

***Roe v. Morgentaler*: Comparative Abortion Policy Development in the United States
and Canada**

Julia Thomson

A Thesis
in
The Department
of
Political Science

Presented in Partial Fulfillment of the Requirements
for the Degree of Master of Arts (Public Policy and Public Administration) at
Concordia University
Montreal, Quebec, Canada

September 2005



Library and
Archives Canada

Bibliothèque et
Archives Canada

Published Heritage
Branch

Direction du
Patrimoine de l'édition

395 Wellington Street
Ottawa ON K1A 0N4
Canada

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file *Votre référence*
ISBN: 0-494-10190-3
Our file *Notre référence*
ISBN: 0-494-10190-3

NOTICE:

The author has granted a non-exclusive license allowing Library and Archives Canada to reproduce, publish, archive, preserve, conserve, communicate to the public by telecommunication or on the Internet, loan, distribute and sell theses worldwide, for commercial or non-commercial purposes, in microform, paper, electronic and/or any other formats.

The author retains copyright ownership and moral rights in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

AVIS:

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque et Archives Canada de reproduire, publier, archiver, sauvegarder, conserver, transmettre au public par télécommunication ou par l'Internet, prêter, distribuer et vendre des thèses partout dans le monde, à des fins commerciales ou autres, sur support microforme, papier, électronique et/ou autres formats.

L'auteur conserve la propriété du droit d'auteur et des droits moraux qui protègent cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

In compliance with the Canadian Privacy Act some supporting forms may have been removed from this thesis.

Conformément à la loi canadienne sur la protection de la vie privée, quelques formulaires secondaires ont été enlevés de cette thèse.

While these forms may be included in the document page count, their removal does not represent any loss of content from the thesis.

Bien que ces formulaires aient inclus dans la pagination, il n'y aura aucun contenu manquant.


Canada

ABSTRACT

Roe v. Morgentaler: Comparative Abortion Policy Development in the United States and Canada

Julia Thomson

Canadian and American abortion policy took suddenly divergent paths after their respective Supreme Court decisions on the constitutionality of abortion; *Roe v. Wade* and *Morgentaler v. the Queen*. The question guiding this research is therefore why, with similar interest groups and policy legacies, has abortion policy diverged in Canada and the United States since *Morgentaler* and *Roe*? The thesis seeks to uncover the institutional access and veto points in order to explain these recently divergent abortion policies. This thesis uses historical institutionalism to seek explanations for this policy divergence.

This thesis uses the comparative method to flesh out institutional similarities and differences that account for divergent abortion policy development in Canada and the United States since the 1970s. The comparative method used here involves the detailed analysis of Canadian and American abortion policy over time and the institutions influencing its development. The dependent variable is therefore abortion policy, while the independent variables are the institutional structures of the two states.

The thesis concludes that because of the policy legacy created through *Roe*, and the permeability of the Republican Party by anti-abortion forces, the American abortion debate centers on judicial nominations and fierce Supreme Court battles. Conversely, the Canadian abortion debate continues along the same path, that of deference to the medical profession, as it did prior to *Morgentaler*. These institutional access and veto points therefore explain the divergent policy paths taken by the United States and Canada after *Roe* and *Morgentaler*.

Acknowledgements

Since so many people supported me throughout this exceptionally long process, I ask that readers – if there are any – accept my equally long list of thanks.

I would first like to thank my parents, Alex and Ursula, for their unconditional love, inspiring lifestyle; and of course, generous financial aid. I would like to thank my brothers Andrew and Michael (aka my favorite little-big and favorite little-little) because they are my best friends, and my grandmother Jeanie, whose energy I hope to some day emulate.

Several people assisted me through my academic experience at Concordia. First, I am forever indebted to Dr. Reeta Chowdhari-Tremblay for encouraging me to enter the MPPPA program and offering her support whenever it was needed. I also want to thank Dr. Brooke Jeffrey and Dr. Francesca Scala for their inspirational courses and valued guidance. Dr. Scala deserves further recognition for her patience and encouragement throughout this research's development and completion. Julie Blumer also saved my butt on numerous occasions.

Finally, I would like to thank my friends, without whom procrastination would have been impossible. These are Heather, the best friend a girl could have, my fellow gargoyle Arjun, Luke & Nina (the coolest couple I know), Kristin, Ara, Kevin and Paul. And of course, I have to thank Josh, for first his friendship and now his love.

It's been an incredibly rewarding ride.

Table of Contents

Chapter 1: Introduction	1
Abortion Policy Analysis and Research Conclusions	5
Methodology	9
Overview of the Chapters	10
Chapter 2: Historical Institutionalism in Comparative Public Policy Making Research	13
Institutions, Interests, and Public Policy: the New Institutionalisms	13
Historical vs. Rational Choice Institutionalism	17
Historical Institutionalism and Abortion Policy	20
Explaining Policy Divergence in Canada and the United States:	21
Exploring Relevant Institutions	
Federalism and Abortion Jurisdiction	24
Parliamentary and Presidential Systems of Government	26
American and Canadian Political Party Associations	34
The Judiciary and Public Policy Development	42
Conclusion	48
Chapter 3: Abortion Policy in Canada and the United States prior to <i>Morgentaler</i> and <i>Roe</i>	51
Abortion Policy Convergence in Canada and the United States prior to <i>Roe</i>	53
The Constitutionalization of American Abortion Politics, 1960-1976	57
The Canadian Constitutional Experience, 1939-1992	67
Conclusion	76
Chapter 4: The Triumph of Anti-Abortion Groups in the United States	79
From the Judiciary to the Political Parties: The <i>Roe v. Wade</i> Aftermath	81
The rise of Single-Issue Groups in American Politics	83
Political Party Associations and Abortion Interest Groups post- <i>Roe</i>	87
An increasingly conservative Court: the triumph of anti-abortion views in the 1980s and early 1990s	95
Conclusion	103
Chapter 5: Limiting Access Points for Policy Influence: Canadian Parliamentary Supremacy and its consequences for Abortion politics	106
The trilogy of abortion cases in Canada	107
Government Response to the trilogy	112
The impermeability of Canadian Political Parties	116
Daigle Revisited: Fetal Rights in the Canadian Charter	120
Conclusion	121

Chapter 6: Conclusion	123
Explaining Modern American and Canadian Abortion Politics:	125
Political Party Permeability	
Policy Legacies and Path Dependency in American and Canadian Abortion Politics	127
Implications of Research Findings	128
Conclusion	129
Table 1: U.S. Supreme Court Rulings on Abortion, 1975-1997	131
Bibliography	133

List of Tables

Table 1 – U.S. Supreme Court Rulings on Abortion, 1975-1997

131

Introduction

Abortion policy has become a fundamental aspect of the political landscape in the United States and Canada over the past thirty years. Since the women's movement exploded onto the mainstream political scene in the 1960s, reproductive rights and abortion have been at the forefront of contemporary North American politics. The emergence of abortion interest groups to mobilize support for abortion access, termed pro-choice, in the 1960s, was quickly followed by the formation of anti-abortion groups in the 1970s. Pro-choice groups argue that a woman's control over reproduction is a constitutional right, while anti-abortion groups consider abortion to be the murder of unborn persons. Arguments advanced by each side are thus in perpetual conflict, leaving policymakers with the undesirable task of seeking compromise where none exists.

Governments in Canada and the United States therefore tended to defer to the medical and legal professions when formulating abortion policy. By defining abortion as a medical procedure, policymakers could formulate policy designed to satisfy the interests of the medical profession and avoid blame for unfavorable policy. Consequently, pro-choice groups found themselves shut out of the legislative policymaking process in the 1960s. Efforts to influence abortion policy were directed to independent judiciaries in both states. As such, abortion policy in Canada and the United States was very similar until their respective judicial decisions.

In the United States, the Supreme Court decision *Roe v. Wade* of 1973 represents the culmination of American pro-choice efforts to ensure a woman's right to choose. The decision effectively struck down over 40 state laws and set up a trimester framework to guide state abortion legislation (Rubin, 1982; Tatalovich, 1997). During the first

trimester, the state could not regulate abortion provision as women's rights trumped state interests. During the second and third trimesters, women's rights diminished in favor of state interests in the fetus. The effects of *Roe*, an example of judicial policymaking, were vast, and included the emergence of an anti-abortion counter-offensive. Since 1973, pro-choice and anti-abortion groups have met regularly in the Courts to debate legislation enacted by anti-abortion politicians. Further, anti-abortion groups have concentrated efforts on influencing judicial nominations in hopes of eventually overturning the *Roe* decision altogether. Thus, while *Roe v. Wade* was the culmination of pro-choice efforts, it was merely the beginning of the abortion debate in the United States.

In Canada, pro-choice groups remained ineffective in the judicial arena until the enactment of the Charter of Rights and Freedoms in 1982. They then enjoyed success with the 1988 Supreme Court decision *Morgentaler v. the Queen*. The *Morgentaler* decision struck down the Criminal Code section that regulated abortion provision (Brodie et al., 1992; Tatalovich, 1997). Since *Morgentaler*, Canada is essentially without an official abortion policy, as pro-choice and anti-abortion groups have been unable to influence Canadian policymakers to enact abortion legislation. Further, without legislation to challenge, pro-choice and anti-abortion groups have met few times in the judicial arena since the 1988 decision. Abortion debate therefore takes place outside traditional political institutions.

Thus with a quick glance at abortion policies since *Roe* in the United States and *Morgentaler* in Canada, it is apparent that they have diverged enormously since their respective court decisions. Prior to their respective court decisions, interest groups and policy actors were unable to utilize the access points available to them. Because groups

had no voice in the policy process, policy was deferred by policymakers to the medical profession in both countries. This meant that legislation generally made abortion a crime unless a doctor decided that it was a necessary procedure to save the life or health of the mother. However, after *Roe*, abortion debate centered on judicial nominations and on legislative action, particularly constitutional amendments. This is in large part due to a shift in interest group strategies. In Canada, however, abortion debate after *Morgentaler* did not change its venue. Unlike their American counterparts, then, Canadian interest groups and policymakers follow the same path as prior to *Morgentaler*. Their strategies did not change. The question guiding this research is therefore why, with similar interest groups and policy legacies, has abortion policy diverged in Canada and the United States since *Morgentaler* and *Roe*? The purpose of this thesis is to uncover the institutional access and veto points that explain these recently divergent abortion policies. This thesis uses historical institutionalism to seek explanations for this policy divergence.

American and Canadian political institutions have both similarities and differences that allow for a strong comparative analysis of institutional constraints over political behavior. Where institutions are similar in structure and function, their effects on abortion policy and abortion interest group strategies are accordingly similar in both states. For example, the division of powers inherent in federalist systems creates many veto points that allow groups to thwart potential abortion legislation. In both countries, independent judiciaries protected by constitutions, ultimately allowed these groups policy influence. This thesis argues that these institutional similarities account for parallel abortion policy development in both countries until the 1970s.

Conversely, institutional differences in structure and function may account for differing abortion policy developments in the past thirty years. The effects of presidential and parliamentary systems of government on other important political institutions are particularly important. First, the supremacy of Parliament in the Canadian system makes the Supreme Court less inclined to engage in judicial policymaking (Cairns, 1992). This reluctance is apparent in the *Morgentaler* decision, which merely struck down existing abortion legislation. In the American political tradition, however, the Supreme Court has actively been involved in policymaking due to its status as the third branch of government in the Presidential system (Tarr, 2003). *Roe* reflects this tradition. Through *Roe*, the justices developed a framework for future abortion legislation completely independently of the legislative and executive branches of government. Institutional differences in their independent judiciaries therefore help explain abortion policy divergence.

Second, the American presidential system allows interest groups access to individual policymakers, while the Canadian parliamentary system prevents it. This allowed abortion interest groups access to legislative arenas in the United States and accounts for the great amount of abortion legislation introduced in Congress since *Roe*. Canadian groups have not enjoyed such access. Third, political party associations developed according to the presidential and parliamentary systems. In the United States, parties are weak and permeable; the opposite is true in Canada. This allows abortion interest groups in the United States greater influence within the political parties. In Canada, however, strong party systems make achieving influence over political parties very difficult to realize. Moreover, institutional changes in the American party system

allowed anti-abortion groups to infiltrate the Republican Party. This thesis argues that these three institutional differences account for abortion policy divergence since the respective American and Canadian Supreme Court decisions on abortion.

Abortion Policy Analysis and Research Conclusions

This research builds on previous studies of abortion policy development in Canada and the United States. Several case studies on abortion in the United States and Canada suggest that the two countries are inherently different in the means by which abortion policy is achieved. Scholars have argued that Canada's parliamentary system allows for consensus building through central policymakers, where the courts play only a provisional role in abortion policy-making (Brodie, Gavigan and Jenson: 1992; Morton : 1992). However, these studies do not place primary emphasis on political parties and their role in setting policy agendas at the federal level in parliamentary systems. This omission is problematic because abortion policy has remained in legislative limbo since *Morgentaler v. the Queen* precisely because viable political parties at the federal level refuse to incorporate abortion into their platforms. The parliamentary institutional structure has thus stalled abortion interest group activity, as well as, the resolution of policy controversy.

By contrast, studies of the United States reveal that federal government institutions, especially the courts, lead agenda setting in abortion policy because of the separation of power in the American presidential system (Tatalovich and Daynes: 1981; Craig and O'Brien: 1993). As with comparable Canadian studies, these do not adequately explore the flexibility that political party associations give their

representatives in presidential systems. The courts have remained the primary means of dispute resolution precisely because state and federal legislation continues to be passed and implemented despite the *Roe v. Wade* ruling. This work will therefore build on previous comparative and individual case studies of abortion policy in Canada and the United States by exploring the effect of political party associations on institutional configurations, interest group strategies and abortion policy outcomes.

Until the mid-1970s, American abortion interest groups gravitated towards judicial activity. This thesis argues that this strategy is best explained through the veto points inherent in the separation of political powers. Control over criminal activity and health policy is delegated to the individual states, although the federal government has successfully intervened in abortion policy in several instances. Further, the separation of powers creates the need for the cooperation of both the legislative and executive branches of the federal government. The plethora of veto points created by these two institutional structures allows opposing groups and individuals to thwart or stall policy changes. As a result, while a small number of states relaxed abortion policy on the advice of medical and legal groups, many states were unable to do so because of the veto points available to opposing groups.

Judicial challenges are therefore attractive because the courts provide an access point. Moreover, the division of powers does not allow pro-choice groups influence over national abortion health care policy, nor for uniform influence over individual state abortion policies. Judicial challenges were therefore a favored tactic of pro-choice groups to influence abortion policy on a national level.

Since 1973, however, anti-abortion groups in the U.S. have favored associations with political parties. This thesis posits that this is due to the access points created in the American political party system after two important institutional changes in the late 1970s. First, campaign financing law reforms accorded interest group contributions greater importance during elections. Second, a leadership crisis in the Republican Party caused by the Watergate scandal allowed anti-abortion groups disproportionate influence over Republican politicians as part of the New Right. These changes led to a 'leadership vacuum' in political party associations, especially the Republican Party, which anti-abortion interests groups successfully utilized to influence abortion policy. As a result, abortion policy in the United States has gradually restricted the right to abortion established in *Roe v. Wade*. Further, abortion policy is consistently debated in American legislatures and is a strong consideration in judicial nomination processes.

Canadian pro-choice groups had no judicial access point through which to influence abortion policy prior to 1982. However, abortion policy development was similar to the American experience pre-1973. Canadian and American policymakers were able to defer to the medical profession, creating legislation that outlawed abortion unless a doctor determined that it was necessary to save the life or health of the mother. Further, interest groups had little or no voice in abortion policy. This thesis argues that the federal and parliamentary systems, and particularly the strong political party systems, explain this policy convergence. While the federal system delegates control over criminal activity to the federal government, health policy is under the jurisdiction of the provinces. Federalism has therefore created a perpetual conflict over abortion policy between the

regional and federal levels of government. The federal government changed abortion legislation in 1969 only on the advice of the medical and legal professions.

Further, the parliamentary system encourages the development of strong political party associations that are relatively impermeable to interest groups. Pro-choice groups were also unable to mount any significant challenges to abortion policy through the judiciary until the 1982 entrenchment of the Charter of Rights and Freedoms in the Canadian constitution. This allowed the medical and legal professions complete control over the abortion debate and its discourse. This thesis argues that the Charter is an important feature of current abortion policy in Canada and is the primary explanation for the Supreme Court decision *Morgentaler v. the Queen*. The Charter created a rights-based discourse that enabled pro-choice and anti-abortion groups to frame abortion as a question of rights and therefore mount a judicial challenge to restrictive abortion legislation. Moreover, the Charter created an access point for abortion interest groups to influence abortion policy without cooperation of legislative and executive branches of government.

However, both pro-choice and anti-abortion groups remain unable to form strong or meaningful associations with Canadian political parties. The strong political party system inherent to parliamentary systems has thus stalled abortion interest group activity. There was no 'leadership vacuum' created through institutional changes as in the United States post-*Roe*. Further, since the landmark cases *Morgentaler v. the Queen* in 1988 and *Roy v. Daigle* in 1989, Canadian pro-choice and anti-abortion groups have been unable to influence abortion policy through judicial challenges, as abortion remains in legislative limbo. This thesis therefore finds that the institutional structures created by presidential

and parliamentary systems help explain policy divergence in comparative public policy research.

Methodology

This research uses the comparative method to flesh out institutional similarities and differences that account for divergent abortion policy development in Canada and the United States since the 1970s. The comparative method used here involves the detailed analysis of Canadian and American abortion policy over time and the institutions influencing its development. The dependent variable is therefore abortion policy, while the independent variables are the institutional structures of the two states. Historical institutionalism is the theoretical framework of this research because it speaks of the interaction between institutions and interest groups. This framework will thus allow a more comprehensive analysis of abortion policy development.

The two case studies were analyzed using secondary sources and unstructured interviews. Political science research on American abortion policy development is extensive. The secondary sources available are therefore equally extensive and provide ample evidence for this thesis' conclusions. These include journal articles, articles in edited volumes, and books. However, I conducted interviews with Canadian abortion interest groups to buttress the Canadian case study analysis, which did not benefit from a vast selection of secondary sources as its American counterpart. The selection of interviewees was simple. I sent emails to all of the major abortion interest groups in Canada requesting interviews. Leaders of the Pro-Choice Action Network and Canadian

Abortion Rights Action League both agreed to answer questions via email and over the telephone.

Questions asked during these interviews included those about the strategies employed and the specific goals of the groups. Questions concerning the groups' overall impression of the abortion debate, the responsiveness of the policymakers lobbied, and the response to *Morgentaler*, were also asked. Wherever possible, I sought to formulate additional questions during the course of the interview to stimulate additional comments.

This thesis also employs triangulation to ensure the accuracy of its evidence. Triangulation involves the "use of multiple methods, data sources, and researchers to enhance the validity of research findings" (Mathison, 1988, 13). Thus wherever possible, this research uses at least three secondary sources to validate its conclusions. This evidence allows the researcher to "contrast good explanations of the social phenomena" (Mathison, 1988, 15). Triangulation also allows for a comprehensive understanding of complex case studies.

Overview of the Chapters

The second chapter of this thesis introduces the theoretical framework of historical institutionalism and examines some of the literature concerning institutional arrangements and policy development. The literature review focuses on previous research that identifies access and veto points for policy influence created by institutional arrangements, particularly executive and legislative relationships, federalism, independent judiciaries, and political party associations. Studies show that these institutions account for policy convergence and divergence and therefore provide a sound

basis for the study of abortion policy development in Canada and the United States. The literature review also examines studies that emphasize the role of interest groups within these institutions.

The third chapter examines abortion policy development in Canada and the United States prior to their respective Supreme Court decisions on abortion. The primary purpose of this chapter is to show that similar institutional arrangements resulted in similar abortion policies prior to *Roe* and *Morgentaler*. A comprehensive analysis of the two court decisions receives particular emphasis in order to demonstrate how they encouraged divergent abortion policy in the two states.

The fourth chapter examines abortion policy development in the United States post *Roe*. It shows that institutional changes in the Republican Party, as well as changes in campaign financing laws, allowed for the permeability of anti-abortion interest groups into an already weak party system. It shows that the abortion debate since 1973, which is spread across all branches of American government and is increasingly restricting the right to abortion established in *Roe*, is best explained by this new access point.

The fifth chapter examines abortion policy development in Canada since the *Morgentaler* decision of 1988. Because Canadian abortion interest groups have been unable to develop strong associations with major political parties, there is no official abortion policy in Canada since 1988. Without legislation to mount judicial challenges, the abortion debate remains largely outside the judicial arena. Unlike American abortion policy development since *Roe*, the *Morgentaler* decision created a legislative limbo in Canadian abortion politics.

The sixth chapter, or conclusion, revisits the key conclusions of the thesis. It shows that the Canadian abortion debate continues along the same path established in the late nineteenth century despite the *Morgentaler* decision. In the United States, however, *Roe* was a critical juncture that created a new policy legacy and therefore restricted future policy options. Coupled with a shift in institutional configurations, the American abortion debate is very different post-*Roe*. The chapter outlines the contributions of historical institutionalism, including the identification of veto points as well as attention to policy legacies and path dependency, in seeking explanations for divergent abortion policy in Canada and the United States in the past thirty years. Finally, the chapter outlines the research's general implications and outlines its applicability to contemporary issues, particularly the compatibility of parliamentary systems and constitutionally guaranteed human rights.

Chapter 2: Historical Institutionalism in Comparative Public Policy Making Research

In order to examine the institutional effects on interest group strategies and abortion policy outcomes, a theoretical framework must guide analysis. As mentioned in the introduction, the overarching framework of this piece will be historical institutionalism, one of the 'new' versions of institutionalism that emerged as a response to the behavioralist revolution of the 1950s and 1960s. This chapter explores historical institutionalist literature within the fields of comparative politics and public policy. It begins by discussing the emergence of the new institutionalisms and explains why historical institutionalism is the most useful framework through which to analyze abortion policy development in Canada and the United States. It then outlines the institutional structures that are the core of this comparative study of abortion policy in the two countries. These are the parliamentary vs. presidential systems and the party systems inherent in each, the electoral systems, and the federalist division of powers. The access and veto points that allow interest groups policy-making influence are of particular importance.

Institutions, Interests, and Public Policy: the New Institutionalisms

The term historical institutionalism, coined by Thelen and Steinmo in 1992, is one of three 'new' institutionalisms guiding contemporary comparative political analyses, the other two being rational choice institutionalism, which Levi (2002) terms rationalist, and sociological institutionalism. Identification of each is according to the emphasis placed on one of three sets of variables – ideas, interests, and institutions – that then becomes the

predominant independent variable (Laitin, 2002)¹. Of course, this is a simplified delineation between the three new institutionalisms. In order to support this thesis' contention that historical institutionalism is the best theoretical framework within which to explain the differences in abortion policy outcomes in Canada and the United States, a more detailed differentiation is required. However, the following pages will concentrate on only two of the new institutionalisms, historical and rational choice. The contributions of sociological institutionalism to comparative political studies are valuable, and some sociological considerations of the abortion policy debate are included in this study². Due to space constraints in this piece, however, sociological institutionalism will not be considered in detail.

Before delving into a detailed comparison of historical and rational choice institutionalisms, it becomes important to establish precisely why, in the discipline of political science, scholars have taken to referring to these institutionalisms as 'new'. As Thelen & Steinmo point out, "at one time the field of political science, particularly comparative politics, was dominated by the study of institutions" (1992, 3). Why, then, is historical institutionalism classified by Thelen & Steinmo (1992) and Hall & Taylor (1996) as a 'new' institutionalism?

The answer to this question lies in the definition of institutions themselves. The more traditional institutionalism, employed by early political scientists, uses a classic definition of institutions, and concentrates on the macro level organization of the state.

¹ Laitin refers to a set of paradigmatic approaches (that he labels structural, cultural, and rational choice) and their association with the three independent variables in his piece "Comparative Politics: The state of the subdiscipline" in *Political Science: The State of the Discipline*, Katznelson & Milner, editors (2002). It is this association that I have adapted to Hall & Taylor's (1996) three 'new' institutionalisms for differentiation purposes.

² For example, Hall & Taylor (1996) point to Ann Swidler's theory of the importance of symbols within interest groups to organize and maintain support.

As the term macro level implies, examples of institutions included would be the constitutional organization of the state and the bureaucratic apparatus. As Thelen & Steinmo explain, “the ‘old’ institutionalism consisted mainly, though not exclusively, of detailed configurative studies of different administrative, legal, and political structures” (1992: 3). New institutionalism, on the other hand, uses both macro level and micro level institutions to develop theories about political behaviour and policy outcomes (Thelen & Steinmo: 1992; Hall & Taylor: 1996). The constitutional makeup of the state is thus still included, but such micro level institutions as standard operating procedures also make valuable contributions to a new institutionalist comparative analysis. The new institutionalisms are therefore new precisely because the definition of institutions they employ is broader than that of the more traditional institutionalism.

