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Do Bills of Rights Matter?: An Examination of Court Change, Judicial Ideology, and the Support Structure for Rights in Canada

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Abstract

Competing theories regarding the development of a “rights revolution” in Canada have appeared in the judicial and constitutional literature in recent years. On the one hand, scholars argue that the profound effects often attributed to the Charter of Rights and Freedoms are substantially overstated, and conventional analyses have overlooked the more important role of changes in what is called the “support structure” for rights. Others have advanced a competing theory that the Charter created an expansion of civil liberties. We take advantage of an extensive dataset on the decisions of the Supreme Court of Canada to provide a more systematic test of these competing theories. We conclude that the adoption of the Charter had effects on both the rights agenda and the constitutional issues agenda of the Court, which were both substantively large and statistically significant. There was some indication that changes in agenda control mattered, but the effects were not consistent across our time-series models. The more limited claim that increases in the support structure are one of multiple factors that are associated with agenda change received only mixed support. In short, we found that bills of rights do matter.

Keywords

Canada. Canadian Charter of Rights and Freedoms; Canada. Supreme Court; Civil rights; Canada

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Do Bills of Rights Matter? An Examination of Court Change, Judicial Ideology, and the Support Structure for Rights in Canada

DONALD R. SONGER, SUSAN W. JOHNSON & JENNIFER BARNES BOWIE *

Competing theories regarding the development of a “rights revolution” in Canada have appeared in the judicial and constitutional literature in recent years. On the one hand, scholars argue that the profound effects often attributed to the *Charter of Rights and Freedoms* are substantially overstated, and conventional analyses have overlooked the more important role of changes in what is called the “support structure” for rights. Others have advanced a competing theory that the *Charter* created an expansion of civil liberties. We take advantage of an extensive dataset on the decisions of the Supreme Court of Canada to provide a more systematic test of these competing theories. We conclude that the adoption of the *Charter* had effects on both the rights agenda and the constitutional issues agenda of the Court, which were both substantively large and statistically significant. There was some indication that changes in agenda control mattered, but the effects were not consistent across our time-series models. The more limited claim that increases in the support structure are one of multiple factors that are associated with agenda change received only mixed support. In short, we found that bills of rights do matter.

Des théories concurrentes sur l'avènement d'une « révolution des droits » au Canada se sont manifestées au cours des dernières années dans la documentation judiciaire et constitutionnelle. D'une part, des chercheurs soutiennent que les effets profonds souvent attribués à la *Charte des droits et libertés* sont sensiblement surestimés et que les analyses traditionnelles ont sous-évalué le rôle plus important de l'évolution survenue dans ce qu'on appelle la « structure de soutien » des droits. D'autres avancent une théorie concurrente voulant que la *Charte* ait conduit à une amplification des libertés civiles. Nous tirons parti d'une vaste banque de données relatives aux jugements de la Cour suprême du Canada afin

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de mettre plus systématiquement à l'épreuve ces théories concurrentes. Nous arrivons à la conclusion que l'adoption de la *Charte* a entraîné un effet à la fois important et statistiquement significatif sur les priorités de la Cour tant dans le domaine des droits que dans celui des questions constitutionnelles. Il semblerait qu'une évolution soit survenue dans les priorités, mais que les effets n'aient pas été uniformes dans tous nos modèles de série chronologique. L'idée plus restreinte que l'évolution de la structure de soutien figure au nombre des multiples facteurs associés à l'évolution des priorités n'a reçu qu'un soutien mitigé. Bref, nous avons découvert que les déclarations des droits possèdent une importance bien réelle.

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SCHOLARS HAVE BEEN INTERESTED in what influences higher court agendas in the United States¹ and other countries.² In this vein, they have examined the extent

1. HW Perry, Jr, *Deciding to Decide: Agenda Setting in in the United States Supreme Court* (Cambridge: Harvard University Press, 1991); Donald R Songer, Reginald S Sheehan & Susan B Haire, *Continuity and Change on the United States Courts of Appeals* (Ann Arbor: University of Michigan Press, 2000).
2. Roy B Flemming, "Processing Appeals for Judicial Review: The Institutions of Agenda Setting in the Supreme Courts of Canada and the United States" in Martin Westmacott and Hugh Mellon, eds, *Political Dispute and Judicial Review: Assessing the Work of the Supreme Court of Canada* (Scarborough: Thompson Learning, 2000) 40 [Flemming, "Processing Appeals"]; Roy B Flemming, *Tournament of Appeals: Granting Judicial Review in Canada* (Vancouver: University of British Columbia Press, 2004) [Flemming, *Tournament of Appeals*]; Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto:

to which constitutional bills of rights matter in terms of influencing high court dockets.³ Understandably, because of the relatively recent passage of the *Canadian Charter of Rights and Freedoms*⁴ in Canada, scholars have been particularly curious about the impact of the *Charter* on the Supreme Court of Canada's (the Court) docket. Within the literature on Canadian courts, there is a debate regarding whether passage of the *Charter* substantially impacted the Court's agenda. On one side of the debate, it is argued that the profound effects often attributed to the *Charter* are substantially overstated and that the structures supporting rights are what greatly influenced the Court's agenda. This view, held by scholars such as Charles L. Epp, suggests that bills of rights matter, "but only to the extent that individuals can mobilize the resources necessary to invoke them through strategic litigation."⁵

On the other side of the debate, some suggest that the *Charter* was the cause of the expansion of civil liberties and rights throughout Canada.⁶ While some have suggested that this increased emphasis on the protection of rights is attributed to legislative activism,⁷ we, like other scholars,⁸ take a court-centered approach

James Lorimer, 2000) [McCormick, *Supreme at Last*]; Rachel Sieder, Line Schjolden & Alan Angell, eds, *The Judicialization of Politics in Latin America* (New York: Palgrave Macmillan, 2005); C Neal Tate, "Courts and Crisis Regimes: A Theory Sketch with Asian Case Studies" (1993) 46:2 Pol Res Q 311.

3. Charles R Epp, "Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms" (1996) 90:4 Am Poli Sci Rev 765 [Epp, "Do Bills of Rights Matter?"]; Linda Camp Keith, "Constitutional Provisions for Individual Human Rights (1977-1996): Are They More than Mere 'Window Dressing?'" (2002) 55:1 Poli Res Q 111; Rainer Knopff & FL Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992) [Knopff & Morton, *Charter Politics*].
4. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. The *Charter* was adopted in 1982, but the first case raising a *Charter* claim did not reach the Court until 1984.
5. Epp, "Do Bills of Rights Matter?," *supra* note 3 at 765. See also Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: The University of Chicago Press, 1998) [Epp, *Rights Revolution*].
6. Sebastien Lebel-Grenier, "The Charter and Legitimization of Judicial Activism" in Paul Howe & Peter H Russell, eds, *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) 94; Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (New York: Oxford University Press, 1993) [Manfredi, *Judicial Power*]; Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008).
7. James B Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver: University of British Columbia Press, 2005).
8. Peter W Hogg, *Constitutional Law of Canada* (Scarborough: Thomson Canada, 2001); Bernard W Funston & Eugene Meehan, *Canada's Constitutional Law in a Nutshell*, 2d ed (Scarborough: Thomson Canada, 1998); Raul A Sanchez Urribarri et al, "Explaining Changes to Rights

in addressing whether bills of rights matter. Using more recently collected data than some previous studies, we provide a more comprehensive analysis of these alternative perspectives. Specifically, we take advantage of an extensive dataset on the decisions of the Court to provide a more systematic test of the support structure thesis and competing theories of agenda change. Using this new data, we create numerical measures of the main components of the support structure thesis. Next, we test the effects of these measures on the Court's changing agenda using a time-series analysis of changes in the agenda of the Court over a fifty-seven year period running from 1949 to 2005. The time-series analysis includes measures of judicial ideology, changes in the Court's docket, and power of judicial review under the *Charter*, along with measures of the support structure. We find there is mixed evidence that increases in the support structure are positively related to an increased presence of rights issues on the docket. More importantly, we find that the adoption of the *Charter* had a profound effect on changes in the rights agenda of the Court, an effect that remains strong even after controls for changes in the support structure, judicial ideology, and docket control are included in the model.

