

What Rights in the “Rights Revolution”? : Analyzing Criminal and other Civil Rights Cases Separately

Susanne Schorpp
Department of Political Science
University of South Carolina
Columbia, SC 29208
schorpp@mailbox.sc.edu
803-777-2367

Donald R. Songer
Department of Political Science
University of South Carolina
Columbia, SC 29208
dsonger@sc.edu
803-777-6801

Raul A. Sanchez Urribarri
Department of Political Science
University of South Carolina
Columbia, SC 29208
sanchezu@mailbox.sc.edu
803-777-2367

A paper presented to the annual meeting of the Southern Political Science Association, New Orleans, January 10, 2008

ABSTRACT

What Rights in the “Rights Revolution”? :

Analyzing Criminal and other Civil Rights Cases Separately

Epp’s ‘Rights Revolution’ theory provides a compelling appraisal of the rise of rights protection in national policy making. He argues that the expansion of rights litigation in the agendas of high courts in four countries -the U.S., England, Canada and India-, results chiefly from the existence of a support structure in society to bring the cases to court, to finance the costs of litigation, and to encourage popular support for an expansion of rights. This paper’s intention is to offer a preliminary first attempt to extend Epp’s analysis and build on his findings. We suggest a more detailed look at the measurements of rights revolutions that takes into account the context in which rights protection takes place, hoping to contribute to a more detailed, cross national analysis of the role of courts in protecting individual rights. In particular, we propose to test the theory that the development of a sophisticated support structure leads to an increased protection of both criminal and other civil rights and liberties by the courts. The preliminary results discussed in this paper show that one’s conclusions about the existence and extent of a rights revolution in these countries can be sensitive to slight data and methodological issues.

There is now widespread recognition within the law and social science community that if we are to make significant advances in the development of a theory of judicial behavior or of the role of courts (rather than of just the behavior and role of the US Supreme Court) there is a strong need for truly comparative, cross-national, empirical studies that employ common concepts and methods to the courts and judges of multiple countries. One early attempt to move in such a direction was Epp's work on the nature and causes of rights revolutions.

Epp's comparative work on the impact of support structures on rights revolutions (1996; 1998) coincided with a growing interest in the judicialization of politics, but the two are not necessarily the same. Activist courts might in some instances actually become agents of elites seeking to suppress the spread of rights. Rights revolutions, on the other hand, describe a shift of agenda in high courts to include more civil rights and liberties cases along with an expansion of judicial support for rights claimants. To the extent that courts foster such a rights revolution, they may become important players in a more general politics of rights. The question of where and under what circumstances such a development could take place should therefore be of particular interest to political scientists interested in the potential for an increasing policy making role for the courts. Whereas institutional explanations of policy making are increasingly in vogue, Epp concentrates on the role of support structures, claiming that an increased attention to civil rights and liberties by the highest courts cannot be explained by institutional features, activist judges or public opinion, but rather by the development of a sophisticated support structure.

. Epp provides an interesting and plausible theory about the existence and causes of a rights revolution. While theoretically rich, his data analysis has significant limitations. This

paper's intention is to offer a preliminary first attempt to extend Epp's analysis and build on his findings while providing a partial critique of his methods.

In short, we find that even though there are severe obstacles in the way of any attempt to operationalize Epp's concept of a "support structure" for rights, the application of a rough ordinal measure of his concept to an expanded dataset on the agendas of the top appellate courts in four advanced democracies in the common law world generally confirms his predictions about the relationship between increasing support structures and expanding rights agendas. However, increases in the support structure for rights do not always lead to increased support for rights claimants. Moreover, when the overall rights agenda is disaggregated, it appears that neither increased agenda space devoted to criminal rights cases nor increased support for criminal defendants is positively correlated with agendas or support for other rights claimants. Finally, it appears that the relationship between increases in support structures and increasing rights agendas is not linear, but is subject to threshold effects.

A Theory of Rights Revolutions

Epp argues that in the middle of the twentieth century, there was a major transformation in the role of the US Supreme Court in which the Court "created or expanded a host of new constitutional rights." This transformation, he argues, has been real and it has had important effects (1998, 2). He names this transformation a "rights revolution" and goes on to argue that a similar phenomenon has occurred and continues to occur in many parts of the world.

Epp argues that more than constitutional guarantees, judicial power or political culture, vibrant support structures for legal mobilization are most important in sustained judicial attention to civil liberties and civil rights. According to Epp, vibrant support for legal mobilization springs from rights advocacy organizations, rights advocacy lawyers and expanding government

financing for legal support structures. First and foremost, rights originate in pressure from below in civil society and not elite imposition from above.

Epp (1996; 1998) argues that while constitutional bills of rights are of some relevance, their impact on the growth of the rights revolution has been vastly overrated. He also dismisses both the judge-centered explanation and the culture-centered explanation as principal causes of rights revolutions. Instead he argues that even under an activist court, there is still the necessity of having rights cases appealed to the high court and this in turn requires support structures to sponsor litigation, finance the costs, and make persuasive arguments in a petition for review. Similarly, a popular rights consciousness is dependent upon the resources provided by a strong support structure to transform general support of rights into rights cases reaching the high court.

Epp uses four cases (US, Canada, Great Britain, and India) to examine the changing agenda associated with the concept of rights revolution. These four cases, Epp concludes, corroborate his theory. Epp found that there had been a substantial increase in rights cases being heard in court, especially in the US and in Canada, signifying that a rights revolution has indeed occurred. More importantly, he discovered that the extent of the support structure varied across countries, and that this variation was directly correlated with the extent of rights protection.

Expanding Epp's Analysis

There are several shortcomings in the methods and data Epp uses to test his theory. First, Epp's conclusions are based on only seven data points per country – one every five years over a period of 35 years. From the proportion of rights cases on the agenda in these seven years, he extrapolates values for the missing years and demonstrates trends with line graphs connecting the seven data points. No statistical tests of any formal hypotheses are used. Furthermore, though his idea of support structure is theoretically appealing, it is very difficult to operationalize. Epp's

descriptive account of rights revolutions suggests that, in the countries he studied, support structures increased gradually but with relative constancy over time. Based on his account we propose to create an ordinal measure to test the implications of Epp's assumptions.

Additionally, we test below the implicit thesis of Epp that the development of a sophisticated support structure leads to an increased protection of both criminal and other civil rights and liberties by the courts. While there is some evidence that in the US, the rights of criminal defendants are part of the same issue dimension as other rights such as free speech, privacy, and equality rights (see Schubert 1965; Rohde and Spaeth 1976), one should be cautious in assuming that the same linkage among issues exists in other high courts. One of the main purposes of this paper thus is to understand how the choice of issues used in measuring rights revolution affects the inferences that may be made in regard to the causes. If there is no positive correlation between decision making regarding criminal and other civil rights and liberties cases, a combined measure might lead to both type I and type II errors.

Tying Epp's analysis to the party capability discussion, this paper will address the significance of support structures not only in forming Supreme Courts' agendas, but also their outcomes. We will furthermore introduce the idea of threshold effects concerning the impact of support structures.

