THE RIGHTS REVOLUTION

Lawyers, Activists, and Supreme Courts in Comparative Perspective

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To Robert O. and Amelia Epp

ONE

Introduction

Sed quis custodiet ipsos custodes?
(But who will guard the guardians?)

—Juvenal

On October 29, 1958, at 5:45 in the morning, nine Chicago police officers acting without a warrant forced their way into James and Flossie Monroe's home, pulled the Monroes and their six children out of bed, and forced them to stand half-naked in the living room while they ransacked the home, dumped out the contents of drawers, tore clothes out of closets, and slit open mattresses. Officer Pape, the leader, beat James Monroe with his flashlight and called him "nigger" and "black boy"; another officer pushed Flossie Monroe; and several officers kicked and hit the children and pushed them to the floor. The officers eventually took Mr. Monroe to a station house, where he was forced to appear in a lineup and was questioned for ten hours about a recent murder. Throughout the ordeal, the officers refused to allow Monroe to call a lawyer or his family. In the end he was released—the victim of a story about a "Negro robber" concocted by the real murderers. The Monroe family sued the officers under a federal civil rights statute, but the federal district court and the court of appeals rejected their right to sue in federal court. In 1961, to the surprise of many, the United States Supreme Court reversed and granted them this right.[1]

A few years later a decision like *Monroe v. Pape* would seem routine. But in early 1961 the Court had yet to establish its reputation as a consistent defender of individual rights against official abuses of power.[2] Only a few years earlier, for instance, in *Screws v. United States*, a criminal case brought against a Georgia sheriff who had brutally beaten a black man to death, the Supreme Court overturned the sheriff's conviction and created a difficult standard for convicting perpetrators of police brutality.[3] The sheriff was acquitted on retrial under the new standard. The *Monroe* decision, by contrast, opened the door to civil lawsuits to redress official abuses of individual rights.[4]

The decision, moreover, was part of a much larger transformation in

which the Supreme Court, for the first time in its history, began deciding and supporting individual rights claims in a sustained way. As late as the mid-thirties, less than 10 percent of the Court's decisions involved individual rights other than property rights; the Court instead devoted its attention to business disputes and often supported property-rights claims brought by businesses and wealthy individuals.[5] The Court's attention and support eventually shifted to modern individual rights.[6] By the late sixties, almost 70 percent of its decisions involved individual rights,[7] and the Court had, essentially, proclaimed itself the guardian of the individual rights of the ordinary citizen. In the process, the Court created or expanded a host of new constitutional rights, among them virtually all of the rights now regarded as essential to the Constitution: freedom of speech and the press, rights against discrimination on the basis of race or sex, and the right to due process in criminal and administrative procedures. Undoubtedly the depth of this transformation is limited in important ways: some rights have suffered erosion, and, as many Americans know, judicial declarations of individual rights often find only pale reflections in practice.[8] But as I demonstrate in more detail shortly, the transformation has been real and it has had important effects. This transformation is commonly called the *rights revolution*.

Why did the rights revolution occur? What conditions encouraged the Supreme Court to regularly hear and support individual rights cases after largely ignoring or spurning them for 150 years? And why, after many years of hearing claims by powerful businesses, did the Court regularly turn its attention to the claims of "underdogs"? In sum, *what were the sources and conditions for the rights revolution?*

Sources and Conditions for the Rights Revolution

The U.S. rights revolution is usually attributed to one or more of the following: constitutional guarantees of individual rights and judicial independence, leadership from activist judges (particularly Supreme Court justices) who have been willing to use those constitutional provisions to transform society, and the rise of rights consciousness in popular culture. Conventional explanations tend to place particular emphasis on judicial leadership as the catalyst for the rights revolution. Constitutional guarantees, judicial leadership, and rights consciousness certainly contributed to the U.S. rights revolution. This book shows, however, that sustained judicial attention and approval for individual rights grew primarily out of pressure from below, not leadership from above. This pressure consisted of deliberate, strategic or-

ganizing by rights advocates. And strategic rights advocacy became possible because of the development of what I call the support structure for legal mobilization, consisting of rights-advocacy organizations, rights-advocacy lawyers, and sources of financing, particularly government-supported financing.

This support structure has been essential in shaping the rights revolution. Because the judicial process is costly and slow and produces changes in the law only in small increments, litigants cannot hope to bring about meaningful change in the law unless they have access to significant resources. For this reason, constitutional litigation in the United States until recently was dominated by the claims of powerful businesses; they alone commanded the resources necessary to pursue claims with sufficient frequency, acumen, and perseverance to shape the development of constitutional law. And for this reason, too, constitutional law and the courts largely ignored the potential constitutional rights claims of ordinary individuals. The rights revolution grew out of the growing capacity of individual rights advocates to pursue the forms of constitutional litigation perfected by organized businesses, but for very different ends. The growth of the support structure, therefore, significantly democratized access to the Supreme Court.

Others have posited, of course, that political pressure and organized support for rights litigation influence judicial attention and approval for civil rights and liberties.[9] My analysis builds on such research. But what is distinctive about my analysis is its emphasis on material resources, on the difficulty with which those resources are developed, and on the key role of those resources in providing the sources and conditions for sustained rights-advocacy litigation. Many discussions of the relationship between the Supreme Court and litigants assume that the resources necessary to support litigation are easily generated and that, as a result, litigants of all kinds have always stood ready to bring forward any kind of case that the Court might indicate a willingness to hear and decide. But that presumes a pluralism of litigating interests and an evenness of the litigation playing field that is wholly unjustified. Not every issue is now, nor has been in the past, the subject of extensive litigation in lower courts, due in part to limitations in the availability of resources for legal mobilization.

Implications of the Support-Structure Explanation

The support-structure explanation for the U.S. rights revolution is significant for two closely related debates in contemporary politics and constitutional law: (1) whether (or to what extent) democratic pro-

cesses must be sacrificed in order to achieve protection for individual rights, and (2) how best to protect individual rights in modern society. Many people perceive a deep tension between rights and majoritarian democracy and believe that, if we wish to "guard the guardians" (the police and other public officials), we must turn unaccountable power over to judicial guardians. Some critics have claimed that the Supreme Court's decision in the *Monroe* case, for instance, amounts to a judicial usurpation of power because under the *Monroe* precedent, courts have constrained the discretion of public officials without regard to the wishes of democratic majorities.

The rights revolution, either implicitly or explicitly, is at the heart of the debate over the relationship between rights and democracy. For it was during the rights revolution, according to the advocates of contemporary individual rights, that courts finally began properly defending and protecting such rights. And according to the critics of the new rights, it was during the rights revolution that judicial power grew out of control and eroded the democratic process. Robert Bork, a leading critic of the new rights, has described the rights revolution as "the transportation into the Constitution of the principles of a liberal culture that cannot achieve those results democratically." Creating rights through judicial interpretation, he declares, is "heresy," and "it is crucial to recognize a heresy for what it is and to root it out."[10] His use of the term "heresy" is deliberate, for the key problem, in Bork's view, is a heretical judicial interpretation of a foundational written text, the Constitution. In the judges' hands, Bork charges, the Constitution has been transformed from a mechanism for limiting arbitrary governmental power into a source for arbitrary judicial power. As Bork observed, "the Constitution is the trump card in American politics, and judges decide what the Constitution means."[11] This is a judge-centered analysis of the rights revolution, but it also asserts that judicial power depends on constitutional structure.

To a remarkable degree many defenders of contemporary rights accept the judge-centered interpretation of the rights revolution and of rights protection in general; they acknowledge that the rights revolution grew out of fundamentally undemocratic processes. But they defend many of the new rights on the ground that the results, in the end, strengthened democracy.[12] In this view, for instance, the electoral reapportionment rulings of the early sixties[13] deeply interfered with the democratic political process but did so in order to enhance the fairness of that process.[14]

If my thesis is correct, however, the common emphasis on constitutional provisions and judges is exaggerated and the concern about undemocratic processes is ill founded. Of course it is unlikely that a majority of the population, if polled, would have supported each judicial decision in the rights revolution. But many legislative policies could not survive a popular referendum either. The meaning of "democracy" is thus complex and nuanced, and the critics recognize that fact by focusing mainly on the issue of process—claiming that the process of rights creation is judge-dominated and therefore is *intrinsically* less a result of broadly based action than is legislative policy making.

This book is intended in part to refute that persistent claim by showing that the rights revolution depended on widespread support made possible by a democratization of access to the judiciary. Cooperative efforts among many rights advocates, relying on new resources for rights litigation—financing, organizational support, and willing and able lawyers—provided the raw material for the rights revolution. Many of those resources either were legislatively created or reflected a democratization and diversification of the legal profession and the interest-group system. Neither judges nor constitutional guarantees are irrelevant; judges ultimately decide whether to support rights claims, and constitutional guarantees may become rallying symbols for social movements and may provide footholds for lawyers' arguments and foundations for judicial decisions. But both the policy preferences of judges and the meaning of constitutional rights are partly constituted by the political economy of appellate litigation, particularly the distribution of resources necessary for sustained constitutional litigation. If the rights revolution developed out of the growth of a broad support structure in civil society, if rights litigation commonly reflects a significant degree of organized collective action, and if judicially declared rights remain dead letters unless they gain the backing of a broad support structure, then the rights revolution was not undemocratic or antidemocratic, even in the processes that created it. And if the evidence and analysis in support of that proposition is persuasive, then critics bear the burden of explaining why we should return to a time when only large businesses and the wealthy commanded the organizational strength, resources, and legal expertise to mobilize constitutional law in their favor.

The support-structure explanation is likewise pertinent to the other rights-related debate mentioned above—how best to protect individual rights in modern society. In the United States, great political battles

are fought over judicial nominees. In other countries, some citizens wish for a John Marshall or an Earl Warren (great American Supreme Court Justices) to breathe life into their moribund constitutional law. And constitutional lawyers from the United States jet about the world engaging in "constitutional engineering," the process of creating new constitutions for other countries—on the assumption that new or revised constitutional structures and guarantees will re-form other societies.

Under the support-structure explanation proposed here, however, proponents of expanded judicial protection for rights should not place *all* hope in judges or constitutional reform but should provide support to rights-advocacy lawyers and organizations. If a nation—the United States or any other—wishes to protect individual rights, it would do well not to confine its efforts to encouraging or admonishing its judges, fine-tuning its constitution, or relying on the values of popular culture to affect rights by osmosis. Societies should also fund and support lawyers and rights-advocacy organizations—for they establish the conditions for sustained judicial attention to civil liberties and civil rights and for channeling judicial power toward egalitarian ends.

The Genesis of the Support-Structure Explanation

The standard emphases on judges, constitutional text, and popular culture reflect a nearly exclusive focus in past research on the U.S. case. In the United States, liberal judges, constitutional rights guarantees, and growing popular support for individual rights coincided at the time of the rights revolution, and so commentators attempting to interpret or explain the rights revolution commonly looked no further than those influences. But as I started to study the U.S. rights revolution I became aware of similar (or apparently similar) rights revolutions in other countries. In Britain, for instance, a country with a conservative judiciary and no constitutional bill of rights, individual rights nonetheless are gaining increasing judicial attention and support.[15] Such developments encouraged me to look for other possible influences, and my focus here on resources for legal mobilization is the result. The four common-law countries selected for my comparative analysis—the United States, India, Britain, and Canada—have gained reputations as sites of rights revolutions (of varying strengths and focuses, to be sure) but differ in a number of dimensions, particularly in their constitutional structures, the reputations of their judges for creativity and activism, the presence of rights consciousness in popular culture, and the strength of their legal mobilization support structures.

In such a comparative investigation, clarity about what is being compared is essential. *Rights*, as I use the term here, consist of the new rights that emerged in judicial interpretation of U.S. constitutional law and statutes in this century. Constitutional rights in the past had been primarily the rights of property and contract. The new rights encompass, among other rights, freedom of speech and the press; free exercise of religion and prohibitions on official establishment of religion; prohibitions against invidious discrimination on the basis of race, sex, and a few other more or less immutable characteristics; the right of privacy; and the right to due process in law enforcement and administrative procedure. What precisely these new rights include and how they are to be applied in practice of course remain matters of some dispute.

I have focused, in particular, on women's rights and the rights of criminal defendants and prisoners. These two issues are especially useful lenses through which to analyze rights revolutions, for their status varies significantly from country to country and also over time. Criminal procedure is an issue within the traditional purview of common-law courts, yet until recently it received little attention in supreme courts. Criminal defendants form a diffuse, unorganized class; I examine how, in some countries and under some conditions, the rights claims of criminal defendants nonetheless came to form a major element of the rights revolution. The issue of women's rights, by contrast, is relatively new to judicial systems. Many countries' courts initially resisted the development of women's rights, yet those rights are now a significant part of the rights revolution in some of these countries. Moreover, the level of organized support for women's-rights litigation has varied significantly among countries and over time.

The *rights revolution*, as I use the term, was a sustained, developmental process that produced or expanded the new civil rights and liberties. That process has had three main components: judicial attention to the new rights, judicial support for the new rights, and implementation of the new rights. This book examines each of the four countries in terms of these components. Judicial attention (or the "judicial agenda") is measured as the proportion of cases decided by a court per year focusing on particular issues, among them the new rights. Judicial support is gauged more informally, by examining the general direction of a court's policies with regard to rights. Implementation of

judicial decisions is a complex and multifaceted matter and, with respect to implementation, this book focuses on the extent to which courts have issued a continuing stream of judicial decisions that enforce or elaborate on earlier decisions.

Do Rights Matter in Practice?

It is important to emphasize that developments in the first two components—greater judicial attention to individual rights, and greater judicial support for them—may not lead to greater protection for those rights in practice. As Gerald Rosenberg has argued, the enforcement powers of courts acting on their own are relatively weak, and some of the key rights announced by the Supreme Court during the rights revolution were not implemented and had little of their intended effect.[16]

Nonetheless, there is good reason to believe that an expansion of the support structure for legal mobilization may significantly enhance the implementation of judicially declared rights in practice. Rosenberg showed that the Supreme Court's decision in *Brown v. Board of Education*[17] striking down racial segregation in public schools was implemented far more rapidly and substantially in the southern states that bordered the north than in the deep South because many officials in the border states favored desegregation and used the *Brown* decision to push for it.[18] Similarly, Michael McCann found that union advocates of comparable worth policies used judicial rulings as leverage in private bargaining to gain favorable changes in work contracts.[19] Those studies suggest that implementation of judicial decisions is greatly influenced by the acts and strategies of public officials and rights advocates. Yet the effectiveness of rights advocates in these endeavors is likely to be conditioned by their knowledge and resource capabilities. As Marc Galanter has written, "the messages disseminated by courts do not carry endowments or produce effects except as they are received, interpreted, and used by (potential) actors. Therefore, the meaning of judicial signals is dependent on the information, experience, skill, and resources that disputants bring to them."[20] The presence and strength of a support structure for legal mobilization enhances the information, experience, skill, and resources of rights claimants and thus likely affects the implementation of judicial decisions on rights. The American Civil Liberties Union (ACLU), for instance, provides individuals with assistance in asserting and defending judicially declared rights in a wide variety of situations.

The dramatic expansion of the United States Supreme Court's attention to liberal rights, then, in conjunction with a vibrant support structure, provided a new assembly of bargaining tools and symbolic resources to a wide array of previously "right-less" individuals and groups. There are limits to the social changes produced by judicial rulings, and those rulings depend on support from government officials and on private parties having the capability to use them well. But judicial rulings may be used to great effect by rights organizers. The rights revolution in the United States did not merely result in judicial recognition of the existence of individual rights; it also gave rights advocates bargaining power and leverage that enabled them to expand protection for individual rights in practice.

An Illustration

The importance of the support structure for legal mobilization may be illustrated by the addition of a few details to the story of *Monroe v. Pape*. James and Flossie Monroe, it turns out, were not exactly lone individuals facing a hostile government on their own. The National Association for the Advancement of Colored People Legal Defense and Educational Fund (NAACP-LDF) for years had pushed a campaign of strategic litigation and political pressure against police brutality and racial discrimination in the criminal justice system, and it had gained the support of the Civil Rights Section of the United States Department of Justice.[21] Then, in the late fifties, the Illinois chapter of the ACLU funded a large study of the problem of illegal detention and questioning by the Chicago police. In 1959, the organization published the study, titled *Secret Detention by the Chicago Police*, which documented, on the basis of a random sample of court cases, that more than half of all persons arrested in Chicago were held and questioned in police stations for more than seventeen hours without any formal charges being filed; 10 percent were held for more than forty-eight hours.[22] The report showed that James Monroe's situation—at least from the time he reached the police station—was not unusual: the Illinois ACLU estimated that twenty thousand people in Chicago suffered similar illegal detention and questioning annually. Supreme Court Justices William O. Douglas and Tom Clark requested copies of the report, and Douglas soon cited it in a speech.[23] Two years later, after the Monroes' appeal had wound its way up through the court system, Justice Douglas wrote the Supreme Court's majority opinion in the case. The NAACP-LDF and Justice Department work, and the Illinois ACLU study in particular, provided the background to the *Monroe* case.

And then there is the matter of how the Monroes managed to pursue

their case up through the judicial hierarchy and present a persuasive legal argument, in an area of the law fraught with esoteric precedents and rules, before the Supreme Court. The main author of their brief before the Court, it turns out, was Morris Ernst, who had been one of the ACLU's leading lawyers since the twenties. The ACLU, then, provided direct support for the *Monroe* case.

The story of *Monroe v. Pape* gets even more complicated. Justice Douglas's opinion in favor of the Monroes was a classically incrementalist decision. By exposing the Chicago police officers to financial liability for their actions, the decision constituted a victory for individual rights advocates and a defeat for their opponents. But Douglas declined to take the additional step of exposing city *governments* to liability for the actions of their officers. And so civil rights advocates criticized the Court for not going far enough, for failing to give cities any incentive to properly train and discipline their officials. The NAACP-LDF, in particular, pursued a legal campaign to convince the courts to take that next step, which the Supreme Court eventually completed in 1978.[24]

The right (really a remedy) won by James and Flossie Monroe thus rested on far more than judicial power and constitutional promises (although both were crucial), and the judicial decision that declared the right was not in any ordinary sense tyrannical. The new right grew out of the collective efforts of a large number of people who relied on organizational, legal, and financial resources that had been created by broad, collective efforts.

TWO

The Conditions for the Rights Revolution: Theory

Conventional interpretations of the rights revolution identify several key factors—constitutional guarantees, judicial leadership, and popular rights consciousness—that have a venerable place in theories of constitutional democracy. The thesis of this book is not that these factors are irrelevant but that they are insufficient to explain the rights revolution. In this chapter I examine the theoretical logic of the conventional interpretations and show how the support-structure explanation supplements them in crucial ways. Although the various factors interact in practice, many commentators give primacy to one or another, and it is useful to discuss each one separately.

Conventional Interpretations

The Constitution-Centered Explanation: Judicial Independence and Bills of Rights

In the constitution-centered view, the crucial conditions for a rights revolution are structural judicial independence and a foundation of constitutional rights guarantees; given those conditions, judges are free to devote sustained attention and approval for civil rights and liberties. The judicial system's structural independence from direct political pressure is widely recognized as a necessary condition for any significant judicial check on arbitrary power. Courts are structurally independent to the extent that the job security and salaries of their judges, and the decision-making process, are insulated from political manipulation.[1]

Apart from judicial independence, the presence or absence of constitutional rights guarantees is widely believed to be the most important influence on the extent of judicial policy making on rights. In the popular imagination, there is no doubt that judicial support for rights flows from a bill of rights. Many scholars, too, view constitutionally en-

trenched bills of rights as significant influences on judicial policies. (The term "entrenched bill of rights," though not common in the United States, is widely used elsewhere to refer to constitutional rights guarantees that authorize judicial review of ordinary statutes). Standard comparisons of the United States and other countries, for instance, typically trace the extraordinary vibrancy of judicial review of state action, judicial attention to rights, and judicial policy making on rights in the United States to the presence of an entrenched bill of rights in the United States Constitution.[2] The U.S. experience, indeed, has powerfully shaped standard conceptions of the influence of constitutional rights guarantees. The common addition of bills of rights in the last several decades to constitutions around the world is surely due in part to admiration of the U.S. model.[3]

Nonetheless, proposals to adopt a bill of rights have often provoked heated debate in many countries. In France, for example, Edouard Lambert opposed establishment of a constitutional bill of rights in the early decades of this century because he feared it would enable French judges to mimic American judges' opposition to economic regulation and planning.[4] The framers of the Indian Constitution in the late forties deliberated at some length on the dangers of American-style judicial activism and then, following the advice of United States Supreme Court Justice Felix Frankfurter, eviscerated a proposed due process clause in order to limit the Indian Supreme Court's power.[5] Canadian debates over adoption in 1982 of the Charter of Rights and Freedoms focused in large part on the desirability of authorizing judges to review legislation; a number of Canadians vigorously opposed the Charter for fear that it authorized what they called American-style judicial activism.[6] In Britain, debates over whether to establish a written bill of rights continue to revolve around the degree to which judges may be trusted with expanded powers.[7]

Debates over proposed bills of rights are vigorous because the documents are widely believed to produce profound effects. One presumed effect, as the foregoing survey suggests, is an expansion of judicial power.[8] Bills of rights undoubtedly seem to grant great but poorly defined powers to the judiciary. It is widely assumed that judges cannot resist the temptation to use those powers broadly and, further, that a bill of rights stymies the legislature from curbing judicial action. Thus, James Madison speculated that a bill of rights would "naturally" lead courts to "resist every encroachment upon rights" by legislatures and executives.[9]

Bills of rights are also thought to encourage the growth of many

competing interest groups. In systems without a bill of rights or judicial review, policies are made primarily in the legislative and executive branches of government. In those forums, groups must form broad coalitions to advance their interests. But some observers have argued that, in systems with an entrenched bill of rights, groups have an incentive to avoid the task of coalition building because they can go it alone in the courts.[10]

Additionally, bills of rights are believed to powerfully shape popular culture. Thus, James Madison argued that "[t]he political truths declared in that solemn manner [in a bill of rights] acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion."[11] Similarly, others have argued that a bill of rights may promote the development of "rights consciousness" in popular culture. That is, the existence of constitutional rights guarantees may encourage individuals to interpret harms to their interests as violations of "rights" and, because of this changed consciousness, constitutional rights may become rallying points for social movements and popular pressure on government. The U.S. Constitution's rights guarantees, according to Vivien Hart, encouraged a popular belief in the right to a minimum wage; and Hendrik Hartog has argued that adoption of the Fourteenth Amendment in 1868 provided a new rallying point for political and social movements by African-Americans, women, and others.[12] In Canada, a supporter of the ill-fated 1960 Bill of Rights argued that "the real significance of the Canadian Bill of Rights lies not in its content but in the way in which it has served as a focal point for and stimulus to arguments about civil liberties. . . . The very existence of this Bill of Rights . . . both acts as a milestone on the road to increased consciousness of civil liberties and itself serves to encourage their further development."[13]

But the effects of a constitutional bill of rights are commonly exaggerated. Among the many new bills of rights created since 1945, some are shams, and even those that are not are quite flexible in practice. Both the U.S. Bill of Rights and the Indian Constitution's anemic due process clause were ignored for many years but have since become foundations for much judicial policy making. The fate of a bill of rights thus depends on forces outside of it. In the United States, at least, the relatively broad arena of judicial action and the limits on legislative power are plausibly due less to the Bill of Rights alone than to the many veto points in the legislative process and the practical difficulty of passing court-curbing actions.[14] And judges are likely to use their

powers under a bill of rights only if they oppose public policy, yet many judges support public policies against rights claims. Additionally, from the perspective of the ordinary individual, a bill of rights, by itself, offers only promises but no resources or remedies for mobilizing those promises in the judicial system. Thus, A. V. Dicey argued that constitutional rights guarantees were meaningless in the absence of ordinary legal remedies to invoke them.[15] Similarly, James Madison warned that a bill of rights would be ineffective *"particularly . . . where the law aggrieves individuals, who may be unable to support an appeal [against] a State to the supreme Judiciary."*[16] It thus takes more than judicial independence and a bill of rights to make a rights revolution.

The Judge-Centered Explanation: Judicial Leadership and Docket Control

According to the judge-centered explanation for rights revolutions, significant judicial protection for individual rights results primarily from supportive judges who have the power to focus on the cases that interest them. Judges, of course, ultimately decide who wins and who loses in appellate cases and whether a particular rights claim is accepted or rejected. Over time, the accretion of such judicial decisions shapes the development of the law. Thus, rights revolutions undoubtedly cannot happen without rights-supportive judges. In the U.S. case, in particular, judicial leadership has always seemed crucial to the genesis of the rights revolution. In 1953 Earl Warren assumed leadership of a Supreme Court that contained only a few consistent supporters of civil liberties and civil rights, and within a few years enough other supporters of those rights joined the Court to form a solid liberal majority. The decisions of that majority greatly expanded the scope of constitutional rights and significantly contributed to the U.S. rights revolution.

