

## **Do Bills of Rights Matter ? A Reconsideration of Epp's Conclusions**

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## ABSTRACT

### **Do Bills of Rights Matter ? A Reconsideration of Epp's Conclusions**

A decade ago, Charles Epp (1996) published an article in the *American Political Science Review* with the provocative title, "Do Bills of Rights Matter ? The Canadian Charter of Rights and Freedoms." It was Epp's thesis that the profound effects often attributed to the Charter of Rights are substantially over rated. Instead, he argued that bills of rights matter, **but "only to the extent** that individuals can mobilize the resources necessary to invoke them through strategic litigation." He argued that there are reasons to be skeptical that a bill of rights by itself will have much effect on either an increasing presence of rights issues on the agendas of top courts or on judicial support for rights claimants. Instead, he argued for the crucial role of what he called the "support structure" for rights. He argued that only when there is an adequate support structure for rights will courts participate in a "rights revolution."

In the analysis below, we take advantage of an extensive dataset on the decisions of the Supreme Court of Canada to provide a more systematic test of Epp's thesis. Instead of relying solely on a visual display of seven data points, we present a three part analysis. First, we make a visual examination of trends in the Court's agenda covering every year from 1946 to 2005. Next, we create an ordinal measure to capture the essence of Epp's concept of a "support structure" for rights and test its effects on changing Court agendas in multivariate OLS model. Finally we conduct a systematic time series analysis of changes in the agenda of the Supreme Court over a 60 year period running from 1946 to 2005. We conclude that while there is little evidence to support Epp's theory that changes in the support structure have a non-spurious effect on changes in the agenda for rights and for constitutional politics, the adoption of the Charter of Rights and Freedoms had a profound effect on changes in the rights agenda of the modern Supreme Court of Canada. In a word, we find that Bills of Rights do matter.

## Introduction<sup>1</sup>

A decade ago, Charles Epp (1996) published an article in the *American Political Science Review* with the provocative title, “Do Bills of Rights Matter ? The Canadian Charter of Rights and Freedoms.” It was Epp’s thesis that the profound effects often attributed to the Charter of Rights are substantially over rated. Instead, he argued that bills of rights matter, **but “only to the extent** that individuals can mobilize the resources necessary to invoke them through strategic litigation.” He argued that there are reasons to be skeptical that a bill of rights by itself will have much effect on either an increasing presence of rights issues on the agendas of top courts or on judicial support for rights claimants. Instead, he argued for the crucial role of what he called the “support structure” for rights. He argued that only when there is an adequate support structure for rights (consisting primarily of organized group support for rights, financing- particularly government financing for rights litigation, and a legal profession that is racially and ethnically diverse and open to women) will courts participate in a “rights revolution.” As evidence for his theory, Epp conducts a “quasi-experiment” which examines the growth

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<sup>1</sup> The authors gratefully acknowledge the support of the National Science Foundation of the US and the Canadian Embassy to the United States for their support that made this research possible. The interpretations of the data and the conclusions are of course the authors and are not endorsed by either the National Science Foundation or the Canadian Embassy. Grant support for the coding to 1946 was provided by the Canadian Embassy’s Canadian Studies Research Grant Program. Two grants contributed to this project, 1) “An Institutional Perspective to Supreme Court Decision Making in Canada and the United States,” Susan W. Johnson, principal investigator; and 2) “An Empirical Analysis of Decision making in the Supreme Court and Courts of Appeal of Canada and the United States,” Donald R. Songer, principal investigator. Much of the statistical analysis in this book was based on The High Courts Judicial Database (HCJD). The HCJD 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). These data were collected under two grants funded by the National Science Foundation, “Collaborative Research: Fitting More Pieces into the Puzzle of Judicial Behavior: a Multi-Country Database and Program of Research,” SES-9975323; and “Collaborative Research: Extending a Multi-Country Database and Program of Research,” SES-0137349, C. Neal Tate, Donald R. Songer, Stacia Haynie and Reginald S. Sheehan, Principal Investigators. It is available for public use and download at [http://sitemason.vanderbilt.edu/site/d5YnT2/data\\_sets](http://sitemason.vanderbilt.edu/site/d5YnT2/data_sets).

of the support structure and changes in the rights agenda and rights support before and after the adoption of the Charter of Rights and Freedoms in Canada.<sup>2</sup>

Epp develops a theoretically rich account of why strong support structures for rights are essential for developing a strong rights agenda on appellate courts and for increasing judicial support for rights. Epp is also convincing in providing a number of pieces of evidence that suggest that from the 1960s on there has been a steady increase in the support structure for rights in Canada. However, we argue below that Epp fails to provide a convincing case for the primacy of these support structures in development of an expanded rights agenda and increasing support for rights in Canada. There are several shortcomings in his analysis that detract from Epp's ability to make a strong case for his thesis. First, his analysis suffers from a small N problem. His main dependent variable (appropriately defined as the percentage of rights cases per year on the agenda of the Supreme Court) has only seven data points. Next, while he provides a rich, thick, descriptive account of changes in the "support structure" he is unable to measure his main explanatory variable. Perhaps most important, he provides no actual empirical test of his thesis pitting his proposed explanatory variable against alternative variables suggested in the literature (e.g., judicial preferences or institutional change). As a result, the evidence presented consists primarily of a series of graphs in which he extrapolates between his seven data points to suggest linear trends.

In the analysis below, we take advantage of an extensive dataset on the decisions of the Supreme Court of Canada to provide a more systematic test of Epp's thesis.

Instead of relying solely on a visual display of seven data points, we present a three part

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<sup>2</sup> The Charter was officially adopted in 1982, but the first case raising a Charter claim did not reach the Supreme Court of Canada until 1984.

analysis. First, we make a visual examination of trends in the Court's agenda covering every year from 1946 to 2005. Next, we create an ordinal measure to capture the essence of Epp's concept of a "support structure" for rights and test its effects on changing Court agendas in multivariate OLS model. Finally we conduct a systematic time series analysis of changes in the agenda of the Supreme Court over a 60 year period running from 1946 to 2005. We conclude that while there is little evidence to support Epp's theory that changes in the support structure have a non-spurious effect on changes in the agenda for rights and for constitutional politics, the adoption of the Charter of Rights and Freedoms had a profound effect on changes in the rights agenda of the modern Supreme Court of Canada. In a word, we find that Bills of Rights do matter.

### **Effects of Constitutions and Institutional Change**

Scholars disagree about the extent to which institutions matter in the attainment of rights. Cultural explanations for rights revolutions, as detailed in Charles Epp's later work, *The Rights Revolution* (1998), suggest that support structures must exist in order for rights to be obtained, and that such support structures may solely account for the achievement of rights in various societies. We believe this approach overlooks the importance of institutions, constitutions, and bills of rights as necessary components of the attainment of rights. Resurgences in studying the importance of constitutions has occurred in recent years (Brennan and Hamlin 1994, Greenberg et.al. 1993, Holmes 1995, Ordeshook 1992, Sartori 1993, Weingast 1993), with rational choice theory becoming more accepted in the fields of comparative politics and judicial studies (Lichbach and Zuckerman 1997, Levi 1997, Olson 1964, Cox and McCubbins 1993, North 1990).

Specifically, in the field of judicial politics, scholars have emphasized for some time the importance of institutions. Perhaps the most well-known is Segal and Spaeth's (1993, 2002) explanation of U.S. Supreme Court behavior as attitudinal in nature, with justices deciding cases in accord with their sincere policy preferences and as a result of lack of institutional constraints. Strategic accounts of judicial behavior also make the underlying assumption that institutions matter for judicial decision making, including both formal institutions, as Segal and Spaeth (1993, 2002) suggest, and informal institutions (Epstein and Knight 1998, Maltzman, Spriggs and Wahlbeck 2000).

Following this assumption of institutional importance, several scholars have pointed to the impact bills of rights have had on judicial decision making and changes in courts' agendas. In the U.S., studies have found links between the Bill of Rights and judicial review and judicial activism (Atiyah and Summers 1987, Holland 1991). The importance of the Bill of Rights in the U.S. has also been shown to impact the agenda of the U.S. Supreme Court (Perry 1991, Pacelle 1991).

The literature on comparative courts also emphasizes the importance of bills of rights to judicial decision making and agenda change. Barnum (1988) finds that India's judicial activism and constitutional due process are linked. Galligan (1991) finds that an institutional framework in Australia strengthened judicial review and rights-based decisions, concluding that for the High Court judicial review and judicial activism were integral to the constitutional system from the outset. Volcansek (1991) found that Constitutional Court in Italy managed to strengthen its power of judicial review in strategic ways and increase a civil liberties agenda despite external attempts to thwart its efforts from the State. In Canada, Knopff and Morton (1992) and Morton (1987)

emphasize top-down approaches, whereby bills of rights and judicial activism encourage interest group litigation and support structures to emerge. Morton and Knopff (2000) suggest that the Court uses the Charter to advance its activist agenda. They agree that the Charter is not the cause of the development of the extension of rights to minority groups in Canada; rather judicial activism and a conscious decision on the part of activist judges to use the Charter in this way has led to decisions that benefit certain special interests.

