

Explaining Changes to Rights Litigation: Testing a Multivariate Model in a Comparative Framework

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Why do we witness variation in the level of judicial attention to rights litigation across countries and over time? Traditional explanations emphasize the constitutional recognition of rights, judicial leadership, and the development in society of a sophisticated “support structure for legal mobilization,” as key covariates of these phenomena. Yet, there is a dearth of quantitative empirical analyses that evaluate these explanations comparatively and actually test their relative influence on trends of rights litigation and protection. Perhaps the most important lacuna in this regard is an assessment of the influence of institutional conditions and modifications in bringing about or facilitating the transformation of the rights scene. To contribute to closing this gap, this article empirically assesses the short and long term impacts of ideology, support structure, and institutional protection on changes in the presence of rights litigation in the dockets of the High Courts of several democracies with Common Law systems. To this purpose, we perform time-series analyses on data from the High Courts Judicial Database and the Spaeth U.S. Supreme Court Database. Our analyses indicate that once one properly models temporal effects, increasing support structures do not influence increases in rights litigation. Rather, specific institutional changes and ideological influences play a significant role in the High Courts’ attention to individual rights.

One of the most important and provocative questions addressed by judicial scholars involves the ability of claimants to petition courts for redress of violations to their individual rights. In resolving these petitions, courts may increasingly become exposed to political pressures, because “an acceptance of the principle that individuals or minorities have rights that can be enforced against the will of putative majorities seems very likely to increase the policy significance of those [institutions]” (Tate 1995a, 30). The extent to which courts engage in rights litigation varies substantially across countries and over time. These trends in particular, and the courts’ willingness to act as policymakers in general, has led several scholars to focus explicitly on the forces and influences leading to the “judicialization of politics” (see Tate and Vallinder 1995).

To get a sense of the importance of rights litigation and the role of courts in the judicialization of politics, one needs look no further than the U.S. Supreme Court in the midtwentieth century. During

these years, the Court abruptly shifted its focus from business litigation to individual rights; a change witnessed in its agenda, decisions, and policy outcomes (Pacelle 1991; Rosenberg 1991). This phenomenon reinforced the important policymaking role of the Court and made it a more prominent political player. Initially, the changes observed were considered to be an instance of the United States’ exceptional reliance on courts to solve political conflicts—different from other democracies that assign less overt political roles to their courts. However, additional courts in common law and civil law jurisdictions around the globe have also experienced increases in the presence of rights cases in their dockets and decisions; trends that arguably have important political consequences (Tate and Vallinder 1995). These trends are observable in transitioning democracies (see Sieder, Schjolden, and Angell 2005; Widner 2001)—where courts often fill vacuums of authority left by previous authoritarian regimes—and established democracies, where increases in rights-based rhetoric have become commonplace.

Understanding how changes in rights litigation evolve is essential to determining the development of courts as potential political actors. Consequently, the focus of the analysis below is why we have witnessed mounting rights litigation before some courts, whereas in others judicial attention to rights cases is less prominent.

Initial explanations emphasized aspects of constitutional recognition of rights, statutory expansion, and/or favorable judicial leadership as key covariates (see Fruhling 1993; Sartori 1994). However, a provocative work emerged in 1998 which challenged these initial explanations. In *The Rights Revolution*, Epp suggested that the most important explanation for these changes lay in the development of a sophisticated “support structure for legal mobilization” in society. This support structure consists of resourceful organizations capable of elevating individual rights claims to the more expensive (and less accessible) higher courts, thereby facilitating the development of successful litigation strategies to obtain judicial redress of rights petitions. After more than a decade, *The Rights Revolution*, and its central argument—that a support structure is a necessary condition for increases in rights litigation over time—remain extremely influential.

Epp’s analysis, however, does not provide systematic or statistical evidence of a relationship between support structures and increases in rights litigation on a court’s agenda, nor does it provide a discussion of the relative impact of support structures versus other potentially competing explanations. To date, there has been no explicit attempt at testing Epp’s central argument against alternative explanations in a comparative framework. This article therefore provides the first analysis of the impact of different factors which contribute to changes in rights litigation over time, with a focus on testing Epp’s claim that support structures are necessary but not sufficient conditions for rights revolutions. Using data from the High Courts Judicial Database (Haynie et al. 2007),¹ the U.S. Supreme Court Database (Spaeth 2007), and specific models designed to control for temporal influences, we demonstrate little system-

atic or statistical support for the claim that support structures are a *necessary* condition, and also demonstrate that increases in such support structures make no significant contribution to increasing rights litigation when evaluated against competing explanations.

Changes in Rights Litigation: A Yet Unanswered Puzzle

During the past decades, several countries experienced dramatic changes in terms of the number and diversity of claimants going to the courts to seek protection for constitutional rights, a trend that is often accompanied by the court’s increasing attention to guaranteeing such rights. The development of the Civil Rights movement in the United States is perhaps the most renowned example of this phenomenon, but similar extraordinary events have occurred across the world, even in unlikely places like Egypt (Moustafa 2003, 2007) and Latin America (Sieder, Schjolden, and Angell 2005). The traditional argument for understanding these events involves a top-down approach, placing emphasis on the importance of constitutional recognition of rights as a precondition for rights litigation. Additionally, institutions can provide incentives and constraints for judicial behavior, which impacts the formal establishment of rights as a method to bring about social change, especially in newly democratizing polities that seek to break from previous abuses under authoritarian regimes (see Sartori 1994; Schneier 2006). The creation of international instruments consecrating fundamental rights and devising mechanisms for their protection serves as an important example in Europe (see Stone Sweet 2000) and in parts of Africa—particularly after the passing of the African Charter of Human and Peoples’ Rights in 1986 (Widner 2001).

Another view suggests that variations of rights agenda are attributable to the judges’ sympathy to these developments. This *attitudinal* explanation is mostly associated with the U.S. Supreme Court, in which justices have the power to choose what cases they will rule on the merits (also known as *docket control*). Recent work by Baird (2006) provides convincing evidence that attitudinal preferences of the justices at time *t* have a substantial effect on the agenda of the U.S. Supreme Court three to five years later. This phenomenon is not unique to the United States—scholars have noticed similar patterns to changes in the attention brought to rights cases in

¹The specific data used for this examination come from the larger High Courts Judicial Database (HCJD), funded by two grants from the National Science Foundation: “Collaborative Research: Fitting More Pieces into the Puzzle of Judicial Behavior: a Multi-Country Database and Program of Research” (SES-9975323); and “Collaborative Research: Extending a Multi-Country Database and Program of Research” (SES-0137349) by C. Neal Tate, Donald R. Songer, Stacia Haynie, and Reginald S. Sheehan, Principal Investigators. The data are available for public download at www.cas.edu/poli/juri (University of South Carolina’s Judicial Research Initiative).