As illustrated by the Warren Court, judicial attitudes undoubtedly influence judicial decisions, but judicial leadership, by itself, cannot create a rights revolution. The influence of judicial attitudes is likely to depend on structural judicial independence (as discussed in the last section) and on the extent to which judges can choose which cases to decide.[17] Judicial freedom to choose cases varies from country to country and from court to court, depending on the extent of legislatively granted docket control. Some courts must decide nearly every case that comes to them; those courts typically become overloaded with routine disputes between private parties and therefore cannot focus on cases they might regard as especially important. Other courts, for instance the United States Supreme Court, enjoy nearly complete control over their dockets and, therefore, may choose which issues they

will decide. Greater discretion at the agenda-setting stage enhances the influence of judicial attitudes more generally. At the extreme, a court that enjoys complete discretion over its docket and that receives a wide array of cases may create whatever agenda it wishes. At the least, it is clear that when the United States Supreme Court gained control of its agenda in 1925, the Court used that discretion to increase its attention to constitutional and other public law issues and decrease its attention to mundane disputes between private parties.[18] Similarly, as state supreme courts in the United States have gained discretionary control over their dockets, their agendas have shifted away from private economic disputes and toward public law.[19]

If a court has structural independence and control of its docket, then its decisions—in theory— may become a matter of personal idiosyncrasy and historical accident—a matter of who is chosen to sit on a court and how long it takes the judge to retire or die. As Robert Yates, an antifederalist critic of the United States Constitution, predicted of Supreme Court judges: "There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself."[20] With an expansive view of the Supreme Court's freedom and a recognition of the growing liberalism of its justices in the fifties and sixties, some proponents of the judge-centered explanation have characterized the U.S. rights revolution as the virtually independent creation of a few Supreme Court justices.[21]

Like the constitution-centered explanation, the judge-centered explanation for rights revolutions undoubtedly has much validity, especially in the United States. Even liberal judges armed with control of their dockets and an entrenched bill of rights, however, cannot make rights-supportive law unless they have rights cases to decide, and the process of mobilizing cases rests on far more than judicial fiat. The judge-centered explanation, alone or in combination with the constitution-centered explanation, is incomplete.

The Culture-Centered Explanation: Culture and Rights Consciousness

Under the culture-centered explanation for rights revolutions, popular culture is thought to influence judicial protection of individual rights in several ways. First, judges are themselves shaped by a society's cultural assumptions and are therefore unlikely to either create rights not

recognized by their society or undermine rights highly valued by their society. Second, courts lack the institutional power to enforce decisions that run contrary to widely held beliefs. Third, the number and kinds of issues that citizens take to the courts as rights claims depend on whether and how the society's culture frames disputes in terms of rights.

These three influences are commonly highlighted by proponents of the culture-centered explanation. Thus, Louis Hartz argued that the power of the U.S. Bill of Rights and the Supreme Court resulted not only from the Constitution but, more importantly, from Americans' "Lockian creed" of liberal individualism, which encourages Americans to frame their political ideals in terms of individual rights, to take their concerns to courts, and to expect courts to make policy on such questions.[22] Mary Ann Glendon has similarly claimed that a popular culture of liberal "rights talk" in the United States has increased the emphasis on rights in American constitutionalism and has thus encouraged and reinforced the Supreme Court's focus on individual rights.[23] And although Glendon emphasizes the continuing uniqueness of the liberal language of rights in the United States, she recognizes that the rights agenda is growing elsewhere, and she attributes this growth to the globalization of human rights discourse.[24]

But the influence of American-style "rights talk" is not the only factor that has affected global awareness of individual rights. The spread of rights consciousness is also likely related to the "democratic deficit" of the modern bureaucratic state. In the twentieth century, particularly since 1945, state bureaucracies have grown far beyond the capacity of the electoral and legislative process to exercise anything approaching direct control, and critics in many countries have bemoaned that lack of democratic accountability. Individual-level checks on the administrative process—in addition to collective control over it—have therefore become increasingly attractive. And individual-level checks are articulated in the language of rights. As Jack Donnelly has argued, the repressive capacities (or, more benignly, the bureaucratic capacities) of the modern state virtually demand a response emphasizing individual rights.[25] That response, in turn, arguably has helped to legitimate judicial oversight over the administrative process. Mauro Cappelletti, for instance, has argued that the growing intervention in individuals' lives by national state bureaucracies, combined with the difficulty of using the electoral process to correct abuses, has encouraged the development of rights discourse and legitimated the growth of judicial oversight over the administrative process.[26] Indeed, in each of the countries

in this study, as government grew, there also began to develop a pervasive sense that unrestrained governmental power threatened important values and that at least some governmental power should be harnessed to serve egalitarian purposes. In each country, the courts and individual rights were seen to be possible institutional mechanisms for achieving those goals.

The culture-centered explanation for rights revolutions is thus partly correct. Cultural frames undoubtedly shape the kinds of claims that individuals can even conceive, as well as the kinds of changes that they view as within the realm of possibility.[27] Individuals, whether ordinary citizens or judges, cannot assert or sanction a right unless they can conceive of the idea of a "right" in general and also of the particular right in question. And so surely the growing attention paid by supreme courts to rights claims would not have developed in the absence of the concept of "rights" or the extension of that concept to areas of life previously untouched by it. Protection of women's rights, for example, depended in part on a growing recognition that gender discrimination is a problem. That recognition is such a recent development that, when Herbert Wechsler gave his famous lecture in 1959 on "neutral principles" in judicial decision making, he offered classification by sex as an example of a type of discrimination that was beyond reproach.[28] The perception that gender discrimination is a problem, however, has grown, and women's-rights claims are now heard and upheld by judges. A minimal recognition of rights, therefore, is a necessary condition for development of a judicial rights agenda and, for that reason, the spread of rights consciousness throughout much of the world has undoubtedly contributed to the development of judicial attention to rights.

But rights consciousness alone is likely to be insufficient to produce an expansion in judicial attention and support for rights, because cases depend on material support, and material support does not flow automatically from changed perceptions.[29] Combining rights consciousness with a bill of rights and a willing and able judiciary improves the outlook for a rights revolution, but material support for sustained pursuit of rights cases is still crucial. A support structure for legal mobilization provides this missing ingredient.

The Support Structure for Legal Mobilization

The unstated premise of the conventional explanations for rights revolutions is that lawsuits and appeals easily arise as a reflection of constitutional provisions, judicial policies, and/or cultural changes. Thus, in

the standard theories, a rights-friendly culture naturally generates rights cases; litigants easily and naturally rely on constitutional rights guarantees; and litigants pursue rights claims if judges indicate a friendliness toward those claims.

But cases do not arrive in supreme courts as if by magic. The premise of the alternative explanation proposed here is that the process of legal mobilization—the process by which individuals make claims about their legal rights and pursue lawsuits to defend or develop those rights—is not in any simple way a direct response to opportunities provided by constitutional promises or judicial decisions, or to expectations arising from popular culture.[30] Legal mobilization also depends on resources, and resources for rights litigation depend on a support structure of rights-advocacy lawyers, rights-advocacy organizations, and sources of financing.

The logic behind the support-structure explanation consists of two interrelated points. First, rights revolutions depend on widespread and sustained litigation in support of civil rights and liberties. Supreme courts that can choose their cases usually will not hear an issue unless cases presenting the issue have reached critical mass in the judicial system; the United States Supreme Court hesitates to hear an issue that has not, in Supreme Court parlance, "percolated" in lower courts.[31] Moreover, even landmark decisions are isolated symbols unless they are supported by a continuing stream of cases providing clarification and enforcement. For example, the implementation of *Brown v. Board of Education*,[32] the 1954 United States Supreme Court decision overturning racial segregation in public schools, depended in large part on a number of later cases (as well as support from Congress and the presidency).[33] Widespread and sustained litigation, therefore, is crucial to a rights revolution.

The second point is that successful rights litigation usually consumes resources beyond the reach of individual plaintiffs—resources that can be provided only by an ongoing support structure. The judicial process is time-consuming, expensive, and arcane; ordinary individuals typically do not have the time, money, or expertise necessary to support a long-running lawsuit through several levels of the judicial system. For this reason, Marc Galanter argued that "one-shotters"—ordinary individuals with little experience in the courts—typically fare poorly in comparison to seasoned, well-resourced organizational litigants ("repeat players") unless the one-shotters can gain the resource-related advantages held by repeat players.[34] Moreover, successful rights litigation depends on a steady stream of rights cases that press

toward shared goals, for changes in constitutional law typically occur in small increments. A support structure can provide the consistent support that is needed to move case after case through the courts. Although one might expect the contingency fee system to provide needed financial support to rights litigants in the United States, it actually provided little support for civil rights and liberties cases during the formative years of the rights revolution. The fruits of constitutional rights victories are essentially "public goods," legal guarantees that benefit a population much broader than the immediate plaintiff seeking to create or expand the right. So at the broadest level, the benefits to rights advocates have outweighed the costs of cases. But at the level of the individual cases, the cost of pursuing a rights case has usually exceeded any monetary award to the plaintiffs (at least in the early phases of a rights revolution), so lawyers have had little monetary incentive to take such cases on a contingency basis. Organized rights advocates, however, have developed a range of sources of support—comparable to the resources held by repeat players—and have made them available to potential rights claimants. These sources of support, consisting of rights-advocacy organizations, willing and able lawyers, financial aid of various types, and, in some countries, governmental rights-enforcement agencies, form what I call the support structure for legal mobilization.

Each of the main components of the support structure has contributed to the process of legal mobilization in significant ways. Organized groups help to provide expert legal counsel and to develop and coordinate legal research and strategy; they provide financing or aid in finding sources of financing; they sponsor or coordinate nonlegal research, particularly in the areas of social science, history, and medicine, that support particular legal claims; they provide publicity; and they provide networks of communication and thereby facilitate the exchange of ideas.[35]

Some governmental rights-enforcement agencies have played a role very similar to private groups. In the United States, the Justice Department at some points in its history has directly supported lawsuits, conducted and coordinated legal research and strategy, and filed supportive briefs as an *amicus curiae* (a nonparty "friend of the court").[36] In some other countries, too, the support of government agencies has been crucial for the development of civil liberties and civil rights litigation.

Funding has come from private foundations, wealthy individuals, and some government programs, particularly legal aid in some countries.[37] Funding from these sources has provided crucial start-up costs

for organizations as well as ongoing support for litigation campaigns. More recently, in the United States some financing has come from fee-shifting statutes that authorize judges to award attorneys' fees to rights plaintiffs whose claims succeed.

Willing and able lawyers, too, have played a crucial role. Lawyers speak for rights plaintiffs in court, contribute to legal strategy, and provide much of the network through which information about rights litigation travels.[38] Rights-supportive lawyers and law schools have also built a body of scholarship on individual rights and legal remedies, which aids others in learning how to successfully pursue rights-advocacy litigation. The availability of such lawyers depends in large part on the diversity and organization of the legal profession in a given country at a given time.[39] The extent to which a legal profession is racially and ethnically diverse and open to women significantly influences the extent to which it provides access to the courts to women and members of racial and ethnic minorities. And the extent to which lawyers practice in firms rather than alone influences their ability to specialize, to work on nonremunerative cases, and to take advantage of economies of scale.

The support structure for legal mobilization is neither a judicial creation nor a direct result of a bill of rights. Opportunities provided by judges and by a bill of rights certainly influence the extent to which people invest time and resources in developing parts of the support structure. But the components of the support structure reflect other influences as well. Rights-advocacy group organizing has historically reflected changes in public policy, the availability of resources, and the growth of knowledge about how to form citizen-action groups.[40] The diversity of the legal profession has reflected patterns of immigration and access to higher education. And the availability of financing has reflected the rise of private foundations and changes in government policy.

Support Structures and Rights Revolutions

Throughout this book, analysis of the relationship between the support structure for legal mobilization and sustained judicial attention and support for rights focuses on the timing of developments in these two areas. Vibrant support structures are a relatively new development—but *they preceded and supported the development of rights revolutions.* Most of the significant developments in the support structure in the United States—including the birth of organized rights-advocacy groups—began shortly after 1910. In other countries, significant developments

came after 1965. The NAACP, the ACLU, the International Labor Defense, and other litigation support groups were formed in the early decades of this century; they organized, financed, and provided legal counsel for many of the most important civil rights and liberties cases to reach the United States Supreme Court.[41] More recently, in a number of other countries interest groups have played an increasingly important role in supporting civil rights and liberties litigation. For instance, in Canada, early developments in freedom of speech and religious liberty resulted from the efforts of Jehovah's Witnesses,[42] and in Britain, litigation by the Child Poverty Action Group overturned some sex discrimination in the Social Security Act of 1975.[43] Similarly, sources of financing for civil rights and liberties cases have become more widespread and substantial in recent years. Private foundations have grown significantly in wealth and size in this century, particularly in the United States. Legal aid in civil cases and the most important forms of aid for criminal defendants are relatively new developments. In the United States, governmental aid began growing only in the last sixty years; in other countries the growth of legal aid has been even more recent. But, again, the expansion of financial resources preceded development of the rights revolution. The legal profession has also become increasingly diverse and has organized in firms. Those developments date to the early years of this century in the United States and occurred much later in other countries;[44] but again, the key developments in the legal profession preceded and supported developments in the rights revolution. The support structure, then, is relatively new: but rights revolutions are more recent yet.

Admittedly, in some instances, judges have created new rights in advance of sustained litigation on the subject by rights advocates, but even then the presence of a vibrant support structure is a necessary condition for rights advocates to capitalize on new legal opportunities offered by judges. As I shall show, for instance, the weakness of the support structure in India is precisely the explanation for why no rights revolution emerged there after Supreme Court justices tried to create one.

None of this means that organized rights advocates, given adequate support, can control and manipulate the nature and timing of the issues appearing on the judicial agenda. As Stephen Wasby has observed, the complexity of the litigation process, the number of litigants, and the inevitability of historical accident and unintended consequences all conspire to limit the extent of deliberately planned control of litigation by organized groups.[45] Thus the support-structure expla-

nation does not replace a theory of judicial control of the agenda with its mirror image, a theory of complete control by strategic litigators. A support structure merely gives rights advocates access to the judicial agenda. But that has been a significant development.

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 in other countries has reflected the political strategies of liberals and egalitarians to use the courts for political change. Recently in some countries political conservatives have responded by developing competing legal advocacy organizations and by attempting to cut governmental funding for legal services. These controversies reflect a recognition that the development of law in general, and of rights in particular, is shaped by the nature and extent of the support structure.

In sum, if the support-structure hypothesis is correct, neither particular civil liberties or civil rights lawsuits nor the rights revolution in general resulted in any direct way only from judicial fiat, the opportunities provided by constitutional rights guarantees, and/or rights consciousness in popular culture. Instead, the development of a support structure for civil rights and liberties litigation propelled rights issues into the higher courts, encouraged the courts to render favorable decisions and, at least to some extent, provided the judiciary with active partners in the fight against opponents of implementation of the new rights. As Ruth Cowan observed regarding women's-rights litigation, "Success in the judicial arena, as in other political forums, hinges on the organization and mobilization of resources."[46] Similarly, as a civil rights litigator told Stephen Wasby, "What there's money for, you tend to do."[47]

Alternative Expectations for Comparative Research

The foregoing discussion leads to a number of alternative expectations for the comparative study of rights revolutions. Assuming a necessary minimum level of structural judicial independence (and that other factors are held equal) the expectations can be summarized as follows: (1) If the *constitution-centered* explanation is correct, we should expect that rights revolutions have occurred only where there exist constitutional rights guarantees, only after adoption of those guarantees, and only on the particular claims supported by those guarantees. We should also expect that popular rights consciousness increases after

adoption of constitutional rights guarantees. (2) If the *judge-centered* explanation is correct, we should find that rights revolutions have occurred only where judges support civil liberties and civil rights, only after development of that support, and only on claims that judges clearly support—at least if the conditions for broad judicial discretion are present. (3) If the *culture-centered* explanation is correct, we should find that rights revolutions have occurred only where popular rights consciousness is widespread, only after development of popular rights consciousness, and only on those claims recognized in popular rights consciousness.

If, however, the elements of the standard explanations, taken singly or together, provide an incomplete explanation of the rights revolution, then we should consider the following proposition: If the *support-structure* explanation is correct, we should find that rights revolutions have occurred only where and when and on those issues for which material support for rights litigation—rights-advocacy organizations, supportive lawyers, and sources of financing—has developed.

Structure of the Study and Overview of Findings

My analysis rests on a comparison of rights revolutions in the United States, Canada, India, and Britain in the period 1960–1990 (although my analysis of the United States begins much earlier). These countries differ in the extent and nature of their rights revolutions, as well as in the structure of their constitutions, the extent to which judicial liberals have dominated their supreme courts, and the extent of their support structures for rights litigation. This study design facilitates analysis of the sources and conditions for the rights revolution.[48]

This analysis has led to the following general observations: First, the growth of judicial protection for individual rights is indeed a widespread, but not universal, development. It has been greatest in the United States and Canada and weakest in India, and it is present but not vibrant in Britain. In the following chapters, variations among countries and over time form the basis for my analysis. Second, in each country, the language of rights became increasingly widespread by the mid-sixties. It flourished in the United States as early as the mid-nineteenth century but developed only after the early sixties in the other countries in this study. Third, although each country's constitutional structure provides a threshold level of judicial independence, the existence of constitutional rights guarantees differs significantly from country to country: the United States has had a bill of rights for more than two hundred years; India adopted a constitution, including

a bill of rights, in 1950; Canada adopted a bill of rights in 1982; Britain has no constitutional bill of rights. The Canadian experience, in particular, offers the chance to assess the effect on the judicial agenda of adoption of a constitutional bill of rights. Fourth, in each country the supreme court has been dominated by activist, rights-supportive judges at one or another point in the recent past. In the United States, that occurred most clearly under the leadership of Chief Justice Earl Warren from 1953 to 1969. In Britain, the Appellate Committee of the House of Lords, under the leadership of Lord Reid, developed a modestly activist posture in the sixties and early seventies. In Canada, judicial supporters of expansive protection for individual rights controlled the Supreme Court after the early eighties. And in India, leading justices on the Supreme Court created a revolution in constitutional law in the late seventies and early eighties, greatly expanding the constitution's formal protection for equality rights and for the less fortunate classes in Indian society.

Finally, the strength and the timing of growth in the support structure for rights litigation varies significantly among the countries. That support structure is larger and more diverse in the United States than in the other countries. The United States has a large legal profession but, more importantly, the profession is ideologically diverse, organizationally adept, and adversarial in orientation; this is increasingly true of the legal profession in Canada, but the profession in Britain remains relatively homogeneous, and Indian lawyers practice individually, thus gaining none of the advantages of specialization and the like that accrue in the firm setting. The United States has a wide array of private foundations that finance a relatively large number of public interest organizations. The other countries in the study almost entirely lack such systems. The United States has large and relatively mature systems for providing legal defense to poor criminal defendants; such systems are newer in the other countries in the study. Although there are important differences among countries in the extent of the support structure for legal mobilization, those structures have changed in similar directions over recent decades. In each country in this study the support structures have deepened and diversified. In the United States the origins of that deepening and diversification began as early as the first and second decades of this century, in the development of the first public interest groups to use litigation as part of their political efforts, in the growing size and diversity of the legal profession, and in the development of official policies requiring the legal representation of

indigent criminal defendants. In other countries such changes began much later, primarily after 1970.

Throughout this study I have relied as much as possible on data from a variety of sources to facilitate triangulation, or double- and triple-checking. The data for the dependent variable, the judicial agenda, consist of cases heard by each high court in 1960, 1965, 1970, 1975, 1980, 1985, and 1990. There are several sources for the data. The agenda data for the United States were obtained from Pacelle's study of the United States Supreme Court's agenda.[49] The data for Canada, India, and Britain were gathered for this study from published court records (the Canadian Supreme Court Reports, All India Reporter, and Law Reports: Appeal Cases). The published records for India and Britain do not include information on all cases heard by their high courts, and so I supplement information gathered from published sources with information from some unpublished sources held at the courts themselves.[50]

The data for the independent variables come from a variety of sources, which I document in each of the chapters. In general, I rely on the large legal and social scientific literature on the legal systems of each of the countries, supplemented by interview and documentary sources that I gathered in visits to Canada, England, and India.

My analysis proceeds country by country. For each of the four countries, I devote a chapter to the political and legal context for judicial protection of individual rights and a chapter to the nature and timing of developments in the rights revolution and the influence of the support structure. As I show, in most places, until relatively recently, the support structure for pursuing rights cases has been weak and access to courts has been limited to a small proportion of the population and to the issues they wish to litigate. Most individuals, and the legal claims they might wish to make, have been ruled out of the contest virtually from the start. The growth of support structures for legal mobilization, as I show in the following pages, however, has democratized access to supreme courts in recent years and has provided a principal condition for the judicial rights revolution.

THREE

The United States: Standard Explanations for the Rights Revolution

The United States, in a popular and influential view, is "The Land of Rights."[1] The language of rights seems to pervade popular discourse, political disputes, and judicial decisions; Americans have come to believe that freedom of speech, freedom of religion, and equality are the central values of their political system. The United States Supreme Court, moreover, is among the most active courts in the world, and its intervention in policy debates is typically justified as necessary for defending individual rights. The Court's "key role in American government," according to Jesse Choper, "is to guard against governmental infringement of individual liberties secured by the Constitution."[2]

Yet the Supreme Court began turning its attention to individual rights only recently. As late as 1916, 125 years after adoption of the Bill of Rights, the Court focused its attention largely on resolving commercial disputes and virtually never examined issues related to individual rights. Partly as a result, protection for civil liberties and civil rights in American society suffered. As late as 1950 state laws relegated most black schoolchildren to separate, poorly funded schools and discriminated against African Americans in public accommodations. State laws also prohibited the sale and use of birth control devices and most states prohibited abortions except in limited circumstances. State police authorities could, by law, use nonphysical coercion in extracting confessions or incriminating information from criminal defendants, and defendants could, by law, be prosecuted, convicted, and sentenced to prison for serious crimes even if they lacked an attorney. In many states, authorities acting without court authorization could search a person's home and seize anything they deemed to be evidence.

By 1975 none of those things remained legal; all were banned by the Supreme Court as violations of fundamental constitutional rights. In a span of about fifty years, the Supreme Court went from virtually ignoring civil rights and liberties to devoting the majority of its attention to

such issues. The constitutional rights revolution constituted a major revolution in the meaning of constitutionalism itself. Where once constitutionalism's central ideal had been limited government, now its central ideal had become the protection of individual rights. As noted in the previous chapters, these dramatic changes are usually attributed to a favorable constitution, leadership by liberal Supreme Court justices, and popular support for civil liberties and rights in American culture. Each of these explanations is partly correct. But, even taken together, they are greatly incomplete as an explanation for the rights revolution.

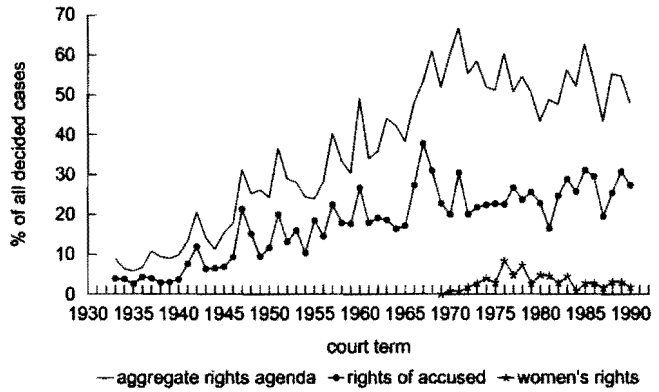
The U.S. Rights Revolution

A necessary first step in examining the U.S. rights revolution is to clarify the timing of developments in that revolution. My analysis in this chapter and the next is devoted to explaining three developments in the rights revolution, which are partially illustrated in figure 3.1.[3] First, the Court's agenda on civil liberties and civil rights as a whole began to grow early in this century, long before the ascendance of a liberal majority on the Court, which is usually dated either to 1937 or to the period after Earl Warren's appointment as chief justice in 1953. The Court's attention to civil liberties and civil rights began to grow even before the 1933 court term, the first year illustrated in figure 3. 1. Second, the Court's agenda on criminal procedure began to grow in the early thirties, again, long before justices with liberal attitudes toward criminal procedure gained control of the Court. Third, the Court's agenda on women's rights began to grow in the early seventies, just after liberals lost control of the Court to conservatives. Let us consider each of these developments in turn.

First, the Court's attention to civil liberties and rights as a whole grew in fits and starts until the beginning of its well-known, dramatic climb in the sixties. The magnitude of the change is surprising. In the 1933 term, civil liberties and civil rights constituted about 9 percent of the Court's agenda; by the 1971 term, they constituted about 65 percent of the agenda.