This line of research on the institutional impact of bills of rights in comparative courts builds on previous research surrounding what Tate and Vallinder (1995) refer to as the judicialization of politics. Tate and Vallinder (1995) classify judicial review of executive and legislative actions as one major form of the judicialization of politics. They cite both politics of rights and judicial activism as favorable conditions for the judicialization of politics (Tate and Vallinder 1995).

Tate (1995) further expands on the judicialization of politics theory using the Philippines as a case study. He concludes that the Bill of Rights in its amended form passed in 1987 created a politics of rights in the Philippines. Similar to the U.S. Bill of Rights, the document contained provisions guaranteeing due process and equal protection and 1<sup>st</sup> amendment-type freedoms. The 1987 Constitution also prohibits the president from suspending the writ of habeas corpus or declaring martial law without congressional consent. This weakening of executive power puts the judicial branch on an equal playing field as it confirms the existence of a true separation-of-powers system, one of the conditions for judicialization, Tate argues. These institutional features make it possible for judicialization to occur, Tate argues, but it does not occur without judges who are willing to use their power. Tate's interviews with several of the Supreme Court justices

revealed activist attitudes. Additionally, newspaper analysis of the 1990-1991 period revealed that the Court was using its power to restrain executive authority (475) and governmental authority in general (475-478).

Shapiro (1995) draws similar conclusions about pluralism and the U.S. Supreme Court. The Court reacts to litigation, he explains, but constitutional interpretation as an equal branch is the impetus for the explosion in litigation itself (Shapiro 1995). Similarly, Sunkin (1995) concludes that because the United Kingdom has an unwritten political constitution with no statements of fundamental rights, a judicialization of politics occurred as the result of other institutional arrangements, such as the emergence of the European Community. In Canada, Russell (1995) found that the judiciary itself constrained the growth of its power after passage of the Charter, rather than the effect resulting from some external source.

Widner (2001) also explores the importance of institutions and the rule of law in Tanzania, also finding a top-down effect where strong leadership in the judiciary defined whether or not the judicial expansion of political rights was achieved. She found that the strong leadership of the chief justice in Tanzania played a role in getting certain institutional features in place, while surrounding African countries' judiciaries continued in turmoil as a result of weak leadership and lack of institutions. Although not directly related to rights building, Helmke (2002) shows the strategic defection in Argentina's highest appellate court, concluding that the expansion of judicial power may occur more subtly than scholars have previously noted. Generally, scholars have examined only the striking down of executive actions or legislative laws in political salient issue areas as the expansion of judicial power. However, Helmke (2002) shows that in their efforts to stay

in office, and ultimately affect government policy, judges may act more subtly in the expansion of their power.

### **Support Structure Argument**

In contrast to the institutional approach described above, Epp (1996) finds that the institutional change, the passage of the Charter of Rights in Freedoms in 1982 in Canada, did not result in a rights agenda or increased judicial review by the Supreme Court of Canada. Instead, he found that the support structure for legal mobilization led to the development of a rights agenda on the Court. Epp (1998) expands on his support structure theory, suggesting that in order to have a rights revolution there must be widespread support through society first. While judicial strength has a place in this perspective, it is much more a “bottom-up” approach where society matters more than the judicial institution itself. Epp (1998) assumes away the importance of a strong and active judiciary. He focuses instead on how rights revolutions are achieved through a support structure in society. He argues that rights-advocacy organizations, support from the legal profession as a whole, and federal policies all lead to the expansion of rights in society. Underlying Epp’s (1998) argument is the notion of a passive judicial branch. The judicial branch is a passive institution in traditional legal scholarship because it waits for cases to come to it. The Court has no ability to bring issues to itself; it sits back and waits for a “case or controversy” to be brought to it. Interest groups, lawyers, and federal policymakers do not have the same passivity. They actively pursue policies that are of interest to them. This underlying theme of Epp’s (1998) account leads to the conclusion that a rights revolution in the United States was not because of an activist Court, but was

due to active groups who brought issues to the Court when there was widespread support of these issues.

Epp provides further explanation of the support structures thesis using other comparative courts. He (1998) argues that India has not undergone the same rights revolution because, even though it has an activist Supreme Court, it does not have the support structure that lends widespread support to certain rights interests. Further, in England, Epp (1998) argues that the reason they have undergone a moderate rights revolution is not due to growing activism on the Court or to new constitutional claims, but instead due to the availability of resources and aggressiveness by legal activists.

Morton and Knopff (2000) argue that Epp does not go far enough in identifying the institutions and actors that contribute to the expansion of judicial power in Canada. Although the authors insist Epp (1998) is similar in his understanding of rights revolutions in Canada to their account of special interests, there is a substantial difference in the two approaches. Epp (1996, 1998) suggests that in order to have a rights revolution, there must be widespread support through society first. Morton and Knopff (2000) describe their approach as a “top-down, state-initiated interest group formation process” (89). While Epp (1996, 1998) is similar to Morton and Knopff (2000) in his accounts of how rights-advocacy organizations, the legal profession, and federal policies help to create the rights revolution, the implication for democracy is different. Epp (1996, 1998) sees the expansion of rights as a democratic notion because the support for it in society is widespread. Morton and Knopff (2000) portray events in Canada as being elite driven and lacking the widespread support needed for democratic legitimacy. Morton and Knopff's (2000) top-down approach contrasted with Epp's (1996, 1998) bottom-up

approach demonstrates the necessity to examine alternate explanations of a rights agenda from a rational choice perspective, placing emphasis not just on individual-level behavior, but also on institutional effects.

Baird (2007) builds on Epp's (1996, 1998) theory of support structures in her examination of agenda change for the U.S. Supreme Court. However, the approach Baird (2007) uses integrates judicial behavior and support structures much more heavily. Baird (2007) finds that policy entrepreneurs, essentially interest groups and organized litigants, do play a role in the Supreme Court's agenda, and in turn, rights that emerge from the Court's decisions. However, she describes the relationship as symbiotic. Organized litigants take their cues from the behavior of the justices and their previous interpretation of rights cases, before deciding which cases to bring to the Court. A four to five year lag in cases accepted for review supports her hypothesis that interest groups are reactive to the Court rather than reacted to directly by the Court. Baird (2007) explains, "...the incentive to support litigation in particular policy areas varies over time in accordance with litigants' changing perceptions of Supreme Court Justices' policy priorities." (4) Shapiro's (1995) conclusions described previously, also suggest a similar court-centered phenomenon, with interest group activity as reactive, rather than the sole impetus for agenda change. In contrast, Epp (1996, 1998) argues neither bills of rights nor activist judges matter very much when there are no efforts in civil society to lobby the courts, and interest groups do not respond to judicial cues from previous decisions in a meaningful way.

### **An Integrated Approach to a Rights Agenda**

Our central argument does not deny that interest groups play an important role in bringing cases to appellate courts for review. A large number of studies have shown the importance of interest group litigation on the U.S. and Canadian Supreme Courts (Hartog 1987, McCann 1994, Rosenberg 1991, Zemans 1983, Galanter 1974, Lawrence 1990, Olson 1990, Epp 1995, 1996, 1998, Abel and Lewis 1988, Morton and Knopff 1993, Morton 1993). Many studies have focused primarily on the role of interest groups as repeat players in affecting an appellate court's agenda (Atkins 1991, Calderia and Wright 1988, Epstein and Kobylka 1992, McCormick 1993, Songer and Sheehan 1992, McGuire 1993).

Following Baird's (2007) work, we support a court-centered theory of agenda change, with interest groups reacting to cues from previous judicial decisions. We support an institutional explanation of an increased rights agenda for the Supreme Court of Canada, following the passage of the Charter of Rights, and the increased activism of the Court following its passage. An increase in a rights agenda may be direct, as Segal and Spaeth (1993, 2002) would suggest, since the Supreme Court lacks any institutional constraints that limit its power. Strategic accounts in the U.S. suggest that the Supreme Court's agenda may also change as a result of strategic action by the justices (Palmer 1982, Brenner and Krol 1989, Boucher and Segal 1995, Epstein and Knight 1998, Calderia, Wright and Zorn 1999). Changes in agenda, whichever approach one supports, however, can be directly linked to the importance of institutions, particularly constitutional bills of rights, when one is talking about changes to the civil liberties and rights agenda.