Canada (Ostberg, Wetstein, and Ducat 2002; Songer and Johnson 2007), Australia (Galligan 1991), and Egypt (Moustafa 2003; 2007).

Yet, the most extensive account of significant changes to rights litigation across disparate political scenarios was crafted by Epp in *The Rights Revolution* (1998). He argues that the source of these changes is the development over time of a sufficiently extensive and sophisticated support structure for sustained rights litigation in courts. Such structure may consist of government-sponsored and nongovernmental rights advocacy organizations and legal assistance; public interest lawyers or legal professionals specialized in creating and arguing for rights before the courts and at other policymaking venues; increasing public and private financing for bringing legal action before courts; and the support of the academic community for the development of a culture of rights and for providing lawyers with sound foundations for their arguments. According to Epp's theory, the different elements that constitute a "support structure" are an *indispensable* condition for the development of positive change in the recognition and protection of rights.

Epp's intuitive explanation relies on a qualitative assessment of four Common Law countries—examining trends in rights' agendas over time. In all four countries, despite important differences in covariates measuring alternative explanations, he finds identifiable trends in rights litigation and specific landmark decisions in each jurisdiction that corroborate his assertions. While his analysis offers a useful first step towards understanding changes in the rights agendas of Common Law courts, it does not provide a complete explanation of this phenomenon. One major limitation is that the research does not rely on rigorous statistical evidence to support the theoretical claims. Rather, Epp's conclusions are based largely on the subjective interpretations of various line graphs, connecting a limited number of data (time) points. Without an accurate empirical model, designed to measure temporal effects, it is not possible to determine whether the graphs represent substantive trends or spurious relationships. Additionally, Epp does not provide a suitable measure of support structures, and therefore it is difficult to determine whether changes in them exert a more substantive impact on the rights agenda than changes to institutional structures or shifting ideological influences. In this article we address these limitations and examine the relative impact of changing support structures versus competing influences from institutional changes and ideological influences. We also

test Epp's assertion that a well-developed support structure is a necessary but not sufficient condition for increases in rights litigation. Consequently, our examination will help determine whether Epp's bottom-up approach provides a better explanation of changing support for individual rights.

Of course, Epp recognizes (and we agree) that reciprocal influences will exist that serve to explain an increase in rights attention. He acknowledges (1998, 200–201) that interest groups and rights-oriented lawyers play a direct role to increase the rights agendas pursued by national high courts. Additionally, these groups influence each other—and national legislatures—which, in turn, has an indirect effect on the judicial branch. These combined direct and indirect influences make it difficult to assess accurately the relative importance of specific causal factors.

Furthermore, one must acknowledge that these various actors not only influence the creation of institutional protections, but are themselves created at later points precisely because of specific institutional developments. For example, several scholars note the presence of a vibrant support structure and its influence on the creation of the Charter of Rights and Freedoms in Canada (Brodie 2002; Manfredi 2004). Yet, the Women's Legal Education and Action Fund (LEAF), arguably the most successful interest group litigator in the Charter period, was not established until after the Charter's adoption; its primary mission was to take advantage of legal possibilities generated by the newly enacted Charter (Brodie 2002, 30–31). In the United States, the inclusion of language supporting gender rights in Title VII of the Civil Rights Act of 1964 was not the result of organized lobbying interests; rather, it was designed as a ploy to defeat the legislation (Deitch 1993). As Congresswoman Edith Green observed "There was not one word of testimony in regard to this amendment given before the Committee on the Judiciary of the House, or on the Committee on Education and Labor of the House, where this bill was considered....There was not one organization in the entire United States that petitioned either one of these committees to add this amendment to the bill" (Congressional Record 1964, 2582, as quoted in Deitch 1993, 185). Yet, because of the inclusion of gender in Title VII, which is the legal basis for the majority of discrimination litigation in the United States, several support groups were later established to champion the elimination of gender inequalities.

These two examples serve to illustrate the vital importance of systematic and statistical testing to

determine the precise relationships between rising support structures, institutional changes, and increases in rights agendas among national high courts. Without a direct test of these various competing explanations, scholars will only be able to speculate about how such influences may affect rights litigation.

Competing Explanations of Rights Litigation

We begin the examination by focusing on those countries that possess well-developed support structures, according to Epp (1998), in lieu of potentially competing explanations. Specifically, we test whether changes in the presence of rights cases on dockets stem from variations in support structures, as Epp argues, variations in judicial ideologies, or modifications of institutional characteristics. Theoretically, these aspects represent competing explanations for observed changes to rights litigation. The “*support structure*” argument suggests that growing resources for litigation are a necessary but not sufficient condition for changes in the docket; “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 [. . .] has developed” (Epp 1998, 23). Thus, while Epp does not argue that support structures are a *sufficient condition*, the implication of his *necessary condition* argument is that one should expect to observe increases in the proportion of rights cases on the agenda of high courts as the size and vitality of support structures becomes more substantial. Consequently, for those countries with identifiable support structures we should witness concurrent upward trends of rights litigation. This leads to the first testable hypothesis:

Support Structure Hypothesis: As support structures increase within a country, the likelihood of rights cases on the High Court’s docket is expected to increase.

The “*judicial ideology*” argument focuses on the philosophical proclivities of judges individually—and the High Court as a collective institution—to explain changes to dockets. Argued most notably in the context of the U.S. Supreme Court by Segal and Spaeth (1993, 2002), this explanation avers that more liberal judges and courts are more sensitive and receptive to arguments supporting individual rights. Thus, as we observe judicial institutions over time, we should expect to see increases in the liberalization of

courts to lead to increases in rights litigation. This leads to the second testable hypothesis:

Judicial Ideology Hypothesis: As the collective ideology of a High Court becomes more liberal, the likelihood of rights cases on the docket is expected to increase.