The transition from the ‘old’ to the ‘new’ institutionalism took place over several decades. The behavioral revolution of the 1950s and 1960s led to what scholars such as Krasner termed the ‘statist’ revolution (1984), and ultimately the new institutionalism (Thelen & Steinmo, 1992; Hall & Taylor, 1996; Evans et al., 1985). In other words, new institutionalism developed as a reaction to behavioralism, which in turn had developed as a reaction to the old institutionalism. The three branches of new institutionalism developed largely independently (Hall & Taylor, 1996; Laitin, 2002).

Group theories of politics, or behavioralism, perhaps best consolidated by Robert Dahl in his landmark book *Modern Political Analysis* (1963), assume that group competition is responsible for policy development. The state and its institutions are merely neutral managers of this group conflict. Thus while old institutionalism ignored

political actors in its analyses, group theories of politics glossed over the role of political institutions.

Historical institutionalism and rational choice institutionalism emerged as a critique of this behaviour-dominated explanation of politics. Historical institutionalism focused on *Bringing the State Back In*, as the aptly named title of Peter Evans et al.'s 1985 book suggests³. The historical institutionalist project seeks to develop group theories of politics by examining how the effects of a state's institutional configuration, at both the macro and micro level, influence political behaviour and consequently policy outcomes.

Hall & Taylor explain that rational choice institutionalism developed during the same period, although relatively independently (1996). Rational choice institutionalists adhere to the rational choice theory's assumption that an individual acts to maximize his or her interests. However, while policy outcomes are the result of strategic interaction among individuals, institutional variables frame this interaction.

The manner in which historical and rational choice institutionalism explain policy outcomes thus differs greatly. However, recent studies by both historical and rational choice institutionalists have 'borrowed' from the other stream in order to form theories with cross-national implications (Katznelson & Milner, 2002). Although recently scholars have suggested reconciling the two⁴, this piece will assert that historical institutionalism remains superior and should be the dominant means by which political

³ Other 'founders' of the historical institutionalist school of thought include Peter Hall, Stephen Krasner, Peter Katzenstein and Theda Skocpol.

⁴ See for example Katznelson and Milner, "American Political Science" in *Political Science: the State of the Discipline* (Katznelson & Milner, eds), W. W. Norton & Company, Inc., New York, NY, 2002, Pgs 1-32.

scientists explain public policy outcomes. In particular, historical institutionalism best explains the abortion policy outcomes in Canada and the United States.

Historical vs. Rational Choice Institutionalism

Historical institutionalists “are interested in the whole range of state and societal institutions that shape how political actors define their interests and that structure their relations of power to other groups” (Thelen & Steinmo, 1992, 2). They argue that the institutional makeup of a state greatly influences collective behaviour and policy outcomes (Hall & Taylor, 1996). However, historical institutionalism also allows scholars to explore the ideas and values embodied by both macro- and micro-level institutions. It therefore helps identify informal institutions that also shape policy development. These include path dependencies and policy legacies⁵. Both formal and informal types of institutions are therefore independent institutions.

Rational choice institutionalism studies “how institutions constrain and the sequence of interaction among the actors, the choices available to particular actors, and the payoffs to individuals and groups” (Weingast, 2002, 661). Hall & Taylor point out that “rational choice institutionalists [draw] fruitful analytical tools from the ‘new economics’ of organization which emphasizes the importance of property rights, rent-seeking, and transaction costs to the operation and development of institutions” (1996, 943). Defined as such, rational choice institutionalism focuses on the preferences, goals, and benefits of political actors. It defines institutions as ‘humanly devised constraints’ on individual preferences (North, 1990 quoted in Weingast, 2002), and therefore intervening variables.

Historical institutionalism “emphasizes path dependence and unintended consequences” (Hall & Taylor, 1996, 938) to account for the development of institutions and their persistence over time. As described by Esping-Andersen, institutional path dependency means that the formal and informal institutions continually reinforce and replicate values and ideas embodied in societies (1999). Path dependency is further advanced by Skocpol, who argues that certain state features, such as sovereignty, stable administrative-military control, a loyal bureaucracy and sufficient financial resources, “come to be rooted in institutional relationships that are slow to change and relatively impervious to short-term manipulations” (1985, 16). Collier & Collier further point out that policy legacies are institutionalized after ‘critical junctures’ establish paths along which policy areas develop and where reversal or dismantlement is extremely difficult and even undesirable (1991). Policy legacies therefore limit the number of alternatives available to policy actors in solving new problems. In other words, institutions develop and persist according to path dependencies or policy legacies.

This is not to suggest however that institutions are entirely resistant to change. Skocpol also posits that policy outcomes necessarily lead to unintended consequences such as structural changes in the institutions (1985). Immergut’s 1992 study of health policy in Switzerland, France and Sweden reinforces this point. Immergut points out that a seemingly small change in France’s legislative rules allowed for a shift in institutional configurations that enormously affected the enactment of health policy legislation.

It follows that historical institutionalism considers policy preferences to necessarily be shaped by institutional arrangements. Rein & Schon (1994) accordingly argue that institutions shape the way actors interpret problems, which in turn shapes

⁵ See Esping-Andersen (1996) and Mahoney (2001) for examples of path dependencies and policy legacies.

discourse and policy preferences within a 'policy frame'. Policy frames therefore shape policy actors' strategies for policy change. Katznelson (2003) similarly argues that policy preferences, while occasionally influencing institutional structures, are better understood as the result of specific institutional arrangements.

Conversely, rational choice institutionalism emphasizes a process of institutional development that emphasizes voluntary agreement by policy actors (Hall & Taylor, 1996). Spurring this voluntary agreement is a need "to create the conditions for self-enforcing cooperation in an environment where there are gains from cooperation but also incentive problems that hinder a community's ability to maintain cooperation" (Weingast, 2002, 670). When relevant actors, or parties, no longer benefit from institutions or institutional arrangements, they are dismantled or reformed (Hall & Taylor, 1996). Path dependencies and policy legacies are of no consequence; similarly, autonomous actors shape policy preferences.

In other words, according to historical institutionalism, core institutions, or macro institutions, may have originated through individual or majority preferences, but they are relatively resistant to change themselves over time, shaping political interaction and even policy preferences. Conversely, rational choice institutionalists prefer to view institutions as merely providing benefits; if institutions persist over time, it is because "it provides more benefits to relevant actors than alternate institutional forms" (Hall & Taylor, 1996, 945). These differing views on institutional development and persistence, like the effects of institutions on policy outcomes, are particularly important for the analysis of abortion policy outcomes in Canada and the United States.

Historical Institutionalism and Abortion Policy

This research uses historical institutionalism rather than rational choice institutionalism to explain abortion policy divergence in the United States and Canada. Pierson & Skocpol's 2002 article "Historical Institutionalism" best introduce the substantial reasons for this preference. Pierson & Skocpol argue that there are three main features of historical institutionalism that render it superior to rational choice and sociological institutionalism. These are the focus on large puzzles, the attention paid to sequences of time, and the emphasis on the interaction between macro and micro level institutions (Pierson & Skocpol, 2002). Within these features, path dependency and policy legacies, as well as the evolution of formal and informal institutions, further stimulate research. As Skocpol points out, "A complete analysis, in short, requires examinations of the organization and interests of the state, specification of the organization and interests of socioeconomic groups, and inquiries into the complementary as well as conflicting relationship of state and societal actors" (Skocpol, 1985, 20).

Historical institutionalism offers a fruitful framework through which to explore abortion policy development in Canada and the United States. Determining an explanation for the evolution of Canadian and American abortion policies is necessarily a large research question. This is due not necessarily to the scope of abortion policy itself but to the large number of political actors seeking to influence outcomes and the institutions through which they try to do so⁶. As discussed above, historical institutionalism is very well suited to address broad research questions and therefore abortion policy development.

Further, abortion policy preferences and outcomes have not remained static in either country over the past century. The strategies employed by abortion interest groups and the institutional access points granted to them have varied over time. Historical institutionalism's attention to time sequences, and more importantly the contexts in which development takes place, is therefore extremely important.

In addition, the shaping of abortion policy outcomes in the Canada and the United States is not by a sole institution or policy actor but rather the interaction of several institutional structures that create access points. Policy legacies established in both states that now guide abortion policy development, necessarily limited the policy choices available to policy actors. Rational choice institutionalism therefore fails to explain abortion policy development in Canada and the United States precisely because of the assumption that actors' policy preferences alter institutional structures. Historical institutionalism's focus on institutional interaction, policy legacies and path dependencies are thus useful tools of analysis for abortion policy research. It follows that historical institutionalism is best suited to explore abortion policy development in Canada and the United States.

Explaining Policy Divergence in Canada and the United States: Exploring Relevant Institutions

Abortion policy uses two separate discourses, advanced by pro-choice and anti-abortion interest groups, neither of which offers room for consensus or mutual resolution by facts. For this reason, abortion policy is what Rein & Schon term a policy controversy (1994). A policy controversy is one where resolution is difficult because policy actors present solutions based on differing interpretations of the facts. The anti-abortion

⁶ Chapter 3 explores these in more detail.

discourse frames abortion as murder, while the pro-choice discourse frames it as a fundamental right. . Because neither discourse allows for the incorporation of the other's, resolution to abortion, policy controversies are extremely difficult.

Rein & Schon also argue that institutional configurations are important in researching policy controversies and attempts at their resolution (1994). Historical institutionalism allows researchers to identify relevant political institutions that shape group strategies of policy influence and of policy development itself. It also allows for the identification of access and veto points for prospective legislation. Veto points are “areas of institutional vulnerability where a mobilization of opposition can thwart a policy reform” (Richardt, 2003, 90). Conversely, access points offer groups opportunities to successfully introduce or reform policy. A historical institutionalist framework therefore helps researchers establish potential explanations for Canadian and American abortion policy outcomes, because it helps flesh out both the access points available to competing groups as well as the veto points that obstruct their policy preferences. Additionally, historical institutionalism allows for the discovery of policy legacies that establish the potential policy preferences adopted by competing groups. The institutional configurations that establish access points and policy legacies, and therefore policy outcomes, are extremely important to this abortion policy research. This section will introduce relevant Canadian and American political institutions in order to explore abortion policy preferences and outcomes in subsequent chapters.

Due to the enduring and extensive nature of the abortion policy debate, the institutional variables studied will not be exhaustive. This research will instead focus on the traditional or institutional veto players identified by George Tsebelis in “Decision-

Making in Political Systems” (1995). Tsebelis defines veto players as those individuals or groups whose agreement is necessary for policy reform. As such, veto players, like veto points, may thwart policy reform through manipulation. Constitutions establish traditional institutional veto players, while institutional configurations may create additional veto players in practice (for example, political party and electoral systems). A combination of both constitutionally dictated and endogenously created veto points, and access points as defined above, will be the focus of this research.

Tsebelis identifies several veto points common to many different types of political systems (1995). These are the relations of legislative and executive branches of government (parliamentary vs. presidential systems), the political party structures inherent to each, electoral systems, independent judiciaries⁷, and federalism. However, Tsebelis finds that federalism merely contributes to the presence of an additional veto player in the second chamber of legislatures (1995). Where unitary systems exist, for example in Great Britain, the upper chamber does not have veto power. Where federal systems exist, such as Canada and the United States, the upper chambers are veto players because they represent the different regions of the state. This research therefore considers federal as an institution that creates additional veto points in presidential and parliamentary systems. It also considers electoral and political party systems, because they are veto points created by constitutionally established veto players. The focus will be on the *interaction* of these institutional variables to influence government policy-making capabilities and therefore interest group access.

Federalism and Abortion jurisdiction

Federalism is a means of dividing government power whereby “each of two levels of government [have] sovereignty over the same populations but [in] different policy areas” (Breckenridge, 1998, 108). For this reason, dual or divided sovereignty is synonymous with federal states. Two independent levels of government that may claim exclusive jurisdiction over constitutionally designated policy sections in a given territory are characteristics of federalism (Archer et al., 1995). Federalism originated in the United States to create a strong coalition of states while alleviating the fear of concentrated government power (Breckenridge, 1998); the American federal system features a central or federal government and fifty autonomous states. Other states used federalism as a means to unite diverse populations within a single country for practical purposes such as taxation, defense and trade (Archer et al., 1995). For example, Canada used federalism to unite their English and French populations for these purposes a century later (Breckenridge, 1998). The Canadian federal system features a federal government and ten autonomous provinces. According to federal design, policy issues should fall clearly under the jurisdiction of either the federal or state/provincial governments. In reality, however, few policy areas have been immune from jurisdictional challenges. Abortion is one such issue.

Abortion may, and has been historically, classified under criminal activity. As further discussed in Chapter 3, Canada and the United States both tend to regulate abortion through criminal law restrictions. Because the delegation of criminal activity is clearer than that of health provision, regulation of abortion under criminal law tends to

⁷ Tsebelis’ study mentions independent judiciaries only as potential institutional veto players. However, given that the development of abortion policy in Canada and the United States necessarily includes judicial

avoid huge jurisdictional disputes. In the United States, the fifty states have jurisdiction over criminal activity. In Canada, the federal government has jurisdiction over criminal activity. However, the Supreme Court in 1973 severely undermined the ability of American states to regulate abortion at all. In Canada, the federal government has not lost the power to regulate abortion through criminal law, but it has failed to do so since 1988. Abortion is thus necessarily also a health policy issue in both countries.

Both federal and state governments in the United States, and both federal and provincial governments in Canada, now govern abortion under the broader mandate of health. Health services became an important feature of North American politics only after the drafting of the Canadian and American constitutions, and so neither includes direct references to the provision of health care (although the Canadian constitution does mention ‘hospitals’). As a result, health care policy issues are replete with jurisdictional conflict between the two levels of government.

In the United States, state governments claim jurisdiction over health policy due to their residual powers, defined as such: “All powers that are not granted to the federal government by the Constitution are reserved to the states or to the people” (Colby, 2002). Because health care provision is not one of the powers granted to the federal government, the state legislatures should have exclusive jurisdiction. Regardless, the U.S. Supreme Court interpreted two of the powers granted the federal government in Article 1, Section 8 to include certain aspects of health care, and therefore abortion, provision. First, the federal government was granted the right to “*to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare* of the United States” (emphasis added). The U.S. Supreme Court determined that that this

power included collecting taxes to spend on health services. Second, because the federal government has the exclusive power over commerce, and therefore interstate commerce, federal authorities continue to regulate health care provision (Colby, 2002).

Section 91 of the Canadian constitution outlines provincial areas of jurisdiction. Number 7 states that provinces have exclusive jurisdiction over “The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities and Eleemosynary Institutions in and for the Province, other than Marine Hospitals”. In addition, the provinces have jurisdiction over anything of a private nature. Until the mid-twentieth century, when the idea of public health care took shape in Canada, health services were part of private life therefore inherently provincial in scope, although the federal government remained the main health provider for members of the armed forces (Maioni, 2002). As the provinces sought to expand their health policy coverage, however, they found themselves constrained enormously by the lack of any broad taxation powers accorded them in the constitution. Section 91(3) gives the federal government the right to “Raising of Money by any Mode of Taxation”. This “fiscal power has given the federal government considerable policy leverage” (Maioni, 2002) determining the nature of health services and provision. The abortion policy debate therefore has the potential for stalemate in both Canada and the United States.

Parliamentary and Presidential Systems of Government

The most palpable difference between Canadian and American political institutions is the nature of the relationship between the executive and legislative branches: Canada’s constitution established a parliamentary system characterized by the

fusion of powers, while the United States' established a presidential system characterized by the separation of powers. Lijphart argues that the relationship between the executive and legislative branches is the most important institutional difference in contemporary democracies (1992). As such, it is a 'prime suspect' in most comparative institutional analysis, including this research on American and Canadian abortion policy controversies. The Canadian parliamentary system and the American presidential system, having established such clearly dissimilar relationships between legislative and executive branches of government, may therefore account for divergent abortion policy preferences and outcomes in Canada and the United States.

In his classic 1959 piece, Verney outlines the differences between presidential and parliamentary systems of government (Chowdhari-Tremblay et al, 2004). In parliamentary systems, the executive consists of two parts, a Head of State (which in Canada is the Governor-General, representative of the Queen) and a Head of Government (the Prime Minister). The Head of State appoints the Head of Government, who in turn appoints members of the Parliament to the cabinet in order to form a government. The cabinet is not subordinate to the Prime Minister. Further, the government is politically responsible to the Parliament, and only indirectly responsible to the electorate. As such, the government is dependent on the legislature to maintain power, although the legislature is not entirely supreme as the government may ask the Head of State to dissolve Parliament at any time. A fusion of executive and legislative powers therefore characterizes the parliamentary system.

Verney defines a presidential system as one in which the President is directly elected and therefore responsible to the constitution (2004). The President is both the

Head of State and the Head of Government, ensuring that he is the sole executive. The President nominates the department heads and these are necessarily subordinate to him. These department heads are not members of the legislature. These features ensure that the executive office of the President is completely independent of the legislature. The legislature thus has no constitutional mechanism available to coerce the President and vice versa. The separation of powers is therefore paramount in the presidential system.

The Presidential system is therefore the complete opposite of the parliamentary system. Breckenridge points out that the framers of the American constitution designed the presidential system precisely to counteract the fusion of powers inherent in the Parliamentary system (1998). Disillusioned with the apparent concentration of monarchical power in the parliamentary system, the attractiveness of a separation of powers was apparent. Considering that the presidential system developed intentionally to correct perceived flaws in the parliamentary system, comparative analysis between Canada and the United States necessarily begins with their relationships between the legislature and executive. For example, Weaver & Rockman analyze various case studies that compare and contrast parliamentary systems with the United States presidential system and conclude that parliamentary systems tend to create fewer policy veto points than the American presidential system (1993). Policy development therefore tends to be more smooth in parliamentary systems because there exist fewer veto points through which to thwart legislation. Other historical institutionalist studies confirm this conclusion.

Feigenbaum, Samuels and Weaver explore the development and outcomes of energy policy in Canada, Japan, Germany, France and the United States in "Innovation,

Coordination and Implementation in Energy Policy” (1993)⁸. The oil crisis of the late 1970s threatened massive increases in costs as well as further disruptions in supply. Governments around the world suddenly realized the need for “[reduced] dependence on Middle Eastern oil and susceptibility to supply shocks, improving energy efficiency and conservation, and finding and bringing on-line new and more secure energy sources” (1993, 44). Feigenbaum et al.’s study therefore explores the ability of governments to develop innovative energy policies, the coordination of conflicting policy preferences, and the implementation of policy outcomes during a period of crisis.

Feigenbaum et al. argue that the United States’ had ‘moderate innovation, low coordination and mixed implementation’ of energy policy after the oil shocks of the 1970s. These they attribute to the presidential system and the permeability it allows interest groups rather than federalism. More specifically, stalemate between the legislature and executive as well as between the two houses of the legislature hampered innovation; coordination was low due to influential interest groups unwilling to suffer major losses; and implementation suffered due to divided control over the legislature and executive between Republican and Democratic parties. Because policy requires consent from both the legislative and executive branches of government, the presidential system allows for the creation of numerous policy veto points at which policy actors’ may stall the decision-making process. This resulted in the United States’ poor ability to respond adequately to the energy crisis of the 1970s.

Canada, on the other hand, experienced ‘high but unstable’ innovation, moderate coordination, and ‘fairly high’ implementation in energy policy during the same time-period. Innovation was high but unstable because Prime Minister Mulroney’s majority

⁸ For the purposes of this research, it considers only the U.S. and Canadian case studies.

reign in Parliament from 1984 to 1993 reversed outright many initiatives developed in the 1970s under Prime Minister Trudeau. The National Energy Program (NEP), pushed through by Prime Minister Trudeau, created price controls, imposed extra taxes on oil-producing provinces, and increased public ownership in the oil industry (for example, through the creation of Petro-Canada). However, under Prime Minister Mulroney these initiatives eroded. Feigenbaum et al. therefore warn that policy reversal is a consequence of Westminster-style parliamentary systems and creates instability. However, Feigenbaum et al. attribute difficulties in energy policy coordination and implementation in Canada to intergovernmental conflicts. Jurisdictional disputes exacerbated bitter conflicts between oil-producing provinces, especially Alberta, and the federal government. They conclude that the combination of a Westminster-style parliamentary system of majority governments and federalism allows for high innovation and coordination and smooth implementation where policy preferences are similar across the two levels of government. It follows that where policy preferences are not symbiotic, coordination and implementation suffer. Further, they point out that there is an “absence of veto points at which interest groups can hold policy hostage” (1993, 74) that results in interest group exclusion from the policy-making process.

Feigenbaum et al’s study therefore reveals that the presidential system creates a ‘plethora’ of veto points that the legislature and executive, as well as powerful interest groups, use to stall policy innovation, coordination and implementation. Such veto points do not exist in a parliamentary system. However, when combined with federalism, parliamentary systems must rely on shared policy preferences between the two levels of government to ensure coordination and implementation. Margaret Weir’s study of

American welfare policy reform confirms the potential for policy stalemate due to veto points in presidential systems.

Margaret Weir's "Ideas and the Politics of Bounded Innovation" explores employment policy in the United States from the 1930s to the 1980s (1992). Her analytical framework "directs attention to the diverse links between ideas, political institutions, political actors, networks of experts, and social interests that are often overlooked in culture- or interest-based accounts of policy-making" (1992, 192). Like Immergut, Weir argues that ideas develop independently of institutions. Policy is the result of 'political processes' that link these ideas and institutions. She states that a historical perspective is necessary to emphasize path dependence, specifically how previous policy decisions restrict future innovation or change. Weir argues that an independent executive and legislature, characteristics of the presidential system, grant new ideas several access points to policy-makers. However, Weir points out that two 'distinctive features' of the American political system encourage the stability of policy, or its bounded innovation: the fragmentation of national institutions and the federal system. These create 'formidable' barriers to proposed legislation and enhance the need for legislators to create alliances to influence policy. Further, short-term results greatly attract American politicians, regardless of a policy's long-term feasibility or even desirability. This encourages the use of ad hoc coalitions "sustained rhetoric with wide but shallow and often vague appeal" (1992, 193) to push through legislation. Weir states that routes that bypass political institutions or those generated by private activity, better convert ideas into policy.

Weir finds that the New Deal spending policies introduced under President Roosevelt were 'new' ideas that developed independently of the federal government. The executive eventually embraced these for the potential short-term electoral gains. Due to the fragmentation of the American political system, however, the legislature severely diluted the policy before enactment. Thus, groups successfully utilized the numerous veto points to thwart policy reform. Directly related is the difficulty of altering existing institutions or creating new ones. Nonetheless, subsequent governments' reliance on academics for policy advice and the ability of interest groups to garner broad public support for Keynesian ideas, established a 'Social Keynesianism' path dependency. Thus, Weir argues that bounded innovation affects employment policy in the United States: employment policy proposals until the 1970s were limited to the 'reworking' of Keynesian principles. After a decade of poor economic performance, however, academics and interest groups alike discredited Keynesian economics in favor of new ideas such as tax reform and deregulation. However, Weir points out that President Reagan was able to implement policy changes because of their simplicity. They consisted mainly of the elimination of Keynesian legislation. Path dependency binds economic policy changes in the United States and therefore creates policy stability due to the many veto points available to groups in the American presidential system. Weir's work therefore shows that the 'plethora' of veto points in the presidential system results in 'bounded innovation' or policy stalemate. The comparison between presidential and parliamentary systems may indeed prove to be instrumental in explaining abortion policy divergence in Canada and the United States.

However, Weaver & Rockman argue that systems of government are merely the first tier of institutional variables to consider when researching policy development and outcomes (1993). Both systems of government interact with second and third tier institutional variables to create additional veto points. Second tier institutions include electoral rules and norms that contribute to the formation of governments. Third tier institutions include those created by constitutions, such as federalism and independent judiciaries, and those created by political organization, such as political party discipline. These tiers together create institutional veto points that threaten the successful development and implementation of policy. Thus, Weaver & Rockman find that the best means to determine government policy-making capabilities is by examining parliamentary and presidential systems in relation to other institutional variables. Linz furthers this conclusion, as he points out that examining relationships between executive and legislative branches is best in relation to institutional contexts unique to every state (1990).

Hence, while it may be tempting to attribute divergent abortion policy outcomes in Canada and the United States to their respective presidential and parliamentary systems of government, such an explanation would be inherently incomplete. The idea of influential constitutional structures that help shape institutional configurations is a better understanding of parliamentary and presidential systems. This literature review will now turn to Canadian and American political party and electoral systems. These are part of the institutional configurations established by the relationship between legislative and executive branches of government and therefore important to this abortion policy research.

American and Canadian Political Party Associations

Because the relationship between the executive and legislative branches of government in Canada and the United States stand in stark contrast to one another, it follows that their political party systems are enormously divergent as well. Political parties developed according to the nature of the relationship between the executive and legislative branches. Linz (2002) points out that the presidential system, because the executive and legislative branches are completely separate, allows for weak party discipline. Conversely, the fusion of powers inherent in the parliamentary system encourages strong party discipline. It is no surprise then that fragmentation due to weak party discipline characterizes the United States' party system and Canada's by unification. As a result, American parties are much more permeable to interest group influence than their Canadian counterparts are. Because political parties play such an important role in policy agenda setting (Pal, 2001), the institutional access and veto points created as a result of party structures are very important for comparative analysis.