### **The Impact of Discretionary Docket Control**

An additional institutional feature, discretionary docket control, we also expect to play a role in the rights cases on the Supreme Court's agenda. The impact of the Canadian Supreme Court's docket control has been studied (Bushnell 1982, 1986), although scarcely. Epp (1996) concluded that discretionary docket control caused greater expansion of a rights agenda of the Court than was caused by the 1982 passage of the Canadian Charter of Rights (Epp 1996). Looking in five-year increments at civil rights and liberties decisions from 1960 to 1990 decided by the Supreme Court, Epp found that despite conservative members of the Court holding majority status during the period after 1975, rights decisions were heard in greater numbers than prior when liberal justices held a majority on the Court. Epp concludes that discretionary docket control led to an expansion of the Court's agenda to include more rights decisions. The existence of the support structure, along with the absence of mandatory appeals, in Epp's estimation, led to an increased rights agenda on the Court. Our argument is slightly different than Epp's. Although we acknowledge the importance of discretionary docket control, as Epp (1996) does, following Segal and Spaeth (1993, 2000), we argue that without a constitutional bill of rights, a rights agenda cannot take place. We test these two competing institutional explanations of a change in agenda, both discretionary docket control and the Charter of Rights in an integrated model that allows us to examine the effects simultaneously. We test both the Supreme Court's gain in jurisdiction in 1975 and an expansion of that jurisdiction in 1997.

### **Evidence of Judicial Activism in the Post Charter Period**

The passage of the Charter of Rights and Freedoms in 1982 has led to a substantial number of studies analyzing the Supreme Court of Canada from an

ideological or policy-making perspective. Studies have concluded that justices of the Supreme Court of Canada are ideological in their decisions and that the Charter of Rights has had a major impact on the potential for judicial policy-making. McCormick (1998) found there to be an existence of voting blocs on the Supreme Court. In interviews with the justices, Greene et. al. (1996) found that none of the justices directly admitted to ideological voting, but none denied that the Court could be divided into ideological camps, either. Baar (1991) found that since the adoption of the Charter of Rights and Freedoms in 1982, the Supreme Court justices had been more activist in their interpretations of the document than was originally expected. Court observers also agree that judicial decision-making on the Supreme Court has become more ideological since the passage of the Charter of Rights. Skeptics who question whether there has been a major transfer of power to the courts still believe that the courts may have a long-term impact on policy by the manner in which they shape the way the public thinks about political values (Russell 1995).

Other studies of the impact of the Charter suggest that new patterns of judicial activism seem to be appearing in post-Charter Canada (Baar 1991). Baar suggests that because of the conservatism of the majority on serving during the period of analysis, judicial activism will lead to an expansion of procedural rather than substantive rights. What this means is that the Charter may lead to “judicial activism that occurs frequently but rarely reaches fundamental social and political questions” (Baar 1991, 65). However, since the Charter’s establishment, the Court has heard issues pertaining to “abortion, rape shield legislation, drunkenness as a defense in sexual assault cases, compulsory retirement, gay rights, Sunday shopping, the rights of refugee claimants, and the spending

of union dues for political purposes” (Greene, et al 1998). Since the Charter of Rights, the Canadian Supreme Court has also increased its reliance on decisions of the United States’ courts. Manfredi (1990) found that citations of U.S. courts in Canadian Supreme Court decisions were at 71 for the period 1969-1973. After a steady increase for each four-year period, by the 1984-1988 period, U.S. citations had increased to 385 (Manfredi 1990). In 1984, in the two Charter cases decided, U.S. courts were cited six times. The year 1987 had the greatest number of U.S. court citations, 63 for eight cases. Manfredi concludes, “With respect to constitutional interpretation [since the Charter], the Supreme Court has adopted the modern reinterpretation of John Marshall’s call for a generous interpretation of constitutional language” (1990, 517). While the quantitative evidence is limited at this point, it appears that the Charter of Rights has introduced an era of judicial activism and an increased policy-making role for the Canadian Supreme Court.

Other attempts have been made to assess ideological decision-making in Canada after the adoption of the Charter of Rights. Ostberg and Wetstein (1998) created newspaper ideology scores based on editorial comments published in the *Globe and Mail* concerning the justices’ ideological orientations prior to their appointments to the Supreme Court. For two of the justices, Lamer and L’Heureux-Dube, ideology and background characteristics predicted voting consistencies more than legal variables in search and seizure cases.

Judicial attribute models have also been effective in measuring judicial preferences during the Charter period. In a study of the Supreme Court from 1949 to 1985, Tate and Sittiwong (1989) found that judicial attributes could be used to successfully predict voting patterns in two issue areas, criminal and civil liberties cases

and economic cases. Specifically, Tate and Sittiwong (1989) found that individual justices' votes on the merits could be predicted using region, religion, party of the appointing prime minister, political experience, and judicial experience. McCormick and Greene (1990) also found social class background to be reliable predictors of pro-Charter rulings by the justices of the Supreme Court. In a study utilizing a combination of methods including factor analysis, judicial attributes, and newspaper ideology scores, Ostberg et.al. (2004) found that ideological voting existed in the post-1990 era across a wide array of issue areas. A recent attitudinal study of the 1978 -2000 period found gender to be related to liberal votes in civil liberties cases, but not criminal or economic (Songer and Johnson 2007). In criminal and economic cases, party affiliation and region were better predictors of judicial liberalism than gender (Songer and Johnson 2007). Overall, a review of past studies suggests the Supreme Court of Canada justices make attitudinally-based decisions after passage of the Charter. We suggest that a fundamental change in the Court's agenda as a result of the passage of the Charter lead to this increase in judicial activism.

### **Testing Whether Constitutions Matter**

We focus on two critical components of Epp's analysis. First, was there a major increase in the rights agenda of the Supreme Court that can be categorized fairly as a "rights revolution" ? If such a trend exists, when did it start and to what extent was the trend affected by the adoption of the Charter of Rights and Freedoms? Second, did the Court become a much more prominent player in constitutional politics, reflected in a substantial increase in the consideration of constitutional questions on its docket and an increased use of judicial review?

As noted above, the analysis provided by Epp (1996) is inadequate to answer these questions. First, Epp's analysis is plagued by a small N problem; he has only seven data points for his dependent variable. Moreover, he utilizes only two data points after the adoptions of the Charter, making it very difficult to assess any effects of the Charter. Additionally, while asserting that the agenda changes on the Court were produced by an increasing support structure for rights that began in the mid to late 1960s, he examines only one data point before that period. The small N problem is exacerbated by the inability of Epp to provide any concrete measure of his primary causal variable, the support structure for rights. Finally, the only "analysis" provided consists of eyeballing line graphs connecting his seven data points; no statistical analysis is provided to determine whether the change that appears from such a visual observation represents actual change rather than chance fluctuation.

To provide a more systematic test, we first coded the universe of published decisions of the Supreme Court of Canada for sixty year period, 1946-2005.<sup>3</sup> For each calendar year, we computed the percentage of cases appearing on the docket of the Court in four categories: cases raising rights claims, cases asking the Court to exercise judicial review, all cases in which the Court actually exercised judicial review, and finally those cases in which the Court's exercise of judicial review was limited to either striking down

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<sup>3</sup> We began with the large sample of cases coded for Canada as part of the High Courts Judicial Database. 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](http://sitemason.vanderbilt.edu/site/d5YnT2/data_sets). We then expanded on that coding of a sample of 100 cases per year to code the universe of cases and then extended that database forward to 2005 and backwards to 1946. Grant support for the coding to 1946 was provided by the Canadian Embassy's Canadian Studies Research Grant Program, project entitled, "An Institutional Perspective to Supreme Court Decision Making in Canada and the United States," Susan W. Johnson, principal investigator. All of the conventions used in the of coding the High Courts Judicial Database were followed in the collection of the additional data.

a federal or provincial statute. These four measures of the annual agenda of the Court became our dependent variables in the analysis below.

For the first dependent variable (the rights agenda), Epp's conception of rights cases was followed. That is, we combined all cases raising criminal rights issues with those representing traditional personal rights such as claims relating to equality, privacy, freedom of expression or political participation, freedom of religion, procedural fairness, and the rights of language groups and indigenous peoples. To assess the role of the Court in resolving constitutional questions, Epp limits his analysis to cases in which the Court declared a statute unconstitutional. As noted above, while we also utilized the percentage of cases on the agenda in which this conception of judicial review was implemented as one of our dependent variables, we added two additional variables representing broader conceptions of the constitutional role of the Court.

