

The Effect of War on the Supreme Court*

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Abstract

Does the U.S. Supreme Court curtail rights and liberties when the nation's security is under threat? In hundreds of articles and books published over the last six decades—but with particular intensity since September 11, 2001—members of the legal community have debated answers to this question. Yet, for all their analyses, not a single large-scale, empirical study exists on the subject. Using the best data available on the causes and outcomes of every civil rights and liberties case decided by the Supreme Court since 1941 and employing methods chosen and tuned especially for this problem, we attempt to fill this void.

Our analyses show that when crises threaten the nation's security, the justices are significantly more likely to curtail rights and liberties than when peace prevails. Indeed, the effect of war and other international crises is so substantial, persistent, and consistent that it may surprise even those commentators who long have argued that the Court rallies around the flag in times of crisis.

Since this basic finding aptly characterizes Court decisions throughout the latter half of the 20th century, and continues to hold today, in post-September 11th America, our study carries important policy implications. First, given the willingness of the justices to suppress rights in times of crisis, the current presidential administration ought reconsider its strategy of maneuvering around the federal courts to fight the war on terrorism. Second, given the extent to which the justices curtail rights during periods of threat to the nation's security, federal judges ought give less weight to legal principles established during wartime, and attorneys should see it as their responsibility to distinguish cases along these lines.

*Our web pages house all information necessary to replicate the empirical results in this article. For research support, we thank the National Science Foundation (SES-0112072, SES-0241369), the National Institute of Aging (P01 AG17625-01), and the Washington University School of Law (for the Israel Treiman Faculty Fellowship). For their comments on earlier drafts of this article, we are grateful to participants at workshops at Columbia University, Florida International University, Georgetown University, Harvard University, New York University, Stony Brook University, and Washington University, and to Ian Ayres, Randy Calvert, Kosuke Imai, Jack Knight, Andrew D. Martin, Kevin Quinn, Steve Smith, Harold J. Spaeth, Nancy Staudt, and Elizabeth Stuart. We also express our gratitude to William J. Dixon and Thomas G. Walker for providing the initial motivation for this project, and to Scott Hendrickson, Eric S. Howard, Shelby Johnston, Chad King, Aaron Knights, Eddie Sindaco, and Chad L. Westerland for superb research assistance. Thanks also to a group of students in King's Advanced Quantitative Research Methodology class who replicated and pushed forward our early work, including Jakob Boss, Anders Corr, Tonya Cropper, Ernani Dearaujo, Alexis Diamond, Carlos Diaz, Jose Fernandez, Michael Fortner, Michael Horowitz, Bingham Kennedy, Jacob Kline, Douglas Kriner, Paa Nunoo, Wendy Pearlman, Frank Petty, Alison Post, Philipp Schnabl, Liam Schwartz, Jared Shirck, Erin Simpson, Maya Smith, Jiyeoun Song, Elina Treyger, Vesla Weaver, Gergana Yankova, and Derek Yi.

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The Effect of War on the Supreme Court

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under circumstances. . . . When peace prevails, and the authority of government is undisputed, there is no difficulty of preserving the safeguards of liberty. . . . but if society is disturbed by civil commotion . . . these safeguards need and should receive the watchful care of those intrusted with the guardianship of the Constitution and laws.

—*Ex parte Milligan*¹

We uphold the order [to exclude those of Japanese ancestry from the West Coast war area] In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

—*Korematsu v. United States*²

I INTRODUCTION

Running through these quotes, taken from landmark U.S. Supreme Court decisions, is a common strand: In both, the justices seem to suggest that their institution ought play a different role in times of emergency and peril than when peace prevails.³ But the cases stand for fundamentally different propositions about that role. *Milligan* implies that the justices must become especially vigilant in protecting rights and liberties during “commotions;”⁴ *Korematsu* commends quite the opposite: that the justices ought be especially willing to subordinate rights and liberties when America is “threatened.”⁵ If *Korematsu* is testimony to the continued viability of Cicero’s maxim *inter arma silent leges* (“during war law is silent”),⁶ as many suggest that it is,⁷ then *Milligan*

¹71 U.S. 2, 120 (1866).

²323 U.S. 214, 219-220 (1944).

³We invoke the terms “emergency and peril,” “commotions,” and “crisis” here to signify major international events, including (but not limited to) war, that threaten the security of the nation. In Part IV we provide more precise definitions.

⁴See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003) at 1043-58 (noting that “[u]nder the Business as Usual model of emergency powers, a state of emergency does not justify a deviation from the normal legal system Thus, Justice Davis could state in *Ex Parte Milligan* that the Constitution applied equally in times of war as well as in times of peace.”) (citations omitted); Jules Lobel, *The War On Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767 (2002); (describing the *Milligan* perspective as “absolutist”).

⁵See, e.g., Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837 (1991); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L. J. 489 (1945); Charles Fairman, *Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253 (1941-1942); John P. Frank, *Ex Parte Milligan v. The Five Companies: Marital Law in Hawaii*, 44 COLUM. L. REV. 639 (1944).

⁶To be precise, Cicero’s phrase was “*silent enim leges inter arma*” (in battle, indeed, the laws are silent). CICERO, *PRO MILONE*16 (N.H. Watts trans., Harvard Univ. Press, 5th ed. 1972).

⁷Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 HAW. L. REV. 649 (1997); WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998); Martin S. Sheffer, *THE JUDICIAL DEVELOPMENT OF PRESIDENTIAL POWERS* (1999).

provides a counter punch: During war the law speaks loudly.⁸

While the Court ignored *Milligan* in its *Korematsu* decision,⁹ and subsequently has repudiated at least the “racist basis” of *Korematsu*, it has overruled neither decision;¹⁰ both, in the eyes of the justices, apparently remain valid law.¹¹ But not so in the eyes of many members of the legal community. To an overwhelming majority, the Court’s jurisprudence in times of crisis is far more in line with the dictates of *Korematsu* than with the language of *Milligan*.¹² Indeed, the belief that the Court acts to suppress rights and liberties under conditions of threat is so widely accepted today in post-September 11th America,¹³ and has been so widely accepted since the World War I period,¹⁴ that most observers no longer debate whether the Court, in fact, behaves in this way;

⁸Indeed, in 1866 the New York Times, in commenting on Ex Parte Milligan, noted that “[t]he experience of our past history showed the wisdom of the framers of the Constitution, in constructing it to be alike efficient in war as in peace.” *Washington: Special Dispatches to the New York Times*, N.Y. TIMES, Dec. 18, 1866, at 1.

⁹In fact, not once did the Court cite *Milligan* in *Korematsu*.

¹⁰Grossman, *supra* note 7. While it is true that the U.S. Supreme Court has not overruled itself, a federal district court reversed *Korematsu*’s original conviction in *Korematsu v. United States*, 584 F. Supp. 1406 (D.C. Cal, 1984). Moreover, Congress apologized for the internment of Japanese Americans and provided for reparations in the Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988) (codified at 50 U.S.C. app. §1989b-1989b-9 (2003)).

¹¹See, e.g., Edwards, *supra* note 5; David P. Currie, *The Constitution in the Supreme Court: Civil War and Reconstruction, 1865-1873*, 51 U. CHI. L. REV. 131 (1984); Dean Masaru Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, 4 ASIAN PAC. AM. L. J. 72 (1996).

¹²Some commentators simply dismiss the importance of *Milligan* altogether, arguing that it cannot be taken to stand for the proposition that the justices must become especially vigilant guardians of the Constitution during times of war because (a) the case was decided after the Civil War ended and therefore cannot shed light on how the Supreme Court acts during times of war, and (b) the case, despite its language, begs the question of how the Constitution applies in war and peace. See, e.g., See Donald A. Downs & Erik Kinnunen, *A Response to Anthony Lewis: Civil Liberties in a New Kind of War*, 2003 WIS. L. REV. 385, 394. The empirical analysis we offer in Part VII addresses both these concerns by providing an explicit and exogenous framework for distinguishing war and peace cases, as well as a transparent measurement of the causal effect of war on case outcomes.

¹³See, e.g., Floyd Abrams, *The First Amendment and the War Against Terrorism*, 5 UNIV. PENN. J. CON. L. 1 (2002); Gross *supra* note 4; Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL’Y 440 (2002); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Sanford Levinson, *What is the Constitution’s Role in Wartime: Why Free Speech and Other Rights Are Not as Safe as You Might Think* 2001, available at: <http://writ.news.findlaw.com/commentary/20011017.levinson.html> (last accessed on February 17, 2003); Anthony Lewis, *Civil Liberties in a Time of Terror*, 2003 WIS. L. REV. 257; Anthony Lewis, *Marbury v. Madison v. Ashcroft*, N.Y. TIMES, at A17, Feb. 24, 2003; Richard A. Posner, *Security Versus Civil Liberties*, ATLANTIC MONTHLY; Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273; Thomas W. Yoo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1 (2002); Judith Resnik, *Invading the Courts: We Don’t Need Military Tribunals to Sort Out the Guilty*, Legal Times, Jan. 14, 2002, at p. 34.

¹⁴Some scholars trace the idea back to Zechariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919). For a sample of supporting work published subsequent to Chafee, see, e.g., RALPH BROWN, *LOYALTY AND SECURITY* (1958); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); PAUL L. MURPHY, *THE MEANING OF FREEDOM OF SPEECH* (1972); REHNQUIST, *supra* note 7; Abrams, *supra* note 13; Thomas Church, *Conspiracy Doctrine and Speech Offenses: A Reexamination of Yates v. U.S. from the Perspective of U.S. v. Spock*, 60 CORNELL L. REV. 569 (1975); Thomas I. Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975 (1968); Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L. J. 1 (1964); Grossman, *supra* note 7; David Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1207 (1983); Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court’s Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945); Edwards, *supra* note 5; MICHAEL LINFIELD, *FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR* (1990); Roscoe Pound, *Civil Rights During and After War*, 17 TENN. L. REV. 706 (1943); Rostow, *supra* note 5; Norman Dorsen, *Here and There: Foreign Affairs and Civil Liberties*, 83 Am. J. Int’l L. 840, 840 (1989); William J. Brennan, Jr. “The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises,” (Jerusalem, Israel: Law School of Hebrew University, 1987) (available at: http://www.brennancenter.org/resources/resources_national_security.html [last accessed on February 24, 2003]);

instead, the discussions are over how this came about or whether the Court should embrace a crisis jurisprudence. As Norman Dorsen puts it:

national security has been a graveyard for civil liberties for much of our recent history. According to this view, the questions to be answered are not whether this is true—it demonstrably is—but why we have come to this pass and how we might begin to relieve the Bill of Rights of at least some of the burden thus imposed on it.¹⁵

This is a strong claim—and one strongly endorsed by a very large fraction of the analysts who have examined the relationship between Court decisions and threats to the national security. But does this claim, sometimes called the “crisis thesis,” accurately capture jurisprudence during threats to the nation’s security? Do the justices, in fact, rally around the flag, supporting curtailments of rights and liberties in wartimes that they would not during periods of peace?

We raise these questions because—despite the crisis thesis’s resilience—no one ever has rigorously assessed it: virtually all the evidence in its favor comes from anecdotes or descriptions of a few selected Court decisions, rather than from systematic analyses of a broad class of cases. Of course, determining whether a piece of conventional wisdom can withstand rigorous scrutiny is almost always a worthwhile undertaking but it is made even more so here for, while the crisis thesis enjoys widespread support, it continues to provide fodder for debate. A number of judges,¹⁶ along with a handful of commentators,¹⁷ challenge the idea in its entirety, suggesting that, in line with *Milligan*, the Court acts as a guardian, not a suppressor, of rights during times of war. Many

Zechariah Chafee, *Free Speech in the United States* (1941); Ted Finman & Stewart Macaulay, *Freedom to Dissent: The Viet Nam Protests and the Words of Public Officials*, 1966 WIS. L. REV. 632 (1966); Margaret A. Garvin, *Civil Liberties During War*, 16 CONSTIT. COMM. 691 (1999); Harry Kalven, *Ernest Freund and the First Amendment Tradition*, 40 U. CHI. L. REV. 235 (1973); IRVING HOWE & LEWIS COSER, *THE AMERICAN COMMUNIST PARTY* (1962); HAROLD L. NELSON, ED., *FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT* (1967); JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (1951); JEROME H. SKOLNICK, *THE POLITICS OF PROTEST* (1969); CLINTON L. ROSSITER, *THE SUPREME COURT AND THE COMMANDER-IN-CHIEF* 54 (1951).

¹⁵Dorsen, *supra* note 14, at 840.

¹⁶See, e.g., ABE FORTAS, *CONCERNING DISSENT AND CIVIL DISOBEDIENCE* 22 (1968) (“[i]t is the courts—the independent judiciary—which have, time and again, rebuked the legislatures and executive authorities when, under stress of war, emergency, or fear of . . . revolution, they have sought to suppress the rights of dissenters.”); *United States v. United States Dist. Court*, 444 F.2d 651, 664 (6th Cir. 1971) (noting that “[i]t is the historic role of the Judiciary to see that in periods of crisis, when the challenge to constitutional freedoms is the greatest, the Constitution of the United States remains the supreme law of our land.”); *Liversidge v. Anderson* [1942] A.C. 206, 244 (Lord Atkin, dissenting) (holding that “[i]n this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges . . . stand between the subject and any attempted encroachment on his liberty by the executive . . .”); Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002) 149 (noting that “matters of daily life constantly test judges’ ability to protect democracy, but judges meet their supreme test in situations of war and terrorism. The protection of every individual’s human rights is a much more formidable duty in times of war and terrorism than in times of peace and security . . . As a Justice of the Israeli Supreme Court, how should I view my role in protecting human rights given this situation? I must take human rights seriously during times of both peace and conflict.”).

¹⁷See, e.g., Geoffrey R. Stone, *Civil Liberties in Wartime*, 28 J. SUP. CT. HIST. 215 (2003), (stating that “it is often said that the Supreme Court will not decide a case against the government . . . during a period of national emergency In fact, however, this does not give the Court its due.”); Harold Koh, *The Spirit of the Laws*, 43 HARV. INT’L L.J. 23 (2002), 189 (noting that “[i]n the days since [September 11], I have been struck by how many Americans—and how many lawyers—seem to have concluded that, somehow, the destruction of four planes and three buildings has taken us back to a state of nature in which there are no laws or rules. In fact, over the years, we

more, though, question the breadth and depth of thesis, with one group claiming that its reach extends to all cases pertaining to rights and liberties¹⁸ and another asserting that its coverage is limited to particular types of disputes, to certain kinds of crises, or even to specific classes of litigants.¹⁹ Debate also exists over the duration of the crisis effect. Some suggest that the justices suppress rights only while a war is ongoing, while others argue that the curtailments linger well after the threat has subsided.²⁰

We understand why these debates continue, as well as why, to date, no one has attempted a large-scale systematic study aimed at addressing the many questions the crisis thesis raises. It has only been in the last decade or so that scholars have developed the high-quality data and statistical tools requisite to conduct such a study or, more to the point, to conduct it in a sophisticated and convincing fashion. But with those data and tools now in place, the time has now come to put the crisis thesis to the test.²¹

have developed an elaborate system of domestic and international laws, institutions, regimes, and decision-making procedures precisely so that they will be consulted and obeyed, not ignored, at a time like this.”); Linda Greenhouse, *Judicial Restraint: The Imperial Presidency vs. the Imperial Judiciary*, N.Y. TIMES, Sept. 8, 2002, at 3 (asserting that the judiciary has played a “restraining role” on executive authority in the war on terrorism and that “[e]ven judges whose every instinct is to defer to plausible claims of national security have recoiled”); George P. Fletcher, *War and the Constitution*, AM. PROSPECT, Jan. 1, 2002 (addressing “the fundamental question of whether the Constitution . . . is different in wartime versus peacetime” and noting that “[t]he fact of wartime does not change the meaning or scope of due process—either linguistically or historically.”). See also Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models*, 1 INTL J. CONST. L. 296 (2003); Mary Dudziak, *The Supreme Court and Racial Equality During World War II*, 1996 J. SUP. CT. HIST. 35.

¹⁸See, e.g., Emerson, *supra* note 14. See also Resnik, *supra* note 13 (noting that “in times of war, courts often do not protect against incursions on civil liberties”).

¹⁹Along these lines come the writings of Justices Brennan and Rehnquist, both of which place emphasis on the Court’s decision in *Korematsu*, 323 U.S. 214 (1944) and other cases that flow directly from the war or other emergency at hand. See Rehnquist, *supra* note 7; Brennan, *supra* note 14. For commentary suggesting that the thesis is not so much about Court treatment of alleged infringements of rights and liberties made by all types of parties but rather about deference strictly in cases when the U.S. government is a party, see, e.g., Rossiter, *supra* note 14, at 54; Edward S. Greenberg, “Will Things Ever Be the Same? The ‘War on Terrorism’ and the Transformation of American Government, in AMERICAN GOVERNMENT IN A CHANGED WORLD 23 (Dresang et al. eds., 2003); Lobel, *supra* note 4; John C. Yoo, “The Continuation of Politics by Other Means: The Original Understanding of War Powers,” 84 CALIF. L. REV. 167 (1996).

²⁰Compare Gross, *supra* note 4 and Tushnet, *supra* note 13. See also Eric Posner and Adrian Vermeule, *Accommodating Emergencies*, STAN. L. REV. (2004), forthcoming (on file with the authors).

²¹Of course, the timing could hardly be more auspicious: In the aftermath of September 11th members of legal, policy, and journalistic communities—in scores of scholarly articles and books, in numerous media reports, and in symposium after symposium—have engaged in a serious debate over the extent role of the federal judiciary in the war on terrorism. See, e.g., Barak, *supra* note 16; James E. Coleman & Barry Sullivan, *Enduring and Empowering: The Bill of Rights in the Third Millennium*, 65 L. & CONTEMP. PROBS. 1 (2002); Viet D. Dinh, *Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL’Y (2002); Gross, *supra* note ??; Heymann, *supra* note 13; Katyal & Tribe, *supra* note 13; Lobel, *supra* note 4; Yoo, *supra* note 13; THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM (Richard C. Leone & Gregory Anrig Jr. eds., 2003); Greenhouse, *supra* note 17; Lewis, *supra* note 13; Levinson, *supra* note 13; *Symposium, Civil Liberties in a Time of Terror*, 2003 WIS. L. REV. 253 (2003); *Civil Liberties in Times of War*, 28 textscJ. Sup. Ct. Hist. (2003): “Are Constitutions Necessary?,” Conference at Columbia University, 2003; “Responding to Terrorism,” Conference at the University of Pennsylvania, 2001; “Journalism and Terrorism: How the War on Terrorism Has Affected the Practice of Journalism,” Conference at the Missouri School of Journalism, 2002; “Homeland Insecurity: Civil Liberties, Repression, and Citizenship,” Conference at Smith College, 2003; “Infinite Respect, Enduring Dignity: Voices and Visions of the September Attacks,” Conference at the University of Iowa, 2002; “Terrorism and Human Rights,” Conference at the University of St. Andrews, 2003; “Justice or Just US: A Conference to Address the Erosion of Civil Liberties, American Friends Service Committee, 2003; “Civil Liberties & the War on Terrorism,” Conference at Suffolk University Law School, 2003; “At War with Civil Rights and Civil Liberties,” Conference at Florida

At the very least, this is the task we undertake in this article. Using the best data available on the causes and outcomes of every civil rights and liberties case decided by the Supreme Court since 1941 and employing methods chosen and tuned especially for this problem we explore systematically the Court’s decisions during periods when the country is in “emergency and peril” and in relative peace.²² Our findings, so that there will be no mystery about them, provide the first systematic support for the existence of a crisis jurisprudence: *The justices are, in fact, significantly more likely to curtail rights and liberties during times of war and other international threats.*²³

Since this basic result aptly captures Court decisions throughout the latter half of the 20th century, and continues to hold today, in the wake of September 11th, our study carries important policy implications. First, given the willingness of the justices to suppress rights in times of crisis, the current presidential administration ought reconsider its strategy of maneuvering around the federal courts to fight its war on terrorism.²⁴ Second, given the extent to which the justices curtail rights during periods of threat to the nation’s security, federal judges ought give less weight to legal principles established while a war is ongoing, and attorneys should see it as their responsibility to distinguish cases along these lines. This would allay the fear that a principle decided in wartime “lies about like a loaded weapon ready for the hand of any authority,”²⁵ while preserving the integrity of the judicial process during times of war.

We arrive at these implications in six steps. We begin, in Parts II and III, with the crisis thesis itself, exploring among other questions, why we might expect the Court to respond to threats to the national security by suppressing rights and what kinds of support exists for this expectation. Part IV explains the basic approach we bring to the debate, defining the concept of a “crisis” and describing the set of civil rights and liberties cases we analyze. We conduct initial investigations into the data in Part V. Since these investigations strongly suggest that simple and common technologies are unlikely to help resolve the debate over whether war and other international crises cause the justices to suppress rights and liberties, we introduce in Part VI a more sophisticated statistical methodology.²⁶ In Parts VII and VIII we deploy this method to examine empirically six

International University, 2003.

²²This investigation is in line with a strand of international relations scholarship that examines the effects of international relations on domestic politics, often termed “the second-image reversed.” See Peter Gourevitch, *The Second Image Reversed: International Sources of Domestic Politics*, 32 INT’L ORG. 881 (1978); INTERNATIONALIZATION AND DOMESTIC POLITICS (Robert O. Keohane & Helen V. Milner eds., 1996) The original three images stem from KENNETH N. WALTZ, MAN, THE STATE, AND WAR (1954).

²³This finding, as we explain in Parts VII and VIII, is robust to a host of other factors that analysts suggest affect Supreme Court decisions, such as long-term changes in legal culture, positions taken by the lower courts, public exposure of the cases, and judicial ideology. Moreover, it does not appear that well-known selection effects of litigation are driving the effect. See, e.g., George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

²⁴The most widely-publicized of these steps is Bush’s order that non-citizens suspected of terrorism appear before military tribunals. See Detention, Treatment, and Trial of Certain Non Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 Nov. 13, 2001. But this is hardly the only action the administration has taken to maneuver around the ordinary courts. We discuss others in *infra* Part IX.

²⁵*Korematsu v. United States*, 323 U.S. 214, 245-46 (1944) (Jackson, J., dissenting.)

²⁶Specifically, we introduce the statistical methodology of matching for assessing the causal effect of war. This method makes fewer assumptions than traditional regression-based models, and has been widely and successfully employed in a variety of academic fields to estimate causal inferences. See generally Paul W. Holland, *Statistics and Causal Inference*, 81 J. AM. STAT. ASSN 945 (1986); Joshua D. Angrist & Alan B. Krueger, *Empirical Strategies in Labor Economics*, in 3A HANDBOOK OF LABOR ECONOMICS 1277 (Orley Ashenfelter & David Card eds., 1999); PAUL R. ROSENBAUM, OBSERVATIONAL STUDIES (2d ed., 2002); and JEFFREY M. WOOLDRIDGE, ECONOMETRIC ANALYSIS OF CROSS SECTION AND PANEL DATA 603-44 (2002).

decades worth of Supreme Court decisions. Finally, we develop our primary implications in Part IX.

II POLITICAL AND JUDICIAL RESPONSES TO WAR

According to proponents of the crisis thesis, the Supreme Court assumes “a highly deferential attitude when called upon to review governmental actions and decisions” during times of threat to the nation’s security,²⁷ supporting curtailments of civil liberties and rights it otherwise would not. On this account, then, there are two relevant sets of responses to crises: the government’s and the Court’s. The former takes steps to curtail rights and liberties during wartimes, and the justices—to a greater extent than they would in times of peace—uphold those measures, along with others that may infringe on rights and liberties.

In what follows, we detail these responses, beginning with the political branches of government and then turning to the primary focus of our inquiry, the Court. As we demonstrate, while commentators agree that the government acts to suppress rights during periods of threat to the national security, they are in somewhat less accord over the justices’ response. In other words, the crisis thesis, as it pertains to the Court, may have the lion’s share of support but it is not without its fair share of detractors—and influential detractors at that.

A Political Responses to War

When societies confront crises, they respond in different ways.²⁸ Sometimes they use military force to attack their aggressors; sometimes they do not.²⁹ Sometimes they impose economic sanctions; sometimes they do not.³⁰ Sometimes they undertake diplomatic efforts; sometimes they do not.³¹ But, as study after study reveals, there is one response that is more universal: in times of emergency—whether arising from wars, internal rebellions, or, yes, terrorist attacks—governments tend to suppress the rights and liberties of persons living within their borders.³² Why they re-

²⁷Oren Gross, ‘Once More unto the Breach’: *The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT’L L. 437, 491 (1998) (alteration in original) (citations omitted), paraphrased in Gross, *supra* note 4, at 1034.

²⁸For a general survey of societies and warfare, see JOHN KEEGAN, A HISTORY OF WARFARE 3 (1993).

²⁹See, e.g., ROBERT GILPIN, WAR AND CHANGE IN WORLD POLITICS (1981); KALEVI J. HOLSTI, PEACE AND WAR: ARMED CONFLICTS AND INTERNATIONAL ORDER 1648-1989 (1991); Waltz, *supra* note 22.

³⁰See Daniel Drezner, *Bargaining, Enforcement, and Multilateral Sanctions: When Is Cooperation Counterproductive?*, 54 INTL ORG. 73 (2000); Lisa L. Martin, *Credibility, Costs, and Institutions: Cooperation on Economic Sanctions*, 45 WORLD POL. 406 (1993).

³¹See ANDREAS HASENCLEVER, PETER MAYER & VOLKER RITTBERGER, THEORIES OF INTERNATIONAL REGIMES (1997); ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984); ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE (3d ed., 2001); LEGALIZATION AND WORLD POLITICS (Judith L. Goldstein et al. eds., 2001); STEPHEN M. WALT, THE ORIGINS OF ALLIANCES (1987); and James Morrow, *The Forms of International Cooperation*, 48 INTL ORG. 387 (1994); SECURITY COMMUNITIES (Emanuel Adler & Michael Barnett eds., 1998).

³²See, e.g., Stone, *supra* note 17; Cecil T. Carr, *Crisis Legislation in Britain*, 40 COLUM. L. REV. 1309 (1940); Cecil T. Carr, *A Regulated Liberty: War-Time Regulations and Judicial Review in Great Britain*, 42 COLUM. L. REV. 339 (1942); Dinh, *supra* note 21; Henry J. Fletcher, *The Civilian and the War Power*, 2 MINN. L. REV. 110 (1918); Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT’L L. & FOREIGN AFF. 89 (2001); Heymann,

spond in this way may reflect their desire to present a unified front to outsiders, their perception that cleavages are “dangerous,”³³ or, of course, their belief that national security and military “necessity” must outweigh liberty interests if government is to be protected and preserved.³⁴

Whatever the reason, the United States is no exception to this rule.³⁵ Indeed, America’s history is replete with attempts, during times of “urgency,” to restrict the people’s ability to speak, publish, and organize; to erode guarantees usually afforded to the criminally accused; or to tighten restrictions on “foreigners” or perceived “enemies.”³⁶ The “ink had barely dried on the First Amendment,”³⁷ as Justice Brennan once observed, when Congress passed the Sedition Act,³⁸ which prohibited speech critical of the United States, as well the Enemy Alien Act,³⁹ which empowered the President to deport alien enemies and prohibited speech critical of the U.S. government⁴⁰ and which the government used during the French-American war and the War of 1812 to stamp out political opponents.⁴¹ In the Civil War, President Abraham Lincoln took a number of steps to suppress “treacherous” behavior, most notably by suspending habeas corpus, out of the belief

supra note 13; Karl Loewenstein, *Legislative Control of Political Extremism in European Democracies*, 38 COLUM. L. REV. 591 (1938); Herbert Marx, *The Emergency Power and Civil Liberties in Canada*, 16 MCGILL 39 (1970); Note, *Civil Liberties in Great Britain and Canada During War*, 55 HARV. L. REV. 1006 (1942); John Lord O’Brian, *Restraints Upon Individual Freedom in Times of National Emergency*, 26 CORNELL L. REV. 523 (1940-1941); Eugene Wambaugh, *War Emergency: A General View*, 30 HARV. L. REV. 663 (1916-1917).

³³As Attorney General Ashcroft told the Senate Judiciary Committee, “To those . . . who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies and pause to America’s friends. They encourage people of goodwill to remain silent in the face of evil.” “The Ashcroft Smear,” WASHINGTON POST, December 7, 2001, p. A40.

³⁴See, e.g., William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1 (2000); Emerson, *supra* note 14; Fairman, *supra* note 5; J. Edgar Hoover, *Alien Enemy Control*, 29 IOWA L. REV. 396 (1944); Jordan J. Paust, *Political Oppression in the Name of National Security: Authority, Participation, and the Necessity within Democratic Limits Test*, 9 YALE J. WORLD PUB. ORD. 178 (1982-1983).

³⁵As Alexander Hamilton presciently wrote:

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights.

THE FEDERALIST NO. 8 (Alexander Hamilton).