Several definitions for political parties exist. Keefe & Hetherington point out that the most common means of organizing the vast assortment of such definitions are by dividing them into two groups, electoral and ideological (2003). Winning power is generally the sole goal of an electoral political party, while propagating certain principles is the goal of an ideological one.

An electoral political party has assumed different names in other research, including for example an 'umbrella party' or 'catch-all party'. Regardless of the label assigned to them, the description given by Epstein that "any group, however loosely

organized, that seeks to elect governmental officeholders under a given label” (Epstein 1967 quoted in Keefe & Hetherington, 2003, 9) broadly defines these types of political parties. The characterization of a party as an electoral one arrives when, with the ultimate goal of winning elections, a party strives to include policies that have universal voter appeal, irrespective of the ideological preferences of that party (Keefe & Hetherington, 2003). Electoral parties are therefore more sympathetic to interest group competition than are ideological ones.

Canada and the United States are similar in the sense that each have two electoral parties that have traditionally alternated national power among them (Keefe & Hetherington, 2003; Young, 2000); the Liberals and Conservatives in Canada, and the Democrats and Republicans in the United States. All four of these parties are electoral ones, although since the 1980s they have arguably strived to solidify ideological boundaries (Young, 2000).

In *Parties, Politics and Public Policy in America* (2003), Keefe and Hetherington conclude that the United States’ institutional arrangements have ‘hardwired’ the domination of two political parties. They argue that four independent variables of the American democratic system have shaped political party formation: the constitution; the electoral system; the political culture; and the heterogeneity of Americans themselves. Keeping with the scope of the research question, this review will concentrate on the first two variables.

The American constitution established a presidential system and a federal arrangement. According to Keefe & Hetherington, these two features of the American constitution together ensure the impossibility of a one-party system precisely because

they check power at all levels of government (2003). Combined with a plurality electoral system and the American primary system, a two-party system is inevitable (Keefe & Hetherington, 2003).

Keefe & Hetherington include two features of the electoral system that ensures the domination of two political parties in the United States: the plurality ballot structure and the American primary system. They thus build on Duverger's 1964 breakthrough piece that emphasizes the plurality electoral system as a variable for a two party domination in the United States. Duverger argues that, "the simple-majority single-ballot system favors the two-party system" (1964, 217). This is because the district magnitude, or number of seats contested in a district, of plurality systems is always one. Losing candidates do not have any means of participating in the government. Duverger's 'law' therefore states that plurality ballot systems are destined to create two-party systems. Thus in the American system, "third party candidates have little inducement to run, because the prospects are poor that they could defeat the candidates of the two major parties" (Keefe & Hetherington, 2003, 8).

The American primary system is the means by which candidate selection under the party name occurs. In order to guard against political elites who controlled the nomination of party candidates in the nineteenth century, the direct primary system was established. Every state now uses the primary system, whereby party members vote for candidate nominations. This has contributed to the exclusivity of two major American political parties, as political battles take place within the party during nomination campaigns and not during elections (Keefe & Hetherington, 2003). Potential third party candidates are therefore more likely to promote policy ideas within one of the two major

parties during a nomination period, where their voices can reach a wider audience. In addition, the primary system contributes to weak party discipline as candidates try to appeal to party members at large and not party elites to secure nominations (Keefe & Hetherington, 2003).

Two political parties with weak party discipline therefore dominate the American political party system. The presidential system, federalism, and the electoral system contribute to this two-party structure of party fragmentation. The Canadian political party system, being situated in a parliamentary system, is one of strong party discipline and therefore of unification.

Canadian political parties have strong control over their members precisely because the parliamentary system encourages it (Linz, 2002). The Parliament, as the supreme body, is able to dissolve the government with a vote of non-confidence. A vote of non-confidence is a rejection of proposed legislation, and the Prime Minister must ask the governor general to dissolve Parliament in order to hold elections immediately following such a vote. Because governments must therefore pass legislation in order to maintain power, and opposition parties must mount viable challenges to undesired legislation to dissolve the government, party control over their respective members of parliament is very strong. All party members vote according to the party line or risk expulsion.

Canada differs from the United States in the sense that it is technically a multi-party system at the federal level. In the 2000 elections, four federal parties competed in the majority of ridings across the country (the Liberals, Conservatives, New Democrats, and the Canadian Alliance), while the Bloc Québécois competed in every Québec riding.

This is apparently contradictory to Duverger's Law, since Canada employs a plurality electoral system. However, Duverger states factors such as regionalism within states, or by looking at the district rather than national level, explain apparent exceptions to his law (1964). Duverger argues that when a state has a multi-party system at the national level it is not an exception if there is still two party competition at the district level as long as there are different parties competing in different regions.

Building on this argument, Andrews analyzes Canadian riding competition in the 1997 and 2000 elections. He contends that ridings are actually two-party competitions depending on which region in the country they are located. Using Gaines' 1999 analysis, which shows that the average top two party vote share across ridings is only 79.8% (2003, 41) and therefore an apparent exception to Duverger's law, Andrews analyzes Canadian riding competitions in relation to actual seats won. He concludes that, "if the measure of electoral success is shifted from merely receiving votes to actually turning those votes into victories and seats in parliament, [then] this analysis supports Duverger's contention that regionalism is the primary reason that Canada does not appear to comply with his law at the national level" (2003, 47). In other words, political party associations in Canada generally fight a two party battle in most constituencies across Canada during federal elections. As such, there are really only two federally viable political parties, or parties that stand to win a majority in Parliament: the Conservatives and the Liberals. Alternative parties (for example, the Bloc Québécois) are primarily regional, and as such are a peripheral consideration in this research (along with the New Democratic Party). None of the three political parties stands to win a majority of seats in Parliament, and therefore cannot successfully alter abortion policy outcomes alone.

These studies show that the presidential system, while providing veto points due to the separation of powers, allows for access points in their weak political party systems. Conversely, parliamentary systems and their strong political party discipline do not encourage the development of veto points in majority governments. Richardt's definition of veto points suggests that they exist where opposition is able to thwart policy reform (2003). As such, the presidential system contains many veto points whereas the parliamentary system contains relatively few. Historical institutionalist literature confirms this argument.

Ellen Immergut's work highlights the importance of the interaction between political party systems and parliamentary or presidential systems in analyzing policy development. Immergut argues that institutional analysis explains not only policy stability but policy change in "The rules of the game: the logic of health policy-making in France, Switzerland, and Sweden" (1992). Immergut seeks to explain variance in national health insurance legislation, despite the similarity of the original policy proposals, by examining institutional configurations, particularly legislative and executive relationships and the political party associations. This is a particularly interesting puzzle, because "the Swedish can be considered the most socialized health system in Europe, the Swiss the most privatized, and the French a conflict-ridden compromise between the two" (1992, 58). Immergut uses a 'two-step causal model', which assumes that "actors formulate their goals, ideas and desires independently from the institutions [and] the institutions become relevant only in strategic calculations about the best way to advance a given interest within a particular system" (1992, 84-85) in her study.

Immergut begins by dismissing 'state capacities' as a potential explanation; she points out that federalism, which divides power among different levels of government, was not an obstacle to health policy enactment in Switzerland, nor was centralization an enabler in France. However, parliamentary systems have an impact when a stable parliamentary majority and strict party discipline exist. Parliament is then less likely to overturn decisions made by the executive. For this reason, Sweden's executive was able to enact extensive health policy laws without fear of a veto in its legislative body. France, despite also having a parliamentary system, suffered from unstable party coalitions and weak party discipline, and powerful doctors' groups that did not approve of the proposed health policy were able to influence the legislature. Consequently, only once constitutional change allowed the independent executive of the fifth Republic to decree policy without parliamentary approval was legislation enacted by the legislature. Interest groups that controlled parliamentary politicians were therefore suddenly without influence, and health legislation was enacted (albeit a diluted version of the original proposal). In Switzerland, the parliamentary body is stacked with potential policy veto points due to the overrepresentation of conservative forces and a divided executive (related to its federal arrangement), but these were not the reason health insurance legislation ultimately failed. Rather, it was the provision of direct electoral referenda to which all legislation is subject. Doctor's groups, which were very powerful, were able to use the referendum threat to ensure the health insurance legislation enacted was a skeleton of its original version. Only once health insurance policy proposals developed independently of institutions and introduced as potential legislation, did state institutions and institutional configurations become important.

Immergut's work therefore shows that political party associations, in addition to legislative and executive relationships, are important institutional actors in policy development. The presidential system such as that which exists in France contained many veto points due to weak party discipline. Conversely, Sweden, with a parliamentary majority and strong party discipline, allowed interest groups virtually no veto points through which to thwart legislation. This is congruent with Tsebelis' analysis (1995). Presidential systems have more constitutionally prescribed veto points than parliamentary ones. As such, they tend to cause additional veto points in their weak political party systems. Parliamentary systems however have few (if any) constitutionally prescribed veto players, and do not tend to cause additional veto points because of their strong political party systems. When there are many veto points available to thwart policy reform, Tsebelis argues that policy stability occurs (1995).

Scholars have pointed out that judicial systems, when independent, can act as additional veto points when government is deadlocked (Shapiro, 1981). Because of the intractability of abortion policy – which encourages both pro-choice and anti-abortion groups to take advantage of veto points to thwart policy reform – and the numerous veto points in the American presidential system that encourage path dependency, the increasing importance of the courts in the American abortion policy debate is hardly surprising. The Canadian abortion debate has also tried to 'constitutionalize' the issue, but with less success.

The judiciary and public policy development

The design of the American Supreme Court ensures an additional check on the legislative and executive branches of government (Tarr, 2003; Breckenridge, 1998). Created by the founders of the American polity, the Court is an independent institution whose role is to protect citizens from government tyranny (Manfredi, 1993). The Court could declare any state or federal law 'unconstitutional' if it was found to violate any of the eleven 'rights' established within the constitutional amendments of 1795⁹. Since the entrenchment of the Charter of Rights and Freedoms in 1982, Cairns argues the Canadian Supreme Court has become 'Americanized' and therefore a protector of citizens rights (1992). Because pro-choice advocates frame abortion as a constitutional right in both states, the Courts are an important institution to examine.

Article Three of the American constitution states, "The Judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish." The Supreme Court is therefore the only judicial power that the constitution protects. Article Three, Section Two outlines the scope of the judicial power of the Supreme Court, which includes "all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made". All legislation passed by state and federal governments must therefore comply with the provisions of the American constitution. This is particularly important for abortion policy. The Supreme Court will declare unconstitutional and therefore invalid all abortion legislation found to violate the rights established by the amendments known as the 'Bill of Rights'. This makes the Court an attractive veto point for abortion interest

⁹ As in Canada, the American Supreme Court also ruled on cases of jurisdiction between state and federal governments. However, this research will focus on the role of the Court in protecting citizens.

groups to influence policy. As American citizens, they can challenge any legislation on the grounds it violates their constitutionally protected rights. However, Davis points out that Supreme Court judges consistently pursue their own policy goals, which he attributes to the Socratic legal tradition in the United States (2002). The selection of judges is therefore an extremely important feature of the abortion debate, because the ideological beliefs of the individual justices will have a great effect on the decisions rendered.

Tatalovich concurs that anti-abortion groups have a vested interest in Supreme Court nominations because of constitutional amendments are extremely difficult to pass (2003).

The American constitution authorizes the President to nominate judges to the Supreme Court, although his selections are subject to review by Congress. To protect them from political manipulation, the justices serve for life. Tarr states that there are four criteria used by Presidents for the selection of judges: party affiliation; region; demographic characteristics; and legal-political compatibility (2003, 80-82). Of these four, legal-political compatibility is the most important criteria for abortion politics. Tarr points out that “usually, Presidents are concerned less with a potential justice’s overall jurisprudential approach than with his or her position on certain salient legal issues” (2003, 82). Abortion is one such issue. Presidents that are anti-abortion themselves or sympathetic to anti-abortion goals will nominate justices that favor overturning *Roe*. Tatalovich states that the court is now stacked 5-4 in favor of conservative values because of anti-abortion lobbying efforts that pushed Presidents to nominate anti-abortion justices to the bench (2003). Certainly, the last three Republican Presidents (G.W. Bush, W.H. Bush, and Reagan) have declared a commitment to overturning *Roe v. Wade*, and the

President and Congress question the potential justices extensively about abortion politics during the selection process (Tarr, 2003).

In addition to the selection of justices, the policymaking capabilities of the American Supreme Court are important to this research. Manfredi points out that the anti-Federalists, concerned about an unaccountable government institution, criticized the proposed Constitution because it awarded justices life tenure (1993). Despite these concerns, the justices serve for life, and their decisions are occasionally unwarranted judicial activism (Manfredi, 1993). Tarr states that while the Court has helped shape policy since its creation, the appointment of Justice Earl Warren in 1953 increased the level of constitutional and remedial policymaking of the Court (2003). Prior to the second half of the twentieth century, the policymaking role of the Supreme Court was largely of a common law nature (Tarr, 2003). This consisted mainly of adapting English common law to the new American state. Since the landmark 1954 decision *Brown v. Board of Education*, however, judicial policymaking has shifted into constitutional and remedial arenas (Tarr, 2003). These refer to interpreting constitutional provisions and overturning past decisions, respectively. Critics refer to the new policymaking orientation of the Court as 'judicial activism'. Shapiro adds that during the 1960s and 1970s, the policymaking power of the Court increased because citizens became increasingly wary of legislative and executive power in America (1988). Considered impartial and apolitical, the Court was able to increase its policymaking role with full support from distrustful citizens. This increased judicial activism and policymaking role led MacKay and Bauman to refer to the American judicial power as "In Courts We Trust" (1985, 44-45).

Roe v. Wade is an example of this increased judicial activism and constitutional policymaking because it established guidelines for abortion provision independently of the legislature. Manfredi argues that the *Roe* decision is a prime example of 'judicial review gone bad', or an act of judicial policymaking that should have been the jurisdiction of the legislature (1993). Chapter 3 includes a detailed examination of the *Roe v. Wade* decision and its implications for American abortion policy. For the purposes of this chapter, it will suffice to state that the abortion constitutional debate began during a period of increased judicial activism and constitutional and remedial policymaking. The *Roe* decision reflects this increased activism. It also increased the importance of the Courts to American abortion policy outcomes enormously. The Supreme Court is therefore an important institution to examine in this research. Because the incorporation of the Charter of Rights and Freedoms in the Canadian Constitution increased the Canadian Supreme Court's policymaking capabilities, it is important to this research to examine the Canadian Court as well.

The Dominion Act of 1875 created an appellate Court known as the Supreme Court of Canada (Jackson & Jackson, 2001). However, the final appellate court for Canada, the Judicial Committee for the Privy Council (JCPC), resided in Great Britain. In 1949, the Supreme Court became the last appellate court of the state, its decisions binding on all lower courts (Jackson & Jackson, 2001). The JCPC's, and later the Supreme Court of Canada's, largest and most important roles were jurisdictional disputes between provincial and federal levels of government until the entrenchment of the Charter in the Canadian constitution (Cairns, 1992; Manfredi, 1993). While American political culture focused increasingly on the 'rights' of citizens vis-à-vis their

governments during the 1960s and 1970s, in Canada the new rights rhetoric had no solid foundation on which to base its claims during this time period (Cairns, 1992; Manfredi, 1993). Cairns therefore argues that the Charter represents a shift from traditional British Parliamentary Supremacy and gave the 'rights movement' in Canada constitutional legitimacy in the 1980s. Vaughan adds that the Charter gave the Supreme Court a new mandate, that of protecting citizens from government (2001). The Charter greatly enhanced the status of the Supreme Court because it allowed citizens to take issues directly to the Courts, bypassing the federal and parliamentary systems of government altogether.

While the entrenchment of the Charter of Rights and Freedoms therefore has the potential to create a 'In Courts We Trust' culture in Canada, the Supreme Court has so far neglected to adopt a policymaking role similar to its American counterparts' (Cairns, 1992; Manfredi, 1993; Vaughan, 2001). In fact, the Court has been extremely cautious about judicial activism and independent policymaking in the abortion policy debate (Brodie et al, 1992). Brodie et al. argue that the 1988 Supreme Court decision *Morgentaler v. the Queen* reflects the ultimate supremacy of the Canadian Parliament (1992). While declaring the abortion laws themselves unconstitutional, the Court refused to establish a constitutional right to abortion similar to the landmark American judicial decision *Roe v. Wade* in 1973. The Court therefore tossed the abortion issue back into the legislative arena. In her study of judicial policymaking in Canada, Hiebert concludes that the Court generally defers to parliamentary supremacy (2001). She points out that while the Court will sometimes rule that government legislation is unconstitutional, the decisions usually contain guidelines for achieving policy goals in future legislation. As

will be discussed further in Chapter 3, *Morgentaler v. the Queen* is an example of this judicial deference to legislators. The federal executive and legislative branches therefore remain the main policy actors in the Canadian abortion debate despite the entrenchment of the Charter of Rights and Freedoms. Regardless, the ability of citizens to challenge the abortion laws in *Morgentaler*, as well as the increased importance of the Supreme Court in regulating the relationship between citizens and government, allows abortion interest groups access to policy influence through the Courts should abortion legislation be passed in the future. This institution therefore remains extremely important to the abortion policy debate in Canada.

This section has argued that both the American and Canadian abortion policy debates are tied to their Supreme Courts' institutional roles. Scheppele argues that these two cases are evidence of the 'constitutionalization' of abortion politics in Western states. In her work "Constitutionalizing Abortion" (1996), Scheppele analyzes abortion politics in four states, including the United States and Canada. She finds that because of the lack of influence of abortion interest groups in the legislative and executive branches of government in both states, the Courts have become an increasingly important veto point to thwart legislation. In the American system, the separation of powers inherent in both the Presidential and Federalist systems does not allow interest groups to pursue a nationwide abortion policy. However, the Courts provide a venue open to all citizens and allow for nationwide policymaking. Similarly, Scheppele points out that the Canadian tradition of Parliamentary Supremacy has effectively shut out abortion interest groups from the legislative and executive branches of government. Once the Charter was entrenched in the Canadian constitution, abortion interest groups could challenge

abortion laws as citizens, bypassing the legislative and executive branches altogether. Scheppele argues that both the United States and Canada adopted new abortion policy orientations because of their respective Supreme Court decisions. Her study therefore suggests that path dependency, whereby policy develops according to a path drawn by previous legislation, may be reversed through Court challenges. Scheppele's work also confirms that the Courts, along with the presidential and parliamentary systems, political party associations, and the federalist system, are important institutions to examine in abortion policy research.

Conclusion

Historical institutionalism is one of the three new institutionalist frameworks that emerged in response to shortcomings perceived in behavioral analysis of social science research. Its incorporation of policy legacies, path dependencies and the development of institutional configurations into its analysis make it superior to rational choice institutionalism, particularly in research on abortion policy in Canada and the United States. Rational choice institutionalism assumes that institutions and institutional interaction persist only because they continue to accommodate policy actors' preferences. As will become clear in subsequent chapters, such an assumption is incompatible with Canadian and American abortion policy outcomes. Historical institutionalism, which assumes that preferences are necessarily constrained by policy legacies and institutional configurations, is best suited for this task. The institutional configurations, or independent variables, analyzed in this research include the federal system, presidential and parliamentary systems, political party associations, and independent judiciaries.

Using historical institutionalism, this research conducts an analysis of these variables to determine their effects on the dependent variable, abortion policy outcomes.

Canada and the United States both have federal systems, which is a division of powers between national and regional levels of governments. However, abortion debate generally centers on the national level because of abortion interest groups' desire to have a uniform policy across governments. Further, the continuous jurisdictional arguments over abortion create additional veto points that abortion interest groups find hard to overcome. Thus the federal system, while important because of the veto point it provided opponents of abortion policy reform in the 1960s, is a secondary institution in this research.

The Presidential and Parliamentary systems are the core institutional arrangements of American and Canadian politics. They are therefore important independent variables in this comparative policy research. Historical institutionalist literature shows that the Presidential system creates a plethora of veto points due to the separation of powers. This creates formidable barriers to the level of policy influence of abortion interest groups in the United States. While these veto points do not exist in the Canadian Parliamentary system, abortion interest groups have not influenced policy development more successfully in Canada. In fact, abortion policy in Canada is in 'legislative limbo'. The political party associations and judicial systems help account for these contradictory findings.

The political party systems in both states developed according to their legislative and executive relationships. In the United States, the presidential system encourages a weak political party system that is very permeable to interest groups. In Canada, the

parliamentary system encourages a strong party system, and it is relatively impermeable to interest group influence. The literature shows that weak political party systems create veto points through which opposing groups can thwart legislation. Again, no such veto points exist in the Parliamentary system. Conversely, interest groups do not have as much influence over political party associations in Canada as they do in the United States. Political party associations are therefore key variables in this research because of their potential effects on abortion policy outcomes.

Finally, the judicial branches, when independent, can function as additional access points for interest groups. In the United States, legislation passed in Congress is subject to challenges in the Supreme Court. Facilitating these challenges was the shift by the Court towards judicial activism and constitutional policymaking in the 1960s. *Roe v. Wade* is an example of this shift. However, because justices tend to pursue their own policy goals, their selection is also very important to this research. In Canada, although the Charter greatly enhanced the power of the Supreme Court, the justices tend to defer policymaking to the legislative and executive branches. Thus while the Charter helped create a new access point through which abortion interest groups can thwart legislation, its effect of the Court on abortion policy outcomes is less than that in the American system. However, the Courts in both states are important institutional variables to consider in this research because the decisions rendered in *Roe* and *Morgentaler* are critical to the contemporary abortion policies in both states.

Chapter Three: Abortion Policy in Canada and the United States Prior to *Morgentaler* and *Roe*

Introduction

As discussed in Chapters 1 and 2, historical institutionalism allows researchers to explain policy convergence and divergence cross-nationally through their institutional configurations. The United States and Canada are liberal democracies that use both similar institutions, such as federalism, and different institutions, most notably the means through which they establish legislative and executive branches of government, to structure their political systems. This chapter will argue that two similar types of institutions in Canada and the United States, federalism and the impermeable political party system, explain the convergence of abortion policy in these countries from the late nineteenth century until their respective judicial decisions *Morgentaler v. the Queen* and *Roe v. Wade*.

As stated in Chapter 2, the federal division of powers complicated jurisdiction over abortion in both Canada and the United States between federal and regional governments. Further, the institutional configurations of both systems provide additional veto points through which to thwart policy reform. In the United States, state governments claimed jurisdiction over abortion policy because of their control of criminal legislation. However, the federal government also has a legal interest in abortion policy due to its taxation power to provide for the general welfare of the American people as well as its jurisdiction over interstate commerce. Politicians in both parties preferred to discuss abortion using a medical discourse that effectively kept groups other than doctor's associations from the debate. By deferring policy decisions to medical doctors, politicians engaged in blame avoidance to skirt electoral backlash.

These two institutional characteristics forced pro-choice abortion interest groups into the courts, as they were unable to enact policy change through legislative means.

In Canada, provincial governments have claimed jurisdiction over medical services, although the federal government had significant control over abortion policy through its jurisdiction over criminal activity in Canada. Its broad fiscal powers have served to increase its influence over health policy. Moreover, the strict discipline necessary in Parliamentary systems that characterizes the political party system was generally impermeable to abortion interest groups. Like the American politicians, Canadian policymakers preferred to defer abortion policy decisions to qualified medical doctors to avoid controversy.

This chapter will argue that Canadian and American abortion policy development followed similar paths prior to their respective judicial decisions. First, the a medical discourse framed the abortion debate and made abortion a privilege for women who could convince their (usually male) doctors to perform them (Jenson, 1992; 1994). Further, both countries' governments deferred to the medical profession, resulting in legislation that made abortion a crime unless a doctor determined it was necessary to save the life or health of the mother. Second, this chapter will argue that because of the veto-ridden nature of American and Canadian institutions, abortion interest groups in both countries launched judicial challenges in the 1960s and 1970s, utilizing the only potential access point available to them. Third, this chapter will argue that the impact of each decision was unique. In the United States, *Roe* made the courts the guardians of abortion policy, and shifted the discourse surrounding it to one that is rights based. Conversely, in

Canada, *Morgentaler* reinforced legislative supremacy and therefore helped maintain the traditional medical discourse.

Abortion policy was therefore convergent until 1973, when the American debate began to focus almost exclusively on rights because of *Roe*; the *Morgentaler* decision did not establish a comparable constitutional right to abortion in Canada in 1988. This chapter will therefore argue that abortion policy in Canada and the United States has diverged since their respective court decisions, and that interest group strategies have diverged as well. The chapter therefore includes a detailed analysis of both the *Roe v. Wade* and *Morgentaler v. the Queen* decisions and their effects on abortion policy in the United States and Canada, as well as an introduction to the main abortion interest groups in both states. It will argue that *Roe* established a new policy legacy focusing on judicial challenges and constitutional amendments in the United States, while *Morgentaler* reinforced the path of deferring to the medical profession. The chapter will conclude that the vastly different decisions rendered in *Roe* and *Morgentaler* led to the ‘constitutionalization’ of American abortion politics and policy stalemate in Canada.