Because systematic data on the Court's agenda are available only after 1932, figure 3.1 misses important changes before that year. Indeed, the Court's attention to civil liberties and civil rights began to grow almost twenty years earlier. Dating the origin of an important development is always a tricky business. Nonetheless, in the matter of the Court's attention to individual rights, there is a fairly clear beginning point in the years following the First World War.[4] Before 1917,

Figure 3.1 Rights Agenda of the U.S. Supreme Court



Source: Pacelle, *Transformation*, and data provided by Pacelle.

the Court rarely decided civil liberties cases. Beginning in that year, however, the Court began deciding such cases relatively regularly. In 1917, the Court overturned Louisville's racially exclusionary zoning law (*Buchanan v. Warley*).[5] In 1919 the Supreme Court decided four important freedom of speech cases (*Schenck v. United States, Abrams v. United States, Debs v. United States, and Frohwerk v. United States*), in each rejecting claims that convictions under the Espionage Act of 1917 violated the First Amendment.[6] After those restrictive decisions, however, the Court handed down several decisions that suggested that freedom of speech might receive some level of constitutional protection. In 1920 the Court suggested, but did not rule, that the First Amendment's guarantee of freedom of speech restricted state action as well as federal action (*Gilbert v. Minnesota*); in 1925, the Court again advanced that suggestion (*Gitlow v. New York*); finally, in 1927 in *Fiske v. Kansas*, the Court ruled that the First Amendment's guarantee of freedom of speech indeed restricts state action.[7] Meanwhile, the Court expanded constitutional protection for some personal liberties not even mentioned in the Constitution's text. In the mid-twenties, the Court affirmed that the Fourteenth Amendment's due process clause protects the liberty of parents to send their children to private schools (*Pierce v. Society of Sisters*) and of schools to teach modern languages other than English (*Meyer v. Nebraska*).[8] In 1931, the Court ruled that freedom of the press applies to the states (*Near v. Minnesota*); in 1932, the Court ruled that the right of fair trial and the right to counsel apply in capital trials in state courts (*Powell v. Alabama*).[9] In addition to these famous

and important cases, the number of less important decisions on civil rights and liberties also began increasing after about 1917.

Undoubtedly the Court heard and decided some civil liberties and rights cases before 1917.[10] In the area of freedom of speech in particular, David Rabban has argued that the Supreme Court's attention to the issue preceded the famous World War I-era cases by several decades.[11] Rabban documented eighteen freedom-of-speech cases decided by the Court in the years before 1917.[12] In relation to the Supreme Court's overall agenda, however, civil liberties and civil rights cases remained lonely exceptions. By the beginning of the twenties civil liberties and civil rights cases appeared with increasing frequency on the agenda.

Although judicial attention to civil liberties and civil rights as a whole began to grow after 1917, not all components of the rights agenda grew at the same time or same pace. The Supreme Court's attention to the rights of the accused and prisoners began to grow as early as the forties, long before the landmark due process decisions in the sixties. At its height in the 1967 term, the criminal procedure agenda commanded just under 38 percent of the agenda space, compared to a low of under 3 percent in the 1935 term. But fully half of that eventual growth–17 percentage points—had occurred *before* the appointment of Earl Warren in 1953.

In the area of women's rights, the Supreme Court had virtually no agenda until 1971 but after that year began devoting increasing attention to the issue. The pattern is intriguing because the Court's attention to women's rights began to grow just after the transition between the liberal Warren Court and the more conservative Burger Court. The Warren Court heard only one case explicitly raising a women's-rights claim and rejected that claim,[13] (although *Griswold v. Connecticut*[14] may also be considered a women's-rights case due to the centrality of reproductive freedom in the women's movement). The Burger Court, by contrast, took up the issue of sex discrimination and heard dozens of cases in the seventies and eighties. The new agenda, furthermore, involved more than a scattering of routine cases: it was a momentous intervention into highly contentious issues, among them equal treatment under the law and abortion.[15] Nonetheless, the agenda space devoted to women's rights has remained far less than the space devoted to the rights of the accused and prisoners.

Why did the Supreme Court's attention to civil liberties and rights begin growing after 1917, long before judicial liberals gained control of the Court? Why did the Court's attention to criminal procedure begin

growing after the early thirties, and why did the Court's attention to women's rights begin growing rapidly only after 1970? In the remainder of this chapter I consider and reject as incomplete the conventional explanations for these developments.

The Limitations of Standard Explanations

The Constitution-Centered Explanation

The United States Constitution and its Bill of Rights have significantly affected the political and legal process in the United States, but the effects have been indirect. The Constitution is less an ironclad framework for government than a set of resources to be used by political actors as best they can. As a consequence, the Constitution has proven to be enormously elastic over time. Its formal structure and provisions, with a few exceptions, have changed little, yet its meaning has changed dramatically.[16] The most significant changes have been the vast expansion in the powers of the national government and the great broadening and deepening of the meaning of individual rights as limitations on the powers of both the national and state governments. One of the most important aspects of that transformation was the application of most provisions in the Bill of Rights to the states, a process that began after 1920.

In the nineteenth century, it was widely accepted that the Bill of Rights placed no limitations on the power of the states. In *Barron v. Baltimore* (1833)[17] the Supreme Court ruled that the Bill of Rights applied only to the federal government; that ruling clearly was consistent with the dominant view in the late 1700s among the framers and ratifiers of the first ten amendments, and the ruling was reaffirmed in several other cases in the nineteenth and early twentieth centuries. The passage of the Fourteenth Amendment in 1868, of course, provided a potential foundation for applying the Bill of Rights to the states, because it explicitly placed rights-based limitations on the states. Yet which rights were guaranteed by the Fourteenth Amendment remained notoriously unclear, for the amendment referred only in relatively vague and general terms to "the privileges or immunities of citizens of the United States," "life, liberty, or property," "due process," and "equal protection of the laws." Although some judges and politicians argued that those words protected a broad range of rights and, in particular, applied the provisions of the Bill of Rights to the states, many others disagreed, and the matter remained a subject of great

dispute well into the twentieth century.[18] The formal constitutional change wrought by the Fourteenth Amendment, then, did not by itself decisively change the meaning of the rights protected by the Constitution, at least as understood by legal elites. Moreover, the growth in judicial attention to individual rights began long after passage of the Fourteenth Amendment, indeed as much as fifty years later. Adoption of the amendment, then, simply is not plausible as a complete, or even nearly complete, explanation for the growth of the rights revolution.

Many of the important developments in the rights revolution in the twentieth century nonetheless were based on the Fourteenth Amendment, and therefore passage of the amendment was a contributing condition. As Hartog has suggested, passage of the Civil War Amendments, arising as they did from the long slave-emancipation struggle in which the language of rights figured prominently, contributed greatly to the connection between the Constitution and rights aspirations in popular culture.[19] That connection has provided a uniquely powerful organizational resource and lever of influence for rights-seeking social movements. Nonetheless, as I show in the next section, those movements existed before passage of the Fourteenth Amendment, and new ones developed in the late nineteenth and early twentieth centuries, and yet the Supreme Court recognized virtually none of their claims until after World War I. That lack of recognition was due in part to the weakness of the support structure for rights litigation in the nineteenth century, as discussed in the following chapter. To a significant extent, of course, it was also due to the Supreme Court's deliberately narrow reading of the Fourteenth Amendment in the 1870s and 1880s. In several key cases, particularly the *Slaughterhouse Cases* (1873), *Minor v. Happersett* (1876), and the *Civil Rights Cases* (1883), the Court virtually defined the Fourteenth Amendment's newly declared rights out of existence.[20] The Court, dominated by judicial conservatives, had great misgivings about demands for a growth of federal power and federal rights. However the weakness of the support structure for civil liberties and civil rights in the late nineteenth century, discussed in the next chapter, also helps to explain the anemia of the new rights in those years.

In any event, the mere presence of rights guarantees in the United States Constitution, although surely contributing to rights consciousness in popular culture, cannot by itself explain the dramatic growth of the rights revolution in the twentieth century, for the text of the key constitutional rights have remained unchanged since 1870.[21]

The Culture-Centered Explanation

As passage of the Fourteenth Amendment contributed only indirectly to the Supreme Court's growing attention after 1917 to rights cases, that growth is commonly attributed either to the policy preferences of the Court's justices (discussed in the next section) or to changes in American political culture, particularly popular attitudes toward rights. It is useful to distinguish two components of popular attitudes. One component, "rights consciousness," is simply the recognition that a particular claim may be formulated in the language of rights. Clearly no rights agenda on a particular topic is possible if there is no recognition that the issue involves "rights." The other component of popular attitudes is "public opinion," the perception (justified or not) that a majority of people support a particular rights claim.

Rights consciousness, although necessary for the development of a rights revolution, is hardly sufficient. Americans were fascinated by rights, made extravagant claims in the name of rights, and developed social movements behind the banner of rights long before the Supreme Court began showing much interest in civil liberties or civil rights cases. Contrary to the view that there has been a recent proliferation of "rights talk" and that only recently have Americans become nearly obsessed with making rights claims, the language of rights has been widely used in popular struggles for at least a century and a half, and perhaps longer. Constitutional interpretation in the United States, as Hartog observed, has been a "contested terrain" over which popular groups and legal elites struggle, and in this struggle, popular groups typically have formulated their claims in the language of rights.[22] "Liberty" and "equality" were profoundly important principles to many of those participating in the antislavery fight before the Civil War.[23] After the war, the freed slaves, participants in the women's movement, and political dissenters in general, all demanded greater respect for civil liberties and civil rights. Thus, rights "consciousness has thrived among those who did not benefit from mainstream interpretations of the Constitution."[24]

Long before the Supreme Court turned its attention to civil liberties and civil rights, moreover, dissident rights claims gained surprisingly wide support among public officials and the general public. The Fourteenth Amendment's ringing promises, as William Nelson has shown, reflected a widespread, if amorphous, popular ideology of "liberty" and "equality" that existed before the Civil War.[25] After that war, proponents of freedom of expression, for instance, regularly used the rhetoric of constitutional rights and gained widespread support.[26] Between

1909 and 1913, the International Workers of the World (IWW), a radical labor organization, aggressively championed freedom of speech, and its members ("Wobblies") made provocative speeches on street corners throughout the country. In what came to be known as the free speech fights, many local officials tried to ban the speeches, but some officials refused to prosecute Wobblies on the grounds that doing so would violate constitutional rights, and other officials who tried to crack down on IWW speakers were surprised by the level of support for the Wobblies' right to speak.[27] In 1913, a leading journalist wrote that, in the free speech fights, "a very vital principle of American life [was] at stake—the right of free speech, of public discussion, and protest."[28] Not all officials and members of the broader public were so tolerant, and the Wobblies themselves proved to be relatively intolerant of dissent against their views. But the IWW free speech fights clearly indicate that there was a strong rights consciousness regarding freedom of speech among the U.S. population in the decades before World War I.

Nor is it true that ordinary people only recently have come to use "rights talk" to justify all manner of claims. For at least a century Americans appear to have been willing to use the language of rights in attempts to justify a wide variety of claims that no court even today would recognize. A man charged with blackmail in Louisiana in 1885, for instance, argued that the Louisiana law prohibiting blackmail was an unconstitutional infringement of freedom of speech.[29]

Nor can it be said that recourse to the courts was not recognized as a possibility before 1917, when individual rights cases began to gain significant attention in the Supreme Court, because those who used the language of rights in the last decades of the nineteenth century and the first decades of the twentieth occasionally pursued their claims in court. As I shall discuss further in the following chapter, the Free Speech League, a loose collection of free speech advocates, supported several appeals against criminal convictions of speakers, writers, and publishers,[30] and the early moving-picture industry, free-thought radicals, and socialists also pursued litigation before 1917 attempting to expand constitutional protection for freedom of expression.[31]

Thus, although there was widespread rights consciousness regarding freedom of speech and the possibility of pursuing free speech claims in the courts, the Supreme Court began turning attention in a sustained way to freedom of speech only after the beginning of World War I. Widespread, popular rights consciousness predated the development of the rights revolution by many decades, perhaps even by a century.

On the other hand, it might be suggested that although "rights talk" has been around for a long time, the majority of the public has supported expansion of constitutional rights only relatively recently (and that the rights revolution reflected trends in public opinion). Many sophisticated observers of the Court have indeed suggested that the Court responds to public opinion.[32] As early as the 1830s, Alexis de Tocqueville observed that, in America, the justices' "power is immense, but it is power springing from opinion. . . . Often it is as dangerous to lag behind as to outstrip it."[33] Similarly, Robert McCloskey, echoing Tocqueville, wrote, "the Court has seldom lagged far behind or forged far ahead of America," largely because the Court's power depends on popular legitimacy.[34]

Although the Court undoubtedly responds to broad changes in public opinion (the justices, after all, are part of the public), any explanation centered on public opinion has great difficulty explaining the three broad changes in the Court's agenda that are the subject of this analysis. Undoubtedly a liberalization in popular attitudes toward women's rights preceded the Court's growing attention to that issue.[35] Similarly, the Court's support for desegregation is sometimes attributed to growing popular support in the fifties and sixties for civil rights.[36]

Nonetheless, changes in public opinion cannot fully explain all significant changes in the Court's agenda. This may be illustrated most clearly by the Court's agenda on the rights of the criminally accused. Although the Court's attention to criminal procedure grew dramatically between the early thirties and the mid-sixties, criminal defendants nonetheless have never received much sympathy from the American public. Instead, since 1918, just after World War I, there have been a number of periods of widespread concern over a "crime wave."[37] More significantly, there has long been a widespread belief that criminal defendants receive unfair advantages in the judicial system. As early as 1937—long before the due process revolution in criminal procedure—two law professors referred to the "widely held" belief that "trial procedure gives to the criminal defendant an unfair advantage."[38] Indeed, articles in popular periodicals have regularly criticized the legal system as going easy on criminals or, worse, aiding them.[39]

On the other hand, concern about police brutality and racial discrimination in the criminal justice system began to develop after the late twenties and thereafter grew increasingly strong. In popular magazines and journals, the number of articles on police brutality, in particular, jumped significantly beginning in 1929. Suddenly article titles

like "Use of Torture in America's Prisons" and "Brutalities by the Police" began appearing frequently.[40] As following chapter shows, the growing publicity about police brutality and racial discrimination in the criminal justice process did not happen by accident: it resulted directly from pressure and research by rights advocates.

In sum, although popular fear of a "crime wave" and concern about the "Unreasonable Leniency of Criminal Justice"[41] seem to have been present from the twenties through the fifties, after the late twenties a counter-argument, raising concerns about police brutality and racial discrimination in the criminal justice system, began to develop in the popular press. The counter-argument undoubtedly offered a new opportunity for judicial attention to criminal procedure; but the opposing concern, the belief that courts remained too lenient and offered too many loopholes for clever defense attorneys, seems to have retained greater popular strength. Public opinion did not drive the growing judicial attention to criminal procedure, at least not in any direct or simple way.

The Judge-Centered Explanation

Perhaps the most common explanation for the judicial rights revolution is that the Supreme Court gained discretionary control over its docket in 1925, and that political liberals who wished to create and expand constitutional rights gained control of the Court after the mid-thirties and used their new discretionary control over the agenda to expand their attention to civil liberties and civil rights.[42]

Undoubtedly the justices of the United States Supreme Court have greater discretion over their agenda than do the supreme court judges of most other countries and, therefore, the conditions exist in the United States for a judge-led transformation of the judicial agenda. The Supreme Court gained substantial control over its agenda in 1925 as part of a set of reforms intended to help the Court better manage its workload. In the early decades of the twentieth century the Supreme Court faced mounting numbers of appeals, and the Court was required by law to decide virtually all of them. As a result, by 1925 the Court was two years behind in processing cases on its docket.[43] Congress responded to demands for judicial reform (urged by Chief Justice Taft and members of the Supreme Court, among others) by passing the Judiciary Act of 1925, which greatly restricted the types of cases the Court was required to hear.[44] In 1924, 40 percent of the cases coming to the Court were under its mandatory jurisdiction; by 1930, only 15 percent were under that jurisdiction.[45] The Judiciary Act's purpose was

to enable the Court to shift its attention away from ordinary business disputes, which had inundated its docket, and toward public law.[46]

The Judiciary Act seems to have largely accomplished its purpose: after 1925 the Court began refusing to hear ordinary business disputes and focused increasing attention on major disputes over public policy. Since 1925, the number of cases brought to the Supreme Court has increased substantially, which has further increased the justices' control over their own agenda. Of the seven thousand or more cases now filed with the Supreme Court each year, the Court grants full hearing, usually, to less than 150, and that number dropped well below one hundred in the early nineties.

As the Court's selection mechanism is discretionary and the available cases so numerous, proponents of the judge-centered explanation have reasoned that the Court's agenda largely reflects the justices' policy preferences. Undoubtedly that is true to some extent. Individual justices tend to vote to grant certiorari more often for cases in which they disagree with the lower court's ruling or for cases in which they can expect their preferred outcome to win in the Supreme Court.[47] Moreover, recent research by Caldeira, Wright, and Zorn shows that the justices' decisions to place cases on the discuss list and their votes on cases on the discuss list exhibit patterns that are consistent with a significant role for policy preferences and strategic decision making.[48] Agenda-setting decisions, then, are clearly influenced by the justices' policy preferences.

Nonetheless, the justices' beliefs about the Supreme Court's institutional role constrain the influence of raw preferences. First, the justices are constrained by the sua sponte doctrine, one variant of which discourages courts from deciding substantive issues not raised by at least one of the parties to the case. Although the doctrine is not universally followed, it appears to be an important constraint on the justices' willingness to create their own agenda apart from the issues presented by litigants.[49]

Second, the justices have developed an institutionalized reluctance to decide issues that have been the subject of little sustained litigation in lower courts. The likelihood that the Court will grant certiorari in any particular case is increased by the presence of the United States as petitioner, legal conflict among lower courts (conflict between federal appellate circuits is especially important), or dissent among judges on a lower appellate court.[50] In addition, H. W. Perry's interviews with justices and their clerks indicate that the justices are reluctant to take cases that have not "percolated" sufficiently in lower courts.[51]

Third, in order for an issue to reach the agenda, the issue typically must be taken repeatedly to the Supreme Court itself. Because of the large number of certiorari petitions, as a clerk told Perry, "there is enormous pressure not to take a case."[52] For this reason, early certiorari petitions on an issue are likely to be denied. The rationale, according to one of Perry's interviewees, is that "it's going to come up again if it's really an important issue. In fact a test to see if an issue is really important is to see if it comes up again."[53]

With some exceptions, a case must have issues that meet all these threshold requirements—conflict among lower courts, dissent in a lower court, extensive percolation, and repeated appearance on the docket—in order to be considered seriously as a candidate for a place on the agenda. The significance of these threshold requirements is that the justices' discretion over their docket is not nearly as unconstrained, and the number of cases among which the justices may choose is not nearly as large, as the judge-centered model assumes. In fact, Perry's interviews suggest that the number of certiorari petitions open for serious consideration is typically only a small fraction of the total docket.[54] Most petitions do not meet the threshold requirements and are rejected from the start.

Moreover, the process by which the justices select their agenda does not facilitate coherent, deliberate, policy-driven control of the agenda. The justices delegate a great deal of the case-screening process to their clerks, and decisions about which cases to select are made periodically over the course of each term rather than at one common point in time. As a result, the Court's agenda is built gradually and in a bureaucratic process in which there is a large number of contributing actors.[55] For various reasons, then, the path of the Supreme Court's agenda over time is likely to be connected, but only weakly, to the justices' policy preferences.

Some observers nonetheless have characterized the dramatic growth in judicial attention to civil liberties and civil rights as resulting primarily from changes in the justices' attitudes.[56] Thus, Jeffrey Segal and Harold Spaeth argue that the civil liberties agenda arose out of the liberal takeover of the Court in 1937, with *Palko v. Connecticut* (1937) and Footnote Four of *United States v. Carolene Products* (1938) signaling the opening of the new agenda; they characterize *Mapp v. Ohio* (1961) as the origin of an agenda on criminal procedure, and so on.[57] Segal and Spaeth thus argue that the development of the civil liberties and civil rights agenda was largely a judge-driven process.

Nonetheless, as we would expect if the justices' control over the

agenda process is attenuated, the judicial rights revolution has developed somewhat independently of changes in the Court's attitudinal composition. The Court's modern rights agenda, as I emphasized above, began to grow almost twenty years before the shift in the Court's majority in 1937. Moreover, it is not at all clear that the growing attention to rights can be attributed primarily to changes in the Court's attitudinal composition before 1937. Undoubtedly Justice Louis Brandeis, who joined the Court in 1916, was a strong early advocate of expanded judicial protection for civil liberties and rights. But only one other justice on the Court at the time, Oliver Wendell Holmes, Jr., can be considered a civil libertarian, and even his support wavered from issue to issue.[58] No other justice who consistently favored expansion of constitutional protection for civil liberties joined the Court until Hugo Black's appointment in 1937.[59] Yet the number of rights cases coming to the Court, and the proportion of its agenda devoted to such issues, began to grow after 1917.

Moreover, there is some direct evidence that the rights agenda's origins in the twenties and early thirties resulted less from the justices' decision to increase attention to such cases than from the growing presence of rights cases on the docket. In the October 1930 term the Court considered eight petitions for a writ of certiorari raising Bill of Rights issues and fifteen petitions relating to the Fourteenth Amendment's due process and equal protection guarantees, rejecting all of them.[60] The acceptance rate was higher in the October 1934 term, when the Court accepted three of five petitions concerning the Bill of Rights and four of thirty-six under the Fourteenth Amendment. But even in the 1934 term, the overall acceptance rate for civil liberties and rights petitions, 17 percent, was *lower* than the 20 percent acceptance rate for nonconstitutional petitions.[61] In brief, *although the Court's acceptance rate for rights petitions remained very low in the early thirties—indeed lower than the acceptance rate for nonconstitutional petitions—the agenda space devoted to civil liberties began to grow. It grew because litigants brought an increasing number of civil liberties and civil rights petitions to the Court*. The earliest developments in the rights revolution, then, resulted not from growing receptivity by the justices but from growing pressure by litigants.

Eventual judicial support for the new rights claims, of course, was necessary for development of the rights revolution. Had the justices continued to reject the new rights claims late into the thirties and forties, the growing pressure from below likely would have shifted toward tactics other than litigation aimed at the Supreme Court. But by the mid-thirties, the Court had rendered liberal decisions favoring the new rights in several key cases, and so rights litigants knew that their efforts might not be wholly in vain.[62]

The most prominent period of liberal dominance on the Court occurred under the leadership of Chief Justice Earl Warren from 1953 through 1968. Warren joined a court deeply divided between judicial liberals and conservatives, and his appointment shifted the balance of power toward those favoring an expansion of judicial support for individual rights. In 1954, in *Brown v. Board of Education*, Warren led the Court to a unanimous decision striking down racial segregation in public schools.[63] But the decision, as expected, provoked a firestorm of controversy and the Court, to avoid further confrontation, allowed implementation of its ruling to proceed haphazardly. Judicial conservatives retained significant power on the Court until the replacement of several conservative justices with liberals in the late fifties and early sixties finally gave a decisive majority to the liberals. For much of the fifties, indeed, the Warren Court made few waves apart from the desegregation rulings. But in the sixties (indeed, beginning about the time of the *Monroe* decision in early 1961), Warren, along with Hugo Black, William Brennan, William O. Douglas, Abe Fortas, and Thurgood Marshall, fashioned a great transformation in many areas of constitutional law. The Warren Court extended most of the rights contained in the Bill of Rights to the states through incorporation in the Fourteenth Amendment's due process clause (thereby revolutionizing state criminal procedure in particular), gave clear and strong support to the civil rights movement, expanded protections for freedom of speech and the press, and created a new constitutional right to privacy. The Warren Court's reputation for creative judicial leadership is well deserved.[64] Nonetheless, at least *half* of the total growth in judicial attention to the new rights that eventually occurred between 1917 and the mid-sixties, as figure 3.1 illustrates, had already occurred by the time Earl Warren joined the Court. Thus, although the Warren Court produced a revolution in the meaning and scope of constitutional rights, earlier growth in the Court's attention to civil liberties and civil rights provided a foundation for that revolution.

THE CRIMINAL PROCEDURE AGENDA. The limitations of judge-centered explanations of the rights revolution are particularly clear if we examine components of the judicial agenda. In the area of criminal procedure, the Supreme Court struggled over the extent of constitutional protection that should be applied to state trials, never fully extending to defendants in state courts the guarantees in the Bill of

Rights until the sixties.[65] In a scattering of other cases, the Court, while still rejecting the theory that the Fourteenth Amendment incorporated the protections in the Bill of Rights, began to supervise limited aspects of the state criminal process more actively.[66] Before 1961, the largest minority in favor of applying the criminal procedure guarantees in the Bill of Rights to state trials came together in 1947 in *Adamson v. California;*[67] by the end of 1947, however, two members of the liberal minority had died and were replaced by more conservative justices. Finally, in 1961, in *Mapp v. Ohio,* a new liberal majority on criminal procedure solidified and led the Court in a revolution in criminal procedure that extended to state trials most of the constitutional rights that applied in federal trials.[68] Among the more important decisions in that revolution was *Gideon v. Wainwright* (1963), which created a constitutional right to legal representation for felony defendants in state trials.[69]

A great disjuncture thus exists between the development of an agenda on criminal procedure, on the one hand, and, on the other, the Court's hesitance to intervene in state criminal proceedings. Between 1933 and 1961, the size of the criminal procedure agenda grew significantly; about three-quarters of the total growth in that agenda, up to its eventual peak in the late sixties, had occurred by the time the liberal majority solidified in 1961 (fig. 3.1). Yet the Court did not *invite* the new federal appeals of state criminal convictions; in fact, the Court hesitantly extended only a very limited federal review over only the most extreme abuses in the state criminal process. Instead, federal appeals of state criminal convictions virtually *forced* the Court to elaborate a limited set of federal protections against egregious abuses of due process. In *Brown v. Mississippi* (1936), for instance, the Court overturned the murder convictions (and death sentences) of three African Americans whose convictions had been based primarily on confessions extracted through brutal whippings.[70] The Court's development of only limited rights against egregious abuses of due process strongly suggests that the Court was not aggressively attempting to build a criminal procedure agenda. Instead, as I show in the following chapter, in the area of criminal procedure, until 1961, the Court mainly reacted to rising pressure from litigants.