We began our analysis by replicating the form of Epp's analysis. That is, we provide simple line graphs of the trends for each of our four dependent variables and discuss the trends. However, since we have coded the agenda of the Court for every year, rather than for only every fifth year, and since we extend the analysis for fifteen additional years in the Charter period, we are able to provide a more complete picture of the trends.

As noted above, one of the limitations of Epp's analysis is that he provides no specific measure that would allow one to actually test in a direct way the effect of changes in the support structure for rights. Instead, he provides a thick description combined with data on changes in several factors that presumably contribute to the general idea of a support structure. As a first step in our attempt to provide a quantitative

test of Epp's basic contention that changes in the support structure are more important than changes in the constitutional status of rights, we provide what we believe is a straightforward attempt to operationalize Epp's concept and then compare its effects on agenda change with the effects of our institutional variables. The main thrust of Epp's description of changes in the support structure is that it began to grow sometime in the mid 1960s and then continued to grow steadily thereafter. While it is impossible to determine precisely how fast the support structure grew over time, it seems reasonable to model the change with an ordinal variable that increases from the mid 1960s to the present. We create such a variable, setting its value at zero for all years prior to 1965, increasing it to one beginning in 1965, continuing as "1" in the next four years, and then increasing its value by one each five years. Thus, it reaches its maximum value of 8 from the year 2000 onward. We then run a simple OLS regression model, separately for each of our four dependent variables, with this measure of the support structure along with the dependent variable lagged by one year to correct for autocorrelation, and with dummies for each of the three potentially important institutional changes (i.e., the Supreme Court Act of 1975 and its amendment in 1997 and the adoption of the Charter of Rights and Freedoms).

Finally, to directly assess whether "constitutions matter", we run separate time series models for each of our trends of agenda change, adding interventions for the adoption of the Charter of Rights and Freedoms and for two potentially important changes in the institutional structure of Supreme Court decision making. The two institutional changes are the Supreme Court Act of 1975 which gave the Court nearly complete control over its docket (i.e., eliminating the majority of cases that came to the

Court as appeals as of right) and the amendments to that act in 1997 that eliminate most of the remaining appeals as of right in criminal cases.

### **Time Series Analysis**

To determine the impact of the institutional interventions we utilize the Box-Jenkins method for ARIMA (AutoRegressive Integrated Moving Average) time series modeling (Box-Jenkins 1976). This technique divides the time series into two parts, which include the time dependent processes and the impact of the interventions. This model can generally be written as:

$$Y_t = f(X_t) + N_t$$

Where  $Y_t$  reflects the dependent time series,  $X_t$  reflects the intervention and  $N_t$  reflects the stochastic noise component.

In order to properly analyze the impact of the intervention variables on the times series we estimate our models using ARIMA.<sup>4</sup> ARIMA modeling begins on the premise that it is first necessary to identify what kind of data generating process is driving the data (McCleary and Hay 1980). In other words, the first step in ARIMA modeling is identifying, estimating, and diagnosing the noise model. Moreover intervention analysis begins with establishing the ARIMA properties of the series (i.e., the  $N_t$  component). This means that we needed to determine the three parameters ( $p,d,q$ ). The  $p$  parameter refers to the number autoregressive (AR) parameters necessary to fit the time series. The  $d$  parameter indicates the number of times the series needs to be differenced (for stationary purposes). Finally  $q$  refers to the amount of moving average (MA) parameters

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<sup>4</sup> This is done because the stochastic processes are removed through the estimation of ARIMA.

required to fit the series in order to turn it into white noise. This is important because a white noise time series means that both the mean and the variance are stationary. After performing the necessary diagnostics we determined we are using an ARIMA (1,1,0) model.

The next step entails adding the intervention variables to our model. These variables discussed in detail above include charter, docket, and docket 2. ARIMA treats these intervention variables much like independent variables in a regression model in that it estimates coefficients for each of them that best fit the data.<sup>5</sup> Before we discuss in greater detail the results of our times series models we first look at the overall trends for the changing agenda of the Supreme Court of Canada.

### **Trends in the Court's Agenda – a First Look**

For a visual overview of the changing agenda of the Supreme Court of Canada, we first turn to Figure 1 which plots the trends over time in the proportion of the Court's agenda devoted to cases presenting rights claims. The figure presents data on the docket of the Court for each year for a sixty year period. The vertical lines in the graph mark three institutional changes. The first line marks the Supreme Court Act of 1975 that gave the Court nearly complete control of its docket, the second line marks the adoption of the Charter<sup>6</sup> and the third line represents an amendment to the Supreme Court Act adopted in 1997 that eliminated most of the remaining appeals as of right in criminal cases.

### **Figure 1 here**

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<sup>5</sup> After running each model with the interventions we examined the Autocorrelation Function Areas (AFC) and the Partial Autocorrelation Function (PACs) errors were within the acceptable limits.

<sup>6</sup> No one would expect that the Charter would have an instantaneous effect on the agenda of the Supreme Court; cases take some time to work their way up the judicial hierarchy to reach the Supreme Court. Thus, in all of the analyses below, we mark the beginning of the Charter effect in 1984 when the first cases raising a Charter claim reached the Court rather than in 1982 when the Charter was adopted.

This first graph demonstrates that there has in fact been a dramatic change in the agenda of the Court that deserves Epp's description of it as a "rights revolution." But Epp's picture of a relatively steady, linear increase in the rights agenda from 1970 on is not borne out by the more detailed data presented in Figure 1. Instead, there appear to be two fairly sharp breaks in the data: one occurring with the increased agenda control gained by the Court in the Supreme Court Act of 1975 and the second corresponding to the adoption of the Charter. After each of these institutional changes, there was a sharp upward surge in the proportion of rights cases on the agenda of the Court followed by annual fluctuation at the new higher level. For thirty years following the end of World War II, rights litigation made up a relatively steady but modest proportion of the Court's agenda, staying below one-fifth of the docket in most years.<sup>7</sup> However, once the Court gained greater control of its docket, the proportion of rights cases rapidly increased to between 30% and 40% for the next docket. Then with the adoption of the Charter, a further large increase occurred in the rights agenda. In summary, for 30 years prior to 1975, rights cases made up less than 20% in most years, then for the next decade they accounted for between 20% and 40% in every year, and since the adoption of the Charter, rights cases have constituted more than 40% in every year and have surpassed 60% of the docket in a number of years. Thus, over time, the attention of the Court to rights cases has more than doubled.

From a simple visual examination of Figure 1 the effects of the adoption of the Charter of Rights and Freedoms on the rights agenda of the Court appear to be major. With the adoption of the Charter, the proportion of rights cases on the docket

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<sup>7</sup> Additional analysis not presented indicates that almost all of these rights cases involved criminal appeals in the years before 1975.

immediately jumped to 15 percentage points above the previous year (and 13 percentage points above the average of the preceding three years). And the increased attention to rights was consistently maintained throughout the Charter period. The proportion of rights cases on the Court's docket in every year after the adoption of the Charter was greater than the proportion of rights cases on the docket in any of the nearly 40 years prior to the adoption of the Charter.

In contrast, the trends displayed in Figure 1 fail to provide much support for Epp's theory that it was the increasing magnitude of the support structure for rights that provided the major engine for increasing attention to rights on the Court. Most damaging to Epp's theory is the trend in the agenda prior to the adoption of the first substantial institutional change (i.e., the Supreme Court Act of 1975). While Epp argues that the support structure was steadily growing in the 1960s and 1970s, there was little corresponding growth in the rights agenda until the Court gained control of its docket. From 1960 through 1975, trend in the Court's agenda was essentially flat. Then, immediately after the institutional change in 1975, the proportion of rights cases on the Court's docket increased quickly, jumping from 21% to 26% in the first year and never subsequently falling below 28%.

**Figure 2 here**

Turning to judicial review, a similar, though less dramatic change in the agenda of the Court can be observed from the data in Figure 2. Prior to the adoption of the Charter, there was not a single year in which as many as 3% of the Court's decisions resulted in the declaration that a statute was unconstitutional. But during the Charter period, the average was an agenda in which the Court exercised judicial review in 4% of its cases.

Looked at slightly differently, the modal response of the Court before the Charter was a year in which no statutes were declared unconstitutional (in 26 of 40 years). But at least one statute has been declared unconstitutional in every year since the adoption of the Charter. And as we saw in the analysis of the rights agenda, there is little evidence that the increasing support structure for rights had more than negligible effect before the agenda change that gave the Court greater control of its docket. In 13 of the 16 years from 1960 through 1975, there was no exercise of judicial review.