Abortion policy convergence in Canada and the United States prior to Roe

Tatalovich points out that abortion was legal in both Canada and the United States until the late eighteenth century (1997; 2003). By 1821, Congress passed the first legislation outlawing abortion after quickening¹⁰ (Tatalovich, 2003). The 50 states passed similar legislation over the next ten years that made abortion a crime unless the life of the mother was in danger (Tatalovich, 2003). In Canada, legislation passed in 1803 that outlawed abortion after quickening, and in 1837, the quickening distinction was

dropped to make all abortion illegal (Tatalovich, 2003). However, as will be discussed shortly, Canadian doctors could provide abortions in accordance with the British 'Bourne defense' after 1939. In both the United States and Canada, abortion legislation resulted from doctors that protested the business the procedure afforded midwives and abortionists who were not medically trained (Tatalovich, 1997). Doctors wanted to control abortion provision, and policymakers complied with appropriate legislation that gave doctors control over women's reproductive functions. Thus from the early eighteenth century, policymakers began to defer to the medical profession, creating abortion policies that followed similar paths.

In the late 1960s and early 1970s, several pro-choice and anti-abortion groups emerged in both countries to lobby government officials for abortion policy reform (Tatalovich, 1997). In 1966, the National Organization for Women (NOW) was founded in the United States, followed by the National Action League for the Repeal of Abortion Laws (NARAL) in 1969¹¹. NOW was founded to lobby politicians for favorable legislation for women in many policy areas, including abortion; NARAL was founded to lobby politicians exclusively on state abortion laws. In 1971, in response to mounting judicial challenges by pro-choice groups, Americans United for Life appeared. In 1973, in response to *Roe*, the National Right to Life Committee emerged. In Canada, the Canadian Association for the Repeal of the Abortion Law (CARAL)¹² organized in 1974 to support Dr. Henry Morgentaler's judicial challenges. Accordingly, anti-abortion groups such as the Campaign for Life Coalition and Realistic, Equal, Active for Life

¹⁰ Quickening refers to the fetus' first movement inside the uterus.

¹¹ After the *Roe* decision in 1973, NARAL changed its name but maintained the same acronym, to become the National Abortion and Reproductive Rights League.

¹² Similarly, CARAL became the Canadian Abortion Rights Action League after 1988.

(REAL) Women of Canada formed over the course of the following decade. However, these groups were not successful in their initial lobbying efforts because of the path dependency of Canadian and American abortion policies. This path dependency arose because of the medical discourse surrounding abortion and the opportunity it gave politicians to defer the abortion issue to the medical profession. Because both pro-choice and anti-abortion groups used a rights discourse, and not a medical one, they were not legitimate actors in the policy debate. Jenson argues that discourse functions

“by setting boundaries to political action and by limiting the range of actors that are accorded the status of legitimate participants, the range of issues considered to be included in the realm of meaningful political debate, the policy alternatives feasible for implementation, and the alliance strategies available for achieving change” (1987, 65).

Both American and Canadian politicians framed abortion as a ‘private’ issue best regulated by the medical profession (Jenson, 1992; Brodie, 1994). Thus abortion interest groups that suggested abortion was a woman’s right, and not a medical procedure best regulated by doctors, were not legitimate actors in the abortion reform movements of the 1950s and 1960s.

In Canada, the Canadian Medical Association and the Canadian Bar Association testified before House Committees on abortion policy reform while women’s groups protested outside (Jenson, 1992; Gavigan, 1992). In the United States, various state medical and law associations, along with their national counterparts, the American Medical Association and the American Law Institute, enjoyed considerable access to the State legislatures to pressure for reform. Abortion interest groups, on the other hand, were almost completely marginalized. In Canada, “debates about state regulation [...] occurred as if the pregnant women had little interest and few rights in the matter” (Jenson, 1992,

16). In the United States, “women’s interests were not as well represented as those of lawyers, doctors, and public health personnel” (Rubin, 1982, 25). Most importantly, State legislatures and Parliament were not interested in radically altering abortion laws, for there was a fear that loyal party voters would revolt (Gavigan, 1992; Rubin, 1982). By maintaining a medical discourse in abortion hearings, legislatures in Canada could claim ignorance and avoid blame for abortion law reform, or alternatively, take credit for it should their constituents support abortion liberalization. Party associations in the United States similarly refused to incorporate abortion into their platforms (Crotty, 1984). In Canada, only the NDP would actively promote a women's right to choose (Brodie et al., 1992). Further, the medical discourse shut out abortion interest groups.

Thus because policymakers deferred to the medical profession, abortion policy in the United States and Canada continued along the same path. As Jenson points out, discourse functions by limiting policy options (1987). While fourteen American states reformed or revoked their abortion laws, and the Canadian federal government reformed the abortion law in 1969, legislation continued to reflect doctors’ interests and not those of women (Tatalovich, 1997). Because doctors fretted about unwarranted prosecution and lawyers were concerned about the unnecessary litigation their clients would face, legislation protected their interests (Brodie et al. 1992; Rubin, 1982). The result of this interest group marginalization was that even reformed laws of the 1960s were unacceptable to both pro-life and pro-choice abortion interest groups. For example, the reformed law in Georgia that was later challenged in a companion case to *Roe v. Wade* was extremely limited in scope and barely changed the status quo (Rubin, 1982). Clearly, legislative reform had proven a completely inadequate medium for abortion

interest groups to challenge abortion laws with any efficacy. However, if “legislatures were unsatisfactory, another route was open to the reformers – litigation” (Rubin, 1982, 29). Judicial challenges were therefore institutional veto points open to abortion interest groups to influence policy-making. Inspired by other successful constitutional challenges in both countries, Canadian and American pro-choice groups decided to try and ‘constitutionalize’ abortion (Scheppelle, 1996).

The judicial branch of government provided an appealing avenue for these groups to challenge abortion laws free from legislative roadblocks. “Social movement activists have found the constitutional court to be an environment for seeking reform of laws they are unable to change through legislative arenas” (Stetson, 2001, 255). On the surface, pro-choice groups were successful with this constitutionalization tactic. However, the policy outcomes of *Roe vs. Wade* and *Morgentaler v. the Queen* are fundamentally different. Both anti-abortion and pro-choice abortion interest groups have had to organize themselves accordingly to protect and/or challenge these judicial decisions. The next two sections of this chapter will analyze the development of judicial challenges in the United States and then in Canada.

The Constitutionalization of American abortion politics, 1960-1976

By the 1960s, constitutional challenges to laws by special interest groups through litigation had become extremely popular, and women’s groups intent on abortion reform were no exception. Further, because groups wanted to frame the abortion debate in terms of rights, the court was an attractive access point. Following the example set by the National Association for the Advancement of Colored People (NAACP) which

culminated in the landmark 1954 *Brown vs. Board of Education* decision, legislative tactics were abandoned and victory in the courts became the ultimate focus for abortion reformers (Rubin 1982, Tatalovich 1997, Scheppele 1996). Despite the possibility of a tragic defeat, pro-choice groups eagerly turned to litigious routes. While the courts offered an accessible forum for abortion reformers, it had many other advantages as well. Because each state law had to be challenged individually, lawsuits allowed abortion interest groups to:

put pressure on majority institutions, publicize causes, and educate the legal community, and each court victory can become the focal point for further organizing and fund raising. It can become part of a process of changing and channeling public opinion that may later result in general revision of the law by legislation. (Rubin, 1982, 31).

Armed with this new strategy, pro-choice groups sponsored constitutional challenges to State abortion laws all over the country. Framing the abortion debate in a constitutional context, however, proved to be relatively difficult.

The Constitution states that “Judicial power of the United States shall be vested in one Supreme Court” (Article III, Sec 1, 1787), and that this power “shall extend to all cases, in law and equity, arising under this constitution” (Article III, Sec 2, 1787).

Arguing in the Supreme Court had two distinct advantages: Because pro-choice groups faced 50 separate abortion laws, a Supreme Court decision that created a right to abortion would strike down all laws at once. This strategy would allow for relatively even access to abortion across the country, and avoid repeated battles in individual States. However, the Supreme Court relied heavily on precedence in their decision-making (Rubin, 1982, Tatalovich, 1997, Stetson, 2001). Because the Constitution does not mention abortion,

pro-choice groups would have to prove that a relevant precedent existed. Before 1965, no such argument could be made.

Griswold vs. Connecticut, decided in 1965, established that a right to privacy in reproduction existed in the Constitution. Many individual states had laws banning the prescription or sale of contraceptives, but “Connecticut had a law, passed in 1879, [...] that was particularly offensive; rather than prohibiting the prescription or sale of contraceptives, it made their *use* a criminal act” (Rubin, 1982, 36: emphasis in original). Encouraged by earlier Supreme Courts opinions written in an another contraceptive case, *Poe v. Ullman* (1961), where several justices suggested that a right to privacy in reproduction could be found to exist in the Constitution, birth control advocates decided to challenge the constitutionality of contraceptive laws. Estelle Griswold, executive director of the Planned Parenthood League of Connecticut, and Dr. C. Lee Buxton, director of the New Haven Planned Parenthood League, invited prosecution for giving birth control advice to a married couple (Rubin, 1982). They were tried and convicted under Section 54-196, General Statutes of Connecticut (958 rev.), which stated that “Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender”. In other words, Griswold and Buxton were criminally responsible for contraceptive use because they encouraged it through counseling. Their convictions were upheld in the Connecticut appeals court, and the Supreme Court soon thereafter agreed to hear their final appeal.

While privacy is not explicitly mentioned in the Constitution, the Ninth Amendment states that “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people” (Amendment IX, 1791).

When the Supreme Court overturned the Connecticut law 6-3, the opinion of the Court, written by Justice William O. Douglas, ruled that a right to privacy could be “derived from the First Amendment, [...] Third, Fourth and Fifth Amendments, all of which create zones of privacy by their provisions” (Rubin, 1982, 40). In his closing statements, Justice Douglas also “tied the right to privacy to the tradition of individual freedom in private affairs that has been generally part of the American tradition” (Rubin, 1982, 40). The concept of privacy in reproductive control was extended in *Eisenstadt v. Baird*, where unmarried persons were also found to have a right to privacy in choosing contraception. The precedents for the repeal of abortion laws had been established. “Clearly *Griswold*, and its extension to unmarried persons in *Eisenstadt*, was the essential precedent that *Roe v. Wade* required” (Tatalovich, 1997, 57, emphasis in original).

Women’s and pro-choice groups and the challengers they supported failed to immediately take advantage of the legal precedent set in *Griswold* (Tatalovich, 1997). The first abortion case to reach the Supreme Court after 1965, *United States vs. Vuitch* (1971), argued against abortion laws on the grounds of due process, and not within the context of privacy. Dr. Milan Vuitch was prosecuted for performing abortions in the District of Columbia. The law stated that the provision of abortions was permitted only “as necessary for the preservation of the mother’s life or health” (quoted from Tatalovich, 1997, 54), and Dr. Vuitch argued that these provisions were unconstitutionally vague. The law “abridg[ed] the physician’s right to carry out his professional responsibilities” (Rubin, 1982, 44) and placed the burden of proof solely with the medical practitioner.

The Supreme Court decision, which upheld the District of Columbia law 5-4, was an exercise to “save [the law] from a charge of unconstitutionality, one of the devices

commonly used by courts to reduce conflicts with legislatures” (Rubin, 1982, 44). The majority opinion argued that while the law was not unconstitutionally vague, the “law had been improperly construed to require the physician himself prove that an abortion was necessary” (Rubin, 1982, 44). Tatalovich argues that the majority opinion, written by Justice H. Lafayette Black, suggests that because the privacy doctrine in *Griswold* was only peripheral to the *United States v. Vuitch* arguments, the “majority opinion did not feel obliged to address that aspect” (1997, 56). It became obvious that for the Supreme Court to strike down abortion laws, arguments had to challenge the constitutionality of abortion laws through the privacy doctrine. Thus the only way to reform abortion laws was to abandon the path that deferred to the medical profession and instead argue that abortion was a right guaranteed in the Constitution.

Roe v. Wade, and its companion case, *Doe v. Bolton*, were heard in the Supreme Court in May and June of 1971, shortly after *United States v. Vuitch*. Unlike *Vuitch*, however, *Roe* and *Doe* argued that their constitutional right to privacy was violated by Texas and Georgia abortion laws. *Roe v. Wade* was not a simple case. “Three parties represented the interests involved – a pregnant woman, a couple wanting to prevent pregnancy but wanting access to abortion as a last resort, and a physician being prosecuted for performing abortions” (Rubin, 1982, 60). In addition to the main arguments, the court heard thirty-six ‘*Amicus Curiae*’, which are “literally friend of the court [briefs] from nonparties who are interested in the outcome of the case” (Rubin, 1982, 45). Here, fledging pro-choice groups reserved the opportunity to voice their opinions in the Court. This is proof of the institutional veto point allowed to interest groups through judicial challenges.

More remarkable, however, was the ability of pro-choice groups to present the abortion issue as a women's issue. "Through presenting *amicus curiae* briefs, women as individuals and in groups [...] were accepted into the judicial policy process" (Stetson, 2001, 253-4). Those groups that filed briefs in support of Jane Roe were largely geared to female membership, and included the American Women's Medical Association, New Women Lawyers, National Abortion Action Coalition, the National Organization of Women and Women's Health and Abortion Project (Stetson, 2001). Those against abortion reform were generally composed of males and females, and included Americans United for Life and the National Right to Life Committee (Stetson, 2001). The destruction of the path dependency of abortion politics was advanced enormously by the Court's decision to allow such briefs because they did not defer solely to the medical profession as had the state legislatures.

On January 22nd, 1973, the Supreme Court ruled 7-2 in favor of Jane Roe, and the impact of their decision was enormous. In addition to striking down the Texas abortion law contested in *Roe v. Wade*, "the decision struck down the existing laws of 46 states, a highly unusual act" (Scheppelle, 1996). However, while the decision is generally considered a victory for pro-choice groups, *Roe* is actually a delicate compromise between women's rights and State interests (Tatalovich, 1997, Rubin, 1982). To this end, Eva Rubin summarizes the ruling's seven points: 1) abortion was legal until the late nineteenth century, and is therefore not inherently anti-American; 2) The Fourteenth Amendment, which guarantees 'liberty', and the privacy doctrine create a fundamental right to abortion in the first trimester; 3) there is no absolute right to abortion; 4) abortion laws must balance the fundamental rights of women with State interests in protecting the

fetus; 5) the balance shifts from the woman to the State as the pregnancy progresses; 6) the State must not impede early abortions by procedural means; and 7) the Constitution does not recognize the fetus as a person (1982). The nature of the compromise is therefore dependent on the progression of the pregnancy. Most importantly for pro-choice and anti-abortion groups, however, was the ruling's contention that abortion was not the unqualified right of women. As Justice Blackmun states in the majority opinion, "We, therefore, conclude that the right of personal privacy includes the abortion decision, [...] *the right, nonetheless, is not absolute* and subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant." (1973, emphasis added). The justices therefore shifted the abortion discourse from medical to rights based because they created a *constitutional right* to abortion in the first trimester. Abortion was no longer a procedure that required a doctor's (usually male) approval. Instead, it was a woman's right to receive an abortion if she deemed it necessary. Further, the decision made the justices the guardians of abortion policy, as the ruling may only be reversed upon future judicial challenges. The fury of judicial and political activity, by both anti-abortion and pro-choice groups, has since *Roe* therefore focused on how far the right of women to abortion extends.

Legal experts and legislators across the country criticized the Court, not simply for the nature of its decision, but because of the activist strategy it employed. The Court tried to prevent hundreds of future cases concerning the fifty states' abortion statutes by setting boundaries for abortion legislation (Tatalovich, 1997, Rubin, 1982). Quite simply, the Court argued that state legislatures had no jurisdiction over early abortion, despite that they had legislated the practice since the adoption of the Constitution.

Dissenters claimed that the ruling was “unwarranted judicial policymaking” (Rubin, 1982, 82) because it denied legislative authorities this traditional policy making role (Tatalovich, 1997). Justice Rehnquist, in his *Roe* dissent, stated that “states were well within their right to enact legislation on this point and that the federal constitution had nothing whatsoever to say about the subject of abortion” (Scheppelle, 1996, 31). The heated debates surrounding the *Roe* decision “put the politics of the court on open view, inviting speculation that the nominees and even the judging process were more political than judicial” (Scheppelle, 1996, 30).

The *Roe* decision was therefore a critical juncture in abortion policy. Because it focused on the right of women to abortion, politicians could no longer defer to the medical profession when formulating policy. In addition, *Roe* shifted the discourse of abortion from medical to rights based. The new policy legacy in the United States means that only through the reversal of *Roe* in subsequent Supreme Court decisions, or a constitutional amendment banning abortion, could abortion policy change. Similarly, abortion interest groups have had to change their strategies.

Since the state legislatures were effectively removed from the center of the abortion debate, *Roe v. Wade* has had an enormous impact on the organization and activities of pro-choice and anti-abortion groups. Judicial challenges in the American abortion debate therefore proved to be the ultimate veto point for policy influence by abortion interest groups.

While the women’s movement itself was emerging in 1959-1972, pro-choice groups were modestly organized and had growing chapters all over the country (Stetson, 2001). Having succeeded in the courts despite being ignored by the legislature, “pro-

choice activists [have since 1973] looked to the judiciary to protect their newfound liberty” (Tatalovich, 1997, 66). Rubin concurs that “[pro-choice groups believed that] the secret to success [...] had been the change from the futility of ladylike lobbying efforts in legislative committee rooms to dramatic, direct-action tactics that demonstrated the strength of public opinion in favor of legal change” (1982, 87). Thus after the success of *Roe*, the courts were cemented at the center of activity for pro-choice groups. This reflects the new policy legacy in American abortion politics.

Anti-abortion groups before *Roe* were “not very strong and well organized” (Stetson, 2001, 254). By the mid-1970s, a very strong [anti-abortion] movement was growing within the Republican party” (Stetson, 2001, 258), while the Catholic Church also launched a national political movement. Arguably, pro-life groups remained unorganized before *Roe* simply because anti-abortion laws remained in place. *Roe* “unleashed a political backlash as the pro-life counteroffensive was mobilized” (Tatalovich, 1997, 59). Like their opponents, the main focus for anti-abortion groups was the courts. While pro-choice groups relished the fact that *Roe* created a precedent for the right to abortion, anti-abortion groups aspired to have the decision overturned. Because the right to privacy is not explicitly mentioned in the constitution, anti-abortion groups argued that the *Griswold* precedent is not sufficient to warrant a woman’s right to choose abortion (Tatalovich, 1997, Scheppele, 1996, Rubin, 1982). Anti-abortionists seek to influence public opinion in favor of overturning *Roe*. Despite this focus on judicial activism, however, political activity became a crucial aspect of their strategy.

In the United States, the President alone is authorized to appoint judges to the Supreme Court, although the candidate is subject to approval from the Senate. Anti-

abortion groups believe that by electing anti-abortion Presidents, the Court will eventually be composed of enough members to gut *Roe* (Tatalovich, 1997, Rubin, 1982). The politicization of abortion was reinforced once Democratic and Republican politicians 'took sides' in the abortion debate, although anti-abortion groups have been more successful in the Republican Party than the pro-choice in the Democratic. This was further reinforced by the adoption of primary systems in all 50 states and campaign finance reform laws, and will be the subject of analysis in Chapter 4. However, suffice it here to state that the Democrats, "at the insistent urging of [pro-choice] groups, included a plank in their [1976] platform that stated, 'We feel that it is undesirable to attempt to amend the U.S. constitution to overturn the Supreme Court decision permitting abortion'" (Rubin, 1982, 98). Republicans countered in their platform that the party favored "a continuance of the public dialogue on abortion and supports the efforts of those who seek enactment of a constitutional amendment to restore protection of the right to life for unborn children" (Rubin, 1982, 98).

Despite these platform statements, however, both pro-choice and anti-abortion groups recognize that a constitutional amendment in favor of or against abortion is most unlikely. Because constitutional amendments require the consent of a two-thirds majority in the House and the Senate as well as ratification by three-fourths of the individual States, they are extremely difficult to successfully pass. Breckenridge points out that while hundreds of amendments have been proposed since 1971, only seventeen have passed (1998). The Supreme Court has thus remained the supreme arbitrator for abortion debates, and the nomination of judges is considered a sacred function of the President by groups on both sides of the abortion debate. However, as will be discussed

in Chapter 4, short term strategies of anti-abortion groups include legislative lobbying, largely to enact laws that limit *Roe v. Wade*. These are ultimately challenged in the Supreme Court, which has slowly been stacked with conservative judges since 1973 by Republican Presidents.

The Canadian Constitutional Experience, 1939-1992

The development of abortion policy in Canada is different from the United States experience for two reasons. First, in Canada, the legality of abortion is within federal jurisdiction. Thus while abortion interest groups in the United States struggled to fight or protect fifty *individual* laws regulating the procedure, Canadian groups enjoyed the simplicity of a *uniform* policy across the country. Second, as part of the British Commonwealth, Canadian courts could invoke precedents of common law from British courts. The abortion experience in Canadian courts is therefore closely tied to the British experience.

In 1892, as part of the Commonwealth, Canada incorporated Britain's 1861 *Offenses against the Person Act* into their Criminal Code. The law stipulated that those who procured abortion, as well as those who provided it, were guilty of an indictable offense, and could face life in prison as punishment (Tatalovich, 1997; Brodie et al., 1992). Unlike in Britain, however, "there was a clear 'saving' provision in the [Canadian] Code which absolved doctors who acted to preserve a woman's life" (Jenson, 1992, 24). Canadian doctors were nevertheless reluctant to provide therapeutic abortions. To avoid criminal responsibility, doctors had to assume that the courts would trust their

professional judgment. Since no precedent existed for therapeutic abortions to save the life of the mother in Canadian courts, few doctors were willing to test such a hypothesis.

The necessary legal precedent was acquired instead in Britain. Dr. Aleck Bourne, a prominent obstetrician, “notified the attorney general [in 1938] that, with the consent from her parents and for no fee, he had performed an abortion on a fourteen-year-old girl who had been gang-raped by four soldiers” (Tatalovich, 1997, 30). In the landmark 1939 *R. v. Bourne*, a British Court determined that “abortion was possible if the pregnancy threatened the life or health – even the mental health – of the woman” (Jenson, 1992, 24). This decision “provided a precedent for the existence of legal abortions in [Britain and therefore] Canada, even in circumstances in which the threat to life was indirect” (Jenson, 1992, 24).

However, these new ‘legal’ abortions still required that the courts accept a doctor’s professional opinion, which is evidence of the medical discourse surrounding abortion. To obtain an abortion, a woman had to convince her doctor that it was necessary to her health to terminate her pregnancy. Once this preliminary approval was given, “most doctors [...] consulted at least one colleague, [and] some hospitals formalized this procedure by setting up a committee of doctors to hear the details of such cases” (Jenson, 1992, 24) to avoid prosecution. The Canadian Criminal Code’s original provision, combined with the legal precedent set in *R. v. Bourne*, therefore shaped abortion reform in 1969.

Over the next few decades, the British abortion reform movement gained momentum, culminating in the law’s reform in 1967. In Canada, “not until the early

1960s was there any indication of public concern [about] abortion, though reform came quickly after Great Britain acted” (Tatalovich, 1997, 32).

As in the United States, Canada’s abortion reform movement of the 1960s focused on the image of conscientious, ethical and responsible doctors hoping to protect themselves from unwarranted prosecution. “Women, organized as women demanding specific and particular gender rights, had as yet no status as political actors” (Jenson, 1992, 25). As in the United States, the legislative and executive bodies therefore did not prove to be institutional veto points for abortion interest groups.

The Canadian Medical Association, the Canadian Bar Association and members of Parliament were the main actors in the abortion debate. Further, “the rhetoric of the associations was based virtually exclusively on the needs of doctors”(Hausmann, 2001, 67), which ensured the framework of the debate would remain outside the realm of women (Hausmann, 2001; Jenson, 1992) and therefore abortion interest groups. This is evidence of the medical discourse that surrounds abortion politics in Canada. While several pro-choice organizations submitted resolutions to the government, “none of these groups [ever] gained recognition as major actors in the debate” (Jenson, 1992, 31). The resulting 1969 ‘omnibus’ bill, within which the government made amendments to several provisions in the Criminal Code, included the much anticipated abortion reforms. Abortions were determined to be legal within ‘accredited’ or ‘approved’ hospitals, and only when that hospital’s therapeutic abortion committee determined that the continuation of pregnancy would endanger the ‘life or health of the mother’. Jenson argues that while many more women had access to abortion than ever before, the law “nevertheless, in general, [subjected] women to the vagaries of doctors’ and hospitals’

judgment of the morality and politics of abortion (1992, 37). In addition, “as the law came into effect, it became evident that the interpretation of the words [life or health of the mother] varied widely across the country” (Dunsmuir, 1993).