³⁶See Stone, *supra* note 17; Brennan, *supra* note 14; Paul G. Casell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and ‘Off Record Wars’*, 73 GEO. L.J. 931 (1985); Chafee, *supra* note 14; Frank B. Cross & Stephen B. Griffin, *A Right of Press Access to United States Military Operations*, 21 SUFFOLK U. L. REV. 989 (1987); David P. Currie, *The Constitution in the Supreme Court: The Second World War, 1941-1946*, 37 CATH. U. L. REV. 1 (1987); MICHAEL KENT CURTIS, LINCOLN, VALLANDIGHAM, AND ANTI-WAR SPEECH IN THE CIVIL WAR, 7 WM. & MARY BILL RTS. J. 105 (1998); Norman Dorsen, Introduction to OUR ENDANGERED RIGHTS xi (Norman Dorsen, ed., 1984); Emerson, *supra* note 14; *Developments in the Law, The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130 (1972); Note, *The Internal Security Act of 1950*, 51 COLUM. L. REV. 606 (1951); Murphy, *supra* note 14; Rehnquist, *supra* note 7; Rostow, *supra* note 5.

³⁷Brennan, *supra* note 14.

³⁸Sedition Act, Law of July 14, 1798, ch. 73, 1 Stat. 596 (expired 1801).

³⁹50 U.S.C. §§2124 (2000).

⁴⁰1 Stat. 570 (1798).

⁴¹See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003); J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402 (1992). In response to the Alien and Sedition Acts, James Madison asserted that “it is a universal truth the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.” HALPERN & HOFFMAN, FREEDOM VS. NATIONAL SECURITY ix (1977).

“that the nation must be able to protect itself in war against utterances which actually cause insubordination.”⁴² Prior to America’s entry into World War I, as Carl Swisher tell us,⁴³ President Woodrow Wilson “predicted a dire fate for civil liberties should we become involved. He predicted that the people would forget there was ever such a thing as tolerance . . .” With passage of the Espionage Act of 1917⁴⁴ and the Sedition Act of 1918,⁴⁵ Wilson’s “prediction,” Swisher continues, was “borne out in high degree”—with Wilson as a prime accomplice. World War II brought yet more repressive measures, including executive orders limiting the movement of and, later, interning Japanese Americans.⁴⁶ The Korean War made palpable the “menace of communism”⁴⁷ and resulted in an “epidemic of witch-hunting, paranoia, and political grandstanding” of “reds” across the country.⁴⁸ And Vietnam as well was accompanied by governmental efforts to silence war protests.⁴⁹ It is thus hardly an exaggeration to write that in the United States “the struggle between the needs of national security and political or civil liberties has been a continual one.”⁵⁰

Of course, politicians would have a difficult time enacting and implementing such curtailments on rights and liberties if those measures lacked public support.⁵¹ But that is not the case, or at least it has not been the case during crises for which we have survey data. In a general sense, the data reveal that public confidence in the President, who is often the catalyst for repressive legislation,⁵² soars in the face of international crises.⁵³ This “rally effect,” as the literature commonly calls it,⁵⁴ gave Franklin Roosevelt a 12-point increase after the Japanese attacked Pearl Harbor, John

⁴²LEE EPSTEIN & THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE* (2004), 216. Earlier during the Civil War, after Major General John Fremont for the Union Army proclaimed that all slaves for owned by Confederates in Missouri were free, the New York Times noted presciently that “the Proclamation of Gen. Fremont . . . only states the inevitable result of the rebel war . . . Inter arma silent leges.” *The War and Slavery*, N.Y. TIMES, Sept. 3, 1861, at p. 4. It is a fact of historical irony that it was Abraham Lincoln himself who then reprimanded and ultimately replaced Fremont, stating in a private letter to Fremont: “[c]an it be pretended that it is any longer the government of the U.S.—any government of Constitution and laws—wherein a General, or a President, may make permanent rules of property by proclamation?” Letter from Abraham Lincoln to Orville H. Browning (Sept. 22, 1861), in *SPEECHES AND WRITINGS 1859-1865*, at 268-69 (Don E. Fehrenbacher ed., 1989).

⁴³Carl Brent Swisher, *Civil Liberties in War Time*, 55 *POLIT. SCI. Q.* 321 (1940).

⁴⁴The Espionage Act of 1917, Act of June 15, 1917, ch 30, title I, section 3, 40 Stat 219, prohibited any attempt to “interfere with the operation or success of the military or naval forces of the United States . . . to cause insubordination . . . in the military or naval forces . . . or willfully obstruct the recruiting or enlistment service of the United States.”

⁴⁵The Sedition Act of 1918, 40 Stat 553, prohibited the uttering, printing, writing, or publishing of anything disloyal to the government, flag, or military forces of the United States.

⁴⁶*Korematsu v. United States*, 323 U.S. 214 (1944).

⁴⁷LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 331 (2002).

⁴⁸*Id.* at 331-32.

⁴⁹See Linfield, *supra* note 14, 113-56 (1990).

⁵⁰Developments in the Law, *supra* note 36, at 1133; see also Stone *supra* note 17.

⁵¹On foreign policy decisions and public opinion generally, see DOUGLAS C. FOYLE, *COUNTING THE PUBLIC IN* (1999); OLE R. HOLSTI, *PUBLIC OPINION AND AMERICAN FOREIGN POLICY* (1996); JEREL A. ROSATI, *THE POLITICS OF UNITED STATES FOREIGN POLICY* (2D ED., 1999); GORDON SILVERSTEIN, *IMBALANCE OF POWERS* (1997); RICHARD SOBEL, *THE IMPACT OF PUBLIC OPINION ON U.S. FOREIGN POLICY SINCE VIETNAM* (2001); *THE DOMESTIC SOURCES OF AMERICAN FOREIGN POLICY* (Eugene R. Wittkopf & James M. McCormick eds., 3d ed. 1999).

⁵²Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 *YALE L. J.* 1385 (1989); Murphy *supra* note 14

⁵³So, for example, the correlation between the most profound sort of international crisis—war—and this presidential rally effect is significant at the $p < .0001$ level.

⁵⁴See, e.g., Richard A. Brody, *International Crises: A Rallying Point for the President*, 6 *PUB. OPINION Q.* 41 (1984); RICHARD A. BRODY, *ASSESSING THE PRESIDENT* (1991); Samuel Kernell, *Explaining Presidential Popularity*, 72 *AM. POL. SCI. REV.* 506 (1978); JOHN E. MUELLER, *WAR, PRESIDENTS, AND PUBLIC OPINION* (1973); Lee Sigelman & Pamela Johnston Conover, *The Dynamics of Presidential Support During International Conflict*

Kennedy, a 13-point lift during the Cuban Missile Crises; and George H.W. Bush, a 14-point boost when Iraq invaded Kuwait.⁵⁵ Current President George W. Bush, too has been the beneficiary of a rally event. As Figure 1 shows, in the wake of September 11, 2001, Bush’s approval rating jumped a record-setting 35-points, from 51 percent on September 7 to 86 percent on September 14.

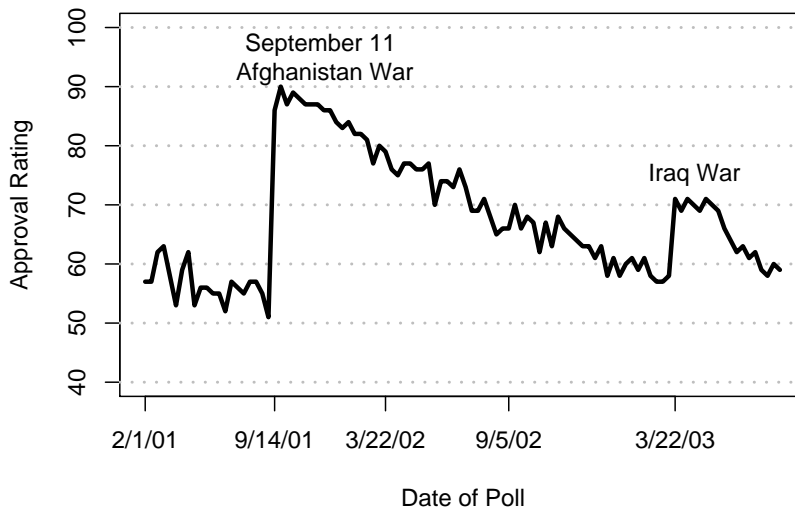


Figure 1: Percentage of Americans approving of the way George W. Bush is handling his job: The “rally effect” generated by September 11, 2001.⁵⁶

Available survey data also reveal a public supportive of specific efforts on the part of political actors to curtail rights and liberties. To take a recent example, consider Americans’ response to September 11th.⁵⁷ As Table 1 shows, all but one measure designed to furnish the government with significant authority to combat terrorism (and, at least in this case, to restrict rights and liberties) attained the support of a substantial majority of respondents.⁵⁸

Situations, 3 POLIT. BEHAVIOR 303 (1981).

⁵⁵For more on rally effects, see *infra* note 215.

⁵⁶Between February 1, 2001 and February 2, 2003, the Gallup Organization fielded 83 polls on the public’s approval of President George W. Bush. The question asked in all instances was: “Do you approve or disapprove of the way George W. Bush is handling his job as president?” We depict the percentage approving. 09/14/01 is the date of the first Gallup poll fielded after September 11, 2001. The data are available at: <http://www.gallup.com/poll/releases/pr030128b.asp> (last accessed on February 17, 2003).

⁵⁷Coleman & Sullivan, *supra* note 21, 5, for example, note that “[i]t is . . . clear that many Americans already have concluded that many of our traditional values of due process and personal liberty must yield to the dangerous realities brought home by the terrorist acts of September 11.”

⁵⁸What we do not know, of course, is whether Americans supported such measures prior to September 11, 2001. But the conclusion reached in a recent paper, which analyzed public opinion data on rights and liberties, is suggestive: “Americans are not ready to concede all of their civil liberties and personal freedoms in order to feel secure from the terrorist threat. *But a sense of threat makes for more reluctant defenders of constitutional rights across the political spectrum and among whites, Latinos, and African Americans.*” Darren W. Davis & Brian D. Silver, *Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America*, 48 AM. J. POL. SCI. 28 (2003). Moreover, evidence from other survey data specifically on racial profiling suggests that September 11 did in fact lead to a substantial rise in the willingness to curtail civil liberties. JAMES X. DEMPSEY & DAVID COLE, *TERRORISM AND THE CONSTITUTION* 168 (2d ed., 2002).

⁵⁹The number of respondents=603. The question was: “In order to reduce the threat of terrorism in the US, would you support or oppose giving law enforcement broader authority to do the following things? Would you support or oppose giving them broader authority to [INSERT EACH ITEM].” The data are from a NPR/Kaiser

Measure	Support	Oppose	Don't Know
Wiretap telephone	69	29	2
Intercept email	72	23	5
Intercept ordinary mail	57	39	4
Examine internet activity	82	15	3
Detain suspects for a week without charging them	58	38	3
Detain terrorists indefinitely without charging them	48	48	4
Examine students' education records	76	22	2
Examine telephone records	82	17	1
Examine bank records	79	20	1
Track credit card purchases	75	21	4
Examine tax records	75	24	1

Table 1: Percentage of Americans supporting and opposing anti-terrorist measures in the wake of September 11, 2001.⁵⁹

B The Court's Response to War: An Overview of Competing Perspectives

In light of the public opinion data, it should hardly come as a surprise that the U.S. Justice Department has undertaken many of the activities listed in Table 1⁶⁰ or that Congress passed and the President signed the USA Patriot Act of 2001,⁶¹ which also contains some of these very measures. Nor, for that matter, is it a surprise that legislators, with the backing of the President, proposed the Patriot Act in the first instance.⁶² Such a response to an “emergency” on the part of elected officials is hardly an anomaly, as our discussion above suggests.

But how do crises affect the U.S. Supreme Court—the apex of the one branch of government that lacks an electoral connection? While it can take years for suits connected to wars and the like to make their way to the nation's highest tribunal, does the Supreme Court nevertheless respond contemporaneously, suppressing rights and liberties in ways it otherwise might not? These questions have generated a host of answers but they generally fall under one of two rubrics: (1) the “guardian view” or the idea, following from *Milligan*, that the Court's response to war *departs* dramatically from that of the public and its elected officials and (2) the so-called “crisis thesis” or the idea, reflecting *Korematsu*, that the Court's response mirrors that of the citizenry and its leaders.

Proponents of the guardian view, as our emphasis on “departs” indicates, stress *difference*:

Family Foundation/Kennedy School of Government survey, conducted on October 31-November 12, 2001. The results are available at: http://www.npr.org/programs/specials/poll/civil_liberties/civil_liberties_static_results_4.html (last accessed on January 15, 2003). Subsequent polls show that Americans, on average, do not believe that the government's war on terrorism is impinging on their liberties. On September 25-29, 2002, for example, ABC News asked Americans whether they “personally feel that the government's anti-terrorism efforts are intruding on your civil liberties, or not?” Only 17 percent of respondents deemed the efforts a “major” or “minor” intrusion; 80 percent said they were “not an intrusion” (3 percent had no opinion). Survey results on file with the authors.

⁶⁰See, e.g., Dinh, *supra* note 21; see also *infra* Part IX.

⁶¹Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (“USA Patriot Act”) Act of 2001, Pub. L. No. 107-56 (2001).

⁶²In the aftermath of September 11, 2001 has come a large amount of commentary on the efforts of the political branches of government to suppress rights. See, e.g., Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455 (2003); Avidan Y. Cover, *A Rule Unfit for All Seasons: Monitoring Attorney-Client Communications Violates Privilege and the Sixth Amendment*, 87 CORNELL L. REV. 1233 (2002); Shiran Sinnar, *Patriotic or Unconstitutional: The Mandatory Detention of Aliens Under the USA Patriot Act*, 55 STAN. L. REV. 1419 (2003).

While the balance of American society rallies around the flag in times of crisis, the Court, on this account, breaks ranks, protecting—not curtailing—basic rights and liberties.⁶³ The justifications for this claim, as we explain in Part III, are constitutional, institutional, and behavioral in nature but a common theme centers on the design of the federal judiciary as juxtaposed against the political branches of government: Because the justices hold life-tenured positions, they are (at least theoretically) freer than elected officials to ignore a public supportive of curtailments on liberties in times of crisis.⁶⁴ In fact, by removing the Court from the whims of the electorate and their elected officials, the framers *explicitly* sought to create an institution of government that would stand above the fray and enforce the law free from overt political forces and influences. The Court, under their scheme, would be a force for legal stability; it would decide cases, not on the basis of politics, but according to the *law*:⁶⁵ the Constitution, statutes, and precedent. Navigating by these stars the justices would, again at least in theory, enforce the limitations of governmental power and “guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves.”⁶⁶

To be sure, many prominent legal scholars and jurists, from Geoffrey R. Stone,⁶⁷ to George Fletcher,⁶⁸ to Justice Abe Fortas⁶⁹ have subscribed to the view of the Court as a guardian of rights in times of war, and not as a suppressor of those very rights. But, truth be told, far more commentators, and just as influential ones at that—including important legal academics, such as Zechariah Chafee Jr.,⁷⁰ Thomas I. Emerson,⁷¹ and Sanford Levinson;⁷² social scientists, such as Edward Corwin,⁷³ Carl Brent Swisher,⁷⁴ and Joel Grossman;⁷⁵ and many federal judges⁷⁶ —

⁶³For supporting work, see *supra* note 16 and *supra* note 17.

⁶⁴We adopt some of the material in this paragraph from LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE* (1992), 2.

⁶⁵This is not to say that constitutional sources for a crisis jurisprudence fail to exist; they, in fact, do as we elaborate in Part III.

⁶⁶THE FEDERALIST NO. 78 (Alexander Hamilton).

⁶⁷Stone, *supra* note 17.

⁶⁸See Fletcher, *supra* note 17.

⁶⁹See Fortas, *supra* note 16.

⁷⁰Chafee, *supra* note 14, at 97 (writing that “it is extremely ominous for future wars that the Supreme Court at the close of the World War was so careless in safeguarding the fundamental human need of freedom of speech, so insistent in this sphere that the interests of the government should be secured at all costs . . . Sweeping judicial interpretations . . . will be constantly cited as precedents for punishing expression of opinion”).

⁷¹Emerson, *supra* note 14.

⁷²Levinson, *supra* note 13.

⁷³EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 177 (1947) (noting that “in total war the Court necessarily loses some part of its normal freedom of decision and becomes assimilated like the rest of society, to the mechanism of the national defense. Sometimes it is able to put on a stately parade of judicial clichés to a predetermined destination, but ordinarily the best it can do is pare down its commitments to a minimum in the hope of gaining its lost freedom in quieter times”).

⁷⁴Swisher, *supra* note 43, at 330 (asserting that “On the whole [Court] decisions exercised little restraint upon administrative authority. It is apparent that they were swayed by the same hysteria which tended to obliterate the concern of other departments of the government for the preservation of liberties”).

⁷⁵Grossman, *supra* note 7, at 649 (claiming that “Notwithstanding the worldwide emergence of constitutions and constitutionalism, the proliferation of constitutional courts with powers of judicial review, and the spread of the rights revolution and concerns for international human rights, rights are always at risk in wartime and other national security crises”).

⁷⁶See, e.g., Judge Harry T. Edwards, *supra* note 5, at 844, (writing that “Though it is perhaps the most graphic example of crisis-driven decision making and its results, *Korematsu* does not stand alone. That the judiciary [does] not act decisively to protect First Amendment freedoms during [times of crisis] . . . represents a failure of significant

advance what we and others label the “crisis thesis.” Whether writing in early 1900s,⁷⁷ the early 2000s,⁷⁸ or eras in between,⁷⁹ they argue that when the nation’s security is under threat, the Court adopts a jurisprudential stance that leads it to curtail rights and liberties it otherwise would not. To crisis thesis supporters it may be true that the Court occasionally has uttered words to the effect that “the phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit” and that “the war power does not remove constitutional limitations safeguarding essential liberties.”⁸⁰ But those utterances, commentators point out, typically have come in disputes that did not involve a crisis or in those decided after the emergency had subsided. When war is present, proponents of the crisis thesis assert, the Court’s response is the same as the rest of American society: It too endorses the efforts of elected officials to suppress rights; and does *not* “guard” the Constitution.⁸¹

With this general argument—the crisis thesis—Chafee, Emerson, Levinson, Corwin, and the others would take little issue. Where variation exists among members of this group is over the reach of the thesis, as well as over the duration of its effect. Certainly there are some who assert that its reach is long and wide: that in times of national emergency, the Court clamps down on *all rights and liberties*, whether related to the crisis or not. Thomas Emerson’s *The System of Freedom of Expression* provides one example. In this now-classic work, Emerson maps the effect of various wars and other national emergencies on the Court’s jurisprudence in a range of legal areas—some of which are directly connected to the particular emergency (such as internal security and the rights of conscientious objectors) and some of which seem less so (such as privacy and religious liberty).⁸² What Emerson’s analysis demonstrates is that even if a particular case is not related directly to the on-going crisis, the effect of that crisis may spill over to the otherwise “ordinary” dispute. Or, as Gross, writing about the current war against terrorism, puts it, “when judges decide ‘ordinary’ criminal cases, they will take into consideration the impact of their rulings on the fight against terrorism.”⁸³ Others, however, suggest that the crisis thesis’s reach is far more circumscribed. To

proportions. Its reverberations echo for years, in the lives of those directly affected and in the distorted and disjointed development of First Amendment doctrine.”). Even jurists who disagree over nearly all other matters of law agree on the existence of a crisis jurisprudence. Consider, for example, Chief Justice William H. Rehnquist and Justice William J. Brennan. Between the 1971 and 1985 terms, then-Justice Rehnquist and Justice Brennan voted together in only 36.3 percent of 435 cases involving matters of criminal procedure. With no other Justice did Brennan so often disagree; only with Thurgood Marshall (33.6 percent) did Rehnquist conflict more frequently than he did with Brennan. Data available in LEE EPSTEIN, ET AL., *THE SUPREME COURT COMPENDIUM* (2003), Table 6-6. Yet Rehnquist and Brennan agreed on the existence of crisis jurisprudence. As Rehnquist has written: “There is some truth to the maxim *inter arma silent leges* . . . Is this reluctance a necessary evil—necessary because judges, like other citizens, do not wish to hinder a nation’s ‘war effort’—or is it actually a desirable phenomenon?” Rehnquist, *supra* note 7, at 221-222. Similarly, Brennan has noted that “[w]hen I think of the progress we have made over the last thirty years, I look upon our system of civil liberties with some satisfaction, and a certain pride. There is considerably less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to its national security.” Brennan, *supra* note 14 .

⁷⁷See, e.g., Chafee, *supra* note 14.

⁷⁸The literature on the courts and civil liberties in the wake of September 11, 2001 is voluminous. For examples, see *supra* note 13 and note *supra* note 21.

⁷⁹For examples, see *supra* note 14.

⁸⁰*United States v. Robel*, 389 U.S. 258, 263 (1967).

⁸¹See Lewis, *supra* note 13, 270 (asserting that “[t]hrough much of U.S. history, in times of war and tension, the courts have bent to claims of presidential power”).

⁸²Emerson, *supra* note 14; see also Resnik, *supra* note 14.

⁸³Gross, *supra* note 4, at 1095 (our emphasis).

these commentators, only in especially salient disputes (such as *Korematsu*), in particular classes of cases (such as those raising questions about constitutional criminal procedure or about the rights of conscientious objectors, aliens, and war protestors) or in litigation to which the U.S. government is a party do we observe the Court engage in a crisis jurisprudence.⁸⁴ Debate also exists over duration of the effect of wars and other threats to the nation’s security, with one school asserting that the justices suppress rights only while a war is ongoing, and a second, claiming that the curtailments endure and may even grow in intensity over time.⁸⁵

III WHY MIGHT THE COURT SUPPRESS RIGHTS DURING TIMES OF WAR? THEORETICAL AND EMPIRICAL SUPPORT FOR THE CRISIS THESIS

Surely the empirical implications of these different interpretations of the duration and scope of the crisis thesis deserve further attention, and we devote many pages to them in Parts V, VII, and VIII. For now, though, it is equally worthy of emphasis that these differences do not depart from thesis’s core proposition; namely, that the Court adopts a distinctly more repressive posture towards rights and liberties in times of emergency. It is this general proposition, rather than the competing view of the Court as a “guardian of rights,” that the vast majority of commentators advance.

If these advocates of the crisis thesis are correct, then their analyses bring into relief a question of no small consequence: Why might the Court exhibit a crisis jurisprudence, curtailing rights and liberties during times of crisis? Proponents of the thesis offer three general sets of explanations—causal mechanisms, really, that trigger the Court to suppress rights: constitutional, institutional, and behavioral. Though they are by no means mutually exclusive, each merits consideration. Accordingly, we take them up (along with competing perspectives offered by detractors of the thesis) in Parts III A, B, and C.

We also examine, in Part III D, the empirical basis on which the three sets of explanations and, more generally, the crisis thesis itself rests. What our investigation into these matters reveals is that, even though the vast majority of studies have validated some version of crisis thesis, the support any one offers is rather unconvincing.

A Constitutional Mechanisms

In a recent article, Eric Posner and Adrian Vermeule write, “there are two main views about the proper role of the Constitution during national emergencies . . . The ‘accommodation’ view is that Constitution should be relaxed or suspended during an emergency . . . [The ‘strict’ view] is that constitutional rules are not, and should not be, relaxed during an emergency.”⁸⁶ Posner and Vermeule go on to contend:

As a practical matter, the difference between the two views will be reflected in the aggressiveness of the courts. Under the first view, the courts will defer to emergency

⁸⁴See *supra* note 19.

⁸⁵For a review of this debate, see Posner and Vermeule, *supra* note 20.

⁸⁶Posner and Vermeule, *supra* note 20, at 1-2.

policy once they determine that an emergency exists . . . Under the second view, courts may permit many emergency measures, but only after subjecting them to review, and courts are likely to strike down many emergency measures as well. *The first view has generally been adopted by American courts during emergencies; the second view is the favored position among civil libertarians and law professors.*⁸⁷

Surely supporters of the crisis thesis would agree with Posner and Vermeule. To them, as we detail below, the justices have made a series of doctrinal moves in the areas of *war powers* (and foreign affairs, more generally) and *civil rights and liberties* that enable them to relax constitutional guarantees, such that, in line with the thesis, they almost always repress rights (or “accommodate” the interests of government) during wartime.

1 War Powers and Foreign Affairs

For supporters of the crisis thesis, the war powers of the elected branches of government constitute an obvious starting point for the analysis of the Court’s response to emergencies. What these commentators maintain is that the justices, while never fully and explicitly endorsing the maxim *inter arma silent leges*,⁸⁸ have more than occasionally read the Constitution to demand judicial deference to the executive and legislature during times of international crisis.⁸⁹ Such a “reading”—or what some term the war powers doctrine—follows, so the argument goes, from the Constitution’s explicit grant of emergency powers to the executive⁹⁰ and the legislature,⁹¹ and its silence with regard to the judiciary.⁹² It also follows, some assert, from the fact that the elected

⁸⁷Id., at 2 (our emphasis).

⁸⁸Indeed, *Ex parte Milligan*, 71 U.S. 2, 121 (1866) asserts that “No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of (the Constitutions) provisions can be suspended during any of the great exigencies of government.”

⁸⁹See Downs & Kinnunen, *supra* note 12, at 390 (noting that “[t]he provisions relating to the war powers of the executive and legislative branches and a long line of Supreme Court precedents indicate that the government possesses greater power in times of war than in times of peace, and that the concomitant balance between the liberty and security may properly shift”); Posner, *supra* note 13, at 46. (describing the balancing process of liberty and security interests); Stephen G. Breyer, *Liberty, Security, and the Courts*, Speech to the Association of the Bar of the City of New York (April 14, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_04-15-03.html (noting that the liberty interests must be balanced with government responses to threats and crises).

⁹⁰Specifically, the Constitution provides that “[t]he executive Power shall be vested in a President,” U.S. CONST. art. II, §1, cl. 1, that the President “shall be Commander in Chief of the Army and Navy,” U.S. CONST. art. II, §2, cl. 1, and that the President shall “take Care that the Laws be faithfully executed.” U.S. CONST. art. II, §3.

⁹¹See, e.g., U.S. CONST. art. I, §8, cl. 1 (providing to Congress the power to “provide for the common Defence”); U.S. CONST. art. I, §8, cl. 14 (giving Congress the power to “provide for calling forth the militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”); U.S. CONST. art. I, §8, cl. 15 (providing Congress the power to suspend the writ of habeas corpus “when in cases of rebellion or invasion the public safety may require it”); U.S. CONST. art. I, §8, cl. 10 (providing Congress the power to “define and punish Piracies and Felonies committed on the High Seas, and Offences against the Law of Nations”); U.S. CONST. art. I, §8, cl. 11 (providing Congress the power to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”); U.S. CONST. art. I, §8, cl. 12 (providing Congress the power to raise and support Armies); U.S. CONST. art. I, §8, cl. 13 (providing Congress the power to “provide and maintain a Navy”); U.S. CONST. art. I, §8, cl. 14 (providing Congress the power to “make Rules for the Government and Regulation of the land and naval Forces”); and U.S. CONST. art. I, §8, cl. 18 (providing Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).

⁹²See, e.g., *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) in which the Court held that:

branches, not the courts, are best equipped to cope with international emergencies. If the Court failed to recognize this fact, if it failed to treat the Constitution as a flexible document⁹³—one that grants leniency to Congress and the President in times of war—then it would be in danger of reading the document as “a suicide pact.” Not only have the justices rejected this notion on more than one occasion;⁹⁴ they also have explicitly endorsed its converse: “The war power of the national government is ‘the power to wage war successfully.’”⁹⁵

While not necessarily denying the merits of this argument, adherents of the guardian view of the Constitution bring a different interpretation to it, emphasizing the role the Court has played in *allocating* war powers under the constitutional separation of powers and not simply in *deferring*

Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

See also *Hamdi v. Rumsfeld*, 316 F.3d 450, 463 (4th Cir. 2003) (“Article III contains nothing analogous to the specific powers of war so carefully enumerated in Articles I and II.”).

⁹³This notion of a flexible Constitution may be traced to Justice John Marshall’s observation that “it is a constitution we are expounding . . . intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819). See also BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 81-97, 81, 85-86 (1921) (discussing the “fluid and dynamic conception which underlies the modern notion of liberty” and noting the case of *American Coal Mining Co. v. Special Coal & Food Com.*, 268 F. 563 (D.I.N. 1920) for finding that regulatory power can be derived from the emergency of war); Tushnet, *Defending Korematsu*, *supra* note 5, at 281-82 (distinguishing between balancing and categorical approaches towards interpreting civil liberties); STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM*, 27-58 (1996) (discussing notions of constitutional change and endorsing the definition of the Constitution as “a text-based institutional practice in which authoritative interpreters can create new constitutional norms” (quoting Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 *COLUM. L. REV.* 1045 (1977))); PAUL W. KAHN, *LEGITIMACY AND HISTORY* 65-96 (1992) (discussing the reaction of constitutional theory to curtailments of rights during the Civil War and the shift towards an evolutionary model of the Constitution); Breyer, *supra* note 89 (noting that jurisprudence in times of crisis is characterized by an “equilibrium that is right in principle” and “will yield flexibility in practice”).