The shift of attention towards human rights adjudication is a phenomenon not restricted to new democracies, but a general trend as documented by the judicialization literature (Tate and Vallinder 1997; Stone Sweet 2000; Sieder et al. 2005). At the heart of the courts' power is its role in balancing the interests of the state or society as a whole and the individual, as the widespread implementation of bills of rights and judicial review attest (see Allan 2005; Malleson

and Russel 2006). Epp similarly states that “The rights revolution, either implicitly or explicitly, is at the heart of the debate over the relationship between rights and democracy” (1998, 4).

Looking at agenda, however, instead of outcomes¹, Epp’s analysis does not address the question of whether an increased *attention* to rights by the courts actually leads to an increased *protection* of rights. However, he defines rights revolutions as “a sustained, developmental process that produced or expanded the new civil rights and liberties” (Epp 1998, 7). In order to prove his claim, outcomes must necessarily be considered alongside agenda. Thus, to extend Epp’s work, the analyses below focus on changes over time in outcomes for rights claimants in addition to changes in the agendas of courts.

Finally, although he does not directly address the issue, it appears that Epp implicitly expects that the relationship between changes in the support structure for rights and the agenda space devoted to rights cases will be linear. We believe that a linear relationship is unlikely. Instead, we expect the impact of support structures on supreme courts agendas to have two thresholds. The first indicates a minimum degree in support necessary to influence the court’s attention on the issue. As this threshold is crossed, Epp’s proposed linear relationship between support structures and high court agendas becomes plausible. Each unit increase in support might lead to an increase in court’s attention to the issue. However, after a point is reached in which the court is flooded with cases pertaining to one issue and it can thus choose from an array of petitions, further increases in the support structures become unlikely to have a continued effect on the proportion of the agenda devoted to that issue. For example, in recent years the US Supreme Court has received several thousand petitions per year asking that it review rights

¹ Epp includes outcomes in his APSA article on Canada (1996), but not in his book (1998).

decisions.² From these thousands of petitions it is reasonable to believe that the Court will docket as many rights cases as the justices are interested in deciding and that even a doubling of the number of petitions (e.g., resulting from a doubling of the size of the support structure) would have little if any impact on the number of rights cases decided by the Court.

In addition to these theoretical contributions, we will make use of new data to extend Epp's analysis temporally and, by looking at the United States, England, Canada, and Australia, add another country to the discussion. Though the scope of our analysis is limited to an analysis of Epp's rights revolution theory, the conclusions are important for any empirical analysis of judicialization in comparative perspective.

The Influence of Resources on Judicial Policymaking

The idea that resources have an impact on judicial outcomes is not new. In 1974 Galanter initiated a lively debate on the relative advantages of “haves” versus “have not’s” in litigation. In his “party capability” discussion, resources were measured and understood in their relative advantage of one litigant over their opponent. Since he categorized resources according to the two sides of legal disputes, his analysis (and the following debate) by necessity also differentiated between issues. Criminal cases thus represented a dispute between the government and individuals, economic cases concerned either two businesses or individuals or a mixture of both, whereas other civil rights and liberty cases could take on a variety of combinations. Galanter's analysis on the U.S. Supreme Court showed that the “haves” (government, followed by businesses) have a comparative advantage over the “have not’s” (individuals) by being “repeat-players” as compared to “one-shotters” in court. Resources, not unlike Epp argues, can be measured in economic terms, but may also reflect advantages in information collection,

² Including petitions to review criminal convictions or incarcerations, which Epp includes in his category of “rights” decisions.

general knowledge, or experience. Epp does not, however, examine the relative advantage of resources. Whereas party capability theory generally focuses on outcomes, Epp is concerned with agenda setting. Nonetheless, the party capability literature is a good place to look for indications on how support structures might influence outcomes and thus protection of individual rights by the courts.

Several follow ups to Galanter's discussion applied the party capability thesis on different levels of courts in the U.S. and on the high courts of other countries (Songer, Sheehan, and Haire 1993; Sheehan, Mishler, and Songer 1992; Songer and Sheehan 1992; Songer, Sheehan, and Haire 1999; Wheeler et al. 1987; Haynie 1994; Atkins 1991; Dotan 1999; McCormick 1993). Whereas these studies generally confirmed Galanter's theory, some exceptions were also uncovered.

These findings are important in the present context for several reasons. First of all, they corroborate Epp's theory that resources matter. McGuire and Caldeira (1993) argue that the expertise of repeat players is influential in setting the agenda in that the court, in order to "discover the importance of cases, [...] takes advantage of the self-interested behaviour of amici and professional litigators" (719, see also Baird 2006). In addition to influencing agenda setting, Epp reasons that increased resources for rights claimants will lead to more wins (1998, 7). His claim is in line with party capability theory, which argues that resources allow the purchase of repeat player experience and knowledge. That knowledge can take the form of an experienced lawyer (McGuire 1993), or of amici briefs filed in favour of the claimant (Songer, Kuersten, and Kaheny 2000). In the same article, Songer et al (2000) also find evidence for a threshold effect in resource contribution to cases that are granted cert. Though the filing of amici briefs was

positively correlated with winning, the effect was not significant in cases that already had an increased advantage through repeat players.

With either amici briefs or repeat players, expert knowledge of the issue at hand, and thus professional and persuasive legal reasoning, lead to a relative advantage. If outcomes are seen as the result of two sided conflict, resources thus contribute to relative parity.

This parity or unequal balance might differ depending on the issue. More specifically and more important for the present analysis, the balance in criminal cases is one between individuals and government, whereas in other civil rights and liberty disputes it is in most part between two private entities. In other words, when looking at the correlation between support structures and rights revolutions, the literature suggests taking into account that resources are distributed unequally between the parties of the dispute.

The distinction between issues is important, because support structures do not benefit every party equally. Nongovernmental organizations are usually devoted to a certain issue. There is no reason to suppose, for example, that the increasing legal involvement of LEAF (Women's Legal Education and Action Fund) in Canada (that Epp cites as a prominent example of the increasing support structure for rights in Canada) should have any effect on criminal cases. Governmental aid, on the other hand, is principally directed at criminal defendants, especially through the provision of legal counsel.

Whereas Epp's analysis of non-governmental organizations and their involvement in litigation concerning civil rights and liberties implies that their participation in litigation has not weakened, Epp also mentions that "recently in some countries political conservatives have responded by developing competing legal advocacy organizations and by attempting to cut governmental funding for legal services" (1998, 22). Regan et al. (1999) furthermore show that

legal aid has in fact declined since the 1980s, a finding echoed by the English Department for Constitutional Affairs (1995), which implies that financial aid to long and costly criminal cases have led to a reduction not of total government spending in legal aid, but of the number of cases receiving aid, both of criminal and, due to the zero sum property of money, also of civil cases. The assumption that increases in the support structures for rights will equally benefit all rights claimants might therefore overlook the potential differences occurring on both the dependent and independent variable.