Pro-choice groups were wholly unsatisfied. Like their counterparts in the United States, Canadian pro-choice groups learned quickly that politicians tend to avoid the abortion issue altogether (Jenson, 1992; Scheppele, 1996). The two most important party associations, the Liberals and the Conservatives, steadfastly refused to present abortion as a fundamental right of women in their platforms (Young, 2000). This reflects the reluctance of party leadership to tackle the ‘messy’ issue of abortion and the medical discourse that surrounds the debate. Strong party discipline inherent in Canada's parliamentary system further excluded interest groups, because they were unable to effectively lobby individual Members of Parliament. With two heated and uncompromising sides, politicians feared losing large numbers of supporters no matter their opinions of abortion (Brodie et al, 1992). Eager to share in the success of the American pro-choice groups in *Roe v. Wade*, Canadian abortion supporters took their arguments to the courts. Judicial challenges in Canada originally proved to be an ineffective access point for pro-choice groups. However, with the adoption of the Charter of Rights and Freedoms, a shift in institutional configurations allowed the judiciary to become an important institutional access point for abortion interest groups.

Two differences between the early *Morgentaler* challenges to abortion laws and *Roe v. Wade* are blatantly obvious and contributed to the establishment of judicial challenges as an access point for abortion interest groups. First, while in *Roe* the constitutionality of a woman's right to abortion was debated, the 1960 Canadian Bill of

Rights did not enjoy constitutional status. The discourse of women's rights was therefore almost completely excluded from courtroom arguments. Second, as a natural consequence of the exclusion of women's rights in abortion discourse, women were not the primary plaintiffs in *Morgentaler* as in *Roe*, but rather male doctors. Pro-choice groups, as well as anti-abortion groups, were noticeably absent from the early Canadian court battles.

Dr. Henry Morgentaler challenged the 1969 reforms by refusing to perform abortions in hospitals, and instead set up his own freestanding clinic in Montreal. He was clearly in violation of the Criminal Code. He did not perform abortions in hospitals, and he did not obtain approval from a recognized therapeutic abortion committee. As a result, he was arrested in 1970 and tried in Québec. He argued that despite ignoring Criminal Code abortion regulations, he was innocent of all charges. He invoked both the 'Bourne defense' of 1939 and Section 45 of the Criminal Code, which absolved doctors of criminal negligence if they could prove "a surgical procedure was performed for the benefit of the patient with reasonable care and skill and with regard to the health of the patient" (Tatalovich, 1997, 74). In addition, he argued that because the Canadian Bill of Rights was modeled on the American Constitution, American common law precedents should be respected (Tatalovich, 1997). According to this reasoning, the right to privacy in regard to contraceptives established in *Griswold*, and further extended to abortion in *Roe*, should also apply to Canadian women and the reproductive procedures performed on them by their doctors. Although a Québec jury acquitted him, the Court of Appeal reversed the decision. Dr. Morgentaler appealed to the Supreme Court, but it refused to hear his case. Unlike the United States Supreme Court, Canada's highest court seemed

determined to show judicial restraint, refusing to shape policy outside the legislatures without a constitutional basis (Scheppelle, 1996, Tatalovich, 1997, Jenson, 1992). “If people did not like the abortion statute, the Court argued, they would have to go to Parliament to get it changed. The courts would stay out of it” (Scheppelle, 1996, 34). This reflects the path dependence of Canadian abortion politics, which centers on the supremacy of Parliament and policymakers’ deference to the medical profession.

Although he spent time in jail after his acquittal was overturned, Dr. Morgentaler continued to perform illegal abortions in his clinic upon his release, and refused to conceal his actions. “Repeatedly arrested, Morgentaler was repeatedly acquitted by juries until the Québec Minister of Justice announced that the province would no longer enforce the abortion laws” (Scheppelle, 1996, 34). Thus victorious in Québec, Morgentaler then set up a clinic in Toronto, Ontario, where he was again arrested in 1983, along with two of his partners, Drs Smoling and Scott. Once again, they were acquitted, but the Ontario Court of Appeal overturned the decision, and the Morgentaler team appealed to the Supreme Court. Dr. Morgentaler was now armed with the 1982 Charter of Rights and Freedoms, and the Court was forced to hear the case. Like the United States’ Bill of Rights, the Charter was entrenched into the Canadian constitution. Dr. Morgentaler et al. was now fighting a constitutional battle.

The entrenchment of the Charter of Rights and Freedoms into the Canadian constitution shifted the institutional configuration of the Canadian judiciary. The Supreme Court was now forced to act as a mediator in disputes between citizens and their governments. An institutional access point was therefore created for policy making influence by abortion interest groups. However, Dr. Morgentaler remained the focus of

the abortion controversy, despite attempts by pro-choice groups to wrest control of the judicial challenge and therefore policy influence. This is because abortion policy path dependency in Canada helps maintain the abortion discourse.

An argument over the framework of Dr. Morgentaler's defense is evidence of this discourse. "Dr. Morgentaler's lawyer wished to emphasize the narrow question of physicians' rights and their fears of prosecution" (Hausmann, 2001, 72), which explicitly excluded women. The defense team felt that focusing on doctors' rights instead of women's would better ensure victory. Thus while *Morgentaler* is generally thought to have centered on women and women's rights, arguments over the defense strategy are illustrative of the medical discourse surrounding Canadian abortion politics.

Under the heading "Legal Rights", Section 7 of the Charter states that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Dr. Morgentaler argued that the Criminal Code infringed upon a woman's right to "life, liberty and security of the person" (Brodie, 1992; Scheppele, 1996; Tatalovich, 1997). Accordingly, several pro-choice groups were visible during *Morgentaler*: the Canadian Abortion Rights Action League (CARAL); the Ontario Coalition for Abortion Clinics (OCAC); and the Coalition Québécoise pour le droit à l'avortement libre et gratuit. (Hausmann, 2001). The anti-abortion side was represented by the REAL women of Canada and the Campaign Québec-vie (Hausman, 2001). While discouraged by Dr. Morgentaler's lawyers from filing supporting briefs, and forbidden by the Court to act as interveners, these groups lobbied the public intensively to gain support for their respective causes (Hausmann, 2001). Thus while they were not able to fully utilize the

new institutional access point afforded them by the Charter of Rights and Freedoms and wrest control over the Morgentaler defense, abortion interest groups did participate peripherally in the debate.

On January 28th, 1988, the Supreme Court ruled in favor of Dr. Morgentaler by a vote of 5-2. “This decision showed more than any other what a difference the Charter of Rights made in the Supreme Court’s view of its power and in its willingness to confront the constitutionality of statutes” (Scheppelle, 1996, 34). The access point created by the shift in institutional configurations by the Charter was therefore further solidified through this decision. As for the decision itself, the majority wrote three opinions, although all agreed on these four points: 1) Section 287 (then 251) of the Criminal Code infringed upon a women’s right to security of the person; 2) The process by which a woman was deprived of that right was not in accord with fundamental justice; 3) The state interest in protecting the fetus was sufficiently important to justify limiting individual Charter rights at some point; and 4) The right to security of the person of a pregnant woman was infringed more than was required to achieve the objective of protecting the fetus, and the means were not reasonable (Dunsmuir, 1992, 11). Thus the ruling made the existing statute invalid, but did not “preclude the enactment of another regulatory statute without these particular offenses” (Scheppelle, 1996, 34). Quite simply, the Court declared the existing statute unconstitutional, but did not attempt to guide future policy beyond its criticisms of Section 251. Although Justice Bertha Wilson authored an opinion that suggested a similar trimester approach to that established in *Roe*, she was alone within the majority. The Court did not create a ‘fundamental’ right to abortion as the United State’s Supreme Court did in *Roe v. Wade*, and there was thus no critical juncture in

Canadian abortion politics. Further, there was no shift from in discourse from medical to rights based. Control over subsequent abortion policy, albeit with minor direction, was handed back to Parliament by the Court. Thus the *Morgentaler* decision merely reinforced the path dependency of Canadian abortion politics because it threw the abortion question back to the legislature, where policymakers could continue to defer to the medical profession and avoid a rights based discourse.

However, the 1988 *Morgentaler* decision “opened space for subsequent public controversy between anti-abortion groups championing the right to life of the fetus and pro-choice supporters claiming women’s right to control their own reproduction” (Jenson, 1992, 17). However, neither pro-choice nor anti-abortion groups were relatively successful in gaining the unconditional support from either the Liberal or Conservative parties, although they have found several individual Members of Parliament or party members that have pledged their support. However, strong party discipline ensures that they vote according to the party platform, which does not include references to abortion. Although generally, the Liberals tend to lean towards the pro-choice movement, the Conservatives with the anti-abortion movement (Jenson, 1992), neither party has succumbed to interest group pressure and added abortion to their planks. Neither mainstream party is interested in solidifying party policy on abortion for fear of electoral retaliation. As Joyce Arthur, Director and Spokesperson of the Pro-Choice Action Network, bluntly states: “[The Courts are by default] the decision-makers when it comes to abortion. Legislatures don’t like to touch the abortion issue: it’s a ‘messy’ issue and can hurt political careers because of its divisiveness” (interview 07/05/2003). The institutional access point created by the Charter is therefore not particularly effective for

Canadian abortion interest groups to influence policymaking. Judicial challenges require offending legislation. As will be discussed in Chapter 5, none has been adopted since *Morgentaler*. Unlike the United States, then, there was no critical juncture that altered the path of Canadian abortion politics. The Canadian abortion debate is in a political stalemate because there are no strategies available to interest groups to create a new policy legacy.

Conclusion

Abortion interest groups in Canada and the United States did not influence the legislatures during the abortion reform movements of the 1960s and 1970s. In Canada, parliamentary hearings ignored both pro-choice and anti-abortion groups. In the United States, the presidential system and its separation of powers established controversy between executive and legislative branches of both federal and state governments. Politicians in both states benefited from a medical discourse, which controlled policy alternatives and the legitimate participants of the debate. Further, political party associations refused to incorporate abortion policy into their platforms until after the landmark *Roe v. Wade* decision. Federalism further encouraged abortion policy reformers to seek alternate means of policy influence because criminal activity was legislated by each individual state. Thus American abortion politics continued along a path similar to the Canadian one, as policymakers deferred to doctors.

The Canadian experience shows that judicial challenges were initially unsuccessful because the functions of the Courts did not include that of mediator to constitutional challenges by citizens to government policies. Dr. Morgentaler's original

court cases were therefore unable to influence abortion policy in Canada. However, with the entrenchment of the Canadian Charter of Rights and Freedoms in 1982, a shift in institutional configuration allowed the judiciary to become an access point. Abortion interest groups were unable to wrest control of the abortion debate in *Morgentaler v. the Queen*, and subsequent judicial challenges again reinforced path dependency.

In the United States, legislative lobbying at the State and federal levels did not prove to be institutional access points for abortion policy reformers. Like their counterparts in Canada, American politicians maintained a medical discourse when discussing abortion prior to 1973. Both pro-choice and anti-abortion groups were therefore unable to exert influence. However, judicial challenges were unquestionably successful. Pro-choice groups were able to utilize the access point afforded by the American Supreme Court and ultimately influence abortion policy making through *Roe v. Wade*. *Roe* was a critical juncture that created a new policy legacy in American abortion politics. This new legacy altered the strategies of interest groups to focus on the judicial arena as well as pursue a constitutional amendment. Further, *Roe* shifted the discourse of the abortion debate from medical to rights based.

Thus after a century of policy convergence that saw Canadian and American abortion policies follow the same path, Canadian and American abortion policies diverged after their respective court decisions *Roe v. Wade* and *Morgentaler v. the Queen*. The United States faced with a new abortion policy legacy; in Canada, the abortion debate continued along the same path. Notably, Canadian abortion interest groups were not able to use a rights based discourse, as their American counterparts did after *Roe*, because of these institutional constraints. As such, American and Canada

abortion policies are now inherently different. Chapters 4 and 5 will develop this argument more thoroughly.

Chapter 4: The Triumph of Anti-Abortion Groups in the United States

In Chapter 3, it was argued that pro-choice groups, hoping to influence American abortion policy development, were forced into the judicial arena in the 1960s. This route was the most attractive primarily because the federal system and political party association structures inherent to presidential systems proved to be unsuccessful veto points for pro-choice interest groups. They were unable to urge politicians to shed the medical discourse surrounding abortion policy that ultimately gave doctors and lawyers greater influence than women in abortion debates, and therefore unable to thwart legislation in Congress. Moreover, political party associations refused to adopt pro-choice abortion planks in their election platforms. In addition, the federal system encouraged pro-choice groups to seek a constitutional ruling on abortion laws because they faced the daunting task of influencing fifty individual state laws regulating the procedure. Pro-choice interest groups were rewarded with the apparently fundamental and permanent right to abortion acquired through *Roe v. Wade*.

However, this chapter will argue that the *Roe* decision was a critical juncture in American abortion policy development. As per Collier & Collier's definition of critical junctures (1991), a new policy legacy was created that limited the policy options available to anti-abortion groups to thwart the new right to abortion. These policy options are the outright reversal of *Roe* in a subsequent Court decision, or a constitutional amendment banning abortion. This chapter will show that anti-abortion groups have been surprisingly successful in seeking the reversal of *Roe*, largely because institutional changes in the Republican Party structure allowed for the infiltration of anti-abortion forces and the New Right in the late 1970s. An institutional access point was created in

the Republican Party that allowed anti-abortion forces influence over Congressional lawmakers and Republican Presidents. This new access point is a direct result of both campaign financing changes as well as the leadership vacuum created by Watergate. Because anti-abortion groups were able to capitalize on this new institutional access point and push through legislation restricting abortion as well as influence judicial nominations, the American abortion policy debate has continued in the judicial arena. New laws are introduced in either individual states or at the federal level that attempt to restrict *Roe*. Pro-choice groups then challenge these laws in the courts because they remain only veto point available to them. However, an increasingly conservative Supreme Court now rules over new legislation.

This chapter argues that the infiltration by anti-abortion groups in the Republican Party, and their subsequent influence over Supreme Court nominations, has allowed the restriction of *Roe* and may even result in its reversal. This chapter will show that while both anti-abortion and pro-choice groups enjoyed increased influence as single-issue groups, organizational differences between the two major political parties and the inclusion of abortion rights in the greater American feminist project allowed anti-abortion groups to better profit from the new access point of policy influence in political party associations. It will conclude by showing how this new access point has allowed for continued judicial battles based on legislative challenges to *Roe v. Wade* that have gradually favored the anti-abortion position as the Supreme Court has become increasingly conservative. This is the direct result of anti-abortion groups' success in influencing the Republican Party leadership and the executive branch of government.

From the Judiciary to Political Parties: The Roe v. Wade Aftermath

The great irony of the American pro-choice movement is that the historic Supreme Court decision *Roe v. Wade* in 1973 was both the end of the judicial battle over abortion and its true beginning. After *Roe*, shifts in institutional configurations allowed for anti-abortion interest groups to increase their influence over political parties and individual politicians. This shift was largely spurred by changes in campaign financing laws (Tatalovich, 2003). As a result, a continuous battle over abortion rights in the United States Supreme Court was able to develop.

Roe v. Wade altered the institutional strategies employed by anti-abortion forces to affect policy change because the decision ruled that abortion was a guaranteed constitutional right. The resulting policy legacy limited the options available to them to affect policy reform. In order to reverse *Roe*, Congress would have to pass a constitutional amendment. As discussed in Chapter Three, constitutional amendments are very difficult to achieve, and while it remains the ultimate goal of most anti-abortion groups, there are alternative strategies available in the short term. More specifically, by pushing through legislation restricting the guidelines established in *Roe v. Wade*, anti-abortion forces could challenge the 'right to privacy' ruling in subsequent Courts (Tatalovich, 1997). If the Supreme Court could be stacked with conservative judges, the argument that the *Griswold* precedent was insufficient to guarantee a right to abortion could ultimately be accepted. In order to succeed, great influence on both the executive and legislative branches of federal government would have to be established to guarantee the nomination of 'acceptable' judges to the Supreme Court. In addition, anti-abortion groups needed anti-abortion politicians to serve in Congress to pass the legislation

required to mount further judicial challenges. The legislative route to policy change, which the pro-choice groups had found replete with veto points due to federalism and the presidential system, would have to be overcome. Fortunately for the anti-abortion groups, changes in campaign financing laws and the subsequent rise of single-issue groups, as well as the political parties' organizational arrangements, facilitated jumping this hurdle.

As Crotty notes, anti-abortion groups have been surprisingly successful in the legislative arena (1984). He attributes their victories to the increasing influence exerted by single-issue groups over Congress in the 1970s. During this period, the Republican Party watched memberships decline and dealt with the Watergate scandal, while the Democratic Party experienced divisive primaries that led to the 1968 riots at the Chicago convention, and underwent massive reforms (Baer & Bositis, 1993; Freeman, 1987; Burrell, 1993). This led many to observe the weakening of the American political party system, which in turn allowed for the infiltration of single-issue groups¹³. As discussed in Chapter Two, the American presidential party system allows for weak party discipline when compared with parliamentary party systems. However, the further 'decline' of American political parties in the 1970s, compounded with changes to campaign financing laws in 1974, ensured that single-issue groups were poised to hijack the public policy process through the parties (Keefe & Hetherington, 2003). Veto points through which groups could stall or halt abortion legislation gradually eroded. These became access points for anti-abortion groups, which were able to push through legislation restricting abortion and therefore influence policy. This new access point is instrumental in

achieving anti-abortion groups' goals. Given that anti-abortion groups are considered one of the most successful single-issue movements in the United States (Crotty, 1984), their legislative successes are not terribly surprising. The inability of pro-choice groups to match their opponents' successes, however, is an important puzzle in American abortion policy development.

The rise of single-issue groups in American politics

Single-issue groups may be defined as political organizations devoted entirely to one cause (Crotty 1984). They therefore differ from those Paul Pross describes, where members from a common background and work together "in order to promote their common interest" (1975, 2). This more traditional definition, which is successfully applied to professional or trade groups, does not accurately describe single-issue groups. Single-issue groups' members may have nothing in common besides the commitment to politicize their cause, which they accomplish by campaigning vigorously for sympathetic candidates in elections. As Keefe and Hetherington note, "their issue is *the* issue; their position is the one on which legislators are to be judged" (2003, 217, emphasis in original). They have given rise to what are called single-issue voters, whereby votes are determined based on the candidates' position on one issue. Anti-abortion single issue voters will therefore vote only for candidates that support their position. Crotty notes that "with ample funding, with an emphasis on media campaigning, and fed by the weakness of the political parties, groups of single-issue voters can often prove decisive in low-turnout primary and general elections" (1984, 142). Tatalovich refutes this argument

¹³ For further discussion of the weakening of political parties, see William J. Keefe and Marc J. Hetherington, *Parties, Politics and Public Policy in America*, Washington, CQ Press, 2003 (Chapter 7); and

based on his study of American elections and the abortion question, which shows that abortion is a factor in voting behavior for only a small minority of citizens, but he does admit that party leadership and convention delegates are much more issue oriented since the late 1970s (1997). The rise of single-issue groups, in which both anti-abortion and pro-choice groups are included, is attributable to changes in campaign financing laws and the decline of political parties in the 1970s.

Campaigns in the United States are financed solely through individual or group contributions. Government funding for campaigns, available widely in Canada, is only available in Presidential elections (Keefe & Hetherington, 2003). Legislators at both the state and federal level are therefore forced to spend a great deal of time soliciting funds in order to mount a viable campaign (Keefe & Hetherington, 2003; Breckenridge, 1998). However, public concerns about the democratic process and fear of corruption have led to the adoption of national campaign financing laws in the past few decades.

In 1971, Congress passed the Federal Election Campaign Act (FECA). Designed to stimulate individual contributions to campaigns (thus eliminating a candidate's reliance on unions and corporations for funding), it allowed for limited tax deductions for campaign contributions from individuals. Subsequent amendments were adopted in 1974 after the Watergate scandal to tighten regulations on campaign spending and disclosure (Keefe & Hetherington, 2003). Strict limits on individual donations were also established: in 1974, individuals could donate up to \$1,000 per candidate per election; and Political Action Committees (PACs) up to \$5,000¹⁴. Ironically, while tightening the

William J. Crotty and Gary C. Jacobsen, *American Parties in Decline*, Boston, Little & Brown, 1980.

¹⁴ These spending limits were increased in 2002 when Congress adopted the McCain-Feingold Act. Individual contributions to candidates doubled to \$2,000 per election, although PAC contributions to candidates remained the same.

rules for individual contributions, the 1974 reforms loosened those regarding the formation of PACs (Crotty, 1984). These have since become a major source of influence for single-issue groups.

PACs are essentially extensions of labor, corporate or membership based groups. They “raise funds, endorse candidates, make campaign contributions, and spend money on behalf of candidates” (Keefe & Hetherington, 2003, 96). PACs are also allowed to spend independently of candidates to publicize their positions. This alone is enough to ensure the importance of PACs in elections, especially with the rise of issue ads that many single-issue groups’ PACs fund (Keefe & Hetherington, 2003). However, additional influence is garnered by using a loophole of the 1974 amendment to FECA, whereby PACs ‘bundle’ individual contributions to bypass the \$5,000 spending limit per candidate (Young, 2000). Essentially, funds are solicited from members of their parent organization in the name of the candidate instead of the PAC. These funds are then ‘bundled’ and passed directly to the candidate. The potential funds ensure that legislators nurture close relationships with PACs (Keefe & Hetherington, 2003). Virtually every abortion interest group mentioned in the course of this research has its own PAC¹⁵:

To illustrate the importance of PAC funding in campaigns, the spending and donation figures need only be consulted briefly. As the cost of mounting campaigns has increased exponentially in the past fifty years, so have the contributions of PACs, and thus their level of influence. Keefe & Hetherington point out that PAC contributions to congressional elections increased from \$55.2 million in 1980 to \$243.2 million in 2000, or from 26% of total receipts in 1980, to a high of 37% in 1988, and back down to 32% in

2000 (2003, 117). PACs have thus contributed between a quarter and a third of all funds to congressional campaigns since 1980. Changes in campaign financing laws have thus been a major factor in the rise of single-issue groups through their PACs. Coupled with the weakening of political parties, changes in campaign financing laws allowed for the creation of an institutional access point for interest group policy influence through American political parties. Indeed, the level of policy influence exercised by single-issue groups has risen significantly.

Anti-abortion and pro-choice groups may both be included in the PAC phenomenon. As such, both contribute to campaigns based on candidates voting records in office and public position on the issue. However, anti-abortion groups have significantly greater funds available to them, in part because of their association with the Catholic Church and evangelical streams of Christianity (Crotty, 1984). Anti-abortion groups were thus poised to win the favor of a greater number of legislators than the pro-choice groups after *Roe*. This is increasingly evident as anti-abortion groups successfully influenced individual politicians of both parties to support conservative nominations to the Supreme Court. However changes in campaign financing laws and the subsequent proliferation of PACs are only one of two reasons for the anti-abortion groups' success over their rivals in the legislative and executive arenas. The second is the relative degree of influence that anti-abortion groups had in the Republican Party when compared to that of the pro-choice groups in the Democratic Party. The following section will argue that the organizational arrangements of the respective parties allowed anti-abortion groups to essentially co-opt the Republican Party platform, while the pro-choice groups, as part of

¹⁵ In addition, feminist organizations such as NOW make campaign contributions through their own PACs to pro-choice candidates. See Lisa Young, *Feminists and Party Politics*, Ann Arbor, Michigan, 2000, for

the larger feminist project, did not achieve the same recognition within the Democratic Party. In other words, anti-abortion groups were able to better utilize the new access point created in political party structures by changes in campaign financing laws than their pro-choice counterparts. The following section will further illustrate this point by examining party platforms before and after *Roe*.

Political Party Associations and Abortion Interest Groups post-Roe

Pro-choice groups have always been associated with the larger women's movement that shook American political life throughout the 1960s and 1970s. Most studies of American feminism have included references to pro-choice organizations and their accomplishments as part of the larger women's movement¹⁶. This association is almost inevitable. Many pro-choice groups were founded during the same time period as the majority of national women's organizations, and abortion became the symbol of the American feminist movement during the 1960s and early 1970s (Muldoon, 1991). Pro-choice groups also relied heavily on support from many women's organizations to carry their judicial campaigns. The ties to women's movement groups are therefore extremely important in the pro-choice campaign for abortion rights. However, two negative consequences of these ties are the stigmatization of the pro-choice movement as a purely feminist interest and the demotion of the status of abortion after *Roe* in the face of more 'pressing' women's issues within the feminist movement itself.

more information on feminist PAC contributions.

¹⁶ For further discussions of feminism in the United States, see Jo Freeman, "Whom you know vs. Whom you represent" in *The Women's movements of the United States and Western Europe* (Eds. Katzenstein, Mary Fainsod & Mueller, Carol), Philadelphia PA, 1987; and Lisa Young, *Feminists and Party Politics*, Ann Arbor, Michigan, 2000.

Anti-abortion groups, while nurturing a lucrative relationship with the Christian Coalition and the New Right within the Republican Party, have no overriding movement within which to be lost. Thus pro-choice groups, which as a part of the larger feminist movement, were viewed as a threat to the social organization of the American family (Young, 2000) and thus national security (Baer & Bositis, 1993), anti-abortion groups had no such social stigma. They were therefore better able to nurture relationships with individual politicians. This became increasingly important during the Equal Rights Amendment (ERA) debate, in which women's groups invested heavily.