**Figure 3 here**

On its face, it would appear that the Charter's protection of individual rights might produce a greater increase in the constraint on the abuses of executive power than an increase in the exercise of judicial review directed at statutes. Thus, Epp's analysis of judicial review which only examined judicial review of statutes, might significantly under-estimate the overall effect of the Charter on constitutional policy making. To explore that possibility, we present in Figure 3 the annual trend in the percentage of all cases in which the Supreme Court exercised judicial review to strike down either statutes or administrative action.

The trends displayed in Figure 3 are dramatic. In the 30 years before the passage of the Supreme Court Act of 1975, there was almost no judicial review of any kind. Subsequently, in the decade before the adoption of the Charter, the average rate of judicial review rose to slightly above 2% of the cases on the docket of the Court. But then with the adoption of the Charter, the rate of judicial review skyrocketed, rising from a rate of two and a half percent per year in the four years before the Charter to almost 10

percent in the first two years of Charter litigation. While the rate of judicial review subsequently fluctuated from year to year, the average rate for the entire Charter period has hovered just under 10%. Prior to the adoption of the Charter, there was only a single year in which the rate of judicial review reached 5%; after the adoption of the Charter there has been only a single year in which the agenda of the Court failed to have at least 5% of its cases in which the Court exercised judicial review. And in a pattern that is very similar to other trends examined to date, there is little evidence that the support structure that Epp says was growing in the 1960s and 1970s had any effect on judicial review before the adoption of the Supreme Court Act of 1975. In fact, from 1960 to 1975, there was not a single year in which judicial review was exercised in even 2% of the cases on the agenda of the Court.

**Figure 4 here**

Our final examination of the trends in involvement of the Supreme Court in constitutional politics involves an examination of all cases in which the Court was asked by litigants to resolve a constitutional challenge. Examination of the trends in Figure 4 suggest that the dramatic increase in constitutional litigation may have been the result of the combined effects of increases in the support structure, plus increasing docket control, and the adoption of the Charter of Rights and Freedoms. After two decades of fluctuation without any clear linear trend, it appears that the proportion of cases raising one or more constitutional questions began to slowly rise in the late 1960s and that this trend then accelerated after the Supreme Court Act of 1975. This trend appeared to sharply increase immediately after the adoption of the Charter. Thus, starting from a low of no cases raising constitutional challenges in 1967, the proportion of constitutional cases on the

docket rose to above 3% in most of the next eight years and then averaged over 7% in the decade following the Supreme Court Act of 1975. But then, as soon as the period of Charter litigation began, the proportion of cases raising constitutional issues immediately rose to 17% and never fell below that point again, averaging over 30% for the Charter period.

In summary, for both the rights agenda and for each of our three measures of the involvement of the Court in constitutional politics, a visual examination of the trends suggest a major impact of the adoption of the Charter of Rights and Freedoms on the agenda of the Supreme Court. In contrast, evidence that an increasing support structure had an effect on the Court's agenda that was independent of docket control and the adoption of the Charter is scarce.

### **A Statistical Analysis of Agenda Change**

Epp's thesis essentially makes two analytically distinct claims. First he asserts that there has been a dramatic change over time in the agenda of the Supreme Court of Canada; a "rights revolution", in which the agenda of the Court has come to contain an increasing proportion of cases raising rights claims and increased demands for the Court to exercise judicial review. Additionally, Epp argues that the main cause for these agenda changes is increases in what he labels the "support structure" for rights. In Epp's account, the role of constitutional and other institutional change is much more modest. We begin our statistical analysis by first providing a simple direct test of the relative effects of changes in the support structure and changes in the institutional structure of the Court on changes over time in the agenda of the Court. Since each of our variables are

expressed as percentages, we use simple OLS regression models, controlling for the lagged dependent variable.

**Table 1 here**

As noted above (Figure 1), a visual plot of the changes in the rights agenda of the Supreme Court of Canada suggest there has indeed been a major change over time. Most dramatically, before 1975 rights cases usually made up less than 20% of the Court's docket but consistently made up more than 40% of the docket after the adoption of the Charter of Rights and Freedoms. The results in Table 1 confirm that overall, the regression model provides an adequate overall explanation of the variation in the proportion of rights cases on the docket of the Court, significant at the .001 level.<sup>8</sup> with an adjusted R square of 0.90. However, Epp's theory receives little support from the model. The effect of the support structure on the rights agenda is positive as predicted, but of very modest magnitude and the coefficient fails to reach statistical significance. In contrast, all three of the institutional changes produced major effects that are statistically significant. Most notably, the model suggests that the adoption of the Charter of Rights and Freedoms led to an increase of approximately 19 percentage points in proportion of rights cases on the Court's docket, a change that is significant at the .001 level. Each of the changes in the Court's control over its docket produced more modest, but still statistically significant changes in proportion of rights cases on the agenda of the Court.

**Table 2 here**

Figure 2 above suggested that Epp was also right in his assertion that there has been an increased tendency over time for the Court to exercise judicial review by striking

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<sup>8</sup> Using a one-tailed test since Epp predicted that the change would be positive (i.e., increasing over time).

down statutes passed by Parliament or provincial legislatures. The regression analysis presented in Table 2 permits a comparison of the contributions of changes in the support structure versus changes in institutional structure including the adoption of the Charter. The results again provide no support for Epp's theory. The substantive effect of changes in the support structure on the use of judicial review by the Court is negligible and are likely due to chance. But the effect of the adoption of the Charter is positive and statistically significant.

**Table 3 here**

In Table 3 we examine the effects of changes in the support structure versus institutional change when one assesses changes by the Court in more complete indicator of judicial review (i.e., including judicial review of both statutes and executive action). The results display a now familiar pattern. The effect of changes in the support structure for rights is quite modest and the effect is not statistically significant. Changes in the institutional rules governing docket control also do not appear to have any significant effect on the exercise of judicial review. However, once again, the results indicate that the adoption of the Charter was associated with an increase in the exercise of judicial review and that change was significant at the .001 level.

**Table 4 here**

The final regression model, presented in Table 4, permits an assessment of the relative impact of institutional change and changes in the support structure on the proportion of the docket containing cases raising constitutional questions. Once again, the overall model does a good job of explaining the variance in the constitutional agenda (the adjusted R square of 0.84 is significant at the .001 level). And once again the effect

of changes in the support structure is small and statistically insignificant. However, the effect of the Charter is substantial. The adoption of the Charter of Rights and Freedoms is associated with an increase of nearly 17 percentage points in the proportion of the Court's docket devoted to the resolution of constitutional questions, a change that is significant at the .001 level.

Thus, the four regression models produce very similar results. In each, adoption of the Charter of Rights and Freedoms is associated with substantively large, statistically significant changes in the agenda of the Supreme Court. But changes in the strength of the support structure have only tiny and non-significant effects.

Epp's analysis does not rely on temporal models even though his theory is about change over time. The data presented above in Figures 1-4 support his findings that there were substantial increases in the rights agenda and in the role of the Court in constitutional politics over time. But even though there are changes over time that are consistent with Epp's claims, there is an absence of evidence that these increases are related to the factors that Epp asserts are the main causal mechanism. That is, Epp's analysis does little to discount the possibility that the association between agenda change on the Court and changes in the support structure are not spurious. The possibility that the relationships are spurious is made more plausible by the results of the four regressions presented above. Each of the four models explain a substantial portion of the variance in the agendas of the Court, but they suggest that changes in the support structure have little to do with agenda change. In all four models, the relationship between changes in the support structure and changes in the Court's agenda fail to reach statistical significance once one controls for the institutional changes that occurred in the sixty years examined.

In contrast, the effects of the adoption of the Charter of Rights and Freedoms are strong and statistically significant in all four models. Of course, the regression models presented above share with Epp's analysis a failure to utilize proper methods of modeling change over time. Most notably, they violate the assumption of stationarity and do not properly provide for a de-trending of the data. Thus, the next stage in our investigation of whether the constitutional protection of rights and other institutional changes matter, is to conduct ARIMA time series analyses of each of the trends on agenda change.

**Table 5 here**

Having confirmed that there has been in fact a major transformation of the agenda of the Supreme Court of Canada, we now focus more directly on the claims by Epp "that the Charter's influence is overrated" (1996, 775) and that the "shift to a largely discretionary docket in 1975 significantly contributed to the agenda transformation." (1996, 775)

We test these claims with an ARIMA time series analysis with interventions for the three major institutional changes occurring during the time series – the Supreme Court Act of 1975 that granted greater agenda control to the court, and the amendment to that act in 1997 that further increased the Court's docket control by eliminating many criminal appeals as of right, and the adoption of the Charter of Rights and Freedoms.