Finally, modifications to “*institutional characteristics*” are expected to influence the presence of rights litigation. Several scholars note that the presence of constitutional and/or statutory protections for rights are essential preconditions for successful rights litigation (see Barker 1991; Brennan and Hamlin 1994; Weingast 1993). While constitutional protections certainly provide clearer signals to judiciaries about the importance of individual rights, in several jurisdictions the institutional structure for rights protections is established by legislative statutes, executive decrees, or administrative regulations. Additionally, some institutional modifications are the result of landmark decisions rendered by high courts (such as *Brown v. Board of Education* in the United States), which often signal jurisprudential shifts by the judges. This leads to the final testable hypothesis:

Institutional Characteristics Hypothesis: As specific institutional changes occur within countries, the likelihood of rights cases on the docket is expected to increase.

Research Design and Methodology

To test these competing explanations on rights litigation and docket composition, we initially examine data from the three countries that Epp (1998) argues have well-developed support structures: the Supreme Court of Canada, the House of Lords in England, and the U.S. Supreme Court.² These countries demonstrate considerable temporal variation in terms of rights litigation, support structures, judicial ideology, and institutional characteristics. For example, according to Epp’s examination, “[p]articularly in the United States and Canada, the support structure, once born, continued to grow, and that growth fueled the rights revolution in the two countries” (1998, 200). Similarly, Epp observes that “[t]he depth of the support structure has been more attenuated in Britain, and the judicial agenda has reflected that attenuation” (200).

²After this examination, we specifically examine countries (including India) where the development of similar support structures has not occurred in order to specifically test whether a support structure is a *necessary but not sufficient* condition for a rights revolution.

Data for this analysis come from the High Courts Judicial Database, comprising the universe of published decisions from 1970 to 2005 in Canada, and from 1969 to 2006 in England. Data for the U.S. Supreme Court are taken from the Spaeth U.S. Supreme Court Database and comprise the universe of formally decided cases for the years 1946–2006.³ For each calendar year (term in the United States), we compute the percentage of cases appearing on the docket of the Court in all civil rights and liberties categories. Consequently, our dependent variable, *Rights*, is the annual proportion of rights cases on a high court's agenda.⁴

To measure the development of a rights support structure we turn to Epp, but as noted earlier one of the limitations to his analysis is the lack of a suitable measure. He claims that support for individual rights “depends on resources, and resources for rights litigation depend on a support structure of rights-advocacy lawyers, rights-advocacy organizations, and sources of financing” (18). While this claim seems intuitive initially, its inherent difficulties become apparent when one tries to operationalize a country's support structure. Epp provides little guidance as to how these indicators fit together to form a coherent support structure, nor does he seem to acknowledge the procedural differences across countries. For example, in the United States interest groups can exert tremendous influence on the Supreme Court's rights agenda—from filing and litigating test cases to submitting *amicus curiae* briefs at the *certiorari* stage. Yet, in Canada interest groups play a substantially more limited role in rights litigation. According to interviews with the Canadian Civil Liberties Association (CCLA) and the Women's Legal Education and Action Fund (LEAF), organizations do not sponsor test cases but rather join pending litigation *after* the Canadian Supreme Court grants a leave to appeal (see Songer 2008). Additionally, both Flemming (2000, 2004) and Brodie (2002) note that interest groups join cases already on the Court's docket (as interveners) rather than try to influence the outcomes of the leave to appeal process.

³For the U.S. Supreme Court we used term rather than calendar year and chose opinion as the unit of analysis. The database and its documentation are available to scholars at the University of South Carolina Judicial Research Initiative (JuRI), <http://www.cas.sc.edu/poli/juri/>.

⁴To construct the dependent variable, we follow Epp's process of conceptualizing rights cases as those involving criminal issues; traditional personal rights relating to claims of equality, privacy, freedom of expression or political participation, freedom of religion, or procedural fairness; and issues related to the rights of language groups or indigenous peoples.

Because Epp does not provide a suitable measure of support structures—that is comparable across multiple countries—to directly test his theoretical model, we rely on his qualitative thick description to derive a quantitative measure. His main argument is that support structures initially developed in the mid-1960s and then continued to grow steadily thereafter. While he does not offer an explicit determination on the rate of growth, Epp does conclude that a constant upward trend occurred.⁵ Therefore, following Epp's explanation, we derive an ordinal variable—*Support Structure*—to quantify the development of support structures in each of the three countries included in the analysis. For example, in accordance with Epp's description of U.S. support structures, our measure is set to “1” for all years prior to 1955; we code the measure as “2” for the years between 1956 and 1960, “3” for the years between 1961 and 1965, and continue this pattern across the entire time-series dataset. This operationalization reflects Epp's qualitative observations that support structures visibly grow every five years. In a similar fashion, we code this measure in England and Canada by setting the value to “0” for the years between 1970 and 1975 and then increase the measure by 1 for every five-year period thereafter. Based on our first hypothesis, if Epp's argument that support structures affect rights litigation is correct, we should expect a positive relationship between this variable and the dependent variable.

While the use of an ordinal variable may not provide an ideal measure of the growth of support structures, we believe it is the most objective way to operationalize Epp's qualitative assessment, given the explanations he provides. To test the validity of this ordinal measure we reanalyzed the data from Canada and the United States using specific indicators in place of our variable *Support Structure*.⁶ Each of the separate indicators correlates highly with our ordinal measure. For example, one alternative specification employed the *Number of Lawyers* (correlated at .98 with our measure of *Support Structure*) and a second specification relied on data concerning *Ontario Legal Aid* (correlated at .91). For the United States we included alternative specifications measuring the

⁵In addition to the qualitative description of support structures, Epp also provides line graphs depicting the growth of a variety of components of support structure for the United States, Britain, and Canada. These graphs indicate steady growth and provide further indication that the operationalization of Epp's support structure variable is most faithfully reflected in a ordinal, increasing measure (see Epp 1998, 53, 57, 143, 144, 183, 185).

⁶These alternative specifications are reported online in Appendix A: Alternative Indicators of Support Structures. This appendix is available at www.journals.cambridge.org/JOP.

number of *Women's Organizations* (correlated at .94), the number of *Women in the Legal Profession* (correlated at .89), the *Number of J.D.s* enrolled per year (correlated at .94), and the *Number of Female J.D.s* enrolled per year (correlated at .92). In none of these alternative specifications did the impact of support structures substantively change. We are therefore confident that our ordinal measure is suitable for this analysis. Not only does it correlate highly with these specific indicators, it performs similarly across several empirical tests in multiple countries.