Towards an Understanding of Rights Protection

Epp's thesis that the existence of sophisticated support structures facilitates the use of courts in the advancement of rights is consistent with what we know from the many party capability studies reviewed above. But in order to provide a satisfactory cross national test of this theory, some way must be found to measure the extent of the support structure in a given country at a given point in time. This, however, is easier said than done. Support structures include a sophisticated and extensive legal market, with law firms; the existence of nongovernmental rights support organizations, in different issue areas, and connected for the purposes of bringing litigation to the courts; and financial aid schemes from government and nongovernmental organizations to pursue legal claims. It is close to impossible to measure the number of nongovernmental organizations involved in litigation per country, let alone create a comparable measure of their participation across countries. Similar difficulties exist in comparing governmental legal aid across states, regions, and especially countries, which employ different rationales for distributing money according to issue, area, and access rules. We may have to accept that the idea of a support structure & legal mobilization may be so complex that it may be impossible to adequately devise useful, quantifiable, and reliable measures for truly cross

national studies (Southworth 2000). Instead, we may have to rely on relatively “soft” measures of support structures; it may not be possible to devise any thing better than a rough ordinal scale derived from somewhat subjective descriptive accounts of each country.

One of the implicit assumptions of Epp’s analysis is that the rights of the criminally accused and other rights are interchangeable parts of a single phenomenon. In other words, if rights revolutions are measured based on the change of agenda devoted to all rights cases reaching the high courts, the same results achieved from looking at that combined measure should still hold true when we look at criminal and other civil rights and liberties separately. Such an assumption appears to be reasonable in the U.S. context, but there is less established support for such an assumption in other countries. There are several reasons why this is an assumption which should be tested before accepted as universally true.

The danger of accepting false assumptions is especially great in the field of comparative politics. When hypotheses that have been proven valid in the U.S. American context are applied in a comparative perspective, many of the assumptions underlying the hypotheses are accepted on face value. In this case, the assumption that criminal and other civil rights and liberties cases are equally valid measures for determining the existence of a rights revolution as a combined measure of rights cases, assumes that a given support structure would have an equal effect on both. The assumption might also skew our analysis of other explanatory variables. Though there is a high correlation between justices’ attitude towards criminal and other civil rights and liberties cases in the U.S. (e.g., see Schubert 1965; Rohde and Spaeth 1976), this might not be the case in other countries (e.g., see Ostberg and Wetstein 2007 for evidence of a different relationship in Canada). We must therefore consider the possibility that outcomes in criminal and other civil rights and liberties cases are not very good predictors of one another.

In short, by including both criminal and other civil rights and liberties in the data indiscriminately, it may not be possible to trace the supposed effect of support structures back to its cause. By using combined a measure of agenda change in supreme courts for both criminal and other civil rights and liberties, the unspoken assumption is that support structures affect both equally. That assumption shall be tested below.

Data and Methods

We initially attempted to define rights in the way in which Epp uses that term. He appears to focus only on individual rights, particularly those that are similar to those established in the main provisions of the US Bill of Rights and the Canadian Charter of Rights. We attempted to follow this general conception of rights. Specifically, we count only rights adhering to individuals (rather than collective, social rights) and include “fundamental freedoms” such as rights to free expression, the right to organize for political purposes, and religious liberty; democratic rights including the right to vote and to bring grievances to the attention of government officials; mobility rights, including the right to freely enter and leave the country; procedural due process guarantees in criminal trials, habeas corpus and rights to fair treatment claimed by prisoners, the rights of indigenous peoples, and equality and privacy rights (Epp 1996, 768-69). Using this definition, we compute the percentage of the agenda devoted to rights cases for each year for each country studied, at the highest court level. In order to measure support for rights claimants, the percentage of cases decided in favor of the rights claimant is determined for each measure. The data are taken from the the High Courts Judicial Database³ and comprise the universe of published decisions from 1970-2002 in the case of Australia, 1970-

³ The High Courts Judicial Database is a public access database created by Stacia L. Haynie, Reginald S. Sheehan, Donald R. Songer, and C. Neal Tate with the support of grants provided by the Law and Social Science Program of the National Science Foundation (NSF). It is available for public use and download at http://sitemason.vanderbilt.edu/site/d5YnT2/data_sets.

2004 in the case of Canada, and 1969-2006 in the case of England. Data on the U.S. Supreme Court are taken from the Spaeth U.S. Supreme Court Database⁴ and comprise the universe of cases for the years 1953-2003.

Our first task is a replication of Epp's analysis. Having compiled yearly data over a period of 32 to 50 years, we are thus able to provide a more confident analysis of the existence of rights revolutions. In addition to graphic results, we regress time (in years) on the yearly measure of rights agenda. Adding the rough categorical measure of support structures to the analysis, we are able to provide insight on the relationship between rights revolutions and support structure. Basing the measure on Epp's qualitative analysis of support structures, we assign a steady increase starting in 1970 for every five years. That is, the period 1970-1974 is assigned the value "1", the next five years is assigned the value "2", etc. The support structure measure was positively correlated with agenda change in all countries but the United States. A discussion about this effect follows in the individual analysis of rights agenda and support for the United States. As rights revolutions are not only defined as an increase of attention to rights cases, but also increased support of rights claimants, we proceed to regress time on judicial outcomes in rights cases.

Since we are interested in the effects the assumption of correlation between criminal and other civil rights and liberties has on the predictive strength of the explanatory variables, we proceed to test the validity of these assumptions by measuring the correlation between the different variables. First, we determine whether agenda changes in criminal cases are correlated with agenda changes of other civil rights and liberties. We also measure whether there is a correlation between support for appellants claiming rights violation in criminal cases and other

⁴ The database and its documentation are available to scholars at the web page of the S. Sidney Ulmer project, <http://www.as.uky.edu/polisci/ulmerproject>

civil liberties cases. If rights revolutions consist not only of an increased percentage of rights cases on high court dockets, but also of an increased protection of those rights, the same assumptions are applied and must be tested. We therefore also calculate the correlation between the support for criminal and other civil rights and liberties claimants.

In order to determine whether the rights agenda is driven by criminal, other civil rights and liberties, or both cases, we correlate the two latter with the former. The results are summarized in Table 1 and represent the correlations for each analyzed country. The first two rows report regression coefficients and standard deviations regarding agenda change and rights support over the years, using a simple model with the ordinal measure of support structure as the only independent variable. Rows 3-6 provide the correlation between the measurements. A more detailed comment on the results follows in the discussion by country.

Table 1 about here.

Results

AUSTRALIA

Figure 1 about here.

Figure 1 represents changes in agenda and support for rights cases on the high court of Australia. The solid line traces the yearly percentage of support for rights claimants by the court, whereas the dashed line represents the change in agenda devoted to rights cases. Both rights agenda and rights support seem to have increased over time. The coefficients corroborate the visual findings. Both coefficients for agenda change and support are positively and statistically significantly correlated with time.

Figure 2 about here.