We first examine changes in the rights agenda of the Court. The value for sigma in the time series model presented in Table 5 confirms that the overall trend in the dependent variable is statistically significant. More importantly, the model indicates that after one accounts for the basic trend in the data (which would include any changes produced by the increasing level of the support structure for rights over time) and for the

effects of statutory increases in the ability of the Court to control its docket, the adoption of the Charter of Rights had a major impact on the trend. On average, the adoption of the Charter increased the proportion of rights cases on the Court's docket by 14 percentage points, a change that is significant at the .01 level. That is, once the data have been differenced (detrended) the evidence suggests that the proximate cause of a significant increase in the rights agenda of the court is the Charter.<sup>9</sup>

In contrast, while both the visual examination of the trend and Epp's (1996) analysis suggested that the Supreme Court Act of 1975 also had a major impact on the docket, the time series analysis indicates that though that effect was positive, its effect was not statistically significant once one controlled for the impact of the adoption of the Charter. Similarly, while the 1997 amendments had a negative effect on the rights agenda as predicted<sup>10</sup>, that change also failed to attain statistical significance.

**Table 6 here**

We next examine changes in the Court's use of judicial review. Table 6 presents the time series analysis of the limited conception of judicial review (only counting cases in which statutes were struck) examined by Epp. The results parallel those for changes in the rights agenda, though the magnitude of the changes are smaller. The adoption of the Charter results in an increase in the proportion of the Court's docket devoted to judicial review that is statistically significant ( $p < .001$ ) even after one controls for the underlying trend in the data and the effects of the two statutory changes in the Court's power to

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<sup>9</sup> One might note, comparing these results to those of the regression analysis presented in Table 1, that the effect of the Charter appears to have dropped from 0.19 to 0.14, reflecting that the general trend in the data may account for 5% of the change.

<sup>10</sup> Epp does not discuss the effects of these amendments since they occurred after the period he studied, but it would be reasonable to expect them to have a negative effect since they removed from the docket a number of criminal cases and Epp counts such criminal cases as part of the "rights agenda."

control its agenda. However, neither of the institutional changes in docket control have significant effects on the use of judicial review by the Court.

**Table 7 here**

When one examines the more inclusive conception of judicial review, the effects of the Charter appear to be even stronger. The time series analysis reported in Table 7 reveals that on average, adoption of the Charter increased the proportion of cases per year in which the Court exercised judicial review by over seven percentage points after one controls for the underlying trend in the data and the effects of the changes in docket control. This effect of the Charter is significant at the .001 level. Once again, neither of the statutory changes in agenda control had statistically significant effects on the frequency of the exercise of judicial review by the Court. To better appreciate the magnitude of this change, one should note that prior to the adoption of the Charter, the Court exercised judicial review in only 1% of its cases and there was not a single pre-Charter year in which the Court exercised judicial review in as many as 6% of its cases. Thus, the effect of the Charter on average was to more than triple the exercise of judicial review by the Court.

**Table 8 here**

Our final investigation was on the effect of the Charter on the proportion of the docket devoted to cases in which one or more of the litigants raised a constitutional issue requiring the potential exercise of judicial review. Once again, the time series analysis (reported in Table 8) reveals that neither of the institutional changes in docket control had a significant effect on the number of constitutional cases on the docket. But the adoption of the Charter was associated with a major change in the docket. On average, the

adoption of the Charter led to an increase of over 10 percentage points in the proportion of the docket devoted to constitutional issues, a change that was again statistically significant. To put these numbers in perspective, a look back at Figure 4 shows that prior to the adoption of the Charter, there were only two years (1950 and 1981) in which the annual percentage of cases raising a constitutional issue reached at least 10%; yet the effect of the Charter was to raise the annual proportion of the docket by more than 10 points.

The results of all four time series models provide statistical confirmation of the impressions gleaned from the earlier examination of the trends in agenda change derived from an inspection of the results presented graphically. The adoption of the Charter of Rights and Freedoms had an effect on both the rights agenda and the constitutional issues agenda of the Supreme Court that were both substantively large and statistically significant.

## **Discussion**

Epp's (1996) provocatively titled essay in the *American Political Science Review* and his related analysis of rights revolutions in a comparative perspective (Epp 1998) provided an important reminder of the truism that neither constitutions nor any other institutional features can bring about substantial change all by themselves. In modern, complex, pluralistic democracies almost no major long lasting change can be brought about solely through the efforts of a single political actor or institution. Almost all significant change is the result of interactions among multiple players and institutions. And when multiple actors and institutions contribute to change, there are frequently patterns of reciprocal influence. Thus, Epp's argument that interest groups and rights

oriented lawyers played a role in increasing the rights agenda pursued by the Supreme Court is almost certainly correct. However, it is difficult to accurately assess its importance relative to the importance of other potential causal factors due to Epp's inability to measure the change over time in the strength of the "support structure."

Epp is certainly right in maintaining that rights oriented lawyers and interest groups played a role in even the creation of the Charter of Rights and Freedoms. For instance, both Brodie (2002) and Manfredi (2004) note the important role played by both informal associations of feminist lawyers and the more formal organizational participation of the Canadian Civil Liberties Association (CCLA) in debates over the drafting of the Charter. But both authors also note that the relationship between interests and institutions is interactive. The most successful group litigator in the Charter period has been the Women's Legal Education and Action Fund (LEAF). Yet, LEAF was founded after the adoption of the Charter and the primary reason for its creation was to take advantage of the possibilities created by the adoption of the Charter (Brodie 2002, 30-31). Similarly, while the CCLA pushed for the adoption of the Charter, it then changed its tactics and increased its level of support for rights litigation following the adoption of the Charter. Thus, the relationship between the influence of groups and the influence of the Charter on the increasing rights agenda of the Supreme Court appears to be reciprocal.

Epp (1996) provides a theoretically rich descriptive account of the idea of a "support structure" for rights and provides a plausible account making it reasonable to believe that this developing support structure was one of the factors that contributed to the changing rights agenda of the Supreme Court. However, he fails to provide a

convincing account of the relative effect of that support structure compared to the effects attributable to other factors because of severe limitations in the data he employs. Most limiting are his inability to provide a concrete measure of changes in the magnitude of the support structure and his small N problem. Simply put, having only two data points to examine after the adoption of the Charter is insufficient to draw any convincing conclusions about the effects of the Charter. Moreover, his analysis fails to consider the ways and extent to which changes in the support structure for rights may interact with changing institutional features or other potential casual agents such as the ideology of the justices. And because he fails to rely on accepted models for assessing temporal change, he is unable to demonstrate convincingly that the associations he finds in his limited data between agenda change and changes in the support structure are not spurious.

The current analysis should not be read to discount the possibility that an increasing support structure had some effect on the increasing rights agenda of the Court. Such changes in the support structure may have contributed to some degree (though a degree which is impossible to assess due to the absence of a measure of that support structure) to the basic trend over time that the regression analysis above demonstrated was statistically significant. The more important point of the analysis above is that even after one factors into account the effects on the overall trend produced by the support structure, the adoption of the Charter of Rights and Freedoms had an independent effect that was substantively important and statistically significant. Once the data were appropriately differenced in an ARIMA time series model, the strong, significant relationship between the adoption of the Charter and the agenda increases in rights litigation and constitutional litigation provide strong evidence that the adoption of the

Charter was an important proximate cause of those agenda changes. Thus, the simple and unambiguous answer to the question posed by Epp (1996, 765), "Do Bills of Rights Matter ?" is YES !

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Figure 1  
 Combined Rights Agenda Change- Canada Supreme Court  
 Change Over Time:  
 %Combined Civil Liberties Agenda 1945 to 2005