⁹⁴Contrary to the Kantian notion of *fiat iustitia ruat caelum* (“let justice be done though the heavens fall”), as Justice Jackson noted “the Constitution is not a suicide pact;” *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). Along similar lines, the Court often invokes the dictum that the power to wage war is “the power to wage war successfully,” 320 U.S. 81 (1943), at 93, in deference to the government not only strictly in areas of military judgment (see Griffin, *supra* note 93, at 60 (1996) (noting that “[t]he recurrence of serious constitutional problems each time the United States fights a major war is a dramatic example of the difference between providing a constitutional framework of government powers and building competent government institutions. While there is no doubt that the Constitution gave the federal government the power to wage war, the mere provision of constitutional powers did not guarantee that the government would be able to use those powers effectively.”)) such as the establishment of military tribunals (*Ex Parte Quirin*, 317 U.S. 1, 28-29 (1942) (noting that “[a]n important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war”), but also broad forms of general regulation that are seen to be relevant, however peripherally, to the war effort (*Woods v. Clayd W. Miller Co.*, 333 U.S. 138 (1948) (finding the war power extended to a wide range of economic regulation). Consider also President Lincoln famous words: “Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?” Message from Abraham Lincoln to Congress in Special Session (July 4, 1861), in 4 *THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1809-1865*, at 426 (Roy Basler ed., 1953).

⁹⁵*Hirabayashi v. United States*, 320 U.S. 81, 93 (1943).

to the government.⁹⁶ In support, they often point to *Youngstown Sheet & Tube Co. v. Sawyer*,⁹⁷ in which the Court considered the constitutionality of President Truman’s seizure of the steel mills during the Korean War. Truman claimed that the seizure was necessary to avert a strike that would “jeopardize our national defense,”⁹⁸ and turned both to the inherent constitutional powers of the executive and those incident to the President’s role as Commander in Chief for legal justification.⁹⁹ Yet quite to the contrary of exhibiting deference to the assertion of military power, the Court found the seizure unconstitutional on either theory, asserting that it constituted an act of law-making power vested in “Congress alone in *both good and bad times*.”¹⁰⁰

In *Youngstown*, then, the Court saw it as its duty to delineate the boundaries of the “zone of twilight in which [the president] and Congress may have concurrent authority, or in which its distribution is uncertain.”¹⁰¹ When the Court undertakes this duty, supporters of the guardian view of the Constitution are quick to note, the prediction of the crisis thesis of extreme judicial deference becomes far weaker. For, despite its lack of a specific constitutional role in war making, the Court’s responsibility in times of crises precisely is to ensure that the government’s use of its war powers follows constitutional principles—a responsibility, as *Youngstown* amply demonstrates, that hardly leads to universal deference.

In response, proponents of the crisis thesis claim that *Youngstown* is an exception to a long string of cases in which the Court in fact has deferred to the President. Some, such as *Korematsu*, pertain directly to the war effort but others have extended into the larger realm of foreign affairs.¹⁰² Along these lines, commentators identify several exemplars but *United States v. Curtiss-Wright*

⁹⁶See, e.g., *Reid v. Covert*, 354 U.S. 1, 40 (1957) (“We should not break faith with this nation’s tradition of keeping military authority subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution.”).

⁹⁷*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁹⁸*Id.* at 583. The connection between steel production, national defense, and the ongoing Korean War are more explicitly spelled out in the preamble of Truman’s Executive Order 10233, 16 Fed. Reg. 3503, authorizing the Secretary of Commerce to seize the steel plants. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589-91 (1952) (noting that “the weapons and other materials needed by our armed forces and by those joined with us in the defense of the free world are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and materials” and that “a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field.”).

⁹⁹*Id.* at 583, 587.

¹⁰⁰*Id.* at 587-89 (emphasis added). Similarly, Justice Douglas warned that the Court could not “expand[] Article II of the Constitution” by “rewriting it to suit the political conveniences of the present emergency.” *Id.* at 632.

¹⁰¹*Id.* at 637. Specifically, in *Youngstown*, Justice Jackson’s concurrence sought to establish a tripartite scheme for review of presidential acts conditional on congressional action and, in the case of inaction, intent. Jackson posited that (a) “[w]hen the President acts pursuant to an express or implied authorization of Congress,” the “widest latitude of judicial interpretation” applies, *id.* at 636; (b) “[w]hen the President acts in absence of either a congressional grant or denial of authority . . . any actual test of power is likely to depend on the imperatives of events and contemporary imponderables,” *id.* at 637; and (c) “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution,” *id.* at 637-38. (1952).

¹⁰²See THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 58 (1992) (noting that “the midst of military hostilities [is] the one circumstance in which some form of judicial reticence might seem warranted”); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* (1990) (arguing for more judicial intervention in foreign affairs); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* (1990).

*Export Corp.*¹⁰³ figures into many of these accounts. In that case, the Court upheld President Roosevelt’s arms ban, stressing in well-known dictum the “very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”¹⁰⁴ Since the conduct of warfare falls within this field, supporters of the crisis thesis argue, the Court should be willing to endorse repressive governmental actions occurring during times of war (that it otherwise would disapprove) on the grounds that such actions are within the executive’s “plenary and exclusive power.”¹⁰⁵ The justices could achieve this end by laying out a rationale, as they did in *Curtiss-Wright* or by turning to the political question doctrine.¹⁰⁶ Under this doctrine, which the Court has more than occasionally invoked in the general area of foreign affairs, a finding of a “lack of judicially discoverable and manageable standards” would lead to much the same result—general deference to the President.¹⁰⁷

2 Civil Rights and Liberties

In addition to the war powers doctrine, many commentators aver that the Court’s approach to civil rights and liberties during periods of war contributes to a crisis jurisprudence. Those advocating this view note that the Constitution explicitly allows Congress to suspend the writ of habeas corpus in time of invasion or rebellion when “the public Safety may require it,”¹⁰⁸ and surely the concern for public safety arises in a time of war. But, even when the writ is not at issue, some analysts say that the Court has read the Constitution as commending one of two approaches to rights and liberties in times of war—both of which would lead it to endorse government efforts to suppress those very rights and liberties. First, the justices simply might “defer to emergency policy once they determine that an emergency exists;”¹⁰⁹ in other words, the government would need not justify its policy with reference to any interest, compelling or otherwise. Second, even if the justices invoke one of their many standards of review—standards that would require some justification on the government’s part—they could read virtually any one, in virtually all areas of

¹⁰³299 U.S. 304 (1936).

¹⁰⁴*Id.* at 320.

¹⁰⁵Strict view adherents take issue with such bold claims about general judicial deference in the realm of foreign affairs. Henkin best summarizes this sentiment when he writes that: “‘There is a zone of twilight in which [the president] and Congress may have concurrent authority, or in which its distribution is uncertain.’ Important foreign affairs powers lie in that twilight zone. Indeed, in few other respects is our constitutional system as troubled by uncertainty in principle and by conflict in practice between Congress and the president. The effect is to raise intractable issues of constitutional jurisprudence and constitutional politics.” Louis Henkin, *Foreign Affairs and the Constitution*, 1987 FOREIGN AFF. 284 (1987) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)). Given these “intractable” issues of constitutional interpretation, it is not clear that the Court always should or, more to the point, always does defer to the executive or legislature.

¹⁰⁶On the political question doctrine, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 96-107 (2d ed., 1988).

¹⁰⁷*Baker v. Carr*, 369 U.S. 186, 217 (1962). Under the analysis in *Baker*, factors that might indicate that a case involving international relations should fall under the political question doctrine include: (a) a “question decided, or to be decided, by a political branch of government coequal with this Court,” namely the legislature and/or executive; and (b) the “risk [of] embarrassment of [the] government abroad or grave disturbance at home.” *Id.* at 226.

¹⁰⁸The justification for suspension of habeas corpus may for example be based on the need to maintain public safety in a time of “rebellion” or “invasion.” U.S. CONST. art. I, §9, cl. 2 (providing that the “writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety shall requires it”). See Tushnet, *supra* note 13, at 301.

¹⁰⁹Posner and Vermeule, *supra* note 20, at 2

rights and liberties, to favor security, rather than liberty, interests, in times of war.¹¹⁰ Take, for example the case of equal protection. In *Korematsu*, the Court justified curtailments based on a racial classification as a “pressing public necessity” of the military power to prevent espionage and sabotage.¹¹¹ Under modern equal protection doctrine, it could do much the same by holding “national security” as an interest sufficiently compelling to justify discrimination against “enemy” groups.

Equal protection is hardly the only example to which proponents of the crisis thesis point. The standard for what constitutes a reasonable search and seizure under the Fourth Amendment, they say, might very well shift during times of perceived threat,¹¹² as may have the definition of a “clear and present danger” in First Amendment litigation.¹¹³ Further examples, though, would only serve to underscore the basic crisis thesis point: Since under most constitutional standards of review the government may have an easier time meeting its burden during times of war, it seems reasonable to believe that the resolution of litigation involving rights and liberties hinges on the presence of such a crisis. At the very least, many justices—even those regarded as strong civil libertarians—have, under this rationale, admitted the limitations of constitutional safeguards when the security of the nation is at risk, and have done so in opinions of great moment at that.¹¹⁴

Of course, proponents of a strict view of the Constitution claim that the Court must not relax constitutional guarantees on the basis of external circumstances, such as a war or other international crisis, because the guarantees themselves do not change. Taking this view to its limit—as might a purely literalist or categorical approach to constitutional interpretation—would lead the Court to protect liberties and rights at levels no less or no greater during wartime than during periods of peace. But even relaxing the strict view, as may be the case when the justices require the government to supply a compelling justification for its policy, would not lead to the near certain deference that the crisis thesis anticipates. Quite the opposite: In light of the uphill battle the government faces to supply a sufficiently compelling reason to justify restrictions on fundamental liberties, the justices almost always would strike them down. Or so the argument goes.¹¹⁵

To these claims comes a singular response from the opposing camp: This strict approach is largely normative in nature and fails to capture the realities of Court decision making.¹¹⁶ Very few justices, they say, analyze the Constitution exclusively (or even nearly so) through a literalist lens, and even those who invoke this approach make exceptions in the case of war or other threats to the national security—with Hugo Black, who authored the opinion for the Court in *Korematsu*,

¹¹⁰See *supra* note 93.

¹¹¹323 U.S. 214, 216 (1944).

¹¹²Justice Breyer, in fact, has focused on the shifting interpretation of “reasonableness” in times of crises. See This Week (ABC television broadcast, July 6, 2003).

¹¹³This test for First Amendment rights was pronounced during World War I, a clear time of crisis. Justice Holmes, delivering the opinion of the Court, found that the defendants circulars calling upon individuals to resist the draft constituted such a danger, noting that “[w]hen a nation is at war many things which might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right.” *Schenck v. United States*, 249 U.S. 47, 52 (1919).

¹¹⁴*Id.* See also *Korematsu v. United States*, 323 U.S. 214, 216 (1944), in which Justice Hugo Black wrote that a “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional...Pressing public necessity may sometimes justify the existence of such restrictions” and *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)—a decision which, according to Justice Jackson, rested heavily on the national security concerns of the day.

¹¹⁵See Posner and Vemeule, *supra* note 20, 2.

¹¹⁶See Posner and Vermeule, *supra* note 20, at 1-2.

a prime example.¹¹⁷ Moreover, as *Korematsu* may also illustrate, even when the Court requires the government to supply a compelling justification for its policies, the government is hardly the non-starter that some proponents of the “strict” account make it out to be.¹¹⁸

B Institutional Mechanisms

If our discussion thus far reveals anything, it is that the Constitution (or at least the Court’s interpretation of it) could provide a triggering mechanism for the judicial response anticipated by the crisis thesis. On this account, doctrine pertaining to war powers, foreign affairs, and fundamental rights leads to the inescapable conclusion that the justices should and apparently do read the constitutional document differently in wartime and peacetime. If this is so, then it is not difficult to see how that document accounts for the “crisis” reaction: Once the Court interprets it to require deference to political actors in times of war, and assuming those actors are bent on curtailing rights and liberties, the Court will inevitably permit the curtailments.

On the other hand, it also is easy to see how a “strict view” of the Constitution could undermine the crisis thesis: If the thesis envisages a Court that almost certainly will endorse repressive government actions taken during times of war, then it cannot sit comfortably with various doctrinal strains enabling far greater judicial scrutiny of those very same actions. More to the point, when the Court interprets the Constitution “strictly,” not only will it fail to defer to the government in all instances; it may very well protect rights and liberties—to the government’s chagrin—in many. Of course, the great majority of commentators (including some supporters of the strict view) suggest that this is largely a normative, and not an empirical, take on how courts operate in wartime. But it remains nonetheless the case that constitutional mechanisms could cut both ways: to support the views of those advancing the crisis thesis and of those articulating a role for the Court as a guardian of rights during wartime.

We can say precisely the same of the various institutional mechanisms—especially the Court’s need for legitimacy and the role the norm of *stare decisis* plays in fulfilling that need—that scholars say explain the Court’s response to crises. These explanations too could cut both ways, though once again proponents of the crisis thesis suggest that competing views work largely in theory and not in fact. Let us elaborate, beginning with the views of detractors of the crisis thesis and then turning to its proponents.

1 Institutional Legitimacy and Learning Effects

Commentators advocating a view of the Court as a guardian of rights during times of war assert that the institution builds and maintains its legitimacy, not by rallying around the flag, but rather by protecting the rights and liberties that the government is attempting to usurp.¹¹⁹ Or, as Madison famously wrote, “If the Bill of Rights is incorporated into the constitution, independent

¹¹⁷See, e.g., Epstein and Walker, *supra* note 42, 26 (noting that perhaps more than any other justice “Hugo Black is most closely associated with [literalism]. During his thirty-four-year tenure on the Court, Justice Black reiterated his literalist philosophy” in opinion after opinion).

¹¹⁸See *supra* note 114.

¹¹⁹See, e.g., Fortas, *supra* note 16, Barak, note *supra* note 16, and note Koh, *supra* note 17.

tribunals of justice will consider themselves in a peculiar manner the guardian of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.”¹²⁰ It is this view of the Court, analysts aver, that follows from the basic institutional design of the judiciary—one that gives its members life tenure so that they can stand above the political fray; and it is this view that permeates decision after decision—with *Ex parte Milligan* but one among many prominent examples.¹²¹

Because the Court, on this account, remains a force for rights and liberties when society “is disturbed by civil commotion,”¹²² not only does it protect (rather than curtail) rights, but it also plays the role of “republican schoolmaster” during times of war,¹²³ educating the public and its leaders about the importance of preserving rights and liberties. Over time, the argument continues, these lessons accumulate—to the point where they now have triggered a “generally ameliorative trend”¹²⁴ or what some call a “libertarian ratchet”¹²⁵ under which the government has “learned” from its from past mistakes at incorrectly suppressing rights.¹²⁶ “[C]ompared to past wars led by Lincoln, Wilson, and Roosevelt,” as Jack Goldsmith and Cass Sunstein explain the ratchet’s current effect, “the Bush administration has diminished relatively few civil liberties. Even a conservative executive branch, it seems, is influenced by the general trend towards civil liberty protections during wartime.”¹²⁷

To supporters of the guardian view, thus, the Court need not generate extremely suppressive doctrine during times of war; doing so would serve to undermine, not sustain, its legitimacy. Moreover, with each passing war, the Court becomes less likely to suppress rights because the government—perhaps because it has learned from the Court and its own past mistakes—becomes less bent on curtailing them

2 Institutional Legitimacy, Ratchets, and Dosages

For proponents of the crisis thesis, libertarian ratchets and, more generally, the view that the institutional design of the judiciary frees it to stand above the political fray and protect rights and liberties in wartimes are the stuff of theory, and not actual practice. To these commentators, the justices understand that, irrespective of their lack of a direct electoral connection, they must bend

¹²⁰Marvin Meyers, ed., *THE MIND OF THE FOUNDER*. (1981), at 171-2.

¹²¹For other examples, see Fortas, *supra* note 16; Stone *supra* note 17.

¹²²*Ex parte Milligan*, 71 U.S. 2, 120 (1866).

¹²³As Franklin and Kosaki explain, “The conception of the Court as republican schoolmaster generally reflects the notion that the Court, through its high moral standing, may give the populace an example of the way good republicans should behave.” Charles H. Franklin and Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 *AM. POL. SCI. REV.* 751 (1989). Some suggest that the justices themselves cultivated this role. See, e.g., Ralph Lerner, *The Supreme Court as a Republican Schoolmaster*, 1967 *SUP. CT. REV.* (1967). And there is some evidence that they have succeeded. See, e.g., Valerie J. Hoekstra and Jeffrey A. Segal, *The Shepherd of Local Public Opinion: The Supreme Court and Lamb’s Chapel*, 58 *J. POL.* 1079 (1996).

¹²⁴Rehnquist, *supra* note 7, at 221.

¹²⁵See Posner and Vermeule, *supra* note 20, 14; See also Jack Goldsmith & Cass R. Sunstein, *Comment: Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 *CONST. COMMENT.* 261 (2002), at 285 (describing the ratchet effect favoring “more expansive civil liberties during wartime”).

¹²⁶See, e.g., Tushnet, *supra* note 13, at 294-95 (proposing a social learning hypothesis that “[t]he threat to civil liberties posed by government actions has diminished in successive wartime emergencies”).

¹²⁷Goldsmith & Sunstein, *supra* note 125, at 28.

to the preferences of other relevant actors—be they members of Congress, the President, or public opinion¹²⁸—and, accordingly, suppress rights and liberties during crises even if suppression is not their sincere desire.¹²⁹ Should the Court fail to accommodate these other actors, it would likely generate a whole host of negative responses—ranging from noncompliance with (or even downright defiance of) specific decisions, to efforts to remove its jurisdiction to hear particular classes of cases, to attempts to impeach justices¹³⁰—that would not only make it difficult for them to achieve their short-term policy or jurisprudential goals; they also would affect their institution’s *legitimacy* in the long run.¹³¹ Grossman makes this point with regard to *Korematsu*:

The Supreme Court’s adjudication of the Japanese internment cases reflects the precarious situation in which it often finds itself in times of national emergency. In such situations there is a need for the Court both to protect itself as an institution by supporting popular government policies, and to avert a clash with a popular president who might decline to follow an adverse judicial ruling and thus expose its institutional weakness. What was the likelihood of President Roosevelt complying with a Supreme Court decision requiring the return of the Japanese Americans to their homes in 1943, or even after, as in 1944, the crisis had largely evaporated?¹³²

In raising this question, Grossman suggests that the justices in *Korematsu* were forced to think long and hard about President Roosevelt’s response to a decision adverse to his order. Apparently, though, pressure from the very same administration in the Nazi saboteur case, *Ex Parte Quirin*,¹³³ avoided any need for Court members to cull subtle and not-so-subtle historical signals.¹³⁴ According to Turley:

¹²⁸For a recent statement on public opinion and the Supreme Court, see Jeffrey Rosen, *How to Reignite the Culture Wars*, N.Y. TIMES MAGAZINE, at 49, Sep. 7, 2003 (claiming that “[o]n those occasions when the Supreme Court ruled in favor of expanding rights, it was typically reflecting a change in public opinion, not marching as an advance guard”). See also *Controversy: Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711 (1994).

¹²⁹See, e.g., Dorsen, *supra* note 14, at 845 (positing that judges may be reluctant to safeguard rights in times of war because of “a blend of institutional insecurity and fear of the consequences of error”); Tushnet, *supra* note 13, at 304 (arguing that “courts may well succumb to the understandable pressure to rationalize the inevitable with the constitution; judges as members of the governing elites will feel the need for emergency powers that other members of those elites do, and judges as judges will feel some need to make what seems necessary be lawful as well.”).

¹³⁰See, e.g., Griffin, *supra* note 93 (noting that “[i]f the Court does take a hard line against changes that the elected branches think are necessary, the Court knows quite well that the objecting justices can eventually be replaced by justices who are more compliant”). See also Lee Epstein, Jack Knight, & Andrew D. Martin, *The Supreme Court as a Strategic National Policy Maker*, 50 EMORY L.J. 101 (2001); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POLITICS 369 (1992).

¹³¹On legitimacy and constitutional theory, see generally Kahn, *supra* note 93. See also LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW, CONSTITUTIONAL STRUCTURES: SEPARATED POWERS AND FEDERALISM (1995).

¹³²Grossman, *supra* note 7

¹³³317 U.S. 1 (1942).

¹³⁴On the other hand, many commentators at the time opined that the Supreme Court’s decision to intervene in the Quirin case represented a victory for rule of law and for the view that the Constitution applies equally in war as in peace. The Wall Street Journal noted on the second day of oral argument of Quirin that “inter arma silent leges . . . is not true today. . . . So long as our Constitution stands, those liberties are safe, even in a state of global war” and that “[n]othing could more clearly prove that the Constitution stands than yesterdays session of the Supreme Court. If it can be invoked in aid of enemy spies in time of war, no citizen should fear for his own freedoms at any time.” *A Constitution Still Govern*, WALL ST. J., July 30, 1942, at p. 6. Similarly, Arthur Krock noted in the New York Times that the Supreme Courts decision to intervene in Ex Parte Quirin “will brighten the American history of a time when Ciceros cynical apothegm— inter arma silent leges— is the rule in almost every other land” and asserted that “the laws are not silent in wartime in the United States, but are open to formal question as in time of

Roosevelt’s Attorney General Francis Biddle warned that the president would not accept anything but total support from the court [in the *Quirin* case]. Justice Owen J. Roberts conveyed this warning to the whole court in its conference on July 29, 1942. He informed his colleagues that the President intended to have all eight men shot if the Court did not acknowledge his authority, warning that they must avoid such a “dreadful” confrontation.¹³⁵

Similar, though perhaps less overt, political pressure continues today—with President George W. Bush’s Justice Department leveling threats against appellate courts it believes have contravened anti-terrorism measures passed in the wake of September 11th. For example, after the Fourth Circuit ruled, in *United States v. Moussaoui*,¹³⁶ that the defendant facing trial for the September 11th attacks should be allowed to interview a captured Al Qaeda member, the Justice Department defied the order in the name of national security. It also threatened to move the prosecution to a military tribunal.¹³⁷

What these and other stories suggest is that when the political branches credibly can threaten to circumvent or ignore disliked outcomes, the Supreme Court is well advised to exercise “passive virtues.”¹³⁸ Rather than squandering its resources on “ineffective judgments,”¹³⁹ as Alexander Bickel warned, the Court ought and, in fact, does assume a more deferential stance. Institutional legitimacy thereby may become an implicit decision calculus that leads justices to issue decidedly different opinions during times of war. Or so proponents of the crisis thesis assert.¹⁴⁰

But this is not the end of the story for advocates of the thesis. Because concerns over institutional legitimacy are constant, the Court must follow precedent established during wartime even after the crisis dissipates. If it does not, it once again may risk undermining its fundamental efficacy. That is so for several reasons, not the least of which is that members of legal and political communities base their future expectations on the belief that others will follow existing rules. Should the Court make a radical change in those rules, the communities may be unable to adapt, resulting in a decision that does not produce a (new) efficacious rule. If a sufficient number of such decisions accumulate overtime, the Court will undermine its legitimacy. Hence, the norm of *stare decisis* can constrain the decisions of all justices, even those who do not believe they should be constrained by past decisions or who dislike extant legal principles.¹⁴¹

peace.” *In the Nation: The Issues of Law and Fact in Sabotage Case*, N.Y. TIMES, July 30, 1942, at p. 20. See also Raymond Moley, *The Issue and the Facts: Congress Alone Can Now Prevent an Alarming and Dangerous Breach in the Constitution*, WALL ST. J., Sep. 11, 1942, at p. 6 (urging “lets omit such generalities as Ciceros inter arma silent leges. For laws are not silent in war—not in the United States at any rate”).

¹³⁵Jonathan Turley, *Quirin Revisited: The Dark History of a Military Tribunal*. National Law Journal, October 28, 2002, <http://www.nlj.com/oped/102802turley.shtml> (visited March 2, 2003).

¹³⁶333 F.3d 509 (4th Cir., 2003), reh’g denied, 336 F.3d 279 (4th Cir., 2003).

¹³⁷See Philip Shenon, *U.S. Will Defy Court’s Order In Terror Case*, N.Y. TIMES, at A1, July 15, 2003. For other steps the administration has taken to maneuver around the ordinary courts, see *infra* Part implications.

¹³⁸ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 (2d ed., 1986).

¹³⁹Alexander Bickel, *The Proper Role of the United States Supreme Court in Civil Liberties Cases*, 10 Wayne L. Rev. 457, 477 (Norman Dorsen ed., 1964) (quoted in Dorsen, *supra* note 14. See also Bickel, *supra* note 138).

¹⁴⁰See, e.g., Rossiter, *supra* note 14.

¹⁴¹See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICE MAKE* (1998); Jack Knight and Lee Epstein, *The Norm of Stare Decisis*, 40 AMERICAN JOURNAL OF POLITICAL SCIENCE 1018.

From this logic, advocates of the crisis thesis assert that one of two possibilities relating to precedent established during wartime result: “statist ratchets” (sometimes termed “lingering effects”)¹⁴² or “dosages”¹⁴³ The first seems to follow from Justice Jackson’s dissent in *Korematsu*, which warns that:

once a judicial opinion rationalizes a [government] order [curtailing rights] to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated [a] principle [that] then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.¹⁴⁴

In other words, once justices articulate doctrine “accommodating” the crisis, that doctrine “becomes entrenched over time and thus normalized and made routine.”¹⁴⁵ Future justices will stick to it, regardless of whether a war is ongoing and regardless of whether they agree with it. This follows from the norm of *stare decisis*, and the norm’s role in helping the Court to establish and maintain its legitimacy.

Dosages too flow from the norm but take a slightly different form. The idea here—in direct contradistinction to “libertarian ratchets”—is that with every passing war or other international crisis, the government responds with ever-increasing “dosages” necessary to fend off the threat. As Gross puts it, “[w]hat might have been seen as sufficient ‘emergency’ measures in the past (judged against the ordinary situation) may not be deemed enough for further crises as they arise. Much like the need to gradually increase the dosage of a heavily used medication in order to experience the same level of relief, so too with respect to emergency powers.”¹⁴⁶ Given the extreme deference the Court must show to the government to retain its legitimacy, it will approve of its ever-extreme measures and thereby generate even more extreme doctrine that future Courts must follow.

Of course, detractors of the crisis thesis would take issue with the notions of statist ratchets and dosages as well as the entire assumption underlying them—namely, that the Court must bend to the government’s desires if it is to retain its legitimacy. But many political actors, especially U.S. presidents, would concur with these ideas. At the very least, most presidents have operated under the belief that they had little to fear—in the form of rebukes to their efforts to deal with security threats to the nation—from the “weakest branch” of government,¹⁴⁷ the judiciary. When President Wilson predicted a “dire fate” for civil liberties on the eve of World War I, he also anticipated that “the spirit of ruthless brutality would enter into the very fiber of national life, infecting Congress, the courts, administrative agencies, and the people at large. Freedom of speech and the press would go in spite of protective constitutional provisions.”¹⁴⁸ Franklin D. Roosevelt also seemed unconcerned

¹⁴²Posner and Vermeule, *supra* note 20, at 6; See also John E. Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* 54 (1991) (noting that “[d]esperate measures have a way of enduring beyond the life of the situations that give rise to them”).

¹⁴³See Cole, *supra* note 41; Gross, *supra* note 4.

¹⁴⁴*Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J. dissenting).

¹⁴⁵Gross, *supra* note 4, 1090.

¹⁴⁶Gross, *supra* note 4, at 1091.

¹⁴⁷THE FEDERALIST NO. 8 (Alexander Hamilton).

¹⁴⁸Swisher, *supra* note 43, at 321 (emphasis added).

with judicial rebuke when he issued his executive order to exclude Japanese Americans from the West Coast, believing that “the Constitution has not greatly bothered any wartime President.”¹⁴⁹ Even today, while George W. Bush may be sufficiently mistrustful of the nation’s courts to order that non-citizens suspected of terrorism appear before military tribunals,¹⁵⁰ he has expressed little doubt that federal judges will uphold the Patriot Act, along with other curtailments of rights undertaken in the wake of September 11th.¹⁵¹

That President Bush, along with his predecessors, is justified in holding this belief is precisely the point of the institutional take on the crisis thesis—so much so that many scholars no longer look to the Court to protect rights when the nation’s security suffers threat. They say, and have said for decades, that only the federal legislature is in a position to curb presidential efforts to repress rights.¹⁵² As Chafee, in expressing a version of the statist ratchet account, put it, “Congress alone can effectively safeguard minority opinion in times of excitement. Once a sedition statute is on the books, bad tendency becomes a test of criminality. Trial judges will be found to adopt a free construction of the act so as to reach objectionable doctrines, and the Supreme Court will probably be unable to afford relief.”¹⁵³

C Behavioral Mechanisms

Obviously, sharp disagreements exist between supporters and detractors of the crisis thesis over the response to wars triggered by institutional mechanisms. To those who believe that the justices act as guardians during war, the Court must take special care to protect the rights and liberties the government wishes to suppress if it is to perform its institutional function, not to mention retain a place of prominence in the American political system. To supporters of the crisis thesis, on the other hand, protecting civil liberties in wartime may be the the Court’s “duty” in theory, but it has not been its actual practice. On their account, the Court must defer to a government intent on “aggrandizing” its powers¹⁵⁴ during wartime, and not pose challenges to it, if it is to retain its legitimacy.

