Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms

CHARLES R. EPP *University of Kansas*

Although constitutional protection for rights is increasingly popular, there is little systematic research on the extent to which bills of rights affect the process of government. This article examines the effects a bill of rights may be expected to produce, and then uses a quasi-experimental design to analyze the effects of the Canadian Charter of Rights and Freedoms on the Canadian Supreme Court's agenda. The data suggest that the Charter indeed has influenced the Court's agenda, although the effects are more limited than generally recognized. More important, the data suggest that a number of the influences often attributed to the Charter likely resulted instead from the growth of what I call the support structure for legal mobilization, consisting of various resources that enable litigants to pursue rights-claims in court. The political significance of a bill of rights, then, depends on factors in civil society that are independent of constitutional structure.

Constitutionalism, the attempt to protect liberty through the design of political institutions, is currently enjoying a revival of interest. Numerous countries, ranging from former members of the Eastern Bloc to Canada, have engaged in fundamental constitutional reform, and social scientists, returning to the study of institutions, have renewed the old wisdom that constitutions matter and matter greatly (see, e.g., Brennan and Hamlin 1994, Greenberg et al. 1993, Holmes 1995, Ordeshook 1992, Sartori 1994, Weingast 1993).

Nearly every new constitution or constitutional revision adopted since 1945 (almost 60 by rough count) contains a bill of rights. Some are shams, yet even those which are not are quite flexible in practice. The U.S. Bill of Rights, for instance, after being nearly ignored by courts for a century and a half, became a foundation for much judicial policymaking. The Indian Constitution's due process clause, which was drafted narrowly so as to preclude the development of American-style judicial activism, nonetheless is now the basis for much judicial creativity (Barnum 1988). Bills of rights, in short, are unpredictable components of constitutionalism.

To what extent, and under what conditions, will a bill of rights fulfill its promise to protect liberty? Answering that question is a difficult task, in part because what we may expect from constitutional reform remains all too often a matter of political rhetoric, not theoretical analysis, and in part because constitutional change is so often intimately bound up with regime change, and thus the effects of the former typically are not easily unraveled from their complex and often turbulent contexts. I present results of a preliminary analysis consisting of a theoretical discussion of the expected effects of a bill of rights and empirical research designed to isolate the actual effects from other influences.

My empirical analysis consists of a quasi-experiment of the effects of the Canadian Charter of Rights and Freedoms. The Charter, a constitutional bill of rights adopted in 1982, is a leading example of the recent revival of constitutionalism, and it offers a nearly ideal opportunity to test for the effects of constitutional change. When the Charter was adopted, Canada's political regime continued much as before; nevertheless, observers of Canadian politics have attributed to the Charter remarkably profound effects, particularly a growing emphasis on individual rights; and those claimed effects are relatively easily isolated and tested because they are expected to appear in a single institution, the Canadian Supreme Court. In short, Canada should be an easy case for the hypothesis that a bill of rights independently affects politics.

I shall argue, however, based on data from the agenda of the Canadian Supreme Court, that the effects of a bill of rights are not as direct as constitutional engineers and scholars commonly assume, because those effects depend on structural conditions, in particular the presence of what I shall call a support structure for legal mobilization, which varies greatly among countries, across time, and among issue areas. The support structure consists of resources—sympathetic and competent lawyers, finances, and organizations—that make possible sustained, strategic appellate litigation. The contours of such resources condition access to the higher courts and, therefore, condition the nature of the issues decided by those courts. Bills of rights matter but only to the extent that individuals can mobilize the resources necessary to invoke them through strategic litigation.

To demonstrate the importance of the support structure, I consider and test several alternative explanations of variations in judicial attention to civil liberties and civil rights. They are (1) the presence or absence of a bill of rights and (2) the justices' policy preferences, conditioned by (3) the extent of judicial discretion over the docket. Recent developments in Canadian constitutional and judicial politics, as I shall show, make possible a nearly ideal test of the alternative hypotheses. Although time series data could be used to test these hypotheses, due to limitations in their availability I have relied on triangulation, a strategy commonly used in qualitative research whereby multiple sources of data and multiple indicators are used to verify causal inferences (Jick 1979; King, Keohane, and Verba 1994, 217–8; Webb et al. 1981, 35, 315).

Charles R. Epp is Assistant Professor of Public Administration, University of Kansas, Lawrence, KS 66045.

This research was supported by the National Science Foundation (SES 9225087) and the Canadian Government (dissertation research grant). I thank Joel Grossman, Herbert Kritzer, Marc Galanter, Ian Brodie, W. A. Bogart, Graham Wilson, Donald Downs, Gerald Rosenberg and the anonymous reviewers for many helpful comments and suggestions.

CONSTITUTIONALISM AND THE CONDITIONS FOR APPLICATION OF A BILL OF RIGHTS

Constitutions, the most basic of political institutions, affect ordinary politics by prescribing the rules of the political game (March and Olsen 1989). Liberal constitutions typically employ two very different kinds of rules to constrain arbitrary power. Some rules structure governing institutions in such a way that decision making is channeled and thereby limited (this is the purpose of the separation of powers and federalism). Other rules define particular issues as outside the authority of the ordinary democratic process (this is the purpose of bills of rights) (Elster 1988, 3–4). Both types of rules, it may appear, produce similarly profound and direct effects on politics. But not all rules are created equal: Federalism and the separation of powers are self-activating, bills of rights are not. The differences between the two types of rules help to illuminate the conditions that influence application of a bill of rights.

Structural mechanisms, as James Madison explained in his classic argument in *The Federalist*, are self-activating because they tie individual interests to institutional resources. Thus, federalism divides factional conflict so that no single faction can succeed in gaining control of the national government, and the separation of powers, by tying the personal ambitions of officeholders to departmental interest, sets the competing governmental institutions against one another, each checking the power of the others and thereby contributing to deliberation (*Federalist*, Nos. 10, 45, 46, 51). These structural components of constitutionalism have appeared to some observers to work mechanically, as "a machine that would go of itself" (Lowell 1888, 312, quoted in Kammen 1986, 18;[1] for recent analyses, see Brennan and Hamlin 1994, Ordeshook 1992, Sartori 1994, Weingast 1993).

Bills of rights, by contrast, are not self-activating because, unlike the separation of powers, they provide individuals with no direct control over institutional resources. In other words, although bills of rights create legal interests (rights), they create no corresponding institutional resources to actualize those interests. Thus, in Madison's evocative metaphor, constitutional rights guarantees are mere "parchment barriers" (Madison 1977 [hereafter *PJM*] 10:211–2). Nonetheless, remarkably profound effects are often attributed to bills of rights. I survey those hypothesized effects and then turn to the conditions—judicial attitudes, discretionary docket control, and external support for legal mobilization—that are likely to influence the application of bills of rights in practice.

Bills of Rights

Bills of rights are often thought to affect politics in several ways. First, it is commonly suggested that they promote an emphasis on rights in political culture (Hart 1994, 174; *PJM* 11:298–9, 12:204–5). Similarly, some scholars argue that rights guarantees shape the development of political and social movements (Hartog 1987; see also McCann 1994).

Second, observers commonly suggest that bills of rights increase the level of intervention by courts in the policymaking processes of other governmental institutions. Thus, Madison speculated that a bill of rights would "naturally" lead courts to "resist every encroachment upon rights" by legislatures and executives (*PJM* 12:207). Similarly, contemporary scholars often trace the extraordinary vibrancy of judicial review, judicial attention to rights, and judicial policymaking on rights in the United States to the presence of a bill of rights in the U.S. Constitution (Atiyah and Summers 1987, 238–9; Holland 1991).

Third, contemporary writers have suggested that the presence of a bill of rights, by encouraging a broader policymaking role for the judiciary, opens the political opportunity structure and thereby encourages a fragmentation of broad coalitions and parties into numerous competing interest groups, which abandon collective solutions in the legislature for more individualized solutions in the courts (Knopff and Morton 1992, Morton 1987).

There are reasons to be skeptical, however, that the mere presence of a bill of rights will have much effect. Madison, for instance, wrote to Jefferson that "experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed.... I have seen the bill of rights violated in every instance where it has been opposed to a popular current" (*PJM* 10:211–2; Rakove 1991, 136).

The Support Structure for Legal Mobilization

The most important weakness of a bill of rights, as I previewed above, is that, unlike the self-enforcing structure embodied in federalism and the separation of powers, a bill of rights creates no automatic institutional resources for its own enforcement. Although bills of rights commonly empower at least some courts to redress violations of rights, there remain several weaknesses to the machinery of enforcement. Some scholars emphasize what they believe to be courts' relatively weak enforcement powers (Rosenberg 1991). Perhaps as important, however, is that rights guarantees rarely provide potential litigants with the resources necessary to mobilize the law. As Madison speculated, judicial enforcement of a bill of rights will be ineffective "*particularly ... where the law aggrieves individuals, who may be unable to support an appeal agst. [against] a State to the supreme Judiciary*" (*PJM* 10:211–2, emphasis added; Rakove 1991, 136). Contemporary scholars reach a similar conclusion. The legal system functions as an entrepreneurial market in which development of law is affected by individuals' decisions to mobilize the law (Zemans 1983); and decisions to mobilize the law depend on individuals' capacity to do so, which depends partly on their access to resources (Galanter 1974, Lawrence 1990, Olson 1990).

At the level of national supreme courts, in particular,

[1] Lowell 1888 (and Kammen 1986) criticized the machine metaphor, arguing that the U.S. Constitution is far less machine-like than it has appeared to some observers.

cost is an important barrier to access (Lawrence 1990, 3–8). The cost of taking any particular case to a supreme court is substantial. The total cost of getting an issue onto such a court's agenda includes the cost not only of the particular case that eventually reaches that agenda but also of the various lower court cases that create the legal conditions which encourage the high court to resolve the issue. The U.S. Supreme Court, for instance, prefers to decide only those issues that have "percolated" for some time in lower courts or that are the subject of conflicting rulings in the lower courts (Perry 1991, 230–4, 246–52). To reach the Court's agenda, then, a case generally must be representative (or at least a part) of a much larger and not ephemeral body of litigation. Thus, those who hope to place a particular issue on the Court's agenda must have sufficient financial resources to support extensive litigation in lower courts or must be able to rely on the resources of a broader class of litigants.