I. EFFECTS OF CONSTITUTIONS AND BILLS OF RIGHTS

Bills of rights are not self-executing; such constitutional provisions will only be effective if there are litigants and lawyers to bring cases, judges prepared to implement the constitutional procedures, and governments willing to abide by the rulings of the courts. Scholars disagree about the extent to which judges, external actors, or institutional structures matter in the attainment of rights. Cultural explanations for rights revolutions suggest that support structures must exist in order for rights to be obtained, and that such support structures may largely account for the achievement of rights in various societies.⁹ Other scholars stress what they perceive to be the relatively greater importance of constitutional bills of rights for the attainment of rights. Resurgences in studying the importance of constitutions have occurred in recent years,¹⁰ with rational choice theory becoming

Litigation: Testing a Multivariate Model in a Comparative Framework" (2011) 73:2 J Pol 391.

9. Epp, "Do Bills of Rights Matter," *supra* note 3; Epp, *Rights Revolution*, *supra* note 5.

10. Geoffrey Brennan & Alan Hamlin, "A Revisionist View of the Separation of Powers" (1994) 6:3 J Theoretical Pol 345; Douglas Greenberg et al, eds, *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993); Stephen Holmes, *Passions and Constraints: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995); Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (New York: New York University Press, 1994).

more accepted in the fields of comparative politics and judicial studies.¹¹ This resurgence in the study of the impact in constitutions is fueled in large part by the observation that virtually all of the newer democracies in Eastern and Southern Europe and in Latin America have adopted bills of basic rights as parts of their new constitutions.¹² Tom Ginsburg argues that these new constitutions, with their associated mechanisms for judicial review of government action, facilitate democracy because they provide a form of “insurance” to prospective electoral losers.¹³ But until very recently, there were virtually no empirical studies of the effects of these new bills of rights.¹⁴ That changed recently with the first attempt to quantitatively assess the impact of written constitutional rights provisions on the reduction of state terror. Undertaking a broad cross-national analysis of countries with populations of at least one hundred-thousand, Linda Camp Keith, C. Neal Tate, and Steven C. Poe found that the adoption of nine specific constitutional protections of civil liberties were significantly associated with lower levels of the abuse of civil liberties.¹⁵

The comparative literature on courts also emphasizes the importance of bills of rights to judicial decision making and agenda change. On this point, David G. Barnum found that India’s judicial activism and constitutional due process are linked.¹⁶ Mary L. Volcansek found that the Constitutional Court in Italy managed to strengthen its power of judicial review in strategic ways and increase a civil liberties agenda, despite external attempts by the state to thwart its efforts.¹⁷ This line of research on the institutional impact of bills of rights in the courts of different

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11. Mark Irving Lichbach & Alan S Zuckerman, eds, *Comparative Politics: Rationality, Culture and Structure* (Cambridge, UK: Cambridge University Press, 1997); Margaret Levi, “A Model, a Method, and a Map: Rational Choice in Comparative and Historical Analysis” in Mark Irving Lichbach & Alan S Zuckerman, eds, *Comparative Politics: Rationality, Culture and Structure* (Cambridge, UK: Cambridge University Press, 1997) 19; Mancur Olson Jr, *The Logic of Collective Action* (Cambridge: Harvard University Press, 1965); Gary W Cox & Mathew D McCubbins, *Legislative Leviathan: Party Government in the House* (Berkeley: University of California Press, 1993); Douglass C North, *Institutions, Institutional Change and Economic Performance* (Cambridge, UK: Cambridge University Press, 1990).
 12. Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004); Seider, Schjolden & Angell, *supra* note 2.
 13. *Judicial Review in New Democracies: Constitutional Courts in East Asia* (Cambridge, UK: Cambridge University Press, 2003) at 18.
 14. Hirschl, *supra* note 12.
 15. “Is the Law a Mere Parchment Barrier to Human Rights Abuse?” (2009) 71:2 J Pol 644.
 16. “Article 21 and Policy Making Role of Courts in India: An American Perspective” (1988) 30 JILI 19.
 17. “Judicial Activism in Italy” in Kenneth M Holland, ed, *Judicial Activism in Comparative Perspective* (New York: St Martin’s Press, 1991) 117.

countries builds on previous research surrounding what C. Neal Tate and Torbjorn Vallinder refer to as the judicialization of politics.¹⁸

An extensive recent scholarship has assessed the impact of the *Charter* on judicial decision making without producing agreement as to whether the effect has been positive or negative. Michael Mandel argues that the *Charter* has led to the “legalization” of politics, and that this change has benefited wealthy interests.¹⁹ Allan C. Hutchinson takes a similar approach, suggesting that judicial implementation of the *Charter* does not lead to social progress.²⁰ In contrast, Rainer Knopff and F.L. Morton emphasize top-down approaches, whereby bills of rights and judicial activism encourage interest group litigation and support structures to emerge.²¹ Knopff and Morton suggest that the Court uses the *Charter* to advance its activist agenda, which has helped to transfer power to left wing social activists.²² They contend that the *Charter* does not cause 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 have led to decisions that benefit certain special interests. While Christopher P. Manfredi takes a less explicitly ideological approach, he too notes that the adoption of the *Charter* has had a profound effect on the development of judicial power and the agenda of the Court, leading to increasing concerns about the tension between judicial review and liberal constitutionalism.²³ These critiques of the *Charter*’s policy impact led to a recent assessment that “[v]irtually all scholars who have joined the debate over this new policy-making role of the Court seem to have assumed ... that the Charter of Rights was the critical event that enabled the Court ... to adopt a more overtly political role.”²⁴

18. *The Global Expansion of Judicial Power* (New York: New York University Press, 1995).

19. *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Education, 1989).

20. *Waiting for a Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995).

21. *Charter Politics*, *supra* note 3; FL Morton, “The Political Impact of the Canadian Charter of Rights and Freedoms” (1987) 20:1 Can J Poli Sci 31 at 39.

22. *The Charter Revolution and the Court Party* (Toronto: Broadview Press, 2000).

23. Manfredi, *Judicial Power*, *supra* note 6; see also Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2d ed (New York: Oxford University Press, 2001).

24. Songer, *supra* note 6, at 71.

II. SUPPORT STRUCTURES AS AN ALTERNATIVE TO THE INFLUENCE OF CONSTITUTIONS

Some scholars have suggested 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. For instance in Canada, Epp argues that the passage of the *Charter* in 1982 had only a modest effect on the emergence of either a rights agenda or on increased judicial review by the Court.²⁵ Instead, he suggests that it was increases in the support structure for legal mobilization, assisted by increasing judicial docket control, that had the greatest impact on the development of a rights agenda on the Court. 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. He further suggests that the extent of judicial control over its own docket is important for the development of a rights agenda. In particular, he notes that the influence of judicial attitudes that favour rights expansion is “conditioned by the extent of discretionary control that judges have over their docket.”²⁶ Furthermore, Epp maintains that only when there is an adequate support structure for rights will courts participate in a “rights revolution.”²⁷ As Epp envisions it, this support structure will consist 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. Raul A. Sanchez Urribarri et al build upon the support structure theory in suggesting that while at least some minimal or threshold level is necessary in the “support structure for rights,” it is less clear that incremental increases above those threshold levels of the support structure will increase the number of rights cases on the agenda of a top court.²⁸

As evidence for the support structure theory, Epp examines the growth of the support structure and changes in the rights agenda and rights support before and after the adoption of the *Charter*.²⁹ He explains that in order to demonstrate the importance of support structures, one needs to test their influence compared to several important alternative explanations, including the effects of a constitutional

25. Epp, *Rights Revolution*, *supra* note 5.

26. Epp, “Do Bills of Rights Matter?,” *supra* note 3 at 768.

27. Epp, *Rights Revolution*, *supra* note 5 at 5.

28. *Supra* note 8.

29. Epp, “Do Bills of Rights Matter?,” *supra* note 3. The *Charter* was officially adopted in 1982, but the first case raising a *Charter* claim did not reach the Court until 1984.

bill of rights, the justices' policy preferences, and the extent of judicial discretion over the docket. Epp suggests that incremental increases above threshold levels of the support structure lead directly to corresponding increases in the rights agenda.³⁰ Graphing the increase in civil liberties cases over time in five-year increments, he finds that since the 1960s, there has been a steady increase in the support structure for rights in Canada. Epp concludes that the increase in the support structure through increased interest-group litigation, not the change to the Court's docket in 1975 or the adoption of the *Charter* in 1982, caused an increase in civil liberties cases decided by the Court.³¹ Epp admits, however, that the slender evidence he marshals in support of his thesis represents only a "preliminary analysis."³² Now that a much larger body of data on the decisions of the Court is available, it is time for a more systematic analysis of the important question he raises.

