

I

THE POLITICAL DISADVANTAGE THEORY

Much of the Canadian scholarship on the new judicial politics of the past twenty years depicts the courts and the Charter as havens for disadvantaged groups in society. Richard Sigurdson, for example, claims: “Not only has the Charter given women and other disadvantaged groups access to an additional arena of democratic participation, it has also signalled to those who resist progressive change that they cannot so easily ignore the claims of Charter rights-holders” (1993, 113). Gregory Hein enthuses about the prospect of the courts using their power to support groups that feel they lack political power, and “improve” democracy by protecting “disadvantaged minorities” (Hein 2000, 19). The heartiest praise is reserved for the Charter’s equality rights provisions. According to Dean Lynn Smith, the equality rights have helped “less advantaged persons and groups in Canadian society” (1994, 60). While some scholars have questioned the capacity of the courts to produce social change, the view that the Charter and the courts are, or ought to be, havens for disadvantaged groups dominates the Supreme Court of Canada’s Charter jurisprudence.

There are good reasons to imagine that this line of thinking is right. The courts are independent of the rest of the political

process, and some Canadians have latched on to the idea that the judiciary is a forum where decisions are made for principled, rather than merely interested, reasons. Judges are protected from political accountability by the doctrine of judicial independence. They stand back from the political process. Since judges are free from the dirty business of political compromise and the need for reelection, they can inject more “principled” considerations into public life (Ely 1980). The Supreme Court of Canada has stated that, at least as far as the Charter’s equality rights section is concerned, the courts will look more favorably on the claims of “discrete and insular minorities” (*Andrews* 1989, 599), or those suffering from “disadvantage, vulnerability, stereotyping, or prejudice” (*Law* 1999, 534). Judges, according to this line of thinking, stand up for the disadvantaged minorities that our majoritarian system of government inevitably marginalizes. Judicial politics is laudable because it gives justice to those who cannot get it elsewhere.

The theory that courts have, or should have, a special responsibility to protect disadvantaged groups emerged from the United States. In 1938, the U.S. Supreme Court first hinted at the possibility that some groups, some “discrete and insular minorities,” were so marginalized in politics that the courts had a particular duty to uphold their rights. Later, in the 1950s and 1960s, the Warren Court picked up on this suggestion and began delivering important victories to racial and religious minorities. Encouraging the courts to deliver, or at least not blocking the courts from delivering, these victories kept constituencies in the Democratic Party’s New Deal electoral coalition during those years. Political scientists then took up the idea that “politically disadvantaged groups” resort to litigation because they cannot get access to the rest of the political process. The “political disadvantage theory” of interest group litigation soon dominated American political science research on public law. Since the collapse of the New Deal coalition in the 1968 presidential election, however, the idea that courts should help politically disadvantaged groups is no longer as politically potent in the United States. At the same time, American political scientists have reconsidered the explanatory utility of the political disadvantage theory. Oddly, though, just as the political disadvantage theory lost its influence in American politics and scholarship, the concept of the disadvantaged group grew in im-

portance north of the border. It has been taken up by academic writers in Canada and become the cornerstone of the Supreme Court of Canada's equality rights jurisprudence.

THE EMERGENCE OF THE CONCEPT OF THE "DISADVANTAGED GROUP"

The concept of the "disadvantaged group" has its roots in the U.S. Supreme Court's retreat from judicial activism at the end of the 1930s. During the 1930s, the U.S. Supreme Court thwarted repeated efforts at national economic and social reform. When the Court struck down President Roosevelt's New Deal legislation, Roosevelt threatened to reconstruct the Court in order to ensure that a second attempt at the legislation would be upheld. Faced with this threat to its constitutional position, the Court's judges reconsidered their opposition to these reform efforts and backed down. Instead of continuing to thwart Roosevelt's efforts, the Court upheld the New Deal, and began to establish limits on the power of the federal courts to review economic and social legislation. The era of judicial self-restraint that followed allowed the president and Congress to stitch together a remarkable coalition behind the New Deal's promise of welfare legislation and economic regulation.