Figure 2 depicts the rights agenda divided into criminal and other civil rights. The positive change in agenda attention to rights cases (noted in Figure 1) seems to be mostly driven by the criminal rights agenda. The proportion of other civil rights and liberties cases fluctuates between 0 and .1, whereas criminal cases only dip below .2 in 1993, otherwise comprising between .2 and .4 of the High Court agenda, mimicking the combined rights docket. Both the criminal and the combined docket seem to rise over the course of years, whereas the agenda comprising other civil rights and liberties seems to remain fairly flat, though with substantial year to year fluctuation. The correlation (see Table 1) between the agendas of criminal and other civil rights shows no statistically significant relationship between the two; that is, contrary to the implicit assumption of Epp, changes over time in the support structure do not appear to be producing the same effects on the dockets of criminal cases and other rights cases. A further inconsistency between the expectations derived from Epp's theory and our empirical results is that the correlation between judicial support of criminal and other rights claimants is negative. Though not a statistically significant finding, it suggests that a combined measure of both criminal and other rights might lead to wrong conclusions in regard to the relationship between support structures and agenda change as well as between support structures and support for rights outcomes.

CANADA

Figure 3 about here

The line graph of rights agenda change and development of rights support (Figure 3) suggests a rise in both over the years. This visual finding is confirmed by the regressions. Both coefficients for the relationship between time (representing a rough measure of increases in the

support structure) and agenda change and change in the support for rights claimants were positive and highly statistically significant.

Figure 4 about here.

The difference in docket composition of combined rights cases is even more apparent in the case of Canada. In Figure 4 we can see that criminal cases rise fairly steadily from comprising around 20% of the docket in the early 1970s to 60% in the mid 1990s, whereas other rights cases remain below 20% until 2002. As in the case of Australia, the combined rights agenda on the High court seems to be driven by criminal cases. However, in this case, the docket share of both criminal cases and other rights cases both increase over time in a roughly parallel manner, though the increase of criminal rights proportion on the docket is markedly greater than the increase of other civil rights and liberties. This parallel increase in both components of the rights agenda as the support structure in Canada increased is consistent with the predictions of Epp and confirms his earlier analysis of trends in Canada. Table 1 confirms that changes in the criminal rights agenda and combined rights agenda are highly correlated. Both the correlation between the agendas of criminal and other civil rights and the correlation between the latter and the combined rights agenda is positive and significant. Lastly, support for criminal and other civil rights claimants are positively correlated and statistically significant. The data therefore suggest that Canada fits Epp's model quite well. Spurred by an increasing support structure for rights, Canada underwent a rights revolution in which the court gave increased attention but also increased support to rights claimants, independently of whether they brought criminal or other civil rights issues to the court.

ENGLAND

Figure 5 about here.

The line graph of agenda change (Figure 5) in England presents a puzzling picture. Whereas the rights agenda seems to remain fairly constant over time with a perceivable rise of rights cases on the docket only after 1998, support for rights claimants fluctuates a lot over the entire period. Accordingly, the regression analysis reveals a statistically significant increase of the percentage of the docket devoted to rights cases, but no statistically significant coefficient in rights support over the years. Since the visual picture presented in Figure 5 seems to indicate that there was a substantial increase in the rights agenda only after 1998, we re-ran our regression analysis, limiting this run to the period 1970 to 1998. For this period, the relationship was not statistically significant; in fact, there was virtually no trend of a change over time.⁵ These results are not consistent with Epp's analysis which showed an increasing support structure for rights prior to 1998.

Figure 6 about here.

As we break the combined rights agenda into its two components, the line graph (Figure 6) indicates that the agendas of criminal and other rights are not likely to be correlated. The docket of criminal rights seems to be dominant in the overall agenda of rights cases decided by the House of Lords, as the docket of other civil rights and liberties almost constantly remains below that of criminal cases. However, this relationship is inverted after 1998. A look at the correlations sheds more light on the relationship between these three agenda measures.

Both the criminal agenda and the agenda of other rights cases show a positive and statistically significant correlation with the overall rights agenda. Unlike Canada and Australia, the correlation of criminal agenda with the overall rights agenda is the weaker of the two. A look at the graphs 2, 3, and 5 clearly show the difference between the countries. Whereas the criminal agenda clearly dominated the overall rights agenda, the distribution in the case of

⁵ The regression coefficient was $b=0.0019$ with a standard error of 0.0084.

England is less straightforward. In fact, the correlation between criminal agenda and the agenda of other civil rights is negative, though not statistically significant. The same applies to rights support, which is negatively correlated in the case of criminal and other rights claimants. These findings of negative correlations between the criminal and other rights agendas and between support for criminal defendants and other rights claimants are contrary to the expectations derived from Epp's theory of the effect of growing support structures for rights.

These findings do not address the obvious change in agenda after 1998. Whereas the overall rights agenda was attributable to criminal cases pre-1998, it is dominated by other civil rights and liberties cases after 1998, which might explain the relatively weak correlation between criminal agenda and overall rights agenda over the entire period. Though we suspect that the adoption of the *Human Rights Act in 1998* might be an explanatory factor in this development, this question must remain to be addressed at a different time.

USA

Figure 7 about here.

The line in Figure 7 representing changes in the overall rights agenda between 1970 and 2003 appears to be fairly flat, whereas support for rights claimants even seems to drop during that time. Accordingly, the regressions do not produce statistically significant coefficients for either rights agenda or rights support, and in fact (see Table 1) regression coefficients for both the rights agenda and rights support over time are negative. Furthermore, the correlation between criminal and other civil rights agendas was negative, as was the coefficient measuring rights support over time.

These results are in contrast to the conclusions of Epp (1998) that the United States experienced a dramatic rights revolution driven by an equally dramatic increase in the support

structure for rights in the United States. While Epp's analysis of trends in the United States focuses on a somewhat earlier period of US history, even a casual glance at the recent trends in the legal system suggest that the support structure for rights has continued to grow after the publication of Epp's analysis. For example, the number of interest groups with concerns with rights has continued to grow, the number of lawyers and the size of law firms has continued to grow, and the proportion of lawyers who are either women or minorities has also continued to increase. Thus, the failure of either the rights agenda or the support for rights to grow in the United States in the years since 1970 is not consistent with Epp's theory.

Figure 8 about here.

To gain further insight into change over time in rights litigation, we took advantage of the readily available data on Supreme Court cases to extend our analysis backwards in time. The line graphs depicting agenda change and support concerning rights cases from 1953 to 2005, present a different picture and provide a possible clue to the otherwise puzzling findings regarding the US Supreme Court justices' treatment of rights cases. Between 1953 and 1970 there is a marked increase in the percentage of rights cases placed on the U.S. Supreme Court docket, rising from under 40% in the 1950s to slightly over 60% by the end of the 1960s, and then remaining at or even under 60% for the remainder of the century. A similar picture exists in the trends in support for rights shown in Figure 8. Support for rights began under 60% in the 1950s, then increased rapidly to over 80% in the 1960s and then dropped to under 60% for the remainder of the century.