This same juxtaposition characterizes debates over the final mechanism, which stresses the justices’ behavioral response to wars and other national emergencies. To detractors of the crisis thesis, that response takes the form of more, not less, scrutiny of repressive government actions. That is because—in line with the logic of *Milligan*—the justices believe that during times of crisis they must exercise an especially “watchful care” over rights and liberties. Or, as Justice Barak

¹⁴⁹Quoted in Rehnquist, *supra* note 7, at 224.

¹⁵⁰Detention, Treatment, and Trial of Certain Non Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 Nov. 13, 2001. This is not the only action the Bush administration has taken to maneuver around the ordinary courts. We discuss others in *infra* Part IX.

¹⁵¹One federal district court, in *Humanitarian Law Project v. Ashcroft*, 2004 U.S. Dist. LEXIS 926 (2004), has struck down a provision of the Patriot Act— §805(a)(2)(B), which prohibits providing “expert advice and assistance” to terrorist groups. The government is appealing this decision, and it may very well fare better in the circuits, depending on the relative state of urgency at the time the judges hear the case. See *infra* Table 9 and the accompanying discussion.

¹⁵²E.g., David Gray Adler, *Courts, Constitution, and Foreign Affairs*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* (David Gray Adler & Larry N. George eds. 1996); Dorsen, *supra* note 14; Sheffer, *supra* note 7; Levinson, *supra* note 13.

¹⁵³Chafee, *supra* note 14, 139; see also Levinson, *supra* note 13.

¹⁵⁴Gross, *supra* note 4, at 1095-96

of the Israeli Supreme Court recently outlined it: “[M]atters of daily life constantly test judges’ ability to protect democracy, but judges meet their supreme test in situations of war and terrorism. The protection of every individual’s human rights is a much more formidable duty in times of war and terrorism than in times of peace and security . . . As a Justice . . . how should I view my role in protecting human rights given this situation? I must take human rights seriously during times of both peace and conflict.”¹⁵⁵ U.S. Supreme Court Justice Abe Fortas expressed a similar view some thirty years earlier, when he proclaimed, “[i]t is the courts—the independent judiciary—which have, time and again, rebuked the legislatures and executive authorities when, under stress of war, emergency, or fear of . . . revolution, they have sought to suppress the rights of dissenters.”¹⁵⁶ What both jurists suggest is that if a justice’s underlying preferences over rights and liberties change during times of war, it is toward a more protective, not suppressive, posture—with the resulting behavior hardly resembling that anticipated by the crisis thesis.

Adherents of the thesis, almost needless to write, deem these the views of a few isolated judges who recount an idealized story about courts rather than one revealing of realities on the bench. Those realities, they suggest, too shore up the existence of a behavioral mechanism but one very different from that which Justices Barak and Fortas describe: It takes the form of a patriotic fervor on the part of justices, rather than a guardian impulse, and manifests itself in a response to repress, not protect, rights. Under this interpretation of the mechanism, it is entirely possible, perhaps even likely, that a justice, for much of his or her career, could hold a preference supporting rights and liberties but that preference could change in light of, say, a national emergency. Grossman again suggests as much when he writes: “When World War II broke out feelings of *patriotism and concern about the success of the war* effort affected Americans nearly universally, including the Justices of the Supreme Court.”¹⁵⁷ Other scholars have variously described this behavioral phenomenon as one in which “domestic judicial institutions tend to go to war” or “rally ‘round the flag.”¹⁵⁸ Whatever they deem it, though, the overall message is the same and it is quite contrary to the prediction made by the competing camp: In times of urgency, a justice’s underlying preference toward rights and liberties moves to the right, resulting in behavior that falls well in line with the crisis thesis—that justice would vote against litigants claiming an infringement of their rights or liberties.

D Existing Empirical Support for the Crisis Thesis

From even this brief discussion of the constitutional, institutional, and behavioral mechanisms scholars say trigger a crisis jurisprudence, it is easy to see that none is above reproach. Those commentators advocating a guardian view of the Constitution have of course offered their share of critiques but even those advancing the crisis thesis would find fault with various features of the three explanations. An obvious problem centers on the mixed expectations the three establish with

¹⁵⁵See Barak, *supra* note 16, at 149.

¹⁵⁶Fortas, *supra* note 16, 22.

¹⁵⁷Grossman *supra* note 7, at 672-673 (emphasis added). For other examples, see Carl Landauer, *Deliberating Speed: Totalitarian Anxieties and Post-War Legal Thought*, 12 *Yale J. Law & Hum. Rts.* 171 (2000); Rabban, *supra* note 14; Melvin I. Urofsky, *Division and Discord: The Supreme Court Under Stone and Vinson, 1941-1953* (1997).

¹⁵⁸Gross, *supra* note 27, at 437, 491 (1998) (alteration in original) LEEJ (quoting Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 *MIL. L. REV.* 59, 59 (1980) and CLINTON ROSSITER & RICHARD P. LONGAKER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 91 (expanded ed. 1976).

regard to the reach and duration of the crisis thesis—issues of considerable debate, as we mentioned earlier. So, for example, if justices become hyper-patriots during times of war, as the behavioral explanation suggests, then it seems reasonable to observe them suppressing rights while the war is ongoing but not thereafter. “Statist ratchets,” which flow from institutional accounts, however, give rise to quite a different expectation: that curtailments of rights would continue well after the duration of the crisis. Much the same conceptual confusion exists over questions concerning the scope of the thesis, that is, does it cover all cases pertaining to rights and liberties or is it limited to particular types of disputes, to certain kinds of crises, or even to specific classes of litigants? Some explanations favor the former, while others suggest a more limited effect.

And, yet, even with these various problems, at the end of the day it would be difficult to conclude that supporters of the crisis thesis have failed miserably at the task of offering plausible explanations for their view of the role of the Court in times of war. Actually, quite the opposite: Their explanations apparently are sufficiently convincing to the vast majority of members of the legal community that one version of the crisis thesis or another has made its way into judicial opinions¹⁵⁹ and off-the-bench writings of Court members.¹⁶⁰ It even supplies a framework around which numerous constitutional law casebooks organize their discussions of rights and liberties,¹⁶¹ with at least some explicitly suggesting that “Supreme Court justices may be as vulnerable to public pressures [in the wake of crises] and to waves of patriotism as the average citizen.”¹⁶² Clearly, and despite challenges from influential opponents, the crisis thesis is deeply embedded in the scholarly literature, in popular commentary, and even in judicial decisions.

But what is the empirical basis underlying all this support for the idea that the Court rallies around the flag in times of war? On the one hand, and judging it by its quantity, it is very firm indeed. Scores of studies have examined the crisis thesis, with nearly as many endorsing at least some version of it.¹⁶³ In fact, in deflecting various challenges to the thesis, as we noted throughout Parts III A, B, and C, supporters point to the observational veracity of their position: Their account, they say, reflects reality on the Court, while the guardian view is but wishful thinking on the part of a small group of “civil libertarians and law professors.”¹⁶⁴

On the other hand—and perhaps this is hardly surprising given continued debate over the thesis despite nearly a century of study—the support in any one investigation is rather flimsy. It consists not of systematically derived data and carefully designed and executed analyses but rather of *anecdotal evidence* or but a *handful of Court decisions*, with analysts seemingly tailoring both to fit the thesis.

Anecdotal evidence is rampant in this line of literature. In an effort to show that Court members are swept up in the patriotic fervor surrounding them, scholars tell stories of justices who, at the request of presidents, spoke to lay audiences on the importance of supporting military efforts;¹⁶⁵

¹⁵⁹See, e.g., *Skinner v. Railway Labor Executives’ Association*, 489 U.S. 602, 635 (1989) (“history teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure”).

¹⁶⁰Brennan, *supra* note 14; Rehnquist, *supra* note 7.

¹⁶¹See, e.g., WILLIAM COHEN & DAVID J. DANIELSKI, *CONSTITUTIONAL LAW: CIVIL LIBERTY AND INDIVIDUAL RIGHTS* (1997); WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* (2001); KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* (2001).

¹⁶²Epstein & Walker, *supra* note 42.

¹⁶³See *supra* note 14 and *supra* note 13 for examples.

¹⁶⁴Posner and Vermeule, *supra* note 20, at 2.

¹⁶⁵Grossman, *supra* note 7, at 672.

of justices who had personal friendships with high level members of the military or the cabinet;¹⁶⁶ of some who were “active proponents . . . of [governmental] war policies,”¹⁶⁷ and of others who chastised colleagues inclined to support individual liberties, rights, or justice claims. Capturing the flavor of this form of evidence is the often-told story of Chief Justice White’s response to an attorney, who, at oral argument, claimed that the military draft lacked public support: “I don’t think your statement has anything to do with legal arguments and should not have been said in this Court,” the Chief said. “It is a very unpatriotic statement to make.”¹⁶⁸

The second form of evidence, the jurisprudential analysis of a few selected Court cases, is equally as pervasive.¹⁶⁹ In many instances, commentators consider a handful of suits resolved during times of emergency to make inferences about all cases decided during such times, without explaining their selection rules and with the selected cases inevitably supportive of the perspective they advance. Garvin’s analysis is illustrative.¹⁷⁰ After reviewing a few “crises” decisions the study concludes that “*Korematsu* is the rule, not the exception: courts finding themselves at the mercy of executive characterizations of war often accept those characterizations.”¹⁷¹ In other instances, the investigator matches cases decided before and after the crisis to explore differences in the Court’s jurisprudence.¹⁷² For those advancing the crisis thesis, those pairings typically involve four cases that well fit the thesis: *Ex parte Quirin*¹⁷³ and *Korematsu v. United States*¹⁷⁴ on the one side (both decided during crises and both repressive of rights)¹⁷⁵ and *Ex parte Milligan*¹⁷⁶ and *Duncan v. Kahanamoku*¹⁷⁷ on the other (both decided after the crisis subsided and both supportive of rights). Chief Justice Rehnquist’s analysis of civil liberties in wartime provides an example:

The maxim [*inter arma silent leges*] speaks to the timing of a judicial decision on a question of civil liberty in wartime. If the decision is made after hostilities have ceased, it is more likely to favor civil liberty than if made while hostilities continue. The contrast between the *Quirin* and the Japanese internment decisions on the one hand and the *Milligan* and *Duncan* decisions on the other show that this, too, is a historically accurate observation about the American system.¹⁷⁸

Why scholars and jurists focus their research on *Ex parte Quirin*, *Korematsu v. United States*, *Ex parte Milligan*, and a handful of others is no great mystery: they are landmark rulings of acute

¹⁶⁶Murphy, *supra* note 14, at 186.

¹⁶⁷Rabban, *supra* note 14, at 1331.

¹⁶⁸See, e.g., Epstein & Walker, *supra* note 42.

¹⁶⁹See, e.g., Michael R. Belknap, *The Warren Court and the Vietnam War*, 33 GA. L. REV. 65 (1998); Chafee, *supra* note 14; Dorsen, *supra* note 14; Emerson, *supra* note 14; Developments in the Law, *supra* note 36; Rehnquist, *supra* note 7; Swisher, *supra* note 43.

¹⁷⁰Garvin, *supra* note 14.

¹⁷¹*Id.* at 706.

¹⁷²E.g., Currie, *supra* note 36.

¹⁷³317 U.S. 1 (1942).

¹⁷⁴323 U.S. 214 (1944).

¹⁷⁵See, e.g., Michael R. Belknap, *supra* note 158, at 61 (1980) (noting that the Supreme Court justices “enlisted in the national military effort, embracing attitudes which would render constitutionally guaranteed civil liberties vulnerable”).

¹⁷⁶71 U.S. 2 (1866).

¹⁷⁷327 U.S. 304 (1946).

¹⁷⁸Rehnquist, *supra* note 7, at 224.

historical, legal, and cultural importance. It is also true, as Garvin,¹⁷⁹ Rehnquist,¹⁸⁰ and others explain, that analyses of particular cases can be extremely useful vehicles for developing more general explanations of phenomena—here, of the effect of crises on Court decisions. At the same time, though, it is important to recognize that the ability to draw reliable inferences from a handful of unsystematically selected cases hinges on whether researchers have conducted their analyses in accord with a set of formalized guidelines and procedures—often called the rules of inference.¹⁸¹

Unfortunately, the vast majority of work of relevance here (that is, work which makes inferences about the pervasive effect of crises on Court decisions from a handful of cases) violates at least three of these rules. First, since virtually all existing studies draw their “sample” of cases on the basis of some private, undisclosed selection rule or on other factors that do not rely on randomization, we simply do not know if the authors of the research avoid the inadvertent introduction of selection bias. We thus have no assurances that the cases included in the studies are comparable to those to which they are inferring. For example, was the Court’s deference to the executive order in *Korematsu* the rule or an historical aberration? Without more systematic evidence, it would be difficult even to begin answering this question. More to the point, it is quite possible—as our discussion of constitutional mechanisms foreshadowed—that the entire disagreement over the empirical validity of the crisis thesis stems from the distinct cases that proponents and detractors invoke to support their claims. By way of illustration, consider the views of Chief Justice Rehnquist, who finds the crisis thesis to be descriptively valid,¹⁸² and of Justice Fortas, who espouses the contrary view of the Court as a guardian of rights.¹⁸³ Chief Justice Rehnquist focuses primarily on landmark cases decided during the Civil War and the two World Wars. Yet to the degree that he infers *generally* that laws in a time of war “will speak with a somewhat different voice,” he extrapolates to other war periods.¹⁸⁴ Extrapolating similarly, Justice Fortas infers, by incorporating the Korean and Vietnam War periods into his analysis, that courts “rebuke” the legislature and the executive when they curtail rights in times of war. Perhaps these diametrically opposed conclusions about Court behavior may be reconciled simply on the basis of sample selection: namely, whether the study included decisions from the rather liberal Court that served during most of the Vietnam War period.¹⁸⁵

But this is not the only way selection bias creeps into this area of inquiry; another comes about when commentators fail to define a “crisis.” Without being explicit about the meaning of this term, scholars fall prey to defining those cases consistent with the crisis thesis as having been decided by the Court during a time of crisis, and those inconsistent with the crisis thesis as not. This may be why detractors of the thesis invariably point to *Youngstown Sheet & Tube v. Sawyer*,¹⁸⁶ whereas proponents simply discount the Korean War (from which *Youngstown* flows) as falling under the rubric of a “crisis.” But perhaps the worst form of bias would manifest if the justices invoke jurisprudential doctrines of emergency power only when they decide *ex ante* to rule against

¹⁷⁹Garvin, *supra* note 14 at 706.

¹⁸⁰Rehnquist, *supra* note 7, at 224.

¹⁸¹Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002); GARY KING, ROBERT O. KEOHANE, & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* (1994).

¹⁸²Rehnquist, *supra* note 7 at 224.

¹⁸³Fortas, *supra* note 16, at 46.

¹⁸⁴Rehnquist, *supra* note 7, at 225.

¹⁸⁵See Figure 14.

¹⁸⁶343 U.S. 579 (1952).

a rights claim. In that situation, a jurisprudential analysis is suspect to being endogenous,¹⁸⁷ and the inference of a crisis effect could be entirely spurious. This would be akin, to draw an analogy, of studying the effectiveness of a drug by selecting only individuals who promoted the drug treatment to their friends. We may find that the drug was effective for those individuals, but that would tell us very little about the drug’s effectiveness overall. Similarly here, if justices move into crisis mode only when they curtail rights, we can learn little about the crisis thesis generally by examining only those particular cases.

Selection bias constitutes one violation of the rules of inference. Another occurs in those studies—perhaps the overwhelming majority—that consider only the effect of the particular crisis under analysis and fail to take into account other factors that may affect judicial decisions, even though they consciously seeks to make causal claims (*e.g.*, a war *causes* courts to repress rights and liberties). To the extent that studies ignore various competing explanations, they suffer from “omitted variable bias,” making inferences reached therein suspect.¹⁸⁸ For example, if we believe that politics plays a role in explaining Supreme Court decisions, then failure to attend to the Court’s changing ideological composition could lead to an incorrect assessment of the true jurisprudential effect of wars.¹⁸⁹ Seen in this way, scholars asserting that *Korematsu* was an aberration and that more typically the Court safeguards rights during war ought take into account the relatively left-leaning composition of the Court in 1944, which would suggest that the impact of crises is, if anything, underestimated. By the same token, perhaps Justice Fortas’s conclusions are biased simply because they fail to consider the Warren Court’s “rights revolution,” which coincided with the Vietnam War.

A third and final problem centers on the literature’s emphasis on (typically landmark) cases decided during times of crisis. This emphasis makes much more difficult the implicit counterfactual analysis of how the Supreme Court would rule in the absence of a war since it relies on large invariance assumptions about how the justices would have decided similar cases in a time of peace. In fact, some studies, while making causal claims, fail to make *any* comparisons between cases decided during war and peace times. This is akin to studying the causal effect of smoking on cancer by examining only smokers. An appropriate investigation explicitly would undertake a counterfactual analysis, thereby providing a firm empirical grounding for any conclusions reached, whether about the effect of smoking or of crises on Court decisions.¹⁹⁰

¹⁸⁷On endogeneity, see Wooldridge, *supra* note 26, 50-51.

¹⁸⁸Epstein & King, *supra* note 181; King, Keohane, & Verba, *supra* note 181. Omitted variable bias occurs when the estimation technique excludes variables that are (a) known to affect the outcome and (b) correlated with the explanatory covariate of interest. For a simple example in a linear regression context, suppose we are interested in the effect of war, X_1 , on some dependent variable Y , but we omit some other relevant variable X_2 , where the data are generated such $E(Y) = X_1\beta_1 + X_2\beta_2$. Our estimate of the effect of war on the outcome when excluding X_2 , would be $E_{(\bar{e}_1)} = \beta_1 + \phi\beta_2$, where ϕ represents the linear projection of war X_1 on the omitted covariate X_2 . In other words, there is no omitted variable bias if X_2 is uncorrelated with the outcome (i.e., if $\beta_2 = 0$) or if X_1 is uncorrelated with X_2 (i.e., $\phi = 0$).

¹⁸⁹For over six decades now, political scientists and legal academics have documented the effect of the political preferences of the justices on the decisions they reach. For recent examples, see Segal & Spaeth, *supra* note 195; Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin, & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decision-Making*, COLUMBIA LAW REVIEW, forthcoming (manuscript on file with the authors). See, generally, Lee Epstein, Jack Knight, & Andrew Martin, *Childress Lecture Symposium: The Political (Science) Context of Judging*, 47 *St. Louis L. J.* 783 (2003). See also Part V.

¹⁹⁰On the fundamental notion of the counterfactual in assessing causal inferences, see generally Michael E. Sobel,

Of course, we understand the argument that commentators focus—and should focus—on landmark cases precisely because they are the cases of interest. So, for instance, because President George W. Bush invoked *Ex Parte Quirin* and a handful of other decisions¹⁹¹ to justify his order establishing military commissions,¹⁹² scholars assert that they are justified in examining only those decisions. Cases such as *Quirin*, *Korematsu*, and *Milligan*, the argument goes, are of far more historical and jurisprudential consequence than the vast majority the Court produces. Yet to the degree that previous analyses have focused on a small number of decisions, they cannot provide an understanding of the magnitude of the impact of war (in other words, we cannot assess the relative accuracy of the crisis thesis), nor can they tell us whether the landmark disputes are the result of factors unrelated to the crisis at hand, such as the political ideology of the justices or the relative salience of the dispute or even the resolution reached in the lower courts—factors that many scholars suggest affect Court decision making.

IV THE STUDY'S APPROACH TO IDENTIFYING THE CRISES AND THE CASES

Judged on the basis of the evidence in its support, not to mention the existence of credible challenges to its validity, the crisis thesis strikes us as something far short of a well-supported theory about the Court's role in war times. It is rather a hypothesis—certainly a serious hypothesis but nonetheless one necessitating systematic evaluation. Undertaking that task could move us in several directions; for example, we could carry out a detailed analysis of free speech doctrine articulated by the justices during periods of war and peace; we could conduct a study of the case selection decisions made by the Court in times of urgency and tranquility; or we could even compare the justices' treatment of particular classes of litigants when the nation's security is at risk and when it is not.

These and other approaches to the crisis thesis are plausible, feasible, and certainly commendable of undertaking. But since our interest lies in determining the breadth and depth of the thesis—specifically, the extent to which it accurately captures Court responses to national security threats across a range of disputes and litigants—we focus on the outcomes of cases in which parties claimed a deprivation of their rights or liberties and that the Supreme Court resolved on the merits, whether in times of international urgency or not, over the last six decades (1941-2001 terms).

Such a focus enables us to scrutinize what may be the most obvious observable implication of the crisis thesis: When the nation's security or its soldiers are at risk, the justices are less likely to rule in favor of criminal defendants, war protestors, and other litigants who allege a violation of their rights. So too a focus on outcomes not only allows us to assess the competing view of the Court as a guardian of rights in wartimes but it also permits for the exploration of more nuanced versions of the crisis thesis itself, including whether international emergencies affect only cases

Causal Inference in the Social and Behavioral Sciences, in HANDBOOK OF STATISTICAL MODELING FOR THE SOCIAL AND BEHAVIORAL SCIENCES 1 (Gerhard Arminger, Clifford C. Clogg & Michael E. Sobel eds., 1995); Christopher Winship & Stephen L. Morgan, *The Estimation of Causal Effects from Observational Data*, 25 ANN. REV. SOC. 659 (1999). See also Gregory Mitchell, Case Studies, Counterfactuals, and Causal Explanations, Florida State University College of Law, Public Law Research Paper No. 84, Aug. 2003.

¹⁹¹See A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 WIS. L. REV. 309 (2003).

¹⁹²See *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 3 C.F.R. 921 (2001), reprinted in 10 U.S.C.A. §801 (West Supp. 2002).

that are especially salient, that are related to the emergency, or in which the federal government participates. Finally, centering our inquiry on outcomes does not mean we eschew other possible approaches to assessing the thesis. Quite the opposite: For reasons we explain later, in Part V, to determine whether the Court curtails rights and liberties in war times, we consider numerous other factors that may explain decisions beyond the presence (or absence) of a crisis. Some of these contemplate the politics of the justices and changing dynamics across time, while others focus on features of the cases themselves, such as their relative salience and their resolution in the lower courts.

Determining the importance of these factors (and, more generally, conducting all the various explorations of case outcomes) necessitates the acquisition of data on the Court's treatment of claims centering on *rights, liberties, and justice* (the chief dependent variable of our study) and *the relative state of urgency with regard to threats to America's national security* (the independent or explanatory variable of primary interest).¹⁹³ With these data in hand, we can proceed with our investigation of whether the Court is more likely to repress rights during times of crisis than it is during times of relative tranquility, as the crisis thesis suggests, or whether it moves in the opposite direction, rebuffing the government's efforts to repress those same rights.

A The Cases

The existence of Harold J. Spaeth's U.S. Supreme Court Database makes amassing data on Court decisions (again, the primary dependent variable) straightforward enough.¹⁹⁴ This database, which many scholars have used to study law and judicial politics,¹⁹⁵ contains information on over two hundred attributes of Court decisions—including whether the justices ruled in favor of or against individuals claiming a violation of their civil rights or liberties—in all cases decided by the Court with an opinion since the 1953 term.

As Appendix A shows, Spaeth classifies civil rights and liberties cases into one of six broad categories: criminal procedure, civil rights, First Amendment, due process, privacy, and attorney

¹⁹³In most empirical research, the investigator asks whether a particular "event" caused a particular "outcome." We can characterize the events and outcomes as "variables" that take on different values, that is, they vary. For example, in our study, an "event"—an international crisis—exists or it does not; and the "outcome"—a Court decision—can be in favor of the rights claim or against it. We typically term the outcomes "dependent variables" and the events, a type of "independent variable" known as a key causal variable. See Epstein & King, *supra* note 181.

In Part V, we consider whether an association exists between these two variables—the key causal variable (crises) and the dependent variable (Court decisions). But even if we find evidence of such an association, we must "control" for other factors that may affect Court treatment of rights, liberties, and justice claims. These "other factors" constitute a second type of independent variable (known as "control variables") and only by incorporating them into analysis would we be able to support fully the causal claim suggested by the crisis thesis; namely, that crises lead the Court to repress rights and liberties. See Epstein & King, *supra* note 181. We undertake this challenge in Part VII.

¹⁹⁴The database and the documentation necessary to use it are available at: <http://www.polisci.msu.edu/pljp/supremecourt.html> (last accessed on November 10, 2003).

¹⁹⁵For recent examples, see Frank B. Cross and Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U.L. REV. 1437 (2001); Youngsik Lim, *An Empirical Analysis of Supreme Court Justices' Decision Making*, 29 J. LEGAL STUD. 721 (2000); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); Epstein et al., *supra* note 76; Ruth Colker & Kevin M. Scott, *Dissenting States?: Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301 (2002); Keith E. Whittington, *Taking What they Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477; Ernest A. Young, *Judicial Activism and Conservative Politics* 73 U. COLO. L. REV. 1139

rights.¹⁹⁶ So, for example, he identifies *Korematsu*¹⁹⁷ as a civil rights case, *Ex Parte Quirin*,¹⁹⁸ as involving criminal procedure, and *Dennis v. United States*,¹⁹⁹ another suit prominent in the literature on the Court’s crisis jurisprudence, as a First Amendment dispute. The specification of whether the Court resolved a dispute in favor of the party claiming a deprivation of his or her rights (that is, in the “liberal” direction) “comports with conventional usage.”²⁰⁰ In issues pertaining to criminal procedure, civil rights, First Amendment, due process, privacy, and attorneys, this means that a case is liberal if the outcome favored the person accused or convicted of crime, or denied a jury trial; the civil liberties or civil rights claimant; the indigent; Native American claims; affirmative action; neutrality in religion cases; the choice stance in abortion; the underdog; claims against the government in the context of due process; attorney rights; and, disclosure in Freedom of Information Act and related federal statutes, except for employment and student records.²⁰¹

Following Spaeth’s coding rules and with his guidance, we backdated the dataset to include the 1941-1952 terms, and updated it to include the 2001-02 term.²⁰² With these additional data we were able to incorporate into our analyses terms coinciding with World War II and the Korean War, as well as the more recent military conflict in Afghanistan.²⁰³

Our strategy of adapting and extending a prominent database to suit our purposes has several advantages. First, while scholars long have recognized the difficulty of defining the range of civil rights and liberties disputes, not to mention the ideological direction of a Court decision,²⁰⁴ many now have converged on those definitions offered by Spaeth—so much so that it is difficult to identify a contemporary empirical study of the Court that fails to employ them.²⁰⁵ Second, while previous studies have focused on particular cases, ours is an effort to analyze the breadth of the effect

¹⁹⁶Spaeth further clarifies the basis of these issue areas:

[C]riminal procedure encompasses the rights of persons accused of crime, except for the due process rights of prisoners. Civil rights includes non-First Amendment freedom cases which pertain to classifications based on race (including American Indians), age, indigency, voting, residency, military or handicapped status, gender, and alienage . . . First Amendment encompasses the scope of this constitutional provision, but do note that not every case in the First Amendment group directly involves the interpretation and application of a provision of the First Amendment. Some, for example, may only construe a precedent, or the reviewability of a claim based on the First Amendment, or the scope of an administrative rule or regulation that impacts the exercise of First Amendment freedoms. In other words, not every record that displays a First Amendment issue will correspondingly display a provision of the First Amendment in its legal provision variable . . . Due process is limited to non-criminal guarantees.

Harold J. Spaeth, Documentation for the United States Supreme Court Judicial Database, 1953-2000 Terms, at 44-45. Available at: <http://www.polisci.msu.edu/pljp/supremecourt.html> (last accessed on November 10, 2003).

¹⁹⁷323 U.S. 214 (1944).

¹⁹⁸317 U.S. 1 (1942).

¹⁹⁹341 U.S. 494 (1951).

²⁰⁰Spaeth, *supra* note 196, at 54.

²⁰¹*Id.* Worth noting is that we reverse Spaeth’s coding of takings clause cases. For our purposes, upholding the government’s authority to take property without just compensation is best seen as a conservative decision.

²⁰²Using Spaeth’s terms, the “*analu*” (the unit of analysis) for this study=0 (case citation) and “*dec_type*” (the type of decision)=1 or 7 (cases that were orally argued and decided with a signed opinion). Civil rights, liberties, and justice cases are criminal procedure, civil rights, First Amendment, due process, privacy, and attorneys (values 1-6 of Spaeth’s value variable). Appendix A provides more details on the types of cases included in these categories.