Issues are not equally endowed with support, and so the resource prerequisite likely affects the nature of the judicial agenda. Access to resources is likely to be especially important for shaping the application of constitutional rights, because the monetary stakes for the affected parties typically are relatively low. Thus, Linda Brown, the named party in *Brown* v. *Board of Education* (1954), could never hope to recoup from a court victory the funds necessary to cover her legal expenses. Therefore, decisions to mobilize the law on public law rights plausibly depend to a great extent on access to resources. For these reasons, we should expect that the presence of civil liberties and rights on the agendas of supreme courts will depend on support beyond that provided by the immediate plaintiff in the case.

Three types of resources—organized group support, financing, and the structure of the legal profession—appear to be important conditions shaping access to the judiciary. Together these resources constitute the support structure for legal mobilization. First, a wide range of scholarship identifies organized group litigants as important influences on judicial agendas. Galanter (1974) suggests that "repeat players," typically organizations, fare significantly better in court and influence legal change and agenda setting significantly more than do "one-shot" litigants (that hypothesis has gained support in a range of research; see, e.g., Atkins 1991, Caldeira and Wright 1988, Epstein and Kobylka 1992, McCormick 1993, Songer and Sheehan 1992; but see Epstein and Rowland 1991; Sheehan, Mishler, and Songer 1992).

In recent decades the number and diversity of organized groups providing support for rights litigation have grown significantly in many countries (Epp 1995). In the United States, organized support for civil liberties and civil rights grew after about 1910 with the development of numerous rights-advocacy organizations, which contributed significantly to the judicial rights agenda. The NAACP Legal Defense Fund, for example, organized, financed, and provided legal counsel for many of the most important civil rights cases to reach the U.S. Supreme Court (Kluger 1977, Vose 1959, Wasby 1995). Similar organizations supported important Supreme Court cases in other areas of law, among them the development of fundamental constitutional rights in general (Walker 1990) and, in particular, the First Amendment's religion clauses (Sorauf 1976) and women's rights (O'Connor 1980).

Another factor contributing to access to the higher judiciary is financing, particularly from governmental sources. Governmental financing appears to be a necessary condition for the presence on the agenda of claims by the poor (Lawrence 1990) and criminal defendants. In the United States, legal aid in civil cases and the most important forms of aid for criminal defendants are relatively new developments within the last sixty years.

Finally, access to lawyers and the structure of the legal profession influence access to the judicial agenda. With some exceptions, the assistance of an attorney is necessary to take a case to a supreme court. Lawyers contribute to legal strategy and provide much of the network through which information about rights litigation travels (Kagan 1993, McGuire 1993). In addition, the degree of diversity in the legal profession appears to influence access to the judicial agenda. The more racially and ethnically diverse and open to women is a legal profession, the more likely it is to provide access to the courts to women and members of racial and ethnic minorities (see, e.g., Abel and Lewis 1988). In some countries, and increasingly in the last few decades, the legal profession has become ethnically diverse and contains a growing number of women. The structure of practice in the legal profession also appears to influence access to the judicial agenda. Law firms gain the benefits of scale economies, which they may use to support litigation campaigns that are not immediately financially productive. Conducting legal practice within firms, however, is a relatively recent development, beginning in the United States in the last hundred years (Galanter and Palay 1991) and spreading to some other countries after the early 1970s (Abel and Lewis 1988).

If the existence of a support structure is necessary for rights advocates to have access to the judicial agenda, we should expect developments in the support structure to be matters of political strategy and controversy. Indeed, this is the case. Much of the support structure's development in the United States and, as I shall discuss shortly, in Canada reflects the political strategies of liberals and egalitarians to use the courts for political change. Recently, conservatives in both countries have responded by developing competing legal advocacy organizations and by attempting to cut governmental funding for legal services. These controversies reflect a growing recognition that the development of law in general, and of rights in particular, is shaped by the nature and extent of the support structure.

Judicial Attitudes

The application of a bill of rights is likely to be influenced also by the policy preferences of judges. It is widely recognized that U.S. Supreme Court justices greatly vary in their votes on civil rights and civil liberties cases (Segal and Spaeth 1993). Moreover, justices vote strategically in setting their agenda, preferring those cases in which their position is likely to prevail (Brenner

and Krol 1989, Perry 1991, 198–215). Thus, the extent of agenda space devoted to rights claims, and the nature of those claims, is conditioned by judicial attitudes. For instance, the U.S. Supreme Court's agenda shifted toward civil liberties and civil rights after the 1930s as judicial liberals gained dominance on the Court (Pacelle 1991). Based on the U.S. experience, we may expect that the extent of liberal control of a court will influence directly its agenda on civil liberties and civil rights.[2] Indeed, the importance of judicial attitudes may be so great as to influence the judicial agenda entirely independently of the presence or absence of a bill of rights.

Discretionary Docket

Although a court's attitudinal composition likely influences its agenda, that influence appears to be conditioned by the extent of discretionary control that judges have over their docket. There is substantial evidence that discretionary docket control contributes to the expansion of a public law agenda. Since many ordinary courts are required to decide nearly any case brought to them, their agenda consists mostly of private economic disputes. The U.S. Supreme Court, by contrast, gained nearly complete discretionary control over its agenda in 1925 as part of a reform aimed at clearing a range of routine private disputes from the Court's docket. As a consequence, the Court's agenda has changed profoundly, from a focus on ordinary economic disputes (contracts, torts, and the like) to a focus on public law (Casper and Posner 1976, Frankfurter and Landis 1927). Similarly, as state supreme courts in the United States gained discretionary control over their docket, their agenda has shifted away from private economic disputes and toward public law (Atkins and Glick 1976, Kagan et al. 1977). The correlation between a discretionary docket and a public law agenda has proven so common in the United States that we are likely to find it as well in Canada.

STUDY DESIGN AND DATA

Canada presents a nearly ideal test of these hypotheses. The Canadian Supreme Court is an active participant in what Tate and Vallinder (1995, 5) have called "the global expansion of judicial power," and there is little doubt that the Court's agenda has been transformed toward a focus on individual rights (Morton, Russell, and Withey 1989; Morton, Russell, and Riddell 1995). Most previous research, however, has not explicitly tested alternative explanations for that transformation but instead has assumed that it resulted primarily from adoption of the Charter of Rights and Freedoms in 1982 (but see Morton 1993, Morton and Knopff 1993). This study makes use of fortunate characteristics of Canada's recent history to conduct such a test. As I shall discuss in more detail shortly, Canada's support structure for legal mobilization began to grow in the late 1960s and continued to strengthen through the 1980s; in 1975 the Supreme Court gained nearly complete discretionary control over its agenda; in 1982, the country adopted a bill of rights; and in the mid-1980s judicial liberals gained a majority on the Court. The staggered timing of these developments makes possible an assessment of the alternative hypotheses.

I rely on data from a variety of sources. Information on the Court's judicial agenda was gathered from the official *Supreme Court Reports* in five-year intervals beginning in 1960 and ending in 1990. The sample includes all full decisions of one page or more reported in the annual volumes. For data on changes in the support structure for legal mobilization, I rely on a variety of primary and secondary sources, as cited in the following pages. For data on judicial attitudes, I rely on a variety of secondary sources, primarily the results of previous studies, as cited in the following pages.

The Charter of Rights and Freedoms

Canada adopted a constitutional bill of rights, the Charter of Rights and Freedoms, in 1982, and Canadians commonly attribute enormous symbolic and practical importance to the document. Its passage culminated a long and arduous battle by some Canadian politicians and activists to establish a working bill of rights. In the 1950s, in the absence of a bill of rights, the Canadian Supreme Court handed down a number of decisions on civil liberties that are generally regarded as landmarks (Snell and Vaughan 1985, 206–8). The Diefenbaker government passed a statutory Bill of Rights in 1960 in an attempt to consolidate and extend the Court's growing civil liberties jurisprudence, but the judicial conservatives who dominated the Court until the mid-1980s refused to give it effect. Meanwhile, Pierre Trudeau, then justice minister and later prime minister in the late 1960s and 1970s, proposed a constitutional bill of rights as part of a larger response to the growing threat of Quebec separatism. Trudeau apparently hoped to accomplish several purposes, among them protecting English speakers from French-only laws in Quebec, assuaging the fears of French speakers in other provinces, and, as Knopff and Morton (1985) have shown, encouraging the development of rights-based cleavages that would unite some Canadians across provincial boundaries. After political maneuvering that is too complicated to relate here (see Romanow, Whyte, and Leeson 1984; Banting and Simeon 1983), the government succeeded in 1982 in passing a greatly revised Charter and a new constitutional amending formula. The final list of rights resulting from that historic struggle is about seven pages long and contains detailed language inserted to discourage the courts from adopting narrow interpretations of its guarantees.[3] Significantly, the Charter's provisions

[2] The direct effect of judicial attitudes is likely to be qualified when conservative judges gain control of a court after a period of liberal dominance. In such a circumstance, the judicial conservatives are likely to continue deciding cases involving liberal rights claims but for the purpose of rejecting those claims. For instance, the Burger Court, which was conservative on criminal procedure, nonetheless maintained the Warren Court's high level of attention to criminal procedure precisely in order to reverse the policy direction of the law.

[3] The charter is more detailed than the U.S. Bill of Rights. The Charter contains separate lists of rights under the headings "Funda-

formally authorize judicial review in cases brought by individuals.