Considering the total percentage and not just the relative increase, the U. S. Supreme Court is more likely to hear a rights case than the other high courts that form part of this paper's analysis. The apparent lack of a rights revolution in the U.S. after 1970 does therefore not

necessarily imply a disregard of rights cases by the courts. Instead, the graph seems to confirm the idea that a certain threshold exists, beyond which increases in support structure do not have any additional effect on agenda change. That is, one might interpret the trends for the entire half century as indicating that an expanding support structure led to sharp increases in the proportion of rights cases on the agenda of the US Supreme Court from the early 1950s until around 1970 or 1971. Although the support structure for rights continued to increase after 1970, the rights agenda did not continue to grow, most likely because by 1970 there were already so many rights cases being appealed to the Supreme Court that as a practical matter the Court could take as many as it wanted to decide. Thus, future increases in the number of rights cases appealed to the Court no longer resulted in any more rights cases actually decided.

A similar effect might also exist in the case of Canada (compare Figures 3 and 8). After a marked rise in the percentage of rights cases between 1970 (20%) and 1993 (>65%), the following ten years witnessed a drop in the rights agenda – not unlike the drop in the U.S. rights agenda after 1969. This development might be indicative of a similar threshold effect happening in Canada. Though sophisticated support structures may still be supposed to be developing, their role in influencing the high courts' agendas, after the upper threshold is reached, may be restricted to maintaining the rights agenda instead of furthering it.

Turning to the congruence between the criminal docket and the docket for other rights cases, the negative correlation between agenda of criminal and other civil cases (see Table 1) is visually demonstrated in Figure 9.

Figure 9 about here.

Discussion

For this analysis we tested some of the implications of Epp's support structure theory in Australia, England, Canada, and the United States⁶. We sought to extend his analysis in five ways: 1) data on the right agenda and rights support was collected for every year rather than just every five years and the analysis was extended more than a decade towards the present from where Epp's analysis left off; 2) we devised a rough ordinal measure of changes in the support structure based the more impressionistic account provided by Epp; 3) we disaggregated Epp's data on rights, looking separately at criminal cases and other rights cases; 4) we systematically looked at outcomes as well as agendas; and 5) we explored the possibility of threshold effects.

Our first concern in starting this analysis was to replicate Epp's theory and findings by extending his data, providing yearly data points and employing a rough measure of the size of the support structures the would make simple statistical models possible. We found that even though there are severe obstacles in the way of any attempt to operationalize Epp's concept of a "support structure" for rights, the application of a rough ordinal measure of his concept to our expanded dataset on the agendas of the top appellate courts in four advanced democracies in the common law world generally confirm his predictions about the relationship between increasing support structures and expanding rights agendas. While the statistical relationships discovered between increasing support structures and increasing agenda space devoted to rights cases were modest, they were in the direction predicted by Epp and reached generally accepted levels of statistical significance in three of the four countries examined (and they are close to statistical significance in the United States if the period under analysis is extended backwards to 1953).

Reflecting the emphasis in Epp's work, our statistical models are of course underspecified and

⁶ Three of these countries are the same as those examined by Epp; we substituted Australia for India in order to restrict analysis to countries with similar levels of democracy and economic development.

do not attempt to provide a complete explanation of agenda change on the high courts of the nations studied. Nevertheless, they do provide some empirical support for Epp's core theory.

In contrast, dis-aggregation of Epp's measure of rights raised questions about the validity of his underlying assumption that all rights were essentially interchangeable. Only the results in Canada proved to be unaffected by a combined measure of rights cases. The correlations between changes in the rights agenda and changes in support for rights in the United States after 1970 and in England were negative and not significant in Australia. Similarly, the correlations between support for criminal rights and support for other rights claimants were negative in England and Australia, not significant in the United States after 1970. These empirical results confirm what we believe is a common sense criticism of Epp's approach; namely that there is little reason to believe that rising activity by groups or institutions that support criminal defendants will necessarily result in increased support for other rights claimants (and vice versa).

In his more general statements, Epp appears to agree that the idea of a "rights revolution" implies not only an increased attention to rights, but also increased support of rights claimants. Nevertheless, Epp provides little analysis to trends in the support of rights claimants. When we provide an overview of these outcome trends, it appears that only Australia and Canada qualify as countries who experienced rights revolutions. Increasing support structures for rights were not found to lead to increasing support for rights claimants in either England or the United States. The conventional wisdom in empirical studies of judicial behaviour in the United States (e.g., see Schubert 1965; Segal and Spaeth 2002) is that, contrary to the implications of Epp's theory of rights revolutions, outcomes in rights cases are determined more directly by the ideology of the justices than by the nature of the litigants or their supporters. Our finding of an absence of a consistent relationship between support structures and outcomes in rights cases

suggests the need for future studies that find a way to develop comparable measures of judicial ideology that can be used in cross-national analyses of the determinates of judicial outcomes

Finally, it appears that the relationship between increases in support structures and increasing rights agendas is not linear, but is subject to threshold effects. In the two countries that arguably have the most developed support structures for rights (the United States and Canada), there were early periods in which the agenda space devoted to rights increased rapidly until rights cases accounted for a majority of all cases heard by the courts. In both countries, if those trend lines had continued, rights cases would have reached or approached 90% of the docket by some time early in the 21st Century. It is difficult to imagine that any high court could devote such extraordinary attention to rights, given the pressures the justices must feel to attend to other legal matters as well. Thus, it is reasonable to believe that at some point, every high court will reach a threshold in its attention to rights cases which will not be crossed even if there is ever increasing support from interest groups and organized sectors of the bar that continue to push the court to take more rights cases. And in fact, this scenario is what appears to have occurred in the United States and Canada. In both countries, the agenda space devoted to rights cases has levelled off, and while remaining high, gives no indication that it is continuing to advance in a linear fashion.

In sum, though our findings provide some empirical support for the basics of Epp's theory of the origins of rights revolutions, they suggest that the relationship between support structures and rights revolutions may be more complex than Epp's consolidated measures suggest. Future research is needed to develop a model that better incorporates this complexity. The suspected interplay between ideology and agenda calls for a more systematic analysis of the role of judicial preferences in rights revolutions. The development of rights agenda in England

and Canada furthermore suggest that institutional change (e.g., the *Charter of Rights* in Canada and the *Human Rights Act* in England) do, in fact, matter and should be taken into account in predicting outcomes concerning individual rights and liberties. And of course, before a truly comprehensive model can be developed, the analysis must be extended beyond courts in just the economically advanced democracies of the common law world.