III. OTHER INFLUENCES ON JUDICIAL BEHAVIOUR

Beyond the debate over the impact of the constitutional protection of rights, there is broad agreement over the importance of two other characteristics of appellate courts for their policy making roles: the existence of substantial control by the justices over their docket and the ideology or political preferences of the justices. In the United States, empirical scholars have long argued that docket control is an essential precondition for active policy making by the justices.³³ The support structure thesis suggests that the importance of docket control for policy making in the United States extends more broadly to other common law courts. For instance, Epp notes that "the influence of judicial attitudes is likely to depend on ... the extent to which judges can choose which cases to decide."³⁴ Peter McCormick makes a similar argument for the transformation of the role of the Court in Canadian politics, citing the 1975 amendments to the *Supreme Court Act*,³⁵ which increased

30. Epp, *Rights Revolution*, *supra* note 5.

31. *Ibid* at 775.

32. Epp's analysis relies on data on the agenda of the Court for seven year-long periods. Each of these data points are five years apart and reflect the assumption that there was a steady increase from the agenda of the court in one year to the next sampled point, five years later.

33. Jeffrey A Segal & Harold J Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge, UK: Cambridge University Press, 1993) [Segal & Spaeth, *Attitudinal Model*]; Jeffrey A Segal & Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge, UK: Cambridge University Press, 2002) [Segal & Spaeth, *Attitudinal Model Revisited*]; David W Rohde & Harold J Spaeth, *Supreme Court Decision Making* (San Francisco: WH Freeman, 1976).

34. Epp, *Rights Revolution*, *supra* note 5 at 14.

35. RSC, 1985, c S-26.

the Court's discretionary control of its docket, as constituting a "silent revolution" that was of "enormous importance"³⁶ in the evolution of the Court from a "bit player to a leading actor"³⁷ in Canadian politics. As Ian Bushnell notes, "Chief Justice Laskin used the occasion of this expansion of the Court's control of its docket to announce that "the Court's status as Canada's ultimate appellate Court" was finally sealed."³⁸ Recent assessments of the changing role of the Court are in agreement that the adoption of the *Supreme Court Act* of 1975, which expanded the Court's discretionary control of its docket, was one of the key changes that helped to bring about the transformation of the Court.³⁹

Once appellate courts have achieved docket control and possess a substantial degree of judicial independence, a major determinant of judicial decisions is thought to be the political values of the justices. While this view of the primacy of judicial attitudes has long been the conventional understanding of decision making on the US Supreme Court (USSC),⁴⁰ substantial evidence exists of the influence of the political values of the justices in a number of other countries.⁴¹ In Australia, for instance, Brian Galligan found that judicial activism played a role in judicial decisions, despite the absence of an explicit bill of rights.⁴² Similarly, Stacia L. Haynie,⁴³ David Robertson,⁴⁴ and George H. Gadbois Jr.⁴⁵

36. *Canada's Courts* (Toronto: James Lorimer & Company, 1994) at 77.

37. McCormick, *Supreme at Last*, *supra* note 2 at 2.

38. *The Captive Court: A Study of the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 1992) at 405.

39. Songer, *supra* note 6; Lori Hausegger, Matthew Hennigar & Troy Riddell, *Canadian Courts: Law, Politics and Process* (Don Mills: Oxford University Press, 2009); Flemming, "Processing Appeals," *supra* note 2.

40. See Glendon Schubert, *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices, 1946-1963* (Evanston: Northwestern University Press, 1965); Segal & Spaeth, *Attitudinal Model*, *supra* note 33; Segal & Spaeth, *Attitudinal Model Revisited*, *supra* note 33; Segal & Rhode, *supra* note 33; Forrest Maltzman, James F Spriggs II & Paul J Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge, UK: Cambridge University Press, 2000).

41. Stacia L Haynie, *Judging in Black and White: Decision Making in the South African Appellate Division, 1950-1990* (New York: Peter Lang, 2003); Glendon Schubert & David J Danelski, eds, *Comparative Judicial Behavior: Cross-Cultural Studies of Political Decision-Making in the East and West* (New York: Oxford University Press, 1969); Brian Galligan, "Judicial Activism in Australia" in Kenneth M Holland, ed, *Judicial Activism in Comparative Perspective* (New York: St Martin's Press, 1991) 70.

42. Galligan, *supra* note 41.

43. Haynie, *supra* note 41.

44. *Judicial Discretion in the House of Lords* (New York: Oxford University Press, 1998).

45. "Selection, Background Characteristics, and Voting Behavior of Indian Supreme Court Judges" in Schubert & Danelski, *supra* note 41.

report finding evidence of the influence of the political values of the justices on the decisions of the top appellate courts in South Africa, the United Kingdom, and India, respectively. Turning to Canada, recent works⁴⁶ have reinforced a number of earlier studies that noticed the influence of Supreme Court justices' political values on their decisions.⁴⁷

IV. PROBLEMS WITH THE ASSUMED PRIMACY OF THE SUPPORT STRUCTURE

According to those who argue for the primacy of the support structure for the development of a rights agenda, there are three types of resources—organized group support, financing, and the structure of the legal profession—that appear to be important conditions for shaping access to the judiciary.

A long line of research demonstrates that in the United States, groups participating as *amici* have a major impact on agenda decisions by the USSC. The agenda-setting process in Canada, however, is not the same as in the United States. In contrast to the United States, interest groups as interveners (functionally the same as *amici* in the United States) play a less direct role in the leave to appeal process in Canada. Interviews with the justices on the Court indicate that all of the justices agree that interest groups are not permitted to participate in the leave to appeal process.⁴⁸ This is confirmed by Roy B. Flemming, who reports that interest group interveners' "involvement focuses exclusively on the stage *after* leave applications are granted. . . . Interest group interveners are conspicuously absent in the Canadian agenda-setting process."⁴⁹ Indirectly, however, interest groups might have an effect on the agenda of the Court, given their participation in the decisions of lower courts from which the appeals are drawn. Interest groups in

46. CL Ostberg & Matthew Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: University of British Columbia Press, 2007); Songer, *supra* note 6.

47. Donald E Fouts, "Policy Making in the Supreme Court of Canada, 1950-1960" in Schubert & Danelski, *supra* note 41; Sidney Peck, "A Scalogram Analysis of the Supreme Court of Canada, 1958-1967" in Schubert & Danelski (*ibid*); C Neal Tate & Panu Sittiwong, "Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations" (1989) 51:4 J Poli 900; CL Ostberg & Matthew Wetstein, "Dimensions of Attitudes Underlying Search and Seizure Decisions of the Supreme Court of Canada" (1998) 31:4 Can J Poli Sci 767; Andrew D Heard, "The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal" (1991) 24:2 Can J Poli Sci 289.

48. For details of the interview process, see Songer, *supra* note 6 at 12, 255-59

49. Flemming, *Tournament of Appeals*, *supra* note 2 at 13 [emphasis in original].

Canada have also been active in legal education and judicial training,⁵⁰ which may also indirectly influence the Court's agenda setting.

As direct parties bringing cases to the Court, interest groups also play a much smaller role in Canada than in the United States. In support of this point, Fleming notes that interest group participation is at much lower levels in Canada than in the United States, and in his extensive study of the leave to appeal process,⁵¹ he considers their role to be of so little significance that he does not even discuss them in his catalog of the major players in the leave process. Similarly, Ian Brodie notes that in Canada, interest groups participate mainly as interveners, rather than as direct parties in their campaigns to influence the Court.⁵² This anecdotal assessment is supported by Donald R. Songer's finding that all groups and associations combined, other than business and labour unions (a category that includes some groups that have nothing to do with the promotion of rights causes), constituted only 1.7 per cent of the appellants bringing their cases to the Court between 1970 and 2003.⁵³ These findings are further confirmed by interviews conducted by the authors with two of the most prominent and influential rights groups in Canada: the Canadian Civil Liberties Association (CCLA) and the Women's Legal Education and Action Fund (LEAF). Both groups told the authors that they relied only on their role as interveners to influence the rights decisions of the Court. Neither group sponsored cases and neither participated directly in the leave to appeal process before the Court.⁵⁴ Lori Hausegger, Matthew Hennigar, and Troy Riddell note that interest groups in Canada have a large disincentive against direct sponsorship of cases.⁵⁵ For example, in *Lavigne v Ontario Public Service Employees Union*,⁵⁶ not only did the National Citizens Coalition, which sponsored the case, lose, but the Court also ordered that it pay the court costs of the union and groups who intervened on the Coalition's behalf.

