

# The Support Structure and Sustained Attention to Rights: A Rejoinder

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In his response, Professor Epp defends his support structure thesis claiming that it is a “*necessary* condition for sustained judicial attention to civil rights and liberties.” He criticizes us for devoting “most of [our] paper to refuting a thesis that is not mine” and for failing to “take into account the findings of research on the support structure in these countries.” Unfortunately, Professor Epp avoids offering a better explanation (or definition) of the support structure mechanism and how one would observe its effects on rights litigation. With this in mind, our rejoinder focuses on two issues: the appropriateness of our time-series analyses and the adequacy of our tests of the necessary but not sufficient condition.

## Time-Series Analyses

Professor Epp dismisses our use of error correction models to compare his support structure hypothesis against competing explanations such as ideological preferences or institutional changes. He quotes from his book that “if the support-structure explanation is correct, we should find that rights revolutions have occurred only where and when and on those issues for which material support for rights litigation—rights-advocacy organizations, supportive lawyers, and sources of financing—has developed” (Epp 1998, 23). Con-

sequently, Professor Epp claims that his is a *conditional* theory of causality rather than a *correlational* view. He then quotes from our response—“the implication of [Epp’s] *necessary condition* argument is that one should expect to observe increases in the proportion of rights cases on the agenda as the size and vitality of support structures becomes more substantial”—and claims that this statement misunderstands his argument.

Despite the claim that his is a *conditional* argument, Professor Epp repeatedly uses language and graphical representations which clearly imply a *correlational* argument. He states that “variations in the strength of the support structure help to explain variations in the judicial agenda on rights [in England]” (145). This does not suggest that a particular level or threshold must be attained in order to produce a rights revolution but rather implies a correlation in which variation in support structures affects variation in the rights agenda. Similarly, Professor Epp states that “the higher number of [Canadian] Charter cases resulted primarily from the greater availability of resources for rights litigation in the early eighties than in the early sixties” (186). This suggests that increases in litigation resources vary directly with increases in rights cases—a *correlational* argument. Finally, Professor Epp’s book<sup>1</sup> offers numerous graphs as evidence in support of his thesis. These graphs consistently depict increasing numbers of rights cases on high court agendas followed by graphs

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<sup>1</sup>Additional examples can be found in the concluding chapter, “Particularly in the United States and Canada, the support structure, once born, continued to grow, and that growth fueled the growing rights revolution in the two countries” (200). Similarly, “these resources expanded dramatically in the seventies and continued to grow in the eighties, and they supported a rising tide of rights claims by criminal defendants” (189). Additionally, “all of the main elements of the support structure... either newly emerged or grew substantially in the seventies. Those developments provided the foundation for the rights revolution: they support a steadily growing number of rights cases” (196). Finally, with regard to England, “there is a close correspondence between the level of funding for legal aid in cases in the House of Lords and the size of that court’s rights agenda” (143).

showing increasing litigation resources (such as spending on legal aid) over time. Although Professor Epp never specifically claims these upward trends between support structures and rights agendas are “correlated,” the juxtaposition of the dual sets of graphs certainly suggests this conclusion.<sup>2</sup>

Given the implied *correlation* between support structures and rights agendas, the question then is whether our error correction models are appropriate to evaluate the support structure hypothesis against competing explanations. In his response Professor Epp concedes that “time-series analysis is appropriate for testing a direct-cause thesis . . .” Had Professor Epp wished to make a *conditional* argument in his book, he should have taken additional steps to explicitly define the necessary thresholds. Doing so presumably would involve providing operational definitions indicating when a particular threshold has been reached, as well as indicating how much attention to rights (e.g., what percentage of a court’s agenda) is needed to conclude that a country has experienced a “rights revolution.” By not providing this information and by dismissing the empirical test we provide, Professor Epp side-steps the primary theoretical/operational criticism we levy against his support structure argument.

### Necessary but not Sufficient Condition

To rebut our additional claim that evidence from additional cases (Australia, the Philippines, and South Africa) refute the necessary but not sufficient condition argument, Professor Epp dismisses our evidence as “speculative and [is] contradicted by the results of several careful case studies.” Unfortunately, this claim boils down to a dispute about whose case studies and evidence are more compelling. In South Africa, Professor Epp cites Abel (1995) that foreign donors channeled large amount of

money into litigation campaigns against apartheid. The empirical data indicate, however, that only 0.5% of the rights cases contain participation by amici or interveners and only 0.7% of the cases consist of groups or associations appearing as litigants. In contrast, we cite Gibson’s (2004) case study demonstrating that the Apartheid era witnessed frequent suspensions of laws by governmental authorities and widespread lawless repression against minority groups.

Similarly, Professor Epp challenges our inclusion of the Australia and the Philippines cases based on extremely nuanced distinctions not discussed in his book. Regarding Australia he claims that we employ an “unconventional definition of rights cases which includes *all* criminal cases.” He elaborates in his online appendix that rights cases only involve criminal cases which raise “issues of due process,” although he does not justify this assertion. This is unfortunate because the conventional definition of “rights cases” involves all criminal and civil liberties issues—cases which outline the rights of individuals (beyond just due process rights) against the authority of government.

Rather than provide concrete definitions of his own central concepts, Professor Epp chooses to contest our efforts to operationalize them. This is unfortunate because the question of judicial attention to individual rights is vitally important. It is our hope that scholars will continue systematic research on how rights revolutions develop across countries and how judicial institutions fit contribute these developments.

### References

- Abel, Richard L. 1995. *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994*. New York: Routledge.
- Epp, Charles R. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago and London: The University of Chicago Press.
- Gibson, James L. 2004. “Truth, Reconciliation, and the Creation of a Human Rights Culture in South Africa.” *Law & Society Review* 38 (march): 5–40.

<sup>2</sup>For examples, see Figures 3.1, 4.1, 4.2, 8.1, 8.3, 8.4, 8.5, 8.6, 10.1, 10.4, 10.6, 10.8, 10.9, and 10.10.