Tables and Figures

Table 1

	DEPENDENT VARIABLE	INDEPENDENT VARIABLE	AUSTRALIA	CANADA	ENGLAND	USA 1970-2003
REGRESSION	COMBINED (DOCKET)	YEAR	.037** (.006)	.072** (.008)	.017** (.006)	-.008# (.007)
	COMBINED (SUPPORT)	YEAR	.042** (.012)	.026** (.009)	.005 (.016)	-.006# (.006)
PEARSON CORR.	CRIMINAL (DOCKET)	CIVIL (DOCKET)	.23	.45*	-.41#	-.039#
	CRIMINAL (SUPPORT)	CIVIL (SUPPORT)	-.05#	.38*	-.13#	.02
	COMBINED (DOCKET)	CRIMINAL (DOCKET)	.94**	.98**	.42**	.45**
	COMBINED (DOCKET)	CIVIL (DOCKET)	.51**	.62*	.58**	.64**

*p<.05, ** p<.01 (figures without asterisks are not significant)

Negative correlation

Figure 1

Agenda Change & Support Change - Australia High Court

Change Over Time:
% Liberal vs Civil Liberties Agenda 1970 to 2003

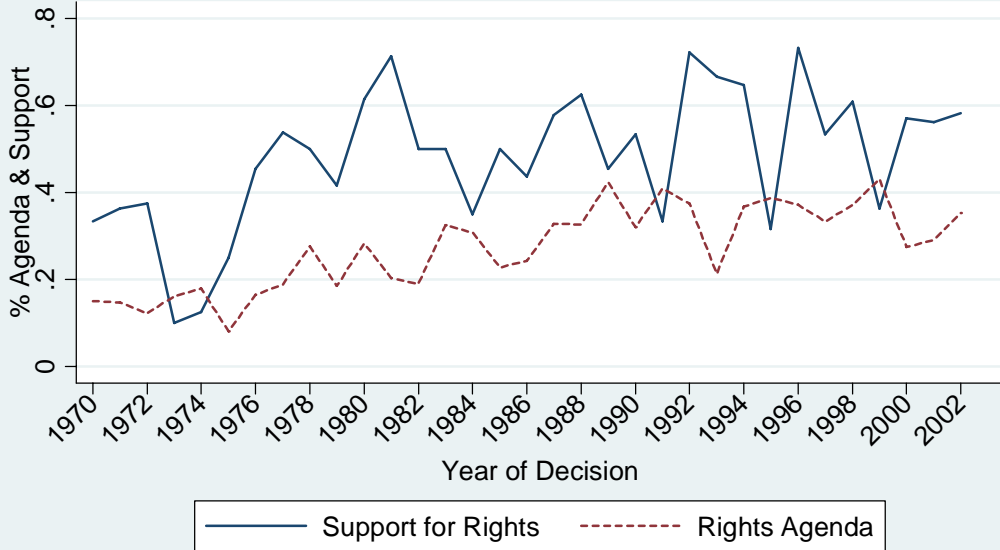


Figure 2

Agenda Change - Australia High Court

Change Over Time:
Criminal Agenda vs Other Civil Liberties 1970 to 2003

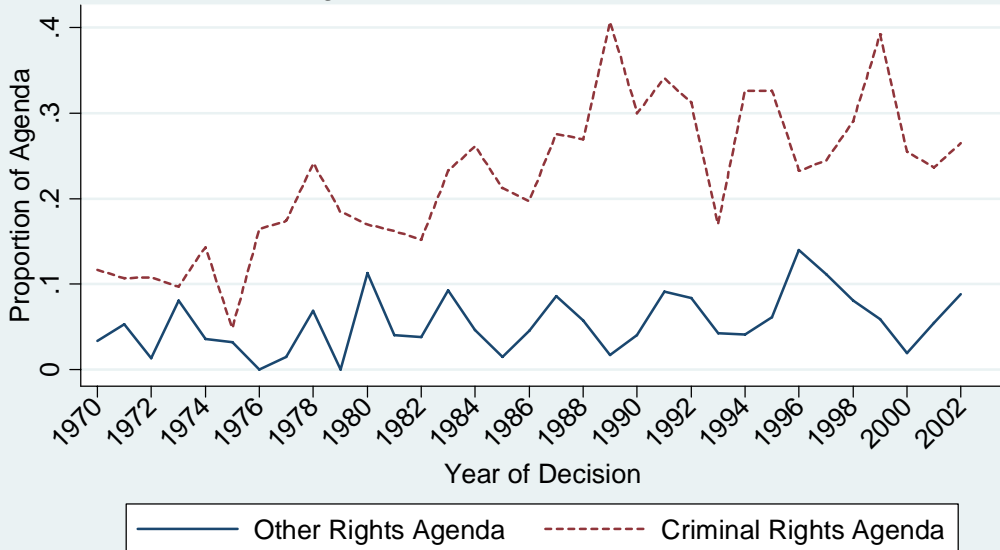


Figure 3

Agenda Change & Support Change - Canada Supreme Court