THE WOMEN'S-RIGHTS AGENDA. The timing of growth in the women's-rights agenda presents different, but equally vexing, problems for a judge-centered explanation. The principal problem is not that growth in the agenda *preceded* liberal control of the Supreme Court but that the agenda did not take off until *after* liberals had lost control

of the Court in 1969. In 1969, Chief Justice Warren and Justice Fortas, both staunch liberals, retired. President Nixon nominated judicial conservatives Warren Burger and Harry Blackmun to fill their seats (Nixon's first two nominations to fill Fortas's seat were rejected by the Senate). In 1971 Hugo Black, another liberal, and John Marshall Harlan II, a conservative, retired and were replaced in January 1972 by Lewis Powell, a moderate conservative, and William Rehnquist, a conservative. Thus by early 1972 the Court, by any standard measure, had shifted decisively to the right. Nonetheless, in what might have at first appeared to be an inhospitable judicial environment, the women's-rights agenda grew explosively for several years.

This anomaly in the judge-centered explanation is not entirely without a solution, of course. The judge-centered explanation asserts that judicial attitudes are relatively fixed, and that judicial policies change only as a result of the replacement of justices. It thus might be argued that the justices who joined the Court after 1968 were more supportive of women's rights than the justices they replaced, and that this change produced the new women's-rights agenda. Some evidence seems at first to be consistent with that proposition. The Warren Court, in *Hoyt v. Florida* (1961), rejected a claim that Florida's practice of excluding women from jury pools (unless they specifically requested to be included) was unconstitutional.[71] By contrast, some of the justices appointed to the Court after 1968, particularly Blackmun and Stevens, proved to be liberals on women's rights and so the Burger Court was fairly receptive to expanding the women's-rights agenda. In fact, in a number of important cases, beginning with *Reed v. Reed* in 1971 (striking down Idaho's statutory preference for male executors of estates), the Burger Court expanded protection for women's rights by majorities of seven or more justices.[72] Thus, at the least it is clear that some of the otherwise-conservative justices in the new Burger Court were persuaded to support some sex discrimination claims.

But the converse—that the otherwise-liberal Warren Court justices were unalterably opposed to women's rights and therefore built no agenda on the issue—is not equally plausible. Indeed, the justices' attitudes toward sex discrimination, contrary to the assumptions of the judge-centered explanation, appear to have been quite malleable and unsettled during this early period, and the judicial agenda seems to have responded more to the litigation environment than to the justices' policy preferences. For example, three of the justices who had joined in *Hoyt*'s rejection of a relatively narrow sex-discrimination claim (Brennan, Douglas, and Stewart) embraced a sex-discrimination claim

in *Reed* that had far broader implications. Thus their attitudes toward sex discrimination seem to have shifted in the intervening years.

Given that malleability, it is possible to piece together a potential judicial majority in favor of striking down at least some sex-discriminatory laws much earlier than *Reed* in 1971. William Brennan, William Douglas, and Potter Stewart, all of whom joined in the *Reed* decision, likely could have been persuaded to support a sex-discrimination claim far earlier than 1971 (certainly Brennan and Douglas were well known for their liberal views). That makes three potential supporters before 1971. Further, if Potter Stewart, a justice with a moderate-to-conservative voting record on individual rights, could come to support sex-discrimination claims (as he did in the early Burger Court years), it is likely that Earl Warren and Abe Fortas, justices with very liberal records on individual rights, also would have supported such claims.[73] That makes five potential supporters long before 1971. Additionally, two other justices on the unanimous *Reed* Court were already serving by the end of 1967 (Byron White and Thurgood Marshall, appointed in 1962 and 1967, respectively). That makes seven potential supporters for sex-discrimination claims by the end of 1967. Thus, had many women's-rights claims reached the Court before 1971, it is at least possible, even easy, to piece together a majority of sympathetic justices.[74]

My point is that the justices' policy preferences, as indicated by their votes in cases, may be very poor predictors of the development of the judicial agenda. The development of the women's-rights agenda in the early seventies, in particular, was a surprising development that could not have been predicted by looking only at the Court's political or attitudinal composition.

Conclusion

The development of the rights revolution in the United States poses important and vexing puzzles. For almost a century and a half after ratification of the Bill of Rights, the Supreme Court largely ignored civil liberties and civil rights. Then, towards 1920, the Court began to devote increasing attention to civil liberties and civil rights, and that attention eventually grew into sustained support for a host of new rights. The earliest phases of the rights revolution, then, began long before the Warren Court's dramatic rulings in support of civil liberties and civil rights; they began even before the famous "switch in time" in 1937 when judicial liberals first gained control of the Court. Similar puzzles appear in particular areas of the agenda. The earliest phases

of the criminal procedure revolution began long before the Warren Court's landmark criminal procedure decisions in the sixties. The judicial revolution in women's rights, by contrast, began in 1971, just as the Court's composition began to shift sharply to the right. I have suggested that several common explanations for these developments, particularly the growth of rights consciousness and other shifts in public opinion, as well as the Supreme Court's growing liberalism after 1937, are greatly incomplete. As I show in the next chapter, changes in the support structure for legal mobilization provided key conditions for the U.S. rights revolution.

FOUR

The Support Structure and the U.S. Rights Revolution

The uneven development in phases of the U.S. rights revolution that I described in the last chapter cannot be understood as a result only of the adoption of the Civil War Amendments, liberal judicial leadership, or popular culture. The new rights were propelled onto the judicial agenda, in addition, by a great expansion in the availability of resources to potential litigants. The first organizations actively litigating on civil liberties were formed just before 1920, and they provided support for the early civil liberties cases that reached the Supreme Court. Similarly, the resources available to defend criminal defendants began to grow in the late twenties, propelling criminal procedure cases onto the Court's agenda. The resources available to women's-rights litigants began to grow relatively late, in the late sixties but, once they emerged, they propelled women's-rights cases onto the Court's agenda. Each of the puzzles, then, is solved by looking to the growth of the support structure for legal mobilization. This chapter provides evidence in support of that proposition.

The Support Structure for Legal Mobilization

The Supreme Court's case selection process and norms significantly affect the relationship between the Court's agenda and outside actors. As was noted in the last chapter, cases generally are not heard by the Supreme Court unless they present issues that represent conflict among and extensive percolation in lower courts. The Court's agenda (with some exceptions) is thus limited to cases that emanate from broad legal conflict in the lower courts. The development of such broad legal conflict on any particular issue, in turn, typically depends on the existence of substantial resources for litigating the issue. For this reason, the development of the support structure for litigation has been especially important in the United States for providing access to the Supreme Court's agenda. For much of U.S. history, only issues directly

related to economic and property disputes enjoyed sufficient support among organized litigants to reach the Supreme Court with any regularity and sophistication. But after 1915, an expanding and diversifying support structure for civil liberties and civil rights began to develop lower-court conflict and extensive litigation on the new issues; as a consequence, various civil liberties and civil rights issues increasingly reached the judicial agenda.

The Domination of Litigation by Managerial Businesses before 1915

The earliest developments in the support structure in the United States occurred between 1870 and 1910 in the organizational structures of businesses. Before 1870, most business enterprises were relatively small family-run operations with ad hoc, nonbureaucratic organizational structures and few professional managers. After 1870, during what business historians call the "managerial revolution," the American business sector began converting rapidly to large, bureaucratically structured, professionally managed organizations.[1] In the United States, the managerial revolution began and flourished first in the railroad industry after 1870; in the 1880s, it spread to areas of the economy involving production of goods; in the late 1890s, it expanded into a merger revolution in which bureaucratic enterprises joined to form still larger organizations. By the middle of the second decade of the twentieth century, the managerial revolution had ended, having transformed organizational structures in many areas of the American economy.

The managerial revolution in American business produced the first nongovernmental organizations with the capacity and the interest to pursue long-term, strategic litigation. Their interest in strategic litigation grew out of the growth in government regulation. To influential political thinkers, as well as large sections of the population, the growth of large business organizations threatened traditional conceptions of the primacy of the individual and the importance of individual initiative in the economy.[2] Legislatures responded by attempting to regulate the power of the new business organizations, leading to a massive change from previous conceptions of the limited constitutional powers of government.[3] Business organizations, naturally, had an interest in manipulating the new regulations in their favor.

The new managerial structure, moreover, provided businesses with the capacity to plan strategically and to allocate resources for the implementation of long-term strategic plans.[4] Additionally, the professional managers in the new organizational sector of the economy formed professional associations and networks of communication that

allowed them to learn from each other and to coordinate political strategies.[5] Many businesses, particularly the railroads, used their newfound capacity for coordinated action to pursue strategic litigation to influence state regulations. Between 1880 and 1900, a number of the new business organizations devoted significant resources to litigation campaigns intended to influence the path of government regulation.

The railroads, as Richard Cortner has observed, mounted the most extensive litigation campaigns during the period.[6] Several railroads challenged the so-called Granger Laws, state statutes that subjected railroads to rate regulation, but they lost their first important challenge (the *Granger Cases*) in 1877, when the Court ruled that private property "affected with a public interest" may be subject to public regulation unhindered by judicial review.[7] In response, the railroads mounted a systematic litigation campaign intended to reverse that unfavorable decision. "The litigation campaign of the roads," Cortner observed, "exhibited a mastery of many of the tactics [test cases, careful development of supporting evidence, and pressure on the judicial appointment process] that have been characteristic of constitutional litigation conducted by interest groups during more recent times."[8] During that campaign, the railroads won several landmark decisions that subjected state policies to judicial review under the Fourteenth Amendment.

Although the Supreme Court rejected the vast majority of constitutional challenges brought by business litigants,[9] businesses nonetheless continued to take large numbers of cases to the Court. They did so because they could: business litigants dominated the field of constitutional litigation in the late nineteenth and early twentieth centuries because of their nearly unique organizational and resource capacities. Scholarship on the legal profession during the first several decades of the century amply demonstrates the new managerial businesses' capacity to control the field of legal resources. As one scholar observed, for instance, the list of lawyers serving the railroads in their strategic litigation campaign consisted of a "Who's Who" of the bar.[10] Similarly, Louis Brandeis, in a speech in 1905, declared that "lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations. . . . The leading lawyers of the United States have been engaged mainly in supporting the claims of the corporations; often in endeavoring to evade or nullify the extremely crude laws by which legislators sought to regulate the power or curb the excesses of the corporations."[11] And Woodrow Wilson in a 1910 speech declared that "we have witnessed in modern business the submergence of the individual within the organization," and that "in gaining new functions, in being drawn into modern business instead of standing outside of it . . . the lawyer has lost his old function"; therefore, Wilson concluded, the country "distrusts every 'corporation lawyer.'"[12]

The alliance between leading lawyers and the leading managerial businesses of the day is not especially surprising. John Heinz and Edward Laumann's pathbreaking study on the social structure of the bar in Chicago revealed that the legal profession remains divided between an upper hemisphere of lawyers who serve large organizations, particularly corporate businesses, and a lower hemisphere of lawyers who serve individual clients.[13] One of the more significant findings of the study is that lawyers who serve organizational clients have far less professional autonomy than lawyers who serve individual clients, largely because of the managerial power of the organizational clients. This pattern of the legal profession's subservience to managerial organizations dates to the emergence of such organizations in the 1870s and 1880s. Theron Strong, a prominent lawyer who experienced the organizational transformation, observed in 1914 that client relations "had undergone a complete and marvelous change. The advent of the captains of industry, the multi-millionaires, the mighty corporations and the tremendous business enterprises, with all the pride of wealth and luxury which have followed in their train, have reversed their relative positions, and the lawyer, with a more cultivated intellect than ever and as worthy of deference and respect as formerly, is not treated with the deference and respect of early days."[14] The development of large organizations had transformed the legal world by dominating the work of lawyers and the development of litigation.

The extensive litigation campaigns mounted by businesses significantly influenced the Supreme Court's agenda, particularly by pushing the Court to address issues of interest to businesses. This is especially clear with regard to the Court's agenda under the new Fourteenth Amendment. "The Supreme Court began to elaborate doctrines resolving issues of priority [under the Fourteenth Amendment]," William Nelson observed, "only when a flood of cases in the closing decades of the nineteenth century made the inevitability of conflict fully apparent."[15] The Court's evolving interpretation of the Fourteenth Amendment in the late nineteenth and early twentieth centuries, of course, encouraged businesses to continue to bring challenges to legislation and regulatory action. Although many businesses lost their cases, leading decisions like *Hammer v. Dagenhart* (1918) (striking down a ban on the interstate shipment of the products of child labor) clearly indicated the general direction of the Court's policies.[16]

Yet even as managerial businesses dominated the field of constitutional litigation, several changes occurred in the availability of resources for legal mobilization that began to democratize access to the Supreme Court's agenda by transforming the capacity of nonbusiness interests to pursue sustained, strategic litigation. The most important changes were the development of rights-advocacy organizations, the diversification and organizational development of the legal profession, the gradual development of financial resources for civil liberties litigation, and the development of the Civil Rights Section in the Justice Department.

Rights-Advocacy Organizations

Effective rights-advocacy organizations such as the ACLU, the NAACP, and the American Jewish Congress began to appear after 1909. Some rights-advocacy groups, admittedly, existed before this time, but there are crucial differences between the earlier organizations and the later, more successful ones. The Free Speech League, which formed in 1902 and disintegrated in 1918 and 1919, was a loose association of activists and intellectuals under the leadership of Theodore Schroeder, an eccentric but brilliant civil liberties advocate.[17] The League, and Schroeder in particular, became heavily involved in a wide range of free speech disputes in the prewar years, particularly disputes over the spread of sex education materials, related anti-Victorian literature, and socialist discourse. In 1909 a benefactor gave Schroeder a "secret fund" for the purpose of supporting the organization and defending people prosecuted for their speech.[18] Schroeder used the fund, along with voluntary support from lawyers who were members of the League, to support First Amendment challenges to the prosecution of a number of activists for libel or for violating various antiobscenity laws or local ordinances against disorderly conduct and the like.[19] One such case, *Fox v. Washington* (1915), reached the Supreme Court, where Justice Holmes (before his conversion to free speech libertarianism) penned a unanimous decision upholding conviction of an anarchist for encouraging nude sunbathing.[20] Although the Free Speech League participated in a wide range of free speech causes, its influence in the courts remained limited. Undoubtedly one reason was a widespread judicial skepticism toward free speech claims. Nonetheless, the League's limited organizational capacities also crippled its potential influence. The League was organized in prebureaucratic fashion as a loose association of individual free speech advocates, and Schroeder's personal efforts and files seem to have constituted the entirety of the formal organization.[21] As a Schroeder biographer noted, "the League was so much a reflection of Schroeder's personality and activity that in effect he carried it with him wherever he went."[22] Similarly, Roger Baldwin, founder of the ACLU, later observed simply that "Schroeder *was* the Free Speech League."[23] Schroeder and the League seem to have influenced the development of ideas about freedom of speech, but their support for appellate litigation remained limited by a lack of organizational and financial resources.

A few other prewar organizations advocated expansion of civil liberties or civil rights, but their influence, too, remained limited for one reason or another. The early moving-pictures industry attacked censorship of movies, in one case supporting appeals to the Supreme Court.[24] The Court decisively rejected a movie company's free speech claim against movie censorship, and the movie industry did not again pursue litigation on the matter until the forties. Similarly, the International Workers of the World aggressively advocated freedom of speech as part of its labor-organizing efforts, but it pursued few legal appeals due to both a lack of financial resources and an ideological opposition to use of the capitalist legal system.[25]

In one way or another, then, litigation on civil liberties and civil rights remained infrequent and isolated before World War I because potential rights litigants enjoyed only limited organizational and financial support. In the immediate prewar and post-war years, by contrast, several organizations developed stronger organizational structures and bases of support, with the result that they could support more cases and could pursue issues repeatedly, even if initially rebuffed by the courts.

Of these organizations, the ACLU, founded in 1920, undoubtedly has had the greatest impact, both by pressing issues onto the Supreme Court's agenda and by developing an effective organizational model—one that has been widely followed by other groups.[26] Roger Baldwin, the ACLU's first leader, recognized the growing importance of organizations in American public life, and he became committed to institutionalizing the ACLU to increase its effectiveness. "It was no accident that the organization was referred to as a 'union,'" Paul Murphy observed, "or that it sought to function on a national scale and implement centrally determined programs through a national organization."[27] In 1922, the ACLU began to receive limited financial support for its activities from the American Fund for Public Service, of which Baldwin was director.[28] Nonetheless, funding remained scarce, and the ACLU developed alternatives to the direct financing of cases, particularly the

use of a network of "cooperating attorneys," lawyers who were not directly employed by the ACLU but who provided legal advice and representation for ACLU-supported court cases, often without charging a fee. Baldwin used the term "cooperating attorney" as early as 1920;[29] since that time cooperating attorneys have proved to be one of the significant strengths of the organization. Additionally, state ACLU affiliate organizations grew out of the main organization over the years, significantly increasing the organization's reach throughout the country.[30]

The ACLU's support for constitutional litigation significantly affected the Supreme Court's agenda. The ACLU (or its pre-1920 predecessor, the National Civil Liberties Board) provided the primary support and coordination for the initial burst of civil liberties litigation between 1917 and the early thirties. Although ACLU strategists had misgivings about financing litigation in the face of conservative courts, the ACLU and its cooperating attorneys financed, provided legal counsel, or otherwise supported a remarkable number of important civil liberties cases in the twenties and early thirties.[31] In fact, most of the Supreme Court's early civil liberties decisions were made in cases that were ACLU-supported and likely would not have reached the Court had not that organization or its cooperating attorneys supported the appeals. The organization sponsored a number of key cases in which the Supreme Court made significant advances in constitutional law, among them decisions relating to incorporation of rights contained in the Bill of Rights into the Fourteenth Amendment as limitations on the states. These cases include *Gitlow v. New York* (1925) (in dicta,[32] incorporating the First Amendment's free speech clause);[33] *Whitney v. California* (1927) (in which Justice Brandeis, concurring, joined by Justice Holmes, argued that the free speech clause allows governments to criminalize only action, and not pure speech);[34] *Fiske v. Kansas* (1927) (incorporating the free speech clause);[35] *DeJonge v. Oregon* (1937) (incorporating the First Amendment's freedom of assembly clause);[36] *Everson v. Board of Education* (1947) (incorporating the First Amendment's establishment of religion clause);[37] and *Wolf v. Colorado* (1949) (incorporating the Fourth Amendment's search and seizure clause).[38] The ACLU, together with the International Labor Defense, also sponsored *Stromberg v. California* (1931) (extending First Amendment protection to symbolic speech),[39] and ACLU lawyers argued *Powell v. Alabama* (1932) (creating, for capital cases, the right of indigents to counsel provided by the state)[40] and filed an *amicus* brief in *Cantwell v. Connecticut* (1940) (incorporating the First Amendment's free exercise of religion clause).[41]

The ACLU also offered to sponsor appeals in *Near v. Minnesota* (1931) (incorporating the First Amendment's freedom of the press clause),[42] but a wealthy publisher stepped in and took over financing.[43]

Similarly, the NAACP, formed in 1909, greatly affected the Court's civil rights agenda by supporting litigation against racial segregation. Prominent lawyer Moorfield Storey became the NAACP's first president and, virtually from the organization's inception, he encouraged the use of test cases. The NAACP supported and won test cases in the Supreme Court, in 1915 (striking down Oklahoma's grandfather clause for voting),[44] in 1917 (striking down Louisville's exclusionary zoning law),[45] and in 1926 (striking down Texas's white primary law).[46] By 1930 black lawyers constituted the active center of the organization and, in that year, the organization was awarded a $100,000 grant from the American Fund for Public Service that allowed its leaders to develop its now well-known systematic litigation strategy against segregation in public life.[47] In 1939 the NAACP created, for tax purposes, a separate Legal Defense and Educational Fund, which took over most of the NAACP's litigation efforts.[48] Between 1909 and about 1960, either the NAACP or the LDF supported the leading race-discrimination cases before the Supreme Court.[49]

The International Labor Defense (ILD), another litigation-support organization, was formed by the Communist Party in 1925. In the late twenties the ILD supported criminal defense campaigns for Sacco and Vanzetti and for labor organizers. Undoubtedly its biggest case was the defense of the "Scottsboro Boys," nine young black men who, in a sham trial in 1931, were convicted and sentenced to death on a charge of raping two white women while riding on a freight train in Alabama. The ILD hoped to use the case to gain support for its broader political agenda of organizing against American capitalism. Eventually the case became a tug of war between the NAACP and the ILD, with the former eventually ousting the ILD from control of the case.[50] The case produced several landmark Supreme Court decisions, particularly *Powell v. Alabama* (1932), which established a constitutional right to counsel in capital cases.[51]

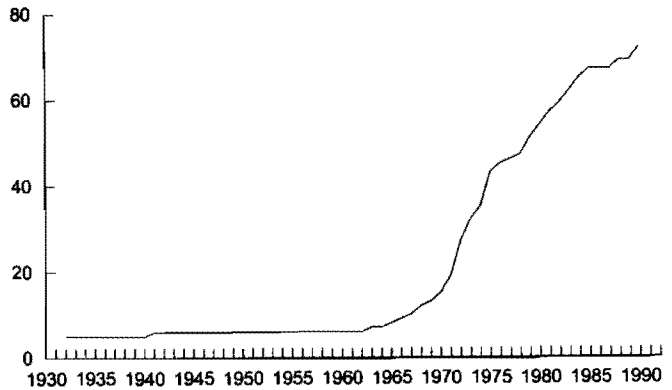
The Jehovah's Witnesses, a religious sect, sponsored a number of other important Supreme Court decisions on both the free exercise of religion and freedom of expression in the years before the Warren Court. The sect's role in the development of U.S. constitutional law preceded a parallel and equally important role in the development of civil liberties law in Canada. The Jehovah's Witnesses originated in the United States in 1884, but only began supporting court cases after

World War I.[52] Two developments appear to have influenced the Jehovah's Witnesses' approach to the legal system. The first was the selection of Judge Joseph Franklin Rutherford, former general counsel to the sect, to lead the sect after the death of its founder in 1917. The second was the increasingly harsh reaction, beginning in World War I, with which authorities responded to Witnesses' proselytizing and antiwar activities. Federal authorities responded vigorously to the organization after it published and widely disseminated *The Finished Mystery* in 1917, a book that argued, among other things, that patriotism and the demands by governments that their citizens engage in "butchery" during wartime violated the principles of the Bible.[53] Federal authorities, armed with the Espionage Act of 1917, brought charges against the eight main leaders of the Witnesses. They were convicted and received 20-year prison sentences in 1919. In response, the Witnesses began pursuing legal appeals.[54] Shortly after their brush with the Espionage Act, the Jehovah's Witnesses began their well-known practice of house-to-house proselytizing, which led increasingly to confrontations with local authorities. The number of arrests related to such mission work rapidly increased between 1928 and the mid-thirties. In response, under Judge Rutherford's leadership the group developed a legal defense strategy that culminated in a number of leading Supreme Court cases on freedom of expression and the free exercise of religion. By 1986 the Jehovah's Witnesses had sponsored or otherwise participated in thirty-six full decisions in the Supreme Court.

After the early fifties, the number of organizations supporting constitutional rights litigation began to increase.[55] This is especially clear in the area of women's rights. The women's movement of the sixties and seventies, unlike earlier women's movements, produced lasting organizations with professional staffs and substantial resources.[56] Most of the growth in the movement and in the number of organizations occurred rapidly in the ten years following 1966 (fig. 4.1).

Some of the organizations were dedicated specifically to financing and supporting women's-rights litigation.[57] The first few women's organizations formed specifically for litigation support—the Legal Defense and Education Fund of the National Organization for Women, the Women's Legal Defense Fund, and the Women's Rights Project of the ACLU—were created in 1971.[58] After that year, the number of such organizations grew significantly, to almost fifteen by 1973 and almost twenty by 1979.[59] Some of the organizations played key roles in propelling women's-rights claims onto the Supreme Court's agenda. The

Figure 4.1 The Women's Movement in the United States: Number of National and Regional Organizations



Source: Associations Unlimited.

ACLU's Women's Rights Project, for instance, played a leading role in directing the development of test-case litigation both in lower courts and in the Supreme Court,[60] and the Center for Constitutional Rights, founded in 1966, developed the research behind privacy rights challenges to state abortion laws.[61]

Although earlier in this century there were some tensions between several of the leading rights-advocacy organizations,[62] over time they have developed a great deal of cooperation. The American Fund for Public Service provided financial support to both the ACLU and the NAACP; and the ACLU, NAACP, and ILD cooperated to provide support for a number of cases in the twenties and early thirties. Indeed, the ACLU, the NAACP, and the American Jewish Congress formed the foundation of civil liberties and civil rights organizing for the first half (and more) of this century. They sponsored the leading cases in the Supreme Court on civil liberties and civil rights. In their briefs, they provided the arguments that the Court used when it supported civil liberties or rights claims; and, crucially, their efforts predated supportive decisions from the Supreme Court: as histories of the organizations reveal, they brought numerous cases in lower courts before they eventually won landmark decisions in the Supreme Court. The efforts of the early rights-advocacy organizations were a necessary condition for the development of the judicial rights revolution: without those efforts, there would have been virtually no civil liberties or civil rights cases for the Court to decide. It is no exaggeration to say that the early history of the Supreme Court's agenda on civil liberties and rights is

largely the history of the strategic efforts of civil liberties and rights organizations to influence the Court. Moreover, the ACLU, as noted above, played a crucial role in the seventies in developing organizations for litigation on behalf of women's-rights, which supported a number of important women's-rights cases in the Supreme Court. The expansion of organized group resources, then, constituted a significant part of the growing support structure for rights litigation in the Supreme Court.