Both critics and supporters of the Charter claim that it has produced a number of important changes in Canadian politics and society. The Court's current chief justice has called passage of the Charter "a revolution on the scale of the introduction of the metric system, the great medical discoveries of Louis Pasteur, and the invention of penicillin and the laser" (quoted in Bogart 1994, 257). Political scientists have made more realistic but still sweeping claims about the Charter's effects. Knopff and Morton (1992, 1), for example, wrote that the Charter "is the occasion not just for new kinds of lawsuits, but also for a new form of constitutional politics.... In a myriad of ways, the Charter of Rights and Freedoms has truly transformed the Canadian political landscape since its enactment in 1982" (see also Cairns 1991, 1992).

The Charter is widely thought to have transformed, in particular, the Court's agenda, decisions, and workload. Most important, scholars argue that the Charter has increased the Court's level of attention to rights claims, its support for rights claims, its reliance on constitutional reasoning, and its exercise of judicial review (see, e.g., Knopff and Morton 1992, Bogart 1994). In addition, several scholars have argued that the Charter encourages interest groups to proliferate and to take their demands increasingly to the Supreme Court, thereby promoting growing complexity of conflict in cases (Bogart 1994, 301–3; Knopff and Morton 1992, 26–9; Morton 1987).

From these observations, I have derived several indicators of the Court's agenda that may be expected to reveal the Charter's influence especially clearly. They are: (1) the proportion of the issue agenda devoted to civil rights and civil liberties; (2) the frequency of exercise of judicial review; (3) the level of support for civil rights and liberties; (4) the extent of reliance on constitutional foundations for decisions, which I expand to include all "higher law" foundations, namely, the common law standard of natural justice, the 1960 statutory Bill of Rights, constitutional law other than the Charter, and the Charter; (5) the extent of participation in cases by interest groups and other third parties; and (6) the size of the docket.

Although Canadian observers nearly universally attribute profound effects to the Charter, Morton (1993) and Morton and Knopff (1993) recently have argued that the effects often attributed to the Charter alone are, instead, the result of active political pressure by the "Court Party," an informal coalition of rights-advocacy groups, lawyers, and judges. As Morton states, "the *Charter* itself is not so much the cause of the revolution as the means through which it is carried out" (1993, 181). That analysis is consistent with the support structure hypothesis.

Canada's Support Structure for Legal Mobilization

The Canadian support structure for legal mobilization grew dramatically between 1965 and 1990, with much of the growth preceding adoption of the Charter. I briefly survey developments in the three components of that structure.

Rights Advocacy Organizations. The development of private rights-advocacy organizations in Canada occurred in a relatively short time, roughly between the late 1960s and the early 1980s. Prior to 1970, business and agricultural groups dominated the Canadian interest group system (Presthus 1974), but thereafter the number of nonproducer advocacy organizations virtually exploded (Paltiel 1982, Pross 1975). Interest groups focusing on civil liberties and civil rights, in particular, did not exist before the mid-1960s, but their prominence in Canadian politics had grown substantially by the early 1980s. The two principal ones, the British Columbia Civil Liberties Association and the Canadian Civil Liberties Association, were founded in 1962 and 1964, respectively, but only became relatively active after about 1970. In the 1970s a number of regional civil liberties organizations also formed (Epp 1995, 260).

Advocacy groups supporting civil rights also began to form after the mid-1960s. In the area of women's rights, the National Action Committee on the Status of Women was formed in 1971; the Canadian Advisory Council on the Status of Women, a quasi-state organization, in 1973; the National Association of Women and the Law in 1977; and the Women's Legal Education and Action Fund in 1985. The major aboriginal rights organizations also formed in the late 1960s and early 1970s. Of 239 major aboriginal political organizations existing in 1993, 43 formed in the 1960s, 92 in the 1970s, and 28 in the 1980s (Frideres 1993, 288). The Advocacy Resource Centre for the Handicapped, a leading organization advocating expanded rights for the handicapped, was formed in 1980.

After the mid-1960s the national and provincial governments created agencies that have acted as advocates of the new civil rights and liberties. The provinces and the national government also began adopting comprehensive human rights codes prohibiting private discrimination on a broad range of grounds; along with these codes, they created quasi-judicial human rights commissions to hear discrimination claims, from which there are appeals to the regular courts (Knopff 1990, 36–40; Tarnopolsky 1982, 25–37, 434–9). In addition, in the late 1960s several provinces and the federal government created law reform commissions that provide continuing advice to legislatures on legal reform. Both types of

mental Freedoms" (similar to the liberties contained in the U.S. First Amendment); "Democratic Rights" (the right to vote and limitations on the time in which the House of Commons may remain in authority without facing reelection); "Mobility Rights" (the right of citizens to leave and enter the country and to move and live in any province); "Legal Rights" (procedural due process); "Equality Rights" (equality before the law and equal protection of the law without regard to race, national or ethnic origin, color, religion, sex, age, or mental or physical disability); and "Official Languages of Canada" and "Minority Language Educational Rights" (providing for the equal status of French and English). The Charter also guarantees the right to redress through the judicial system, states that the Constitution is the supreme law of Canada, and declares that any laws inconsistent with it are "of no force and effect."

commissions became institutional sites for liberal rights advocacy, and there has been a fluid interchange of talent and legal resources among these governmental agencies, the law schools, and private rights advocacy organizations (Devins 1993; Morton 1993, 193–4; Morton and Knopff 1993, 72).

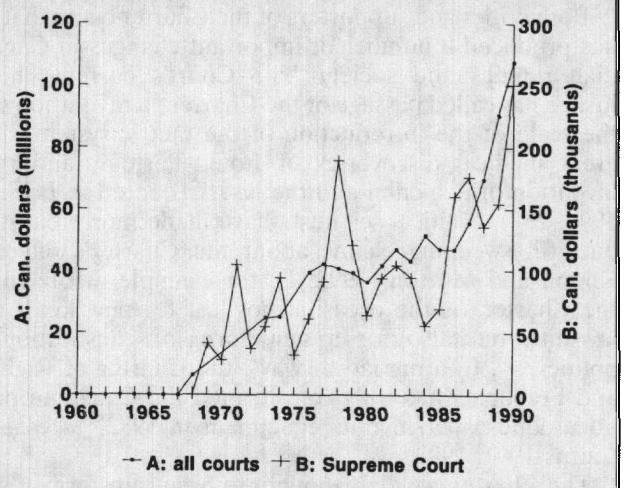
Canadian rights advocacy organizations are primarily liberal or left-liberal in orientation. To a significant extent this reflects deliberate policies by the national government to cultivate liberal advocacy organizations. The Canadian Department of the Secretary of State, under the direction of Trudeau's Liberal Government in the late 1960s, developed an aggressive program to finance citizens' advocacy organizations focusing on such issues as women's rights, language rights, and multiculturalism (Pal 1993). Nonetheless, several conservative organizations support litigation, among them the National Citizen's Coalition and REAL Women, but they have enjoyed much less success than liberal groups because, as Morton and Knopff (1993, 70) observe, "they are decidedly swimming against the ideological tide."

Government Sources of Financing. The national and provincial governments have developed a variety of programs that finance rights litigation and advocacy. In the decade after 1965, in a major policy revolution, the Canadian provinces created legal aid programs that finance both civil and criminal cases. The rapidity of the development cannot be overstated. Ontario incorporated an official legal aid program in 1966; by the end of 1975 all the provinces had created such a program (National Legal Aid Research Centre 1981). The federal government contributed to the rapid growth with subsidizes (Zemans 1978). In brief, the provinces and the national government created virtually the entire legal aid apparatus in less than a decade.

Spending on court cases by the new legal aid organizations increased dramatically in the 1970s. The level of funding by the Ontario Legal Aid Program, the largest of the provincial programs and the first to be created, illustrates that growth (see Figure 1). The level of funding grew between 1970 and 1977, and then rose rapidly again in the late 1980s.[4]

The Court Challenges Program, a set of funds created specifically for financing test cases, is another government-sponsored legal program that began prior to passage of the Charter. The program was established in 1978 to finance court cases on language rights protected under the Constitution Act of 1867; since then, it has "supported almost every major language law case at the [Supreme] Court" (Brodie 1992). The government added a component to the program in 1985 to finance cases under the equality provisions in the Charter. Between 1985 and 1992, when the program was eliminated by the Mulroney government, the equality component financed 178 court cases at all levels of the system, including 24 cases in the Supreme Court (Court Challenges Program 1992). Trends in the program's funding and case support across time are not easily identified, although it is clear that the language component supported some cases prior to passage of the Charter (Court Challenges Program 1992). It is also clear, however, that the creation of the equality component in 1985 resulted directly from the desire of interest groups and government officials to implement the equality rights in the Charter (Brodie 1992). Conservative groups have criticized the program for supporting only liberal or left-liberal causes, and the government briefly eliminated the program's financing from 1992 to 1994.

FIGURE 1. Legal Aid Expenditures (Ontario)



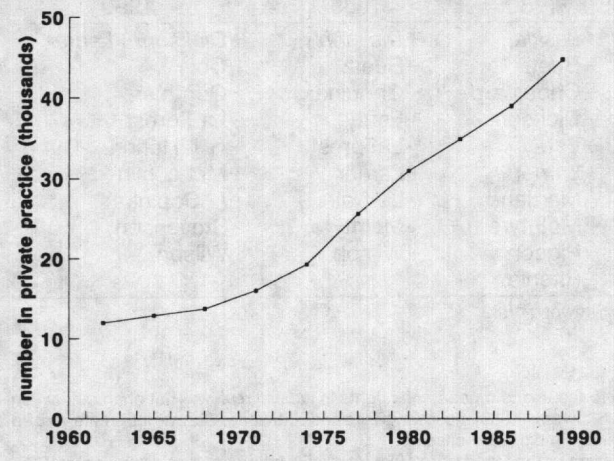
Source: *Ontario Legal Aid Plan Annual Reports*, adjusted for inflation.