The Court was divided, though, on whether to extend judicial self-restraint to other areas of government activity. In his famous footnote to the 1938 *Carolene Products* decision, Justice Stone suggested that judicial activism might be warranted when legislation prevented "discrete and insular minorities" from participating in the political process. Fifteen years later, the judges of the Warren Court took Stone's suggestion as their duty. They elaborated a doctrine of "strict scrutiny" based on Stone's footnote (Powell 1982) and embarked on a new era of judicial activism in the service of racial, ethnic, and religious minorities. The highest point of the Warren Court's work was its effort to advance the black civil rights movement. There is no more famous example of the Court's efforts than the 1954 *Brown v. Board of Education* decision ordering the desegregation of American public schools. The groups that won in the Warren Court and their supporters were

important constituencies in the New Deal coalition. The Court's activism of the 1950s and 1960s helped cement their support for the coalition. By the time of Kennedy's New Frontier and Johnson's Great Society programs, the Court's activism for these groups had the backing of the executive branch. "By linking the federal judiciary with Kennedy's New Frontier and Johnson's Great Society, the justices of the Warren Court were confident that judicial activism in the service of the disadvantaged would be embraced as the new definition of judicial liberalism" (Silverstein 1994, 49). Democrats had no reason to stop and every reason to encourage the Court to deliver victories to these "disadvantaged groups."

Many social scientists supported the Warren Court's new activism, and they followed the Court's lead by providing sympathetic analysis of the federal courts' work on behalf of disadvantaged groups. Arthur Bentley (1967 [1908]) and David Truman (1960 [1951]) had earlier broached the idea of the judiciary as an arena for group-based political competition. For both of them, litigation was series of battles between members of socially or politically active groups. Truman, for example, opened his discuss of interest groups and the judiciary with the bold declaration that "[t]he activities of the judicial officers of the United States are not exempt from the processes of group politics" (1960 [1951], 479). In the wake of Truman's work, American scholars produced influential case studies of interest group litigation. This literature emphasized that interest groups decided to go to court when they found little support for their causes in other political forums. Clement Vose studied interest group litigation to show how judicial review "constitutes an invitation for groups whose lobbying fails to defeat legislation to continue opposition by litigation" (1958, 25). His work on the NAACP's campaign against restrictive covenants argued that the organization saw litigation as its only choice for political action given that the U.S. Congress was hostile to its interests. "In the face of failures to gain concessions from Congress, due in large part to the power wielded by the Southern delegation . . . Negroes turned to the judiciary" (1955, 102). He later documented what he saw as the NAACP's carefully planned litigation on voting rights, housing, transportation, education, and jury service (1958, 23). By deliberate use of "strategic litigation," launching cases in hostile judicial districts to guarantee opportunities for appeal, groups such as the NAACP could advance

their causes step by step through the courts. In the same vein, Jack Peltason (1955) argued that groups chose litigation when they could not win in other institutions. When the NAACP sought to become more aggressive in the 1930s, its leaders considered a variety of political strategies to combat segregation. Some of these strategies would have required cooperation from state legislatures and Congress, but NAACP leaders decided they could not win in the country's segregationist legislatures. Desegregation could win in the federal executive because black Americans were becoming an important constituency in presidential elections. The NAACP's leaders also saw potential in the judicial branch. The NAACP planned its lobbying and litigation campaigns accordingly (1955, 50). Moreover, this was not just a political strategy of "outsider" groups such as the NAACP. Peltason carefully noted that solidly establishment groups such as the laissez-faire interests of the late nineteenth century used it. When business gradually found that it could no longer win in state legislatures following the Civil War, business groups decided to overcome this political disadvantage by enlisting the Supreme Court as an ally with an ambitious, planned litigation strategy (53).