The Legal Profession

The legal profession, too, has changed significantly in this century, and the changes greatly contributed to the growing support for civil liberties and rights litigation. Increasing numbers of lawyers began practicing in firms, the site of training shifted to law schools, and the lawyer population diversified.

Law firms provide economies of scale and a capacity for specialization and long-term strategic planning, all of which are valuable assets in supporting strategic litigation campaigns.[63] The widespread presence of law firms, like the other developments in the support structure, is a relatively new phenomenon. In 1872 there were only 15 firms with 4 or more lawyers in the entire country; between 1892 and 1903 the number of such firms jumped from 87 to 210; by 1924 there were well over 1000. As the number of firms grew, so did their size. In 1903, no firms consisted of ten or more lawyers; by 1914, there were six such larger firms; in the following years the number and size of large firms continued to grow.[64] Rights-advocacy organizations commonly have drawn cooperating attorneys from law firms that free up their attorneys to do such work. In addition, liberal rights advocates in the sixties and seventies developed public interest law firms to gain the benefits of the firm structure. The development and spread of the law firm as a principal form of legal practice after 1900, then, contributed to the growing support structure for rights litigation.

Additionally, in the 1880s the site of legal training began to shift from apprenticeship under established lawyers to formal education in law schools. In the nineteenth century, most lawyers were trained in apprenticeships; by 1915, most lawyers were trained in law school.[65] That change had important effects on the legal profession. First, the decline of apprenticeship and the rise of law schools disconnected training from the conservative interests of the practicing legal profession and provided the institutional basis for the development of theoretical study of law and for reform-oriented political efforts.[66] The developing legal professoriat, for instance, was the source for sociological jurisprudence and legal realism, two important movements in the study and practice of law that advanced the then-novel theory that legal decision making is policy making in disguise, and that, therefore, judicial policies should be developed self-consciously for political ends. The changes in legal education thus provided one of the foundations for the change in the justices' conception of their role as the defender of static constitutional limits on legislative power to a new role as guardian of evolving fundamental rights.[67] The law schools, moreover, also provided institutional support for clinical programs and legal research that supported some rights-advocacy litigation. The Court's decision in *Gideon v. Wainwright* (1963),[68] for instance, was widely expected at the time because of sustained litigation on the issue by, among others, several law professors from the University of Virginia.[69]

In addition, the growth of law schools provided entry into the legal profession to an increasingly diverse range of people who had difficulty getting apprenticeships under the old training system. As late as 1910, the legal profession remained, as Richard Abel writes, "overwhelmingly Protestant and native born."[70] The new law schools, however, were open to all whites, regardless of ethnic or religious background (although many schools, particularly in the South, continued to exclude blacks for several decades), and many of the schools offered night classes, which increased their accessibility to members of the lower classes.[71] These changes led to a dramatic and substantial diversification of the lawyer population, as new Jewish and Catholic immigrants from eastern and southern Europe, among others, got law degrees.[72] In New York City, for instance, between 1924 and 1929, 56 percent of new lawyers were Jewish; between 1930 and 1934 the percentage reached 80 percent. Moreover, between 1920 and 1930, the number of lawyers as a whole also grew rapidly, by 31 percent.[73]

The growing presence of Jewish, Catholic, and black lawyers in the United States in the years following World War I provided a growing base of legal representation for previously unrepresented groups. The new lawyers represented conscientious objectors, radical labor organizers, criminal defendants, communists, free speech advocates, and other unpopular figures and causes.[74] The significance of the change is revealed in part by its opponents' response. A prominent lawyer, for instance, railed against "the great flood of foreign blood . . . sweeping into the bar . . . [with] little sense of fairness, justice and honor as we understand them."[75] Another (George Wickersham) wrote, "To think

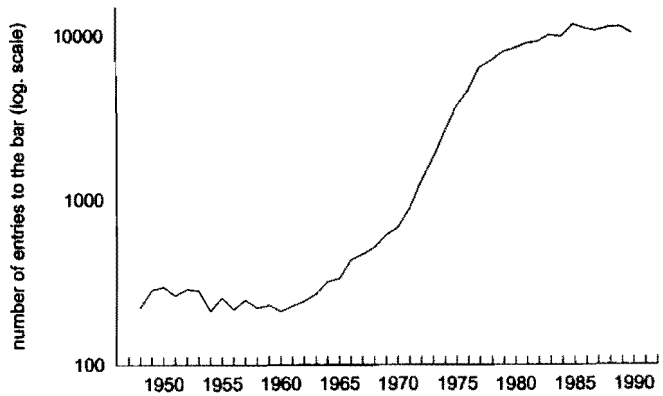
that those men, with their imperfect conception of our institutions, should have an influence upon the development of our constitution, and upon the growth of American institutions, is something that I shudder when I think of."[76] In response, the established bar formed professional associations, worked to increase bar admission standards, and used character tests in an attempt to maintain the legal profession's allegiance to the fading traditional conception of the constitutional order.[77] Moreover, some lawyers for the new interests faced disbarment proceedings; some even suffered beatings.[78] For instance, when a New York attorney presented evidence to J. Edgar Hoover of beatings and other repressive actions by federal agents against labor organizers in 1919, Hoover responded by urging that the attorney be disbarred for publicizing the evidence.[79]

By the mid-thirties, the changes in the legal profession began to take institutional form. In 1936, the National Lawyers Guild was formed. The Guild was created by progressive and radical lawyers who saw a need for an organizational alternative to the conservative American Bar Association, particularly as the latter continued to engage in racial discrimination in the thirties.[80] Yet the American Bar Association itself increasingly was pressed by its members to take up the issue of civil liberties and civil rights. In 1938, the organization created its Bill of Rights Committee, which greatly increased the symbolic prominence of the civil liberties issue in the broader organization. The Bill of Rights Committee's work was not only symbolic: it encouraged the Roosevelt administration's Justice Department to work more proactively in favor of protection of civil liberties, and it collected complaints of violations of civil liberties and passed them on to state and local bar associations for investigation and action.[81]

The changes in the legal profession in the years between the turn of the century and the beginning of the New Deal, then, constituted the beginning of the powerful tradition of progressive "cause" lawyering that reached its peak during the Warren Court era and shortly after it. The growing diversity of the U.S. legal profession in the teens and twenties thus provided an important source of support for the cases that constituted an emerging judicial rights agenda after 1917.

Just as the U.S. legal profession became significantly more ethnically diverse after 1900, it became dramatically more diverse along gender lines after 1965 as women increasingly chose law as a career. The number of women entering the legal profession began growing after the early sixties and, by the mid-seventies, women had become a primary source for the very rapid growth in the number of lawyers as a whole.[82]

Figure 4.2 Women Entering the Legal Profession in the United States



Source: Curran and Carson, *Lawyer Statistical Report*, 2, 5.

The rapid growth in the number of women entering the legal profession in the late sixties and seventies is illustrated in figure 4.2.[83]

The entry of substantial numbers of women into the profession transformed the base of support for women's-rights litigation. Certainly there were a few women lawyers in earlier years, and occasionally they supported cases, even to the Supreme Court. In 1948, Anne R. Davidow, for instance (who, along with her brother, served as general counsel to the Reuther brothers and helped to organize the United Auto Workers), took the case *Goesaert v. Cleary* to the Supreme Court (unsuccessfully challenging a Michigan law banning from bartending any woman who was not the wife or daughter of the bar owner).[84] But Anne Davidow was an exception in these early years. Many of the much larger number of new women lawyers in the seventies supported the women's-rights cause and women's-rights litigation, and their efforts generated litigation campaigns that otherwise would not have existed. Early women's-rights lawyers expressed frustration with what they regarded as male lawyers' lukewarm support and narrow conception of women's rights; to fill the void, the new women lawyers vigorously pursued women's-rights litigation on a number of fronts.[85] Thus, two female women's-rights lawyers who had just graduated from law school argued the landmark abortion rights case *Roe v. Wade* (1973).[86] Ruth Bader Ginsburg, a prominent attorney appointed to the Supreme Court in 1993, directed the ACLU's Women's Rights Project in the seventies and argued or otherwise supported many of the sex-discrimination cases that reached the Supreme Court during that time, among them the key early case *Reed v. Reed* (1971).[87] The growth in the

number of women lawyers beginning in the late sixties, then, provided a new base of support for women's-rights litigation, just as the newly diversifying profession a half-century earlier had pioneered the process of "cause" lawyering.

Sources of Financing for Litigation Campaigns

Organized civil liberties groups provided the institutional direction and support for rights litigation after 1916 but they lacked sufficient resources to finance more than a few court cases. The financial support for court cases came from one of two main sources. The first was private philanthropy, in the early years donated by the American Fund for Public Service and some wealthy individuals, and in later years provided by major foundations, the Ford Foundation in particular.

Charles Garland's American Fund for Public Service was created in 1922, and for a short time it supported key rights-advocacy efforts.[88] Roger Baldwin, the director of the ACLU, became the director of the new fund as well, and the original board of directors consisted largely of members of the ACLU's national committee.[89] Under Baldwin's leadership, there was little strategic focus; the Fund supported a wide array of left-wing causes in the twenties and thirties. Nonetheless, the Fund was the primary source of financial support for court battles directed by the ACLU in the twenties.[90] In addition, as noted in my discussion of the NAACP, the American Fund for Public Service, although lukewarm in its support for the NAACP, provided the financing for that organization's early legal research and litigation campaigns against racial segregation. The stock market crash of 1929 devastated the Fund, however, and as a consequence its support for litigation dropped dramatically in the thirties. In 1942 the Fund's board of directors dissolved it.

Other foundations, particularly the Ford Foundation, provided major grants to organizations working in favor of civil liberties and civil rights. The Ford Foundation gave $7.4 million to the National Legal Aid and Defender Association from 1953 to 1972; $15 million to create the pro–civil liberties Fund for the American Republic in 1952–53; $8.6 million to the Southern Regional Council from 1953 to 1977; $3.3 million to the NAACP-LDF from 1967 to 1976; and $13 million for the development of public interest law centers from 1970 to 1977.[91]

In addition, various states developed right-to-counsel policies that provided support for legal defense and appellate litigation on behalf of the criminally accused. The provision of counsel to poor people in civil cases and to indigent defendants in criminal cases is a relatively

old development in the United States. German immigrants developed the earliest forms of legal aid in the late 1800s in New York City for the purpose of protecting new immigrants from being victimized by fraud. An early champion of legal aid, Arthur von Briesen, however, expanded and institutionalized programs specifically to discourage new immigrants from joining radical movements by persuading them that the American legal system was fair. He argued that legal aid "keeps the poor satisfied, because it establishes and protects their rights; it produces better workingmen and better workingwomen, better houseservants; it antagonizes the tendency toward communism; it is the best argument against the socialist who cries that the poor have no rights which the rich are bound to respect."[92] The earliest forms of legal aid in civil cases were informally organized, and it was not until the sixties that a comprehensive national system was developed.

Providing defense counsel to indigent defendants developed later than civil legal aid, largely after World War I. The first organization providing counsel to indigent defendants was created in 1911 in Oklahoma, followed by one in Los Angeles in 1914.[93] Undoubtedly the Supreme Court's *Powell v. Alabama* decision in 1932 (and the publicity around the Scottsboro case in general) reinforced and invigorated the development of state policies on the right to counsel.[94] Supporters of legal aid and the right to counsel argued that policies providing legal representation to the poor were an effective rebuttal to criticisms that the judicial system served only the wealthy. The *New York Times*, for instance, declared that the Court's decision in *Powell* "ought to abate the rancor of extreme radicals while confirming the faith of the American people in the soundness of their institutions and especially the integrity of the courts."[95] The *Christian Century* agreed, arguing that had the Supreme Court upheld the convictions and death sentences, "a pronounced swing toward economic and political radicalism . . . would have been the inevitable result."[96]

As these pressures grew, states passed laws expanding the provision of counsel to indigent defendants. As early as the late twenties, and continuing through the late fifties, various states began adopting laws that required the provision of counsel to indigent criminal defendants. Some provided counsel only in capital cases, as required by *Powell;* other states went further, providing counsel to any indigent defendant charged with a felony. Although these state programs were grossly inadequate given the needs of vast numbers of poor defendants, particularly in states that provided counsel only in capital cases, they nonetheless provided a financial base for growing numbers of criminal

appeals to the United States Supreme Court decades before similar developments occurred in other countries.[97] By the late fifties, so much had changed that advocates of a right to counsel for all felony defendants could confidently declare that "the necessity for [legal] representation is generally recognized today" and that "any society which does not afford the right to counsel gravely endangers judicial search for truth and risks its replacement by the purge or the ceremonial trial."[98]

The diffusion of state right-to-counsel policies covering felonies is illustrated in table 4.1. By the late fifties, as the table shows, only six states limited their right-to-counsel policies to capital cases; most states guaranteed the right to counsel in felony cases, the standard that the Supreme Court eventually constitutionalized in 1963 in *Gideon v. Wainwright*.[99] The spread of such policies propelled a growing number of criminal procedure cases onto the Supreme Court's agenda. From 1957 through 1966 a significant proportion of criminal defendants before the Supreme Court were represented by government-provided attorneys.[100]

Finally, in 1965 the federal government launched a major initiative, the Legal Services Program, to supplement the spotty civil legal aid programs provided on the state and local level. In the late sixties and early seventies, the Legal Services Program developed a systematic test-case campaign to bring about legal reform in policies directly affecting the poor. As Susan Lawrence has shown, eighty cases financed by the Legal Services Program reached the Supreme Court's agenda; in many, the Court announced landmark decisions that significantly influenced the development of the due process revolution.[101] In the absence of the Legal Services Program it is highly likely that many of the cases never would have reached the Court, as few such cases reached the Court either before the Program was formed or after it was replaced in 1974 by the more conservative Legal Services Corporation.[102]

Additional financing for rights litigation has come from "fee shifting"—use of defendants' funds to pay attorneys' fees for successful plaintiffs—which is authorized in certain cases under both state and federal legislation. By the early eighties, some 150 federal statutes authorized the award of attorneys' fees to private litigants who prevail in court when seeking to enforce federal law, and many states had similar legislation.[103] The most important federal authorizations for fee shifting are found in the Civil Rights Act of 1964, the Civil Rights Attorney's Fees Award Act of 1976, and the Equal Access to Justice Act of 1982. These statutes are explicitly intended to encourage rights litigation for the purpose of enforcing federal civil rights. Fee shifting

Table 4.1 Proliferation of State-Level Right-to-Counsel Laws Covering Accused Felons, 1929–1959

Nevada	1929	Utah	1943
Idaho	1932	West Virginia	1943
Washington	1932	Minnesota	1945
Indiana	1933	Iowa	1946
Tennessee	1934	Kentucky	1946
Colorado	1935	Arkansas	1947
Delaware	1935	Vermont	1947*
Georgia	1935	Wisconsin	1947
Illinois	1935	Wyoming	1947
Kansas	1935	Connecticut	1949
Montana	1935	Virginia	1950
New Jersey	1937	Michigan	1954
Oklahoma	1937	Texas	1954
Arizona	1939	New Hampshire	1955*
Missouri	1939	North Carolina	1955
Ohio	1939	Maine	1956†
South Dakota	1939	Rhode Island	1956
California	1941	Maryland	1957
New Mexico	1941*	Alabama	‡
New York	1942	Florida	‡
Louisiana	1943	Massachusetts	‡
Nebraska	1943*	Mississippi	‡
North Dakota	1943	Pennsylvania	‡
Oregon	1943	South Carolina	‡

Sources: Beaney, *Right to Counsel*, 84–87; Special Committee, *Equal Justice*, appendix.

*Included only capital crimes and crimes punishable by three or more years imprisonment.

†By judicial decision.

‡These states had not created comprehensive right-to-counsel policies by the end of the fifties. Several other states that had already created right-to-counsel policies ran afoul of the Supreme Court's decision in *Gideon v. Wainwright* (1963) requiring states to provide counsel for indigents facing felony charges. In the three years following the *Gideon* decision, the Court set aside convictions on the basis of the new *Gideon* rule in cases arising from Alabama, Florida, Illinois, Louisiana, Maryland, Missouri, North Carolina, Ohio, Oklahoma, and Pennsylvania. See Lewis, *Gideon's Trumpet*, 214.

clearly provides significant assistance to some rights litigants: several public interest litigation groups have derived substantial portions of their budgets from attorney fee awards.[104] Nonetheless, the extent of support provided to ordinary litigants should not be exaggerated, as some research shows that, at least in constitutional tort cases, attorneys' fees are rarely awarded to plaintiffs.[105]

The Federal Government

Federal policies, particularly those of the Department of Justice and the solicitor general, the second-ranking Department official, also have significantly influenced the Supreme Court's agenda. The solicitor general screens cases lost by the federal government in lower courts, deciding which to petition the Supreme Court to hear. In 1984, for in-

stance, then–Solicitor General Rex Lee screened almost seven hundred government cases, taking only forty-three to the Court.[106] Of those forty-three, the Court granted certiorari in thirty-three cases, a 76 percent success rate for the solicitor general—far higher than the 4 percent success rate for other petitions in the same term.[107] For the 1925–1988 period, the Court granted certiorari in over 70 percent of the cases supported by the Justice Department.[108] Indeed, studies of the Court's certiorari process agree that the presence of the solicitor general as petitioner greatly increases the likelihood that a case will be placed on the Court's agenda.[109] Moreover, between 1959 and 1989, solicitors general won over two-thirds of the Supreme Court cases in which they participated.[110] The policies pushed by the federal government in its litigation before the Supreme Court, therefore, have had a great impact on the Court's agenda and policy decisions.

Beginning in the thirties, the Justice Department increasingly advocated clear policy programs in the Supreme Court, and its strong support for civil rights in the late forties, fifties, and sixties encouraged the Supreme Court to devote sustained attention to civil rights.[111] After initially rebuffing pressure from civil rights groups for federal prosecutions of civil rights violations in the South, the Justice Department gradually began developing a civil rights program in the late thirties in response to growing pressure from organized labor, African Americans, and some elements of the legal profession.[112] In 1938, the Justice Department initiated a prosecution against coal companies in Kentucky for violating the rights of coal miners to speak and hold public meetings.[113] In 1939 Attorney General Frank Murphy, following suggestions by President Roosevelt as well as his own political commitments, created the Civil Liberties Unit of the Department's Criminal Division (soon renamed the Civil Rights Section and now called the Civil Rights Division) and charged it with enforcing long-dormant Reconstruction-era federal civil rights laws.[114] The new section developed a careful strategy to expand federal protection for civil liberties and civil rights: under Murphy's direction, section lawyers developed an analysis of federal enforcement power under old Reconstruction-era statutes, and then pursued test cases in the courts to vindicate their positions. In the test-case strategy, the section worked primarily to bring cases concerning lynchings, police brutality, and involuntary servitude and peonage in the South, several of which reached the Court in the forties and fifties.[115] In the late forties, Attorney General Tom Clark reinvigorated federal support for civil rights as part of an effort to shore up support for Truman's administration among northern

blacks.[116] As Clayton shows, the Justice Department's new commitment to civil rights led to its development of an amicus brief in support of the NAACP's case in *Shelley v. Kraemer* (1948),[117] which was followed by similar briefs in a string of other NAACP cases. In the Eisenhower administration, the Justice Department under Attorney General Herbert Brownell continued its support of civil rights, filing crucial briefs in *Brown* (1954) and other civil rights cases.[118] Moreover, during the crucial period leading up to the Court's decision in *Brown*, Justice Frankfurter and Philip Elman, a lawyer in the solicitor general's office (and former Frankfurter clerk) cooperated closely in developing strategies and counting votes in pursuit of a pro–civil rights decision on school segregation.[119]

After *Brown*, the Justice Department's influence over the Court's rights agenda deepened even further. The Department played a major role in the late fifties and sixties in pushing the civil rights agenda by supporting litigation against racial segregation and by pushing legislation that both expanded its own powers to fight segregation and also broadened the scope of civil rights.[120] As Robert Dixon observed, participation by the Justice Department in civil rights cases brought by private plaintiffs "strengthen[ed] their cases through the addition of federal legal resources."[121] After the Department pushed for and gained the authority under the 1964 Civil Rights Act to bring suit in its own name in discrimination cases, its direct participation in civil rights litigation before the Court grew dramatically.[122] In addition, in the sixties the Justice Department supported major expansions in the scope of statutory protection for civil rights, thereby providing the foundation for a new wave of litigation.

Thus, as Cornell Clayton has argued, "[t]he executive branch originally supported—even drove—the Supreme Court in its new political role" particularly by pushing civil rights cases onto the Court's agenda and by urging the Court to broaden its support for civil rights.[123] On the other hand, the Justice Department's early enforcement of civil rights in local communities should not be exaggerated. In the forties, even after creation of the Civil Rights Section, the Justice Department hesitated to intervene vigorously in actions against lynching in the South and, as Michal Belknap observed, "characterized its own policy as one of 'strict self-limitation.'"[124] Nonetheless, in the late forties, Truman's Justice Department became increasingly active on the issue, particularly by pressing race-discrimination cases onto the Supreme Court's agenda.

By the late sixties, actions by the federal government also contrib-

uted to the support structure for women's rights. In 1964, Congress passed Title VII of the Civil Rights Act, which banned employment discrimination against women and became the basis for Supreme Court case law on sexual harassment. Title VII's establishment of the Equal Employment Opportunities Commission (EEOC) to implement the law, and Congress's authorization in 1972 of the EEOC to initiate lawsuits in its own name, affected the judicial agenda.[125] Like the Equal Opportunities Commission in England, the EEOC in the United States provided an important extrajudicial source of financial and legal resources for appellate litigation.

Supplementing such legislation, Presidents Johnson and Nixon issued a number of executive orders directing the federal bureaucracy to implement rules against sex discrimination. The Nixon administration directed a review of the hiring practices of higher education institutions and, on the basis of the review, brought hundreds of suits in lower courts against such institutions.[126] While such policies did not directly affect the Supreme Court's agenda, they shaped the legal and political environment in which the Court began to take women's-rights cases.

The Impact of Judicial Policies on the Support Structure

The broadest changes in the U.S. support structure thus have sources in civil society and governmental policy that are largely independent of the Supreme Court's influence. Nonetheless, some Supreme Court policies have influenced developments in the support structure. Both Wasby and McCann have explored in rich and nuanced detail the various effects of judicial policies on rights-advocacy organizations and movements.[127] First, favorable judicial decisions typically have encouraged rights-advocacy organizations and lawyers to invest further resources in rights litigation. For instance, the Court's pro–civil liberties decisions in the early thirties—*Near v. Minnesota* (1931), *Stromberg v. California* (1931), and *Powell v. Alabama* (1932)[128]—encouraged the ACLU and its cooperating attorneys to continue their litigation campaigns;[129] similarly, *Brown v. Board of Education* (1954)[130] and subsequent decisions encouraged civil rights organizations and private foundations to invest substantial resources in further litigation campaigns.[131]

Additionally, some judicial decisions have contributed directly to the creation of resources for litigation. The Court's right-to-counsel decisions in *Gideon v. Wainwright* (1963)[132] and subsequent cases contributed directly to the deepening of institutional resources for criminal procedure litigation. The Court's decision protecting the right of organizations (specifically the NAACP) to support litigation on behalf of their members, and the decision upholding the award of attorneys' fees under the Civil Rights Act of 1964, directly encouraged litigation by rights-advocacy organizations and contributed to their resource base.[133] Similarly, the Court's various decisions in the sixties loosening the rules on standing and class actions broadened access by organized group litigants to the judicial agenda. Nonetheless, in 1975, a more conservative Supreme Court undermined previous judicial expansions of the fee-shifting system by ruling that courts had no authority to award attorneys' fees to successful plaintiffs unless specifically authorized by statute to do so.[134] Congress responded by enacting the Civil Rights Attorney's Fees Award Act, discussed earlier.

Although favorable judicial decisions have clearly contributed to the support structure, decisions against rights claims, perhaps surprisingly, often have not directly eroded that structure. This phenomenon supports my contention that the support structure's base is broader than judicial policies alone. In the twenties, the ACLU faced repeated negative decisions from the Supreme Court, only to return to the Court with additional cases. Had the ACLU's strategies been determined by the Court's policies, *Stromberg* would never have reached the Court. Similarly, as a civil rights litigator told Wasby, "Many cases have gone forward anyhow [in spite of apparent opposition from the Supreme Court], or *Brown* wouldn't have happened."[135] Thus, although the Supreme Court's decisions matter, "litigators may attempt to change such patterns."[136]

The Impact of the Support Structure

The developments in the support structure for legal mobilization that are described earlier in this chapter have been crucial to the emergence of judicial revolutions in freedom of speech and the press beginning around 1918, in criminal procedure beginning in the early thirties, and in women's rights in the early seventies. In each era, the Court's agenda responded to litigants availing themselves of newly developed resources for litigation.