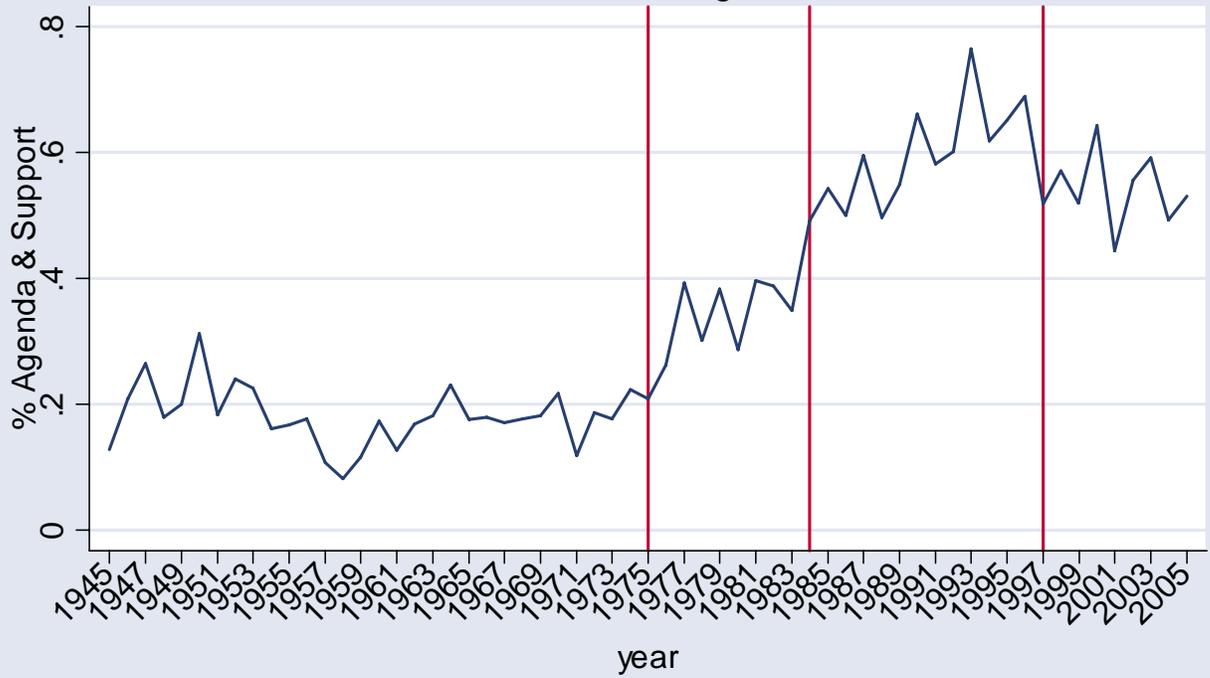


Figure 2  
Agenda Change-Laws Struck by Canada Supreme Court

Change Over Time :  
Judicial Review 1945 to 2005

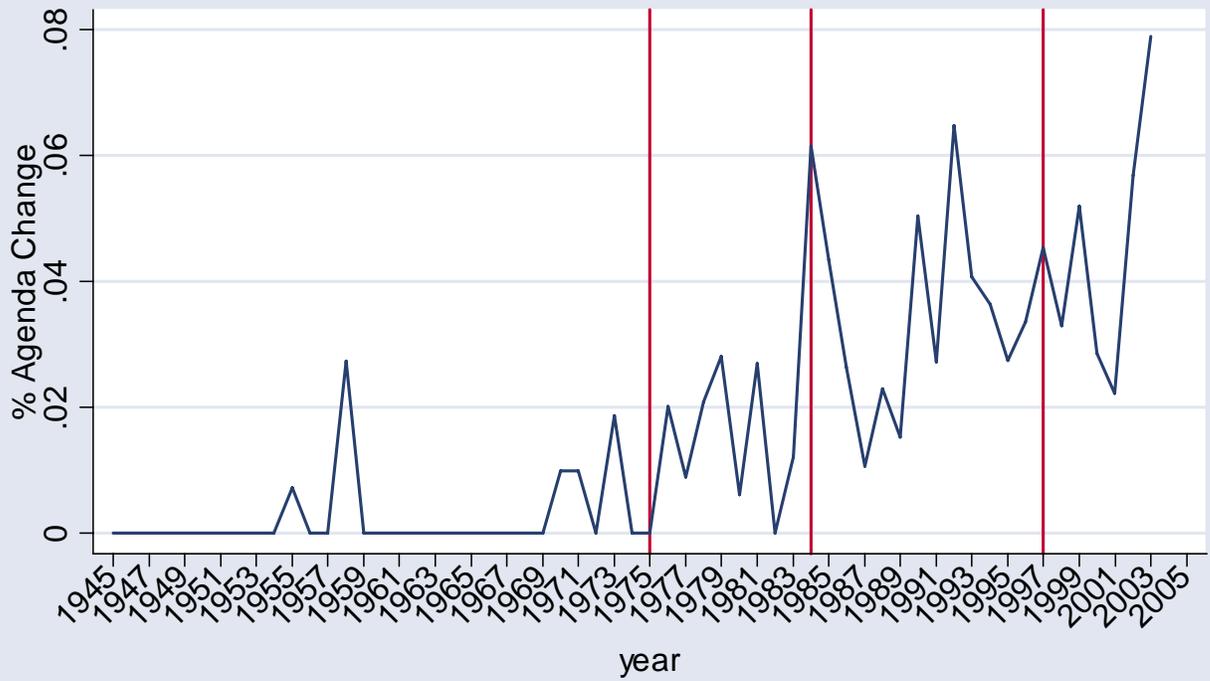


Figure 3  
Change in Judicial Review  
Laws & Executive Action Struck by Canada Supreme Court  
Agenda Change 1945 to 2005

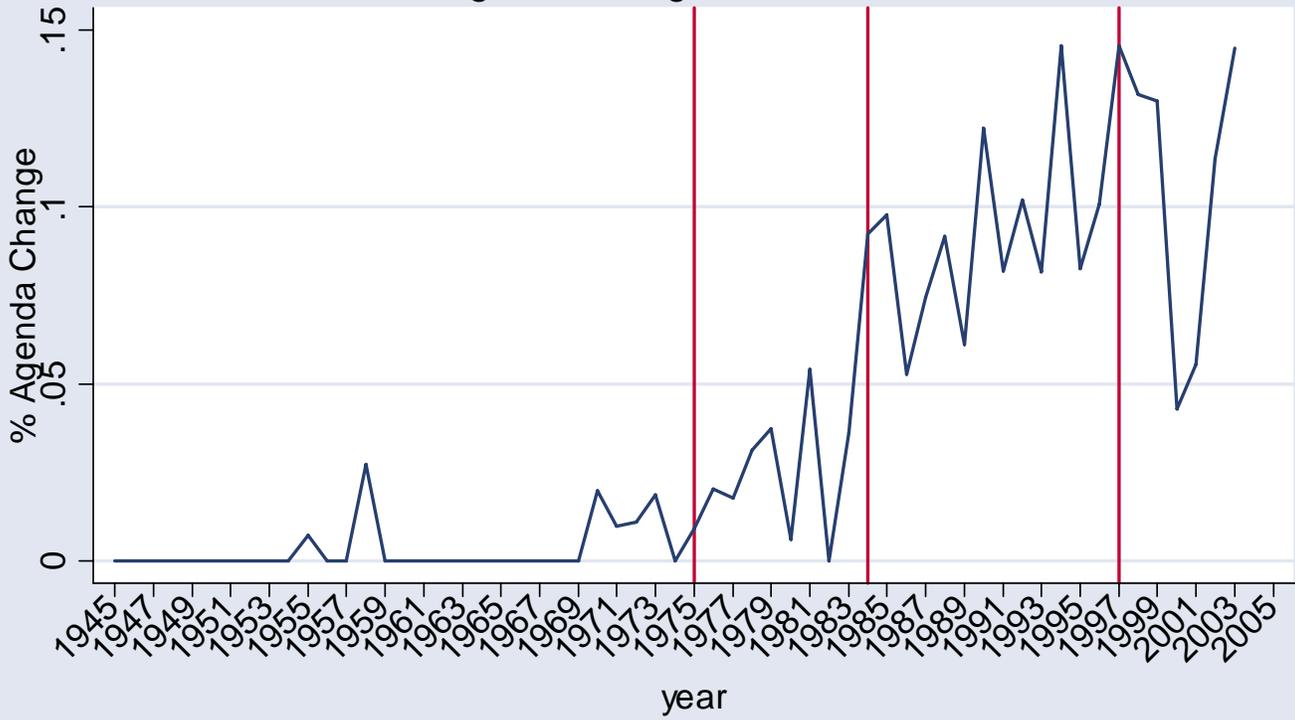
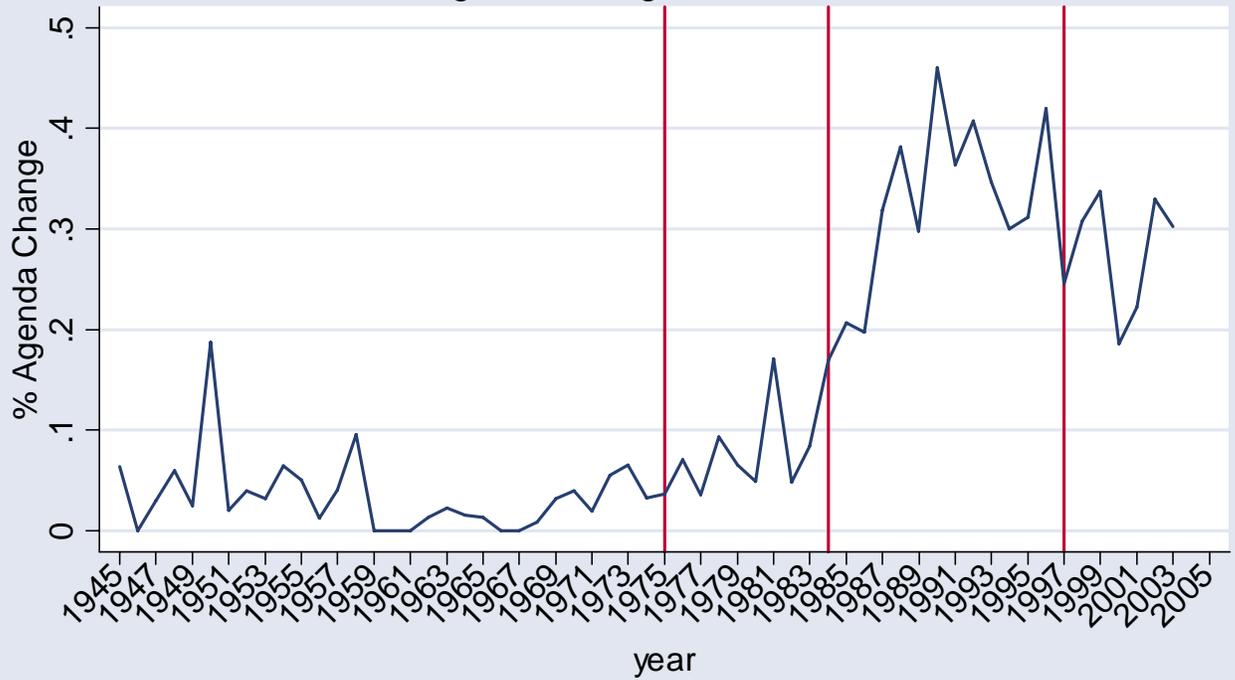