²⁰³The data cover the 1941 through 2001 terms, such that the first case in the database was argued on October 10, 1941 and the last case, on April 24, 2002. All data and documentation are available on our web site: <http://artsci.wustl.edu/~polisci/epstein/research/crisis.html>.

²⁰⁴See, e.g., Cardozo, *supra* note 93, 76-80.

²⁰⁵See *supra* note 195.

of war and other threats to the nation’s security. That is, we are interested in addressing the empirical question of whether crises actually affect a large universe of cases. Given the broad and deep coverage of the database, it is ideally suited to help answer this question. Third, if the data lend support to the crisis thesis (or to the guardian view) as it pertains to all cases of rights and liberties, we surely should investigate whether that basic finding holds across various types of disputes falling under the general rubric of “rights and liberties.” Because the database categorizes cases into particular issues,²⁰⁶ we easily can determine whether the war effect might exist in all cases or only in a particular subset.

B The Crises

Since we are interested in assessing whether a “crisis” affects the Supreme Court and just how expansive that effect (if it exists at all) might be, defining what constitutes a “crisis” in a transparent manner is crucial for our study. In the absence of other large-scale empirical assessments, however, determining the presence of a “crisis” (again, the chief independent variable) is something of a challenge.²⁰⁷ Is a “crisis” solely a “constitutional war” (that is, a war fought pursuant to a congressional declaration of war),²⁰⁸ or is that term broad enough to encompass a long-term military effort in the form of a war or even more temporary states of conflict? The literature’s emphasis on cases such as *Milligan*²⁰⁹ and *Korematsu*²¹⁰ suggests a long-term military effort but an exclusive focus on “war,” whether formally declared or otherwise, would eliminate what many specialists in international law view as major U.S. “crises,” such as the Berlin Blockade—and, of course, September 11th. Should we include these, as well as several others (e.g., the Cuban Missile crisis, the Iran-Hostage crisis) in our working definition of a “crisis”?

Because it is difficult, if not impossible, to answer these questions with a high degree of precision,²¹¹ we chose to develop three explicit definitions of crisis.²¹² The first two are rather obvious:

²⁰⁶See Appendix A.

²⁰⁷Even the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§1541-1548 (1976)), provides no definition of what constitutes “hostilities.” See Louis Henkin, *Foreign Affairs and the Constitution*, 1987 Foreign Aff. (1987) (noting that “[a]bove all, the [War Powers R]esolution suffers gravely from a lack of any definition of hostilities”).

²⁰⁸See U.S. CONST. art. I, §8, cl. 11. Strictly speaking, this definition of constitutional war would exclude the Korean War (1950-53), The Vietnam War (1965-73), the Gulf War (1991), the War in Afghanistan (2001-02), and the Iraq War (2003). Then again, we might consider intermediate expressions of support for war, such as the Gulf of Tonkin Resolution of 1964 used to justify Executive power during the Vietnam War, and the Congressional Resolution expressing support for the deployment of troops in the Gulf War. This approach would entail weighing the impact of the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§1541-1548 (1976)), on the definition of a constitutional war.

²⁰⁹71 U.S. 2 (1866).

²¹⁰323 U.S. 214 (1944).

²¹¹See, e.g., Gross, *supra* note 4, at 1089-96 (noting that five reasons for a blurring distinction between emergency and normalcy). One strand of classical realist international relations theory views war as merely a continuation of politics by force, so a clear definition of crises may simply not be possible. See, e.g., CARL VON CLAUSEWITZ, *ON WAR* 78, 87 (Peter Paret ed. trans., 1976) (asserting that “war is never an isolated act” and that war is “a continuation of political intercourse, carried on with other means”). But cf. Keegan, *supra* note 28 3 (1993) (asserting that “war is not the continuation of policy by other means” and proposing a cultural theory of war). Even Keegan’s framework, however, does help to clarify a definition of crises for our purpose here.

²¹²We do not, however, explicitly consider the notion of a strict constitutional war, since this would exclude, in light of the time frame of our study, all wars save World War II from investigation. Nonetheless, since our analysis estimates causal effects for each individual war case and includes restrictions on terms, we could easily compare the estimated

the absence or presence of war²¹³ (with wars defined as World War II, the Korean, Vietnam, and Gulf wars, and the recent war in Afghanistan)²¹⁴ and the absence or presence of wars, plus four other international conflicts that specialists have labeled as “major” (the Berlin Blockade, the Cuban Missile and the Iran-Hostage crises, and September 11th). The third measure—the presence or absence of a “rally effect” in the form of 10-point (or greater) surge in presidential popularity caused by an international event—may be less obvious but it well taps a “crisis” as social scientists have employed that term.²¹⁵ After all, it is during those periods when the public rallies around a President (typically the catalyst for efforts to suppress rights and liberties) that we might expect the Court to do the same.²¹⁶

Gathering data on the three measures requires knowing when each crisis began and each ended.²¹⁷ Since that information is readily available,²¹⁸ we were left with only one task: de-

causal effects specific to each war, which would in turn enable us to determine whether the only constitutional war, World War II, exhibited distinct effects on Supreme Court decision making. For more on this point, see Part VII A.

²¹³Following the vast majority of literature in this area, “war periods do not include the cold war, the war drugs under the first Bush administration, or the war on poverty under the Johnson administration (but cf. Edwards, *supra* note 5 [considering the Cold War and the war on drugs]). At the same time, it is possible that our third measure of a crisis, a rally effect, may capture periods of particular intensity during the cold war.

²¹⁴Since it remains unclear whether we should code the entire period after September 11th as war or not, we pursue both coding schemes here. See, e.g., Tushnet, *supra* note 13, at 279, 279-80 (arguing that “we ought not think of [the war on terrorism] as a war in the sense that World War II was a war” and that it is “a condition rather than a more traditional war”); but cf. Downs & Kinnunen, *supra* note 12, at 399-402 (arguing that the acts of terrorism “unmistakably bear the characteristics of war”).

²¹⁵Beginning with World War II, rally effects have occurred 16 times, 14 of which (not surprisingly) involved international events. (The two that did not centered on the Clinton “scandal” and impeachment.) In each case, the Presidents popularity jumped at least 10 points, with George W. Bush receiving the biggest boost (35 points); and the surges endured anywhere between 5 and 41 weeks. For this study we include only the 14 international events. For a complete list, navigate to: www.gallup.com/poll/Releases/Pr010918.asp (last accessed on January 23, 2003)(on file with the authors).

²¹⁶In research seeking to identify the public opinion consequences of crises, the key threat to inference is endogenously defining the explanatory variable on the basis of shifts in the dependent variable (usually presidential approval). As such, all lists of “rally points” are by definition problematic for that sort of research. For our study, if we take the combination of the crisis and any possible public opinion changes as our explanatory variable, we have no such definitional problems.

²¹⁷Some readers might wonder why we do not take another step, attempting to measure whether a particular case is related to a crisis. This would require us to determine *ex ante* whether a case is crisis-related or not, which is not at all an obvious determination to make, as we explain in Part VIII and as others have made clear. See, for example, Gross, who notes that “when judges decide ordinary criminal cases, they will take into consideration the impact of their rulings on the fight against terrorism.” Gross, *supra* note 4, at 1095. At the very least, we certainly could not make that determination on the basis of whether the Court found the on-going crisis relevant to the case. That is because justices may very well point to the existence of a crisis in order to justify a particular decision. If this is so, then determining whether a case is crisis related or not on the basis of what the Court says would be the equivalent of defining a crisis to exist whenever the outcome of the case fit the crisis thesis. A possible approach to circumventing this drastic problem of endogeneity would be to examine systematically briefs filed by the parties to the cases as these arrive at the Court before the justices make their decisions. Unfortunately, the most comprehensive electronic database housing Supreme Court briefs covers only terms since 1979. (Archival research would of course be possible, and we commend it to others to undertake.)

These severe problems noted, we nonetheless do make an effort to identify war-related cases for the purpose of responding to a potential critique of our study: that by including suits connected to wars we have stacked the deck in favor of the crisis thesis. As it turns out, extracting these cases, as we explain in Part VIII, does not alter our basic conclusions.

²¹⁸The dates for wars are: World War II: 12/7/41-8/14/45; Korea: 6/27/50-7/27/53; Vietnam: 2/7/65-1/27/73; Gulf: 1/16/91-4/11/91; Afghanistan: 10/7/01-3/14/02. With the exception of September 11th, the dates for the major crises are from the International Crisis Behavior Project (ICPSR Study 9286) (available at: <http://www.icpsr.umich.edu/>); September 11 began on 9/11/01 and continues through the 2001 term, the last in

termining whether the Supreme Court made its decision during a crisis period (for each measure of crisis) or not. Two possibilities presented themselves: pegging the existence (or lack thereof) of the crisis to the date the Court handed down its decision or to the date it heard oral arguments in the case. We opted for the latter. That is because we are studying the effect of a crisis on the direction of the Court's decision (for or against the rights, liberties, or justice claim)—which typically is determined by an initial vote taken within a few days of oral arguments in a case²¹⁹—rather than the rationale in the opinion—which usually is determined during a bargaining period that occurs between oral argument and the printing of the final version of the opinion.²²⁰ Of course, individual justices do change their votes between the conference following oral arguments and publication of the final decision. Yet, those vote shifts rarely produce alterations in the direction (*i.e.*, for or against the claim) of the Court's decision.²²¹

Table 2 documents the results of these research decisions, summarizing information on the 3,345 civil rights, liberties, and justice cases in which the Court heard arguments between the 1941 and 2001 terms, along with the three measures of crisis. As we can observe, decision making in times of international urgency is not the norm for the Court. Into none of our measures do a majority of the cases fall; and combining the indicators does not change the picture. Overall, the justices decided 32 percent (n=1,061) of the 3,345 cases while a war, major conflict, or rally event was in place. On the other hand, crisis decision making is hardly a rare event. Surely this is true of the first two measures—war and war, plus major conflicts—with roughly a quarter of the cases occurring while such crises were ongoing. It also holds for rally effects. The percentage of 9 may be small but the number of cases (n=292) is sufficiently large to enable meaningful analysis and, thus, to explore the potential effect of rallies on the Court.

our database. Dates for rally events are available at: www.gallup.com/poll/Releases/Pr010918.asp (last accessed on January 23, 2003)(on file with the authors).

²¹⁹See Epstein & Knight, *supra* note 141 for information on the Courts internal decision-making procedures.

²²⁰To see the logic behind our choice, consider September 11 and assume (even though the Courts term does not begin until October) that the Court heard arguments in, say, a First Amendment case on September 1, 2001, took its initial vote on September 2, and handed down its decision on September 13. Had we pegged the existence of a crisis to September 13, rather than to September 2, we would have coded this as a decision made during a crisis despite the fact that September 11 had yet to occur at the time the Court took a vote in the case. And while this is an initial vote (subject to change), alterations in Court disposition (e.g., from an affirm to a reverse), as we note in the text, are quite rare.

²²¹Lee Epstein & Jack Knight, "Documenting Strategic Interaction on the U.S. Supreme Court" (paper presented at the annual meeting of the American Political Science Association, Chicago, IL, 1995); Saul Brenner, *Fluidity on the United States Supreme Court: A Reexamination*, in AMERICAN COURT SYSTEMS (Sheldon Goldman & Austin Sarat ed. 1989). For some exceptions to this general rule, see EDWARD LAZARUS, CLOSED CHAMBERS (1998).

Measure of Crisis	% of Cases
War	23
War, Plus Major Conflicts	28
Rally Effect	9
(Total Cases)	(3,345)

Table 2: Crises and U.S. Supreme Court Cases Involving Rights, Liberties, and Justice, 1941-2001 Terms²²²

V THE APPARENT EFFECT OF WAR

With our data and measures now noted, let us turn to an exploration of the crisis thesis, as well as its variants and its alternatives. In what directly follows we investigate whether a simple association exists between the key explanatory variable (here, the presence or absence of an international emergency in the form of a war, major conflict, or rally event) and a handful of dependent variables suggested by various versions of the crisis thesis (e.g., whether or not the Court ruled in favor of the litigant who claimed a deprivation of their rights and liberties; whether the Court ruled in favor of the federal government). Even though this approach is not useful in generating causal claims about the effect of war on the Court’s jurisprudence²²³—our ultimate goal—we have several reasons for beginning in this way. Primarily, the crisis thesis itself seems to anticipate the emergence of this sort of simple association. Whether we consider typical or more qualified accounts, proponents apparently expect the Court to curtail rights in times of international threat regardless of the political propensities of its members or particular features of the cases, to name just a few factors that might affect the outcomes of cases. We could say precisely the same of competing perspectives, which emphasize the role of the Court as a guardian of rights.

As it turns out, this first look at the data suggests that the existence of a war or other threat to the nation’s security is not associated with Court decisions disfavoring parties who claim a deprivation of their rights or with decisions favoring the federal government. In other words, the initial analyses we present below *seem* to lend support to those who have long argued that the Court protects, rather than, curtails rights during crises. It is only when we introduce a more appropriate and rigorous statistical methodology in Part VI that we discover the clear and robust causal effect of war anticipated by the crisis thesis.

²²²The data on Supreme Court cases come from the U.S. Supreme Court Judicial Database, backdated by the authors, with *analu*=0, *dec_type*=1 or 7, and *values*=1-6 (see *supra* notes 194, 202 and 203). “War” includes World War II, and the Korean, Vietnam, Gulf, and Afghan Wars; (see *supra* note 218 for more details). “War, Plus Major Conflicts” includes Wars and the Berlin Blockade, Cuban Missile, and Iran-Hostage (see *supra* note 218 for more details). Rally Effects are periods during which the Presidents popularity rises by 10 points or more as a result of an international event (see *supra* notes 215 and 218).

²²³See *supra* note 193.

A The Relationship between Crises and Decisions in All Civil Rights and Liberties Cases

Underlying so much of the writing on crises and the Court is a simple expectation; namely, that when the nation’s security is under threat the Supreme Court “rallies ’round the flag,” supporting curtailments of rights and liberties that it otherwise would not. To begin to assess this expectation we conducted an equally straightforward test, asking simply whether the Court exhibits a greater tendency to rule against litigants claiming a deprivation of their rights and liberties during times of international emergency.

As it turns out, this “naïve” approach to the crisis thesis, visually depicted in in Figure 2, suggests that the answer is no; that, in fact, the Court appears to be more supportive of rights, liberties, and justice claims raised during the presence of international crises than in their absence. Of the 778 cases decided during a major war, the Court decided roughly 55 percent in favor of the party claiming a rights violation, compared to 47 percent of the cases decided during peace.²²⁴

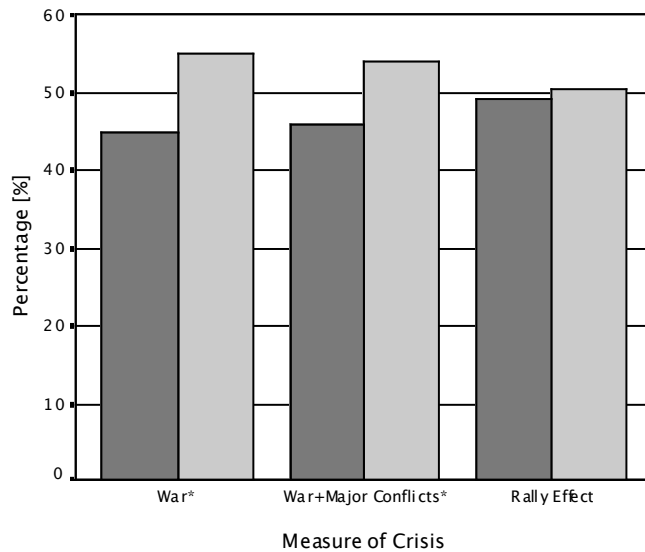


Figure 2: Percentage of U.S. Supreme Court decisions supporting rights, liberties, or justice claims in times of crisis, 1941-2001 terms. N=3,344. The darker bars indicate the absence of a crisis (e.g., the country was not at war) at the time the Court heard oral arguments in the cases; the lighter bars indicate the presence of a crisis. * indicates a statistically significant association (see *supra* notes 224 and 226).²²⁵

A similar lack of validation of the crisis thesis characterizes our findings on the two other measures (war plus other major conflicts and rally events). Regardless of which we observe, a significant relationship, in the direction posited by the thesis, fails to emerge. Of the 925 cases that

²²⁴This association is statistically significant, with a 95% confidence interval of (-3,-11), t-statistic=-3.6, and p-value=0.0003.

²²⁵We obtained data on the Supreme Court’s decisions from U.S. Supreme Court Judicial Database (backdated by the authors) with *analu*=0, *dec_type*=1 or 7, and *values*=1-6 (see *supra* notes 194, 202, and 203). For the crisis measures, War includes World War Two, and the Korean, Vietnam, Gulf, Afghan Wars; War, Plus Major Conflicts includes War and the Berlin Blockade, Cuban Missile, and Iran-Hostage; Rally Effects are periods during which the President’s popularity rises by ten points or more as a result of an international event (see *supra* notes 215 and 218 for more details).

the justices heard during either times of war or other conflicts, the Court decided about 54 percent in support of the claim, compared to 47 percent against;²²⁶ and for the 291 cases occurring during international rally events, roughly 51 percent adopted the rights claim, and 49 percent rejected it.²²⁷

B Other Possible Relationships between Crises and Court Decisions

The above results seem to suggest that, regardless of the measure of crisis we use, the Court is not responding to international emergencies in the way assumed by the crisis thesis, at least the thesis in its broadest and perhaps most typical form; namely that the Court acts in a more repressive manner toward *all* civil liberties claims during times emergency. But the question remains: Do simple bivariate comparisons reveal support for more qualified versions of the thesis, such as those suggesting that the justices evince less tolerance toward rights and liberties only in particular kinds of suits or those to which the federal government is a party?

1 Particular Areas of the Law

To consider the first possibility, we examined the effect of war and other threats to the nation's security on four finer categories of rights and liberties: criminal procedure, civil rights, First Amendment, and procedural due process.²²⁸ Figure 3 displays the results, and they are no more supportive of the crisis thesis than are our earlier findings; actually, in all four areas, the Court tended to be more supportive of rights, liberties, and justice claims during times of “emergency” than in periods of relative tranquility.²²⁹ To be sure, those “tendencies” did not reach statistically significant levels for all measures in all areas but several potentially interesting associations did emerge. One is that the Court evinced a propensity to rule in support of the criminally accused when the nation is at war. Of the total 1,376 criminal procedure cases, the justices decided roughly 41 percent in favor of the defendant; during war time the percentage was close to 50 but less than 40 percent when the nation was not engaged in an international conflict.²³⁰ Since criminal cases typically involve claims of procedural injustice for those accused of wrong doing,²³¹ which are matters many studies suggest are particularly vulnerable during times of war, some may view the finding of a statistically significant association that runs counter to crisis thesis as a particularly damaging piece of evidence against it.²³²

²²⁶This association is statistically significant, with a 95% confidence interval of (-3,-11), t-statistic=-3.6, and p-value=0.0003.

²²⁷This association is not statistically significant, with a 95% confidence interval of (-8,4), t-statistic=-0.5, and p-value=0.57.

²²⁸See Appendix A for details about the types of cases included in these categories.

²²⁹The exceptions here are when a presidential rally is ongoing, the Court is slightly less supportive of due process and First Amendment claims than in periods without rallies. But neither relationship is statistically significant.

²³⁰The precise percentages are 49.06 and 38.85, respectively.

²³¹See Appendix A for the types of cases categorized as “criminal procedure.”

²³²Cutting even finer slices of the rights, liberties, and justice cases proves just as unilluminating. Whether we explore litigation involving aliens and immigrants, conscientious objectors, protest demonstrators, or individuals accused of posing a threat to the nation's internal security—four legal areas that either relate to the crisis or that may entail subject of particularly harsh judicial treatment in times of urgency—the results mirror those in displayed in Figures 2 and 3: No statistically significant associations in the expected direction emerge between Court treatment of aliens, conscientious objectors, demonstrators, or alleged “traitors” and the presence or absence of an international

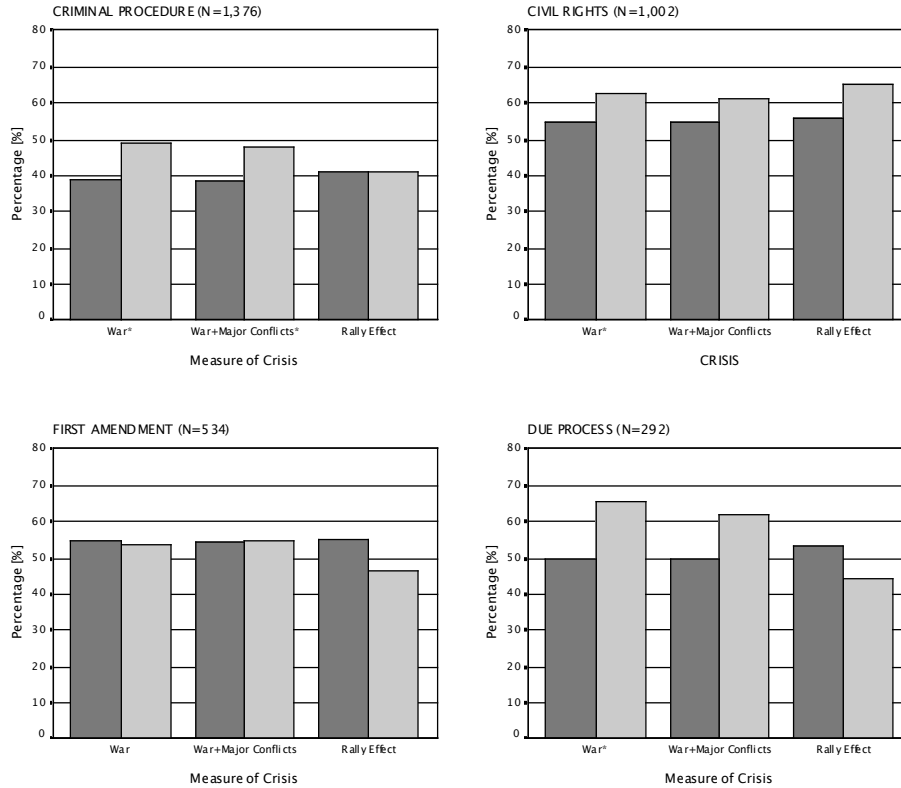


Figure 3: Percentage of U.S. Supreme Court decisions supporting rights, liberties, or justice claims in times of crisis by case type, 1941-2001 terms. The darker bars indicate the absence of a crisis (e.g., the country was not at war) at the time the Court heard oral arguments in the cases; the lighter bars indicate the presence of a crisis. * indicates a statistically significant association ($p \leq .05$).²³³

2 Government Claims

Turning to the role of the U.S. government in litigation, we considered the claims of some observers that the crisis thesis is more about deference to the federal government when it is a party (or even an *amicus curiae*) in the case than it is about Court treatment of alleged infringements of rights and liberties made by all parties. Opponents of the crisis thesis, of course, make precisely the opposite claim: that during times of war, the Court is particularly likely to rebuff the government, casting an especially watchful eye on its activities. The data, however, do not appear to support either of these positions. Simple bivariate comparisons fail to unearth a statistically significant

crisis. See Appendix A for details about these issue areas; see our web site for the data on which we base this conclusion.

²³³We obtained data on the Supreme Court's decisions from U.S. Supreme Court Judicial Database (backdated by the authors) with *analu*=0, *dec.type*=1 or 7, and *value*= 1 (criminal procedure) or 2 (civil rights) or 3 (First amendment), or 4 (due process) (see *supra* notes 194, 202, and 203). For the crisis measures, War includes World War Two, and the Korean, Vietnam, Gulf, Afghan Wars; War, Plus Major Conflicts includes War and the Berlin Blockade, Cuban Missile, and Iran-Hostage; Rally Effects are periods during which the President's popularity rises by ten points or more as a result of an international event (see *supra* notes 215 and 218 for more details). Test statistics and p values are available in the replication archive located on our web site.

association between outcomes in Court cases and deference to the government as a party or an *amicus* in a suit.

For the first comparison, we focused on federalism cases, exploring the possibility that the Court is more likely, in times of urgency, to rule in favor of the federal government in litigation directly challenging the scope of its powers. Despite the unanimous view of six legal academics that “when you see a national emergency, federalism disappears,”²³⁴ the data, as Figure 4 shows, do not bear it out. As is the case for most of the other legal areas we have analyzed thus far, not only does a statistically significant relationship fail to emerge but the association, if anything, works the other way: On two of the measures (war, and war plus major conflicts) the Court is somewhat less—though again not significantly so—deferential to federal claims in times of crisis than during other periods.²³⁵ Across all 295 federalism cases decided between the 1941 and 2001 terms the Court supported the position advanced by the federal government in roughly 59 percent. During times of war that percentage is roughly 54 percent; when a war was not in effect, that figure increases slightly to 60 percent.

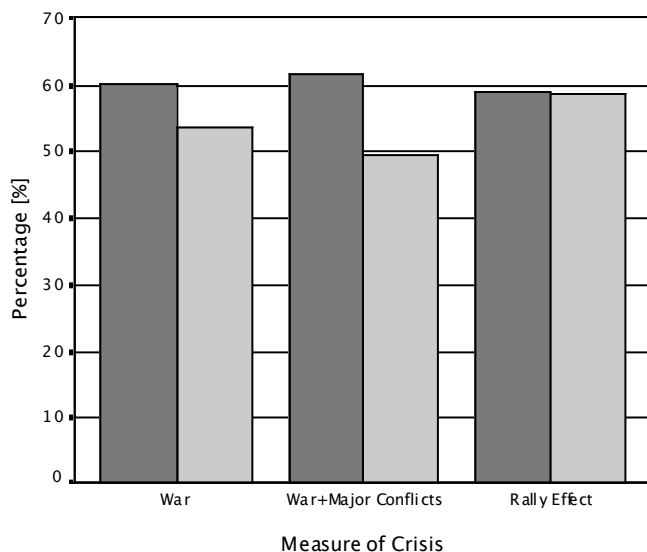


Figure 4: Percentage of U.S. Supreme Court decisions in the area of federalism supporting the position advocated by the U.S. government, 1941-2001 terms. N=295. The darker bars indicate the absence of a crisis (e.g., the country was not at war) at the time the Court heard oral arguments in the cases; lighter bars indicate the presence of a crisis.²³⁶

For our next set of comparisons, we shifted away from case type and toward participation, examining whether the justices are more likely to support the U.S. government during times of

²³⁴Quoted in Linda Greenhouse, *Will the Court Reassert National Authority?*, N.Y. TIMES, September 30, 2001.

²³⁵We conducted this analysis via the U.S. Supreme Court Database, using `analu=0; dec_type=1 or 7; and value=10` (federalism) (see also *supra* notes 255, 262, and 263.)

²³⁶We obtained data on the Supreme Court’s decisions from U.S. Supreme Court Judicial Database (backdated by the authors) with `analu=0, dec_type=1 or 7, and value= 10` (see *supra* notes 194, 202, and 203). For the crisis measures, War includes World War Two, and the Korean, Vietnam, Gulf, Afghan Wars; War, Plus Major Conflicts includes War and the Berlin Blockade, Cuban Missile, and Iran-Hostage; Rally Effects are periods during which the President’s popularity rises by ten points or more as a result of an international event (see *supra* notes 215 and 218 for more details).

crisis when it is a party to the suit or participates as an *amicus curiae* regardless of the nature of the litigation. The answer harmonizes with the other results: Court treatment of the government appears indistinguishable when crises do and do not exist. To see this consider that the government, overall, wins 67 percent of the cases to which it is a party. If the nation is not at war the percentage increases ever so slightly to roughly 68; the corresponding figure during wartimes is 65 percent. The *amicus* data evince a similar, equally trivial difference. When a war is ongoing, the Court adopts the position advanced in the government’s *amicus curiae* brief in roughly 76 percent of the cases; the percentage is marginally (and again not significantly) lower in periods when the nation is not at war (73 percent).²³⁷

C Confounding Factors

Based on the results depicted in Figures 2, 3, and 4, we might be tempted to conclude that the crisis thesis plainly is wrong. For if these analyses suggest anything it is that justices of the Supreme Court fail to make distinctions in their decisions based on the presence or absence of a crisis. They rather seem to take advantage of their life-tenured positions and whatever independence flows from that institutional protection to create law as they deem appropriate.²³⁸

But we ought resist that temptation for a simple reason: Our analyses thus far fail to take into account (that is, “control for” or “hold constant”) other factors that that may affect case outcomes (and that are causally prior to the chief explanatory variable, a crisis).²³⁹ Rather, we have assumed that if the Court ruled against the litigant claiming a rights violation during a war (or ruled in favor of the litigant during peace) it was the presence (or absence) of the war alone that led the Court to reach the outcome that it did. To put it another way, the analyses in Parts V A and B assume that all factors which might affect case outcomes (other than the presence or absence of a crisis) are the same (or constant) during periods of war and peace, thereby negating the need to control for those other factors. But if the cases the Court decides during war and peace differ, then the direction of its decisions can also differ in the two times for reasons completely *unrelated* to the existence of a crisis.