The growing support structure for legal mobilization provided a key foundation for the rights revolution in two ways. First, the development of support for constitutional rights litigation propelled new civil liberties and civil rights claims onto the Court's agenda. Few civil liberties or civil rights cases reached the Court's agenda before about 1918. The few that reached the agenda remained isolated complaints, hardly part of a sustained uprising of organized litigation. By around 1918,

however, an increasing number of organized groups, aided by an increasingly diverse legal profession, forcefully began pressing rights cases onto the Court's agenda. The ACLU led the effort, and other organizations followed or worked closely with the ACLU. By the early thirties, the NAACP had launched its strategic campaign against racial segregation, and the Jehovah's Witnesses had begun their campaign to defend door-to-door and street-corner proselytizing.

Developments in the support structure also propelled criminal procedure cases onto the Court's agenda. By the late twenties, several organized groups began attacking, partly through litigation, abuses in the criminal justice process, particularly racial discrimination by police and courts. In 1929, President Hoover created the Wickersham Commission to report on the state of the criminal justice system.[137] The ACLU's director succeeded in having leading members and supporters of the ACLU appointed to write the portion of the Commission's study devoted to the police. The ACLU researchers drew on previous research by the ACLU and released a report titled *Lawlessness in Law Enforcement*, which, as Samuel Walker observed, "created a national sensation, overshadowing all the other ten commission reports."[138] The report shocked many people; particularly legal and judicial elites, because it documented that police departments regularly used the "third degree"—physical and psychological coercion—against criminal suspects. The second key development that placed law enforcement practices on the national agenda was the Scottsboro case. The litigation around the Scottsboro case continued for years after the initial Supreme Court decision in 1932 and helped to focus attention in the legal community on various problems in the criminal justice process. Additionally, the Justice Department's Civil Rights Section, as noted earlier, supported civil rights and liberties litigation on a range of matters, particularly discrimination in the criminal justice process, and a number of the cases reached the Supreme Court. The Section heavily publicized its work against racial discrimination in the South and pursued a number of cases arising from problems in the justice system in southern states.[139] Finally, the growth of state right-to-counsel policies provided new resources for criminal appeals, so much so that many of the criminal procedure cases reaching the Supreme Court by the fifties were argued by government-sponsored attorneys. In the absence of these various sources of support, it is very likely that few criminal procedure cases would have reached the Supreme Court.

Similar developments in the support structure for women's-rights litigation help to explain the judicial revolution in women's rights just

as the Court's majority began shifting toward the right. Before 1970, a broad base of support for women's-rights litigation simply did not exist. But, as the women's movement developed after the mid-sixties, several new developments occurred—the number of women's-rights organizations and the number of women entering the legal profession grew dramatically—creating, for the first time in American history, a strong support structure for women's-rights litigation. The new support structure propelled a range of women's-rights issues onto the Supreme Court's agenda and thus, just as the Court's majority became increasingly conservative, it faced a rising tide of women's-rights litigation and a public mood increasingly supportive of women's rights.

By 1971 women's-rights litigators, unlike earlier civil rights and liberties litigators, were not inventing a new weapon against discrimination: they could model their litigation campaigns on earlier successful campaigns in many other policy areas. The Warren Court's egalitarian rulings on racial discrimination, and the litigation campaign of the NAACP-LDF, provided inspiration and practical guidelines for the women's-rights litigators in the seventies.[140] For these reasons, the judicial revolution in women's rights advanced far more rapidly than had the earlier developments in freedom of speech and race discrimination. Although some legal issues remained open to debate, both the justices and the litigators knew well the nature of the process in which they were participating, for it had been done many times before. Thus, once the Court had signaled clearly its willingness to question sex discrimination on constitutional grounds, litigation moved rapidly.

In early developments in each phase of the rights revolution, the justices often had not clarified and solidified their attitudes on a particular issue before its regular appearance on their agenda. Justice Holmes' flip-flop on freedom of speech is perhaps the most famous example of this judicial uncertainty. In 1919 Holmes wrote the Court's opinion in a unanimous decision upholding Charles Schenck's criminal conviction, over First Amendment objections, for distributing antidraft leaflets.[141] Holmes's opinion held that Congress had the authority to criminalize criticism of the military draft during wartime. As several legal scholars and historians have recently observed, Holmes's opinion in *Schenck* followed conservative prewar free speech jurisprudence, which authorized government restrictions of any speech having a "bad tendency."[142] Yet litigants continued to bring free speech cases arising out of antiwar protests to the Court. Harvard professor Zechariah Chafee developed a strong defense of freedom of speech, and Holmes soon reversed his conservative position and began to use dissenting

opinions to articulate a libertarian defense of free speech.[143] Holmes's judicial attitude toward freedom of speech seems either remarkably malleable or, more plausibly, not clearly developed before the proliferation of free speech litigation confronting the Court in the postwar years. The birth of other issues through newly developing litigation similarly has forced the justices to develop new jurisprudential and policy positions. *Everson v. Board of Education* (1947),[144] as J. Woodford Howard showed, presented the Court with establishment clause claims that it had not previously faced, and the justices, with no prior experience in the matter, shifted votes and jurisprudential positions during conference discussions of the case. "Ideological hardening came later," as Howard observed; "time and litigation may be necessary for implications to be perceived and attitudes to harden in a case-law system."[145] As these examples illustrate, the justices' policy preferences, at least during the early development of a new judicial agenda, developed in response to new cases placed on their agenda by outside litigants.

In the context of frequent litigation on any particular issue, of course, the justices typically have developed clear attitudes and sharp divisions. And in those circumstances, the replacement of justices may produce substantial effects on the judicial agenda. In the area of criminal procedure, for example, the replacement of liberal justices by conservatives in the late sixties and early seventies produced a dramatic shift in the agenda. The liberal justices of the sixties had granted certiorari in criminal cases mainly to claims brought by defendants for the purpose of overturning convictions and expanding procedural rights; the new conservative majority, by contrast, began granting certiorari in cases brought by prosecutors for the purpose of reinstating convictions and narrowing procedural rights. But such a dramatic shift was possible only because there existed a steady stream of criminal appeals supported by a broad support structure.

The second way in which the growing support structure for legal mobilization influenced the rights revolution is by supporting continued litigation, in response to landmark decisions, that capitalized on openings offered by the justices. In the absence of a vibrant support structure, landmark decisions remain isolated events, neither implemented nor developed through further litigation. The Supreme Court's early decision in *Strauder v. West Virginia* (1880) banning race discrimination in jury selection, for instance, remained a lonely, isolated precedent before the development of a support structure for litigation

against race discrimination in the criminal justice system.[146] Similarly, as we shall see in the following chapters on India, after 1977 the Indian Supreme Court's decisions on due process have been as revolutionary as the leading decisions of the Warren Court, but the Indian rights revolution has failed to develop because of the support structure's weaknesses. By contrast, the U.S. support structure responded with speed and vigor to the Court's landmark rights decisions of the sixties.

Conclusion

The rights revolution in the United States, as I have shown in this chapter, has developed within a broader political economy of litigation. The growth of a support structure for legal mobilization—consisting of rights-advocacy organizations, a diverse and organizationally sophisticated legal profession, a broad array of financing sources, and federal rights-advocacy efforts—propelled new rights issues onto the Supreme Court's agenda.

Although judicial policies undoubtedly contributed to the development of that support structure, changes in the support structure have typically resulted from forces that are broader than the Court's policies alone. The major rights-advocacy organizations were formed during the wave of institution building in the early twentieth century, and the interest group system diversified tremendously as part of broader changes in American society in the post–World War II period; the legal profession diversified due to the development of law schools and major demographic changes in American society; and the growth of foundation funding for rights advocacy reflected the rise of the foundations themselves.

The great expansion of support for rights litigation could not, by itself, have produced the transformation of the Court's agenda. The Court has aided some developments in the support structure and not others and has thereby influenced long-term developments in the agenda. Thus the Court's civil liberties decisions of the early thirties encouraged ACLU lawyers to continue pursuing rights litigation. By the fifties, the support structure for rights litigation had deepened and broadened significantly; in that context, the liberal court majorities of the fifties and sixties produced a major transformation in the agenda. The *Brown* decision transformed the entire field of civil rights litigation, and the Court's procedural decisions of the sixties on standing, class actions, and the award of attorneys' fees provided significant support for liberal rights-advocacy organizations and lawyers. But the de-

velopment and persistence of a broad support structure for rights litigation was a crucial condition for even those supportive judicial decisions. Of the countries in this study, and arguably of the countries in the world, that support structure developed the earliest and the most substantially in the United States, and on its foundation the Supreme Court has built the U.S. rights revolution.

FIVE

India: An Ideal Environment for a Rights Revolution?

In the late seventies, Indian journalists revealed evidence of shocking abuse in the nation's prisons. Prison guards beat and tortured prisoners, sometimes using bicycle spokes and battery acid to cause blindness, and some prisons kept the criminally accused behind bars for years without trials, often far beyond the maximum sentence for their alleged crimes. The Supreme Court of India heard several cases arising from these allegations and handed down landmark decisions extending constitutional rights to prisoners.[1]

The prisoner rights cases were part of a dramatic attack on violations of individual rights begun by the Indian Supreme Court in the late seventies. The supposed judicial activism of American courts seems almost conservative by comparison to the Indian Court's leading decisions. By 1987 the Indian Supreme Court had ordered a complete reform of the country's prison administration and created, among other things, a constitutional right to a minimum wage,[2] a constitutional right to counsel ("free legal aid") in criminal cases,[3] and broad new remedies against destruction of the environment (for instance, in 1987 the Court ordered the immediate shutdown of twenty tanneries emitting pollutants into the Ganges River).[4] The Indian Supreme Court clearly *tried* to spark a rights revolution—*but little happened.*

As I shall show in the next chapter, the Indian rights revolution remained stunted, limited to a few Supreme Court decisions that were in large part neither fleshed out by later cases nor implemented in practice. The best explanation for that lack of energy, I shall show, is the weakness of the Indian support structure for legal mobilization. But first, this chapter shows that the key conditions identified by the conventional explanations—rights consciousness, judicial independence and the presence in the constitution of rights guarantees, and rights-supportive judges—all were met by 1978. Indians have increasingly framed their aspirations in the language of rights, the Indian

effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

NOTES

Citations to case reporters use the abbreviations listed below.

AC	Law Reports, Appeal Cases (United Kingdom)
AIR . . . SC	All India Reporter, Supreme Court Division
All ER	All England Law Reports
D.L.R.	Dominion Law Reports (Canada)
ECR	European Court Reports
EHRR	European Human Rights Reports
F. Supp.	Federal Supplement (United States)
IRLR	Industrial Relations Law Reports (England)
ICR	Industrial Court Reports (England)
KB	Law Reports, King's Bench Division
La. Ann.	Louisiana Annual Reports
QB	Law Reports, Queen's Bench Division
SCALE	Supreme Court Almanac (India)
SCC	Supreme Court Cases (India)
SCR	Supreme Court Reports (India)
S.C.R.	Supreme Court Reports (Canada)
U.S.	United States Reports
WLR	Weekly Law Reports (England)

Chapter One

1. *Monroe v. Pape*, 365 U.S. 167 (1961). The victim's wife and her lover were eventually convicted of the crime. "Negro Family Wins Right to Sue Police Officers," *Chicago Tribune*, Feb. 21, 1961, p. 17; Thomas J. Klitgaard, "The Civil Rights Acts and Mr. Monroe," *California Law Review* 49:145–71 (1961). A federal jury eventually awarded the Monroes $13,000 in damages. *Monroe v. Pape*, 221 F. Supp. 635, 638–39 (1963). Although the number of officers has been widely reported as thirteen, the actual number apparently was nine. Ibid.

2. The Court's decision was announced almost four months before the Court's landmark decision in *Mapp v. Ohio*, 367 U.S. 643 (1961) (and over a month before *Mapp* was argued). The *Mapp* decision, which held that illegally seized evidence must be excluded from state criminal trials, is now recognized as the beginning of the criminal procedure revolution. *Monroe*, although not a criminal procedure decision, addressed policy questions that were very similar

to those addressed in *Mapp*: how may unlawful police activity be controlled? Coming as it did before *Mapp*, and indeed in the absence of any change in membership on the Court, the *Monroe* decision was unexpected.

3. 325 U.S. 91 (1945). The Court in *Screws* ruled that, in order to convict an official under 18 U.S.C. §242 (which makes it a federal crime to act under "color of law" to deprive any individual of constitutional or other federal rights), prosecutors must show beyond a reasonable doubt that the official had a "specific intent" to violate the victim's rights. The "specific intent" standard was very difficult to meet in most cases. As late as 1960, United States Justice Department officials believed that the standard posed a major obstacle to police brutality prosecutions and convictions. See John T. Elliff, *The United States Department of Justice and Individual Rights, 1937–1962* (New York: Garland, 1987), 569. Yet it must be noted that the justices who supported the difficult standard for conviction created by *Screws* did so because they believed that standard to be necessary in order to save the statute from challenges that it was void for vagueness (that it gave officials no adequate notice of what kinds of actions were to be illegal).

4. In *Monroe*, the Court repudiated the *Screws* standard for cases involving civil, not criminal liability; Justice Douglas's majority opinion declared that the civil rights statute authorizing civil lawsuits (42 U.S.C. §1983) "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." That new standard for civil actions against police brutality and other deprivations of civil rights significantly eased the burden of proof for plaintiffs, and the number of civil lawsuits brought under the statute grew significantly. Nonetheless, constitutional tort litigants still face significant obstacles. See Theodore Eisenberg and Stewart Schwab, "The Reality of Constitutional Tort Litigation," *Cornell Law Review* 72:641–95 (1987). See also David H. Rosenbloom and Rosemary O'Leary, *Public Administration and Law* (New York: Marcel Dekker, 1997).

5. Richard L. Pacelle, Jr., *The Transformation of the Supreme Court's Agenda: From the New Deal to the Reagan Administration* (Boulder: Westview Press, 1991), 138.

6. Much of this development in the United States is documented in Pacelle, *Transformation;* C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937–1947* (New York: Macmillan, 1948); C. Herman Pritchett, *Civil Liberties and the Vinson Court* (Chicago: University of Chicago Press, 1954); and Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge: Cambridge University Press, 1993).

7. Pacelle, *Transformation*, 138.

8. Gerald R. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991). The landmark school desegregation ruling, *Brown v. Board of Education*, in particular has been eroded in practice. See Gary Orfield, Susan E. Eaton, and the Harvard Project on School Desegregation, *Dismantling Desegregation: The Quiet Reversal of* Brown v. Board of Education (New York: New Press, 1996).

9. See, for instance, Bruce Ackerman, *We the People: Foundations* (Cambridge: Harvard University Press, 1991); Lee Epstein and Joseph F. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* (Chapel Hill: University of North Carolina Press, 1992); Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989); Michael J. Klarman, "Rethinking the Civil Rights and Civil Liberties Revolutions," *Virginia Law Review* 82:1–67 (1996); Robert G. McCloskey, *The American Supreme Court*, 2d ed., ed. Sanford Levinson (Chicago: University of Chicago Press, 1994); Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925–1950* (Chapel Hill: University of North Carolina Press, 1987); Clement E. Vose, *Constitutional Change: Amendment Politics and Constitutional Litigation since 1900* (Lexington, Mass.: Lexington Books, 1972); and many others.

10. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990), 9, 11.

11. Ibid., 3; William J. Quirk and R. Randall Bridwell, *Judicial Dictatorship* (New Brunswick, N.J.: Transaction, 1995). For a more sophisticated analysis along the same line, see James Allan, "Bills of Rights and Judicial Power—A Liberal's Quandary," *Oxford Journal of Legal Studies* 16:337–52 (1996).

12. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

13. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Baker v. Carr*, 369 U.S. 186 (1962).

14. Ely, *Democracy and Distrust*, 120–24.

15. Susan Sterett, *Creating Constitutionalism? The Politics of Legal Expertise and Administrative Law in England and Wales* (Ann Arbor: University of Michigan Press, 1997). Several scholars have examined such developments more broadly. Mauro Cappelletti, for example, argued that the role of constitutional courts in many countries is experiencing a fundamental transformation toward rights-based activism. See "Repudiating Montesquieu? The Expansion and Legitimacy of 'Constitutional Justice,'" *Catholic University Law Review* 35:1–30 (1985). Most of the western European countries, in fact, have granted to courts of one sort or another the power of judicial review over legislation, and some (but not all) of those courts have used their power broadly to develop unwritten but nonetheless foundational principles of human rights. See Louis Favoreu, "Constitutional Review in Europe," in *Constitutionalism and Rights: The Influence of the United States Constitution Abroad*, ed. Louis Henkin and Albert J. Rosenthal (New York: Columbia University Press, 1990); and Alec Stone, *The Birth of Judicial Politics in France* (Oxford: Oxford University Press, 1992). For a comprehensive analysis of developments in judicial policy making in many countries, see C. Neal Tate and Torbjorn Vallinder, eds., *The Global Expansion of Judicial Power* (New York: New York University Press, 1995).

16. Rosenberg, *The Hollow Hope*.

17. 347 U.S. 483 (1954).

18. Rosenberg, *The Hollow Hope*, 103–4.

19. Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994).

20. Marc Galanter, "The Radiating Effects of Courts," in *Empirical Theories about Courts*, ed. Keith O. Boyum and Lynn Mather (New York: Longman, 1983), 136.

21. Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961* (New York: Oxford University Press, 1994), 56–66; Elliff, *Department of Justice.*

22. ACLU—Illinois Division, *Secret Detention by the Chicago Police* (Glencoe, Ill.: Free Press, 1959), discussed in Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (New York: Oxford University Press, 1990), 248–49.

23. S. Walker, *In Defense of American Liberties*, 249.

24. *Monell v. Department of Social Services*, 436 U.S. 658 (1978); Conrad K. Harper, "The Overthrow of *Monroe v. Pape:* A Chapter in the Legacy of Thurgood Marshall," *Fordham Law Review* 61:39–48 (1992). See also *Owen v. City of Independence*, 445 U.S. 622 (1980).

Chapter Two

1. The precise meaning of "judicial independence" is open to endless debate; the criteria mentioned here are threshold requirements. See Owen M. Fiss, "The Right Degree of Independence," in *Transition to Democracy in Latin America: The Role of the Judiciary*, ed. Irwin P. Stotzky (Boulder: Westview Press, 1993), 55–72; Christopher M. Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis," *American Journal of Comparative Law* 44:605–26 (1996).

2. Allan, "Bills of Rights"; P. S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law* (Oxford: Oxford University Press, 1987), 238–39; Kenneth M. Holland, ed., *Judicial Activism in Comparative Perspective* (New York: St. Martin's Press, 1991).

3. Louis Henkin and Albert J. Rosenthal, eds., *Constitutionalism and Rights: The Influence of the U.S. Constitution Abroad* (New York: Columbia University Press, 1991).

4. Favoreu, "Constitutional Review in Europe," 42–43. Similarly, in other European countries, the critics of judicial policy making have opposed the adoption of bills of rights precisely because such documents are thought to empower judges.

5. Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Delhi: Oxford University Press, 1966), 103–6.

6. See, for example, Michael Mandel, *The Charter of Rights and the Legalisation of Politics in Canada* (Toronto: Thompson, 1989).

7. Michael Zander, *A Bill of Rights?* 3d ed. (London: Sweet & Maxwell, 1985).

8. See, for instance, James Allan's discussion of "raw judicial power" in "Bills of Rights," 347–51.

9. James Madison, *The Papers of James Madison*, vol. 12 (Charlottesville: University Press of Virginia, 1979), 207.

10. Rainer Knopff and F. L. Morton, *Charter Politics* (Scarborough, Ont.: Nelson Canada, 1992); F. L. Morton, "The Political Impact of the Canadian Charter of Rights and Freedoms," *Canadian Journal of Political Science* 20:31–55 (1987).

11. James Madison, *The Papers of James Madison*, vol. 11 (Charlottesville: University Press of Virginia, 1977), 298–99; see also Madison, *Papers*, vol. 12, 204–5.

12. Vivien Hart, *Bound by Our Constitution: Women, Workers, and the Minimum Wage* (Princeton: Princeton University Press, 1994), 174; Hendrik Hartog, "The Constitution of Aspiration and 'The Rights That Belong to Us All,'" *Journal of American History* 74:1013–34 (1987).

13. Mark MacGuigan, "The Development of Civil Liberties in Canada," *Queen's Quarterly* 72:273 (1965), quoted in Cynthia Williams, "The Changing Nature of Citizen Rights," in *Constitutionalism, Citizenship, and Society in Canada*, ed. Alan Cairns and Cynthia Williams (Toronto: University of Toronto Press, 1985), 107.

14. David Adamany and Joel B. Grossman, "Support for the Supreme Court as a National Policymaker," *Law and Policy Quarterly* 5:405–37 (1983).

15. A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1961), 198–202. Dicey identified another limitation of bills of rights. A government intent on tyranny, he argued, is easily capable of wiping out a bill of rights in a single action; but to destroy the common law's remedies, a government must eradicate virtually the entire common law and the legal culture with which it is intertwined. Ibid.

16. James Madison, *The Papers of James Madison*, vol. 10 (Chicago: University of Chicago Press, 1977), 211–12, emphasis added. See also Jack N. Rakove, "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, 1991), 136. Madison's doubts about a bill of rights reflected in part his belief that such rights promises were likely to be far less effective than structural mechanisms for restraining governmental power. Structural mechanisms, particularly the separation of powers and federalism, tied the individual interests of officials to the institutional resources of branches of the government, thus enabling officials to effectively defend their interests. A bill of rights, by contrast, as the quoted statement indicates, provided individuals with no institutional resources for pursuing their interests. For further discussion, see Charles R. Epp, "Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms," *American Political Science Review* 90:766 (1996).

17. Segal and Spaeth, *Attitudinal Model*, 69–72.

18. Gerhard Casper and Richard A. Posner, *The Workload of the Supreme Court* (Chicago: American Bar Foundation, 1976); Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (New York: Macmillan, 1927).

19. Burton M. Atkins and Henry R. Glick, "Environmental and Structural Variables as Determinants of Issues in State Courts of Last Resort," *American Journal of Political Science* 20:97–115 (1976); Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman, and Stanton Wheeler, "The Business of State Supreme Courts, 1870–1970," *Stanford Law Review* 30:121–56 (1977).

20. Robert Yates, "Letters of Brutus" (letter no. 15, 1788), in *The Origins of the American Constitution: A Documentary History*, ed. Michael Kammen (New York: Penguin Books, 1986), 356.

21. Segal and Spaeth, for instance, devote their discussion of the United States Supreme Court's civil liberties agenda to a history of turnover in the Court's membership. See *Attitudinal Model*, 97–118.

22. Louis Hartz, *The Liberal Tradition in America* (San Diego: Harcourt, Brace, Jovanovich, 1955), 9.

23. Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991).

24. Ibid.

25. Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, N.Y.: Cornell University Press, 1989).

26. Cappelletti, "Repudiating Montesquieu?"

27. Elizabeth Heger Boyle, "Litigants, Lawbreakers, Legislators: Using Political Frames to Explain Cross-National Variation in Legal Activity" (Ph.D. diss., Stanford University, 1996). See also, more generally, Walter W. Powell and Paul J. DiMaggio, eds., *The New Institutionalism in Organizational Analysis* (Chicago: University of Chicago Press, 1991).

28. Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73:33 (1959). He asked rhetorically (clearly presuming that the answer was obvious), "Does enforced separation of the sexes discriminate against females merely because it may be the females who resent it and it is imposed by judgments predominantly male?" Ibid.

29. See Elisabeth Clemens's analysis of the complex interaction between beliefs about organizational possibilities and resource mobilization in the historical development of interest groups. She argues that interest-group organizing grew out of the discovery and development of a new "organizational repertoire"—new understandings about how political pressure might be mobilized and channeled. Elisabeth S. Clemens, *The People's Lobby: Organizational Innovation and the Rise of Interest Group Politics in the United States, 1890–1925* (Chicago: University of Chicago Press, 1997), 41–64.

30. For discussions of this issue, see Frances Kahn Zemans, "Legal Mobilization: The Neglected Role of the Law in the Political System," *American Political Science Review* 77:690–703 (1983); Mark Kessler, "Legal Mobilization for Social Reform: Power and the Politics of Agenda Setting," *Law & Society Review* 24:121–43 (1990); Susan E. Lawrence, *The Poor in Court: The Legal Services Program and Supreme Court Decision Making* (Princeton: Princeton University Press, 1990); and Susan M. Olson, "Interest Group Litigation in Federal District Court: Beyond the Political Disadvantage Theory," *Journal of Politics* 52:854–82 (1990).

31. H. W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Cambridge: Harvard University Press, 1991), 230–34.

32. 347 U.S. 483 (1954).

33. J. Harvie Wilkinson, *From* Brown *to* Bakke: *The Supreme Court and School Integration, 1954–1978* (New York: Oxford University Press, 1979).