Young notes that the Equal Rights Amendment (ERA) occupied the majority of women's groups' organizational skills from the mid 1970s until its defeat in 1982 (2000). Section one of the ERA stated that "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex" (quoted in Breckenridge, 1998, 101). Women's groups such as NOW and the NWPC lobbied both the Republican and Democratic Party organizations at both the federal and state level extensively to pass the ERA (Young, 2000). The ERA campaign was the major pre-occupation of the women's movement for over ten years. The abortion rights campaign, believed won after 1973, was allowed to be lost within the movement's goals.

During this time, state laws seeking to limit *Roe* were passed and ultimately challenged in the Supreme Court. Until 1989, these were struck down because the Court refused to renege on the rights established in *Roe* (Tatalovich, 1997). However, when the ERA ratification process was finally defeated in 1982, women's groups began to realize that the Court, increasingly conservative in nature, was a direct threat to their movement in general and the abortion rights campaign in particular. In the words of one NOW

activist: “the belief that ‘we can always go to court’ has been rendered a myth – at least for another generation” (quoted in Young, 2000, 39). Women’s groups and their PACs altered their collective strategy to make electing women to Congress their overriding goal, believing that women in Washington would secure women-friendly policies and judicial appointments (Freeman, 1987; Young, 2000). By this time, however, anti-abortion groups were fully entrenched in the Republican Party, and had been working hard over the past decade to limit *Roe* and ultimately reverse it in the Supreme Court. Thus anti-abortion groups were able to successfully entrench themselves within the Republican Party, but women’s and pro-choice groups’ failed to similarly influence the Democratic Party. Abortion policy outcomes since *Roe* are therefore a direct reflection of anti-abortion groups’ successful utilization of the new access point created that the pro-choice groups were unable to match. Moreover, the judicial veto point available to pro-choice groups in the past was in danger.

Crotty argues that anti-abortion groups first came to the attention of the Republican Party due to their high visibility during the 1970s (1984). Anti-abortion groups contested many high profile elections, such as the Democratic presidential primary, thanks to a large availability of funds from their huge memberships attracted through extreme religious and emotional overtones (1984, 156). Further, the political tactic of contesting elections ensured constant media coverage and therefore publicity to the anti-abortion cause. This brought them to the attention of the New Right in the mid-1970s.

The New Right “is a label given to a broad [partnership] of conservative groups [that] attempts to build coalitions in elections of [single-issue groups] from anti-ERA’s to

those protesting taxes” (Crotty, 1984, 167). The New Right therefore includes business and religious groups. Anti-abortion groups, which enjoyed much publicity during the 1970s and were believed to have been very influential in several close election races, were extremely attractive to the New Right (Crotty, 1984; Freeman, 1987). The New Right would incorporate anti-abortion positions in their movement provided they received unconditional support for their other conservative views. A very powerful coalition of single-issue groups with ample funding was therefore established.

The New Right, in turn, was extremely attractive to the Republican Party because of the campaign financing they promised as well as for the opportunity to crosscut the Democratic Party’s hold on the ‘New Deal’ coalition of voters (Freeman, 1987). The New Right, in which anti-abortion groups had solid representation, claimed to represent a large contingent of voters that included traditionally Democratic voters. However, not all elites in the Republican Party were open to the conservative policies that the New Right advocated. Baer & Bositis point out that the Republican party was dealing with an ideological tug-of-war between extremists and moderates following President Nixon’s 1972 election to a second term (1988, 75). Nixon may be classified a moderate, particularly in relation to women’s issues: he supported the

[ERA], federally funded day care and vigorous action on behalf of women’s equality and in opposition to discrimination in the workplace, the educational system, and the field of credit (Young, 2000, 94-95)

The resignation of President Nixon in 1974 after the Watergate scandal served to give Republican extremists added influence in party ranks (Crotty 1984; Freeman 1987; Baer & Bositis, 1988). Freeman argues that a vacuum was created within the Republican Party ranks (1987), into which the New Right was quickly ushered (Baer & Bositis, 1988).

Young points out that the anti-abortion groups benefited enormously from this 'changing of the guard' in the Republican Party and became a very important internal constituency (2000). At the 1972 Republican Party convention, women's issues were favorably treated by Nixon, although abortion was not addressed for fear of divisive debate. By 1976, however, the party platform rescinded the women friendly policies of 1972 and pledged support for "those who seek enactment of a constitutional amendment to restore protection of the right to life for unborn children" (quoted in Young, 2000, 98).

Tatalovich further points out that Republican presidential platforms have solidly reflected the anti-abortion position ever since (1997). This is evident in the success of the anti-abortion groups, both alone and through their ties with the New Right, to successfully utilize the new institutional access point created by changes in campaign financing laws and infiltrate the Republican Party.

Conversely, pro-choice and women's groups have not had the same success within the Democratic Party. The Democratic Party did not face the same power vacuum that worked with the changes in campaign financing laws to widen the institutional access point to the Republican political party association. However, there are two other important reasons for pro-choice groups' apparent failure to infiltrate the Democratic Party as the anti-abortion forces did in the Republican Party. These included political cultures inherent in each party and the 'gender-gap' disaster.

In addition to the vacuum created by President Nixon's resignation and the Watergate scandal, the political culture of the Republican Party has been more favorable to anti-abortion groups' infiltration than that of the Democratic Party towards pro-choice groups (Freeman, 1987; Burrell, 1993; Young, 2000). Freeman argues that differences in

structure and attitude account for this reality (1987). While the two parties are superficially similar in composition, the Republican Party is a top-down organization and the Democratic Party a bottom-up organization. Therefore the

Democratic Party is pluralistic, with multiple power centers that compete for membership support in order to make demands on, as well as determine, the leaders. The Republicans have a unitary party in which great deference is paid to the leadership; activists are expected to be 'good soldiers' and competing loyalties are frowned upon (Freeman, 1987, 236).

Thus the pro-choice groups, as part of the greater women's coalition within the Democratic Party, must fight at each convention to have pro-choice planks included in the party's platform by gathering enough support among party members.

Anti-abortion groups, on the other hand, need only to lobby the Republican leadership in order to ensure being heard at the conventions. Freeman argues that these differences in structure encourage a climate of 'whom you know' in the Republican Party, while in the Democratic Party, 'whom you represent' is more crucial (1987). Once the anti-abortion forces, as part of the New Right, had sufficient influence over the Republican Party leadership, they were assured conservative nominations to the Supreme Court as well as support for a constitutional amendment banning abortion. In turn, the New Right pledged support and funding for elections. In the Democratic Party, however, each convention was a new battleground for women's and pro-choice groups' policy preferences. They received no explicit and continuous support for abortion rights from the party as a whole; rather such support came from individual politicians and was fought for at each convention (Young, 2000).

These structural differences are directly related to the parties' attitudes. The Republicans tend to view themselves as the 'center' of society, adopting policies that they

feel best represent the national interest, while Democrats think of themselves as outsiders demanding policy change (Freeman, 1987). In this sense, with the sweep of the New Right within the Republican Party, anti-abortion planks in platforms are included to protect what they perceive to be the erosion of morality in American culture¹⁷ (Crotty, 1984). The pro-choice groups, however, are part of the greater movement demanding fair policies for a large group of 'outsiders' - women. Garnering enough support in the Democratic Party to include women-friendly policies in their platforms became increasingly difficult in the 1980s after the gender-gap disaster (Young, 2000).

NOW, by publicizing extensive survey data that identified an increasing gender gap in American voting patterns, managed to convince the Democratic Party that women represented an important voting bloc (Young, 2000). The voting intentions of women had been mounting in the Democrats favor since 1972. The Democrats thus pursued what Young terms 'the gender gap strategy' in the 1984 presidential election contest (2000). The gender gap strategy consisted of a mass mobilization movement to encourage women to vote¹⁸ as well as the nomination of Geraldine Ferraro as the Vice-Presidential running mate on the Democratic ticket. It was hoped by both the women's movement and the Democratic Party alike that appeals to women voters would result in victory for their candidates in 1984. However, the Democratic presidential nominees lost by 18 percentage points, the worst result since 1972 (Young, 2000). This led to the women's movement loss of appeal in Democratic Party ranks (Young, 2000). Because

¹⁷ The inclusion of anti-abortion planks within a greater 'New Right' strategy is not to be confused with the inclusion of pro-choice groups in the larger women's movement. Anti-abortion groups have been extremely successful in lobbying Republican leaders who are part of the New Right and therefore sympathetic to the anti-abortion movement, while pro-choice groups have been affiliated with women's organizations since their founding.

they are tied so closely to women's groups, the pro-choice groups also lost influence. While pro-choice groups were arguably able to use the new access point to political parties' to effect Democratic abortion policy prior to 1984, the gender gap disaster had eroded their influence and made it much more difficult. During the same period, the Republican Party increasingly felt their New Right coalition had become an important feature of their success (Young, 2000; Freeman, 1987). Anti-abortion groups have thus enjoyed increased representation within the Republican Party while feminist and pro-choice groups lost much of the gains they had made over the 1970s in the Democratic Party.

This section has shown that anti-abortion groups were able to better profit from the new institutional access point for policy influence through political parties that campaign financing law changes created. Pro-choice groups were largely forgotten within the greater women's movement in the 1980s. Further, the 'gender gap' disaster of 1984 temporarily upset the relationship between the women's movement and the Party. Finally, the Party's bottom-up structure meant pro-choice groups had to fight to be heard every convention. Conversely, the hierarchical nature of the Republican Party meant that anti-abortion groups had only to win over its leadership for recognition. Because of the inclusion of the anti-abortion groups in the New Right, and their apparently large and dedicated following, the leaders of the Party soon embraced anti-abortion groups.

With this support, anti-abortion groups are able to push through legislation restricting abortion rights in Congress. Pro-choice groups, because of their relatively minor influence in the Democratic Party, are unable to veto such legislation. Pro-choice

¹⁸ Voting rates in the United States' presidential elections consistently hover around 55% of the total eligible population and voter mobilization campaigns are important features of both the Republican and

groups thus continue to use the only veto point available to them, the judiciary, to thwart anti-abortion legislation. This will become increasingly evident in the next section, which outlines the legislative and judicial challenges to *Roe* since the late 1970s. However, because the Republicans controlled the presidency from 1968-1976 and again from 1980-1992, all nominations to the Supreme Court were made by Republican Presidents from 1969-1986 (Breckenridge, 1998). This has thus threatened the last veto point available to pro-choice groups in the United States.

An increasingly conservative Court: the triumph of anti-abortion views in the 1980s and early 1990s

Pearson and Kurtz argue that anti-abortion forces developed two new strategies after *Roe*: to curb its applicability through subsequent legislation and to overrule the decision itself, either in the form of a constitutional amendment or Supreme Court ruling (1984). These were the only options available to them once the policy legacy of *Roe* was established in American abortion politics. The institutional access point provided by the infiltration of the Republican Party by anti-abortion groups allowed for the passing of anti-abortion legislation as well the nomination of conservative judges. Tatalovich notes that anti-abortion groups successfully convinced Republican Party leadership to evaluate potential justices based on abortion views (1997). It comes as no surprise then that *Roe* has been gradually restricted from persistent attacks by anti-abortion forces since the late 1970s.

Twenty-three major Supreme Court rulings between 1973 and 1997 concerned abortion legislation (Tatalovich, 1997). Table 1 outlines nineteen of these judicial

battles¹⁹. There are two important abortion policy developments that become clear by examining Table 1. First, challenges to abortion provision based on Medicaid funding have always been accepted by the Court because they did not restrict the right to abortion established in *Roe*. Pro-choice groups attempted various constitutional challenges to ensure the Medicaid or public funding of abortion, but were consistently denied. Second, until the *Webster* decision of 1989, the Court generally refused to allow for unnecessary hurdles blocking abortion provision. These include parental and spousal consent requirements; informed consent requirements that outline risks; waiting periods; and other provisions designed to render abortion provision difficult and undesirable. However, as the Supreme Court was increasingly stacked with conservative judges, decisions began to directly infringe on *Roe* and therefore the constitutionality of abortion rights. Thus the increasing success of anti-abortion groups in influencing the Republican Party and executive nominations to the Supreme Court are clearly visible over time.

The four highlighted judicial decisions demonstrate the increasing successes of anti-abortion groups in the legislative and executive arenas of the United States. First, the Hyde Amendment is arguably the most famous piece of anti-abortion legislation post *Roe* (Rubin, 1982; Crotty, 1984; Tatalovich, 1997). In 1976, Representative Henry Hyde, a Republican from Illinois, introduced federal legislation that eliminated the Medicaid funding of abortion. This essentially curtailed the use of public funds for abortion provision across the United States as Medicaid is a national health insurance program that supports low-income citizens. Pro-choice groups immediately challenged the amendment in the Court because it limited the availability of abortion to poor women and therefore

¹⁹ Four judicial rulings concerning state supremacy over abortion rights and the unconstitutionality of abortion protestors blocking access to abortion clinics are not included in Table 1.

created inequality. However, the Supreme Court ruled that the Hyde Amendment did not violate the right to abortion established in *Roe*, which did not guarantee free or publicly funded abortions (Rubin, 1982; Tatalovich, 1997). This was not a surprise decision, however, as the Court had consistently ruled that state restrictions on Medicaid funding of abortion were constitutional. As shown in Table 1, the two 1977 rulings *Beal v. Doe* and *Maher v. Roe* provided the necessary precedents for state restrictions on public funding of abortions. The Hyde Amendment merely made these restrictions national in scope.

However, the three other highlighted decisions in Table 1 are important because of their direct infringement on *Roe v. Wade*. As such, they reflect the increasing influence of anti-abortion groups on judicial appointments as well as state legislators willing to pass laws challenging *Roe*. The first is 1981's *M.L. v. Matheson*; the second 1989's *Webster v. Reproductive Health Services*; the third 1992's *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

Matheson is an important ruling because it was the first time the United States' Supreme Court upheld a state law that required parental notification for abortion provision to women under eighteen years of age. Unlike previous parental consent laws struck down by the Court, this Utah law merely required that parents were informed of their daughters' intent to procure an abortion. The Court ruled that this was not an unnecessary restriction on abortion rights because the women affected by the law were minors and their parents still legal guardians. This decision is important because it reflects a subtle shift in the Court's attitudes towards restrictions on abortion rights

established in *Roe* (Tatalovich, 1997). The Court no longer refused to accept 'minor' restrictions on abortion provision in state laws.

The *Webster* decision of 1989 indicated a shift in the Supreme Court's views towards abortion (Wells, 1995). The *Webster* decision upheld a Missouri state law that defined life, prohibited the use of public facilities or employees for abortions, prohibited the use of public funds for abortion *counseling*, and forced viability tests during the second trimester. It was therefore a direct infringement on *Roe* because it abolished the trimester framework that called for a balance between women's and state interests during the second trimester. As Tatalovich points out, "*Webster* resulted because there was turnover on the high court and Republicans had owned the White House for all but four years between 1973 and 1989 [...] *Webster* is a turning point in abortion jurisprudence" (1997, 69). Wells concurs that "after *Webster*, then, the status of the abortion right was unclear at best" (1995, 1754). *Webster* provided the judicial precedent required to further limit abortion provision through state regulations, even those that had been rejected by previous Courts. This is most evident in 1992's *Casey* ruling. The *Casey* ruling is without a doubt the biggest infringement on the right to abortion established in *Roe* to date (Tatalovich, 1997). In addition, *Casey* is the culmination of anti-abortion groups' vigorous lobbying of the executive branch to achieve a conservative Court and therefore chip away at *Roe*.

The Planned Parenthood group of Pennsylvania launched a judicial challenge against the recently enacted Pennsylvania Abortion Control Act in the late 1980s on the grounds that it created 'undue burden' on a woman's right to abortion. Tatalovich points

out that the law was clearly a violation of the unrestricted right to abortion during the first trimester established in *Roe* (1997). It

“required an unmarried woman under eighteen to obtain written consent from at least one parent, or from a judge, and also required a parent to accompany the woman for abortion counseling. After giving her informed consent, the woman had to wait twenty-four hours before getting the abortion. Prior to her written consent, doctors had to counsel the woman on the risks of abortion, detail the stages of fetal development, and supply her with a list of facilities that offered alternatives to abortion. Doctors also had to report each abortion performed to the state, including copies of the informed consent and, where appropriate, parental consent forms, *and those documents were to be open to the public*” (1997, 70, emphasis added).

This law is therefore clearly a violation of the right to privacy that guaranteed abortion rights in *Roe* because it allowed for the public to access abortion records. A woman who obtained an abortion in Pennsylvania could expect that her decision would be part of the public record. In addition, it created many obstacles to abortion provision designed to make obtaining an abortion difficult and undesirable. Wells further points out that the doctor’s obligation in providing (often biased) abortion information outlined in the Pennsylvania statute was challenged because Planned Parenthood argued this violated the First Amendment guaranteeing Free Speech (1995). Regardless, the Court upheld the law, although it did strike down one section that required spousal consent if the woman was married. Wells further points out that the Court almost completely avoided the issue of Free Speech because the statute required the disclosure of accurate information (1995).

That the Court upheld the Pennsylvania law when it was so clearly in violation of *Roe* is proof of the increasingly conservative nature of the Court. It is also evidence of the erosion of the veto point available pro-choice groups to influence abortion policy. As discussed in Chapter Two, the United States judicial system operates on common law, and legal precedents are generally binding on subsequent decisions. Thus as with

previous decisions, the right to privacy and therefore abortion established in *Griswold* and *Roe* should have been used to strike down the Pennsylvania law. Despite these legal precedents, however, the Court decided to rule in favor of the anti-abortion arguments in *Casey*. The majority opinion stated that while the Pennsylvania statute instituted restrictions on abortion provision, these did not contradict *Roe* because they did not place an undue burden on women seeking abortion (Campbell, 1993; Wells, 1995; Tatalovich, 1997). This decision is perhaps even more startling, however, because only six years previously the Court struck down a similar Pennsylvanian law in *Thorburn* (see Table 1).

This is a direct reflection of the increasingly conservative nature of the Court. Wells argues that the *Casey* decision of 1992 cemented the shift in abortion policy from a 'fundamental right' as established in *Roe* to a medical procedure with 'less than fundamental status' (1995). Wells argues that this shift is the direct result of Reagan's two nominations, in 1986 and 1988, and Bush's 1991 nomination, of more conservative justices. Campbell argues that Justice Blackmun, who was among *Roe*'s majority opinion, was the only justice that defended the trimester framework in his *Casey* opinion, although he voted to uphold the Pennsylvania statute (1993).

As discussed in previous sections of this Chapter, anti-abortion groups were extremely successful in influencing the Republican Party leadership, and therefore judicial nominations, as part of the New Right. Appeals to voters by pro-choice groups during presidential campaigns regarding the dangers to *Roe* went unheeded. Democratic presidential candidate Michael Dukakis stated in 1992 that "I believe that a choice that personal must be made by the woman in the exercise of her own conscience [...] and that

is why we don't want George Bush and Dan Quayle appointing new justices to the Supreme Court" (quoted in Tatalovich, 1997, 157). However, Dukakis lost the election.

As well, the Republican Party platforms grew increasingly anti-abortion in nature from 1980 to 1992, pledging support for the reversal of *Roe v. Wade* and thus reflecting the growing influence of anti-abortion groups in the party and among the leadership (Tatalovich, 1997; Young, 2000). As such, it is no surprise that Republican presidents, in power from 1980-1992, made many conservative nominations to the Supreme Court. During this time, pro-choice groups, as part of the larger women's movement, were concerned primarily with the ERA and the election of women to Congress during the early 1980s. They essentially allowed for the loss of the Supreme Court to their anti-abortion foes by overestimating the power of legal precedents. As Young points out, pro-choice and women's groups suddenly realized that the Court was an enemy (2000).

In the 1980s, President Reagan nominated Antonin Scalia, an extremely conservative judge, as well as Anthony Kennedy, a moderate conservative, to the Supreme Court bench. Wells points out that these two appointments hurled the right of women to choose as established in *Roe* towards extinction (1995). President Bush followed in his 1988-1992 term by David Souter, a more moderate conservative, and Clarence Thomas, a staunch conservative. By 1992, then, the Court was ready to reverse previous abortion decisions it deemed too liberal, but not necessarily completely overturn *Roe*. The *Casey* decision is evidence of a newly conservative Supreme Court. Thus anti-abortion groups, through their successful influence on the Republican Party and therefore presidential candidates, were able to stack the court with conservative judges and were ultimately rewarded by the *Casey* decision of 1992.

One possible explanation for the Court's continued reluctance to completely overturn *Roe* is public opinion. It is worth noting that these court decisions, and the Republican Party's inclusion of anti-abortion planks in its election platforms, do not reflect American popular opinion concerning abortion. Abramowitz uses the 1992 National Election Survey (NES) data to argue that "it appears [...] that the extreme 'pro-life' position adopted by the Republican party in its platform had almost no support among the American public and that even the slightly less restrictive position taken by President Bush was out of line with the views of most of the electorate" (1995, 178). In 1992, the NES survey showed that while 49% of Americans opposed abortion restrictions, and 15% supported abortion when there was a 'clear need', only 29% favored more restrictive abortion policy and only 10% opposed abortion under any circumstances. Abramowitz uses these statistics, as well as the views of rank and file Republicans on abortion policy, as an independent variable for vote determination. He argues that President Bush lost the 1992 election to President Clinton because of the defection of many pro-choice Republicans that chose to vote for either Clinton or Perot (1995). The Supreme Court may be unwilling to risk public backlash should it overturn *Roe*.

Campbell argues that the main reason the justices did not directly overturn *Roe* through the *Casey* decision is because it was concerned "that overruling *Roe*'s central holding would 'seriously weaken' the Court's capacity to exercise judicial power and its function as the Supreme Court of a nation dedicated to the rule of Law" (1993, 578). Thus the justices were concerned with maintaining the legitimacy and therefore power of the Court, which they felt would be seriously damaged if *Roe* were overturned. It may be

posited, then, that the justices were aware that public opinion was not on the side of anti-abortion goals. However, if future Supreme Court appointments continue to reflect the extremist anti-abortion position, this apparent prudence may be eroded.

President Clinton nominated two justices to the Supreme Court during his two terms, Ruth Bader Ginsburg in 1993 and Stephen Breyer in 1994. Both are Democrats and both are pro-choice. Tarr states that these two nominations thus provided a 'temporary reprieve' from anti-abortion attacks on *Roe* (2003). Legislative and judicial attacks on abortion accordingly declined during the Clinton administration. They continue to be relatively scant under President George W. Bush's tenure, although the Court recently agreed to hear a case involving parental notification from New Hampshire. Arguably, anti-abortion forces are biding their time until another conservative appointment to the Supreme Court guarantees the outright reversal of *Roe*. With President George W. Bush in power until 2008, and the Supreme Court justices ageing rapidly, such a reversal is a distinct possibility.

Conclusion

A shift in political party structures, spurred by changes in campaign financing laws, created a new access point for policy influence in the American political party system. Anti-abortion forces were able to successfully utilize this new access point and as such exert enormous influence over the Republican Party leadership as well as individual politicians. This is because the campaign finance changes were coupled with a power vacuum created in the Republican Party after the Watergate scandal. The institutional access point created in the Republican Party was therefore much wider than

the one created in the Democratic Party, which was initiated only by changes in campaign financing laws. Much of the anti-abortion lobbying efforts were concentrated in the nomination of conservative Supreme Court judges. As part of their post-1973 strategy for abortion policy influence, it was hoped that an increasingly conservative Court would ultimately overturn *Roe*. This strategy was one of the only ones available to them after *Roe* established a policy legacy in American abortion politics. The *Casey* decision of 1992 is evidence of the increasingly conservative nature of the Court. While *Roe*'s reversal is not a foregone conclusion, further conservative nominations to the Supreme Court will certainly encourage the attainment of the ultimate anti-abortion goal.

While the pro-choice groups did not benefit from as wide an institutional access point in the Democratic Party, two other important factors contributed to their failed infiltration of that political party association. First, the Democratic political party culture differs enormously from the Republican one. The Republican Party is a top-down association and the Democratic Party a bottom-up. This means that pro-choice groups had to fight for recognition from rank and files at every party convention, rather than merely convincing party leadership to adopt pro-choice planks in their platforms. Second, pro-choice groups, as part of the larger women's movement, focused their attention on the election of women legislators and suffered enormously in the 1984 election due to the gender-gap disaster. These two factors, along with the lack of a power vacuum in the Democratic Party, means that pro-choice groups have not been nearly as successful in influencing abortion policy as their anti-abortion counterparts. Abortion policy outcomes in contemporary American politics therefore more strongly reflect the anti-abortion position, although public opinion sides with the pro-choice position.

Chapter 5 will explore the Canadian experience, which is decidedly different from the American one. Most importantly, no new institutional access points were created for abortion policy influence in Canadian political party associations. Canadian abortion policy would be a non-issue in both the legislative and judicial arenas.