By the 1960s, once the Warren Court revolution was in full swing, studies of interest group litigation stated the academic political disadvantage theory more sharply. Richard Cortner (1968), in a seminal article on litigation tactics in constitutional cases, wrote that while many litigants are corporations and labor unions simply lobbying for the kinds of advantage in court that they also seek in the legislature, the executive, and the bureaucracy, other litigants

are highly dependent upon the judicial process as a means of pursuing their policy interests, usually because they are temporarily, or even permanently, disadvantaged in terms of their abilities to attain successfully their goals in the electoral process, within the elected political institutions or in the bureaucracy. If they are to succeed at all in the pursuit of their goals, they are almost compelled to resort to litigation. (287)

He argued that the coalition supporting redistricting in *Baker v Carr* (1962) exemplified this kind of disadvantaged litigant. In this case, the winning litigants were unable to have state legislatures

reapportion themselves. They were forced to go to court, and they prevailed there by using strategically planned campaigns of litigation. Similarly, Lucius Barker's article on third parties in litigation concluded, "[T]hose unable to achieve policy goals in other forums do not hesitate taking their cause to the judicial arena" (1967, 64). He referred extensively to *Brown* and the planned, strategic litigation that preceded it. He also referred to *Baker v Carr*. In both instances, he wrote, "Congress and the states, primarily responsible for fashioning such policy, refused to give relief to the aggrieved interest. The Supreme Court did" (42). Moreover, he explicitly endorsed this judicial action. "It might be," he wrote, "that there are some issues on which the judiciary must act as a safety valve for the elected political branches, providing leadership when it is reasonably ascertained that the elected institutions are either unwilling or unable to act" (64). *Brown* became such a storied case, it lent credibility to the political disadvantage theory.

By 1968, the political disadvantage theory was the preeminent explanation of interest group litigation in American social sciences. High profile litigation campaigns and courtroom victories in cases such as *Brown* certainly added zest to the idea that interests who were shut out of other political arenas could use planned, strategic litigation campaigns to gain political advantage in the courts. Inspired by the litigation of the NAACP, redistricting groups, the ACLU, and others, scholars happily noted how the American courts could make up for the majoritarianism of other political institutions by championing the causes of disadvantaged groups.

THE DECLINE OF THE CONCEPT OF THE "DISADVANTAGED GROUP"

Just as the political disadvantage theory was gaining hegemony in academic circles, the importance of allowing judicial review to deliver political gains to disadvantaged groups began to decline in political circles. In the 1968 election the New Deal coalition, the keystone to Democrats' electoral success for a generation, collapsed. In part, the coalition collapsed because of the success of the courts in delivering political victories to some members of the coalition. The Warren Court's activism sparked a massive political

reaction. In the South and elsewhere, other supporters of the New Deal became concerned with what they saw as liberal judges handing out special privileges to blacks, thwarting the battle against crime, and debasing American morality on issues such as contraception and obscenity. By 1968, racial issues and Vietnam were dividing Democrats. Union members, white southerners, and northerners from recent immigrant groups began leaving the New Deal coalition. Nixon showed that Republican candidates could win votes attacking judges for imposing liberal values on American politics. When the Supreme Court pushed forward to declare a constitutional right to abortion and restrict the death penalty, it fed the movement against judicial activism. For twenty of the next twenty-four years, Republicans controlled the White House and the power to nominate federal court judges.

The political disadvantage theory also faced a series of attacks in the social science literature. The first attack began with Marc Galanter's famous speculation about why the legal system might privilege the "haves" in society (1974–1975). Courts and judges, rather than giving a hand up to the disadvantaged, help those who already have social and political resources. Galanter argued that advantaged elements in society have more resources and are therefore either "repeat players" in the court system or can buy the services of repeat players. Since the "haves" are usually repeat players in the courts, they play the game with a longer time horizon and can often play for advantageous rules over the long haul rather than victory in a single case. They can bring greater resources to a particular case and then make better use of them over time. The disadvantaged, by contrast, usually have only isolated, one-time interactions with the legal system. They do not have the resources to hire experienced repeat players and, in any case, would not play the game for the long term even if they could. The "party capability" literature that arose from Galanter's work largely confirmed his speculations. In their test of this theory, Wheeler et al. (1987) discovered that the "haves," particularly governments, did come out ahead, although modestly, in state supreme courts between 1870 and 1970. Songer and Sheehan found that the parties they assumed to have relatively more resources did gain a marked advantage in three federal courts of appeal during 1986 (Songer and Sheehan 1992). These parties also gained an advantage