34. Marc Galanter, "Why the Haves Come Out Ahead: Speculations on the Limits of Social Change," *Law & Society Review* 9:95–160 (1974). Galanter's hypothesis has been tested most directly by examining the win/loss records of different kinds of litigants in head-to-head conflict in court. In general (there are some exceptions), "upperdog" litigants fare better than "underdogs." The research based on the theory includes Peter McCormick, "Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949–1992," *Canadian Journal of Political Science* 26:523–40 (1993); Donald R. Songer and Reginald S. Sheehan, "Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals," *American Journal of Political Science* 36:235–58; Stanton Wheeler, Bliss Cartwright, Robert A. Kagan, and Lawrence M. Friedman, "Do the 'Haves' Come Out Ahead? Winning and Losing in State Supreme Courts, 1870–1970," *Law & Society Review* 21:403–45 (1987); Stacia L. Haynie, "Resource Inequalities and Litigation Outcomes in the Philippine Supreme Court," *Journal of Politics* 56:752–72 (1994); Mary L. Voncansek, "Winners and Losers before the European Court of Justice: Litigant Status and Ideology" (unpublished paper on file with author); and Burton M. Atkins, "Party Capability Theory and Judicial Decisions: A Multivariate Perspective on the Structure of Intervention Behavior by the English Court of Appeal," *American Journal of Political Science* 35:881–903 (1991). Atkins also found, however, that party capability, measured by type of litigant, did not significantly influence mobilization of appeals in the English judicial system. See his "Alternative Models of Appeal Mobilization in Judicial Hierarchies," *American Journal of Political Science* 37:780–98 (1993). The research on the United States Supreme Court finds that party type is not closely associated with degree of success on the merits, perhaps for the reason that in that court judicial preferences have a larger impact on case outcomes. See Reginald S. Sheehan, William Mishler, and Donald R. Songer, "Ideology, Status, and the Differential Success of Direct Parties before the Supreme Court," *American Political Science Review* 86:464–71 (1992). There is some evidence indicating that groups may fare no better on the merits than nongroup litigants. See Lee Epstein and C. K. Rowland, "Debunking the Myth of Interest Group Invincibility in the Courts," *American Political Science Review* 85:205–17 (1991). But whether differences in resources lie behind differences in the victory ratios of different *types* of litigants has not been explored adequately.

35. The litigation-related activities of organized interest groups are surveyed in L. Epstein and Kobylka, *Supreme Court and Legal Change*, 24–32. See also Gregory A. Caldeira and John R. Wright, "Organized Interests and Agenda-Setting in the U.S. Supreme Court," *American Political Science Review* 82:1109–27 (1988); Galanter, "Why the Haves Come Out Ahead"; Wasby, *Race Relations Litigation*.

36. Cornell W. Clayton, *The Politics of Justice: The Attorney General and the Making of Legal Policy* (Armonk, N.Y.: M. E. Sharpe, 1992).

37. See, for instance, Lawrence, *The Poor in Court*.

38. Robert A. Kagan, "Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry," *Law & Social Inquiry* 19:1–62 (1994); Kevin T. McGuire, *The Supreme Court Bar: Legal Elites in the Washington Community* (Charlottesville: University Press of Virginia, 1993).

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

40. Clemens, *People's Lobby*.

41. Tushnet, *NAACP's Legal Strategy;* Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* (New York: Vintage, 1977); Clement E. Vose, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (Berkeley: University of California Press, 1959); Wasby, *Race Relations Litigation;* S. Walker, *In Defense of American Liberties;* Frank J. Sorauf, *The Wall of Separation: The Constitutional Poli-*

tics of Church and State (Princeton: Princeton University Press, 1976); Karen O'Connor, *Women's Organizations' Use of the Courts* (Lexington, Mass.: Lexington Books, 1980).

42. M. James Penton, *Jehovah's Witnesses in Canada: Champions of Freedom of Speech and Worship* (Toronto: Macmillan, 1976).

43. *Drake v. Chief Adjudication Officer*, Case 150/85 [1987] QB 166 (ECJ). The Act had prevented married women from receiving assistance allocated to caregivers for disabled persons. See Roger Smith, "How Good Are Test Cases?" in *Public Interest Law*, ed. Jeremy Cooper and Rajeev Dhavan (Oxford, Basil Blackwell, 1986), 271–85; Carol Harlow and Richard Rawlings, *Pressure through Law* (London: Routledge, 1992).

44. Marc Galanter and Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (Chicago: University of Chicago Press, 1991); Abel and Lewis, *Lawyers in Society*.

45. Stephen Wasby, "How Planned is 'Planned Litigation'?" *American Bar Foundation Research Journal* 1984:83–138.

46. Ruth B. Cowan, "Women's Rights through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971–1976," *Columbia Human Rights Law Review* 8:383 (1976).

47. Wasby, *Race Relations Litigation*, 96.

48. For an important early discussion of comparative research of judicial systems, see C. Neal Tate, "Judicial Institutions in Cross-National Perspective: Toward Integrating Courts into the Comparative Study of Politics," in *Comparative Judicial Systems: Challenging Frontiers in Conceptual and Empirical Analysis*, ed. John R. Schmidhauser (London: Butterworths, 1987). Each of the countries is a crucial addition to the study because each contributes significant variation to the dependent variable (extent of attention to rights) and to the independent variables (the various factors thought to be most important in influencing attention to rights). This research design thus combines elements of the most-similar and most-different comparative methods. For a discussion of the most-similar and most-different comparative designs, see John P. Frendreis, "Explanation of Variation and Detection of Covariation: The Purpose and Logic of Comparative Analysis," *Comparative Political Studies* 16:255–72 (1983).

49. Pacelle, *Transformation*.

50. Burton M. Atkins has shown that there are important systematic differences between published and unpublished cases decided by the British Court of Appeal. Accordingly, my evidence for the supreme courts that produce some unpublished decisions, those of Britain and India, relies on both published and unpublished decisions. See Burton M. Atkins, "Selective Reporting and the Communication of Legal Rights in England," *Judicature* 76:58–67, and "Communication of Appellate Decisions: A Multivariate Model for Understanding the Selection of Cases for Publication," *Law & Society Review* 24:1171–96 (1990).

Chapter Three

1. Glendon, *Rights Talk*, 1.

2. Jesse H. Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980), 64, 128.

3. The data presented in figure 3.1 are taken from Pacelle, *Transformation*, and from additional data generously supplied by Richard Pacelle, for which I am grateful.

4. Paul L. Murphy, *The Meaning of Freedom of Speech: First Amendment Freedoms from Wilson to FDR* (Westport, Conn.: Greenwood Press, 1972).

5. 245 U.S. 60 (1917).

6. *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919).

7. *Gilbert v. Minnesota*, 254 U.S. 325 (1920); *Gitlow v. New York*, 268 U.S. 652 (1925); *Fiske v. Kansas*, 274 U.S. 380 (1927).

8. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

9. *Near v. Minnesota*, 283 U.S. 697 (1931); *Powell v. Alabama*, 287 U.S. 45 (1932).

10. The Court handed down several important civil rights and liberties decisions before 1917, particularly *Minor v. Happersett*, 88 U.S. 162 (1875) (law prohibiting women from voting found not to violate the citizenship and privileges and immunities clauses of the Fourteenth Amendment, the Guarantee Clause, the due process clause of the Fifth Amendment, or the prohibition against bills of attainder); *United States v. Cruikshank*, 92 U.S. 542 (1876) (federal civil rights statute improperly invoked to convict defendants of participation in armed mob that killed over a hundred black men over a disputed election; the decision narrowed congressional authority to criminalize armed violence against blacks in the South); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (state statute expressly limiting jury service to white males found to violate equal protection); the *Civil Rights Cases*, 109 U.S. 3 (1883) (portions of Civil Rights Act of 1875 prohibiting discrimination in private accommodations and the like found to be beyond congressional authority, which is limited to "state action"); *Hurtado v. California*, 110 U.S. 516 (1884) (Fifth Amendment's guarantee of grand jury indictment in capital cases not applicable to state cases under the Fourteenth Amendment); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (law applied in a discriminatory manner found to violate equal protection); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (law requiring racial segregation on railroad cars found not to violate equal protection); *Maxwell v. Dow*, 176 U.S. 581 (1900) (state conviction for robbery by jury of eight, not twelve, and without indictment by grand jury, found not to violate privileges and immunities and due process clauses); and *Twining v. New Jersey*, 211 U.S. 78 (1908) (privilege against self-incrimination found not to be incorporated in the Fourteenth Amendment as limitation on states).

11. David M. Rabban, "The First Amendment in Its Forgotten Years," *Yale Law Journal* 90:514–95 (1981).

12. *United States v. Cruikshank*, 92 U.S. 542 (1876); *Ex parte Jackson*, 96 U.S. 727 (1877); *Ex parte Curtis*, 106 U.S. 371 (1882); *Spies v. Illinois*, 123 U.S. 131 (1887); *Davis v. Beason*, 133 U.S. 333 (1890); *In re Rapier*, 143 U.S. 110 (1892); *Rosen v. United States*, 161 U.S. 29 (1896) (*Rosen* concerned mailing of obscene materials, but no free speech issues were raised by either party or the Court); *Davis v. Massachusetts*, 167 U.S. 43 (1897); *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902); *Public Clearing House v. Coyne*, 194 U.S. 497 (1904);

Turner v. Williams, 194 U.S. 279 (1904); *Halter v. Nebraska*, 205 U.S. 34 (1907) (*Halter* concerned what would now be considered commercial speech issues, although neither the defendant, the government, nor the Court raised free speech issues); *Patterson v. Colorado*, 205 U.S. 454 (1907); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911); *United States v. Press Publishing Co.*, 219 U.S. 1 (1911); *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913); *Fox v. Washington*, 236 U.S. 273 (1915); and *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230 (1915).

13. *Hoyt v. Florida*, 368 U.S. 57 (1961).

14. 381 U.S. 479 (1965).

15. I treat the abortion cases as women's-rights cases because of the centrality of issues related to reproductive freedom in the women's movement. See, e.g., Kristin Luker, *Abortion and the Politics of Motherhood* (Berkeley: University of California Press, 1984).

16. Stephen M. Griffin, *American Constitutionalism* (Princeton: Princeton University Press, 1996); Morton Keller, "Powers and Rights: Two Centuries of American Constitutionalism," *Journal of American History* 74:675–94 (1987).

17. 32 U.S. (7 Pet.) 243 (1833).

18. William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge: Harvard University Press, 1988).

19. Hartog, "Constitution of Aspiration."

20. *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873); *Minor v. Happersett*, 88 U.S. 162 (1875); *Civil Rights Cases*, 109 U.S. 3 (1883).

21. The Nineteenth Amendment, guaranteeing the right to vote regardless of sex, of course was added in 1920; but it has not been part of the constitutional foundation for the judicial rights revolution.

22. Hartog, "Constitution of Aspiration."

23. William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760–1848* (Ithaca, N.Y.: Cornell University Press, 1977).

24. Hartog, "Constitution of Aspiration," 1030.

25. Nelson, *Fourteenth Amendment*, 13–39.

26. David M. Rabban, "The IWW Free Speech Fights and Popular Conceptions of Free Expression before World War I," *Virginia Law Review* 80:1055–1158 (1994); David M. Rabban, "The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History," *Stanford Law Review* 45:47–114 (1992).

27. Rabban, "IWW Free Speech Fights," 1081–86, 1098–1102.

28. The statement is from Amos Pinchot, a progressive journalist, and is quoted in Rabban, "IWW Free Speech Fights," 1084–85.

29. *State v. Goodwin*, 37 La. Ann. 713 (1885), noted in John W. Wertheimer, "Free-Speech Fights: The Roots of Modern Free-Expression Litigation in the United States" (Ph.D. diss., Princeton University, 1992), 64.

30. Rabban, "Free Speech League," 88–97.

31. Wertheimer, "Free-Speech Fights"; John W. Wertheimer, "*Mutual Film* Revisited: The Movies, Censorship, and Free Speech in Progressive America," *The American Journal of Legal History* 37:158–89 (1993). See also Alexis J. Anderson, "The Formative Period of First Amendment Theory, 1870–1915," *The American Journal of Legal History* 24:56–75 (1980).

32. Undoubtedly the Supreme Court responds at least marginally to public opinion. See Roy B. Flemming and B. Dan Wood, "The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods," *American Journal of Political Science* 41:468–98 (1997). See also William Mishler and Reginald Sheehan, "The Supreme Court as a Counter-Majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions," *American Political Science Review* 87:87–101 (1993).

33. Alexis de Tocqueville, *Democracy in America*, ed. J. P. Mayer (New York: Harper & Row, 1969), 150.

34. McCloskey, *American Supreme Court*, 209.

35. In public opinion polls, respondents' stated willingness to vote for a woman for president, for instance, jumped dramatically in the late sixties and early seventies, from 55 percent of survey respondents in 1963 to 80 percent of respondents by 1974. George H. Gallup, *The Gallup Poll: Public Opinion 1935–1971*, vol. 13 (New York: Random House, 1972), 1846; Floris W. Wood, *An American Profile—Opinions and Behavior, 1972–89* (Detroit: Gale Research, 1990), 541.

36. See, for example, David G. Barnum, "The Supreme Court and Public Opinion: Judicial Decision-Making in the Post—New Deal Period," *Journal of Politics* 47:652–66 (1985); Hazel Erskine, "The Polls: Race Relations," *Public Opinion Quarterly* 26:137 (1956); Glendon, *Rights Talk*.

37. In 1920, for instance, the *Literary Digest* denounced "America's High Tide of Crime" (*Literary Digest*, Dec. 11, 1920, 11–12). In 1921, articles appeared on "Accounting for the Crime Wave" (*Literary Digest*, Aug. 27, 1921, 30) and "Meeting the Crime Wave" (J. Gollomb, *Nation*, Jan. 19, 1921, 80–83). Since that period, fear of a "crime wave" has been fairly continual.

38. Sam B. Warner and Henry B. Cabot, "Changes in the Administration of Criminal Justice During the Past Fifty Years," *Harvard Law Review* 50:583 (1937), quoted in Lawrence M. Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993), 303.

39. In 1916, for instance, *Outlook* published an article by "An Exconvict" characterizing "Criminal Lawyers as a Cause of Crime" (*Outlook*, Dec. 27, 1916, 911–13); in 1927, William Johnson argued that "Law Protects the Criminal" (*Good Housekeeping*, March 1927, 20–21); in 1931, M. N. Davis demanded, "Let the Police Have the Breaks Rather Than the Criminal" (*American City*, March 1931, 102); in 1934, J. Beatty criticized the "Guardians of Crime: Lawyers Who Defend Criminals" (*American Magazine*, Sept. 1934, 81–82); in 1940, J. Edgar Hoover previewed a currently popular theme, "Crime's Law School: Combing the Prison Lawbooks to Find Loopholes for Freedom" (*American Magazine*, Nov. 1940, 55); and in 1945, still more than fifteen years before the Supreme Court's criminal procedure revolution, V. W. Peterson blasted the "Unreasonable Leniency of Criminal Justice" ("Case Dismissed: Unreasonable Leniency of Criminal Justice," *Atlantic Monthly*, April 1945, 69–74).

40. A. B. Hart, "Use of Torture in America's Prisons," *Current History*, Nov. 1931, 249–50; and A. M. Turano, "Brutalities by the Police," *American Mercury*, July 1934, 341–50.

41. V. W. Peterson, "Case Dismissed: Unreasonable Leniency of Criminal Justice," *Atlantic Monthly*, April 1945, 69–74.

42. See Segal and Spaeth, *Attitudinal Model*.

43. Casper and Posner, *Workload of the Supreme Court*, 19 (citing research by Mary Cornelia Porter).

44. Act of Feb. 13, 1925, ch. 229, 43 Stat. 93.

45. Casper and Posner, *Workload of the Supreme Court*, 20, table 2.6.

46. Frankfurter and Landis, *Study in the Federal Judicial System*.

47. Saul Brenner, "The New Certiorari Game," *Journal of Politics* 41:649–55 (1979); Saul Brenner and John F. Krol, "Strategies in Certiorari Voting on the United States Supreme Court," *Journal of Politics*, 51:828 (1989); Segal and Spaeth, *Attitudinal Model*, 165–207.

48. Gregory A. Caldeira, John R. Wright, and Christopher J. W. Zorn, "Strategic Voting and Gatekeeping in the Supreme Court" (paper presented at the annual meeting of the American Political Science Association, Aug. 29–Sept. 1, 1996, San Francisco).

49. Lee Epstein, Jeffrey A. Segal, and Timothy Johnson, "The Claim of Issue Creation on the U.S. Supreme Court," *American Political Science Review* 90:845–52 (1996).

50. Caldeira and Wright, "Organized Interests"; Caldeira, Wright, and Zorn, "Strategic Voting;" Perry, *Deciding to Decide*; Doris Marie Provine, *Case Selection in the United States Supreme Court* (Chicago: University of Chicago Press, 1980).

51. Perry, *Deciding to Decide*, 230–34. These indicators of legal conflict at the very least fit uncomfortably with the judge-centered model; more plausibly, they are deeply inconsistent with it. In "Organized Interests" Caldeira and Wright suggest that the justices seek cases involving legal conflict in lower courts because such cases enhance their own policy-making power. Perry (*Deciding to Decide*, 246–60), however, argues that these factors are important because the justices believe it to be their institutional responsibility to decide such cases in order to maintain coherence and consistency in the interpretation of federal law. At the very least, the indicators (presence of legal conflict, intercircuit disagreement) more directly measure *legal* factors than attitudinal factors, because they are not direct measures of the *policy* importance of cases but instead are measures of the presence of legal conflict. Segal and Spaeth seem to concur: "the justices . . . refuse to decide . . . meritless cases"; they acknowledge the importance of legal conflict in lower courts as virtually a prerequisite for a case to reach the Court's agenda. Segal and Spaeth, *Attitudinal Model*, 70, 195–99.

52. Perry, *Deciding to Decide*, 218.

53. Ibid., 221.

54. Ibid., 218.

55. Joel B. Grossman, "Agenda Formation on a Policy Active Supreme Court" (unpublished paper on file with author, n.d.). The agenda is constructed over a number of months, and the decisions of a number of actors influence the eventual aggregate outcome. The process is as follows: The Court now employs what is called the "cert. pool," a group of law clerks from each of the justices (except for Stevens) who assist the justices in selecting cases for the Court's agenda. The clerks divide the incoming certiorari petitions among themselves. Each clerk writes a separate memo to the justices on each of the petitions assigned to him or her. The chief justice selects from among the petitions those that he considers most worthy of review and places them on the "discuss list." This list is circulated among the justices, and they may add cases

to the list. The approximately 70 percent of petitions that never reach the discuss list are automatically denied review. In special conferences in late September, before the beginning of the Court's October term, and in conferences on Wednesday and Friday during the regular term, the justices vote on whether to grant or deny certiorari in the numerous petitions on the discuss list. There is little time during the conferences for discussions about the merits of the various petitions, and the justices rely on the clerks' memos in deciding how to vote. Under the "Rule of Four," if four of the nine justices vote to grant certiorari, a case is scheduled for argument. Thus, although each justice may vote to select some cases based on his or her policy preferences, the balance of those policy preferences may be poorly reflected in the aggregate agenda that emerges at the end of the serially conducted, bureaucratic agenda-setting process.

56. Segal and Spaeth, *Attitudinal Model*, 97–118.

57. *Palko v. Connecticut*, 302 U.S. 319 (1937); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Mapp v. Ohio*, 367 U.S. 643 (1961); Segal and Spaeth, *Attitudinal Model*, 97, 102, 107. The famous Footnote Four of *Carolene Products* confirmed that henceforth the Supreme Court would presume the constitutionality of economic regulations, but it also declared that the same presumption would not be accorded to legislation that on its face violated a specific constitutional provision, particularly one contained in the Bill or Rights, or if the legislation were directed at particular religions, national or ethnic minorities, or "discrete and insular minorities" that were systematically excluded from the political process. The footnote is commonly viewed as identifying the Court's emerging role as a defender of the rights of minorities (although only four justices concurred in the opinion containing the footnote).

58. Although by 1920 Holmes vigorously favored freedom of speech, he dissented from the Court's ruling in *Meyer v. Nebraska*, 262 U.S. 390 (1923), which protected the right of parents to educate their children in modern languages other than English.

59. Admittedly Harlan Stone (appointed in 1925), Charles Hughes (reappointed to the Court in 1930 after his resignation in 1916), and Benjamin Cardozo (appointed in 1932 to replace Holmes) in some cases favored the expansion of constitutional protection for rights. But with the votes only of Holmes/Cardozo, Brandeis, Stone, and Hughes, the Court never contained a majority clearly in favor of the expansion of constitutional protection for rights during the period from 1916 through 1937; in most cases there were far fewer than four in favor of such expansion.

60. Felix Frankfurter and James M. Landis, "The Business of the Supreme Court at October Term, 1930," *Harvard Law Review* 45:271 (1930), 286–87.

61. Calculated from Felix Frankfurter and James M. Landis, "The Business of the Supreme Court at the October Term, 1934," *Harvard Law Review* 49:68 (1935), 80–81.

62. See, in particular, *Stromberg v. California*, 283 U.S. 359 (1931), *Near v. Minnesota*, 283 U.S. 697 (1931); *Powell v. Alabama*, 287 U.S. 45 (1932).

63. 347 U.S. 483 (1954).

64. Bernard Schwartz, ed., *The Warren Court: A Retrospective* (New York: Oxford University Press, 1996); Mark Tushnet, ed., *The Warren Court in Historical and Political Perspective* (Charlottesville: University Press of Virginia, 1993); and

John Downing Weaver, *Warren: The Man, the Court, the Era* (Boston: Little, Brown, 1967).

65. Until 1961 the Supreme Court hesitated to impose significant constitutional requirements on state criminal trials. In *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), the Supreme Court had decided that the Bill of Rights in general did not apply to the states. The Fourteenth Amendment appeared to many observers of the time as effecting an extension of the Bill of Rights to the states but others disagreed, including a majority on the Supreme Court, which rejected that view in the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, in 1873. A little over ten years later, in *Hurtado v. California*, 110 U.S. 516 (1884), the Court refused to require that felony charges in state trials be initiated by grand jury indictment as the Bill of Rights required for the federal courts. The Court's refusal to apply the Bill of Rights to state governments continued in the early twentieth century. In *Twining v. New Jersey*, 211 U.S. 78 (1908), the Court ruled that states could compel a defendant to testify against himself in spite of the Fifth Amendment protection against self-incrimination in federal trials. Even while the Supreme Court refused to apply the Bill of Rights against the states, the Court supported some rights claims advanced by criminal defendants. In federal trials, the justices gradually expanded procedural protections under the Fifth Amendment's due process clause, among them the exclusionary rule requiring that illegally seized evidence be excluded from federal trials, *Weeks v. United States*, 232 U.S. 383 (1914); the prohibition on police seizure of items other than the "fruits" or "instrumentalities" of a crime, *Gouled v. United States*, 255 U.S. 298 (1921); the requirement of a warrant for police searches, *Agnello v. United States*, 269 U.S. 20 (1925); and the requirement that the police must have probable cause to gain a search warrant, *Byars v. United States*, 273 U.S. 28 (1927). Then, in a major step in 1938, the Court created a constitutional right to counsel for defendants charged with felonies under federal laws, *Johnson v. Zerbst*, 304 U.S. 458 (1938).

66. The Court held that race may not be used to exclude people from state juries, *Strauder v. West Virginia*, 100 U.S. 303 (1880); that state trials dominated by mob pressures violate the Fourteenth Amendment's guarantee of due process, *Moore v. Dempsey*, 261 U.S. 86 (1923); that federal courts may overturn a guilty verdict where evidence is insufficient to support the verdict, *Fiske v. Kansas*, 274 U.S. 380 (1927); that in capital cases due process requires the provision of legal counsel to indigent defendants, *Powell v. Alabama*, 287 U.S. 45 (1932); and that state authorities may not use methods that "shock the conscience" in their interrogation of criminal suspects, *Brown v. Mississippi*, 297 U.S. 278 (1936). By the thirties, the Supreme Court had developed a "fair hearing" standard covering state criminal trials, which the Court used until 1961 when it replaced the standard with the federal case law interpreting the Bill of Rights. See Richard C. Cortner, *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of Civil Liberties* (Madison: University of Wisconsin Press, 1981), 124–76.

67. 332 U.S. 46 (1947); Adamson had been convicted of murder and sentenced to death after a trial in which the prosecutor drew the jury's attention to the defendant's failure to testify. The Supreme Court, in a 5–4 vote, refused to accept Adamson's argument that this violated his right against self-incrimination under the Fifth and Fourteenth Amendments and rejected Justice Black's dissent arguing in favor of total incorporation of the Bill of Rights.

68. 367 U.S. 643 (1961). The new liberal majority actually first came together in 1960. The case was *Elkins v. United States*, 364 U.S. 206 (1960), in which the Court excluded from a federal trial, for the first time, evidence that had been illegally obtained by state officials; prior to *Elkins*, while the Court excluded from federal trials evidence that was illegally obtained by federal officials, it allowed the use of evidence illegally obtained by state officials. This approach was known as the "silver platter doctrine." See Cortner, *Second Bill of Rights*, 177–78.

69. 372 U.S. 335 (1963).

70. 297 U.S. 278 (1936).

71. 368 U.S. 57 (1961).