Together, these findings on the very minor role of interest groups as either direct parties or interveners in the leave to appeal process cast doubt on the theoretical underpinnings of the argument that an extensive support structure is critical to the

50. Hausegger, Hennigar & Riddell, *supra* note 39 [emphasis on original].

51. Fleming, *Tournament of Appeals*, *supra* note 2.

52. *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (Albany: State University of New York Press, 2002).

53. Songer, *supra* note 6 at 81.

54. Interview of Kerri Froc, senior official of the women's Legal Education and Action Fund, by Donald Songer (12 June 2001).

55. Hausegger, Hennigar, & Riddell, *supra*, note 39.

56. [1991] 2 SCR 211, 3 OR (3d) 511.

rights agenda of the Court. If interest groups play such an indirect role in the leave to appeal process, then the increase in the number of interest groups in Canadian society would appear to have minimal influence on the increasing rights agenda of the Court.

Another possible explanation for the substantial increase to the rights agenda of the Court centres on the changing structure of the legal profession. Of particular note is the growth of a number of large law firms in Canada and the increasing diversification (especially gender diversification) in supporting the increasing rights agenda of the Court. Recently, however, Flemming assessed the factors that influence the success of leave applications and found that attorneys from large firms are no more successful than other attorneys in the leave to appeal process.⁵⁷

V. A MODEL OF SUPREME COURT AGENDA CHANGE

As noted above, prior scholarship suggests that that the rights agendas of courts may be influenced by the presence or absence of an explicit constitutional guarantee of rights, the nature of the support structure for rights litigation, the degree of docket control possessed by the top court, and the political preferences of the justices on the court. We construct a model of agenda change on the Court to determine the relative impact of each of these four factors on increases in the rights agenda. Specifically, we hypothesize that (1) the adoption of the *Charter* will increase the proportion of rights cases and the proportion of constitutional cases⁵⁸ on the agenda

57. See Flemming, *Tournament of Appeals*, *supra* note 2. Moreover, while it is plausible to believe that the increasing gender diversity of the legal profession may make it easier to find attorneys who will bring gender-equality cases (and perhaps other discrimination cases) to the Court, the support structure argument for the importance of gender diversity provides no basis for believing that an increased number of female attorneys is important for bringing criminal appeals to the Court. This is important, because when Epp's category of rights cases is broken down into its specific issue components, it appears that at least from 1970 on, more than 80 per cent of all of the rights cases are criminal appeals.

58. We use the term "rights cases" *sensu* Epp—*i.e.*, all cases involving personal rights, freedoms, and liberties whether brought under the *Charter*, statutory protection of rights, or common law protection of rights. "Constitutional cases" refer to all cases in which there is a significant issue addressed in the majority opinion of the Court involving the interpretation or application of any provision of the Canadian Constitution. These can involve claims under the *Charter* or the *Constitution Act, 1867*. As indicated below, "rights cases" map only into the first dependent variable (referred to above as the "rights agenda"). Our conception of constitutional cases is broader than Epp's conception. Thus, we note that we test three hypotheses related to constitutional cases on the agenda of the Court. Below, we indicate that our second dependent variable is the proportion of cases in which the Court declared a statute unconstitutional (under either the *Charter* or the *Constitution Act, 1867*). This is the same as a variable used in Epp's analysis. In the next paragraph, below, we indicate that our

of the Court; (2) increases in the strength of the support structure for rights will increase the proportion of rights cases and the proportion of constitutional cases on the agenda of the Court; (3) increases in the degree of control of its docket will increase the proportion of rights cases and the proportion of constitutional cases on the agenda of the Court; and (4) as the ideology of the Court's majority becomes more liberal, the proportion of rights cases and the proportion of constitutional cases on the agenda of the Court will increase.

To test these hypotheses, we constructed a database based on the universe of published decisions of the Court for a fifty-seven year period (1949-2005). The unit of analysis is the aggregate composition of the Court's docket for each year. To compute the aggregate scores for each year, we supplemented data from the High Courts Judicial Database (HCJD).⁵⁹

To assess fully the impact of the *Charter* on the Court's agenda, we need to examine both the proportion of cases that deal explicitly with rights issues as well as those that tap the role of the Court more generally in constitutional politics. To accomplish this goal, we created four dependent variables. 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 in which the Court struck down a statute as unconstitutional, cases in which the Court either struck down a statute or overturned the actions of some executive official, and cases in which a substantial question of constitutional interpretation was discussed in the opinion of the Court. These four measures of the annual agenda of the Court become our dependent variables in the analysis below.

For the first dependent variable (the rights agenda), we follow Epp's conception of rights cases. That is, we combined all cases raising criminal rights issues with those

third dependent variable is the proportion of cases in which either a statute or the action of some government executive official was declared unconstitutional (under either the *Charter* or the *Constitution Act, 1867*). In the same paragraph we indicate that the fourth dependent variable is the proportion of cases in which there was a significant constitutional issue (under either the *Charter* or the *Constitution Act, 1867*) that was considered by the justices.

59. The data and codebooks for the HCJD can be downloaded from the JURI project at the University of South Carolina. The Judicial Research Initiative, online: <<http://artsandsciences.sc.edu/poli/juri/>>. The Canadian data in the HCJD include the universe of decisions published in the Supreme Court Reports for the years 1970–2003. The authors coded all of the decisions from 2004 and 2005 and from 1949 to 1969, following the same coding scheme. The HCJD data are part of a larger project 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; "Collaborative Research: Extending a Multi-Country Database and Program of Research," SES-0137349, C Neal Tate et al, Principal Investigators.

addressing 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.

For our second dependent variable, we also follow Epp's lead, computing the proportion of cases in each term in which the Court declared a statute unconstitutional.⁶⁰ This represents what might be termed a "narrow" version of the court's judicial review function.

For the remaining two dependent variables, we employ a broader understanding of the role of the Court in constitutional politics. Thus, our third dependent variable is the proportion of cases each term in which the Court exercised judicial review to strike down either a statute (including provincial laws and local ordinances) or the actions of some executive official. It thus represents a broader version of judicial review. The final dependent variable is the proportion of cases each term in which there was a significant constitutional issue raised. Since one might argue that a constitutional decision to uphold a statute or administrative action is as much a part of constitutional law making as a decision to strike one down, this last category provides the broadest measure of how active the Court was in constitutional policy making.

To directly assess whether "constitutions matter," we run separate time-series models of agenda change for each of our four dependent variables. We create independent variables to assess each of the four hypothesized influences on agenda change. For the hypothesized effects on agenda change (hypotheses one and three), we include intervention variables that mark the dates of institutional change. Specifically, to assess the impact of the *Charter* (H1), all years from 1984 onward are coded "1" and all years before 1984 are coded "0." Significant expansions of the degree of docket control possessed by the Court occurred with the enactment of the *Supreme Court Act* in 1975, and its subsequent amendment in 1997.⁶¹ Thus, all years from 1975 to the present are coded "1" for the variable "Docket Change 1975," and all years from 1997 onward are coded "1" for the variable "Docket Change 1997." For both variables, the years before the institutional change are coded "0."

60. Epp, "Do Bills of Rights Matter?," *supra* note 3.

61. In 1975, Parliament granted the Court nearly complete control of its discretionary docket in civil cases, substantially reducing the number of "appeals as of right" the Court was required to hear. Ian Bushnell, "Leave to Appeal Applications in the Supreme Court of Canada: A Matter of Public Importance" (1982) 3 *Sup Ct L Rev* 479. In 1997, the remainder of the Court's mandatory jurisdiction in criminal cases was also largely converted to discretionary. Songer, *supra* note 6.

To tap the effects of changes in the support structure for rights (H2), we utilize the two measures used by Epp:⁶² legal aid expenditures by the province of Ontario and the changing size of Canada's lawyer population.⁶³ For both sets of data, we expanded the data so that we would have annual values for each variable for the whole fifty-seven year period we analyzed.