at the U.S. Supreme Court from 1953 to 1988, although the changing ideological balance of the Court seemed to matter more than relative resources in determining case outcomes. The Songer and Sheehan studies excluded cases involving nonprofit groups, public interest groups, churches, clubs, and so forth, and also used indirect rather than direct measures of litigants' resources. Nonetheless, the party capability theory studies do question whether disadvantaged groups get a hand up from the courts.

Other studies used other approaches to the question of judicial capacity but arrived at similar answers. Horowitz (1977), for example, raised doubts about the courts' abilities to act as effective policy makers. Drawing on four case studies of judicial involvement in making social policy, Horowitz hypothesized that decision making by adjudication often produces perverse results in complex policy areas. In particular, judges may find it impossible to produce the changes they wish to see in areas where many players have mutually exclusive interests. The bipolar and retrospective nature of adjudication hampers the judiciary's ability to manage issues with many interested parties. Horowitz is skeptical that judges can ever truly achieve the public policy aims that they seek to impose on other government institutions.

Rosenberg raised even deeper doubts about the judiciary's ability to bring about wider social or political change. The "bounded nature of constitutional rights" means courts cannot handle "many significant social reform claims, and lessens the chances of popular mobilization" for reform (1991, 13). Most legal rights secure "negative" freedom and therefore cannot readily create positive political outcomes. The judicial process also usually forces advocates of social change to fragment their cause into many small cases. Moreover, the judiciary is not truly independent (15). Political actors control the appointment process, and in the United States, courts have seldom departed from the mainstream of public opinion. The U.S. Supreme Court in particular regularly defers to the position of the Solicitor General in litigation. Finally, Rosenberg reiterates Horowitz's concern that "courts lack the tools to readily develop appropriate policies and implement decisions ordering significant social reform" (21). Perhaps Rosenberg's most damaging attack on the political disadvantage theory is his appraisal of the black civil rights revolution of the 1950s and

1960s. He argues that the courts played only a small role in promoting the civil rights agenda. *Brown*, for example, did almost nothing to desegregate schools. The federal courts only began to play a role in desegregation after Congress passed its 1960s civil rights legislation. *Brown* did not even have an indirect effect on the desegregation campaign. The case did not increase the political saliency of civil rights issues. It had no measurable impact on press coverage, (111–116).¹ It did not figure in the legislative debates on civil rights of the 1950s or 1960s (118–121). White opinion on civil rights issues began to liberalize after World War II and *Brown* had no impact on this trend (121–128). Finally, the case did not figure in any mobilization efforts by civil rights leaders, even for the Montgomery bus boycott (131–134).² Instead, Rosenberg attributes the success of the civil rights movement to social and economic changes underway in the United States after 1945. Similarly, he argues that the abortion rights movement, the criminal rights movement, and the environmental movement also succeeded because of nonjudicial factors. Even the reapportionment of state legislatures, which began soon after *Baker v Carr*, failed to deliver the kind of social reform its proponents had hoped it would (293–303). Yet, Rosenberg does think the courts can sometimes help disadvantaged groups. They can help bring about social change if: the law provides a firm base for the desired changes, there is strong support for the change in Congress and the executive, public opinion does not vigorously oppose the change, and other policy actors are willing to go along (36).

The second line of attack on the political disadvantage theory began in the early 1980s. A new generation of students of interest group litigation started to go beyond single case studies to use quantitative methods to study interest group participation in the courts across the full range of policy issues. These studies show the narrow applicability of the political disadvantage theory. Some show that the number of “upperdog” groups outnumbers or equals the number of “underdog” groups in the U.S. courts (McIntosh and Parker 1988; Bradley and Gardner 1985). Others show that conservative groups are active in the court system, and their activities grew more quickly than those of “liberal” groups in the 1970s did. Still others show that civil rights cases are only a small part of the dockets of the U.S. federal courts. Civil rights litigation is

only a small part of the universe of interest group litigation (McIntosh 1984). Moreover, interest groups are not any more successful than others in the U.S. federal district courts (Epstein and Rowland 1991) or the U.S. Supreme Court (Songer and Sheehan 1993).