The national government's Department of Indian Affairs and Northern Development (DIAND) also began sponsoring test case litigation prior to adoption of the Charter. DIAND began funding court cases in 1965 but significantly increased its support in the late 1970s, financing about 25 test cases before 1982 (Milligan 1989, 16; Oscapella 1988). DIAND has provided financial support for most of the aboriginal rights cases that have reached the Court (author's interviews with lawyers for native rights organizations, June 1992).

The Legal Profession. Several highly significant changes in the Canadian legal profession have occurred since 1945, with the most important developments between the mid-1960s and the early 1980s. First, Canada's system of legal education changed dramatically as the importance and autonomy of law schools increased. In Canada, as in the United States, training for the practice of law has shifted from apprenticeship, a system in which legal education is dominated by the relatively conservative interests of the practicing bar, to law schools. Ten of Canada's 20 law schools were created after World War II, and the number of full-time law professors almost doubled between 1971 and 1982 alone (Stager and Arthurs 1990, 90, 302–3). As the importance and autonomy of the law schools grew, legal training increasingly emphasized theoretical and constitutional issues (Bushnell 1992, 281–2, 341–2, 343–6; Stager and Arthurs 1990, 84–91). By 1982, the year of the Charter's adoption,

[4] Some of the growth in legal aid in the late 1980s may have been due to the Supreme Court's decision in *Singh* (1985), which required the government to conduct hearings before deporting illegal immigrants and to ensure that immigrants have counsel in such hearings. I am indebted to Ian Brodie for this observation.

FIGURE 2. Canada's Lawyer Population



Source: Stager and Arthurs (1990, 146).

Canadian law professors were remarkably young (the median age was 38) and generally supportive of a growing policymaking role for the judiciary on civil liberties and civil rights (Stager and Arthurs 1990, 303). For instance, in a survey conducted in 1982–83, 18% of law professors reported working for a law reform commission, and 25% reported working for a public interest or community group (Stager and Arthurs 1990, 304).

The growth of law schools also provided an institutional base for critical scholarship and advocacy on constitutional issues. Bora Laskin, chief justice of the Supreme Court from 1973 to 1984, led the push in the 1950s and 1960s for scholarly critique and advocacy. In 1951 he attributed the Court's conservatism to "the conservative tradition of the Canadian legal profession . . . [and] the late development of university law schools" (Laskin 1951, 1046). By the 1980s, by contrast, many in the growing ranks of law school professors actively pursued advocacy scholarship favoring liberal judicial interpretation of civil rights and liberties (Morton and Knopff 1993, 61, 72–5).

In addition, in the 1970s Canada's lawyer population grew dramatically and began to diversify, and attorneys increasingly engaged in advocacy. The most significant rise in the number of lawyers occurred between 1971 and 1981, when their ranks more than doubled (see Figure 2) (Stager and Arthurs 1990, 149). As Figure 2 illustrates, the attorney population grew at a faster pace prior to 1981 than afterward; thus, the Charter induced no unprecedented growth in the number of lawyers.

The Canadian legal profession also began to diversify by ethnic origin and sex after 1970. In 1961, 79.6% of all Canadian lawyers were from either a British or French background; by 1971, that proportion had declined to 74%; by 1981 it had dropped to 68.1% (Stager and Arthurs 1990, 148–54). The proportion of British origin, in particular, declined from 56.3% in 1961 to 44.5% in 1981. Ethnic minorities, who constituted only about one-fifth of the total in 1961, accounted for almost one-third by 1981. The rate of growth in the representation of women in the legal profession was even more dramatic. In 1961, only 3% of all lawyers were female; their proportion grew to 5% in 1971, 15% in 1981, and 22% in 1986 (Stager and Arthurs 1990, 148–50).

The structure of legal practice also began to change in the 1970s as the number and size of large law firms began to grow. Both the quantity of such firms and the lawyers working in them have risen at a significantly faster pace than the number of lawyers in general (Stager and Arthurs 1990, 170–7).

Taken together, these changes in Canada's interest group system, governmental financing of litigation, and the legal profession fundamentally transformed the Canadian support structure for legal mobilization *prior to adoption of the Charter in 1982.*

The Canadian Supreme Court: Attitudinal Composition and Docket Control

Due to patterns in the Supreme Court's attitudinal composition from 1960 to 1990, the Canadian case also makes possible a test of the judicial attitude hypothesis. Recent research has confirmed that judges in Canada, like their counterparts in the United States, differ significantly in their voting on rights cases (Heard 1991; Morton, Russell, and Riddell 1995; Tate and Sittiwong 1989). Nonetheless, what is striking about the Court's attitudinal composition is the unambiguous dominance by judicial conservatives over the entire period prior to the mid-1980s. Judicial liberals gained a majority on the Court only after 1985. Table 1 illustrates the changing composition of the Court by characterizing the justices as liberal (+) or conservative (−) in their attitudes toward the new rights claims. Prior to 1982 there were three leading proponents of an expanded civil liberties agenda on the Supreme Court—Ivan Rand (served 1943–59), Emmett Hall (1962–73), and Bora Laskin (1970–73 as associate justice, 1973–84 as chief justice). Nonetheless, no majority of justices consistently supported the expansion of judicial policymaking on civil liberties and civil rights until the late 1980s.

Canada also presents an ideal test of the docket-control hypothesis. The Court's workload began growing in the early 1970s, prompting Parliament to grant the Court in 1975 nearly complete discretion over which cases to decide (Bushnell 1982; Knopff and Morton 1985). There remain appeals as of right principally in some criminal cases, but the vast majority of cases coming to the Court are now on the discretionary docket. Thus, 1975 marked a significant turning point in the Canadian Supreme Court's institutional history.

PATTERNS IN THE CANADIAN SUPREME COURT'S AGENDA

In light of the various changes in Canada's Constitution, its support structure for legal mobilization, the Supreme Court's attitudinal composition, and the Court's docket control, what changes have occurred in the Court's agenda, and when did they begin? I pursue here a data triangulation strategy, using a variety of alternative measures of the Court's agenda and workload from 1960 through 1990. The data generally tell much the same

TABLE 1. Attitudinal Composition of the Canadian Supreme Court

1960	1965	1970	1975	1980	1985	1990
−Kerwin	*−Taschereau*	*−Fauteaux*	*+Laskin*	*+Laskin*	*+Dickson*	*+Dickson/+Lamer*
−Abbott	−Abbott	−Abbott	−Beetz	−Beetz	−Beetz	−Cory
+Cartwright[a]	+Cartwright	+Hall	+Dickson	−Chouinard	−Chouinard	−Gonthier
−Fauteaux	−Fauteaux	−Judson	−Grandpre	+Dickson	−Estey	−La Forest
−Judson	+Hall	+Laskin	−Judson	−Estey[b]	−LaForest	+/−L'Heureux-Dubé[c]
+Locke	−Judson	−Martland	−Martland	+Lamer	+Lamer	+McLachlin
−Martland	−Martland	−Pigeon	−Pigeon	−Martland	−Le Dain	+/−Sopinka[d]
−Ritchie	−Ritchie	−Ritchie	−Ritchie	−McIntyre	−McIntyre	−Stevenson
	+Spence	+Spence	+Spence	−Pigeon	+Wilson	+Wilson
				−Ritchie		

Sources: Bushnell 1992; Heard 1991; Morton, Russell, and Riddell 1995; Tate and Sittiwong 1989.
Note: chief justices are italicized at the top of each column
(+) indicates liberalism on civil liberties and rights
(−) indicates conservatism on civil liberties and rights
[a]Bushnell (1992, 317) places Cartwright in the group of justices who were opposed to the use of fundamental rights in judicial review. That characterization differs significantly from Cartwright's high civil liberties score in research by Tate and Sittiwong (1989). Following Tate and Sittiwong, Cartwright is categorized here as a liberal because his votes overwhelmingly supported the civil liberties position in disputed cases.
[b]According to Bushnell (1992, 487–8), Estey opposed the growing rights-based activism of the Court after 1985, publicly stating so upon resigning in 1988. This differs from his above-average civil liberties support score as reported by Tate and Sittiwong (1989).
[c]Morton, Russell, and Riddell (1995) report that L'Heureux-Dubé tends to support Charter claims on equality rights but tends to oppose Charter claims on legal rights (of the criminally accused).
[d]Morton, Russell, and Riddell (1995) report that Sopinka tends to support Charter claims on legal rights (of the criminally accused) but tends to oppose Charter claims on equality.

story: Significant changes in the Court's agenda, on a number of dimensions, began in the early 1970s and continued at rates that remained largely the same at the time the Charter was adopted in 1982. There are some exceptions to that general pattern. Most important, both the Court's level of support for rights claims and the number of requests for the exercise of judicial review apparently rose in response to passage of the Charter, but on most dimensions the agenda transformation began at least ten years before. In this section I survey these developments, leaving a discussion of their significance to the following section.