To measure the effect of ideology on the attention to rights litigation, we include the variable *Judicial Ideology*. Since direct measures of ideology do not exist beyond the United States, such as the Martin and Quinn (2002) or Segal and Cover (1989) scores, we rely on a proxy measure for the median justice of the high court. We obtain this proxy measure by computing the annual proportion of cases decided by the high court in a liberal direction, lagged by one year. Lagging these liberalization scores by one year ($t-1$) helps avoid circularity issues when predicting judicial behavior in time t . If ideology affects the presence of rights cases on the docket a positive relationship should exist between *Judicial Ideology* and the dependent variable.

Finally, to control for the presence of institutional changes within specific countries, we create a series of dummy variables to measure certain events. For the Supreme Court of Canada, these dummy variables measure the impact of discretionary *Docket Control* (which occurred in 1975) and the *Charter* (though the Charter of Rights and Freedoms was adopted in 1982 the first case under its provisions does not appear until 1984). In England, we include a dummy variable to measure the influence of the *Human Rights Act*, which was passed in 1998. Finally, for the U.S. Supreme Court we include three dummy variables to control for the influence of *Brown v. Board of Education* (1954), *Mapp v. Ohio* (1961), and the *Civil Rights Act* (1964). Each of these dummy variables is expected to have a positive relationship with the dependent variable.

To examine the potential influences of these measures, we adopt two methodological approaches. The first replicates the approach utilized by Epp; that is, we construct simple line graphs of the trends found in rights litigation. In so doing, we improve on Epp's procedure by examining annual fluctuations in rights cases on high court dockets—Epp based his conclusions on patterns noticed over five-year collective time spans rather than yearly trends. Furthermore, since our examinations focus on time periods between 32 and 60 years, we are able to provide more complete pictures of these trends.

Our second approach relies on a more sophisticated time-series analysis to empirically ascertain both the short-term and long-term effects of the variables on the proportion of rights cases. Following the suggestion by De Boef and Keele, we estimate an error correction model (ECM) to specifically control for the dynamic effects of the covariates. As they note, "careful time series analysis is critical to the study of change and its consequences" (2008, 185). Consequently, because Epp's theoretical argument involves understanding the causes of change in rights litigation, a carefully constructed dynamic model is essential. Error correction models (ECMs) operate by examining changes to a dependent variable, which in turn is calculated by first differencing the data.⁷ Therefore, rather than examining values of the dependent variable (Y) at time t , as one would in a traditional cross-sectional analysis,⁸ the ECM examines changes in the dependent variable (ΔY).

Empirical Results

Initially, we test the possibility that influences pertaining to support structures are spurious and conclude that Epp's argument receives modest support.⁹ However, we argue that a more robust analysis is required in order to determine the precise relationships between various competing explanations. Consequently, it is necessary to test the predictive accuracy of the support structure hypothesis against any analytic leverage offered by the judicial ideology hypothesis or the institutional characteristics hypothesis. Similar to Epp's examination, we analyze each country separately.

Canada

In Canada, the support structure for legal mobilization developed vigorously over the past decades, especially after 1970 (Epp 1998). The number of rights-advocacy organizations increased dramatically after that year at the local, regional, and national levels, reflecting society's growing interest in engaging

⁷Differencing the data is an important step in removing any spurious temporal effects from trending data—thereby insuring its stationarity. Tests of our dataset reveal that the trends are the result of an AR (1) process. Consequently, first differencing the data is the appropriate approach.

⁸We also ran each analysis using a glm model with a Gaussian family and an Identity link (available in Appendix B online). The results of these models corroborate the substantive findings of the dynamic error correction models.

⁹These results are available in Appendix C online.

in litigation (180–81). As in the United States, these groups often relied on the help of lawyers who helped to articulate their claims and file cases before the court. Another important contributory factor was the government's engagement in financing legal aid programs, which have continued to grow since their rapid development. These efforts at the national level were promoted even further at the subnational level, by the provincial governments, which made substantial institutional innovations that favored rights litigation, such as legislation forbidding discriminatory practice, and creating public bodies in charge of hearing and ruling on rights claims (Epp 1998, 186). Moreover, the legal profession in Canada also witnessed tremendous changes, in terms of number of lawyers, diversity in the legal profession, and training in rights litigation and protection, a trend that also continues even today.

An examination of the change in the proportion of rights cases heard by the Canadian Supreme Court (represented in Figure 1) provides an initial assessment of the temporal trends associated with rights litigation. This figure provides preliminary evidence to support Epp's contention that Canada underwent a rights revolution. Yet, the preliminary evidence also suggests that specific institutional changes affected the Canadian Supreme Court's docket—specifically after the Court gains discretionary control of its docket, and again after the adoption of the Charter of Rights and Freedoms. Prior to the first institutional change (*Docket Control*) the proportion of rights cases on the docket never exceeded .250; since the institutional change the proportion of rights cases has never dropped below .300. Furthermore, after the adoption of the *Charter*, the Supreme Court's docket

devoted to rights litigation fluctuates around .600 and never drops below .400. Thus, while Figure 1 provides initial support for Epp's conclusions, it also provides support for the effects of institutional changes to the Canadian Supreme Court.

Examining the results of the error correction model for Canada in Table 1 corroborates the impact of institutional changes but refutes a claim that support structures significantly affect rights litigation. Examining the variables for *Support Structure* indicates that this influence possesses neither a short-term nor a long-term effect on the Court's agenda. Additionally, changes in rights cases on the docket do not seem to be affected by the ideology of the Canadian Supreme Court (the *Judicial Ideology* variables are not statistically significant). In contrast, the results indicate that possession of discretionary *Docket Control* exerts a significant long-term effect on rights litigation (an approximate increase of .165 to the Court's docket). Furthermore, the empirical evidence suggests that the adoption of the *Charter of Rights and Freedoms* has both an instantaneous and long-term influence on rights litigation. With the adoption of the *Charter* the proportion of the Court's docket devoted to rights litigation immediately increased by .159; and, over the long-term the presence of the *Charter* exerts a .211 increase to the proportion of rights cases on the docket. To better visualize a comparison between changes to the *Support Structure* in Canada versus the adoption of the *Charter* we graphed these effects and present the results in Figure 2. Examining this figure reveals a more substantial impact on rights litigation for the *Charter* than can be attributed to Epp's *Support Structure* thesis. The adoption of the Charter of Rights and Freedoms possesses a large initial spike and then resolves to a long-term equilibrium substantially higher than the influence of a support structure. Consequently, the empirical results displayed in Table 1 and the visual representation in Figure 2 offer substantial evidence to refute Epp's argument that rights litigation in Canada is affected by developments in a support structure. Rather, it is apparent from the data that institutional changes—most notably the adoption of the Charter of Rights and Freedoms—substantially affect the presence of rights cases on the Canadian Supreme Court's docket.