Change Over Time:
% Liberal vs Civil Liberties Agenda 1970 to 2003



Figure 4

Agenda Change - Canada Supreme Court

Change Over Time:
Criminal Agenda vs Other Civil Liberties 1970 to 2003

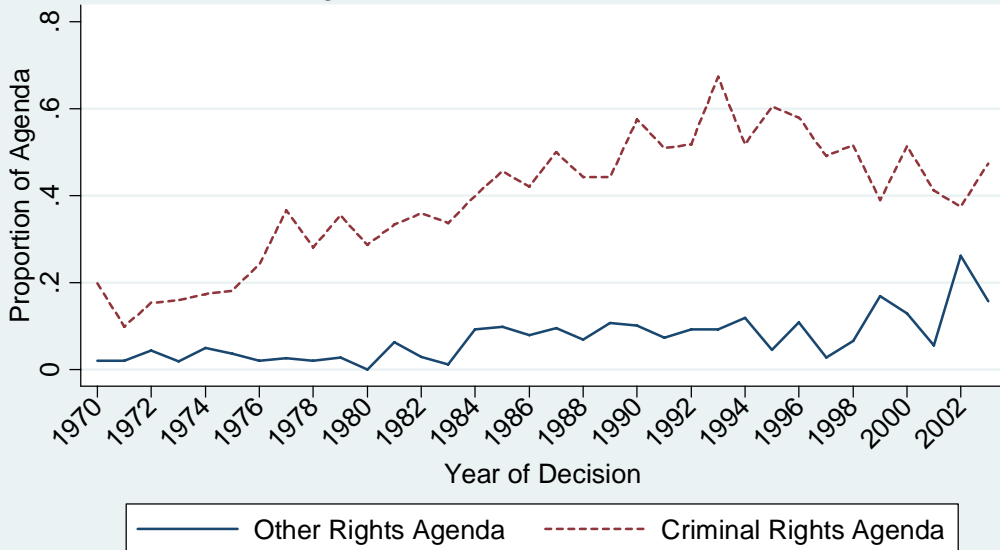


Figure 5

Agenda Change & Support Change - England House of Lords

Change Over Time:
% Liberal vs Civil Liberties Agenda 1970 to 2003

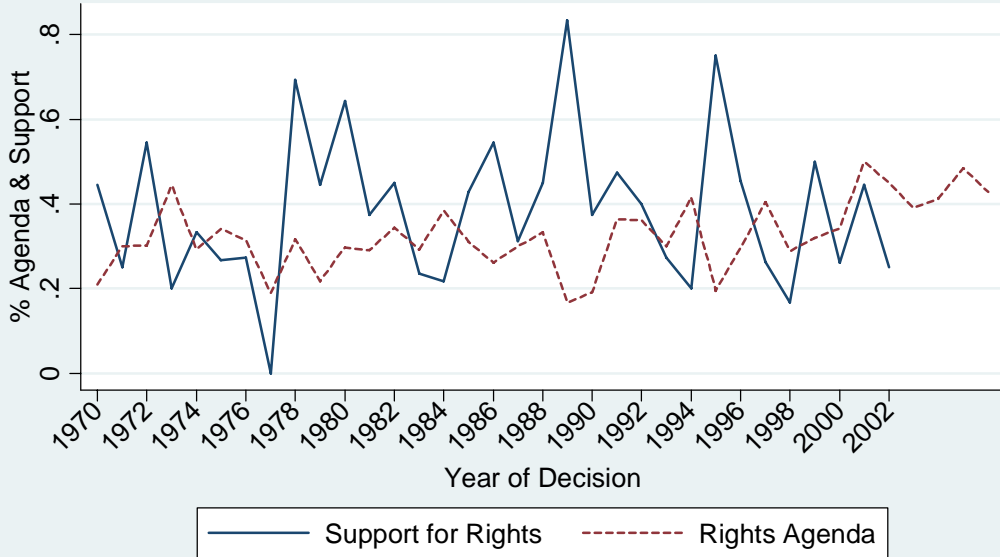


Figure 6

Agenda Change - England House of Lords

Change Over Time:
Criminal Agenda vs Other Civil Liberties 1970 to 2003

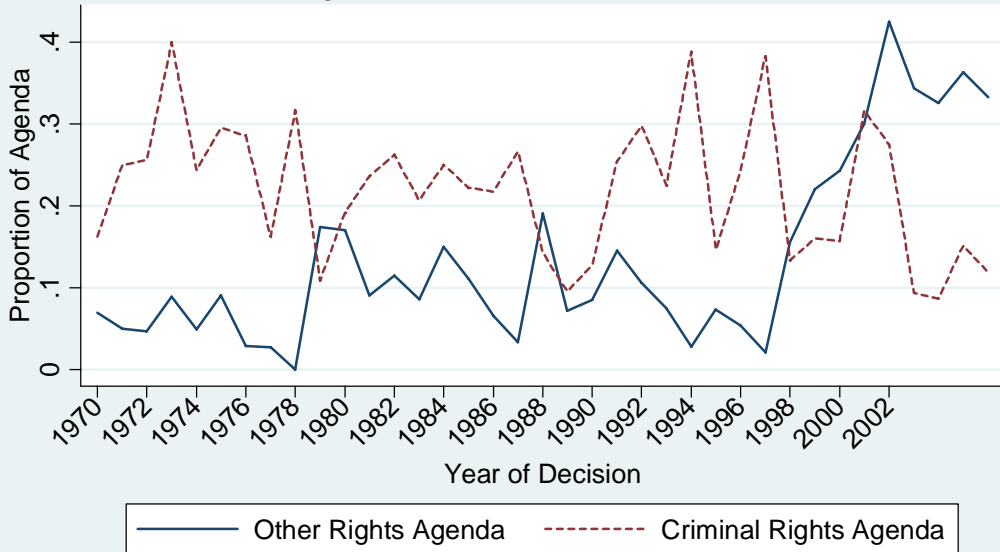


Figure 7

Agenda Change & Support Change - US Supreme Court

Change Over Time:
% Liberal vs Civil Liberties Agenda 1970 to 2003

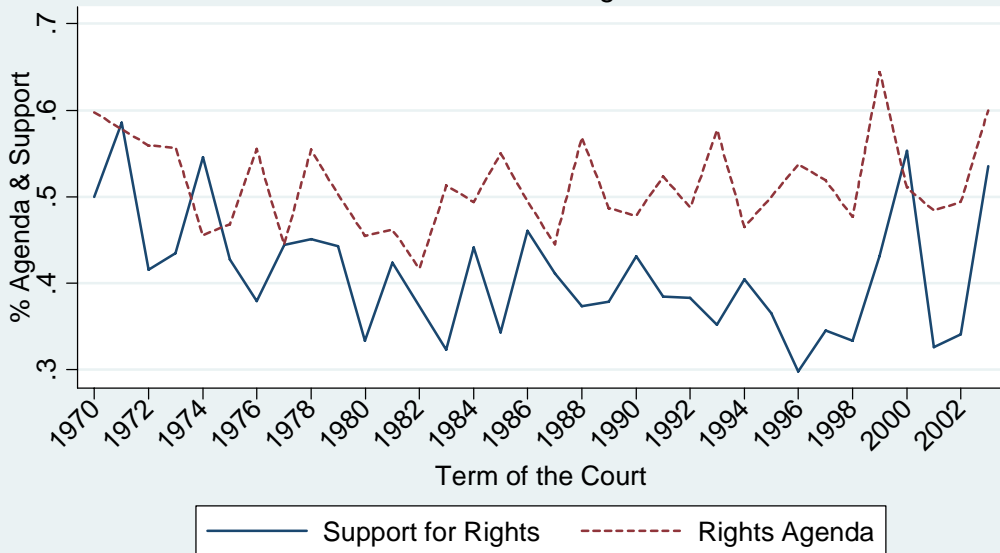


Figure 8

Agenda Change & Support Change - US Supreme Court

Change Over Time:
% Liberal vs Civil Liberties Agenda 1953 to 2003

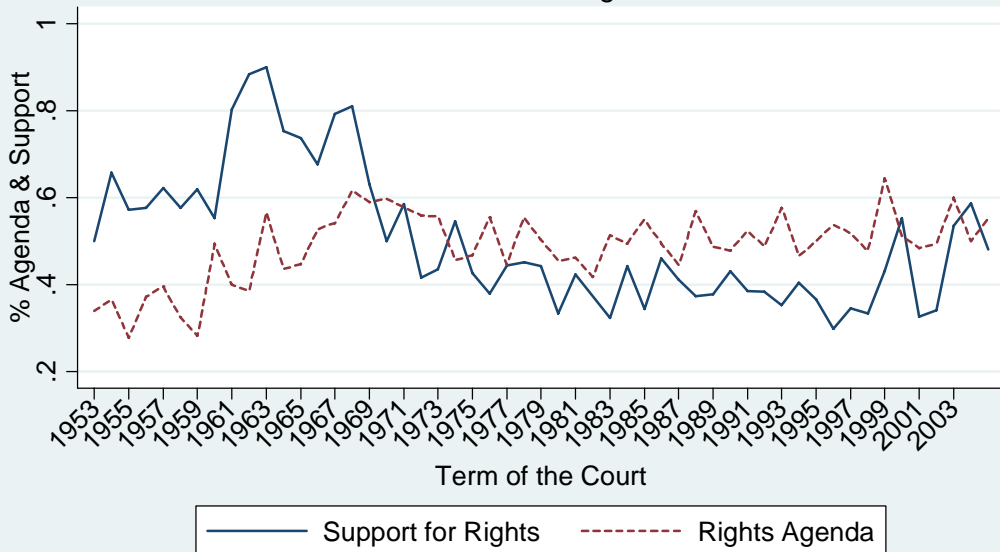
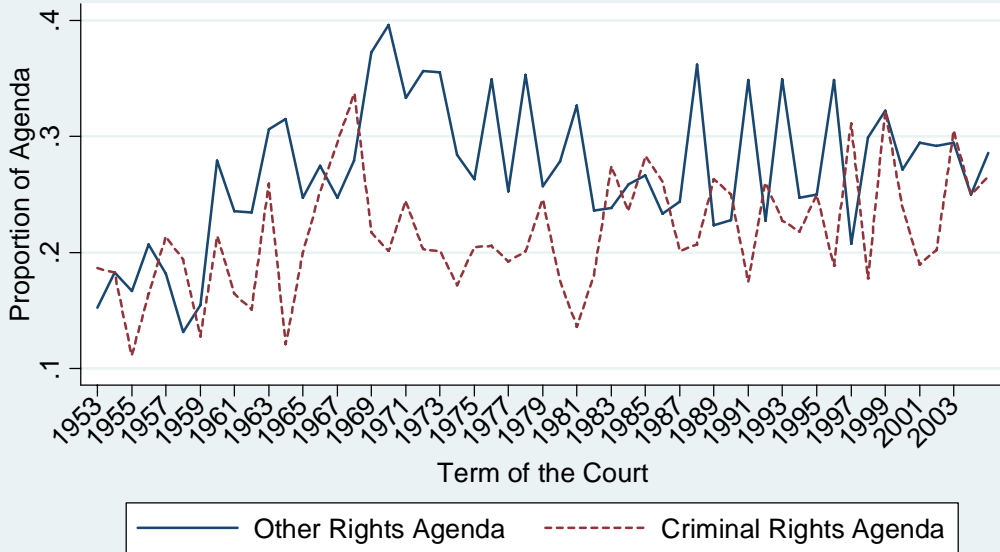