In what follows we consider the two most prominent of these potentially “confounding” factors: the *characteristics of cases* that come to the Court during times of war and peace²⁴⁰ and the *political composition* of the Court hearing those cases.²⁴¹ We also briefly discuss several other factors—including case salience, lower court rulings, and time effects—to which any large-scale study of judicial decision making in times of crisis ought be attentive.

²³⁷Appendix B provides the data figures on which we base these empirical claims.

²³⁸TERRI PERETTI, *IN DEFENSE OF A POLITICAL COURT* (1999).

²³⁹See *supra* note 193.

²⁴⁰See e.g., Yoo, *supra* note 13; Robert S. Chang, *The Legal, Moral, and Constitutional Issues Involving Diversity*, 66 ALB. L. REV. 349 (2003); David Richman, *Prosecutors and their Agents, Agents and their Prosecutors*, 103 COLUM. L. REV. 749 (2003); Sidak, *supra* note 41; Cover, *supra* note 62.

²⁴¹See *supra* note 189.

1 The Characteristics of Cases

A primary potential confounding factor, if we take seriously several contemporary essays on the effect of war on judicial decisions,²⁴² relates to the well-known selection effects of litigation²⁴³—presenting itself here in the form of distinctions in the characteristics of cases that come to the Court during times of crisis and periods of tranquility. Specifically, several scholars have argued that when the nation is at war, the government becomes increasingly bent on curtailing individual rights. Accordingly, it undertakes prosecutions in which the facts are so “severe” (or “extreme”) that even a sympathetic (that is, right-of-center) Court would have difficulty simultaneously ruling in the government’s favor and following extant legal principles.²⁴⁴ If this argument has merit, that is, if the types of cases are related to our measures of crisis, then it could confound the simple bivariate comparisons we thus far have presented; it also would commend the incorporation of the relative extremity of case facts into any further analyses.

To see why, think about the Fourth Amendment’s guarantee against unreasonable searches and seizures—an oft-cited exemplar of constitutional provision that governments attempt to skirt during war times.²⁴⁵ From various statistical analyses, we know a great deal about the particular features of cases that lead the Court to interpret this guarantee in a way that favors defendants (typically when it strikes down the challenged search) or the government (typically when it upholds the search);²⁴⁶ from those same studies, we also have a reasonably good idea about how the various features affect the probability of the Court striking down or upholding a search.²⁴⁷

Figure 5 lists those features—eleven critical facts pertaining to search and seizure cases, along with the impact empirical investigations have shown them to have on the Court (when compared to a 0.5 baseline probability of a decision favoring the defendant).²⁴⁸ Consider, for example, the three types of searches that can occur when law enforcement officials make an arrest: searches incident to a valid arrest, searches after lawful arrests, and searches after unlawful arrests.²⁴⁹ In light of existing legal principles,²⁵⁰ it is hardly a surprise to find, as the figure shows, that those searches incident to arrest are the most likely to receive Court validation (such a search has a 0.46 greater predicted probability of being upheld than a search that was not incident to an arrest); searches after lawful arrests receive less favorable treatment from the justices; and searches after unlawful

²⁴²See *infra* note 240.

²⁴³See Priest & Klein, *supra* note 23.

²⁴⁴For supporting literature, see *supra* note 240.

²⁴⁵See, e.g., Dorsen, *supra* note 14; Heymann, *supra* note 13; Michael P. O’Connor & Rumann, *Emergency and Anti-Terrorist Power: Going, Going, Gone: Sealing the Fate of the Fourth Amendment*, 26 FORDHAM INTERNATIONAL LAW JOURNAL 1234 (2003); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L. J. 2137 (2002).

²⁴⁶See, e.g., Jeffrey A. Segal, *Predicting Supreme Court Decisions Probabilistically: The Search and Seizure Cases*, 78 AM. POL. SCI. REV. 891 (1984); Segal & Spaeth, *supra* note 195.

²⁴⁷See Segal & Spaeth, *supra* note 195, at 318.

²⁴⁸Note that since impact calculations are not additive in a logistic probability model, these impact findings should not be interpreted as constant or additive. The impact depends on which other facts are present. See, e.g., GARY KING, UNIFYING POLITICAL METHODOLOGY: THE LIKELIHOOD THEORY OF STATISTICAL INFERENCE 97-110 (1989); Wooldridge, *supra* note 26; Gary King, Michael Tomz & Jason Wittenberg, *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 AM. J. POL. SCI. 341, 355 (2000).

²⁴⁹In determining whether an arrest is valid or unlawful, scholars typically rely the holding of the lower courts. See Segal & Spaeth, *supra* note 195.

²⁵⁰For a review of those principles, see Epstein & Walker, *supra* note 42; LLOYD WEINREB, WEINREB’S CRIMINAL PROCESS, 2D: PART ONE—INVESTIGATION (1998).

arrests are the least likely of all “arrest” searches to be upheld.

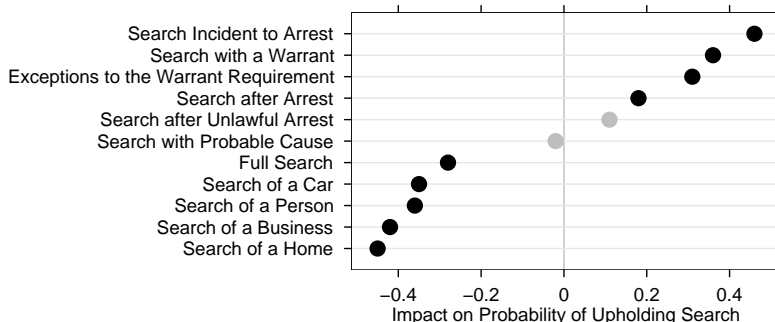


Figure 5: Facts relevant to the Supreme Court’s adjudication of Fourth Amendment Cases, and the impact of the facts on the predicted probability of the Court upholding a search. Grey circles indicate statistically insignificant impacts.²⁵¹

Now suppose it is in fact the case that the government acts in a more repressive fashion during times of war. Such “overzealous” prosecution might in turn generate more “extreme” cases—for example, a disproportionate number of cases that involve searches incident to unlawful arrests, which the justices, on average, are less likely to uphold than searches incident to a lawful arrest (see Figure 5). As the Court begins to adjudicate these “unlawful arrest” cases,²⁵² rather than, say, “incident to arrest” cases,²⁵³ we might expect to find more and more holdings in favor of the defendant, even if the justices did not alter existing legal doctrine whatsoever. To put it more generally, the facts, in response to overzealous government efforts, may move sufficiently far to the right during times of war as to compel the Court—in face of extant legal principles—to articulate a position that favors defendants. This may explain why the bivariate comparisons depict a Court that fails to defer to the government.²⁵⁴ It also would, of course, violate an assumption underlying those simple comparisons: in a consequential way, the types of cases resolved by the justices during times of war are no different than those that they resolve when peace prevails.

To investigate this possibility, we computed the average degree of severity (or extremeness) in the facts of Fourth Amendment cases for each term in our database,²⁵⁵ hypothesizing that this average should increase during times of war if, in fact, the government is overzealous in its prosecution efforts.²⁵⁶ We then ran a series of time-series models to assess the hypothesis, with Table 3 depicting one specification of an ordinary least squares with a variable representing the lag

²⁵¹This is a graphical depiction of data in Segal & Spaeth, *supra* note 195, at 318, which contains the statistical model from which the authors derived these predictions. The probabilities for Person, Home, Car, and Business are all compared to a baseline where the defendant does not have a property interest. The probability for Full Search is compared to the baseline of a limited intrusion such as a stop-and-frisk.

²⁵²This holds for any suits in which the facts are such that the justices typically strike down the search.

²⁵³This holds for any others in which the facts are such that the justices typically uphold the search.

²⁵⁴See *supra* Figure 4.

²⁵⁵Figure 5 illustrates the facts we included.

²⁵⁶We also estimated a series of models that assessed the effect of international crises on the severity of case facts at the case (rather term) level. After controlling for the political ideology of the Court—a crucial variable, as we explain in Part V C 2—we cannot uncover statistically significant differences between cases decided during times of war and peace. In other words, the results (available from the authors) confirm the analyses presented in Table 3.

of “case severity” on the right-hand side.

Explanatory Variables	Average Per Year Severity of Search & Seizure Cases		
	Dynamic Specification— Partial Adjustment		
War	-.330 (.340)	—	—
War, & Major Conflicts	—	-.146 (.333)	—
Rally Effect	—	—	.460 (.359)
Average Severity _{t-1}	.360 (1.88)	.415 (.188)*	.476 (.156)*
Constant	-1.26 (.393)*	-1.18 (.395)*	-1.17 (.367)*
Adj. R ²	.20	.17	.22
N	32	32	32

Table 3: Time series assessments of the effect of international crises on the severity of case characteristics. * indicates $p \leq .01$.²⁵⁷

We can draw several conclusions from this table²⁵⁸ but only one is relevant here. All the models depicted in the table, along with every plausible alternative time-series specification we tested, returned the same substantive result: a lack of any detectable impact of the crises variables on the extremity of cases on the Court’s docket.²⁵⁹ In other words, the facts presented in these cases simply did not vary; they became no more (or less) “severe” (or “extreme”) in times of war, suggesting, in turn, that it was no more (or less) difficult for the Court to resolve the suits for (or against) the government.

2 The Political Composition of the Court

The lesson from our analysis of case facts is clear: We find no support for the existence of a systematic correlation between any of the facts and any of our crisis measures in a way that would bias our estimates of the impact of war on case outcomes. This conclusion is important because it undermines a potential point of critique of our earlier analyses: that, owing to overzealous prosecution efforts during times of war, we ought control for the relative extremeness of case characteristics. The variation anticipated by this claim simply does not emerge.

Where differences do emerge is in a second confounding factor: the political composition of the Supreme Court.²⁶⁰ Specifically, owing to the confluence of several historical phenomenon—

²⁵⁷The database used to conduct this analysis is available on our web site. For the crisis measures, War includes World War II, and the Korean, Vietnam, Gulf, and Afghan Wars; War, Plus Major Conflicts includes War and the Berlin Blockade, Cuban Missile, and Iran-Hostage; Rally Effects are periods during which the President’s popularity rises by 10 points or more as a result of an international event ((see *supra* notes 215 and 218 for more details). We calculated the severity levels of searches from the same coefficients used to calculate the probabilities in Figure 5. Because negative values are associated with more extreme searches, the case-severity account predicts significantly negative coefficients on our crisis measures.

²⁵⁸Another conclusion is that the case facts heard by the Court are generally not random, as judged by the lagged severity coefficients.

²⁵⁹We did obtain a set of significant coefficients by running OLS and excluding lagged severity. But the Durbin-Watson statistics show clear signs of autocorrelation ($DW_{2,35} = 1.12, 1.22, \text{ and } 0.89$ respectively), which means that the reported standard errors are biased downward. Every analysis we conducted that controls for autocorrelation finds no significant relationship. Our web site houses the complete set of findings.

²⁶⁰For the importance of this factor, see *supra* note 189.

the dominance of the Democratic party during long periods of the 20th century and the resulting appointment of relatively liberal justices,²⁶¹ coupled with a greater frequency of wars during those periods—Courts deciding cases during times of crisis were composed of considerably more left-of-center (“liberal”) justices than those deciding cases during times of peace.

This, at least, is the inescapable conclusion of our investigation into the politics of the Court. To undertake it, we assessed the extent to which Courts sitting between the 1941 and 2001 terms were “liberal” or “conservative.” While social scientists and legal academics have proposed several operational approaches to these terms,²⁶² we rely here on a particularly powerful and pervasive one:²⁶³ the ideology scores that Jeffrey A. Segal and Albert Cover have assigned to each justice serving since the 1930s.²⁶⁴ Why these scores, which range from -1 (the most conservative) to 0 (moderate) to +1 (the most liberal), are so prominent is not difficult to explain: They have proven to be highly accurate predictors of judicial votes, especially in the areas (civil liberties and rights)²⁶⁵ and in the terms (1941-2001)²⁶⁶ under analysis here. They also are exogenous to the vote, since Segal and Cover developed them not from examining the decisions reached by justices but rather by analyzing newspaper editorials written between the time of justices’ nominations to the Court and their confirmations.²⁶⁷

²⁶¹See *infra* Figure 6.

²⁶²For a review of many of these measures, see Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 260 (1996). The simplest one is the use of party affiliation, but this fails to capture nuances along the ideological spectrum, which are so vital to controlling for policy preferences. See, e.g., Epstein & King, *supra* note 181, at 74-75 (discussing the relation between theory and operationalization of policy preferences). Accordingly, political scientists have proposed much more sophisticated models using item response theory. See, e.g., Simon Jackman, *Multidimensional Analysis of Roll Call Data via Bayesian Simulation: Identification, Estimation, Inference and Model Checking*, 9 POL. ANAL. 227 (2002); Simon Jackman, *Estimation and Inference are ‘Missing Data’ Problems: Unifying Social Science Statistics via Bayesian Simulation*, 8 POL. ANAL. 307 (2000). For a particularly sophisticated estimation of Supreme Court ideal points using Markov Chain Monte Carlo methods, see Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANAL. 134 (2002); and Andrew D. Martin & Kevin M. Quinn, *Patterns of Supreme Court Decision-Making, 1937-2000*, Working Paper No. 26, Center for Statistics and the Social Sciences (2002) (on file with authors). This measure is not well suited for our purposes, however, since Martin & Quinn estimate the ideal points by using actual votes, thus endogenously defining them with respect to our main causal variable of interest. But an alternative Martin & Quinn measure—one that uses votes from all Supreme Court cases *except* those involving rights civil rights and liberties could provide an alternative to the Segal & Cover scores, assuming that (a) war does not affect non-civil rights and liberties cases and (b) ideal points are non-separable and therefore correlated among issue areas. We make these assumptions in Part VIII where we employ these alternative measures (graciously provided by Martin & Quinn) to analyze the robustness of our results.

²⁶³Indeed, these score figure prominently in many studies of judicial decisions. See, e.g., Epstein, Knight, & Martin, *supra* note 130; William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613 (1991); Barry Friedman and Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123 (2003). One commentator, though, has criticized the Segal & Cover scores as “reflect[ing] rather general opinions about the political orientation of a justice” and not being a “good guide[] to the views of justices in specific areas of constitutional controversy.” Griffin, *supra* note 93, 32-33. Yet capturing the general “political orientation” is precisely the purpose of the Segal & Cover scores. As we employ them, they are not meant to provide predictive power for one particular case, but rather to control for long-term changes in judicial ideology of the court. Moreover, we use them to study decisions in the areas of civil rights and liberties, where they work well as general predictors of trends in decision making. See, e.g., Epstein & Mershon, *supra* note 262.

²⁶⁴Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

²⁶⁵Epstein & Mershon, *supra* note 262.

²⁶⁶Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995).

²⁶⁷Specifically, as Segal and Cover tell it:

From these analyses, Segal & Cover devised their scale of judicial political ideology, such that each justice obtains a score within the +1 to -1 range.²⁶⁸ For example, William J. Brennan's score is +1.0 (the most liberal); and Scalia's is -1.0 (the most conservative), while O'Connor's is a more moderate -.17.²⁶⁹ Because we are interested in examining the political composition of the Court as a whole, rather than the policy preferences of particular justices, however, we employed the Segal & Cover scores to calculate the ideology of the median justice serving on each Court,²⁷⁰ for each year in our analysis. So doing is consistent with public choice and jurisprudential theories emphasizing the importance of the swing vote²⁷¹—not to mention with contemporary commentary, which often stresses the critical role Justice O'Connor (and, to a lesser extent, Kennedy) plays on the Court by casting key votes in many consequential cases.²⁷²

Figure 6 depicts these Court “swings”: the median's political ideology, computed on the basis of the Segal & Cover scores, for the 1941-2003 terms. As we can observe, the data are well in line with commonly held intuitions about particular Court eras.²⁷³ Note, for example, the increase in liberalism during the Warren Court years (1953-1968 terms) and the decrease that occurs thereafter as more and more justices appointed by Republican Presidents Richard M. Nixon, Ronald Reagan, and George H.W. Bush ascended to the bench.

We trained three students to code each paragraph [in the editorial] for political ideology. Paragraphs were coded as liberal, moderate, conservative, or not applicable. Liberal statements include (but are not limited to) those ascribing support for the rights of defendants in criminal cases, women and racial minorities in equality cases, and the individual against the government in privacy and First Amendment cases. Conservative statements are those with an opposite direction. Moderate statements include those explicitly ascribe moderation to the nominees or those that ascribe both liberal and conservative values.

Segal & Cover, *supra* note 264, at 559. They arrived at their measure by subtracting the fraction of paragraphs coded conservative from the fraction of paragraphs coded liberal and dividing by the total number of paragraphs coded liberal, conservative, and moderate. *Id.*

The fact that this measure is exogenous to the judicial vote is crucial to the analysis, as noted in *supra* note 262. Since the entire question of this study is the causal effect of war on the outcome of opinions, we cannot very well use outcomes to derive a control variable.

²⁶⁸In subsequent analyses in which we employ propensity score matching (see Part VII), we rescale this so that the ordering of the Segal & Cover score is invariant to a square transformation.

²⁶⁹For a list of the Segal and Cover scores for all justices, see Epstein et al., *supra* note 76, Table 6-1.

²⁷⁰The median is the middle justice, such that four justices are more liberal and four are more conservative.

²⁷¹See, e.g., Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997); Epstein and Mershon, *supra* note 262; R. Randall Kelso and Charles D. Kelso, *Swing Votes on the Current Supreme Court: The Joint Opinion in Casey and Its Progeny*, 29 PEPP. L. REV. 637 (2002); Mario Bergara, Barak Richman & Pablo T. Spiller, *Modeling Supreme Court Preferences in a Strategic Context*, 28 LEG. STUD. Q. 247 (2003). The role of the pivotal justice is deeply rooted in the theory of the median voter. See generally ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); Harold Hotelling, *Stability in Competition*, 39 ECON. J. 41 (1929).

²⁷²See, e.g., Editorial, *A Moderate Term on the Court*, N.Y. Times, at 4:12, June 29, 2003 (noting Justice O'Connors status as the “court's critical swing vote”); Associated Press, *Affirmative Action Case Puts Judges in Spotlight*, April 1, 2003 (describing Justices O'Connor and Kennedy as the “perennial swing voters”); Charles Lane, *Supreme Court: On the Sidelines, for Now*, Wash. Post, at A5, Sep. 30, 2001 (describing Justice O'Connor as the “perennial swing voter”).

²⁷³For ideological characterizations of particular Court eras, see, e.g., Thomas W. Merrill, *Childress Lecture: The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003); HOWARD GILLMAN, THE VOTES THAT COUNTED (2001); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331 (1991).

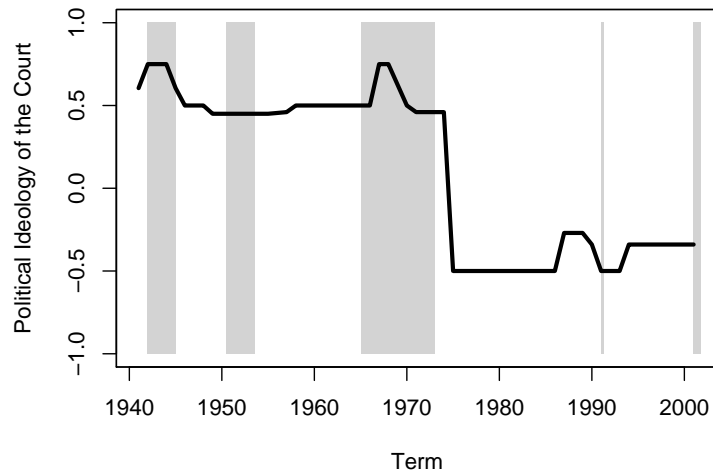


Figure 6: The political ideology of the median justice on the U.S. Supreme Court, 1941-2003. The line depicts the Segal & Cover score of the median justice for each term. The scores range from 1.00 (most liberal) to -1.00 (most conservative).²⁷⁴ The gray shading depicts terms during which the Court heard disputes while a war was ongoing.

Note too the gray shading in Figure 6, indicating terms during which wars were ongoing.²⁷⁵ For the vast majority, as we can see, the median was quite liberal, thereby providing the first glimpse of support for our claim that the political composition of the Court has varied during times of war and peace. But it is Figures 7 and Figure 8 that virtually clinch the case. The former houses smoothed versions of two histograms²⁷⁶—one representing the distribution of cases by political ideology during times of war and the other, during times of peace. Notice immediately that during periods of peace (“no war”), relatively left-of-center Courts (those toward the left end of the figure) and relatively right-of-center Court (toward the right end) decided roughly the same number of cases. We cannot, of course, say that same about periods of war: it was almost exclusively liberal courts that decided cases during those periods.

²⁷⁴The Segal & Cover scores are available in Epstein et al., *supra* note 76, Table 3-12.

²⁷⁵From this point on, we focus our analyses exclusively on times of war. We do so primarily because it would be cumbersome to present data on all three measures of crisis. Unless we indicate otherwise, though, our claims also apply to other crisis periods and rally events.

²⁷⁶These are known as kernel density estimates. See DAVID W. SCOTT, *MULTIVARIATE DENSITY ESTIMATION: THEORY, PRACTICE AND VISUALIZATION* (1992); B. W. SILVERMAN, *DENSITY ESTIMATION* (1986).

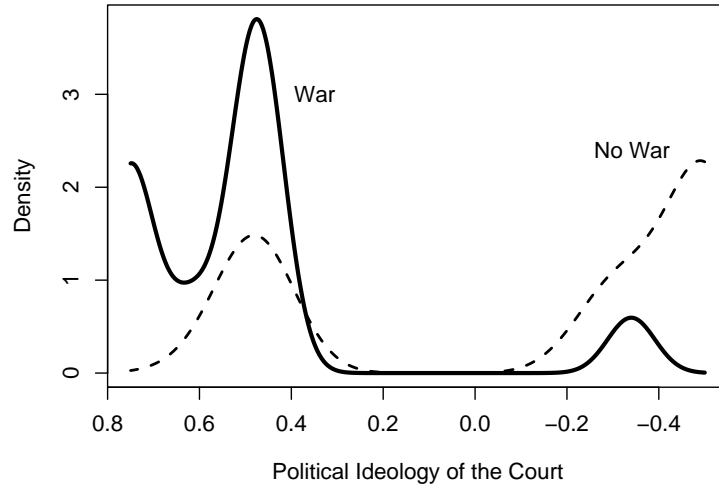


Figure 7: Kernel Density Estimate of Ideology Conditional on War, 1941-2002²⁷⁷

Figure 8 makes this last point even clearer. There we depict the actual distribution of the data such that the higher the circles (which represent the terms included in our dataset) the greater the proportion of decisions supporting rights; and the further left the circles, the more “liberal” the Court (again, on the Segal and Cover scale). Note that while right-of-center justices dominated during many terms as indicated by the gray circles, during only two was a crisis in effect (the Gulf and Afghan War) as indicated by the white circles; rather liberal justices controlled during all others.

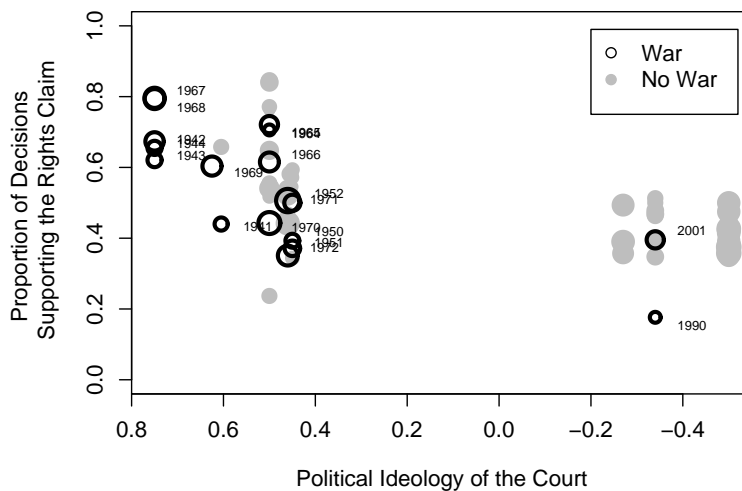


Figure 8: The Preponderance of Left-of-Center Courts During Times of War: The Empirical Distribution of the Data. N=3,345. Each circle is weighted by the number of cases decided in the term, with an average of roughly 55 cases decided each term.²⁷⁸

²⁷⁷We obtained data on the Supreme Courts decisions from U.S. Supreme Court Judicial Database (backdated by the authors) with *analu=0*, *dec.type=1* or *7*, *values=1-6* (see *supra* notes 194, 202, and 203); War includes World War II, and the Korean, Vietnam, Gulf, and Afghan Wars (see *supra* note 218 for more details); the Political Ideology of the Court is based on the Segal and Cover score of the median justice. See *supra* note 274.

²⁷⁸We obtained data on the Supreme Courts decisions from U.S. Supreme Court Judicial Database (backdated by

The only conclusion we can reach from Figures 7 and 8—that the political composition of the Court during times of war and peace has varied rather dramatically—is damaging to any analysis that assumes relevant features of the judicial decision-making environment remained constant over the past six decades and during periods of crisis and tranquility. In fact, this one difference is so dramatic that it might account for the results depicted in Figures 2, 3, and 4: It is entirely possible that we have been unable thus far to uncover a “crisis effect” because we have failed to attend to the political composition of the Court.²⁷⁹ Figure 8 certainly hints at this possibility. Notice that on the left (“liberal”) side, the darker circles are lower than the lighter ones, indicating that liberal Courts seem to render fewer decisions in support of the rights claimant during times of war. Likewise comes the placement of the darker circle on the right end of the figure, which suggests that the relatively conservative 1990 Court issued even more conservative decisions during the Gulf War.

3 Case Salience, Lower Courts, and Time Effects

What our analyses of confounding factors thus far reveals is that we need not concern ourselves too much with the characteristics of cases—however widespread the view that those characteristics differ in times of war and peace,²⁸⁰ litigation does not, on average, appear to become more “severe” (or “extreme”) in the midst of crisis. But surely we ought control for the political composition of the Court.

The ideology of the justices, though, is not the only confounding factor that deserves attention; others also may have obscured the simple bivariate analyses presented in Figures 2, 3, and 4. For one, it seems entirely possible that the crisis effect may manifest itself only in particularly salient cases.²⁸¹ At the very least, this seems to be the lesson of our discussion of public opinion effects;²⁸² and it reflects a rather common view in the literature, namely that the Court feels the impact of international emergencies not in “routine” cases of rights, liberties, and justice but only in those that are particularly salient or important to decision makers of the day.²⁸³ Second, the bivariate analyses failed to attend to changing dynamics in the lower courts. This is especially problematic in light of the well documented propensity of the justices to accept cases to reverse the holding of the tribunal directly below.²⁸⁴ Of course, the presence of a war or other international crisis may very well affect lower court judges too, and we ought consider this possibility by including and excluding their decisions in our analyses. Finally, it is reasonable to think that broad time effects,

the authors) with `analu=0`, `dec_type=1` or `7`, `values=1-6` (see *supra* notes 194, 202, and 203); War includes World War II, and the Korean, Vietnam, Gulf, and Afghan Wars (see *supra* note 218 for more details); the Political Ideology of the Court is based on the Segal and Cover score of the median justice. See *supra* note 274.

²⁷⁹An enormous social science—and a growing legal—literature exists on this topic. For examples, see works cited in *supra* note 189.

²⁸⁰See e.g., Yoo, *supra* note 13; Chang, *supra* note 240; Richman, *supra* note 240; Sidak, *supra* note 41; Cover, *supra* note 62.

²⁸¹See *supra* note 19.

²⁸²See Part II.

²⁸³But see Gross, *supra* note 4; *supra* note 245.

²⁸⁴See, e.g., Segal & Spaeth, *supra* note 195. During only four terms since 1946 (1946, 1951, 1953, 1993) has Court affirmed a greater proportion of cases than it reversed. For term-by-term data on the proportion of cases reversed, see Epstein et al., *supra* note 76.

including shifts in the executive and legislative branches,²⁸⁵ as well as in legal culture,²⁸⁶ may have confounded our initial analyses. To control for these, we should take into account the term in which the Court made its decision and draw comparisons between those as close in time as is feasible.

VI A METHODOLOGY FOR ASSESSING THE CAUSAL EFFECT OF WAR ON THE COURT

While the bivariate comparisons we presented in Part V seem to suggest that the justices of the U.S. Supreme Court fail to make distinctions in their decisions based on the presence or absence of a crisis, we now know that it would be a mistake to reach strong conclusions from these naïve analyses. To be sure, the relative extremity of case facts is unlikely to pose much of a problem but, before we fully can assess the crisis thesis, we must consider judicial ideology, time effects, lower court dynamics, and case salience.

In the analyses to follow in Part VII, we are attentive to these factors. The relevant consideration for now, though, is how to incorporate them into our investigation. We address this question directly below by introducing a statistical framework for causal inference—a framework, which has a following in other disciplines²⁸⁷ but not, to our knowledge, in the law schools or in the broader legal community.