England

In England, the support structure evolved hesitantly and unevenly, and never to the degree of its American and Canadian counterparts. The assumption that the legislative process was the only legitimate venue to

FIGURE 1 Agenda Change on the Canadian Supreme Court

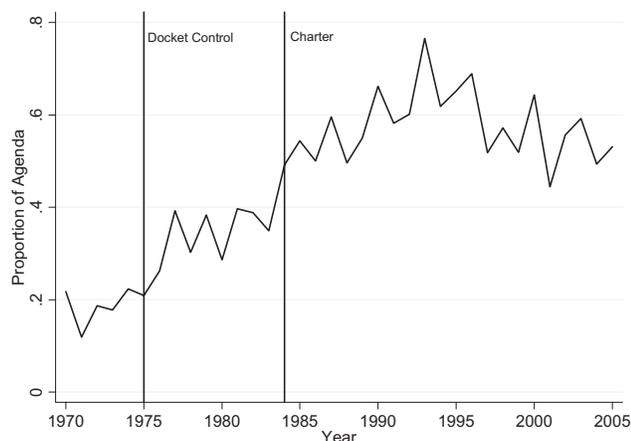


TABLE 1 Support of Rights Litigation in High Court Agendas

	Canada (1970–2005)	England (1969–2006)	United States (1946–2006)
Rights $t-1$	-.882*** (.184)	-1.132*** (.172)	-1.171*** (.136)
Δ Support Structure	.021 (.034)	-.038 (.030)	.013 (.021)
Support Structure $t-1$	-.002 (.013)	.009 (.009)	.002 (.004)
Δ Judicial Ideology	-.207 (.142)	-.153** (.073)	.202** (.077)
Judicial Ideology $t-1$	-.167 (.175)	-.234* (.115)	.216** (.086)
Δ Docket Control	-.043 (.098)	–	–
Docket Control $t-1$.165*** (.055)	–	–
Δ Charter	.159* (.086)	–	–
Charter $t-1$.211*** (.067)	–	–
Δ Human Rights Act	–	-.090 (.077)	–
Human Rights Act $t-1$	–	.048 (.044)	–
Δ <i>Brown</i>	–	–	-.059 (.062)
<i>Brown</i> $t-1$	–	–	.038 (.033)
Δ <i>Mapp</i>	–	–	-.048 (.061)
<i>Mapp</i> $t-1$	–	–	.095* (.049)
Δ Civil Rights Act	–	–	-.051 (.069)
Civil Rights Act $t-1$	–	–	.101** (.050)
N	35	36	60
F Statistic	3.84	7.18	7.30
Probability > F	.003	.000	.000
R ²	.581	.642	.626
Adjusted R ²	.430	.553	.540

*p < .10 ** p < .05 *** p < .01 (two-tailed test)

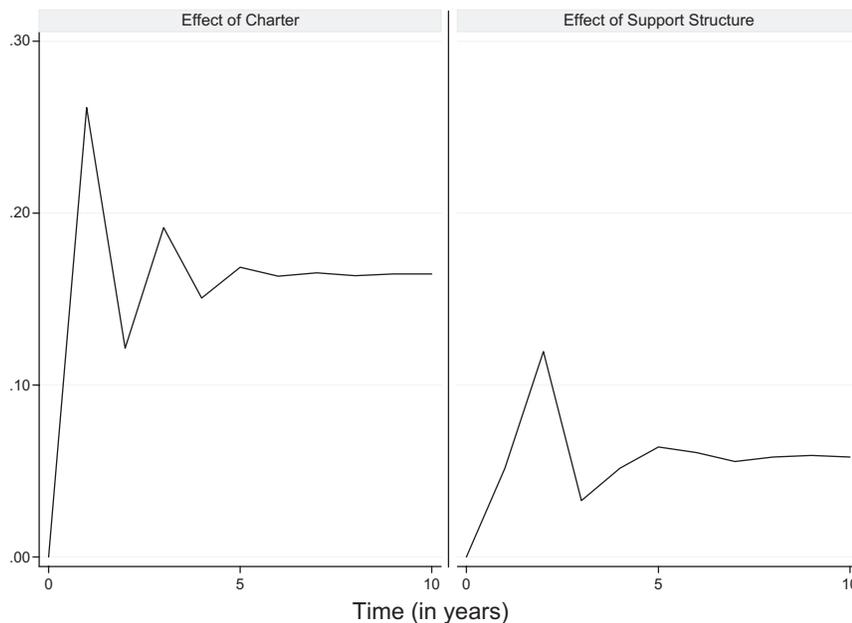
Note: The dependent variable is Δ *Rights* (i.e., changes to the rights agenda on high court dockets). Coefficients represent the results of an error correction model with the standard errors in parentheses.

define rights, and to seek their protection, impaired the expansion of a sophisticated support structure for sustained litigation of rights. Yet, England experienced the gradual development of organizations dedicated to promote and assist litigation, especially in discrimination cases and with regards to prisoner rights (see Epp 1998). The British government has also increasingly allocated legal aid, allowing for litigation at the different levels of the judiciary (see *Department of Constitutional Affairs*, 2005). On the other hand, although the legal profession has gradually witnessed an increment in the number of lawyers, and has become more diverse over time, it is also true that its structure—especially the division of labor between barristers and solicitors—generates a negative impact on the support structure. Barristers increasingly cooperate with rights advocacy groups to increase litigation, and the growing interest for human rights—especially following the passing of the 1998 Human Rights Act—suggesting that in the latter years the support structure should be increasing in size and impact. Given this relatively limited scenario, we do not expect positive trends in the proportion of rights in the docket of the House of Lords.