To measure the ideology of the Court, we computed the proportion of decisions in rights cases each year that supported the rights claimant (*i.e.*, that supported a liberal position). We lagged this measure one year.⁶⁴ We also included in our models a multiplicative term to assess the interaction of our measure of ideology with a dummy variable for the agenda change that occurred in 1975.

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62. See Epp, "Do Bills of Rights Matter?," *supra* note 3. Epp also conceptualized the number of interest groups supporting rights as a part of the support structure, but because interest groups do not play a significant role in agenda setting in Canada, as we noted above, we did not include any measures of the number of interest groups in our model.
63. See *ibid.* While it might be preferable to utilize a measure of the combined legal aid expenditures from all provinces in Canada, we followed Epp's lead in using the Ontario data as a rough indicator of the impact of external funding of rights cases for several reasons. First, it appears that comparable data from all provinces are not readily available for the entire period included in our analysis. In addition, even if such data were available, there is no obvious best way to weight the data from the different provinces. For example, aid from Ontario certainly has a greater potential to influence the overall agenda of the Court than aid from New Brunswick because both the population and the amount of litigation in Ontario is substantially larger than that in New Brunswick. But empirically, the relative share of the overall docket of the Court proceeding to cases from Ontario and New Brunswick has varied over time. Given these problems in devising a perfect measure of legal aid financing, we concluded that the figures from Ontario would provide an acceptable rough indicator. This confidence is increased by the finding that there were substantially more rights cases heard by the Court from Ontario than from any other province (the cases from Ontario constituted 30.3 per cent of all rights cases heard by the Court) and that the correlation in the changes in the number of rights cases in Ontario and the total number of rights cases heard per year by the Court is high and statistically significant ($r=0.79$).
64. The only direct measure of the political preferences of the justices not derived from their voting behavior on the Court is based on an analysis of newspaper editorials and news stories published at the time of their appointment. It is constructed in a manner that is analogous to the Segal and Cover scores, which are widely used in analyses of the behaviour of justices on the USSC. Unfortunately, this measure is not available for justices appointed before the 1960s because prior to that time, there was virtually a complete absence of media coverage that discussed judicial appointees in terms of their political preferences. However, for the period between 1984–2003, Ostberg and Wetstein have shown that this independent measure of ideology is substantially correlated with the measure of ideology used in our analysis. Osterberg & Wetstein, *supra* note 46 at 129.

VI. TIME-SERIES ANALYSIS

To determine the impact of the institutional interventions, we utilize the Box-Jenkins method for Auto Regressive Integrated Moving Average (ARIMA) time-series modeling.⁶⁵ 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.⁶⁶

More simply, we want to understand the impact that the intervention variables—the 1982 *Charter*, the 1975 docket change, and the 1997 docket change—had on the Court’s agenda. Because we are dealing with a time span of fifty-seven years and we want to assess the impact these changes or “interventions” had on the courts agenda, the most appropriate way to do so is to analyze the data using an intervention model (with an ARIMA specification). The intervention model essentially flags the occurrence of an event so that one can examine whether anything changed after the intervention occurred. This more sophisticated method of analyzing data permits us to understand more fully the nature of the influence (if any) of the four interventions we identified, rather than simply analyzing the

65. George EP Box & Gwilym M Jenkins, *Time Series Analysis: Forecasting and Control*, revised ed (San Francisco: Holden-Day Press, 1976).

66. In order to properly analyze the impact of the intervention variables on the times series, we estimate our models using ARIMA. This is done because the stochastic processes are removed through the estimation of ARIMA. ARIMA modeling begins on the premise that it is first necessary to identify what kind of data-generating process is driving the data. See Richard McCleary & Richard A Hay Jr, *Applied Time Series Analysis for the Social Sciences* (Beverly Hills: Sage Publications, 1980). In other words, ARIMA analysis entails model identification of the (p,d,q) parameters, then estimating, and finally diagnosing the residuals. Specifically, 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 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 for identifying the ARIMA properties (such as examining the autocorrelation and partial autocorrelation functions, ACF and PACF, examining the correlograms against lag length, and applying the Dickey-Fuller test) we determined each model’s ARIMA specification. Because each model has a different ARIMA identification, please see Tables 1-4 for the ARIMA specification of each analysis.

data through a set of graphs. Because of the additional years under review and data collected, we present a more accurate estimation of the impact these interventions may have had.⁶⁷

VII. RESULTS

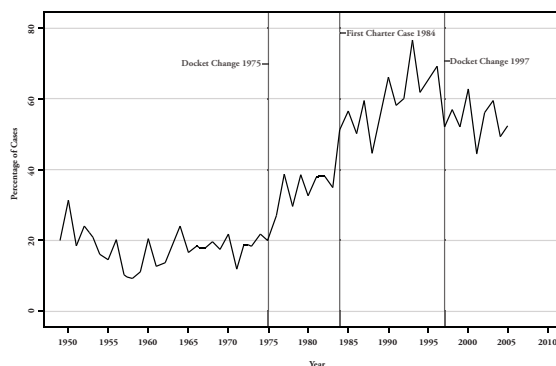
A. TRENDS IN THE COURT'S AGENDA—A FIRST LOOK

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 Court. For a visual overview of the changing agenda of the Court, 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 fifty-seven year period. The vertical lines in the graph mark three changes to the Court. The first line marks the *Supreme Court Act* of 1975, which gave the Court nearly complete control of its docket; the second line marks the adoption of the *Charter*,⁶⁸ and the third line represents an amendment to the *Supreme Court Act* in 1997, which eliminated most of the remaining appeals as of right in criminal cases.

67. After we determined each model's ARIMA specification, the next step included adding the intervention variables to our model. ARIMA treats these intervention variables much like independent variables in a regression model in that it estimates coefficients for each intervention variable that best fit the data. After running each model with the interventions, we determined that the Autocorrelation Function Areas (AFC) and the Partial Autocorrelation Function (PACFs) errors were within the acceptable limits. Generally speaking, the PACF is the amount of correlation between two variables and AFC refers to the amount of correlation between a variable and its lag. If the coefficient estimate is significant, we can be statistically confident that the intervention had an effect. Finally, in order to assess whether each model is a reasonable fit to the data, we examined the residuals for each model by analyzing the ACF and PACF and examining the Box-Ljung statistic (this indicates whether the autocorrelations are different from zero). The results of these diagnostic checks for each model indicated the residuals estimated are random, which demonstrated that the ARIMA model was properly identified. In addition we also examined the Akaike Information Criterion (AIC) goodness of fit measure in order to determine the "best" ARIMA model to use.

68. No one would expect that the *Charter* would have an instantaneous effect on the agenda of the Court; cases take some time to work their way up the judicial hierarchy to reach that level. 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.

**FIGURE 1: CHANGE IN THE RIGHTS AGENDA OF THE SUPREME COURT OF CANADA
PERCENTAGE OF RIGHTS CLAIMS CASES PER YEAR 1945–2005**



**B. CHANGE IN THE RIGHTS AGENDA OF THE SUPREME COURT OF
CANADA: PERCENTAGE OF RIGHTS CASES PER YEAR 1945–2005**

Figure 1 demonstrates that there has been a dramatic change in the agenda of the Court that deserves Epp’s description of it as a “rights revolution.”⁶⁹ 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 changes, there was a sharp upward surge in the proportion of rights cases on the agenda of the Court, followed by annual fluctuations 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.⁷⁰ However, once the Court gained greater control of its docket, the proportion of rights cases rapidly increased to between 30 per cent and 40 per cent of the docket. Then, with the adoption of the *Charter*, a further large increase occurred in the rights agenda of the Court. In summary, for thirty years prior to 1975, rights cases made up less than 20 per cent of the Court’s docket in most years; then, for the next decade, they accounted for between 20 per cent and 40 per cent in every year. Since the adoption of the *Charter*, rights cases have constituted more than 40 per cent in every year and have surpassed 60 per cent

69. Epp, *Rights Revolution*, supra note 5 at 177.

70. Additional analysis not presented indicates that almost all of these rights cases involved criminal appeals in the years before 1975.

of the docket in a number of years. Thus, over time, the attention of the Court to rights cases has more than doubled.