A A Framework for Causal Inference

We, along with virtually all those who have studied the role of the Supreme Court in times of crisis, are concerned with a particular quantity of interest: the causal effect of war.²⁸⁸ That is, we want to understand whether wars cause the justices to suppress rights and liberties in ways they would not during times of peace. Estimating this causal effect is inherently about counterfactual inference: we care to know what the outcomes of cases decided during a war (“war” cases) would be but for the presence of the war.²⁸⁹

²⁸⁵See, e.g., Eskridge, *supra* note 263; Eskridge, *supra* note 273; Merrill *supra* note 273; Bergara, Richman & Spiller, *supra* note 271.

²⁸⁶See, e.g., Goldsmith & Sunstein, *supra* note 125.

²⁸⁷See, e.g., Rajeev H. Dehejia & Sadek Wahba, *Causal Effects in Nonexperimental Studies: Re-Evaluating the Evaluation of Training Programs*, 94 J. AM. STAT. ASS'N 1053 (1999); Constantine Frangakis & Donald B. Rubin, *Principal Stratification in Causal Inference*, 58 BIOMETRICS 21 (2002); James J. Heckman, Hidehiko Ichimura & Petra Todd, *Characterizing Selection Bias Using Experimental Data*, 66 ECONOMETRICA 1017 (1998); James J. Heckman, Hidehiko Ichimura & Petra Todd, *Matching as an Econometric Evaluation Estimator*, 64 REV. ECON. STUD. 605 (1997); Kosuke Imai, *Do Get-Out-The-Vote Calls Reduce Turnout? The Importance of Statistical Methods for Field Experiments*, AM. POL. SCI. REV. (forthcoming 2003); CHARLES F. MANSKI, IDENTIFICATION PROBLEMS IN THE SOCIAL SCIENCES (1995); Donald B. Rubin, *Statistical Issues in the Estimation of the Causal Effects of Smoking Due to the Conduct of the Tobacco Industry*, in STATISTICAL SCIENCE IN THE COURTROOM (J.L. Gastwirth ed., 2000); Donald B. Rubin, *Estimating Causal Effects of Treatments in Randomized and Nonrandomized Studies*, 66 J. EDUC. PSYCHOL. 688 (1974); Paul R. Rosenbaum & Donald B. Rubin, *Reducing Bias in Observational Studies Using Subclassification on the Propensity Score*, 79 J. AM. STAT. ASS'N 516 (1984); Rajeev H. Dehejia & Sadek Wahba, *Propensity Score Matching Methods for Non-Experimental Causal Studies*, Department of Economics Discussion Paper 0102-14, Columbia University, 2002..

²⁸⁸For a treatment of the general difficulties of causal inference, see Epstein & King, *supra* note 181.

²⁸⁹This conception of causation is obviously quite closely related to the notion of but-for causation in other areas of the law. See H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW (2d ed., 1985). One key to our investigation is that we view causation as probabilistic. For more on this distinction, see DAVID H. KAYE & DAVID A. FREEDMAN,

In a research environment without any constraints whatsoever, generating a response would be simple enough: We would create a world without a war and ask the U.S. Supreme Court to decide a case; then we would rerun history, holding everything constant other than the absence of a war, and ask the Court to decide the same case. If, in the version of our history without a war, we observed support for civil liberties but in the version with a war we observed a lack of support, then we might conclude that that the war had an effect on the Court with respect to that case in the direction anticipated by the crisis thesis.²⁹⁰

To state it more formally, denote the decision of the Court for case i by a binary variable Y , such that $Y_i = 1$ if the Court decided case i in the liberal direction and $Y_i = 0$ if the Court decided case i in the conservative direction ($i = 1, \dots, n$).²⁹¹ Now denote the presence or absence of war by another binary variable T , where $T_i = 1$ denotes that a war occurred for case i and $T_i = 0$ denotes that no war occurred for case i . Finally, let $Y_i(1)$ and $Y_i(0)$ signify the *potential outcomes* for case i under war $T = 1$ and $T = 0$, respectively. In other words, $Y_i(1)$ represents the outcome of case i if war had occurred, whereas $Y_i(0)$ represents the outcome of case i if war had *not* occurred. Note that this notation is in terms of potential outcomes. That is, case i could *potentially* have occurred under war or under peace, and the Court could have decided for (“liberal”) or against (“conservative”) the party alleging a violation of his or her rights. But we always observe only one of the potential outcomes.

This type of a counterfactual inference in crisis jurisprudence was evident to Justice Jackson in *Korematsu*.²⁹² In a dissenting opinion, he noted: “[i]f Congress in *peace-time legislation* should enact such a criminal law, I should suppose this Court would refuse to enforce it.”²⁹³ In other words, in the counterfactual world in which President Roosevelt’s exclusion order²⁹⁴ came before the Supreme Court during a time of peace (or in a world in which we could rerun history but for the presence of the war) the Court would not have upheld the order. That is, Jackson’s belief was that $Y_{Korematsu}(1) = 0$ while $Y_{Korematsu}(0) = 1$.²⁹⁵

Since it is just this causal effect of war that virtually every study on the topic, however implicitly, has sought to estimate, let us now formally define it—such that the causal effect τ_i for each case i is simply the difference between potential outcomes:

$$\tau_i = Y_i - Y_i(0)$$

REFERENCE GUIDE ON STATISTICS, IN REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 83, 90-97 (Federal Judicial Center 2d. ed, 2000).

²⁹⁰For more on this point, see Epstein & King, *supra* note 181; Holland, *supra* note 26; and King, Keohane, & Verba, *supra* note 181.

²⁹¹This notation is standard in the literature on causal inference and program evaluation. See *supra* note 287 for exemplars of this literature.

²⁹²*Korematsu v. United States*, 323 U.S. 214, 242-48 (1944).

²⁹³*Id.* at 243-44 (emphasis added).

²⁹⁴Civilian Exclusion Order No. 34, 7 Fed. Reg. 3967 (May 28, 1942).

²⁹⁵Another example of counterfactual inference is from *Schenck v. United States*, 249 U.S. 47 (1919), in which Justice Holmes noted that there are “things that might be said in time of peace”, i.e., $Y_{Schenck}(0) = 1$, that “[w]hen a nation is at war . . . will not be endured”, i.e., $Y_{Schenck}(1) = 0$. *Id.* at 52. In other words, had Schenck printed similar leaflets to assert his rights against conscription during a time of peace, he would have likely prevailed. An objection to this counterfactual is that we would be unlikely to observe it since conscription occurs only in a war effort. This is precisely the estimation problem that causal inference presents but it does not bar an estimate of Justice Holmes’s notion that a comparable act of speech in a time of peace would not have been censored. Indeed, this is what our framework addresses.

Within this framework, we explicitly have incorporated the counterfactual state of the world, or the “treatment effect”²⁹⁶—with the *average treatment effect* (ATE) providing one way of summarizing the causal effect of war:

$$\bar{\tau} = E(Y_i(1)) - E(Y_i(0)),$$

which is simply the average across case-specific treatment effects τ_i .

But, of course, it is impossible to rerun history to estimate the counterfactual and obtain τ_i —the causal effect for each particular case. This impossibility is known as the “fundamental problem of causal inference,”²⁹⁷ which, in concrete terms, means that we simply cannot observe the counterfactual, such as the *Korematsu* decision during peacetime. In fact, for each case i we only observe:

$$Y_i^{obs} = T_i Y_i(1) - (1 - T_i) Y_i(0).$$

That is, we only observe $Y_i(1)$ if $T = 1$ and $Y_i(0)$ if $T = 0$.

From this, we now formally can describe the estimates from our bivariate analyses in Part V as simple differences in means:

$$E(Y_i(1) | T_i = 1) - E(Y_i(0) | T_i = 0).$$

This represents the *difference* between the proportion of cases decided in favor of litigants claiming a deprivation of their rights when war occurs and the proportion of cases decided in favor of litigants claiming a deprivation of their rights when no war occurs. Note, however, that this is not the same as the average treatment effect, since $E(Y_i(0) | T_i = 0)$ does not necessarily equal the counterfactual $E(Y_i(0) | T_i = 1)$ because of confounding covariates.²⁹⁸

One scientific approach to resolving this fundamental problem of causal inference is to conduct an experiment.²⁹⁹ For our study, the hypothetical experiment would consist of *randomly* assigning a war to be conducted for each case.³⁰⁰ Because randomization would ensure that all of the other confounding factors that we know to affect “liberal” outcomes are uncorrelated with the occurrence of a war, we could provide an unbiased estimate of the causal effect of war by simply comparing the war cases to the peace cases (as in the bivariate analyses presented in Part V). In other words, by

²⁹⁶This term stems from the biomedical literature examining the causal effect of treatment as opposed to control. See, e.g., Donald B. Rubin, *Estimating Causal Effects From Large Data Sets Using Propensity Scores*, 127 *Annals Internal Med.* 757 (1997).

²⁹⁷King, Keohane, & Verba, *supra* note 181; Holland, *supra* note 26.

²⁹⁸This is termed a problem of identification. See CHARLES F. MANSKI, IDENTIFICATION PROBLEMS IN THE SOCIAL SCIENCES (1995) and CHARLES F. MANSKI, PARTIAL IDENTIFICATION OF PROBABILITY DISTRIBUTIONS (2003). See also Rosenbaum, *supra* note 26.

²⁹⁹For a recent description of experiments in law and economics, see Rachel Croson, *Why and How to Experiment: Methodologies from Experimental Economics*, 2002 UNIV. ILL. L. REV. 921. See generally DAVID R. COX, PLANNING OF EXPERIMENTS (1958); DAVID R. COX & NANCY REID, THE THEORY OF THE DESIGN OF EXPERIMENTS (2000); RONALD A. FISHER, DESIGN OF EXPERIMENTS (9TH ED., 1971).

³⁰⁰By no means are we suggesting this would be a desirable experiment, but it is useful from a research design perspective to identify the hypothetical random assignment of treatment.

construction, we would ensure that the confounding factors of judicial ideology and the like would not exist, leading to:

$$E(Y_i(0) | T_i = 1) = E(Y_i(0) | T_i = 0).$$

But this only underscores the tremendous difficulty of previous examinations of the crisis thesis. The implicit comparison that other scholars have made assumes this invariance, akin to assuming that the difference between, say, *Korematsu* and *Ex Parte Milligan* is only a random assignment of war. Granted, scholars have attempted to control for particular case facts, but this assumption of randomization still looms huge, making unbiased inferences unlikely.

To be sure, we cannot overcome this problem by performing an experiment; that is impossible for ethical and practical reasons.³⁰¹ But it certainly is true that many scholars have generalized the insight of causal inference in an experiment to assess causal effects with observational data.³⁰² Along these lines, perhaps the most traditional and predominant approach is the use of parametric methods, such as regression analysis, to estimate the counterfactual.³⁰³

Unfortunately, though, because regression analysis often makes assumptions that largely are unjustified in a legal setting,³⁰⁴ it is not well suited the problem we confront. So we employ a statistical method—called propensity score matching—that uses the insights of random assignment to draw causal inferences in observational studies, with uniformly fewer assumptions than traditional parametric methods. This technique was developed in statistics and has been applied widely in other disciplines,³⁰⁵ but it does not seem to enjoy much of a following in law; indeed, we know of not a single published study in a legal journal that has employed it.

Accordingly, in what directly follows, we provide a detailed explanation of propensity score matching. Then, in Part VII we describe the results this approach yields. As we have foreshadowed, those results could not be clearer: the effect of war on Court decisions is quite dramatic. Just as the crisis thesis suggests, the presence of an international threat substantially decreases the likelihood of the Court supporting claims of rights and liberties deprivations.

B Propensity Score Matching

The intuition behind propensity score matching is quite simple. While we may not be able to rerun history to see if the Court would decide the same case differently in times of war versus peace, we can match cases that are as similar as possible on all relevant dimensions (except, of course, whether the Court decided them during a war) to make that same causal assessment. In

³⁰¹See *supra* note 300. Of course, we could simulate the actual decision-making procedure by a laboratory experiment, but this would face problems of external validity. See Kaye & Freedman, *supra* note 289, 83, 96-97 (Federal Judicial Center 2d. ed, 2000).

³⁰²See Rosenbaum, *supra* note 26.

³⁰³For a review of the state of experimental and empirical legal studies, see Symposium, *Empirical and Experimental Methods in Law*, 2002 U. ILL. L. REV. 789.

³⁰⁴For example, traditional ordinary least squares regression analysis makes the assumptions of a constant additive treatment effect (that war affects all cases similarly) and linearity in the covariates (that all variables affect the outcome in a linear fashion). These often remain unjustified in the analysis of social and legal phenomena.

³⁰⁵See *supra* note 287.

fact, obtaining a balance of covariates across “war” and “peace” cases is precisely the purpose of the hypothetical experiment we described above.

While legal scholars have yet to invoke this precise approach, the idea of “matching” is not unknown in law. For example, to investigate whether the participation of interest groups affects litigation outcomes, Epstein and Rowland paired similar cases decided by the same judge; the only relevant point of distinction between the two was whether an interest group participated or not.³⁰⁶ Likewise, Walker and Barrow matched male and female judges of similar backgrounds to determine whether women speak “in a different voice.”³⁰⁷ In each of these studies, the researchers attempted to control for relevant differences (whether judges or backgrounds) so that they could examine the effect of a causal factor (whether interest group participation or the sex of the judge).

That too is our objective. We seek to match cases that are analogous on all pertinent dimensions, except the key causal variable (here crises) so that we can assess the effect of that key variable on Court outcomes. Using the same formal framework as in Part VI A, if X represents all the case characteristics which affect the probability of a liberal decision, by conditioning on X we can arrive at an unbiased estimate of the causal effect of war, since we can estimate the *counterfactual* with an *observed* quantity:

$$E(Y(0) | (T = 1, X) = E(Y(0) | T = 0, X),$$

where “|” signifies that we are conditioning on particular values. So, for example, $E(Y(0) | T = 0, X)$ is the expected value (estimated by an average) of the direction of decision given that it was decided in a time of peace and other case characteristic(s) X , such as the relative importance (or salience) of the case and the politics of the Court resolving the dispute. To put it another way, suppose that cases decided during wars happen to be more salient, represented by $X = 1$. To obtain an unbiased estimate of the causal effect of war we condition on salience, such that we only compare the means within the category of salient cases and within the category of non-salient cases. The intuition is that once we have conditioned on all relevant confounding factors but war, we can infer that the remaining difference in proportions of cases decided in favor of the party alleging an abridgment of rights and against that party is due to war.

This is a simple idea but it presents two challenges: (1) identifying the relevant dimensions of X_i on which to match cases and (2) matching the cases themselves. To address the first, we return to our discussion of confounding factors; to tackle the second, we turn to propensity score matching. In what follows, we elaborate on both.

³⁰⁶Lee Epstein & C.K. Rowland, *Debunking the Myth of Interest Group Invincibility in the Courts*, 85 AM. POL. SCI. REV. 205 (1991).

³⁰⁷Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596 (1985). Note, though, that the literature on causal inference has largely eschewed inferences stemming from treatments that are not at least in theory subject to manipulation. In a rejoinder to Holland, *supra* note 26, Donald Rubin, *Statistics and Causal Inference*, 81 J. AM. STAT. ASS’N 945 (1986) discusses this mantra of “no causation without manipulation.”

1 Matching on Factors that Affect Supreme Court Decisions

In Part V, we explicated general theoretical concerns associated with confounding factors. From this discussion emerge several guidelines that inform our selection of the factors on which to match cases. Most important, the factors must be correlated with our measure of crisis and must be *causally prior to war*. So while the extant literature has proposed as many as a dozen or more explanations for Court outcomes,³⁰⁸ the crises themselves are likely to affect many of these (such as whether the Court’s opinion discussed war powers). Since these factors are not causally prior to war, we should not match on them. Moreover, if factors are not correlated with our measures of a crisis—which, for example, appears to be the case for characteristics of the disputes³⁰⁹—excluding them from the analysis will not bias our estimates.

Following this and related guidelines leaves us with the four factors outlined in Part V: the term of the Court, the politics of the justices, the relative salience of the case, and the decision reached in the lower court. In light of that earlier discussion, these require little conceptual attention. What does merit some discussion, though, is how we defined them for purposes of analysis.

Beginning with the term of the Court, we sought to match cases that were as proximate in time as possible. Many reasons exist for this decision, not the least of which is Goldsmith and Sunstein’s theory that a fundamental shift has occurred in legal culture over time.³¹⁰ If they are correct, we would surely want to capture these time trends by matching on a variable indicating the term during which the Court heard oral arguments in the case.

A second factor is the political composition of the Court that resolved the dispute. As we demonstrated earlier,³¹¹ the politics of the Court have varied considerably during times of war and peace; and, as we know from a vast social science (and rapidly expanding legal) literature, those politics could exert a considerable effect on the outcomes of cases. Accordingly, we attempted to identify cases that were decided by ideologically akin Courts, again relying on the Segal & Cover scores to do so (see Figure 6 for a depiction of those scores).

The third dimension on which we sought to match was the relative importance or salience of the dispute. To incorporate this it into our matching scheme, we adopted Epstein and Segal’s approach to case importance. These analysts identify a case as “salient” if it received front-page coverage in the *New York Times* on the day after the Court announced its decision.³¹² Because Epstein and Segal sought to assess contemporaneous salience (as do we), this measure is suited ideally to our purposes.³¹³ Moreover, as Figure 9 shows, there is a sufficient number of salient cases to make matches on this dimension a realistic venture. Overall, 711 of the 3,345 civil liberties cases (roughly

³⁰⁸For reviews and examples, see Epstein & Walker, *supra* note 42; Segal & Spaeth, *supra* note 195; Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relation Decisions*, 23 RAND JOURNAL OF ECONOMICS 463 (1992); Eskridge, *supra* note 263; Merrill, *supra* note 273.

³⁰⁹See Part V C.

³¹⁰Goldsmith and Sunstein, *supra* note 125.

³¹¹See Part V C 2.

³¹²Lee Epstein & Jeffrey A. Segal, Measuring Issue Salience, 44 Am. J. Pol. Sci. 66 (2000). A list of the salient cases is available at: <http://artsci.wustl.edu/~polisci/epstein/ajps/>.

³¹³By contemporaneous salience, we mean that the justices thought the case was salient at the time they were resolving it, regardless of whether analysts now view it as salient. SEE DAVID R. MAYHEW, DIVIDED WE GOVERN (1991); Epstein & Segal, *supra* note 312.

21 percent) were covered on the front page of the *Times*, with 199 of the 711 (roughly 28 percent) occurring in the midst of war and the remaining 512 (72 percent), reported in times of peace.

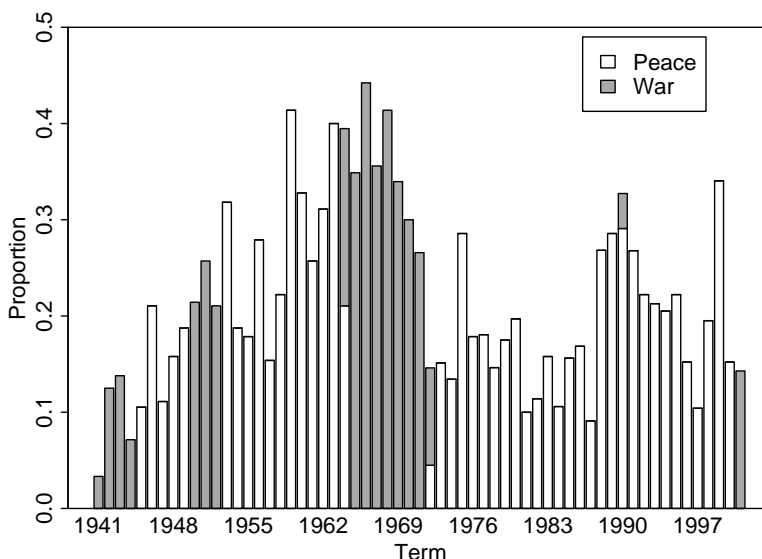


Figure 9: Proportion of U.S. Supreme Court decisions in the areas of rights, liberties, or justice that are salient, 1941-2001 terms. 711 of the 3,345 cases of rights, liberties, and justice decided during the period under analysis are salient. The white bars indicate the absence of a crisis (e.g., the country was not at war) at the time the Court heard oral arguments in the cases; darker bars indicate the presence of a crisis.³¹⁴

Finally, to account for the “reversal” tendency of the Court, we examined the outcome (either favorable or not to the litigant claiming a rights infringement) reached in the lower court.³¹⁵ The logic behind this choice is simple. Suppose we were seeking to explain the decisions of a liberal Supreme Court, such as that which sat in 1965.³¹⁶ Without controlling for the justices’ propensity to reverse the disposition reached in the court below, we would predict that this group of justices would rule in favor of a party claiming a deprivation of her rights regardless of whether that party was the appellant or the appellee. But, in light of that propensity, we ought expect even a left-of-center Court occasionally to reverse left-of-center lower court decisions.³¹⁷

³¹⁴We obtained data on the Supreme Courts decisions from U.S. Supreme Court Judicial Database (backdated by the authors) with `analu=0`, `dec_type=1` or `7`, `values=1-6` (see *supra* notes 194, 202, and 203); War includes World War II, and the Korean, Vietnam, Gulf, and Afghan Wars (see *supra* note 218 for more details). Salient cases are those that were covered on the front page of the New York Times on the day after the Court handed down its decision (see Epstein & Segal, *supra* note 312). A listing of these cases is available at: <http://artsci.wustl.edu/~polisci/epstein/ajps/>.

³¹⁵We obtained this information from the U.S. Supreme Court Judicial Database (see *supra* notes 194, 202, and 203). The variable is `lctdir`.

³¹⁶See *infra* Figure 6.

³¹⁷We also consider an alternative hypothesis that the crisis thesis may not readily admit; namely that war may similarly affect the lower courts. See Part VII.

2 Matching the Cases

With the list of variables on which to match cases in hand, we next contemplated how to go about matching the cases on those variables so that we could estimate ultimately the causal effect of war. Certainly, this task would be easy if our covariates were strictly categorical and exact matches existed for all cases decided during wars. But that is not the case: The term and the ideology score impose an order on some variables that is not strictly categorical, and we cannot always find exact matches along all variables. To see this, suppose we begin with the first case in our database, which was, say, a salient dispute resolved in favor of the rights litigant by the court below and was heard by a U.S. Supreme Court with a median ideology of .605 in 1941 during peacetime. To find an exact match for this case, we would need to locate a dispute that had all these characteristics—a salient dispute resolved by a rights-oriented lower court that a U.S. Supreme Court with an ideological score of .605 reviewed in 1941—but that was decided during a war.

Since such an exact match might not exist in our database (and surely does not exist for all cases), this approach is problematic: If it was the only one on which we relied, we would be unable to make use of the vast majority of our cases.³¹⁸

To avoid wasting valuable data, we must then create matches that are not “exact” but as close to “exact” as possible. But this too presents its share of challenges. To see this, we need only reconsider the hypothetical we present above: Ignoring all variables other than term, it would be possible to match “war” and “peace” cases decided in the 1941 term (owing to the onset of World War II after the term had started) but the same cannot be said of most other terms in our database: in only 1941, 1964, 1972, 1991, and 2001 did a war fail to span the entire term. Moreover, even for the five terms on which we could match “war” and “peace” cases, we would confront difficulties finding exact matches on variables other than term—difficulties that in turn would force us to make choices over which variables to select for inclusion, how to weight particular variables, and so on.

These problems fall under the rubric of the “curse of dimensionality.” It is indeed a curse when many variables on which to match exist, but it is one for which the propensity score provides antidote. This score, which is simply the probability of war given these covariates $P(T = 1) | X$,³¹⁹ acts as a *balancing score*, balancing all the relevant covariates X between cases decided during times of war and peace, just as randomization balances these covariates in an experiment.³²⁰ In other words, as long as we match cases that have similar propensity scores, we can obtain a balance

³¹⁸This is not to say that this approach to matching is impossible to implement. And, in fact, we do use it to assess the robustness of our results (see *infra* Table 7). The number of cases we were able to incorporate under exact matching, as the table indicates, ranged from 140-170, depending on the approach we used.

³¹⁹For our study, we estimate the propensity score using the logistic model, regressing war on X , where X is comprised of the direction of the lower court’s decision (“lower court”), the political ideology of the Court’s median justice (“politics”), term, politics², case salience (“salience”), a pre-1975 indicator (“bef75”), bef75*salience, term*salience, term*politics², term², lower court*salience, politics*salience, politics*lower court, lower court*term², salience*term². For information on these variables, see Part VI B 1.

³²⁰The distinction is that the propensity score can only balance observed covariates, while random assignment can also balance unobserved covariates. This is why the strong ignorability assumption has also been coined as the “selection on observables” assumption.

along all covariates³²¹ without attempting to weight these various dimensions ourselves.

A recent program co-written by King and Ho automates this process of balancing the covariates (with relevant options and diagnostic techniques).³²² Nonetheless, in generating the actual matches, researchers must make a number of decisions—for example, how to treat “discarded cases.”³²³ Figure 10, which presents a plot of the estimated propensity scores for cases decided during war on the top and those decided during times of peace on the bottom, provides an illustration. The simplest matching approach picks for each “war” case the “nearest neighbor,” that is, the “peace” case that has the closest propensity score, and discards unmatched peace cases. But other approaches drop fewer cases; and still others discard more.³²⁴

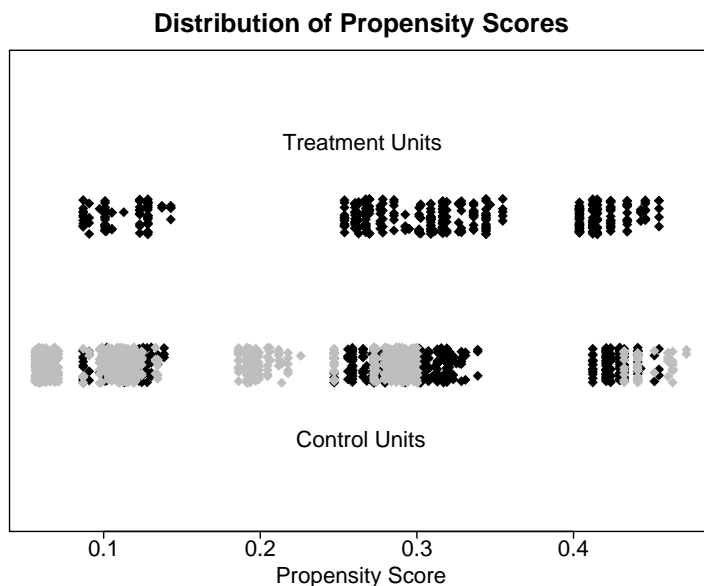


Figure 10: Sample jitter plot of propensity scores. Dark points indicate that cases were matched, while grey points indicate that cases were discarded.³²⁵

³²¹More formally, assuming strong ignorability of treatment assignment:

$$\begin{aligned} &(Y(1), Y(0)) \perp T \mid X \\ &0 < P(T = 1 \mid X) < 1 \end{aligned}$$

which is akin to the assumption of no omitted variables conditional on X asserted in any regression analysis. Rosenbaum and Rubin have shown in a seminal result that matching on the propensity score is as bias-reducing as matching on the covariates themselves. In other words,

$$(E(Y(1)) - E(Y(0))) = E_{e(X)} \{E(Y(1) \mid T = 1, e(X)) - E(Y(0) \mid T = 0, e(X))\}$$

where $e(X) = P(T = 1 \mid X)$ represented the propensity score. See Paul R. Rosenbaum & Donald R. Rubin, *The Central Role of the Propensity Score in Observational Studies for Causal Effects*, 70 *BIOMETRIKA* 41 (1983).

³²²Daniel E. Ho, Kosuke Imai, Gary King & Elizabeth Stuart, *MatchIt: Matching Software for Causal Inference* (2003), available at <http://gking.harvard.edu/matchit/>.

³²³See *infra* note 333 for these choices; see Table 7 for examples of alternative matching models (some of which do not rely on propensity scores) for this study; and see Appendices C and D for sample matching algorithms.

³²⁴See *supra* note 333 for these choices; see Table 7.

³²⁵This figure presents a jitter plot of propensity scores, using Method G in *infra* Table 7.

These sorts of variations aside, the general aim of all matching approaches is the same: to compare cases within the match to generate an unbiased estimate of the causal effect of the independent variable of primary interest (here, war). Since this too is our overarching goal, we invoke a number of different methods to generate the actual matches (including those that do not use propensity scores).³²⁶ Following this tack enables us to determine, across a range of possibilities, the degree to which our results remain robust across different approaches.

As we report in the Part VII, the various matching methods lead to different estimates of the causal effect of war but what they have in common is more important: all show that the presence of a war significantly lowers the probability of Court decisions in favor of parties alleging an infringement of their rights.

VII EMPIRICAL RESULTS ON THE CAUSAL EFFECT OF WAR

Having outlined our approach to assessing the causal effect of war, we now turn to the empirical results of our study. We begin, in Parts VII A and B, with an attempt to explore the impact of war on all the cases in our database—that it, on all suits involving claims of rights, liberties, and justices resolved by the Supreme Court between the 1941-2001 terms—as well on particular types of disputes. After presenting these results, we consider, in Part VIII, possible critiques of our analysis, and the degree to which they may impinge on the integrity of our primary findings.