Figure 9

Agenda Change - US Supreme Court

Change Over Time:
Criminal Agenda vs Other Civil Liberties 1953 to 2003



References

- Allan, James. 2005. "Judicial Appointments in New Zealand: If it were done when 'tis done, then 'twere well it were done openly and directly" in Kate Malleon, and Peter H. Russell, eds.. *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World*. Toronto: University of Toronto Press.
- Atkins, Burton M. 1991. Party Capability Theory as an Explanation for Intervention Behavior in the English Court of Appeal." *American Journal of Political Science* 35(4): 881-903.
- Baird, Vanessa A. 2006. *Answering the Call of the Court: How Justices and Litigants Set the Supreme Court Agenda*. Charlottesville: University of Virginia Press.
- Epp, Charles R. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago: University Of Chicago Press.
- Epp, Charles E. 1996. "Do Bills of Rights Matter ? The Canadian Charter of Rights and Freedoms." *American Political Science Review* 90: 765-779.
- Department of Constitutional Affairs. 1995. *A Fairer Deal for Legal Aid*. Available at: <http://www.dca.gov.uk/laid/laidfullpaper.pdf>. London, UK.
- Dotan, Yoav. 1999. "Do the "Haves" Still Come out Ahead? Resource Inequalities in Ideological Courts: The Case of the Israeli High Court of Justice." *Law & Society Review* 33(4): 1059-1080.
- Galanter, Marc. 1974. Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change. *Law & Society Review* 9(1), Litigation and Dispute Processing: Part One (Autumn): 95-160.
- Haynie, Stacia L. 1994. "Resource Inequalities and Litigation Outcomes in the Philippine Supreme Court." *The Journal of Politics* 56(3): 752-772.
- Malleon, Kate and Peter H. Russell, eds. 2006. *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World*. Toronto: University of Toronto Press.
- McCormick, Peter. 1993. "Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949-1992." *Canadian Journal of Political Science* 26(3): 523-540.
- McGuire, Kevin T. 1995. "Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success." *Journal of Politics* 57(1): 187-196.
- McGuire, Kevin T., and Gregory A. Caldeira. 1993. "Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court." *American Political Science Review* 87:746-755.
- Mishler, William, and Reginald S Sheehan. 1996. Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective. *The Journal of Politics* 58(1): 169-200.
- Moustafa, Tamir. 2003. "Law Versus the State: The Judicialization of Politics in Egypt". *Law & Social Inquiry*. 28(4): 883-930.

- Ostberg, C. L, Matthew E Wetstein, and Craig R Ducat. 2002. Attitudinal Dimensions of Supreme Court Decision Making in Canada: The Lamer Court, 1991-1995. *Political Research Quarterly* 55(1): 235-256.
- Ostberg, C. L, Matthew E Wetstein. 2007. *Attitudinal Decision Making in the Supreme Court of Canada*. Vancouver: University of British Columbia Press.
- Regan, Francis, Alan Paterson, Tamara Goriely, and Don Fleming (eds). 1999. *The Transformation of Legal Aid: Comparative and Historical Studies*. New York: Oxford University Press.
- Rohde, David W., and Harold J. Spaeth. 1976. *Supreme Court Decisionmaking*. San Francisco: W. H. Freeman.
- Rosenberg, Gerald N. 1993. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University Of Chicago Press.
- Schubert, Glendon. 1965. *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices 1946-1963*. Evanston: Northwestern University Press.
- Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. NY: Cambridge University Press.
- Sheehan, Reginald S., William Mishler, Donald R. Songer. 1992. "Ideology, Party, and the Differential Success of Direct Parties Before the Supreme Court." *The American Political Science Review* 86(2): 464-471.
- Sheehan, Reginald S. 1992. Governmental Litigants, Underdogs, and Civil Liberties: A Reassessment of a Trend in Supreme Court Decisionmaking. *The Western Political Quarterly* 45(1): 27-39.
- Sieder, Rachel, Line Schjolden and Alan Angell (eds.). 2005. *The Judicialization of Politics in Latin America*. New York: Palgrave Macmillan.
- Songer, Donald Ashlyn Kuersten, and Erin Kaheny. 2000. "Why the Haves Don't Always Come Out Ahead: Repeat Players Meet Amici Curiae for the Disadvantaged." *Political Research Quarterly* 53(3): 537-556.
- Songer, Donald R, Reginald S Sheehan, and Susan Brodie Haire. 1999. Do the "Haves" Come out Ahead over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925-1988. *Law & Society Review* 33(4), Do the "Haves" Still Come Out Ahead?: 811-832.
- . 1993. "Interest Group Success in the Courts: Amicus Participation in the Supreme Court." *Political Research Quarterly* 46(2): 339-354.
- Songer, Donald R., Reginald S. Sheehan. 1992. "Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals." *American Journal of Political Science* 36(1): 235-258.
- Southworth, Ann. 2000. "The Rights Revolution and Support Structures for Rights Advocacy." *Law & Society Review* 34(4): 1203-1219.

- Stone-Sweet, Alec. 2000. *Governing with Judges: Constitutional Politics in Europe*. New York: Oxford University Press, USA.
- Tate, C. Neal, and Panu Sittiwong. 1989. "Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations" *The Journal of Politics* 51(4): 900-916.
- Tate, C. Neal, and Torbjörn Vallinder (eds). 1997. *The Global Expansion of Judicial Power*. New York: New York University Press.
- Wheeler, Stanton, Bliss Cartwright, Robert A. Kagan, and Lawrence M. Friedman. 1987. "Do the "Haves" Come out Ahead? Winning and Losing in State Supreme Courts, 1870-1970". *Law & Society Review* 21(3): 403-446.