Figure 1 indicates that the effect of the adoption of the *Charter* on the rights agenda of the Court appears to be major. With the adoption of the *Charter*, the proportion of rights cases on the docket immediately jumped 15 per cent above the previous year (and 13 per cent above the average of the preceding three years), and this increased attention to rights has continued 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 forty years prior to the adoption of the *Charter*.⁷¹

The trends displayed in Figure 1 do not provide much support for the contention that it was the increasing magnitude of the support structure for rights that provided the major engine for the increasing attention paid to rights by the Court. For example, from 1960 to 1975, when the extent of the support structure was gradually increasing, the trend in the Court's agenda was essentially flat. Then, immediately after the Court gained control of its agenda in 1975, the proportion of rights cases on the Court's docket increased quickly, jumping from 21 per cent to 26 per cent in the first year, and never subsequently falling below 28 per cent.

Furthermore, it is reasonable to assume that at least most of the changes in the elements of the support structure thesis, such as the increasing diversity of the bar and the increasing number of interest groups involved in litigation, continued to increase in the late 1990s and the early years of the twenty-first century. Thus, the rights agenda on the Court should have continued to increase in the last decade. But, contrary to these expectations, the proportion of rights cases on the docket has declined fairly steeply. After reaching 69 per cent of the docket in 1996, the proportion of rights cases fell below 60 per cent for all but one of the next nine years. For the 1997–2005 period, rights cases made up on average only 54 per cent of the Court's agenda.

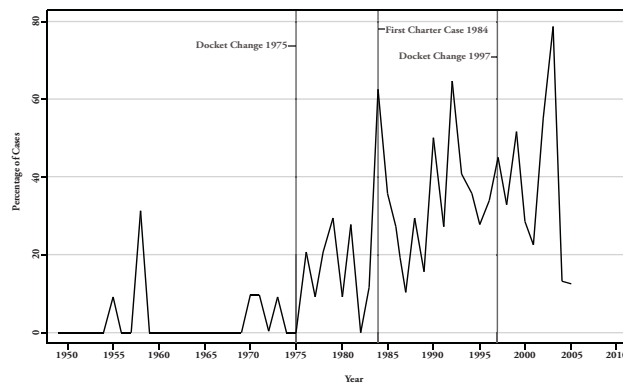
C. CHANGE IN THE JUDICIAL REVIEW OF STATUTES AGENDA OF THE SUPREME COURT OF CANADA 1945–2005

Turning to judicial review, a similar though less dramatic change in the agenda of the Court can be observed in Figure 2. Prior to the adoption of the *Charter*, there was not

71. Running a simple OLS regression model (not displayed) provides results that are consistent with this visual interpretation. Using the three Court changes as the only independent variables, both the 1975 change in docket control and the adoption of the *Charter* produced statistically significant increases in the proportion of rights cases on the docket, with the magnitude of the change associated with the *Charter* being approximately 1.7 times greater than those associated with the docket change.

a single year in which as many as 3 per cent of the Court's decisions resulted in the declaration that a statute was unconstitutional. During the *Charter* period, however, the Court declared a statute unconstitutional in an average of 4 per cent 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 twenty-six of forty years), though 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 a more than negligible effect before the agenda change that gave the Court greater control of its docket. In thirteen of the sixteen years from 1960 to 1975, no statutes were declared unconstitutional.

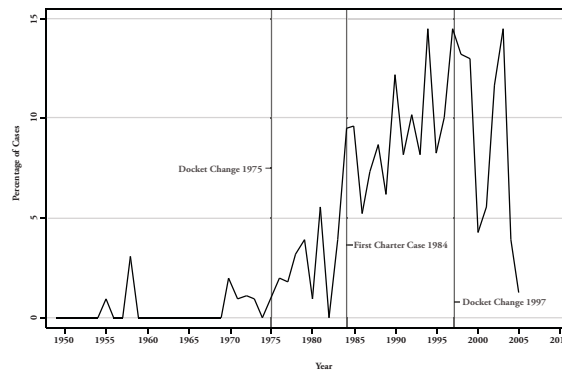
FIGURE 2: CHANGE IN THE JUDICIAL REVIEW OF STATUTES AGENDA OF THE SUPREME COURT OF CANADA CASES 1945–2005



D. CHANGE IN THE JUDICIAL REVIEW OF LAWS AND EXECUTIVE ACTION STRUCK DOWN BY THE SUPREME COURT OF CANADA 1945–2005

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 would. Thus, an analysis of judicial review that only examines judicial review of statutes might significantly underestimate 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 Court exercised judicial review to strike down either statutes or administrative action.

FIGURE 3: CHANGE IN JUDICIAL REVIEW OF LAWS AND EXECUTIVE ACTION STRUCK DOWN BY THE SUPREME COURT OF CANADA 1945–2005



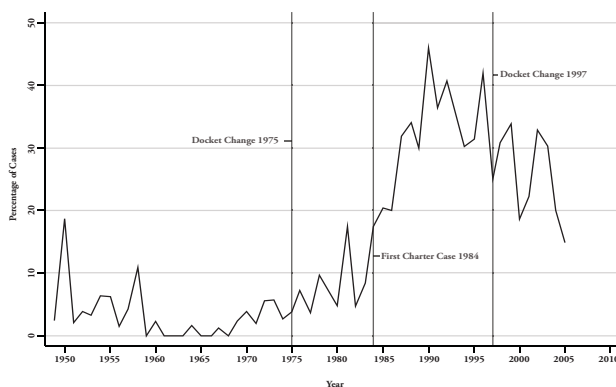
The trends displayed in Figure 3 are dramatic. In the thirty years before the passage of the *Supreme Court Act* of 1975, there was almost no judicial review of any kind. Subsequently, in the decade before the adoption of the *Charter*, the average rate of judicial review rose to slightly above 2 per cent 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 2.5 per cent per year in the four years before the *Charter* to almost 10 per cent 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 per cent. Prior to the adoption of the *Charter*, there was only a single year in which the rate of judicial review reached 5 per cent; after the adoption of the *Charter*, there has been only a single year in which the Court failed to exercise judicial review in at least 5 per cent of its cases. In a pattern that is very similar to other trends examined to date, there is little evidence that the support structure that was growing in the 1960s and 1970s had any effect on judicial review before the adoption of the *Supreme Court Act*. In fact, from 1960 to 1975, there was not a single year in which judicial review was exercised in even 2 per cent of the cases on the agenda of the Court.

E. AGENDA CHANGE IN CONSTITUTIONAL CASES IN THE SUPREME COURT OF CANADA 1945–2005

Our final examination of the trends in involvement of the Court in constitutional politics comprises an examination of all cases in which the Court was asked by litigants to resolve a constitutional question. 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, increasing docket control, and the adoption of the *Charter*. 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 enactment of the *Supreme Court Act* in 1975. This trend appeared to increase sharply 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 per cent in most of the next eight years and then averaged over 7 per cent in the decade following the arrival of the *Supreme Court Act*. But then, as soon as the period of *Charter* litigation began, the proportion of cases raising constitutional issues immediately rose to 17 per cent and never fell below that point again, averaging over 30 per cent for the *Charter* period. That is, the average proportion of cases raising constitutional claims after the adoption of the *Charter* was nearly double the highest level in any of the nearly forty years preceding the adoption of the *Charter*.

FIGURE 3: AGENDA CHANGE IN CONSTITUTIONAL CASES IN THE SUPREME COURT OF CANADA 1945–2005



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 suggests a major impact of the adoption of the *Charter* on the agenda of the Court. In all four graphs, there was an immediate and sharp increase following the adoption of the *Charter*. In each figure, it appears that the 1975 change in docket control also was associated with increases in a rights and constitutional agenda, but the magnitude of these changes was substantially smaller than those associated with the adoption of the *Charter*. In contrast, there is minimal evidence to suggest 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*.

F. A STATISTICAL ANALYSIS OF AGENDA CHANGE

The support structure thesis essentially makes two analytically distinct claims. The first claim is that there has been a dramatic change over time in the agenda of the Court, a “rights revolution” in which the agenda of the Court has come to contain an increasing proportion of cases raising rights claims and increasing demands for the Court to become involved in constitutional policy making. Additionally, it is asserted that the main causes for these agenda changes are increases in the support structure for rights. We find that the agenda change on the Court has been so great that one is justified in labeling it a “rights revolution” (see Figures 1–4). There is little doubt that the agenda of the Court in the post-*Charter* period is dramatically different from its agenda during the 1950s. In essence, Figures 1–4, which cover a much longer period than Epp’s data, support his basic conclusions about changes in the agenda.⁷²

According to the support structure thesis, the role of constitutional change is quite modest. To evaluate more systematically whether the *Charter* played a role in this change, we proceed to statistically test the relative impact of the *Charter*, elements of the support structure, judicial ideology, and changes to the Court’s docket.