Chapter 5: Limiting Access Points for Policy Influence: Canadian Parliamentary Supremacy and its Consequences for Abortion Politics

While their American counterparts fought vicious judicial battles and struggled to gain recognition in the two major political parties, Canadian abortion interest groups found that despite the 1988 *Morgentaler* decision they remained on the sidelines of the abortion debate. Further, unlike the American abortion controversy, judicial battles were few and political parties' attention to the subject relatively rare. As a result, Canadian abortion policy may be not be defined either as a legislative or judicial issue in contemporary Canadian politics. As discussed in Chapter 4, however, American abortion policy continues to be an issue of major contention in federal and state elections and in the judicial system. Thus after their respective constitutional decisions, *Roe* and *Morgentaler*, Canadian and American abortion policy development began to diverge after almost a century and a half of convergence.

This chapter explores the factors that contributed to abortion policy stagnation in Canada in order to make subsequent comparisons with the American experience in the conclusion of this thesis. It argues that Canadian abortion policy remains on the backburner of modern politics because of three institutional features of the Canadian political system. These are the supremacy of Parliament, the strong party discipline of political parties, and the reluctance of the Supreme Court to guide Canadian policy preferences. These three features are also evidence of path dependency in Canadian abortion politics. According to Esping-Andersen's (1999) definition of path dependency, societal values and ideas are continually reinforced through formal and informal institutions. In abortion politics, then, these three features reinforce the Canadian

tradition of parliamentary supremacy in regulating important policy issues, especially abortion.

This chapter will therefore begin by discussing the trilogy of abortion cases that affirmed the Supreme Court's respect for legislative supremacy in the Canadian parliamentary system. Second, it will examine the government's response to the *Morgentaler, Borowski and Daigle* decisions, with specific attention paid to the reluctance of the government to confront the abortion question definitively. Further, the medical discourse of abortion reinforced in *Morgentaler* allowed politicians to continue to defer to doctors and keep the abortion question out of the legislature. Third, it will discuss the futile attempts of abortion interest groups to influence Canadian political parties. Finally, it will show that the marginal status of abortion policy in Canada is the direct result of the Supreme Court's deference to the legislative branch and the refusal of political parties to legislate the abortion controversy. The chapter will conclude that path dependency manages abortion politics in Canada because it ensures policymaking is the jurisdiction of the Parliament.

The trilogy of abortion cases in Canada

As discussed in Chapter 3, the *Morgentaler* decision differs greatly from its American equivalent. Most significantly, the Canadian Supreme Court refused to undermine the legislative and executive branches of government as the American Supreme Court did in *Roe* by establishing the trimester framework to inform future abortion legislation in both the individual States' and federal governments (Brodie, 1994; Tatalovich, 1997). Admittedly, one explanation exists that could potentially justify the

Court's reluctance to guide abortion policy that does not involve the institutional organization of Canada. Criminal activity, and therefore abortion, is clearly under the jurisdiction of the Canadian federal government. The Canadian Supreme Court therefore did not face an enormous amount of litigation from various provincial governments. Studies of *Roe* have pointed out that the trimester framework saved the Court from rendering countless judicial decisions on abortion laws challenged by pro-choice interest groups in all fifty states (Tatalovich & Daynes, 1981; Rubin, 1982; Tatalovich, 1997).

This explanation, however, is incomplete because it does not consider the provincial jurisdiction over health established in the Canadian constitution. While the criminal nature of abortion is squarely within the federal mandate, health care provision resides with the provinces. The Court could potentially be forced to rule on cases of provincial legislation mandating health care policy should provincial governments decide to disregard the *Canada Health Act* and attempt to reduce abortion access. In fact, the very nature of the *Morgentaler* decision seemed to invite this type of legislation because it treated abortion as a health issue and not one of women's rights (Brodie, 1994). As discussed in Chapter 3, the Supreme Court refused to create a right to abortion in *Morgentaler* as the American justices did in *Roe*. By throwing the issue back to the legislature, where politicians defer to the medical profession, abortion remained predominantly a health issue, not a rights issue, in Canada.

A more plausible explanation for the reluctance of the Court to guide future legislation through the *Morgentaler* decision is that of parliamentary supremacy. As shown in Chapter 2, parliamentary systems differ from presidential ones because the three branches of government, while independent, are not considered equal. While

Cairns argues that the Charter of Rights and Freedoms created an additional role of mediator between citizen and State for the Supreme Court (1992), the Canadian system has nonetheless retained the notion of parliamentary supremacy. And again, because the Court treated abortion as a question of health and not of citizen rights guaranteed by the Charter in *Morgentaler*, the supremacy of Parliament over the abortion question may still be considered absolute (Brodie, 1992; 1994).

Scheppele's argument that the constitutionalization of abortion politics exists simultaneously in both Canada and the United States (1996) is therefore essentially incorrect. The constitutionalization of abortion suggests that relevant policymaking is the responsibility of the Courts, and the Courts protect abortion rights (Schepelle, 1996). In Canada, while the abortion issue was brought to the Courts, the legislature remains the guardian of abortion policy. Thus Canadian abortion interest groups ultimately failed to make abortion the exclusive jurisdiction of the Courts because a right to abortion guaranteed in the Constitution was not established through *Morgentaler*. In Canada, then, abortion was not constitutionalized. Rather, although pro-choice interest groups attempted to challenge the 1969 abortion legislation in the Courts because of the inaction of Parliament, the *Morgentaler* decision ensured the supremacy of Parliament and therefore of the federal government in the Canadian abortion controversy (Brodie, 1992). As mentioned, the *Morgentaler* decision refused to rule on the constitutionality of abortion as the American Supreme Court did in *Roe v. Wade*. Instead, it ruled that the 1969 abortion law itself was unconstitutional, although the Court explicitly suggested that it would accept some restrictions on abortion, provided that they did not infringe on a woman's right to 'security of the person'. If Canadian abortion interest groups wanted to

influence abortion policy, they would have to do it through Canadian political parties and the reigning government. However, anti-abortion and pro-choice groups have found themselves in two important Court battles since *Morgentaler*. The decisions however ultimately further solidified the supremacy of Parliament to determine abortion policy in Canada and therefore make up the 'trilogy' of abortion cases that have helped shape contemporary Canadian abortion policy (Tatalovich, 1997). These are *Borowski v. Canada* (1989) and *Tremblay v. Daigle* (1989).

Borowski v. Canada, launched by Dr. Morgentaler's alleged nemesis, Joe Borowski (Tatalovich, 1997), attempted to extend the guarantee to life, liberty and security of the person to the unborn. Borowski argued that the Charter provided protection to 'everyone' and that 'everyone' should include the fetus. However, the Supreme Court was again reluctant to infringe on what it perceived to be legislative territory, and instead ruled in 1989 that because of the *Morgentaler* decision, *Borowski v. Canada* was moot (Brodie, 1992; Tatalovich, 1997).

Tremblay v. Daigle was inherently more complicated. If *Morgentaler* is associated with women's rights and *Borowski* with fetal rights, then *Daigle* involved the rights of potential fathers in abortion decisions. Jean-Guy Tremblay, who admitted to physical abuse, tried to stop his ex-girlfriend Chantal Daigle from obtaining an abortion. Not surprisingly, Tremblay was backed by anti-abortion forces, while Daigle received support from pro-choice groups, although the Supreme Court refused to award either side intervenor status (Hausmann, 2001). Tremblay argued that the Quebec Charter of Human Rights accorded the fetus personhood, and he won a temporary injunction from the Quebec Superior Court. By the time the case reached the Supreme Court of Canada,

Daigle had already obtained an abortion by disguising herself and crossing the border into the United States. However, the Court decided to hear the case regardless, most likely because other similar cases were popping up in both Quebec courts and in other provincial courts across the country. Keeping the theme of legislative supremacy, however, the Supreme Court ruled that the framers of the Quebec Charter did not intend to ascribe personhood to the fetus and removed Tremblay's injunction. As Tatalovich states, "the high court [...] once again deferred to the legislative branch" (1997, 79) the question of fetal rights.

Anti-abortion and pro-choice groups found themselves with no opportunities to battle in the Supreme Court after this trilogy of cases. Abortion would have to be legislated by government to launch further constitutional challenges in the Courts. As seen in the next section, after an initial attempt by the Mulroney government to re-criminalize abortion, abortion has remained outside the policy agendas of the federal governments. Joyce Arthur, spokesperson for the Pro-Action Choice Network, states that

"Legislatures don't like to touch the abortion issue; it's a 'messy' issue and can hurt political careers because of its divisiveness. This can work in our favor because it means no abortion restrictions will likely be passed, but it also works against us, because no enhancement of abortion services will happen either" (interview 07/05/2003).

Thus abortion policy is not part of federal governments' agendas since 1990, and abortion interest groups can not initiate constitutional challenges to abortion legislation in the Courts. Abortion policy is therefore not 'constitutionalized' in Canada. Rather, it is in 'legislative limbo'.

Government response to the 'trilogy'

The Mulroney government viewed their role in the abortion policy controversy with extreme trepidation (Brodie et al., 1992). Abortion is, as defined by Rein & Schon (1994), an intractable policy controversy. Pleasing all constituencies concerned with abortion policy would be impossible. The federal government therefore did not want to preside over abortion policy deliberations during an election year for fear of lost votes (Tatalovich, 1997). Further, political parties, including the ruling Progressive Conservatives, were wary of the American politicization of abortion that polarized the two political parties, their members, and the voters over abortion in the *Roe* aftermath. When the *Morgentaler* judgment was rendered, the Mulroney government was faced with a precarious dilemma specifically because the Court had refused to constitutionalize abortion.

The Court ruled that the 1969 abortion law was unconstitutional because the Therapeutic Abortion Committee (TAC) system created undue burden on women seeking an abortion. Although it referred to Section 7 of the Charter and ruled this undue burden violated life, liberty and security of the person, it did not establish a constitutional right to abortion as in *Roe* (Brodie, 1992; Tatalovich, 1997). Further, and of great importance to the government, the majority opinion suggested that the Court would not strike down future restrictions on abortion in the Criminal Code provided they did not create a similar undue burden (Brodie, 1992; 1994; Tatalovich, 1997). The Mulroney government thus had two main options immediately following the *Morgentaler* decision (Gavigan, 1992). First, they could do nothing. By treating abortion as a solely medical question and therefore hiding behind the medical discourse surrounding abortion that remains

prevalent in Canadian politics, abortion would become a provincial health issue that the federal government could avoid altogether. Second, they could introduce new legislation that would re-criminalize abortion in the Canadian Criminal Code. Faced with the potential loss of votes in what was increasingly deemed to be an election year, the Mulroney government initially chose the former.

This plan backfired (Gavigan, 1992). British Columbia almost immediately moved to restrict abortion access by refusing to fund abortions in either public hospitals or private clinics. It soon became clear that at least one other province, Alberta, intended to follow British Columbia's example. The provincial governments thus threatened to create unequal access to a health service across Canada. Because the Mulroney government had decided to treat abortion as a medical issue, it was subject to regulations established under the Canada Health Act of 1984. The Act guaranteed all Canadians equal and funded access to medically necessary services. Should any province fail to provide or fund any of these services, it could potentially lose health care funding from the federal government. Kim Luton, President of the Canadian Abortion Rights Action League (CARAL), concurs that the 'carrot & stick' method over transfer payments worked well to ensure abortion provision across Canada until 1995 (interview 06/15/2005). B.C.'s legislation refusing the provision of funds for abortion services was a clear violation and an attack on the federal government's health care policy, and the province's government eventually caved when threatened with loss of funding.

Although the British Columbia courts would strike down the new legislation, the province's threat to abortion services and therefore the Canada Health Act was proof that the abortion controversy would not disappear according to the Mulroney government's

wishes. Mulroney would have to deal with the abortion question after all. To this end, he decided to 'get a sense of the House' in the summer of 1988, for which he was conveniently absent (Brodie, 1992).

The ruling Tories discovered that the controversy over abortion was greater than they had thought (Tatalovich, 1997). The House was completely divided over the abortion question, and the government let the issue die until after the election. Once the Mulroney government was re-elected that fall with an enormous majority, the Mulroney government once again set its sights on abortion legislation. It was further spurred to action by the *Daigle* decision of 1989, which again refused to establish a constitutional guarantee to abortion. After consulting both anti-abortion and pro-choice Tory members of Parliament, Bill C-43 was introduced in late 1989 (Tatalovich, 1997). Bill C-43 was interesting as well because it would be put to a free vote in the House, although Cabinet members were required to vote with the government (Brodie, 1992; Tatalovich, 1997). This would reduce the importance of political party discipline in maintaining Parliamentary supremacy in Canada.

Bill C-43 essentially made abortion provision a punishable offence unless performed by a qualified medical practitioner who was of the opinion that the life or health of the mother was threatened by the continuation of the pregnancy. It was therefore very similar to the 1969 abortion law, except that instead of requiring the approval of a therapeutic abortion committee, a doctor could perform an abortion based on his or her approval alone. Neither anti-abortion nor pro-choice forces were happy with Bill C-43, and as Brodie points out, this created an unusual coalition in the House (1992).

Bill C-43 passed through the House with few amendments of any importance in 1990. Thus the elimination of political party discipline for backbench members of Parliament did not reduce the supremacy of Parliament in abortion politics, because the executive branch was able to pass its legislation regardless. However, in a historic decision, C-43 was defeated in the Canadian Senate due to a 43-43 tie vote (Brodie, 1992: Tatalovich, 1997). Kim Luton argues that the Senate rejected C-43 because of threats made by the Canadian Medical Association (CMA) (interview 06/15/2005). She points out that media coverage of Bill C-43 was enormous, although “perhaps the most important and forceful voice was the CMA” (interview 06/15/2005). The CMA threatened to stop providing abortions altogether if Bill C-43 passed because of the potential criminal charges for doctors. Luton argues “the Senate, like all Canadians, heard that threat” (interview 06/15/2005) and refused to pass the legislation.

The Mulroney government or the subsequent Liberal governments have not introduced abortion legislation since Bill C-43²⁰. Ironically, provincial governments, which were originally responsible for Mulroney’s confrontation with abortion in the House, have also generally refused to restrict abortion in ways that would invite litigation from anti-abortion or pro-choice groups. Abortion interest groups are therefore forced to lobby federal governments for abortion legislation. For example, Joyce Arthur points out that,

“Right now, we have a Liberal government [in B.C.] that doesn’t really care about women, but they have promised not to touch abortion services. We are keeping a close watch on things, but don’t expect anything truly bad to happen. [As such, the Pro-Choice Action Network is] focusing efforts on national issues, such as the funding of abortion clinics”

²⁰ It is important to note that Private Members bills concerning abortion have been introduced into Parliament since the defeat of Bill C-43 in 1990. However, the majority Liberal government (1993-2004) has refused to consider such bills and they have never come close to passing.

(interview 07/05/2003).

However, abortion policy continues to remain in legislative limbo in Canada. This is in part due to the inability of either to influence the major political parties in Canada as well as the strong party discipline that exists in the Canadian parliamentary system.

The impermeability of Canadian Political Parties

The Supreme Court refused to aid in the constitutionalization of the Canadian abortion question, and the federal government failed to secure passage of Bill C-43. By 1990, then, it became obvious to abortion interest groups that in order to influence abortion policy, they would have to infiltrate the major Canadian political parties. Only in this manner could they hope to establish a women's constitutional right to procure abortions or a fetal constitutional right to life by challenging legislation in the Supreme Court. Joyce Arthur states, "We try to develop relationships with sympathetic MPs that can speak for us in Ottawa, in caucus and in the House" (interview 07/05/2003).

However, abortion interest groups have thus far been unable to influence any of the major political parties. As such, abortion policy remains outside the legislative arena of federal governments since 1990.

This is in direct contrast to the American experience as discussed in Chapter 4. Studlar and Tatalovich argue that one reason for this difference is the discourse employed in the states' respective abortion debates (1996). The American abortion policy discourse is one of rights in accordance with the Supreme Courts' ruling in *Roe*. Conversely, the Canadian discourse remains medical because the trilogy of abortion cases refused to rule as to women's rights to abortion or fetal rights to life. The enormous attention paid to

physicians' groups during Bill C-43 deliberations noted by Kim Luton is further evidence of this medical discourse (Studlar & Tatalovich, 1996). However, this is not the primary reason that abortion remains outside federal policy agendas, although it certainly helps shape the Canadian abortion debate characteristics. Rather, the reason that abortion policy remains stagnant in Canada is because the leadership of the major parties refuses to adopt either anti-abortion or pro-choice planks in election platforms.

The refusal of political parties to incorporate abortion into their political platforms is evidence of two features of Canadian politics. The first is the culture of the two major political parties themselves. As electoral parties, the Liberals and Conservatives want to have platforms that attract everyone and alienate no one. The second is the strength of political party discipline in Canada, which is buttressed by restrictive campaign financing laws.

As discussed in Chapter 2, Canadian political parties are electoral parties. Keefe & Hetherington define electoral parties as those that strive to adopt policies that have universal voter appeal in order to win elections (2003). This type of party has been labeled an 'umbrella party' or a 'catch-all party' in other research. Further, as Andrews points out, Canadian ridings are fought over between two parties at the district level, and only two have ever held federal power (2003). This is because Duverger's law stipulates that the simple majority electoral system encourages two party systems, the thus two main electoral parties can be expected to adopt policies that will ensure the achievement of a simple majority (Andrews, 2003). Simple majority electoral systems thus encourage competition between two electoral parties eager to attract as many voters as possible. The Liberals and Conservatives, the only two political parties to hold majority power in

Parliament, are reluctant to adopt either pro-choice or anti-abortion planks in their platforms for fear of alienating large numbers of voters. Thus as Kim Luton explains, while “extensive lobbying of federal governments [by CARAL] is limited [due to lack of funding,] there has also been very limited success with such lobbying efforts” (interview 06/15/2005).

In the American system, as discussed in Chapter 4, changes in campaign financing laws were part of the shift in institutional structures that allowed for the infiltration of anti-abortion groups into the Republican Party and of women’s groups in the Democratic Party. While the American campaign financing laws dictate how much money individuals and groups can give candidates and political parties, Canadian campaign financing laws until 2003 dictated instead how much money individual candidates and political parties could spend on campaigns themselves (Young, 2000)²¹. How much candidates are allowed to spend depends on the electors in their constituencies. Unlike the American system, then, Canadian politicians may not spend exorbitantly on their campaigns. Interest groups are therefore much less likely to exert any significant influence on the two major political parties simply due to their spending power²². Young further suggests that interest groups must therefore appeal to party leadership in order to infiltrate political parties because of the strong party discipline that exists within the Canadian parliamentary system. Thus influence Canadian policy

²¹ In 2003, Parliament passed Bill C-24, which further restricts the amount of money individuals and corporations can donate to individual candidates and political parties. Canadian campaign financing laws are therefore now similar to the American ones in that respect, although they still differ with regards to spending limits.

²² As discussed in Chapter Two, only the Liberals and Progressive Conservatives are considered in this thesis because they are the only two that have ever formed the federal government.

agendas by abortion interest groups hinges on their relationships with the leaders of the two major political parties.

Further, Galipeau points out that while interest groups have increased their visibility in Canadian politics since 1965 the major political parties will only allow moderate viewpoints to enter their policy agendas (1996). He argues that because the two major Canadian political parties both engage in brokerage politics, interest groups may influence party leadership only to the extent that their goals coincide with that of the Canadian public majority. Because political parties are the gatekeepers of policy agendas, interest groups must therefore pursue goals that appeal to a large majority of Canadian citizens in order to be heard. Galipeau suggests that this is accomplished by tailoring ideas to fit bureaucratic norms (1996). However, since both anti-abortion groups and pro-choice groups engage in a rights discourse as opposed to a medical discourse as preferred by political parties, neither has utilized this route successfully. A barrier to the infiltration of political parties is therefore a consequence of the institutional organization of the Canadian political system, as per its parliamentary organization and campaign financing laws. To this date, abortion interest groups on either side of the debate have been unable to break this barrier down. The lack of federal legislation since Bill C-43, and therefore of judicial battles, is evidence of this institutional barrier.

Abortion policy in Canada therefore remains outside the legislature and the judiciary. Abortion interest groups, because they can not influence the abortion policy directly, try to increase availability and funding as well as public opinion. As Joyce Arthur pointed out, the Pro-Choice Action Network is currently lobbying the federal government to provide funding for abortion clinics (interview 07/05/2003). Dr. Henry

Morgentaler is also challenging New Brunswick's refusal to fund abortion clinics in the courts. Finally, Kim Luton points out that CARAL is focusing on educating the Canadian public on abortion (interview 06/15/2005). Thus because groups do not have access to the legislature and political party associations, they seek to indirectly influence abortion policy outside these traditional arenas.

Daigle Revisited: Fetal Rights in the Canadian Charter

While Chapter 4 included a long list of American constitutional battles over abortion post-*Roe*, the impermeability of political parties by abortion interest groups has kept the abortion question out of the legislature and thus the courts. Since the abortion trilogy of 1988-1989, there has been but one major Supreme Court ruling concerning abortion, and it served to solidify its position on fetal rights. In the *Daigle* case, the Court ruled that the spirit of the Quebec Charter of Human Rights did not accord the fetus personhood. In *Winnipeg Child and Family Services v. D.F.G.*, the Court extended this ruling to Canadian law and indirectly to the Canadian Charter of Rights and Freedoms.

In 1996, a superior court judge in Manitoba ruled that the province acted legally when it took custody of a pregnant woman, D.F.G., addicted to glue sniffing. D.F.G. had previously given birth to three children, the last two born with severe disabilities caused by her addiction. The Winnipeg Child and Family Services organization had successfully petitioned for the forced detention and treatment of D.F.G. during her fourth pregnancy to protect her fetus. Both anti-abortion groups (including the Catholic Group for Health, Justice and Life, the Evangelical Fellowship of Canada, and the Alliance for Life) and pro-choice groups (including CARAL and the Women's Legal and Education Action

Fund, both involved in the *Morgentaler* case of 1988) acted as intervenors in the case. Both sides of the abortion debate had an extensive interest in its outcome because it would have set a precedent for the legal protection of the fetus. This protection could then be extended to restrict abortion availability in Canada. On appeal, however, this decision was reversed by the Supreme Court. The 7-2 decision pointed out that Canadian law “does not recognize the unborn child as a legal person possessing rights” (Tatalovich, 1997). The *Daigle* ruling of 1989, which refused to accord the fetus personhood, was therefore extended to Canadian law and indirectly to the Canadian Charter of Rights and Freedoms.

Since the Winnipeg ruling, Canadian litigation over abortion is quiet²³. This is a direct reflection of abortion interest groups’ inability to influence federal political parties and therefore the federal legislature. The lack of legislation, and thus of constitutional battles, regarding abortion is evidence of this veto point available to policymakers. Abortion policy in Canada remains in legislative limbo.

Conclusion

The Supreme Court struck down the 1969 abortion law in *Morgentaler* on procedural grounds, refusing to rule that a woman had a constitutional right to abortion. Further, the *Borowski* and *Daigle* cases further solidified the Supreme Court’s view that the legislative branch remains the primary Canadian political institution. Abortion interest groups would have to stage their battles in Parliament. This is because formal and informal institutions continually reinforce the supremacy of Parliament, which in turn

²³ However, Dr. Henry Morgentaler is currently challenging the province of New Brunswick over funding for private abortion clinics.

defers authority over abortion policy to the medical profession. This is evidence of the path dependency of Canadian abortion politics, over which a medical discourse prevails. Unlike the American abortion debate, then, Canadian abortion policymaking is not the exclusive jurisdiction of the courts, nor is it a rights issue, and is therefore not constitutionalized as per Schepelle's definition.

In addition, since the Mulroney government failed to secure passage of Bill C-43, ruling parties in the federal government have refused to legislate abortion. This is a direct reflection of the barriers abortion interest groups face in infiltrating the two major Canadian political parties. Campaign financing laws regulate the amount of money spent by candidates and parties in federal elections, thus eliminating a major source of influence used extensively by similar groups in the United States. Further, because of the strong party discipline inherent in the Canadian parliamentary system, abortion interest groups must focus their lobbying efforts on party leadership. Yet due to the brokerage character of the two major political parties, party leadership remains lukewarm to abortion interest groups because of the controversy surrounding their political goals. Canadian abortion policy is therefore a non-issue in Canadian politics in that neither political party will incorporate it into their policy agendas. The Canadian abortion debate is in 'legislative limbo', and groups try to influence abortion policy indirectly.

Chapter 6: Conclusion

Until 1973 in the United States and 1988 in Canada, abortion policy was considered a private medical procedure best regulated through criminal legislation. This legislation generally outlawed abortion unless a doctor determined that the health of the mother was in grave danger. This allowed policymakers to defer the abortion question to the medical profession, because they could claim the legislation permitted doctors to make responsible decisions as to the needs of their patients. Women's groups in both states were wholly unsatisfied with this situation, because they felt it gave control of women's reproductive functions to white, male doctors (Brodie et al., 1992). These groups were therefore determined to make abortion an elective procedure. They were not terribly successful (Tatalovich, 1997; Tatalovich, 2003).