Quantitative measures of political disadvantage, “underdogness,” or liberality are fraught with problems of operationalization. Some researchers have used tangible organizational resources such as staff levels (Scheppelle and Walker 1991) or budget (Bruer 1988) to measure disadvantage or underdogness.³ None of these studies has attempted to measure the specialized legal or policy expertise that an organization might be able to mobilize to offset its lack of tangible resources. Furthermore, an unthinking equation of underdogs with liberals and the politically disadvantaged obscures the real differences between the categories (Olson 1990, 857). Bradley and Gardner (1985), for example, distinguish the upperdog-underdog categorization, which they use, from the liberal-conservative categorization that O’Connor and Epstein (1983) use. While their sociopolitical resources identify upperdogs and underdogs, liberals and conservatives are identified by their sociopolitical resources and their ideology.⁴ “Politically disadvantaged” is a different category again. The political process can obviously give advantages to underdogs, upperdogs, ideological liberals, and ideological conservatives. Although it is important to keep these different categories distinct, the verdict that emerges from this line of attack is that the political disadvantage theory described only part of the universe of interest group litigation.

Wasby (1984, 1995) and Tushnet (1987), for their part, have both questioned whether the most successful litigation campaigns over race were all that planned or strategic to begin with. Tushnet reconsiders the NAACP’s litigation to end segregated education in the three decades leading up to *Brown*. He finds that divisions within the organization and uneven support from the broader black community meant its litigation strategies were always in flux and not the product of a master plan. Wasby looks at later race relations litigation by the NAACP and other groups. He concludes that these litigation campaigns were not carefully planned or strategic. Instead, the campaigns often responded to organizational and short-term imperatives. These studies ques-

tion the idea that highly disciplined and centralized groups sponsor test cases across the country, wherever they might be of help to a cause.

By questioning the court's capacity to act as effective policy makers or social reformers, Galanter, Horowitz, and Rosenberg undermined the picture of the courts as safe havens for anyone, let alone politically disadvantaged minorities. Rosenberg's meticulous demonstration that court action had little independent impact on the social conditions of American blacks is particularly damaging. These were important new findings about the judicial capacity to bring about social change. Combined with the evidence that ethnic and religious minorities were not the only groups suing, and winning, in the U.S. courts, and that ethnic and religious minorities probably never were canny, strategic litigators in the first place, they led American scholars to reject the political disadvantage theory by the mid-1980s.

THE CONCEPT OF THE DISADVANTAGED GROUP IN CANADA

Just as American academics were questioning the political disadvantage theory, Canadians began to find it persuasive. Today, many observers conclude that the courts are, or should be, havens for disadvantaged groups. Richard Sigurdson argues that the Charter is good for Canada, and improves Canadian democracy, because it has produced victories in the areas of due criminal process, abortion, voting, pay equity, welfare state benefits, and benefits for same sex couples. These are "victories for underprivileged individuals and groups" and they "enhance, rather than undermine, the democratic nature of our society" (1993, 108). The Charter "certainly does not guarantee that less advantaged groups will be given the means to overcome oppression and inequality," but it does recognize the "special needs of those who have historically been targets for discrimination" (109). It therefore helps prevent the worst rights abuses and symbolizes our commitment to respect others. Gregory Hein analyzes the litigation of groups he calls "judicial democrats"—aboriginal groups, civil libertarians, and New Left activists. These groups, he argues, have the greatest potential to influence public policy through litigation because they are

motivated by the idea that litigation can enhance democracy. If the Canadian courts listen to groups that lack political power, they can “protect vulnerable minorities and guard fundamental freedoms” (2000, 5). Judicial democrats believe, according to Hein, that litigation can make Canadian institutions “more accessible, transparent and responsive” so long as the courts listen to “a diverse range of interests, guard fundamental social values and protect disadvantaged minorities” (19).