The initial examination of England's attention to rights litigation reflects our expectation (see Figure 3). The fluctuation in the composition of the agenda is more pronounced in England than the fluctuations observed in Canada. Yet, in spite of the substantial variation, it seems apparent that the adoption of the Human Rights Act in 1998 exerts an influence on the agenda composition. Prior to its passage, the proportion of rights cases fluctuated between .150 and .450; after its adoption, the proportion does not drop below .300. Additionally, the development of a support structure, however modest, in the 1970s, 80s, and 90s, does not seem to have any impact on the proportion of rights cases heard by the House of Lords.

An examination of the results for England in Table 1 confirms the lack of influence (i.e., no statistical significance) exerted by *Support Structure* on the proportion of rights cases in the House of Lords. In contrast, the variable *Judicial Ideology* is significant both in the short-term and long-term. However, the negative coefficient indicates that as the House of Lords increases the number of cases decided in a liberal fashion, this leads to an instantaneous decrease of .169 in the proportion of rights cases on the docket and a long-term decrease of

FIGURE 2 Long-Run Effect of Influences on the Canadian Supreme Court



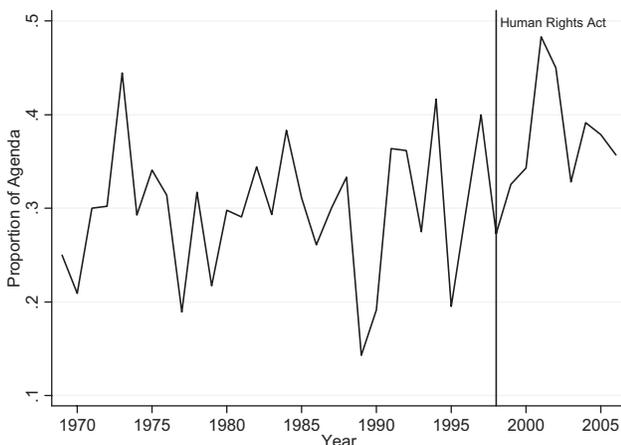
Note: The vertical axis represents changes in time (years) to the proportion of the Supreme Court’s docket devoted to rights cases following a change from 0 to 1 (for the dummy variable *Charter*) or a one standard deviation change (for the ordinal variable *Support Structure*). The lines represent both the instantaneous effect (observed in a single time period) and the long-run equilibrium effect following the particular shock to the system.

.277 to the Court’s agenda. Thus, as the English House of Lords becomes more liberal it becomes less prone to place rights cases on the docket. The evidence reported in Table 1 also indicates that the passage of the *Human Rights Act* does not exert a statistically significant effect in either the short-term or the long-term.

United States

The United States is the paradigmatic example of a country with widespread and functioning support

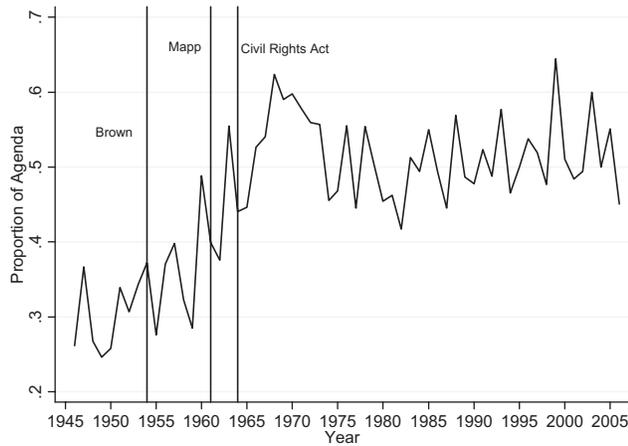
FIGURE 3 Agenda Change on the English House of Lords



structures. Rights-advocacy organizations have existed for over a century, at the regional and national level, providing litigants with resources to carry out litigation with the purpose of changing policy through the courts (such as the ACLU or the NAACP). These organizations have increased in number, complexity, sponsorship and coverage; they have developed extensive connections with the legal system as a whole, and as a result have become very influential in the legal system. *Amici curiae* are accepted, welcomed, and often encouraged by courts, and there are an impressive number of well-trained lawyers and firms eager to cooperate with them in their advocacy efforts. Scholarship and education of civil rights and liberties is widespread and goes beyond law schools, with countless centers and institutes dedicated to studying almost every imaginable issue from the angle of the fundamental rights of individuals. And, most importantly, there are economic resources for sustained litigation, provided by advocacy organizations, interest groups, philanthropic entities, and even private individuals. Finally, although this phenomenon first occurred in the early decades of the twentieth century—as Epp and others have adequately pointed out—it is important to emphasize the continued growth over time.

Figure 4 plots the proportion of rights cases heard by the U.S. Supreme Court from 1946 to

FIGURE 4 Agenda Change on the U.S. Supreme Court



2006. Three vertical lines represent separate institutional changes during the time-series: the decision by the Supreme Court in *Brown v. Board of Education* (1954), the Court’s decision in *Mapp v. Ohio* (1961), and the passage of the Civil Rights Act (1964). The change in attention to rights claimants by the U.S. Supreme Court over the last 60 years shows a distinct increase. Whereas rights cases comprised approximately .300 of the docket in the 1940s, the proportion of rights cases since 2000 is approximately .500. The increased attention to rights litigation did not occur incrementally over the 60-year time period. Rather, a closer inspection of the graph reveals substantial increases following each institutional change—with the largest increase occurring after the passage of the Civil Rights Act.

Examining the empirical results for the United States displayed in Table 1 provides little support for Epp’s argument about the influence of a *Support Structure* on rights litigation. Rather, the data indicate that *Judicial Ideology* plays a significant short-term and long-term influence on rights adjudication. As the U.S. Supreme Court becomes more liberal over time an instantaneous increase of .202 occurs to its docket, followed by a sustained, long-term increase of rights cases (approximately .216). This confirms our second hypothesis that positive increases to rights litigation are the result of ideological influences—and confirms research on the attitudinal model and its influence on the U.S. Supreme Court (Segal and Spaeth 1993, 2002), and research pertaining to the relationship between ideology and agenda change (Baird 2006). Additionally, the long-term coefficients for $Mapp_{t-1}$ and the $Civil\ Rights\ Act_{t-1}$ indicate significant institutional influences. After the Court’s

decision in *Mapp v. Ohio* the proportion of rights cases on the docket increased by .095; similarly, the adoption of the Civil Rights Act led to a corresponding increase of .101 on the Court’s agenda. To better visualize this institutional impact, we compared the effects of the Civil Rights Act to changes in the support structures (represented in Figure 5). This graph reveals a negligible impact for Epp’s argument that developing support structures in the United States facilitated rights litigation. Rather, the graph demonstrates that the passage of the Civil Rights Act in 1964 substantially influenced the long-term increases in rights litigation.