The Issue Agenda

First, the Court's issue agenda changed dramatically between 1960 and 1990 (see Figure 3). The proportion of the docket devoted to civil liberties and civil rights grew dramatically, and the proportion devoted to tax cases and ordinary economic disputes declined dramatically.[5] Both developments began prior to adoption of the Charter in 1982. Civil rights and civil liberties cases constituted 13% or less of the Court's agenda before 1975, and by 1990 they claimed about 60%—but the growth rate between 1980 and 1985 (86%) was only marginally faster than between 1975 and 1980 (78%). Similarly, the proportion of the agenda devoted to tax and ordinary economic issues abruptly began to decline after 1975 but prior to adoption of the Charter in 1982.[6]

Judicial Review

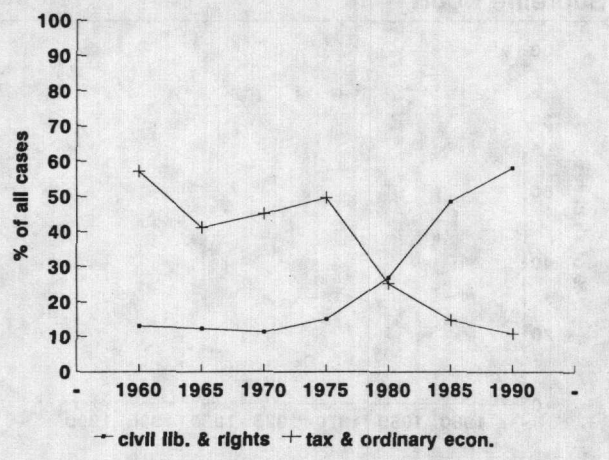
The Court's exercise of judicial review increased between 1960 and 1990, but the growth appears unaffected by passage of the Charter. Figure 4 presents two summary measures, the number of cases in which the Court considered whether to overturn a law, and the number of cases in which it did so. The use of judicial review grew moderately between 1960 and 1990, but the largest increase occurred between 1975, when the Court struck down a law in only one case, and 1980, when it struck down laws in five cases. After 1980, although the number of laws struck down increased, the rate of growth appears to have declined.[7] Yet, the number of cases in which litigants asked the Court to exercise judicial review significantly rose after passage of the Charter. Although the growth apparently originated in the late 1960s or early 1970s, between 1985 and 1990 the number of requests for judicial review increased dramatically. In 1985 the Court decided eight cases centering on a request for the exercise of judicial review; in 1990 it decided almost thirty such cases.

[5] In using these measures, I follow Pacelle (1991). I include in the rights agenda, in addition to constitutional rights, some statutory or common law rights that have taken on a status analogous to constitutional rights. They include the common law concept of "natural justice" and statutory prohibitions of discrimination. The proportion of the agenda devoted to rights that I report here is somewhat higher than that reported by Morton, Russell, and Riddell (1995), probably because my analysis is not limited to Charter cases and because I use, as a base, only full decisions (one page or more of opinion). Ordinary economic issues, as defined here, include all tax disputes (unless they raise a rights claim) and a range of ordinary private disputes, among them contracts, torts, wills and estates, and the like.

[6] There is also some evidence that the Court's ordinary economic cases are themselves shifting toward a focus on rights. For example, in *Norberg* v. *Wynrib* (1992), a tort case, the decision centered on the issue of sex discrimination. Thus, the trends presented in Figure 2 likely understate the extent of the transformation from ordinary economic issues to rights issues. I am indebted to Ian Brodie for this observation.

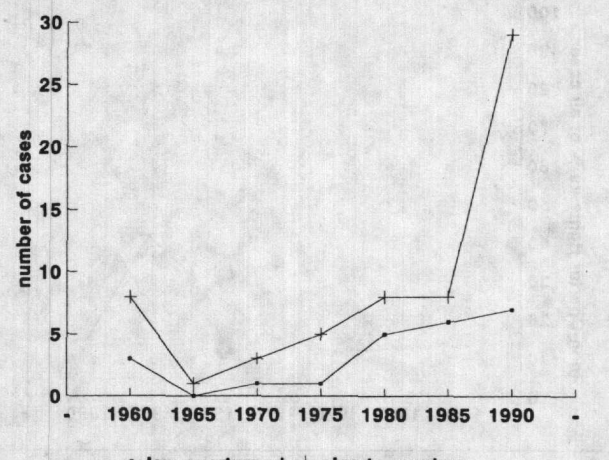
[7] At its high point in 1990, the Court overturned fewer than ten federal and provincial laws. Compared to the average of about 16 state laws and just under two federal laws struck down by the U.S. Supreme Court per year in the 1980s (Baum 1992, 188–90), that is not a particularly high number. There are far fewer provinces than states, however, to generate potential conflict with Supreme Court policy, and so we might expect the use of judicial review to be somewhat less frequent in Canada than in the United States.

FIGURE 3. Issue Agenda of the Canadian Supreme Court



Source: Author's coding of Supreme Court decisions.
N = 1960, 77; 1965, 73; 1970, 80; 1975, 119; 1980, 119; 1985, 68; 1990, 110.

FIGURE 4. Judicial Review by the Canadian Supreme Court



Source: Author's coding of Supreme Court decisions.

Support for Rights Claims

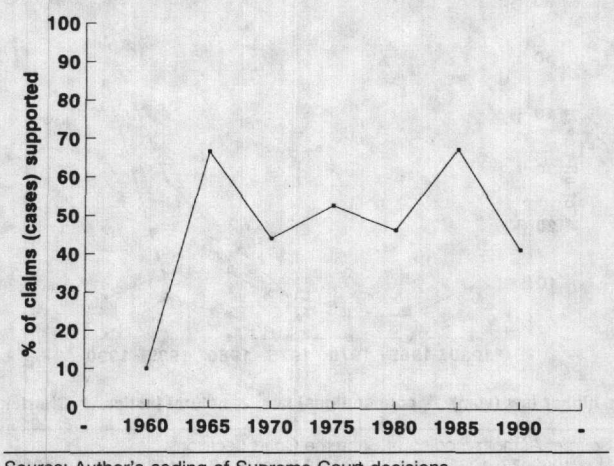
Adoption of the Charter may have affected the Court's level of support for rights claims, but, if so, the effect was neither clear nor dramatic (see Figure 5).[8] In the early period of the study, changes in the level of support are an artifact of the small number of rights cases, and so most of our attention should focus on the years after 1970. At the aggregate level, the Court's support for rights claims grew significantly between 1980 and 1985 but dropped again by 1990 (this observed decline is consistent with results of research by Morton, Russell, and Riddell 1995). Contrary to expectations, the Charter had no sustained effect on the Court's level of support for the rights claims on its agenda. These aggregate results, however, do not control for changes over time in the nature of the rights claims being decided. In addition, the aggregate results do not reveal a growing dispute on the Court in the late 1980s over which rights claims should be supported: in broad terms, some justices favored criminal due process and negative liberties, while others favored egalitarian claims (Morton, Russell, and Riddell 1995, 43–9). Nonetheless, the results in Figure 5 suggest that the Charter's effects have been more subtle than is generally believed.

Basis for Decisions

Trends in several indicators of the basis for Court decisions reveal another dimension of the Court's agenda. First, even after passage of the Charter, the proportion of cases involving rights claims *not* founded on that document continued to expand (see Figure 6). There was a substantial increase in non-Charter rights cases in 1985 over 1980; in fact, a surprisingly small proportion of the cases in 1985 were decided on Charter grounds, probably in part because of the time lag in bringing Charter cases through several levels of the judicial system. The drop in the number of non-Charter cases in 1990 resulted either from Charter cases squeezing non-Charter cases off the agenda or from a translation of what previously would have been non-Charter cases into Charter language. These data cannot answer that question. But it is clear that Charter cases themselves were only a small proportion of rights claims in 1985 and that, for much of the period before the late 1980s, rights claims developed in formal independence of the Charter.

Second, trends in the Court's use of all higher law foundations—including non-Charter constitutional law (primarily federalism), the 1960 Bill of Rights, the common law standard of natural justice, and of course,

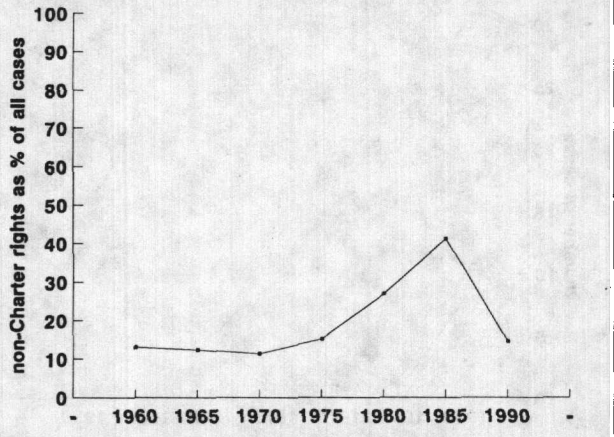
FIGURE 5. Support for Rights Claims by the Canadian Supreme Court



Source: Author's coding of Supreme Court decisions.
N = 1960, 10; 1965, 9; 1970, 9; 1975, 17; 1980, 30; 1985, 31; 1990, 60.

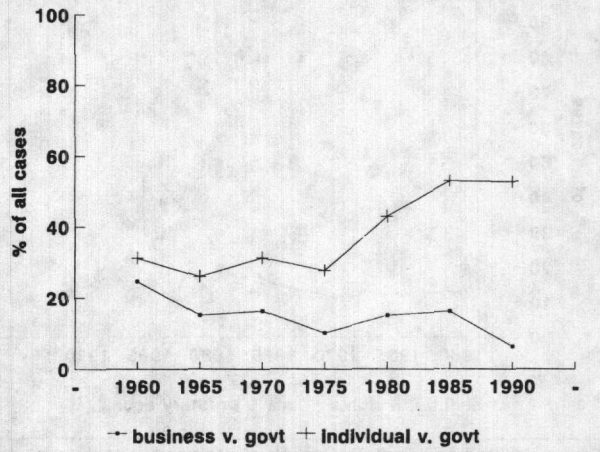
[8] I define "support" as decisions that the rights claimant would have regarded as favorable. I omitted from this coding decisions in which the outcome was ambiguous or split, as well as cases in which there were competing rights claims.

FIGURE 6. Non-Charter Rights Cases in the Canadian Supreme Court



Source: Author's coding of Supreme Court decisions.
N = 1960, 77; 1965, 73; 1970, 80; 1975, 119; 1980, 119; 1985, 68; 1990, 110.