72. In *Reed*, 404 U.S. 71 (1971), the Burger Court struck down the offending statute on the relatively narrow ground that the statute's preference was "arbitrary" and therefore unacceptable under the rational basis test, the lowest level of scrutiny under the Fourteenth Amendment. The decision was regarded, nonetheless, as a major breakthrough for women's rights. Over the next few years the Court struggled to agree on what test—the ordinary rational-basis test, the strict-scrutiny test applied to race-based discrimination, or a test somewhere in between—to apply to sex-based discrimination. Although the Court ruled in favor of a women's-rights claim in *Frontiero v. Richardson*, 411 U.S. 677 (1973), the majority rejected the application of the strict-scrutiny standard in that case. The Court eventually settled on a vague, middle-level, "heightened scrutiny" standard in 1976, requiring that sex-based classifications be substantially related to an important government purpose and narrowly tailored to serve that purpose. See *Craig v. Boren*, 429 U.S. 190 (1976). But how broadly such a test would be applied remained unclear, subject to shifting votes among the justices. Nonetheless, the new opening offered by *Reed* and *Frontiero* signaled that the justices would carefully consider sex-discrimination claims.

73. Stewart supported civil rights claims in 58 percent of the split decisions in which he participated (only five of the Warren Court's seventeen justices had lower support scores for civil rights than Stewart); Fortas and Warren, by contrast, supported such claims in 82.7 and 82.6 percent of such cases respectively (and only four of the Warren Court's justices—among them Fortas—had higher support scores for civil rights than Warren). Segal and Spaeth, *Attitudinal Model*, 246–47, table 6.6.

74. Admittedly, the Court in *Dandridge v. Williams*, 397 U.S. 471 (1970), affirmed its earlier decision in *Goesaert v. Cleary*. It is plausible that the justices could have drawn a distinction between such "protective" legislation and legislation, as in *Reed*, that had no plausible protective purpose. So the *Dandridge* decision does not necessarily rule out the possibility that a majority of justices might have been sympathetic to sex discrimination claims prior to the seventies, had many such cases reached the Court.

Chapter Four

1. Alfred D. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* (Cambridge: Harvard University Press, 1977); Alfred D. Chandler, Jr., "The United States: Seedbed of Managerial Capitalism," in *Managerial Hier-*

archies: Comparative Perspectives on the Rise of the Modern Industrial Enterprise, ed. Alfred D. Chandler, Jr. and Herman Daems (Cambridge: Harvard University Press, 1980); Martin Sklar, *The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law, and Politics* (Cambridge: Cambridge University Press, 1988).

2. Herbert Croly, *The Promise of American Life* (Indianapolis: Bobbs-Merrill, 1965) 105–17, 351–54.

3. Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993), 147–93.

4. Chandler, *Visible Hand*, and "Seedbed of Managerial Capitalism."

5. Chandler, "Seedbed of Managerial Capitalism," 30–35.

6. Richard C. Cortner, *The Iron Horse and the Constitution: The Railroads and the Transformation of the Fourteenth Amendment* (Westport, Conn.: Greenwood Press, 1993).

7. *Munn v. Illinois*, 94 U.S. 113 (1877) ("the *Granger Cases*").

8. Cortner, *Iron Horse*, p. xii.

9. Gillman, *Constitution Besieged;* Melvin I. Urofsky, "Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era," *Yearbook—Supreme Court Historical Society* 1983:55.

10. C. Peter Magrath, *Morrison R. Waite* (New York: Macmillan, 1963), 178, quoted in Cortner, *Iron Horse*, 3.

11. Louis Brandeis, "The Opportunity in the Law," in *Business—A Profession* (Boston: Small, Maynard, 1914), 337–38.

12. Woodrow Wilson, *The Papers of Woodrow Wilson*, vol. 21 (1910), ed. Arthur S. Link (Princeton: Princeton University Press, 1976), 70, 79.

13. John P. Heinz and Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (New York: Russell Sage Foundation, 1982).

14. Theron Strong, *Landmarks of a Lawyer's Lifetime* (New York: Dodd, Mead, 1914), 378, quoted in Galanter and Palay, *Tournament of Lawyers*, 16.

15. William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge: Harvard University Press, 1988), 8.

16. 247 U.S. 251 (1918).

17. Rabban, "Free Speech League."

18. Ibid., 74.

19. In "Free Speech League," 89–96, Rabban documents legal defenses of John Turner, Emma Goldman, Margaret Sanger, William Sanger, IWW organizers arrested during the San Diego and New Jersey free speech fights, Max Eastman, Upton Sinclair, an anarchist group calling itself the Home Colony, and Jay Fox.

20. 236 U.S. 273 (1915); Rabban, "Free Speech League," 95–96.

21. S. Walker, *In Defense of American Liberties*, 22–23. Although Rabban acknowledges Schroeder's "key role" in the League, he argues that historians have underestimated the League's influence and have exaggerated Schroeder's role in the association. Rabban, "Free Speech League," 49 n. 8, 73–74.

22. David Barry Brudnoy, "Liberty's Bugler: The Seven Ages of Theodore Schroeder" (Ph.D. diss., Brandeis University, 1971), 246 n. 1, citing the views of Joseph Ishill, a friend of Schroeder's. Other evidence from Schroeder's contemporaries calls into question Rabban's view that the League was substantially more than a vehicle for Schroeder. In 1912 Lincoln Steffens wrote to Schroeder, "annoyed at how lax the rest of the directors of the League had become. Steffens thought Schroeder was being too polite to come right out and say so." Ibid., 212. Brudnoy observed that Schroeder's correspondence and papers mention the League only in a "few places" and that the correspondence clearly indicates "that he was its only full-time activist." Ibid., 145.

23. Ibid., 145 (emphasis in original).

24. *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230 (1915). See Wertheimer, "*Mutual Film* Revisited."

25. Rabban, "IWW Free Speech Fights," 1071, 1115–20.

26. S. Walker, *In Defense of American Liberties*.

27. P. Murphy, *Freedom of Speech*, 118.

28. Ibid., 163.

29. S. Walker, *In Defense of American Liberties*, 47.

30. The significant role of the ACLU state affiliates is explored in Donald J. Farole, Jr., *Interest Groups and Judicial Federalism: Organizational Litigation in State Judiciaries* (Westport, Conn.: Praeger, 1998).

31. P. Murphy, *Freedom of Speech*, 131–32; S. Walker, *In Defense of American Liberties*, 47, 51–114.

32. Dicta are statements in a judicial decision that are not essential to the holding of the decision and therefore have no precedential value. Nonetheless, dicta often carry great significance as indications of decisions the court may make in the future.

33. 268 U.S. 652 (1925).

34. 274 U.S. 357 (1927). The ACLU had also sponsored *Ruthenberg v. Michigan*, which became moot because Ruthenberg died while the case was under consideration. The dissent Justice Brandeis had drafted for *Ruthenberg* was turned into his famous concurrence in *Whitney* (and the Court eventually endorsed Brandeis's speech-action distinction in *Brandenburg v. Ohio*, 395 U.S. 444, 1969).

35. 274 U.S. 380 (1927).

36. 299 U.S. 353 (1937).

37. 330 U.S. 1 (1947).

38. 338 U.S. 25 (1949).

39. 283 U.S. 359 (1931).

40. 287 U.S. 45 (1932).

41. 310 U.S. 296 (1940).

42. 283 U.S. 697 (1931).

43. S. Walker, *In Defense of American Liberties*, 91.

44. The NAACP filed an *amicus* brief in *Guinn v. United States*, 238 U.S. 347 (1915).

45. *Buchanan v. Warley*, 245 U.S. 60 (1917).

46. *Nixon v. Herndon*, 273 U.S. 536 (1926).

47. The NAACP eventually received only a little more than $20,000 from the grant due to the Fund's growing financial difficulties in the thirties. Nonetheless, the grant greatly assisted the NAACP in developing its long-term strategy against racial segregation. See Tushnet, *NAACP's Legal Strategy*, 17.

48. The NAACP and the LDF worked closely together for much of their

early history. They shared many of the same directors until 1954, when the two boards of directors became totally separate (due to pressure from an IRS investigation). But even then they continued to cooperate until 1956, when strains began to develop over how to proceed with desegregation litigation. The two organizations eventually split entirely, with the LDF pursuing desegregation efforts in the South and the NAACP pursuing similar litigation in the North. See Tushnet, *Making Civil Rights Law*, 27, 310–11.

49. Tushnet, *Making Civil Rights Law;* Vose, *Caucasians Only.*

50. Dan T. Carter, *Scottsboro: A Tragedy of the American South*, rev. ed. (Baton Rouge: Louisiana State University Press, 1979).

51. 287 U.S. 45 (1932).

52. This summary of the Jehovah's Witnesses' use of the legal system in the United States relies on William Shepard McAninch, "A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court," *Cincinnati Law Review* 55:997 (1987). The sect went by several other names before settling on its present one in 1931.

53. Ibid., 1008.

54. The convictions were overturned after the Witnesses had served a year of the sentences. A case arising out of the prosecution, *Ex parte Hudgings*, 249 U.S. 378 (1919), eventually reached the Supreme Court as a challenge to a contempt citation. See McAninch, "Jehovah's Witnesses," 1009–12, for discussion of the Espionage Act case.

55. Wasby, *Race Relations Litigation*, 46–75.

56. Joyce Gelb, *Feminism and Politics: A Comparative Perspective* (Berkeley: University of California Press, 1989).

57. O'Connor, *Women's Organizations*, Karen O'Connor and Lee Epstein, "Beyond Legislative Lobbying: Women's Rights Groups and the Supreme Court." *Judicature* 67:134–43 (1989).

58. Karen O'Connor and Lee Epstein, *Public Interest Law Groups: Institutional Profiles* (Westport, Conn.: Greenwood Press, 1989), 151, 208, 211. It should be noted, however, that the initial efforts of the NOW-LDF were hampered by internal dissent. See O'Connor and L. Epstein, "Beyond Legislative Lobbying," 136.

59. The numbers are derived from O'Connor and L. Epstein, *Public Interest Law Groups*, and Lee Epstein, *Conservatives in Court* (Knoxville: University of Tennessee Press, 1985). *Conservatives in Court* also lists a small number of conservative organizations that have supported court cases *challenging* women's rights.

60. Cowan, "Women's Rights." Although women's rights organizations contributed significantly to the judicial revolution in women's rights, many of the Supreme Court cases involving women's rights were not brought directly by such organizations. O'Connor and Epstein reported that only 29 percent of the sixty-three gender discrimination cases considered from the Court's 1969 term through its 1980 term were brought by interest groups (and most of those were supported by the ACLU's Women's Rights Project). O'Connor and L. Epstein, "Beyond Legislative Lobbying," 139.

61. Cynthia Fuchs Epstein, *Women in Law*, 2d ed. (Urbana: University of Illinois Press, 1993), 137.

62. The liberal NAACP and the radical ILD greatly disagreed over the tactics and some of the goals in the defense of the Scottsboro Boys. See D. Carter, *Scottsboro*, 54–58, 61–62, 77–80, 93–96. Similarly, the NAACP's request for a relatively large grant from the Garland Fund generated a great dispute among the Fund's directors over whether the NAACP's proposed litigation strategy against racial segregation would aid the cause of labor organizing. Roger Baldwin opposed the grant on the grounds that the strategy would not aid the radical labor movement, but he was narrowly defeated and the NAACP received the grant. See Tushnet, *NAACP's Legal Strategy*, 7–14.

63. Galanter and Palay, *Tournament of Lawyers*, 1–3.

64. Ibid., 14–15.

65. Richard L. Abel, *American Lawyers* (New York: Oxford University Press, 1989), 40–44.

66. Jerold Auerbach, *Unequal Justice; Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976), 74–101; William R. Johnson, *Schooled Lawyers: A Study in the Clash of Professional Cultures* (New York: New York University Press, 1978), 164–70.

67. Gillman, *Constitution Besieged*, 147–93.

68. 372 U.S. 335 (1963).

69. Daniel John Meador, *Preludes to Gideon: Notes on Appellate Advocacy, Habeas Corpus, and Constitutional Litigation* (Charlottesville, Va.: Michie, 1967).

70. Abel, *American Lawyers*, 201.

71. By 1920 virtually all of the new law schools were open to women as well. Ibid., 90.

72. Ibid., 78–80; Auerbach, *Unequal Justice*, 211–15; Maxwell Bloomfield, "From Deference to Confrontation: The Early Black Lawyers of Galveston, Texas, 1895–1920," in *The New High Priests: Lawyers in Post–Civil War America*, ed. Gerard W. Gawalt (Westport, Conn.: Greenwood Press, 1984).

73. Abel, *American Lawyers*, 86, 280.

74. Auerbach, *Unequal Justice;* Bloomfield, "From Deference to Confrontation"; D. Carter, *Scottsboro;* S. Walker, *In Defense of American Liberties.*

75. William V. Rowe, "Legal Clinics and Better Trained Lawyers—A Necessity," *Illinois Law Review* 11:602–3 (1917), quoted in Auerbach, *Unequal Justice*, 107.

76. George Wickersham, *American Bar Association Journal*, March 1922, 8, quoted in Auerbach, *Unequal Justice*, 115–16.

77. Auerbach, *Unequal Justice;* Abel, *American Lawyers.*

78. Auerbach, *Unequal Justice*, 219.

79. P. Murphy, *Freedom of Speech*, 79.

80. Ann Fagan Ginger and Eugene M. Tobin, eds., *The National Lawyers Guild: From Roosevelt through Reagan* (Philadelphia: Temple University Press, 1988).

81. Elliff, *Department of Justice*, 91–92.

82. Barbara Curran and Clara N. Carson, *The Lawyer Statistical Report: The U.S. Legal Profession in the 1990s* (Chicago: American Bar Foundation, 1994).

83. Data are from Curran and Carson, *Lawyer Statistical Report*, and a letter from Curran and Carson on file with the author. It is nearly impossible to construct an annual series of data on the total lawyer population; the lawyer population is available in three-year intervals from the mid-fifties to 1970, but

then there is a ten-year gap until 1980, followed by a five-year gap until 1985, followed by a three-year gap until 1988, and a two-year gap until 1990. Admittedly the estimates presented in the figure do not provide a measure of the growth of the female legal profession as a whole; rather, they provide a measure of the pace of female entrance into the legal profession. That pace was roughly constant through the fifties and early sixties but quickened significantly after about 1965.

84. 335 U.S. 464 (1948).

85. C. Epstein, *Women in Law*, 37–45, 130–61.

86. 410 U.S. 113 (1973).

87. Deborah L. Markowitz, "In Pursuit of Equality: One Woman's Work to Change the Law," *Women's Rights Law Reporter* 11:73–97 (1989); *Reed v. Reed*, 404 U.S. 71 (1971).

88. The following discussion is based on Gloria Garrett Samson, *The American Fund for Public Service: Charles Garland and Radical Philanthropy, 1922–1941* (Westport, Conn.: Greenwood Press, 1996).

89. Samson, *American Fund*, 19–20.

90. S. Walker, *In Defense of American Liberties*, 70–71.

91. Richard Magat, *The Ford Foundation at Work: Philanthropic Choices, Methods, and Styles* (New York: Plenum, 1979), 194–95.

92. Quoted in Auerbach, *Unequal Justice*, 55.

93. Special Committee of the Association of the Bar of the City of New York, *Equal Justice for the Accused* (Garden City, N.Y.: Doubleday, 1959), 44.

94. *Powell v. Alabama*, 287 U.S. 45 (1932).

95. Quoted in D. Carter, *Scottsboro*, 163.

96. Ibid.

97. The British government in 1949 adopted the Legal Aid and Advice Act, which provided legal aid in civil cases, and the British plan seems to have encouraged the U.S. legal profession into renewed agitation around the issue of legal aid. Nonetheless, the British plan provided little support for criminal defendants until the sixties. J. R. Spencer, *Jackson's Machinery of Justice*, 8th ed., Cambridge: Cambridge University Press, 1989), 474.

98. Special Committee, *Equal Justice*, 38–39.

99. 372 U.S. 335 (1963).

100. Jonathan Casper, *Lawyers before the Warren Court: Civil Liberties and Civil Rights, 1957–66* (Urbana: University of Illinois Press, 1972), 89.

101. Lawrence, *The Poor in Court*, 9.

102. Lawrence, *The Poor in Court*; Warren E. George, "Development of the Legal Services Corporation," *Cornell Law Review* 61:681–730 (1976).

103. Robert V. Percival and Geoffrey P. Miller, "The Role of Attorney Fee Shifting in Public Interest Litigation," *Law & Contemporary Problems* 47:233 (1984); Note, "Attorneys' Fees: Exceptions to the American Rule," *Drake Law Review* 25:717 (1976).

104. Karen O'Connor and Lee Epstein, "Bridging the Gap between Congress and the Supreme Court: Interest Groups and the Erosion of the American Rule Governing the Award of Attorneys' Fees," *Western Political Quarterly* 38:241 (1985).

105. Stewart J. Schwab and Theodore Eisenberg, "Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant," *Cornell Law Review* 73:733, table 4 (1988).

106. Rebecca Mae Salokar, *The Solicitor General: The Politics of Law* (Philadelphia: Temple University Press, 1992), 114.

107. Ibid., 108.

108. Clayton, *Politics of Justice*, 67–68.

109. Caldeira and Wright, "Organized Interests"; Perry, *Deciding to Decide*.

110. Salokar, *Solicitor General*, 29.

111. Clayton, *Politics of Justice*; Robert G. Dixon, "The Attorney General and Civil Rights, 1870–1964," in *Roles of the Attorney General of the United States*, ed. Luther A. Huston, Arthur Selwyn Miller, Samuel Krislov, and Robert G. Dixon (Washington, D.C.: American Enterprise Institute, 1968); Philip Elman, "The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History," *Harvard Law Review* 100:817–52 (1987).

112. Elliff, *Department of Justice*, 66, 71–73.

113. The case ended in a hung jury and the Justice Department, after initial efforts to pursue the case again, dropped it; nonetheless, the case focused much attention on the coalfield disputes and, after the case was closed, a number of the mine operators signed a contract with the United Mine Workers. See Elliff, *Department of Justice*, 75–76.

114. Ibid., 93–95. See also Robert K. Carr, *Federal Protection of Civil Rights: Quest for a Sword* (Ithaca, N.Y.: Cornell University Press, 1947).

115. Elliff, *Department of Justice*, 99–126, 156–80; Dixon, "Attorney General and Civil Rights," 110–12. The Supreme Court's decision in *Screws* (1945) upheld the constitutionality of the Civil Rights Act and prosecutions under it but handicapped such prosecutions by requiring for conviction that the defendant have a specific intent to deprive the victim of his or her constitutional rights—a difficult standard to meet.

116. Clayton, *Politics of Justice*, 128; Elman, "Solicitor General's Office," 818–19.

117. 334 U.S. 1 (1948).

118. Clayton, *Politics of Justice*, 129–31; Elliff, *Department of Justice*, 323–33.

119. Elman, "Solicitor General's Office," 822–45.

120. Clayton, *Politics of Justice*, 131–37; Dixon, "Attorney General and Civil Rights," 114–17.

121. Dixon, "Attorney General and Civil Rights," 114.

122. Clayton, *Politics of Justice*, 126–27, 135.

123. Ibid., 126.

124. Michal Belknap, *Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post-Brown South* (Athens: University of Georgia Press, 1987), 19.

125. By contrast, even as late as 1990 the English Equal Opportunities Commission could not initiate suits in its own name and had to rely on use of nominal plaintiffs. Significantly, in 1994 the House of Lords ruled in favor of the EOC's claim to initiate such suits (see chapter 8).

126. Joan Hoff, *Law, Gender, and Injustice: A Legal History of U.S. Women* (New York: New York University Press, 1991), 234.

127. Wasby, *Race Relations Litigation*, 26–45; McCann, *Rights at Work*.

128. *Near v. Minnesota*, 283 U.S. 697 (1931); *Stromberg v. California*, 83 U.S. 359 (1931); *Powell v. Alabama*, 287 U.S. 45 (1932).

129. P. Murphy, *Freedom of Speech*; S. Walker, *In Defense of American Liberties*, 79–92.

130. 347 U.S. 483 (1954).

131. Wasby, *Race Relations Litigation*, 32; McCann, *Rights at Work*.

132. 372 U.S. 335 (1963).

133. Ibid., 42–43. The cases were, respectively, *National Association for the Advancement of Colored People v. Button*, 371 U.S. 415 (1963), and *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

134. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

135. Wasby, *Race Relations Litigation*, 31.

136. Ibid., 28.

137. The following discussion is based on S. Walker, *In Defense of American Liberties*, 87–88.

138. Ibid., 87.

139. Elliff, *Department of Justice*; Carr, *Quest for a Sword*.

140. O'Connor, *Women's Organizations*.

141. *Schenck v. United States*, 249 U.S. 47 (1919).

142. Fred D. Ragan, "Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919," *Journal of American History* 58:24 (1971); Rabban, "First Amendment"; Rabban, "The Emergence of Modern First Amendment Doctrine," *University of Chicago Law Review* 50:1205 (1983); Gerald Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History," *Stanford Law Review* 27:719 (1975).

143. Ragan, "Oliver Wendell Holmes"; Rabban, "First Amendment" and "Emergence"; Gunther, "Learned Hand."

144. 330 U.S. 1 (1947).

145. J. Woodford Howard, Jr., "On the Fluidity of Judicial Choice," *American Political Science Review* 62:43–56, 54 (1968).

146. 100 U.S. 303 (1880). The Court undermined the *Strauder* precedent in *Virginia v. Rives*, 100 U.S. 313 (1880), decided the same year, which held that the absence of blacks from juries, even though a repeated occurrence, did not in itself constitute a violation of the equal protection clause. Nonetheless, there was little subsequent litigation testing the practical conflict between the two decisions.

Chapter Five

1. See, e.g., *Kishore Singh v. State of Rajasthan*, (1981) 1 SCC 503.

2. *People's Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473.

3. *M. H. Hoskot v. State of Maharashtra*, AIR 1978 SC 1548, reaffirmed in *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1369.

4. *M. C. Mehta v. Union of India*, AIR 1988 SC 1037; *M. C. Mehta v. Union of India*, AIR 1988 SC 1115.

5. Rajeev Dhavan, *Justice on Trial: The Supreme Court Today* (Allahabad: Wheeler, 1980), chapter 1. See also Carl Baar, "Social Action Litigation in India: The Operation and Limits of the World's Most Active Judiciary," in *Comparative Judicial Review and Public Policy*, ed. Donald W. Jackson and C. Neal Tate (Westport, Conn.: Greenwood Press, 1992).

6. Paul R. Brass, "The Punjab Crisis and the Unity of India," in *India's Democracy: An Analysis of Changing State-Society Relations*, ed. Atul Kohli (Princeton: Princeton University Press, 1988).

7. Ghanshyam Shah, "Grass-Roots Mobilization in Indian Politics," in *India's Democracy*, ed. Kohli.

8. Arend Lijphart, "The Puzzle of Indian Democracy: A Consociational Interpretation," *American Political Science Review* 90:258–68 (1996).

9. See, for example, Madhu Kishwar and Ruth Vanita, "Indian Women: A Decade of New Ferment," in *India Briefing, 1989*, ed. Marshall M. Bouton and Philip Oldenburg (Boulder: Westview Press, 1989), on which this discussion of the paradox is based.

10. A widely reported figure is one to two such "dowry deaths" per day in Delhi. See Nandita Gandhi and Nandita Shah, *The Issues at Stake: Theory and Practice in the Contemporary Women's Movement in India* (New Delhi: Kali for Women, 1992), 52–61. That figure, however, may be somewhat high. A study of 179 unnatural deaths in New Delhi in a one-year period in 1981 and 1982 found that 12 percent were dowry-related and that one-third of those were clearly murder (the other two-thirds are listed as suicide, but the characterization of a dowry death as "suicide" is a commonly made by relatives and widely disputed by women's-rights advocates). See M. S. Khan and R. Ray, "Dowry Death," *Indian Journal of Social Work* 45:303–7 (1984). Advocates for women's rights generally believe that the number of deaths related to dowry has increased since 1982. A study by the Department of Woman and Child Development concluded that the reported number of dowry-related deaths in India grew from 2209 in 1988 to 4006 in 1989. Soli Sorabjee, "Women, Constitution and the Courts," in *Women, Law and Social Change*, ed. Shamsuddin Shams (New Delhi: Ashish Publishing House, 1991). On the practice of dowry generally, see M. N. Srinivas, *Some Reflections on Dowry* (New Delhi: Oxford University Press, 1984); and Rehana Ghadially and Pramod Kumar, "Bride-Burning: The Psycho-Social Dynamics of Dowry Deaths," in Rehana Ghadially, ed., *Women in Indian Society: A Reader* (New Delhi: Sage, 1988).

11. Sohaila Abdulali, "Rape in India: An Empirical Picture," in *Women in Indian Society: A Reader*, ed. Rehana Ghadially (New Delhi: Sage, 1988).

12. Gandhi and Shah, *Issues at Stake*, 49–51.

13. Lloyd I. Rudolph and Susanne Hoeber Rudolph, *In Pursuit of Lakshmi: The Political Economy of the Indian State* (Chicago: University of Chicago Press, 1987), 21–23, 412–13 n. 6.

14. Paul R. Brass, *The Politics of India Since Independence* (Cambridge: Cambridge University Press, 1990), 13.

15. Kuldeep Mathur, "The State and the Use of Coercive Power in India," *Asian Survey* 32:344 (1992). For instance, according to Mathur, the number of armed police battalions grew from 66 in 1963 to 144 in 1983. The Assam Rifles grew from 21 battalions in 1983–84 to 31 battalions only four years later; the Indo-Tibetan Police Force grew from 9 battalions in 1981–82 to 14 in 1985–86; the Border Security Force, originally created for defense of the India-Pakistani border but increasingly used for maintenance of internal order, grew from 25