Testing a Necessary but not Sufficient Condition

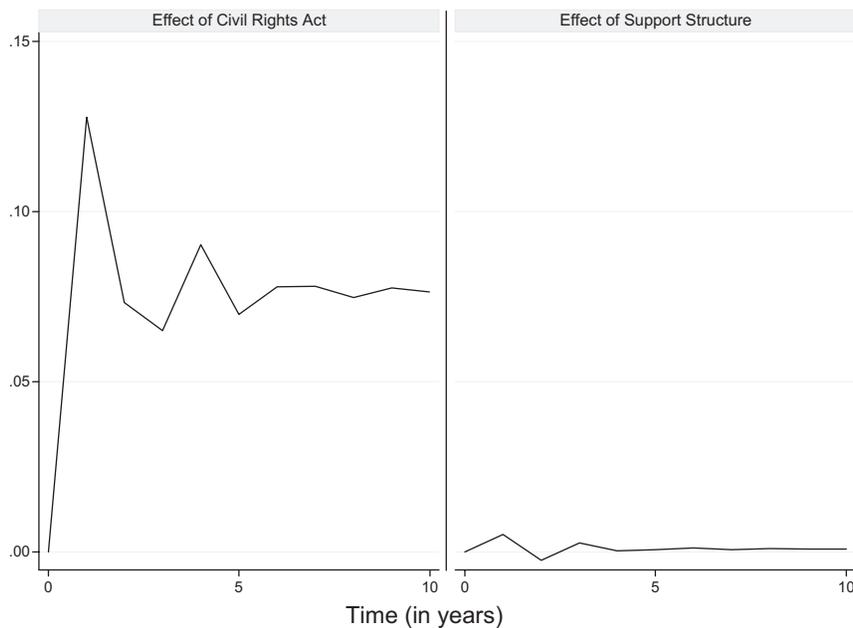
These initial results demonstrate that the impact of well-developed support structures does not significantly affect the proportion of rights cases on the agendas of High Courts. Thus, when subjected to rigorous empirical analysis, the influence of institutional and ideological factors is more prominent especially in Canada and the United States. Yet, to be fair, Epp’s argument is that the development of a support structure is a *necessary but not sufficient condition* for a rights revolution. As evidence, Epp offers India where a well-developed support network has not emerged and, as a consequence, a rights revolution has not occurred. Relying on the High Courts Judicial Database, we reexamine India using annual data on agenda change¹⁰ and confirm Epp’s conclusion that a continual decline occurs for rights litigation (see Figure 6).

Testing whether a condition is necessary but not sufficient requires alternative approaches to the empirical models we developed earlier (see Goertz and Starr 2003; King, Keohane, and Verba 1994; Ragin 1987). If we conceptualize the relationship between an independent variable (X) and a dependent variable (Y) as a 2x2 matrix we see:

		Rights Revolution	
		No	Yes
Support Structure	No	+	0
	Yes	+	+

¹⁰Recall that Epp’s original analysis only used seven temporal data points to draw general conclusions.

FIGURE 5 Long-Run Effect of Influences on the U.S. Supreme Court



Note: The vertical axis represents changes in time (years) to the proportion of the Supreme Court’s docket devoted to rights cases following a change from 0 to 1 (for the dummy variable *Civil Rights Act*) or a one standard deviation change (for the ordinal variable *Support Structure*). The lines represent both the instantaneous effect (observed in a single time period) and the long-run equilibrium effect following the particular shock to the system.

Consequently, in order to falsify a statement that X is a necessary but not sufficient condition for Y, one must identify cases in which $X = 0$ and where $Y = 1$ (Hildebrand, Laing, and Rosenthal 1976). As Braumoeller and Goertz explain, “if X is a *necessary* condition for Y, then the absence of X is *sufficient* for the absence of Y” (2003, 203). Substantively, this means that Epp’s thesis is falsified if one identifies

countries in which a well-developed support structure does not exist, but where a rights revolution occurs.

To conduct this test we examine cases from Australia, the Philippines, and South Africa. Among these three countries, the support structure in Australia arguably is the most developed. Yet, a recent analysis Galligan and Morton (2006) assessed the Australian support structure for litigation extensively, finding that such arrangement exists, but in an extremely weak form. Similarly, Goldsworthy notes that “[Australia] differs from Canada in lacking what Charles Epp has called “a support structure for legal mobilization”: a body of well-funded human rights lobby groups that use litigation to advance their objectives” (2006, 340). Pierce (2006) discovers similar evidence; the main causes for the transformation of the agenda on the Australian High Court are due to the activism of some justices combined with several institutional changes (e.g., the abolition of appeals to the Privy Council). Though the country possesses an extensive number of rights-protection organizations, both official and private, they are not technically advocacy entities like their American counterparts—they seldom engage or participate in litigation. Our examination confirms these observations. Though at first glance the percentage of cases with amici or intervener participation seems high