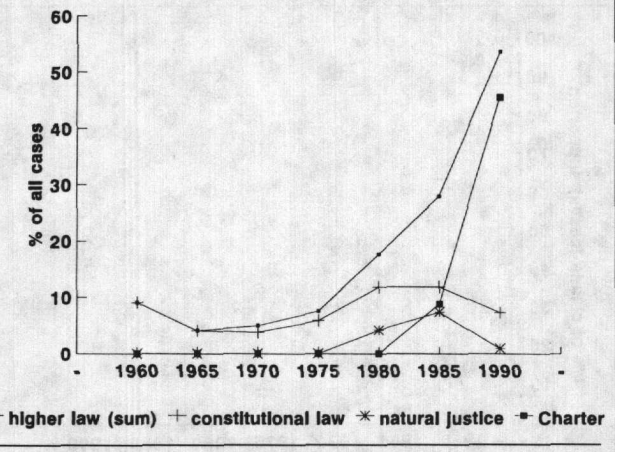
FIGURE 8. Individuals and Businesses v. Governmental Parties in the Canadian Supreme Court



Source: Author's coding of Supreme Court decisions.
N = 1960, 77; 1965, 73; 1970, 80; 1975, 119; 1980, 119; 1985, 68; 1990, 110.

the Charter after 1982—are presented in Figure 7. The proportion of cases decided on all higher law grounds began to rise prior to 1982. Part of that growth reflects an increase in the number of federalism cases decided by the Court (Monahan 1987, 18–21; Russell 1985). After 1982, the proportion of cases in each of the non-Charter categories declined as the proportion of cases involving the Charter increased. By 1990, Charter cases began to replace non-Charter cases on the agenda, although even in 1990 a significant portion of higher law cases was not based on the Charter. Because the use of higher law foundations for decisions began to increase as early as 1975 and because the most important changes after 1982 consisted not of an acceleration in the rate of growth for *all* higher law cases but a shift toward Charter foundations away from other higher law foundations, it is possible that passage of the Charter simply changed the foundation on which claimants based their challenges.

FIGURE 7. Higher Law Foundations for Decisions in the Canadian Supreme Court



Source: Author's coding of Supreme Court decisions.
N = 1960, 77; 1965, 73; 1970, 80; 1975, 119; 1980, 119; 1985, 68; 1990, 110.

Types of Litigants

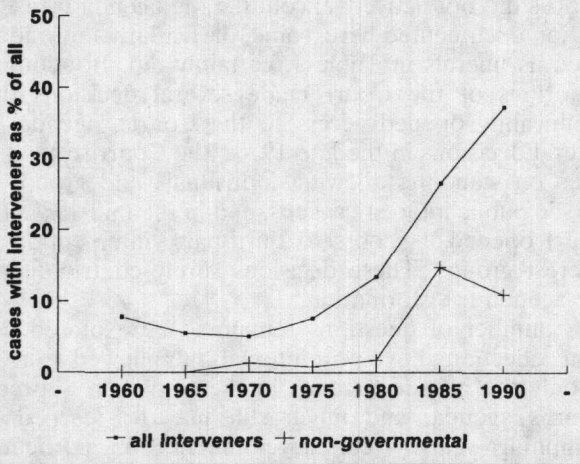
The nature of the parties appearing in Court cases also changed between 1960 and 1990. A useful indicator consists of trends in the types of private litigants who oppose government actors. I focus here on individuals, who often must rely on external sources of support to reach the Court, and on businesses. Over the period of the study, the presence of individuals increased, and the presence of businesses decreased (see Figure 8). Significantly, the growing presence of individual litigants began before passage of the Charter in 1982, and the rate of growth did not increase after passage.

The extent of intervention in Court cases by third parties also has grown since 1960 (see Figure 9). Third-party intervention in the Canadian judiciary is analogous to amicus curiae participation in the U.S. courts, and is often taken as an indicator of the degree to which the Court has become politicized. Brodie (1995; see also 1992) found that third-party intervention began to increase before passage of the Charter, and my data also clearly indicate that trend. Some growth is apparent as early as 1975, and substantial changes are undeniable by 1980. As Brodie (1995) points out, however, third-party intervention by nongovernmental organizations began to increase only after 1980.

Caseload

The number of cases brought to the Court grew dramatically over the period studied, but almost all the growth occurred before 1982 (see Figure 10). The Court's docket is composed of two broad categories, leave to appeal applications (over which the justices have complete discretion) and appeals by right (which the Court

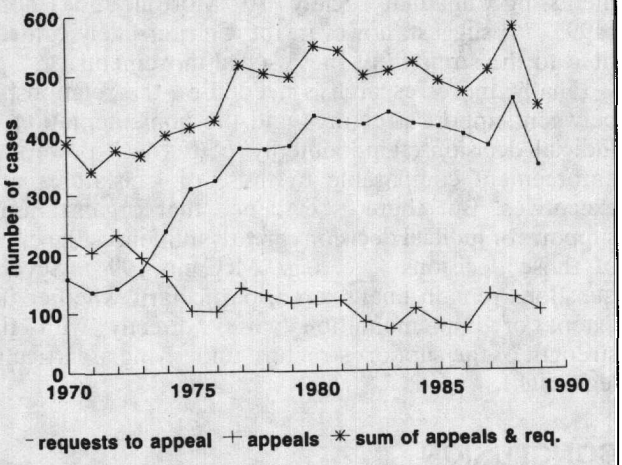
FIGURE 9. Third-Party Interveners in the Canadian Supreme Court



Source: Author's coding of Supreme Court decisions.
N = 1960, 77; 1965, 73; 1970, 80; 1975, 119; 1980, 119; 1985, 68; 1990, 110.

theoretically must hear). As noted earlier, a statutory change in the Court's jurisdiction in 1975 shifted much of its docket to the discretionary leave category, thus giving the Court greater discretion over which cases to decide. As a result, the number of leave applications filed per year began to grow around 1975, accompanied by a corresponding drop in the number of appeals. This drop, however, did not entirely compensate for increases in the number of leave applications, and so the total number of cases coming to the Court rose substantially between the mid-1970s and early 1980s. The period of significant growth ended in the early 1980s, prior to passage of the Charter. In short, litigants began turning to the Court in greater numbers long before passage of the Charter, and that event produced no new spurt in the number of cases brought to the Court.[9]

FIGURE 10. Caseload of the Canadian Supreme Court



Sources: Calculated from Bushnell (1982; 1986) and *Bulletin of the Supreme Court of Canada*.

DISCUSSION

The Canadian Supreme Court's agenda indeed has been transformed in the last several decades. The Court is now a major constitutional policymaker, focuses much of its attention on civil rights and liberties, increasingly decides cases brought by individuals who are supported by interest groups and government financing, increasingly faces complex disputes involving large numbers of parties, increasingly relies on higher law foundations for its decisions, increasingly entertains requests to strike down laws, and increasingly does strike down laws.

Most observers have attributed this broadly based transformation to Canada's recent adoption of the Charter of Rights and Freedoms or, secondarily, to the efforts of left-liberal justices on the Court. The evidence presented here, however, suggests that the Charter's influence is overrated and that judicial liberals gained control of the Court too late to have done more than encourage existing developments. Instead, changes in the Court's agenda appear to have resulted from the combined influence of two developments, the shift to a discretionary docket in 1975 and the development of a support structure for legal mobilization.

The shift to a largely discretionary docket in 1975 significantly contributed to the agenda transformation. When the Court gained control over its docket, it abruptly began moving private disputes from its agenda, making way for a growth in cases related to public law in general and to civil liberties and rights in particular. This shift occurred even though judicial liberals were in the minority on the Court at the time and remained so until after the mid-1980s. The experience of the Canadian Supreme Court in this respect closely parallels that of other courts, in particular the U.S. Supreme Court, that have gained discretion over their agenda. Given a choice, judges apparently prefer to decide rights cases rather than private economic disputes. Perhaps this is because rights cases are more interesting and expand judges' influence more than do ordinary private disputes, and perhaps because rights cases are difficult for judges to avoid.

The growth of the support structure for legal mobilization also contributed to the agenda transformation. The various components of the support structure began growing and diversifying just before the Court's agenda transformation started, and the support structure continued to grow as that transformation unfolded. Temporal priority and correlation alone cannot prove causation, but the weakness of the primary alternative explanations, those focusing on judicial attitudes and adoption of the charter, lends credibility to the support structure hypothesis.

Moreover, there is direct evidence of causal links

[9] The surprising lack of significant growth in the number of leave applications in the 1980s may have resulted from the Court's refusal to abandon oral hearings on leave to appeal applications, which placed time restrictions on the number of applications that could be heard.

between the support structure and the Court's agenda. Government financial aid has supported a range of important rights cases that have reached the Court. Legal aid, for instance, directly contributed to the growth of the Court's agenda on criminal procedure. In interviews conducted for this study, lawyers who were active in criminal defense and human rights work in the 1970s identified legal aid as the principal source of financing for criminal cases before the Court. For example, a leading criminal defense lawyer who has argued many cases before the Court said, "oh, it was legal aid, of course. None of those cases could have gotten to the Canadian Supreme Court without it" (interview with author, June 1992). Government financing also supported other types of rights cases. The Court Challenges Program funded virtually all the language rights cases to reach the Court (Brodie 1992) and many of the equality cases. Financing by DIAND supported nearly all the aboriginal rights cases to reach the Court.

In addition, both the diversification of the Canadian legal profession and the growth of large law firms influenced the Court's agenda.[10] In the 1980s, large Toronto firms allowed a number of their female attorneys to divert time and resources to the development of a legal strategy and funding for women's rights litigation (Razack 1991, 29–42). Those lawyers created the Women's Legal Education and Action Fund (LEAF) in 1985, which has financed virtually all the women's rights cases in the Court since 1985.

Even the Charter itself may be understood as a product of the changes in the Canadian support structure that transformed the Court's agenda. A number of rights advocacy organizations directly influenced the language of the Charter in highly significant ways by participating in the drafting process or by putting pressure on the national government's negotiators (Kome 1983, Morton 1993; Pal and Morton 1986). For instance, the Canadian Civil Liberties Association, along with several other groups, successfully lobbied for significant changes in the Charter's procedural rights provisions (Epp 1995, 297–9).