Some look particularly to the equality rights section in the Charter of Rights. This section reads:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Lynn Smith, a legal academic and volunteer for the Women’s Legal Education and Action Fund, thinks the proper way to evaluate the impact of the Charter’s equality rights is to ask whether “equality rights have done anything to remedy inequalities affecting members of the most disadvantaged groups in our society” (1994, 62). Section 15’s purpose is to counterbalance “certain kinds of inequalities,” namely, “disadvantage based on the kinds of personal or socially attributed characteristics listed in the section” (62). Overall, Smith sees the Charter’s equality rights as achieving this purpose. Elizabeth Shilton, another LEAF activist, chips in that section 15 is “an instrument to promote equality for the disadvantaged” (1992, 658).

This is not to say that the main tenets of the political disadvantage theory have gone unchallenged in Canada. Various leftist scholars have mounted attacks on the Supreme Court’s use of its

new Charter powers, attacks that implicitly repudiate the theory. Mandel (1989) advances a neo-Marxist attack. He claims that judicial review has a profound class bias against the truly disadvantaged groups of capitalist society. Bogart (1994), following Rosenberg's analysis of the American Supreme Court, questions whether the Canadian courts can bring about social change. Litigation as a political tool is biased toward liberalism, in his account. Hutchinson (1995) advances a postmodern attack based on the idea that "rights talk" cannot adequately confront the reality of oppression and private economic power (see also Bakan 1997).

Indeed, there are few examples of courts providing aid to disadvantaged groups in Canadian history. Canada's courts had done little to help Canadian Indians, arguably the country's most discrete and insular minority. The Canadian government, like the American government, interned Japanese Canadians during World War II and Canadian courts, like American courts, failed to take remedial action. In the 1950s, the Supreme Court did eventually respond to the Duplessis government's persecution of the Jehovah's Witnesses with fits and starts of civil libertarian activism. Consequently, some partisans of the Witness cause wrote favorably about how judicial action could protect threatened minorities (Botting 1993; Kaplan 1989; Berger 1982). Yet, when Parliament adopted a legislative Bill of Rights that gave the courts the power to review federal legislation in 1960, it took the Supreme Court twenty-five years to respond with a significant activist decision using the bill.⁵ Judges did not use the bill of Rights to reform Canada's criminal law. Canadian feminists found Canada's courts were unwilling to use the bill to reform Canada's abortion law (*Morgentaler* 1976), its laws governing Indian status for women who married non-Indian men (*Lavell and Bédard* 1974), and the pregnancy leave provisions of the Canadian unemployment insurance program (*Bliss* 1979) (Hosek 1983). As Peter McCormick (1993) shows, over the long run the "haves" have come out ahead in the Supreme Court of Canada.

Even when explicit constitutional guarantees were available to help disadvantaged Catholic and French-language minorities, the courts did not intervene on their behalf. In 1915, the Ontario government forbade the province's Catholic schools from using public funds for secondary schooling. Catholic

schools had enjoyed the right to public funding since Confederation and that right seemed clearly protected in the BNA Act (Schmeiser 1964, 141). Yet, the Ontario courts, the Supreme Court of Canada, and the Judicial Committee of the Privy Council all refused to uphold Catholic school rights by overturning Ontario's decision.⁶ In 1890, the Manitoba legislature abolished French as an official language of the province, and ended public funding of Catholic schools. Both decisions almost certainly violated the *Manitoba Act, 1870*. Yet, at the time only one county court judge overturned the official language legislation, and his decisions were ignored (Mandel 1989, 111–116). The Supreme Court did uphold the rights of Manitoba's Catholics to public funding for their schools (*Barrett* 1891), but the Judicial Committee reversed that decision on appeal the next year (*Barrett* 1892). The Manitoba schools question became a national political issue that was eventually resolved by a political compromise (Wiseman 1992, 711–712). In both Ontario and Manitoba, the Canadian courts failed to protect politically disadvantaged minorities even when they had relatively clear constitutional provisions on their side. The overall treatment of politically disadvantaged minorities by the Canadian courts hardly warranted any hope that the Charter would be a tool for political reform.