FIGURE 6 Agenda Change on the Indian Supreme Court

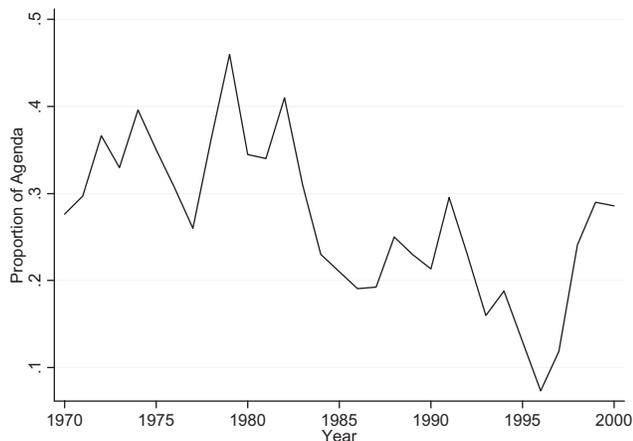
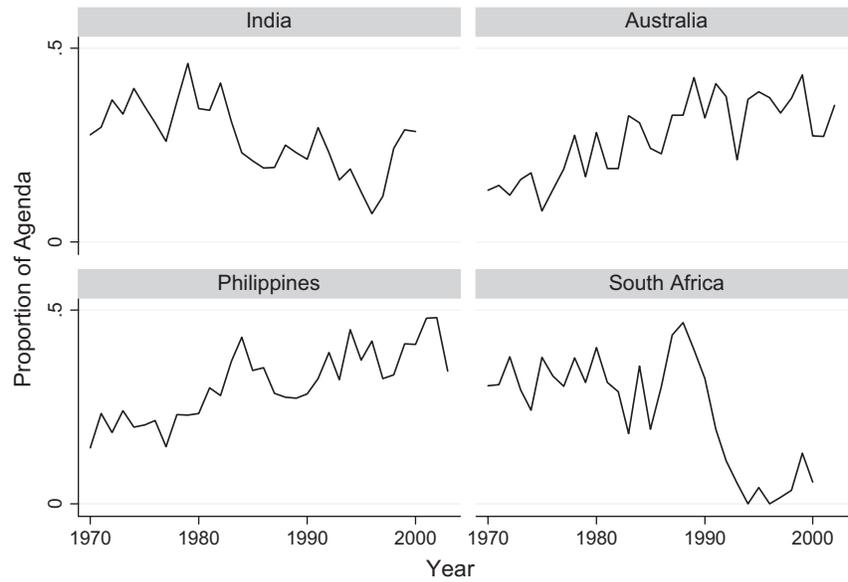


FIGURE 7 Agenda Change on Four High Courts



(19.7% of the cases) the majority of these participants are actually fellow state governments siding with the prosecution in criminal cases. Additionally, in only 0.2% of the rights cases did a group or an association appear as a formal litigant.

For a relatively poor country like the Philippines, one would expect the lack of a vibrant support structure similar to India. Previous research on the Philippines (see Haynie 1998; Tate 1995b) does not make reference to the active use of courts by various interest groups or of a well-developed and diverse bar association. Rather, explanations of judicial activity in this country are attributed to increases in the activist orientations of judges combined with weak democratic institutions and a strong constitutional protection of rights. Our own analysis confirms the notion of a weak support structure in the Philippines. Only 3% of all rights cases on the Court's docket involve the participation of amici or interveners. Additionally, in only 0.2% of the cases did groups or associations appear as litigants. Almost all rights cases were brought to the Philippine Supreme Court by individuals unaffiliated with any association and who lacked any apparent group support.¹¹

South Africa represents a country in which the development of a support structure is directly tied to

the pre and post-Apartheid era. Though the country currently offers "significant resources to aid disadvantaged litigants" (Gloppen 2005, 165), these reforms have developed in the years following the adoption of the 1996 Constitution. Arguably, these groups either were not as well developed or did not exist before 1994 during Apartheid. As Gibson (2004) acknowledges, the Apartheid era witnessed frequent suspensions of laws by governmental authorities and widespread lawless repression against minority groups. Consequently, for the vast majority of time under our analysis (1970–2000) the development of an adequate support structure was either minimal or nonexistent. An examination of the High Courts Judicial Database supports this contention—in South Africa amici or interveners appeared in only 0.5% of the rights cases and groups or associations appeared as litigants in only 0.7% of the rights cases.

Therefore, these three countries represent observations in which $X = 0$ (i.e., no support structure). Consequently, an examination of High Court agendas should reveal no increases in the proportion of rights cases litigated. That is, graphs for Australia, the Philippines, and South Africa should reveal patterns resembling the Indian Supreme Court. Yet, when we examine Figure 7 (which includes India for comparative purposes), we do not encounter similar patterns. In both Australia and the Philippines, the proportion of rights cases increases over time despite the lack of a well-developed support structure. In South Africa, the

¹¹These low percentages remain consistent when the analysis is limited to the post-Marcos period of democracy.

proportion of rights cases remains relatively constant until approximately 1989 and then declines substantially, due to the creation of the South Africa Constitutional Court (which gained jurisdiction over the majority of rights cases (see Haynie 2003)). Therefore, our test of Epp's necessary but not sufficient argument reveals that lack of well-developed support structures does not preclude the development of rights revolutions in particular countries.

Conclusions

Epp's previous work (1998) suggests that a substantial support structure for rights litigation is a necessary but not sufficient condition to bring about an increase of attention of courts to rights cases. Yet, alternative explanations have not been tested empirically against Epp's theory, thereby severely limiting our understanding of the development of rights litigation. When we subject Epp's original argument to empirical tests that include competing explanations—the influence of judicial ideology and the impact of institutional changes—the results change dramatically. Using a variety of empirical methods, including Epp's graphical approach and a dynamic error correction model, our analyses provide several important conclusions. First, it is readily apparent that no empirical support exists for Epp's support structure argument. In none of the countries analyzed (Canada, England, and the United States) did we encounter results confirming Epp's hypothesis. While we do not dispute his claim that support structures developed in these countries, we cannot agree that this development corresponds directly to increases in the proportion of rights cases before the High Courts. It is quite possible that support structures exert an *indirect influence* on the attention to rights placed by high courts. It is also plausible that the presence of support structures operate on various thresholds—once a country attains a particular level of rights attention the presence of support structures ensure that this level is maintained.

Second, when we specifically test the assertion that support structures are *necessary but not sufficient conditions* for rights revolutions the evidence does not hold up. In the three additional countries examined (Australia, the Philippines, and South Africa) well-developed support structures are absent. Yet, in two of the countries significant increases of rights cases occur, while the third country only experiences a decline in rights cases after the creation of a new judicial institution (i.e., the South African Constitutional Court).

These conclusions lead us to make a strong call for further analyses on rights revolutions. Additional research using within-country and cross-national designs are required to determine more precisely how the development of rights litigation commences. Thus, it would be interesting (and important) to look at civil law countries and see whether similar results can be found there. Increasingly, civil law countries are adopting constitutional protections of individual rights and exercising different degrees of judicial review (Stone Sweet 2000; Tate and Vallinder 1995). We believe that these features matter and that we will see similar relationships hold true in civil law countries that we see in the countries analyzed in this paper. Similarly, further analysis is needed to evaluate the development and implementation of rights cases. One of the implications of the rights revolution is the implementation and protection of rights. Though further analysis on this question is beyond the scope of the current analysis, we hope it will be taken up by researchers interested in these phenomena. Fundamentally, our analyses demonstrate the need for rigorous empirical testing of various theoretical models before conclusions are drawn—taking into account explicitly the dynamic, temporal nature of rights development.

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