Although both the Charter and the Court's agenda transformation reflect changes in the support structure for legal mobilization, the Charter nonetheless has exerted an independent influence on some aspects of the Court's decision making. In particular, the Court's level of support for liberal rights claims grew, albeit temporarily, after passage of the Charter. Furthermore, this growing support apparently encouraged litigants to bring more such cases, as evidenced by the dramatic growth between 1985 and 1990 in the number of requests for judicial review. As Manfredi (1993, 170–2, 212–7) has argued, the Court's willingness to interpret the Charter's provisions broadly and creatively, and the willingness of interest groups to constitutionalize their claims through litigation, interact to heighten the policymaking role of the judiciary.

Finally, although the majority of Supreme Court justices did not actively encourage the agenda transformation documented here, some, particularly those identified as liberals in Table 1, certainly did. In addition, majorities of the Court made several decisions that significantly opened access to the Court's agenda. In several decisions in the late 1970s, the Court relaxed its rules on standing, allowing individuals and groups to pursue public interest lawsuits, and in the mid-1980s the Court opened its doors to third-party intervention by interest groups. These decisions surely contributed to the agenda transformation.

A number of questions remain to be explored. My data collection at five-year intervals has allowed a survey of only the broadest trends in the Canadian Supreme Court's agenda, and much still may be learned by examining year-by-year developments. In particular, there is evidence that the Charter encouraged at least some of the justices to lend greater support to rights claimants, but the nature and extent of that influence could be explored more adequately with research designed to isolate that relationship. For example, we would learn much about the Charter's influence by studying justices' votes and case outcomes in various categories of cases over the period of transition to the Charter, controlling for the justices participating in the decisions, fact patterns in the cases, and bases for the decisions. I suspect that such a research strategy would show that the adoption of the Charter indeed affected judicial decision making. But any such effect should be interpreted in the context of the broader trends reported here.

In addition, this study did not examine the cultural or educative effects of a bill of rights. Some might argue that the Charter created a culture of rights-claiming in Canada. I would speculate that this effect, too, depended on the strategic efforts of rights advocacy groups. Brodie and Nevitte (1993), for instance, have shown that a number of the cultural developments commonly attributed to the Charter in fact preceded its adoption and appear to reflect the development of new social movements in Canadian society. As Morton and Knopff (1993, 76) suggest, however, the Charter likely contributed to the strength of these social movements.

Finally, more research is needed on the relationship between support structures and the implementation of judicial decisions. Undoubtedly, courts lack powers of enforcement comparable to those of legislatures and executives. But there is evidence that organizational support for judicial decisions greatly influences the effect of those decisions (see, e.g., McCann 1994). Several questions remain unanswered, particularly whether the extent of implementation varies directly with the strength of the support structure underlying a particular legal right.

CONCLUSION

Sunstein has written that "rights do not fall from the sky" but depend on carefully crafted institutions and a

[10] Although the diversification of the Canadian legal profession contributed to the support structure for legal mobilization, it is also clearly true that a number of leading litigators on rights issues have been from the dominant demographic base of the legal profession, white English Canadians (Razack 1991). The transformation of the legal profession, therefore, has been ideological as well as demographic.

rights-supportive culture (1995, 61). In recent decades constitutional engineers have relied heavily on bills of rights as a means for protecting rights. As James Madison recognized more than two centuries ago, however, bills of rights are not self-activating. Interpreting and developing the often ambiguous provisions of a bill of rights depends on mobilization of the law by individuals, but they typically lack the capacity to take cases to a country's highest court. The effects of a bill of rights, therefore, depend on the extent of organized support for mobilization of the law. Admittedly, a bill of rights may affect judges' willingness to strike down legislation or to check official action, but in the absence of adequate resources for legal mobilization, few noneconomic cases are likely to reach the judicial agenda, and judges will have few occasions to use their constitutional authority. Thus, constitutional reform alone, in the absence of resources in civil society for legal mobilization, is likely to produce only empty promises.

To what extent may we generalize from these conclusions to the experience of other countries? If a bill of rights profoundly and independently influences politics in any country, those effects should be clearest and strongest in Canada. There, observers commonly attribute to the Charter a number of profound effects; moreover, the Charter intervened in an otherwise comparatively stable political system, and so its influence should be easily isolated. But even in Canada, an ideal case, some effects attributed to the Charter resulted instead from the growing capacity of rights claimants to pursue litigation, and other effects that indeed resulted from the Charter depended in addition on those changes in litigant capacity. Moreover, similar support structures appear to influence the judicial agenda in other countries, particularly in the common law world, where access to the higher courts depends on private initiative.

None of this indicates that bills of rights are irrelevant to politics. Bills of rights matter, but only if civil societies have the capacity to support and develop them.

REFERENCES

Abel, Richard L., and Phillip S. C. Lewis, eds. 1988. *Lawyers in Society, Volume I: The Common Law World*. Berkeley: University of California Press.

Atiyah, P. S., and Robert S. Summers. 1987. *Form and Substance in Anglo-American Law*. Oxford: Oxford University Press.

Atkins, Burton M. 1991. "Party Capability Theory as an Explanation for Intervention Behavior in the English Court of Appeal." *American Journal of Political Science* 35 (November):881–903.

Atkins, Burton M., and Henry R. Glick. 1976. "Environmental and Structural Variables as Determinants of Issues in State Courts of Last Resort." *American Journal of Political Science* 20 (February): 97–115.

Banting, Keith, and Richard Simeon, eds. 1983. *And No One Cheered: Federalism, Democracy, and the Constitution Act*. Toronto: Methuen.

Barnum, David G. 1988. "Article 21 and Policy Making Role of Courts in India: An American Perspective." *Journal of the Indian Law Institute* 30 (1):19–44.

Bogart, W. A. 1994. *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada*. Toronto: Oxford University Press.

Brennan, Geoffrey, and Alan Hamlin. 1994. "A Revisionist View of the Separation of Powers." *Journal of Theoretical Politics* 6 (July):345–68.

Brenner, Saul, and John Krol. 1989. "Strategies in Certiorari Voting on the United States Supreme Court." *Journal of Politics* 51 (November):828–40.

Brodie, Ian Ross. 1992. "Interest Groups and the Charter of Rights and Freedoms: Interveners at the Supreme Court of Canada." M.A. thesis, University of Calgary.

Brodie, Ian Ross. 1995. "Charting the Rise of Interest Group Activity in the Supreme Court of Canada." Presented at the annual meeting of the Law and Society Association, Toronto.

Brodie, Ian, and Neil Nevitte. 1993. "Evaluating the Citizens' Constitution Theory." *Canadian Journal of Political Science* 26 (June):235–59.

Brown v. *Board of Education*. 1954. 347 U.S. 483.

Bushnell, Ian. 1982. "Leave to Appeal Applications to the Supreme Court of Canada: A Matter of Public Importance." *Supreme Court Law Review* 3:479–558.

Bushnell, Ian. 1986. "Leave to Appeal Applications: The 1984–1985 Term." *Supreme Court Law Review* 8:383–404.

Bushnell, Ian. 1992. *The Captive Court: A Study of the Supreme Court of Canada*. Montreal: McGill-Queen's University Press.

Cairns, Alan C. 1991. *Disruptions: Constitutional Struggles from the Charter to Meech Lake*, ed. Douglas E. Williams. Toronto: McClelland and Stewart.

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

Caldeira, Gregory A., and John R. Wright. 1988. "Organized Interests and Agenda Setting in the U.S. Supreme Court." *American Political Science Review* 82 (December):1109–27.

Casper, Gerhard, and Richard A. Posner. 1976. *The Workload of the Supreme Court*. Chicago: American Bar Foundation.

Court Challenges Program. 1992. *Court Challenges Program Annual Report, 1991–1992*. Ottawa: Court Challenges Program.

Devins, Reva. 1993. "A Perspective from the Ontario Human Rights Commission." In *The Impact of the Charter on the Public Policy Process*, ed. Patrick Monahan and Marie Finkelstein. North York, Ont.: York University Centre for Public Law and Public Policy.

Elster, Jon. 1988. "Introduction." In *Constitutionalism and Democracy*, ed. Jon Elster and Rune Slagstad. Cambridge: Cambridge University Press.

Epp, Charles R. 1995. "Constitutional Courts and the Rights Agenda in Comparative Perspective, 1960–1990." Ph.D. diss., University of Wisconsin-Madison.

Epstein, Lee, and Joseph F. Kobylka. 1992. *The Supreme Court and Legal Change: Abortion and the Death Penalty*. Chapel Hill: University of North Carolina Press.

Epstein, Lee, and C. K. Rowland. 1991. "Debunking the Myth of Interest Group Invincibility in the Courts." *American Political Science Review* 85 (March):205–17.

Frankfurter, Felix, and James M. Landis. 1927. *The Business of the Supreme Court: A Study in the Federal Judicial System*. New York: MacMillan.

Frideres, James S. 1993. *Native Peoples in Canada*. Scarborough, Ont.: Prentice-Hall.

Galanter, Marc. 1974. "Why the Haves Come Out Ahead: Speculations on the Limits of Social Change." *Law & Society Review* 9 (Fall):95–160.

Galanter, Marc, and Thomas Palay. 1991. *Tournament of Lawyers: The Transformation of the Big Law Firm*. Chicago: University of Chicago Press.

Greenberg, Douglas, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley. 1993. *Constitutionalism and Democracy: Transitions in the Contemporary World*. New York: Oxford University Press.

Hart, Vivien. 1994. *Bound by Our Constitution: Women, Workers, and the Minimum Wage*. Princeton: Princeton University Press.