Despite this history, the Supreme Court has incorporated the concept of political disadvantage as the dominant mode of analysis in its equality rights cases. In *Andrews v Law Society of British Columbia*, the Supreme Court's first equality rights case, Justice McIntyre repudiated the Supreme Court's Bill of Rights jurisprudence as a guide to interpreting the Charter's equality rights. Instead, he decided that the purpose of section 15 is to stop governments from burdening "discrete and insular" minorities (1989, 599). Justice Wilson, concurring in McIntyre's analysis, wrote that the purpose of section 15 was to protect those groups "lacking in political power" and "vulnerable to having their interests overlooked" (1989, 152). These groups would be identified not simply from the context of the laws being challenged, but by "the context of the place of the group[s] in the entire social, political and legal fabric of our society" (152). In the follow-up case of *Turpin* (1989), Wilson expanded upon her earlier com-

ments. The purpose of section 15, according to her reasoning, is to remedy or prevent “discrimination against groups suffering social, political and legal disadvantage in our society.” Such groups would be identified by “indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice” (1989, 1333). In more recent equality rights cases, the Court has gone on to say that historical disadvantage is not the only way to gain the benefit of section 15. The Court has also disavowed a strict division between advantaged and disadvantaged groups in its jurisprudence (*Miron* 1995; *Egan* 1995). Nonetheless, the Court has emphasized that “pre-existing disadvantage, vulnerability, stereotyping, or prejudice” are likely to be the “most compelling” factors in deciding section 15 claims (*Law* 1999, 534). Canadian scholars have noticed that this line of jurisprudence is inspired by American developments. In his textbook, Peter Hogg, Canada’s foremost constitutional law scholar, notes, “The view that systemic disadvantage and political powerlessness are essential characteristics of the groups protected by s. 15 reflects a theory of equality that finds its origin in the famous footnote 4 of *United States v Carolene Products Co.* (1930)” (Hogg 1999, 1008). The political disadvantage theory, now discredited in the United States, has become the normative justification for Canada’s constitutional equality rights jurisprudence.⁷

CONCLUSION

The concept of the “disadvantaged group” has a long history, and a storied one in the United States. It emerges from the idea that activist judicial review is simply a way of correcting the failures of other political institutions in properly representing the full range of interests in society. It inspired the early political science work on interest group litigation in the United States. It has become a popular concept in Canadian academic work on the courts, and plays a central role in the Supreme Court of Canada’s equality rights jurisprudence. Arguably, an important part of the concept’s currency is the ready justification it provides for courts to make activist use of the judicial review power. There is a strong moral dimension the political disadvantage theory and the concept of the

“disadvantaged group” brings some of the most shining moments of American jurisprudence to the fore.

How has this played out in Canada? Since the 1980s, there has been a dramatic increase in the role of interest groups in the judicial system. One indicator of this increase is the Supreme Court of Canada’s willingness to accept interveners in its cases. The next two chapters document the Court’s changing treatment of interest groups, particularly through the intervention mechanism. The Court’s openness to interest groups is driven by the Court’s rapid change of role in the 1970s and 1980s. During that time, the Court moved away from a focus on adjudicating individual, concrete, legal disputes. It took on a more explicit law-making role, and then embraced the invitation inherent in the Charter of Rights to embrace the supreme role in making constitutional law. Each of these stages in the Court’s development has entailed changes in the way it treats interest groups. At the same time, as the Court has expanded its role in Canada’s constitutional order, it has had to justify its expanded role. The moral stories embedded in the political disadvantage theory and the concept of the “disadvantaged group” have, I argue, helped immunize the Court from the kind of backlash final courts of appeal often face when they engage in activist use of the judicial review power.