TABLE 1: ARIMA (1,1,1) TIME-SERIES ANALYSIS OF TRENDS IN COMBINED RIGHTS AGENDA 1949–2005

Variables	Coefficient Estimate	Robust Standard Error
Lagged Combined Rights Agenda	0.237	0.145
Lagged Ideology	-0.085	0.081
Lagged Ideology*	0.240*	0.122
Docket Change 1975		
Docket Change 1975	0.084*	0.035
Docket Change 1997	-0.026	0.076
Charter Rights	0.118***	0.033
Lawyers (1000s)	0.002	0.004
Ontario Legal Aid (\$ Million)	0.00057**	0.00021
Constant	-0.0062	0.00196
Σ	0.051***	0.005
Wald Chi ²	664.68***	
Log Likelihood	83.22	

NOTES: N=55, *p<.05, **p<.01 ***p<.001 (one tailed)

72. Epp, *Rights Revolution*, *supra* note 5 at 194-96; Epp, “Do Bills of Rights Matter,” *supra* note 3 at 777.

We test these claims with an ARIMA (1,1,1)⁷³ time-series analysis, with interventions for the three major changes occurring during the time series—the *Supreme Court Act* of 1975, which granted greater agenda control to the court; the amendment to that act in 1997, which further increased the Court’s docket control by eliminating many criminal appeals as of right; and the adoption of the *Charter*. We also model the effects of elements of the support structure and the conditional effect of changing judicial ideology.

The model indicates that after one accounts for the basic trend in the data, the effects of changes in the support structure, judicial ideology, and statutory increases in the ability of the Court to control its docket, the adoption of the *Charter* 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 12 per cent, a change that is significant at the .001 level.⁷⁴ That is, once the data have been differenced (detrended),⁷⁵ the evidence suggests that the proximate cause of a significant increase in the rights agenda of the court is the *Charter*.

Consistent with the data in Figure 1, the *Supreme Court Act* of 1975 also had a statistically significant impact on the docket, though one that was substantially smaller than the impact of the *Charter*. In contrast, the 1997 amendments did not have a significant effect on the rights agenda.⁷⁶ Docket control, however, remains an important part of the overall explanation of increases in the rights agenda because of the strong conditional effect of ideology on the size of the rights agenda. Increasing liberal preferences among the justices became an important predictor of increasing attention to rights cases only after the Court achieved discretionary control over most of its docket. As Table 1 indicates, there is a strong and statistically significant relationship between increasing liberalism on the Court and an increase in the proportion of rights cases on the Court’s docket only after the adoption of the 1975 *Supreme Court Act*, which increased the justices’ control

73. See *supra* note 66.

74. That is, there is only one chance in one thousand that the observed change in the proportion of rights cases occurred by chance or that it is due to random variation naturally occurring in the agenda of the Court.

75. “Differencing” or “de-trending” is a process to control for autocorrelation. We want to control for the dependency the value at time “t” has on time “t-1” so that we may observe the actual values.

76. Epp, “Do Bills of Rights Matter?,” *supra* note 3. 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 which Epp counts as part of the “rights agenda.”

over their docket. Before 1975, changes in the ideology of the justices appear to have had a negligible impact on the rights agenda of the Court.

The time-series analysis provides mixed support in regard to the effect of changes in the support structure. Increases in the amount of legal aid for indigent criminal defendants are associated with statistically significant increases in the number of rights cases on the docket. The magnitude of the effect of an increase of one standard deviation in the amount of legal aid funding, however, is less than half of the effect of the adoption of the *Charter*. In contrast to the support structure theory, though, increases in the number of lawyers do not appear to increase the proportion of rights cases heard by the Court.

TABLE 2: ARIMA (2,1,1) TIME-SERIES ANALYSIS OF TRENDS IN JUDICIAL REVIEW OF STATUTES 1949–2005

Variables	Coefficient Estimate	Robust Standard Error
Lagged Judicial Review Agenda	-0.250	0.209
Lagged Ideology	-0.022	0.017
Lagged Ideology*	0.093*	0.030
Docket Change 1975		
Docket Change 1975	0.017*	0.008
Docket Change 1997	0.052**	0.019
Charter Rights	0.018**	0.007
Lawyers (1000s)	-0.002	0.001
Ontario Legal Aid (\$ Million)	0.00019***	0.00005
Constant	0.00083	0.00045
Σ	0.011***	0.001
Wald Chi ²	474.85***	
Log Likelihood	167.61	

NOTES: N=55, *p<.05, **p<.01 ***p<.001 (one tailed)

We next examine changes in the Court's use of judicial review. Table 2 presents the ARIMA (2,1,1)⁷⁷ time-series analysis of the limited conception of judicial review (only counting cases in which statutes were struck down) examined by Epp. The results are quite similar to those for our analysis of changes in the rights agenda. Both the adoption of the *Charter* and the adoption of the *Supreme Court Act* in 1975, which increased the Court's discretionary control of its docket, are related to a statistically significant degree to increases in the use of judicial review

77. See *supra* note 66.

by the Court. The magnitude of the impact of these two changes appears to be quite similar. 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 ($p < .05$),⁷⁸ 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 control its agenda. Similarly, the 1997 amendments to the *Supreme Court Act*, which further increased the Court's discretion over its docket, also produced a statistically significant increase in the number of cases involving judicial review. As noted in Table 1, the impact of the increasing liberalism of the justices is conditioned upon the Court's control of its docket. Once again, the evidence for the effect of increases in the support structure is mixed. Increases in legal aid are strongly related to increases in the use of judicial review ($p < .001$),⁷⁹ but increases in the number of lawyers do not lead to similar increases.

TABLE 3: ARIMA (2,1,0) TIME-SERIES ANALYSIS OF TRENDS IN JUDICIAL REVIEW OF STATUTES & ADMINISTRATIVE ACTION 1949–2005

Variables	Coefficient Estimate	Robust Standard Error
Lagged Expanded Judicial Review Agenda	-0.175	0.157
Lagged Ideology	-0.011	0.032
Lagged Ideology*	0.034	0.063
Docket Change 1975		
Docket Change 1975	0.028	0.023
Docket Change 1997	0.134**	0.048
Charter Rights	0.069**	0.025
Lawyers (1000s)	-0.009	0.0026
Ontario Legal Aid (\$ Million)	0.00026#	0.00015
Constant	0.006	0.003
Σ	0.024***	0.002
Wald Chi ²	35.75***	
Log Likelihood	125.07	

NOTES: N=55, * $p < .05$, ** $p < .01$ *** $p < .001$, # $p = .08$ (one tailed)

78. That is, there is only one chance in twenty that the observed change in the proportion of rights cases occurred by chance or that it was due to random variation naturally occurring in the agenda of the Court.

79. See *supra* note 74.

When one examines the more inclusive conception of judicial review, the effects of the *Charter* appear to be even stronger. The ARIMA (2,1,0)⁸⁰ time-series analysis reported in Table 3 reveals that on average, adoption of the *Charter* increased the proportion of cases per year in which the Court exercised judicial review by close to 7 per cent, after one controls for the underlying trend in the data and the effects of the changes in the support structure, the ideology of the justices, and docket control. This effect of the *Charter* is significant at the .01 level.⁸¹ In this model, the statutory changes in agenda control adopted in 1997 had even larger and statistically significant effects on the frequency of the exercise of judicial review by the Court, but the effects of the 1975 changes were not significant.⁸² The principal effect of the 1997 changes was to eliminate appeals as of right brought in a number of criminal cases. Many of these cases do not raise any significant constitutional challenges to police or prosecutorial conduct. Moreover, the elimination of these appeals as of right freed up additional docket space for the Court, and it appears that the increased space was often filled with challenges to police conduct that were based on alleged *Charter* violations. So, the elimination from the Court's docket of a number of cases raising no *Charter* claims and their replacement with cases that often did raise such claims had the practical effect of increasing the proportion of cases raising significant constitutional issues.⁸³

Changes in the ideology of the justices on the Court appear to have little impact on the likelihood of exercising judicial review. Neither the direct nor

80. See *supra* note 66.

81. That is, there is only one chance in one hundred that the observed change in the proportion of judicial review cases occurred by chance or that it is due to random variation naturally occurring in the agenda of the Court.