Hartog, Hendrik. 1987. "The Constitution of Aspiration and 'The Rights that Belong to Us All.' " *Journal of American History* 74 (December):1013–34.

Heard, Andrew D. 1991. "The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal." *Canadian Journal of Political Science* 24 (June):289–307.

Holland, Kenneth M., ed. 1991. *Judicial Activism in Comparative Perspective*. New York: St. Martin's.

Holmes, Stephen. 1995. *Passions and Constraint: On the Theory of Liberal Democracy*. Chicago: University of Chicago Press.

Jick, Todd D. 1979. "Mixing Qualitative and Quantitative Methods: Triangulation in Action." *Administrative Science Quarterly* 24 (December):602–41.
Kagan, Robert A. 1994. "Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry." *Law & Social Inquiry* 19 (Winter):1–62.
Kagan, Robert A., Bliss Cartwright, Lawrence M. Friedman, and Stanton Wheeler. 1977. "The Business of State Supreme Courts, 1870–1970." *Stanford Law Review* 30 (November):121–56.
Kammen, Michael. 1986. *A Machine that Would Go of Itself: The Constitution in American Culture*. New York: Norton.
King, Gary, Robert O. Keohane, and Sidney Verba. 1994. *Designing Social Inquiry: Scientific Inference in Qualitative Research*. Princeton: Princeton University Press.
Kluger, Richard. 1977. *Simple Justice: the History of Brown v. Board of Education and Black America's Struggle for Equality*. New York: Vintage.
Knopff, Rainer. 1990. *Human Rights and Social Technology: The New War on Discrimination*. Ottawa: Carleton University Press.
Knopff, Rainer, and F. L. Morton. 1985. "Nation Building and the Charter." In *Constitutionalism, Citizenship and Society in Canada*, ed. Alan Cairns and Cynthia Williams. Toronto: University of Toronto Press.
Knopff, Rainer, and F. L. Morton. 1992. *Charter Politics*. Scarborough, Ont.: Nelson Canada.
Kome, Penney. 1983. *The Taking of Twenty-Eight: Women Challenge the Constitution*. Toronto: Women's Press.
Laskin, Bora. 1951. "The Supreme Court of Canada: A Final Court of and for Canadians." *Canadian Bar Review* 29 (December):1038–79.
Lawrence, Susan E. 1990. *The Poor in Court: The Legal Services Program and Supreme Court Decision Making*. Princeton: Princeton University Press.
Lowell, James Russell. 1888. "The Place of the Independent in Politics." In *Political Essays*. Boston: Houghton, Mifflin.
Madison, James. [1787–90] 1977, 1979. *The Papers of James Madison*.
Vol. 10. 1977. Chicago: University of Chicago Press.
Vol. 11. 1977. Charlottesville: University Press of Virginia.
Vol. 12. 1979. Charlottesville: University Press of Virginia.
Mandel, Michael. 1989. *The Charter of Rights and the Legalisation of Politics in Canada*. Toronto: Thompson.
Manfredi, Christopher P. 1993. *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*. Norman: University of Oklahoma Press.
March, James G., and Johan P. Olsen. 1989. *Rediscovering Institutions: The Organizational Basis of Politics*. New York: Free Press.
McCann, Michael W. 1994. *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: University of Chicago Press.
McCormick, Peter. 1993. "Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949–1992." *Canadian Journal of Political Science* 26 (September):523–40.
McGuire, Kevin T. 1993. *The Supreme Court Bar: Legal Elites in the Washington Community*. Charlottesville: University Press of Virginia.
Milligan and Company. 1989. "Evaluation of the Test Case Funding Program." Report prepared for Department of Indian Affairs and Northern Development. Ottawa.
Monahan, Patrick. 1987. *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada*. Toronto: Carswell.
Morton, F. L. 1987. "The Political Impact of the Canadian Charter of Rights and Freedoms." *Canadian Journal of Political Science* 20 (March):31–55.
Morton, F. L. 1993. "The Charter Revolution and the Court Party." In *The Impact of the Charter on the Public Policy Process*, ed. Patrick Monahan and Marie Finkelstein. North York, Ont.: York University Centre for Public Law and Public Policy.
Morton, F. L., and Rainer Knopff. 1993. "The Supreme Court as the Vanguard of the Intelligentsia: The Charter Movement as Post-Materialist Politics." In *Two Hundred Years of Canadian Constitutionalism*, ed. Janet Ajzenstat. Ottawa: Canadian Study of Parliament Group.
Morton, F. L., Peter H. Russell, and Troy Riddell. 1995. "The *Canadian Charter of Rights and Freedoms*: A Descriptive Analysis of the First Decade, 1982–1992." *National Journal of Constitutional Law* 5:1–60.
Morton, F. L., Peter H. Russell, and Michael J. Withey. 1989. "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis." *Osgoode Hall Law Journal* 30 (Spring):1–56.
National Legal Aid Research Centre. 1981. *Justice Information Report: Legal Services in Canada 1979/80*. Ottawa: Implementation Work Group.
Norberg v. *Wynrib*. 1992. 92 D.L.R. 4th 449.
O'Connor, Karen. 1980. *Women's Organizations' Use of the Courts*. Lexington, MA: Lexington Books.
Olson, Susan. 1990. "Interest-Group Litigation in Federal District Court: Beyond the Political Disadvantage Theory." *Journal of Politics* 52 (August):854–82.
Ordeshook, Peter C. 1992. "Constitutional Stability." *Constitutional Political Economy* 3 (2):137–75.
Oscapella, E. L., and Associates. 1988. "Legal Liaison and Support Study: Test Case Funding Program." Report prepared for the Department of Indian Affairs and Northern Development, Ottawa.
Pacelle, Richard L., Jr. 1991. *The Transformation of the Supreme Court's Agenda: From the New Deal to the Reagan Administration*. Boulder, CO: Westview Press.
Pal, Leslie. 1993. *Interests of State: The Politics of Language, Multiculturalism, and Feminism in Canada*. Montreal: McGill-Queen's University Press.
Pal, Leslie, and F. L. Morton. 1986. "*Bliss v. The Attorney General of Canada*: From Legal Defeat to Political Victory." *Osgoode Hall Law Journal* 24 (Spring):141–60.
Paltiel, Khayyam Z. 1982. "The Changing Environment and Role of Special Interest Groups." *Canadian Public Administration* 25 (Spring):198–210.
Perry, H. W., Jr. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge, MA: Harvard University Press.
Presthus, Robert. 1974. *Elites in the Policy Process*. Toronto: MacMillan.
Pross, Paul, ed. 1975. *Pressure Group Behaviour in Canadian Politics*. Toronto: McGraw-Hill, Ryerson.
Rakove, Jack N. 1991. "Parchment Barriers and the Politics of Rights." In *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law—1791 and 1991*, ed. Michael J. Lacey and Knud Haakonssen. Cambridge: Cambridge University Press.
Razack, Sherene. 1991. *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality*. Toronto: Second Story Press.
Romanow, Roy, John Whyte, and Howard Leeson. 1984. *Canada Notwithstanding: The Making of the Constitution 1976–1982*. Toronto: Carswell/Methuen.
Russell, Peter. 1985. "The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Resources." *Canadian Public Policy* 11 (March):161–70.
Rosenberg, Gerald N. 1991. *The Hollow Hope: Can Courts Bring About Social Change*? Chicago: University of Chicago Press.
Sartori, Giovanni. 1994. *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives, and Outcomes*. New York: New York University Press.
Segal, Jeffrey A., and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. Cambridge: Cambridge University Press.
Sheehan, Reginald S., William Mishler, and Donald S. Songer. 1992. "Ideology, Status, and the Differential Success of Direct Parties before the Supreme Court." *American Political Science Review* 86 (June):464–71.
Singh v. *Minister of Employment and Immigration*. 1985. 1 S.C.R. 177.
Snell, James G., and Frederick Vaughan. 1985. *The Supreme Court of Canada: History of the Institution*. Toronto: University of Toronto Press.
Songer, Donald R., and Reginald S. Sheehan. 1992. "Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals." *American Journal of Political Science* 36 (June):235–58.
Sorauf, Frank J. 1976. *The Wall of Separation: The Constitutional Politics of Church and State*. Princeton: Princeton University Press.
Stager, David A. A., and Harry W. Arthurs. 1990. *Lawyers in Canada*. Toronto: University of Toronto Press.
Sunstein, Cass R. 1995. "Rights after Communism." *East European Constitutional Review* 4 (Winter):61–2.
Tarnopolsky, Walter S. 1982. *Discrimination and the Law in Canada*. Toronto: Richard de Boo.

Tate, C. Neal, and Panu Sittiwong. 1989. "Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations." *Journal of Politics* 51 (November):900–16.
Tate, C. Neal, and Torbjorn Vallinder, eds. 1995. *The Global Expansion of Judicial Power*. New York: New York University Press.
Vose, Clement E. 1959. *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases*. Berkeley: University of California Press.
Walker, Samuel. 1990. *In Defense of American Liberties: A History of the ACLU*. New York: Oxford University Press.
Wasby, Stephen. 1995. *Race Relations Litigation in an Age of Complexity*. Charlottesville: University Press of Virginia.
Webb, Eugene J., Donald T. Campbell, Richard D. Schwartz, Lee Sechrest, and Janet Belew Grove. 1981. *Unobtrusive Measures: Nonreactive Research in the Social Sciences*. 2d ed. Chicago: Rand McNally.
Weingast, Barry R. 1993. "Constitutions as Governance Structures: The Political Foundations of Secure Markets." *Journal of Institutional and Theoretical Economics* 149 (1):286–311.
Zemans, Frances Kahn. 1983. "Legal Mobilization: The Neglected Role of the Law in the Political System." *American Political Science Review* 77 (September):690–703.
Zemans, Frederick. 1978. "Legal Aid and Advice in Canada." *Osgoode Hall Law Journal* 16 (November):663–93.