Figure 4  
Agenda Change- Canada Supreme Court  
Cases with Requests for Judicial Review

Agenda Change 1945 to 2005



**Table 1:** OLS Regression Analysis on the Direct Test of Epp’s Combined Rights Agenda 1945-2005

| VARIABLES                     | COEFFICIENT ESTIMATE | STANDARD ERROR |
|-------------------------------|----------------------|----------------|
| LAGGED COMBINED RIGHTS AGENDA | 0.131                | 0.124          |
| SUPPORT STRUCTURE             | 0.016                | 0.011          |
| CHARTER                       | 0.190**              | 0.042          |
| DOCKET                        | 0.084*               | 0.039          |
| DOCKET 2                      | -0.074*              | 0.037          |
| CONSTANT                      | 0.150***             | 0.024          |

N= 61, \* p≤.05 , \*\* p≤.01, \*\*\* p≤.001 (one-tailed)

**Table 2:** OLS Regression Analysis of Review of Statutes Agenda 1945-2003

| VARIABLES                          | COEFFICIENT ESTIMATE | STANDARD ERROR |
|------------------------------------|----------------------|----------------|
| LAGGED JUDICIAL REVIEW OF STATUTES | -0.048               | 0.147          |
| SUPPORT STRUCTURE                  | -0.002               | 0.002          |
| CHARTER                            | 0.020**              | 0.007          |
| DOCKET                             | 0.007                | 0.008          |
| DOCKET 2                           | 0.006                | 0.007          |
| CONSTANT                           | 0.002                | 0.002          |

N= 59, \*  $p \leq .05$ , \*\*  $p \leq .01$ , \*\*\*  $p \leq .001$  (one-tailed)

**Table 3:** OLS Regression Analysis of Judicial Review of Statutes & Administrative Action 1946-2003

| VARIABLES  | COEFFICIENT ESTIMATE | STANDARD ERROR |
|--|----------------------|----------------|
| LAGGED JUDICIAL REVIEW OF STATUTES & ADMINISTRATIVE ACTION | -0.023               | 0.138          |
| SUPPORT STRUCTURE  | 0.005                | 0.003          |
| CHARTER  | 0.061***             | 0.014          |
| DOCKET   | 0.005                | 0.013          |
| DOCKET 2   | -0.002               | 0.012          |
| CONSTANT   | 0.0005               | 0.0004         |

N= 59, \* p≤.05 , \*\* p≤.01, \*\*\* p≤.001 (one-tailed)

**Table 4:** OLS Regression Analysis of Constitutional Issues on the Agenda 1945-2003

| VARIABLES                    | COEFFICIENT ESTIMATE | STANDARD ERROR |
|------------------------------|----------------------|----------------|
| LAGGED CONSTITUTIONAL ISSUES | 0.244*               | 0.120          |
| SUPPORT STRUCTURE            | 0.008                | 0.010          |
| CHARTER                      | 0.168***             | 0.039          |
| DOCKET                       | 0.008                | 0.036          |
| DOCKET 2                     | -0.042               | 0.034          |
| CONSTANT                     | 0.022***             | 0.011          |

N= 59, \*  $p \leq .05$ , \*\*  $p \leq .01$ , \*\*\*  $p \leq .001$  (one-tailed)

**Table 5:** ARIMA (1,1,0) Time Series Analysis of Trends in  
Combined Rights Agenda 1945-2005

| VARIABLES                        | COEFFICIENT ESTIMATE | STANDARD ERROR |
|----------------------------------|----------------------|----------------|
| LAGGED COMBINED RIGHTS<br>AGENDA | -0.280               | 0.146          |
| CHARTER RIGHTS                   | 0.142**              | 0.057          |
| DOCKET                           | 0.025                | 0.057          |
| DOCKET 2                         | -0.080               | 0.060          |
| CONSTANT                         | 0.005                | 0.006          |
| $\Sigma$                         | 0.061***             | 0.006          |
| WALD CHI <sup>2</sup>            | 36.19                |                |
| LOG LIKELIHOOD                   | 80.887               |                |

N= 59, \* p $\leq$ .05, \*\* p $\leq$ .01, \*\*\* p $\leq$ .001 (one-tailed)

**Table 6:** ARIMA (1,1,0) Time Series Analysis of Trends in  
Judicial Review of Statutes 1945-2003

| VARIABLES                          | COEFFICIENT ESTIMATE | STANDARD ERROR |
|------------------------------------|----------------------|----------------|
| LAGGED JUDICIAL REVIEW OF STATUTES | -0.364               | 0.186          |
| CHARTER RIGHTS                     | 0.053***             | 0.013          |
| DOCKET                             | -0.007               | 0.014          |
| DOCKET 2                           | -0.005               | 0.014          |
| CONSTANT                           | 0.0009               | 0.002          |
| $\Sigma$                           | 0.013***             | 0.001          |
| WALD CHI <sup>2</sup>              | 30.33                |                |
| LOG LIKELIHOOD                     | 166.365              |                |

N= 57, \* p $\leq$ .05, \*\* p $\leq$ .01, \*\*\* p $\leq$ .001 (one-tailed)

**Table 7:** ARIMA (1,1,0) Time Series Analysis of Trends in  
Judicial Review of Statutes & Administrative Action 1946-2003

| VARIABLES  | COEFFICIENT ESTIMATE | STANDARD ERROR |
|--|----------------------|----------------|
| LAGGED JUDICIAL REVIEW OF<br>STATUTES & ADMINISTRATIVE<br>ACTION | -0.219               | 0.185          |
| CHARTER RIGHTS   | 0.074**              | 0.024          |
| DOCKET   | 0.002                | 0.023          |
| DOCKET 2   | 0.007                | 0.024          |
| CONSTANT   | 0.001                | 0.003          |
| $\Sigma$   | 0.024***             | 0.002          |
| WALD CHI <sup>2</sup>  | 20.96                |                |
| LOG LIKELIHOOD   | 131.355              |                |

N= 57, \* p≤.05 , \*\* p≤.01, \*\*\* p≤.001 (one-tailed)

**Table 8:** ARIMA (1,1,0) Time Series Analysis of Trends in  
Constitutional Issues on the Agenda 1945-2003

| VARIABLES                    | COEFFICIENT ESTIMATE | STANDARD ERROR |
|------------------------------|----------------------|----------------|
| LAGGED CONSTITUTIONAL ISSUES | -0.296               | 0.181          |
| CHARTER RIGHTS               | 0.105                | 0.056          |
| DOCKET                       | -0.013               | 0.056          |
| DOCKET 2                     | -0.027               | 0.058          |
| CONSTANT                     | 0.006                | 0.006          |
| $\Sigma$                     | 0.058***             | 0.005          |
| WALD CHI <sup>2</sup>        | 24.16                |                |
| LOG LIKELIHOOD               | 81.70                |                |

N= 57, \* p≤.05, \*\* p≤.01, \*\*\* p≤.001 (one-tailed)