82. Both the direct effects of the changes in docket control in 1975 and the multiplicative effect of docket control and judicial ideology failed to reach statistically significant levels.

83. The dependent variable in Table 3 is a combination of cases in which the Court declared a statute unconstitutional and those in which it struck down an administrative action. In practice, the latter occurred more frequently. Thus, the majority of cases in which the dependent variable equals "one" are those in which the Court struck down an administrative action. Virtually all of these instances of judicial review are taken because of the incompatibility of the administrative action with the *Charter*. After the Court gained greater control of its docket in 1975, Figure 2 indicates that the proportion of cases involving judicial review of a statute increased. In 1975, though, there was no *Charter* and therefore little or no chance for the Court to strike down administrative actions. Thus, the increase after 1975 in the proportion of its docket involving the expanded conception of judicial review reflected in Table 3 (*i.e.*, striking statutes and administrative actions) did not increase nearly as much as it did after the 1997 changes in docket control allowed the Court to increase both forms of judicial review.

the conditional impact of changing ideology reaches conventional standards for statistical significance. As in both of the previous models, evidence of the impact of increases in the support structure are mixed. Increases in the number of lawyers in the country did not produce any increase in the exercise of judicial review and increases in the amount of legal aid produced changes that were only marginally significant.

To better appreciate the magnitude of the changes to judicial review modeled in Table 3, one should note (see Figure 3) that prior to the adoption of the *Charter*, the Court exercised judicial review in only 1 per cent of its cases—there was not a single pre-*Charter* year in which the Court exercised judicial review in as many as 6 per cent 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 4: ARIMA (1,1,0) TIME-SERIES ANALYSIS OF TRENDS IN PROPORTION OF CASES RAISING CONSTITUTIONAL QUESTIONS ON THE AGENDA OF THE SUPREME COURT OF CANADA 1949–2005

Variables	Coefficient Estimate	Robust Standard Error
Lagged Expanded Judicial Review Agenda	-0.312	0.204
Lagged Ideology	-0.011	0.072
Lagged Ideology*	0.049	0.159
Docket Change 1975		
Docket Change 1975	0.012	0.062
Docket Change 1997	0.037	0.099
Charter Rights	0.112*	0.061
Lawyers (1000s)	-0.003	0.0057
Ontario Legal Aid (\$ Million)	0.00010	0.00048
Constant	0.001	0.009
Σ	0.059***	0.005
Wald Chi ²	17.33*	
Log Likelihood	76.94	

NOTES: N=55, *p<.05, **p<.01 ***p<.001 (one tailed)

Our final analysis involves an ARIMA (1,1,0)⁸⁴ model of the factors that impacted change over time in the proportion of cases on the Court's docket that raise constitutional questions. The results are presented in Table 4. The dramatic finding of the analysis in Table 4 is that of all of the potential influences on

84. See *supra* note 66.

agenda change on the Court, only the adoption of the *Charter* is associated with a statistically significant increase in the proportion of cases raising constitutional questions. On average, the adoption of the *Charter* increased the proportion of cases raising constitutional questions on the Court's docket by 12 per cent, a change that is significant at the .05 level.⁸⁵ Neither the direct nor the conditional effects of changing judicial ideology were significant and neither of the changes in docket control produced significantly more constitutional questions. Similarly, changes in the measures of the support structure for rights are associated with agenda changes that are small and not significant.

In summary, 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* had effects on both the rights agenda and the constitutional issues agenda of the Court, which were both large and statistically significant. Support for Epp's theory, which stated that the most important influences on these aspects of the "rights revolution" were the changes in agenda control legislated in 1975 and increases in the support structure for rights, was ambiguous at best. There was substantial indication that changes in agenda control mattered, but the effects were not consistent across the four models. Specifically, the *Supreme Court Act* of 1975 was associated with increases in rights cases on the agenda and with increases in our first measure of judicial review. Moreover, in all four of our models, the impact of the ideology of the justices on agenda change was conditional on the Court gaining control of its docket. However, increased agenda control did not appear to contribute to an increase in the most comprehensive measure of the Court's involvement in constitutional politics. Moreover, the magnitude of the direct effect of gaining docket control in 1975 appeared to be roughly only half as large as the contribution of the adoption of the *Charter*. Support for the asserted importance of changes in the support structure was mixed. Two measures of the support structure were included in the models. The first (increases in the number of lawyers) was not associated with agenda change to a statistically significant degree in any of the four models. The second measure (increasing government funding) was strongly related to agenda change in two models, only marginally related in one model, and had no statistically significant relationship in the final model.

85. See *supra* note 78.

VIII. DISCUSSION

We are reminded of an important truism that neither constitutions nor any other institutional features can bring about substantial change all by themselves. In modern, complex, and 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. When multiple actors and institutions contribute to change, there are frequently patterns of reciprocal influence. Thus, Epp's argument—the availability of adequate funding for indigents seeking to raise rights challenges and rights-oriented lawyers played a role in increasing the rights agenda pursued by the Court—is almost certainly correct.

The interactions among rights-oriented lawyers and groups, changes to the Court's agenda and judicial review, policy agendas of prime ministers, and the preferences of the justices themselves appear to be complex and multifaceted. For instance, both Brodie⁸⁶ and Manfredi⁸⁷ note the important role played by informal associations of feminist lawyers and the more formal organizational participation of the CCLA in debates over the drafting of the *Charter*. The existence of the *Charter*, in turn, provided an incentive for prime ministers interested in rights policy to consider more carefully the preferences of their judicial appointees. Additionally, once the *Charter* was adopted, the incentives were in place for the creation of additional groups to take advantage of its provisions. The most successful group litigator in the *Charter* period has been 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 this constitutional enactment.⁸⁸ Similarly, while the CCLA pushed for the adoption of the *Charter*, prior to the *Charter* it had largely attempted to influence policy through legislative lobbying. Following the adoption of the *Charter* it changed its tactics and focused its strategy on litigation for rights. Moreover, as the analysis above demonstrates, the preferences of the justices who were interested in pursuing a rights agenda had little impact until the *Supreme Court Act* of 1975 gave them greater control over their agenda. Thus, the relationship between the influence of groups, judicial preferences, changing rules on docket control, and the influence of the *Charter* on the increasing rights agenda of the Court appears to be interactive and mutually reinforcing.

86. Brodie, *supra* note 52.

87. Christopher P Manfredi, *Feminist Activism in the Supreme Court* (Vancouver: University of British Columbia Press, 2004).

88. Brodie, *supra*, note 52 at 30-31.

The current analysis demonstrates that an increasing support structure had some effect on the increasing rights agenda of the Court. The more important point of the analysis above, though, is that even after one takes into account the effects on the overall trend produced by changes in the support structure, changes in the degree of docket control possessed by the Court, and the ideology of its justices, the adoption of the *Charter* still had an independent effect that was substantively important and statistically significant. Once the data were appropriately differenced in an ARIMA time-series model, the robust and 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. In conclusion, the answer to the question, “Do bills of rights matter?” is “Yes.”

APPENDIX

Summary Statistics of Dependent and Independent Variables for Models 1–4

Variables	Mean	Standard Deviation	Min	Max
Dependent Variables				
Percentage of Combined Rights Agenda	0.355	0.192	0.094	0.765
Percentage of Judicial Review Agenda	0.018	0.020	0	0.079
Percentage of Expanded Judicial Review Agenda	0.041	0.048	0	0.145
Percentage of Constitutional Cases Agenda	0.140	0.137	0	0.460
Independent Variables				
Lagged Combined Rights Agenda	0.349	0.192	0.094	0.765
Lagged Judicial Review Agenda	0.019	0.020	0	0.079
Lagged Expanded Judicial Review Agenda	0.041	0.048	0	0.145
Lagged Constitutional Cases Agenda	0.140	0.137	0	0.460
Lagged Ideology	0.347	0.119	0.048	0.600
Lagged Ideology* Docket Change 1975	0.193	0.195	0	0.552
Docket Change 1975	0.544	0.503	0	1
Docket Change 1997	0.140	0.350	0	1
Charter Rights 1984	0.386	0.491	0	1
Lawyers (1000s)	31.840	21.534	8.800	77.200
Ontario Legal Aid (\$ Millions)	108.674	130.059	0	362.600