In the United States, a plethora of veto points were available to opposition groups looking to thwart legislative reforms. Pro-choice groups lobbied for reforms in the 1960s that sought to eliminate all restrictions on abortion provision. However, the veto points available to opposition were numerous and these reforms passed in diluted form, if at all. For example, reformed laws in Georgia legalized abortion only if a doctor determined that it was medically necessary to save the life of the mother.

The veto points arose due to the federal system, which muddled jurisdiction over health policy (Colby, 2002), and the presidential system, which fostered weak party discipline and competing interests between legislative and executive branches of government (Hacker, 2004). However, an additional veto point is available to pro-choice groups via the Courts. In Canada, federalism again confused jurisdiction between provincial and federal governments over health policy (Maioni, 2002), and although the

parliamentary system itself is generally veto-free (Hacker, 2004), the disciplined Canadian political party system can act as a veto point because abortion groups have difficulty influencing leadership. With the entrenchment of the Charter of Rights and Freedoms in the Constitution, however, the Supreme Court became an important access point for abortion interest groups.

Given the veto points facing pro-choice groups in both the United States and Canada, it is no surprise that interest groups sought to influence abortion policy through their respective judicial systems. This was the only access point available to them. However, their impacts on policy were inherently different. It is after *Roe v. Wade* in the United States and *Morgentaler v. the Queen* in Canada that abortion policies began to diverge after a century of convergence.

This thesis therefore examined this important question in comparative public policy between Canada and the United States: why, after almost a century of convergence, did abortion policy suddenly diverge after their respective Supreme Court decisions *Roe v. Wade* and *Morgentaler v. the Queen*? It was argued that policy divergence occurred because of the different levels of activism of the two Supreme Courts, which are reflected in the *Roe* and *Morgentaler* decisions, coupled with institutional differences in the two states. *Roe* was a critical juncture that created a new policy legacy in American abortion politics; conversely, *Morgentaler* merely threw the abortion question back to the legislature, and Canadian abortion politics essentially remained on the same path as prior to the Court's decision. These opposing results mean that American abortion debate is now firmly entrenched in a rights discourse, while the Canadian debate remains within a medical discourse.

The American Supreme Court decision in 1973 established a trimester framework that created a constitutional right to abortion in the first three months of pregnancy. *Roe* was therefore a critical juncture because the justices developed new policy independently of the legislature and greatly limited future policy choices. The new policy legacy in the United States has given anti-abortion groups, which formed after the controversial decision, only two means through which to influence abortion policy: a constitutional amendment or the outright reversal of *Roe* in a future Supreme Court decision (Pearson & Kurtz, 1984). Given the difficulty of passing a constitutional amendment, particularly with regards to such a controversial issue, anti-abortion groups have focused on the latter. As Crotty notes, they have been extremely successful in their efforts (1984). Much of this success is a result of the American political party system.

Explaining Modern American and Canadian Abortion Politics: Political Party Permeability

This thesis has argued that this success is due to a shift in institutional configurations that allowed anti-abortion groups to infiltrate the Republican Party. Two factors led to this shift. First, changes to campaign financing laws increased the influence of single-issue groups with deep pockets. Second, the leadership crisis in the Republican Party, caused in part by President Nixon's resignation, created a power vacuum. The resulting shift allowed the 'New Right' and therefore anti-abortion groups to wield enormous influence over the party leadership, and the Republican Party became an access point for anti-abortion groups in the United States to influence abortion policy.

Consequently, when Republican Presidents are in power, they nominate conservative, anti-abortion judges. As 17 of the past 25 years have seen Republicans

controlling the executive, this has led to a Court stacked 5-4 with conservative justices (Tatalovich, 2003). Thus far, the Court has not reversed the *Roe* decision, although the 1992 decision in *Planned Parenthood v. Casey* was the first to directly curtail the right guaranteed in 1973 during the first trimester of pregnancy. Given the intensity of the abortion debate, abortion politics are therefore a central aspect of American politics; it is an issue discussed during Presidential and Congressional races. The Canadian debate has been markedly less visible.

In Canada, the *Morgentaler* decision of 1988 struck down the abortion law in the Criminal Code. However, the Court refused to design policy or establish a constitutional right to abortion like their American counterparts. Instead, the justices lobbed the issue back into Parliament, suggesting that they would accept future legislation provided it did not create an undue burden on a woman seeking an abortion (Brodie et al., 1992). Thus there was no critical juncture, and no resulting policy legacy. Instead, this thesis has argued that Canadian abortion politics have continued along the same path established by policy decisions made decades ago. More specifically, because the issue was thrown back into Parliament, policymakers could again defer to the medical profession and maintain the medical discourse surrounding abortion. Even women's groups such as CARAL note that, during the debate over Bill C-43 (the Mulroney government's attempted re-criminalization of abortion), "perhaps the most important and forceful voice was that of the Canadian Medical Association" (interview with Kim Luton 06/15/2005). Further, because abortion is a messy, divisive issue, no policymakers are willing to touch it, and it has remained outside of Parliament and party platforms since 1990. This thesis has argued that this is in large part due to the strong political party system encouraged by

parliamentary systems of government. Abortion interest groups have thus far been unable to infiltrate either of the two major political parties in Canada. Party leadership is wary of abortion politics because of its divisiveness, and the strong party discipline ensures that groups are unable to successfully lobby party ranks. Thus because the abortion question has not been revisited since Bill C-43, this thesis has argued that Canadian abortion politics remain in legislative limbo.

Policy Legacies and Path Dependency in American and Canadian Abortion Politics

This thesis has therefore developed an answer to the research question posed above. First, because of the policy legacy created through *Roe*, and the permeability of the Republican Party by anti-abortion forces, the American abortion debate centers on judicial nominations and fierce Supreme Court battles. Conversely, the Canadian abortion debate continues along the same path, that of deference to the medical profession, as it did prior to *Morgentaler*. Thus Canadian policymakers continue to leave divert the abortion question to doctors, who perform the procedure when they consider it medically necessary for women. Hence, after nearly a century of convergence, the two states' abortion policies diverged. This conclusion offers insight into future comparative works as well as the abortion policy debates in both states.

The research shows that historical institutionalism, with its attention to the interaction of institutions and their effects on policy development, as well as its incorporation of policy legacies and path dependency, is able to explain difficult policy puzzles. The concept of critical junctures and policy legacies is essential to understand the current abortion debate in the United States. The same may be said of path

dependency in the Canadian case study. With the study of institutions, the veto and access points they create in practice, and attention to sequences of time, historical institutionalism helps researchers formulate potential answers to explain policy convergence and divergence in comparative studies. It also helps understand the strategies of interest groups and the interests of other policy actors. Further, historical institutionalist studies reveal valuable patterns that lead to generalization of future policy development.

Implications of Research Findings

The United States' unique political system makes it difficult to generalize these findings (Tatalovich, 2003; Hacker, 2004). The presidential system has not been successfully replicated in the world, and the veto points that shaped first the path dependence of abortion policy and then the new policy legacy are therefore also unique. Moreover, the level of judicial policymaking demonstrated in *Roe* is arguably the result of the activist justices who are no longer serving on the Court. Finally, Manfredi argues that the resulting political stalemate that is *Roe*'s legacy encouraged the Canadian Supreme Court to shy away from judicial policymaking (1993). One lesson may therefore be to justices in other states wary of creating such chaos. Regardless, the American abortion policy debate is most likely unique to that state alone.

However, the Canadian case study contains important lessons for interest groups and policymakers in other parliamentary systems. First, it shows interest groups that policy influence through judicial challenges can be successful, although the infiltration of political party associations is crucial to absolute success. Second, it shows that the

tradition of parliamentary supremacy inherent in Westminster style systems can survive with an independent Court assigned the role of judicial review of government legislation. The Canadian Supreme Court, while striking down federal legislation in *Morgentaler*, lobbed the issue back into Parliament and therefore refused to develop policy independently. This suggests that parliamentary supremacy is compatible with strong judicial review. Finally, this research shows that the codification of rights in parliamentary systems does not fundamentally alter the political configuration. In other words, while the Charter created an additional veto point and therefore enabled pro-choice groups to challenge abortion legislation in the Courts, the ultimate decision-making role resides with accountable politicians in Parliament. These lessons are especially important today considering Great Britain's recent flirtation with constitutionally codified rights.

Conclusion

In conclusion, while this thesis has examined the development of abortion policy in Canada and the United States, it must be noted that neither state has successfully resolved this intractable debate. This suggests that additional, possibly non-institutional, variables should be considered in abortion policy research. For example, the personalities of party leaders and government leaders may contribute to abortion policy development. Further, the personal goals of new Chiefs and new judicial appointees may facilitate or hinder future judicial challenges by both Canadian and American abortion interest groups.

Moreover, this thesis suggests that both the rights and medical discourses create policy controversies in which resolution is impossible. In the medical discourse, abortion interest groups object to the control afforded doctors over women's bodies; in the rights discourse, neither anti-abortion nor pro-choice groups are willing to accept limits on the rights of fetuses or women. As such, it is doubtful whether any country will silence its abortion policy critics, either from the anti-abortion or pro-choice camps. Abortion policy is therefore guaranteed a starring role in future comparative research.

Table 1: U.S. Supreme Court rulings on abortion, 1975-1997

Year	Case	Reflects anti-abortion position?	Major Issues
1975	<i>Bigelow v. Virginia</i>	N	Abortion advertisement
1976	<i>Planned Parenthood of Central Missouri v. Danforth</i>	N	Attempted to define viability; spousal and parental consent requirements
1976	<i>Bellotti v. Baird</i>	N	Parental consent requirements rejected
1977	<i>Beal v. Doe</i>	Y	Upheld Medicaid limits on abortion provision
1977	<i>Maher v. Roe</i>	Y	Upheld Medicaid limits on abortion provision
1977	<i>Poelker v. Doe</i>	Y	Ruled that public hospitals were not required to perform abortions
1979	<i>Bellotti v. Baird</i>	N	Parental consent requirements struck down
1979	<i>Colautti v. Franklin</i>	N	Struck down a requirement that abortion methods should enhance survival of fetus
1980	**Harris v. McRae	Y	Upheld the Hyde Amendment that created Medicaid limits on abortion provision
1981	**M.L. v. Matheson	Y	Parental notification requirements upheld
1983	<i>City of Akron v. Akron Center for Reproductive Health</i>	N	Struck down a 24 hour waiting period after informed consent; parental consent; and 'humane disposal of fetal remains'
1983	<i>Planned Parenthood of Kansas City v. Ashcroft</i>	Y/N	Struck down a provision that second trimester abortions could be performed only in hospitals; but upheld provisions that required parental consent or judicial bypass
1983	<i>Simopoulos v. Virginia</i>	Y	Allowed for a law that authorized only state-licensed facilities to perform

1986	<i>Thornburgh v. American College of Obstetricians and Gynecologists</i>	N	second semester abortions Struck down a myriad of provisions that created hurdles to obtaining an abortion
1987	<i>Zbaraz v. Hartigan</i>	N	Struck down parental notification requirements and a waiting period
1989	**Webster v. Reproductive Health Services	Y	Upheld a law that defined life and prohibited the use of public funds for abortions; also established the constitutionality of viability tests before abortion performance
1990	<i>Hodgson v. Minnesota</i>	Y	Parental notification required but allowed for judicial bypass
1990	<i>Ohio v. Akron Center for Reproductive Health</i>	Y	Parental notification requirements
1992	**Planned Parenthood of Southeastern Pennsylvania v. Casey	Y/N	Upheld provisions that required parental consent and informed consent; overturned a spousal consent requirement

Source: Adapted from Tatalovich, R. *The politics of abortion in the United States and Canada*. M.E. Sharpe: Armonk, New York. 1997. Pages 67-69.

** Represent cases that either restrict the right to abortion established in *Roe v. Wade* or reverse earlier Supreme Court decisions that created obstacles to abortion provision.

Bibliography

Abramowitz, Alan I. It's Abortion, Stupid: Policy Voting in the 1992 Presidential Election. *The Journal of Politics*, Vol 57, No. 1. February 1995. Pp. 176-186.

Andrews, Chris.

Archer, Keith et al. *Parameters of Power: Canada's Political Institutions*. Toronto: Nelson Canada, 1999.

Baer, Denis L. and Bositis, David A. *Elite Cadres and Party Coalitions: Representing the Public in Party Politics*. Westport: Greenwood Press. 1988.

Baer, Denise L and Bositis, David A. *Politics and Linkage in a Democratic Society*. Englewood Cliffs, N.J.: Prentice Hall. 1993.

Breckenridge, George. *United States Government and Politics*. Toronto: McGraw-Hill Ryerson. 1998.

Brodie, Janine, Gavigan, Shelley and Jenson, Jane. *The Politics of Abortion*. Toronto: Oxford University Press. 1992.

Brodie, Janine. "Choice and No Choice in the House" in Brodie, Janine, Gavigan, Shelley and Jenson, Jane (eds). *The Politics of Abortion*. Toronto: Oxford University Press. 1992. Pp. 58-116.

Brodie, Janine. "Health versus Rights: Comparative Perspectives on Abortion Policy in Canada and the United States" in Sen, Gita and Snow, Rachel (eds) *Power and Decision: The Social Control of Reproduction*. Cambridge: Harvard University Press. 1994.

Burrell, Barbara C. "Party Decline, Party Transformation, and Gender in the U.S.A." in Lovenduski, Joni and Norris, Pippa. *Gender and Party Politics*. Thousand Oaks, CA: Sage Publications. 1993.

Cairns, Alan C. *Charter versus Federalism: The Dilemmas of Constitutional Reform*. Montreal & Kingston: McGill-Queen's University Press. 1992.

Campbell, A. "A Divisive Issue and a Divided Court: Planned Parenthood v. Casey". *Oxford Journal of Legal Studies*, Vol 13, No. 4. Winter, 1993. Pp. 571-583.

Colby, David C. "Federal State Relations in United States Health Policy" in Banting, Keith G. and Corbett, Stan (eds) *Health Policy and Federalism: A Comparative Perspective on Multi-Level Governance*. Montreal: McGill-Queen's University Press, 2001.

Collier, David and Collier, Ruth Berins. *Shaping the Political Arena: Critical Junctures, the Labour Movement, and Regime Dynamics in Latin America*. Princeton: Princeton University Press. 1991

Craig, Barbara Hickson and O'Brien, David M. *Abortion and American Politics*. Chatham, NJ: Chatham House, 1993.

Crotty, William J. *American Parties in Decline*. Boston: Little Brown. 1984.

Dahl, Robert. *Modern Political Analysis*. Englewood Cliffs, N.J.: Prentice Hall Press. 1963.

Davis, Jeffrey. "Adversarial Jurisprudence: Legal Education and the Demise of the Consensual Norm" in *Politics & Policy*. Volume 30, No. 4. December 2002. Pp. 763-783.

Dunsmuir, Mollie. "Abortion: Constitutional and Legal Developments". *Current Issue Review* 89-10E. Ottawa: Library of Parliament Research Branch. 1993.

Duverger, Maurice.

Esping-Andersen, Gosta. *Social Foundations of PostIndustrial Economies*. New York: Oxford University Press. 1999.

Evans, Peter; Rueschemeyer, Dietrich; & Skocpol, Theda (eds). *Bringing the State Back In: New Perspectives on the State as Institution and Social Actor*. Cambridge: Cambridge University Press. 1985.

Feigenbaum, H; Samuels, R.; & Weaver, R. Kent. "Innovation, Coordination, and Implementation in Energy Policy" in Weaver, R. Kent & Rockman, Bert A. *Do Institutions Matter? Government Capabilities in the United States and Abroad*. Washington, D.C.: The Brookings Institution. 1993.

Freeman, Jo. "Whom you know vs. Who you Represent: Feminist Influence in the Democratic and Republican Parties" in Katzenstein, Mary and Mueller, Carol. *The Women's Movements of the United States and Western Europe*. Philadelphia, PA: Temple University Press. 1987.

Galipeau, Claude. "Political Parties, Interest Groups, and New Social Movements" in Tanguay, A. Brian and Gagnon, Alain G. (eds) *Canadian Parties in Transition*. Toronto: Nelson Canada. 1996.

Gavigan, Shelley. "Morgentaler and Beyond: Abortion, Reproduction, and the Courts" in Brodie, Janine, Gavigan, Shelley and Jenson, Jane (eds). *The Politics of Abortion*. Toronto: Oxford University Press. 1992. Pp. 118-146.

Hall, Peter A. & Taylor, Rosemary C. R. "Political Science and the Three New Institutionalisms" in *Political Studies*. Volume 44. 1996. Pp. 936-957.

Hausmann, Melissa. "Of Rights and Power: Canada's Federal Abortion Policy 1969-1991" in Stetson, Dorothy McBride (ed) *Abortion Politics, Women's Movements and the Democratic State*. New York, NY: Oxford University Press, 2001.

Hiebert, Janet L. "Wrestling with Rights: Judges, Parliament, and the Making of Social Policy" in Howe, Paul and Russell, Peter H. (eds) *Judicial Power and Canadian Democracy*. Montreal: McGill-Queen's University Press. 2001.

Immergut, Ellen. "The Rules of the Game: The Logic of Health Policy-making in France, Switzerland, and Sweden." in *Structuring Politics: Historical Institutionalism in Comparative Analysis*. Steinmo, Sven; Thelen, Kathleen; and Longstreth, Frank (eds). New York: Cambridge University Press, 1992.

Jackson, Robert J. & Jackson, Doreen. *Politics in Canada: Culture, Institutions, Behaviour and Public Policy*. Toronto, ON: Pearson Education Canada Inc. 2001.

Jenson, Jane. "Getting to Morgentaler: From One Representation to Another" in Brodie, Janine, Gavigan, Shelley and Jenson, Jane (eds). *The Politics of Abortion*. Toronto: Oxford University Press. 1992.

Katznelson, Ira. "Periodization and Preferences: Reflections on Purposive Action in Comparative Historical Social Science" in *Comparative Political Historical Analysis: Achievements and Agendas*. Mahoney, James and Rueschemeyer, Dietrich (eds). New York: Cambridge University Press. 2003.

Katznelson, Ira & Milner, Helen (eds). *Political Science: The State of the Discipline*. Katznelson and Milner (eds). Third Edition. New York: W.W. Norton. 2002

Katznelson, Ira and Milner, Helen. "American Political Science: The Discipline's State and the State of the Discipline," in Katznelson, Ira and Milner, Helen (eds) *Political Science: The State of the Discipline*. Third Edition. New York: W.W. Norton. 2002.

Keefe, William J. and Hetherington, Marc J. *Parties, Politics, and Public Policy in America*. Washington, D.C.: CQ Press. 2003.

Krasner, Stephen D. "Approaches to the State: Alternative Conceptions and Historical Dynamics" in *Comparative Politics*. Volume 16, Number 2. January 1984. Pp. 223-246.

Laitin, David. "Comparative Politics: The state of the subdiscipline" in Katznelson, Ira and Milner, Helen (eds). *Political Science: The State of the Discipline*. Third Edition. New York: Norton. 2002.

Levi, Margaret.

Lijphart, Arendt (ed). *Parliamentary versus Presidential Government*. New York: Oxford University Press. 1992.

MacKay, A. Wayne & Bauman, Richard W. "The Supreme Court of Canada: Reform Implications for an Emerging National Institution" in Beckton, Clare F. & MacKay, A. Wayne (eds) *The Courts and the Charter*. Toronto: University of Toronto Press. 1985
Maioni, Antonia. "Federalism and Health Care in Canada" in Banting, Keith G. and Corbett, Stan (eds) *Health Policy and Federalism: A Comparative Perspective on Multi-Level Governance*. Montreal: McGill-Queen's University Press, 2001.

Manfredi, Christopher P. *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*. Toronto: McClelland & Stewart Publishing. 1993.

Mathison, Sandra. "Why Triangulate?" in *Educational Researcher*. Volume 17, March 1988. Pp 13-17.

McLaren, Angus and McLaren, Arlene Tigar. *The Bedroom and the State: the changing practices and politics of contraception and abortion in Canada, 1880-1997*. Toronto: Oxford University Press, 1997.

Morton, F. L. *Pro-choice vs. Pro-Life: abortion and the courts in Canada*. Norman, OK: University of Oklahoma Press. 1992.

Muldoon, Maureen. *The Abortion Debate in the U.S. and Canada: A Sourcebook*. New York: Garland. 1991.

Pal, Leslie A. *Beyond Policy Analysis: Public Issue Management in Turbulent Times*. Scarborough: Nelson Thomson Learning. 2001.

Pierson, Paul and Skocpol, Theda. "Historical Institutionalism in Contemporary Political Science," in Katznelson, Ira and Milner, Helen (eds.) *Political Science: The State of the Discipline*. New York: Norton Press. 2002.

Pross, Paul. *Group Politics and Public Policy*. Toronto: Oxford University Press. 1986.

Richardt, Nicole. "A Comparative Analysis of the Embryological Research Debate in Great Britain and Germany". *Social Politics: International Studies in Gender, State & Society*. Volume 10, No. 1 (2003). Pp. 86-128.

Rubin, Eva R. *Abortion, Politics and the Courts: Roe v. Wade and its aftermath*. Westport, Conn.: Greenwood Press, 1982.

Scheppele, Kim. "Constitutionalizing Abortion" in Githens, Marianne and Stetson, Dorothy McBride (eds) *Abortion Politics: Public Policy in Cross-Cultural Perspective*. New York, NY: Routledge, 1996.

Schon, Donald A. and Rein, Martin. *Frame Reflection: Towards the Resolution of Intractable Policy Controversies*. New York: Basic Books. 1994.

Shapiro, Martin. *Courts, a Comparative and Political Analysis*. Chicago: University of Chicago Press. 1981.

Shapiro, Martin. *Who Guards the Guardians? Judicial Control of Administration*. Athens, Georgia: University of Georgia Press. 1988.

Skocpol, Theda. "Bringing the State Back In: Strategies of Analysis in Current Research." in Evans, Peter; Rueschemeyer, Dietrich; and Skocpol, Theda (eds.), *Bringing the State Back In*. New York: Cambridge University Press. 1985.

Stetson, Dorothy McBride and Githens, Mariane (eds). *Abortion Politics: Public Policy in Cross-National Perspective*. New York: Routledge. 1996.

Stetson, Dorothy McBride. "US Abortion Debates 1959-1998: The Women's Movement Holds On" in Stetson, Dorothy McBride (ed) *Abortion Politics, Women's Movements and the Democratic State*. New York, NY: Oxford University Press, 2001.

Studlar, Donley & Tatalovich, Raymond. "Abortion Policy Implementation in Canada and the United States" in *American Review of Canadian Studies*. Volume 25, Nos. 2 & 3 (Summer & Autumn 1995). Pp. 203-217.

Tarr, G. Alan. *Judicial Process and Judicial Policymaking*. Belmont: Wadsworth Thomson Learning. 2003.

Tatalovich, Raymond and Daynes, Byron R. *The Politics of Abortion*. New York, NY: Praeger Press. 1981.

Tatalovich, Raymond. *The Politics of Abortion in the United States and Canada*. Armonk, NY: M. E. Sharpe, 1997.

Tatalovich, Raymond. "Abortion" in Pal, Leslie A. & Weaver, R. Kent (eds) *The Government Taketh Away: The Politics of Pain in the United States and Canada*. Washington, D.C.: Georgetown University Press. 2003.

Thelen, Kathleen; Steinmo, Sven.; and Longstreth, Frank. (eds) *Structuring Politics: Historical Institutionalism in a Comparative Analysis*. New York: Cambridge University Press. 1992.

- Thelen, Kathleen. & Steinmo, Sven. "Historical Institutionalism in Comparative Politics" in *Structuring Politics*. New York: Cambridge University Press. 1992.
- Tsebelis, George. "Decision-Making in Political Systems: Veto players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism". *British Journal of Political Science*. Volume 25, No. 3 (1995). Pp. 289-325.
- Weaver, R. Kent and Bert A. Rockman, *Do Institutions Matter? Government Capabilities in the United States and Abroad*. Washington, D.C.: The Brookings Institution, 1993.
- Weingast, Barry. "Rational Choice Institutionalism" in Katznelson, Ira and Milner, Helen (eds). *Political Science: The State of the Discipline*. Third Edition. New York: WW Norton. 2002. .
- Weir, Margaret. "Ideas and the Politics of Bounded Innovation" in Steinmo et al., eds, *Structuring Politics: Historical Institutionalism in Comparative Analysis*. Cambridge University Press, 1992.
- Wells, Christina E. "Abortion Policy as a vice-activity: The Free Speech implications of *Rust v. Sullivan* and *Planned Parenthood v. Casey*". *Columbia Law Review*, Vol. 94, No. 7. November 1995. Pp. 1724-1764.
- Vaughan, Frederick. "Judicial Politics in Canada: Patterns and Trends" in Howe, Paul and Russell, Peter H. (eds) *Judicial Power and Canadian Democracy*. Montreal: McGill-Queen's University Press. 2001.
- Verney, Douglas. "Parliamentary Government and Presidential Government" in Chowdhari-Tremblay, Reeta, et al. (eds) *Mapping the Political Landscape: An Introduction to Political Science*. Toronto: Thomson Canada Limited. 2004.
- Young, Lisa. *Feminists and Party Politics*. Ann Arbor: University of Michigan Press. 2000.