A The Causal Effect of War on All Civil Rights and Liberties Cases

As we have emphasized throughout, our prime objective is to assess the causal effect of war; in other words, we aspire to address the the question of whether the presence of a crisis causes the Court to “rally ’round the flag,” supporting curtailments of rights and liberties that it otherwise might not.

To answer this question, many scholars would rely on the sort of analysis we present in Table 4—a parametric multivariate investigation into the causal effect of war, using logistic regression. What this analysis indicates, as we can observe from the row labeled “Effect of war on Pr(liberal),” is remarkable stability in the estimates of that causal effect, ranging from -7 to -8 percent. In other words, war depresses, by 7 to 8 percent, the likelihood of the Court reaching an outcome in favor of the parties alleging a violation of their rights.

³²⁶See Table 7 for the range of our estimates of the causal effect of war.

	Model 1	All Cases Model 2	Model 3	1971-1974 Model 4	1975-2001 Model 5
War	-0.30*** (0.11)	-0.32*** (0.11)	-0.31*** (0.11)	-0.28*** (0.12)	-0.43 (0.31)
Politics	—	—	-0.57 (0.61)	22.16 (17.26)	0.28 (2.78)
Politics ²	1.30*** (0.27)	1.31*** (0.27)	1.58*** (0.40)	-8.76 (7.86)	-2.55 (13.37)
Lower Court	-1.03*** (0.08)	-1.03*** (0.08)	-1.03*** (0.08)	-1.01*** (0.12)	-1.04*** (0.10)
Saliency	—	0.40*** (0.09)	0.41*** (0.09)	0.46*** (0.13)	0.34*** (0.13)
Pre-1975	-0.90*** (0.28)	-0.92*** (0.28)	-0.67* (0.39)	—	—
Intercept	0.22*** (0.06)	0.15** (0.07)	0.18** (0.08)	-12.85 (9.38)	0.20** (0.09)
AIC	4345.1	4326.6	4327.7	4328.7	2311.2
N	3341	3341	3341	1563	1778
Effect of war on Pr(liberal) (95% CI)	-0.07 (-0.13,-0.02)	-0.08 (-0.13,-0.02)	-0.08 (-0.13,-0.02)	-0.07 (-0.13,-0.01)	-0.07 (-0.16,0.05)

Table 4: Logistic estimates of effect of war on probability of a liberal decision. *** indicates $p < 0.01$, ** indicates $p < 0.05$, * indicates $p < .10$; all models are logistic estimates with the dependent variable of the direction of the decision, reporting standard errors of coefficient estimates in parentheses. The effect of war on the probability of a liberal decision (“Effect of war on Pr(liberal)”) is estimated holding covariate values of all observations at observed values and simulating the first difference on the probability of a liberal decision by changing the value of war from 0 to 1, with 95% confidence interval presented in parentheses.³²⁷

This is an interesting result, to be sure, but it is one, as we suggested in Part VI, that might be problematic owing to systematic differences between war and peace cases. As it turns out, this is the case—with Table 5 presenting statistics on the biases present in the data. In line with our earlier analyses, we can observe that cases decided during war are far more likely to have been resolved by a left-leaning Court. They are also much less likely to have been decided in the liberal direction in the lower courts and are biased toward earlier terms.

³²⁷We obtained data on the Supreme Courts decisions and outcomes from U.S. Supreme Court Judicial Database (backdated by the authors) with `analu=0`, `dec.type=1` or `7`, `values=1-6` (see *supra* notes 194, 202, and 203); War includes World War II, and the Korean, Vietnam, Gulf, and Afghan Wars (see *supra* note 218 for more details). Politics is the political ideology of the Court is based on the Segal and Cover score of the median justice. See *supra* note 274. Lower court is the direction of the lower court decisions. Saliency represents salient cases, which are those that were covered on the front page of the New York Times on the day after the Court handed down its decision (see Epstein & Segal, *supra* note 312).

	Mean under War	Mean under Peace	Standard Deviation	T-Statistic
Lower Court	0.29	0.46	0.49	8.78
Politics	1.01	0.37	0.49	-49.06
Term	1964	1976	15.90	21.62
Saliency	0.26	0.20	0.41	-3.56
Pre-1975	0.92	0.33	0.50	-44.79

Table 5: Summary statistics of overall sample.

Given these substantial differences, regression-based techniques are likely to fare poorly.³²⁸ But not so of our matching procedure. As the statistics in Table 6 indicate, a reduction in bias occurs uniformly across all covariates, ranging from 34 percent to 99 percent. (A 100 percent bias reduction would indicate that we have matched exactly on all covariates.)

	Means of Matched War Cases	Means of Matched Peace Cases	Standard Deviation	T-Statistic	Estimated Bias Reduction
Lower Court	0.29	0.24	0.44	2.50	72%
Politics	1.01	0.91	0.25	-7.78	84%
Term	1964	1969	13.44	5.21	76%
Saliency	0.26	0.55	0.49	-2.04	43%
Pre-1975	0.92	0.93	0.26	-3.85	91%
Lower Court	0.33	0.33	0.47	0.07	99%
Politics	0.87	0.84	0.30	-1.49	97%
Term	1966	1969	14.88	2.35	89%
Saliency	0.25	0.32	0.45	2.34	34%
Pre-1975	0.86	0.83	0.36	-1.50	97%

Table 6: Summary statistics of matched cases. Statistics for variables above the line derived from the matching method in Model F of Table 7 (not discarding non-overlapping cases). Statistics for variables above the line derived from the matching method in Model G of Table 7 (discarding non-overlapping cases).³²⁹

In light of these results, we have even more confidence that propensity score matching provides the optimal approach to address the question of whether the presence of a crisis causes the Court to “rally ’round the flag.” Via that approach, we can answer it by calculating the causal effect of war, which is simply the difference, across matched pairs, in the Court’s average support for rights and liberties claims during times of war and its average support during times of peace.

We can express the answer, that is, our estimate of the causal effect of war, in a single, rather startling number—*15 percent*—or in words: *the probability of the Supreme Court deciding a case in favor of the litigant claiming a deprivation of his or her rights decreases by 15 percent during*

³²⁸See Gary King & Langche Zeng, *When Can History Be Our Guide? The Pitfalls of Counterfactual Inference* (on file with authors); and Daniel E. Ho, *Majoritarian Electoral Systems and Consumer Power: A Matching Rejoinder* (on file with authors).

³²⁹In both cases, the estimated bias reduction R is calculated by $R = \frac{t_a - t_m}{t_a}$, where t_a represents the absolute value of the means test statistic from the overall sample and t_m represents the absolute value of the means test statistic for the matched sample.

times of war.

This percentage conveys important information about the “on average” effect of international crises across the 3,345 cases in our database. In particular, it provides the first systematic support for the received wisdom: the justices are, in fact more likely to curtail rights and liberties during times of war and other international threats. But, of course, the precise estimate of the effect of war, whether 15 percent or a lower or higher figure, depends on the model (and the method underlying the model) we use to match the cases. So, for example, the effect of 15 percent represents an approach that generates the best reduction of bias with the constraint of incorporating all cases decided during a war.

To assess the degree to which this basic finding holds, we examined a range of estimates of the effect of war produced by other methods of matching. Overall, as Table 7 shows, our main result confirming the crisis thesis is robust. Even if we match exactly on all covariates except for the term, thereby dropping a substantial number of cases (primarily from the World War II and the Vietnam War periods), the estimated average treatment effect (“ATE”) is 9 percent.³³⁰ On the other hand, matching on all covariates exactly, including term—meaning that we only consider cases decided during terms in which a war either ended or began (i.e., 1941, 1964, 1972, 1991, 2001)—results in a rather large ATE of 24 percent. Since this estimate has a close relation to a difference-in-difference estimator,³³¹ it may be the case that the short-term effects of war outstrip the long-term effects.

Results from the other matching models presented in Table 7 provide estimates of the average treatment effect depending on various assumptions.³³³ The bottom line, however, is the same: The effect of war is persistent and substantial, ranging from -24 to -6 percent (all statistically significant at conventional levels), and estimating the effect for all war cases yields an ATE of -15 percent.

³³⁰Of course this fails to take into account the smoothness of the Segal & Cover score and the relevance of time dynamics.

³³¹See Wooldridge, *supra* note 26.

³³²The specific methods used are as follows. Method A: simulated ATE using logistic regression of direction on politics, politics², lower court, war, and pre-1975 indicator; Methods B, C, D, and E: exact matching war and peace cases on politics, lower court, salience, and term; Method F: one-to-one nearest-neighbor matching algorithm with replacement, where the propensity score is estimated using the logistic model, regressing war on lower court, politics, term, politics², salience, pre-1975 indicator, pre-1975*salience, term*salience, term*politics², term², lower court*salience, politics*salience, politics*lower court, lower court*term², and salience*term² (see Appendix C for the full algorithm); Methods G, H, I, and J: one-to-one nearest-neighbor matching algorithm, where the propensity score is estimated using the logistic model, regressing war on lower court, politics, term, salience, and pre-1975 indicator, and separate logistic regressions are used for matched war and peace cases to impute missing potential outcomes; Method K: substratification into ten bins according to the propensity score, estimated using the specification for Method F, where missing potential outcomes are imputed by the predicted probability and ATE and ATT are weighted by the number of treated units in each bin (see Appendix D for the full algorithm); Method L: substratification into eight bins according to propensity score, which is estimated using the specification for Method F, with weighted logistic model where treatment observations weighted as 1 and control observations weighted by the number of times they are matched to a treatment observation, and where missing potential outcomes are imputed by predicted probability.

³³³Specifically, the fewer cases that we keep in the analysis, the closer the matches become. Given, however, the difficulty of dropping cases from World War II and the Vietnam war, we provide matching estimates both dropping and keeping these cases. Other matching parameters include: (a) whether we match with replacement (thereby not forcing us to match largely incomparable cases, but increasing the variance of the ATE); (b) whether we want to match exactly on particular covariates (thereby dropping more cases but obtaining better matches); and (c) whether we include a parametric logistic adjustment for remaining imbalances in the matched samples (thereby relying on a model-based analysis but potentially further reducing remaining biases of inexact matches). Regardless of specification here, we find the same robust estimate of the ATE, ranging from 660 percent to 24 percent. We present the estimate which we believe is of most interest, which results for incorporating all war cases.

Method	ATE	Observations	ATT	Observations
A. Logistic Model	-0.07 (0.03)	3341	-0.06 (0.02)	778
B. Exact Matching except for Term (no replacement)	-0.06 (0.03)	1006		
C. Exact Matching except for Term (replacement)	-0.09 (0.03)	986		
D. Exact Matching (no replacement)	-0.24 (0.08)	140		
E. Exact Matching (replacement)	-0.21 (0.08)	170		
F. Propensity score matching	-0.13 (0.07)	1556		
G. Propensity score matching, discarding non-overlapping cases, no replacement (WWII and Vietnam war cases)	-0.12 (0.03)	866		
H. Propensity score matching, with logistic adjustment, discarding non-overlapping cases, no replacement (WWII and Vietnam war cases)	-0.10 (0.02)	866	-0.10 (0.02)	434
I. Propensity score matching, discarding non-overlapping cases, with replacement (WWII and Vietnam war cases)	-0.12 (0.03)	606		
J. Propensity score matching, with logistic adjustment, discarding non-overlapping cases, with replacement (WWII and Vietnam war cases)	-0.09 (0.03)	606	-0.09 (0.04)	434
K. Propensity score stratification with logistic adjustment	-0.11 (0.03)	2468	-0.10 (0.03)	778
L. Stratification of matched pairs with logistic adjustment	-0.15 (0.02)	1556	-0.10 (0.02)	778

Table 7: Estimated causal effects of war. ATE is the average treatment effect, the causal effect of war on the probability of a liberal decision in civil liberties and rights cases. ATT is the average treatment effect on the treated, the causal effect of war on the war cases. Replacement indicates replacement matching and discarding non-overlapping cases indicates discarding units below the minimum propensity score of peace cases and maximum of war cases. See *supra* note 333.³³²

The data in Table 7 provide a flavor of the range of estimates, produced by the various methods. Figure 11 takes a somewhat different approach to our primary result about the effect of war on the Court but also lends support to it. There we display a histogram (with confidence intervals) of the simulated average treatment effect of war using Method L in Table 7. Note that the distribution of the causal effect of war is clearly below 0, easily surpassing any conventional statistical significance levels.

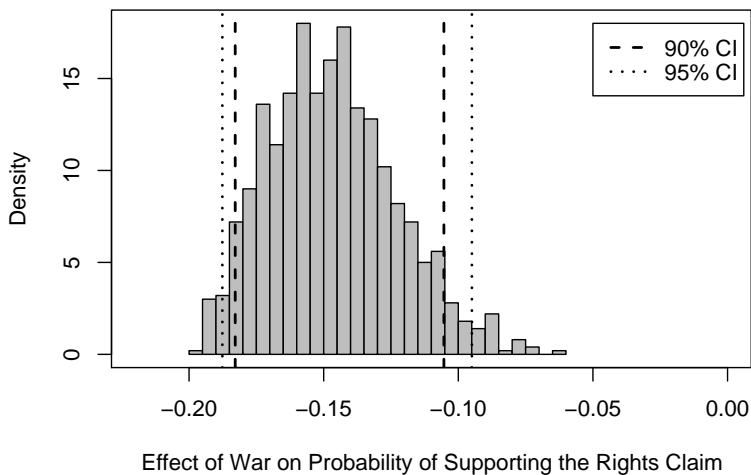


Figure 11: Histogram of the effect of wars on civil rights and liberties. The vertical lines represent 90% and 95% confidence intervals.³³⁴

B Other Possible Causal Effects of War

However we interpret them, the results presented in the preceding section lend support to commentators who aver that the reach of the crisis effect is wide and deep, affecting the Court’s treatment of *all* cases involving rights, liberties, and justice. But what of those variants of the crisis thesis suggesting that the impact of war and other threats to the national security is more limited? In what follows, we consider three of these offshoots: The effect of war (1) on particular areas of the law, (2) overtime, and (3) on the government’s claims.

1 The Effect on Particular Areas of the Law

Recall that several scholars have argued that the effect of war would not be felt in all cases of rights and liberties but rather limited to particular areas of the law. In Part V we considered four—criminal procedure, civil rights, First Amendment, and due process—with the findings of the simple bivariate comparisons showing no impact (in the expected direction) of war on the Court.

From the more appropriate matching procedure, however, emerges a far different picture. To see it, consider Figure 12, which presents boxplots, in which the boxes represent the spread of

³³⁴Distribution simulated from Model L in Table 7. We obtained data on the Supreme Courts decisions and outcomes from U.S. Supreme Court Judicial Database (backdated by the authors) with `analu=0`, `dec_type=1` or `7`, `values=1-6` (see *supra* notes 194, 202, and 203); War includes World War II, and the Korean, Vietnam, Gulf, and Afghan Wars (see *supra* note 218 for more details).

the estimated treatment effect and the large dot, the median treatment effect. Note the uniform decrease in the probability of a liberal decision in the areas of First Amendment, criminal procedure, and civil rights—with each box squarely to the left of the vertical line (which indicates no war effect).

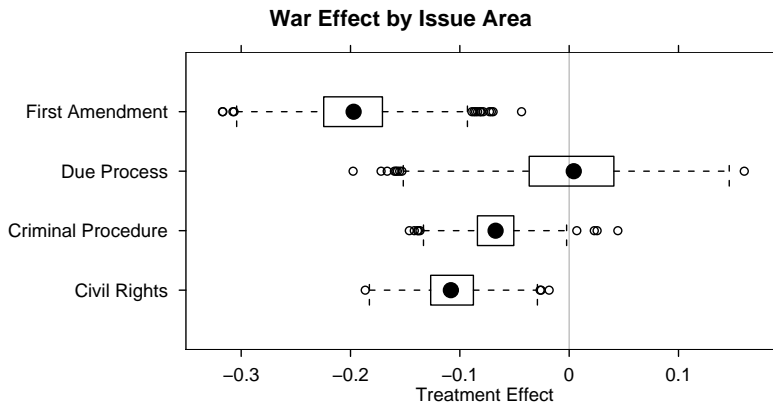


Figure 12: The effect of wars on the outcomes of Supreme Court cases in the four areas of rights, liberties, and justice. The large circle represents the median effect, and the box represents 25th and 75th percentiles of the treatment effect, where box “whiskers” represent coverage 1.5 times the length of the box, and dots represent rare outliers.³³⁵

These results are hardly surprising in light of the substantial effect of war across all civil rights and liberties cases (see Table 7). On the other hand, the effect does vary considerably by the particular area under analysis. It virtually is nonexistent in due process cases, while it is quite large in those implicating the First Amendment. Indeed, in cases involving speech, press, association and the like, war decreases the probability of a liberal decision by roughly 19 percent. This is an interesting finding—and one that may very well explain why the crisis thesis has found such a comfortable home in the legal academy since the World War I era: most of the early analyses focused on First Amendment cases.³³⁶ It also is a rather explicable result considering the litigation falling under the rubric of this Amendment: suits involving the Smith Act,³³⁷ the Alien Registration Act of

³³⁵Boxplot of posterior distribution of 1000 simulated ATEs in each issue area, using a one-to-one matching model, discarding common support, without replacement. Simulated ATEs for each issue area are:

Issue	ATE (%)	SE	P-value	N
First Amendment	-19.0	1.1	0.00	164
Due Process	1.1	6.0	0.60	82
Criminal Procedure	-5.5	2.7	0.02	384
Civil Rights	-10.8	2.8	0.00	276

On simulation techniques for presenting results, see King, Tomz & Wittenberg, *supra* note 248. On boxplot techniques, JOHN W. TUKEY, *EXPLORATORY DATA ANALYSIS* (1977); and Robert McGill, John W. Tukey & Wayne A. Larsen, *Variations of Box Plots*, 32 AM. STATISTICIAN 12 (1978).

³³⁶See, e.g., Chafee *supra* note 14. Subsequent studies focusing on the First Amendment include Emerson’s classic works, cited at *supra* note 14.

³³⁷The Smith Act made it a crime to “knowingly or willfully advocate, abet, advise, or teach the duty, necessity,

1940,³³⁸ loyalty oaths, conscientious objectors, and protest demonstrations.³³⁹ Due process cases, on the other hand, are primarily confined to procedural due process cases relating, for example, to jurisdiction over non-resident litigants, the takings clause, and prisoner’s rights.³⁴⁰

As Figure 12 also shows, the effect of war on criminal procedure is relatively small, though still significant—such that the likelihood of the Court ruling in favor of defendants in cases involving, say, the Fourth Amendment’s search and seizure clause and the Eighth Amendment’s protection against cruel and unusual punishment drops by 6 percent. War also decreases the probability that the Court will find a violation of a litigant’s civil rights (including claims of race and gender discrimination) but by a heftier 11 percent—a result so substantial that it may call into question the assertions of some scholars that international crises lead to enhanced protections for minorities.³⁴¹

2 The Effect Over Time

In our discussion of institutional explanations for the presence (or absence) of a crisis effect,³⁴² we noted scholarly assertions of various kinds of time effects. One, the “libertarian ratchet” or “learning effect” suggests that the impact of each successive war on the Court should dissipate with time³⁴³—such that with each passing crisis the justices should become less and less likely to engage in a crisis jurisprudence. In direct contrast comes the idea of “dosages,”³⁴⁴ which predicts that the Court becomes increasingly more repressive of rights over time in response to the government’s increasingly extreme measures. Finally, following from Justice Jackson’s dissent in *Korematsu*, some scholars have asserted the existence of “statist” ratchets, leading to the expectation that wartime jurisprudence lingers on, effecting the Court’s resolution of suits in times of peace.³⁴⁵

Learning, dosages, and statist ratchets are of course different effects but they all implicate time: Over time, we should observe distinct patterns in the impact of war and other threats to the national security—whether a declining treatment effect with each successive war (as the libertarian ratchet predicts), an increasing one (as the dosage conjecture suggests), or a “lingering” of crisis jurisprudence into peacetime cases (as the statist ratchet anticipates).

To explore these possibilities, we depict, in Figure 13, the estimated causal effect of war for each

desirability, or propriety of overthrowing . . . any government in the United States by force or violence.” Alien Registration Act of 1940, 54 Statutes at Large 670-671 (1940). The Act has been amended several times and can now be found at 18 U.S. Code §2385 (2000). The Supreme Court considered the constitutionality of the Act in *Dennis v. United States*, 341 U.S. 494 (1951), in which the appellants, leaders of the Communist Party, had been charged by the Truman administration of conspiracy to overthrow the U.S. government. *Dennis et al.* challenged the constitutionality of the Smith Act under the First Amendment but the Court ruled against them, holding that the Act did not violate the First Amendment. The legal historian Lawrence Friedman attributes their defeat, at least in part, to a war effect, asserting that, “the outbreak of the Korean War undoubtedly hurt their cause.” Friedman, *supra* note 47, 333-34. Our results lend general support to Friedman’s speculation.

³³⁸54 Statutes at Large 670-671 (1940), amended and reprinted at 18 U.S. Code §2385 (2000).

³³⁹See Appendix A.

³⁴⁰See Appendix A.

³⁴¹See PHILIP A. KLINKER & ROGERS M. SMITH *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 4-5, 353 n4 (1999); Sheppelle, *supra* note 17; and Dudziak, *supra* note 17.

³⁴²See *supra* Part III B.

³⁴³See, e.g., Rehnquist, *supra* note 7, 221; Goldsmith and Sunstein, *supra* note 125; Tushnet, *supra* note 13.

³⁴⁴See, e.g., Cole, *supra* note 41; Gross, *supra* note 4.

³⁴⁵See, e.g., *supra* note 142; see also Posner and Vermeule, *supra* note 20, for a description of the literature on statist ratchets.

term in which a war occurred. The circles represent matched pairs of cases (weighted by the number of cases), with those in white indicating all the “war” mates in the pair and those in gray, all the “non-war” matched cases; the arrows specify the direction of the outcomes of the cases, whether they were more (an up, dashed arrow) or less (a down, solid arrow) favorable toward rights and liberties.

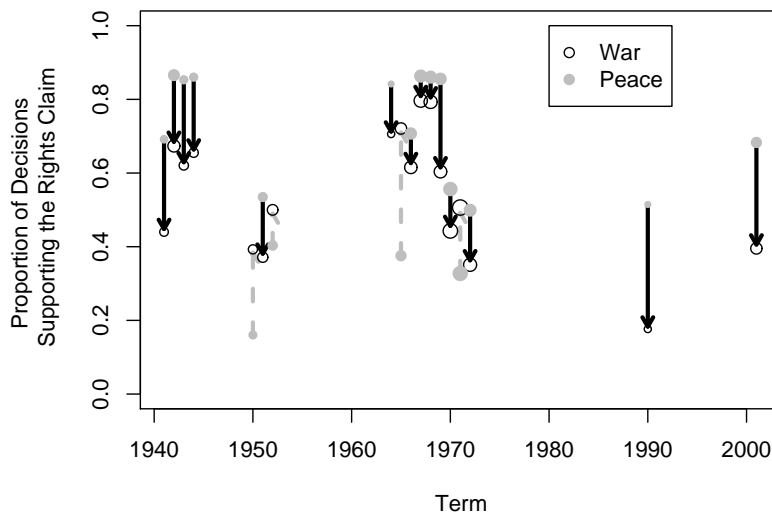


Figure 13: The effect of wars on the outcomes of supreme court cases in the areas of rights, liberties and justice: a comparison of matched pairs³⁴⁶

From this figure we can observe interesting variations in the causal effect of war on Court outcomes. Note, for example, the relatively small impact of the conflict in Korea (in the 1950s). Taking the three Korean War terms collectively, the justices became neither distinctly more or less unlikely to support rights. In stark contrast comes the consistent impact of World War II. In each of the four terms encompassed by the war, the (relatively left-of-center) Court supported curtailments of rights and liberties that it otherwise would not have tolerated—with, of course, the internment at issue in *Korematsu* among them. Likewise the justices who sat during the Gulf and Afghanistan Wars appear to have become more willing to rule against litigants claiming a deprivation of their rights. Indeed, however conservative the majority on these Courts toward individual rights and liberties in the absence of conflict, the presence of war intensified those ideological predilections.

These patterns are intriguing and certainly worthy of further consideration. But what they fail to do is lend support to the three time effects scholars have posited. Figure 13 provides no evidence of any patterns of the effect of war, thereby casting large doubt onto the contradictory theories of learning and dosages.³⁴⁷ While it is true that the effect appears to have been more robust in World War II, it similarly appears to have affected the Court’s disposition of cases during the Vietnam

³⁴⁶Distribution simulated from Model L in Table 7. We obtained data on the Supreme Courts decisions and outcomes from U.S. Supreme Court Judicial Database (backdated by the authors) with *analu*=0, *dec_type*=1 or 7, *values*=1-6 (see *supra* notes 194, 202, and 203); War includes World War II, and the Korean, Vietnam, Gulf, and Afghan Wars (see *supra* note 218 for more details).

³⁴⁷Granted, there may be changing baselines of decisional standards, but to the degree that a decisional standard changes across time, we have taken this into account by matching on term. So even relative to this changing baseline, it does not appear that any time effects exist.

war years. The data also question the existence of statist ratchets: Contrary to widespread fear and speculation that doctrine created during wartime “lingers” on in peace time, rights jurisprudence appears to “bounce back” during peacetime.³⁴⁸

3 The Effect on the Government’s Claims

Earlier, we discussed the claims of some commenators that the crisis thesis is more about deference to the federal government when it is a party to the litigation (or even an *amicus curiae*) than it is about Court treatment of alleged infringements of rights and liberties made by all parties.³⁴⁹ We explored these claims in Part V via simple bivariate comparisons—with our results showing that the Court, despite the assertions of some legal academics,³⁵⁰ is not especially deferential to the United States in the specific area of federalism or, for that matter, in any other type of suit.³⁵¹

Use of the matching approach does not alter these conclusions. Contrary to claims of increasing support for federal interests (as opposed to the states) in war periods, we find that war actually decreases the probability of a pro-federal claim succeeding in federalism litigation by roughly 0.25. In other words, it appears that the Court is more likely to sustain states’ rights during times of war. Given the small total number of cases in the federalism category and substantial remaining differences in background covariates,³⁵² however, we are hesitant to rely on this finding. Nonetheless, it does call into question the commonly-held notion that “when you see a national emergency, federalism disappears.”³⁵³

Other approaches to assessing support for the U.S. government also turn up empty; for example, the Court is no more or less likely to defer to the government during times of war, regardless of whether it participates as *amicus curiae* or is a party to the litigation. Also noteworthy is that while the results we have reported throughout—on the overall causal effect of crises on the Court’s jurisprudence—hold for periods of war and for war plus other major crises, they do not for presidential rallies; that is, we find little impact of rallies on case outcomes. What this finding, taken with our other results suggest is that the crisis thesis appears to apply most directly to civil rights and liberties cases; it does not seem to mean deference to the government generally or the executive branch in particular.

VIII POTENTIAL CRITIQUES OF THE STUDY

Despite our rather exhaustive examination of the crisis thesis, we view our study as the beginning of a conversation about the empirical impact of war on the federal judiciary, and not the last word.³⁵⁴

³⁴⁸Given this empirical regularity, it may be no surprise that Presidents have often attempted to make analogies between domestic issues in peacetime and crisis situations so as to bolster executive powers. See, e.g., Griffin, *supra* note 93, 82-85 (noting the need for Presidents to sell domestic agendas on foreign policy crisis metaphors).

³⁴⁹See *supra* Part II.

³⁵⁰See *supra* note 234.

³⁵¹See Table 4 and Appendix B.

³⁵²Discarding incomparable cases from the sample of 295 federalism cases leads to only 68 matched cases.

³⁵³Quoted in Greenhouse, *supra* note 234.

³⁵⁴Surely this is the case with regard to our examination of the lower federal courts (see Part VIII G) for which we can reach only a tentative inference based on a limited amount of evidence. But it also holds for the Supreme Court,

To be sure, we have attempted to validate the crisis thesis in many and varied ways, but we have by no means explored all the possibilities,³⁵⁵ nor could we do so in a single article.

At the same time, we realize that scholars and other commentators may take issue with various features of our analysis. For two reasons, we think it crucial to confront these potential points of critique here and now before moving to the implications of our investigation. First, since we do indeed view our study as a starting, and not ending, point for future empirical analyses of the effect of war on the courts, identifying its strengths and weaknesses may provide something of a roadmap for those subsequent analyses. Second, since we develop policy implications from our results,³⁵⁶ demonstrating that our study—albeit not without points of vulnerability—can withstand potentially powerful criticism, may bolster the importance and integrity of those implications.

In what follows we attempt to make that demonstration by examining seven potential critiques of our study: (A) the inclusion of war-related cases; (B) the analysis of all civil rights and liberties cases; (C) the possibility of omitted variables; (D) the potential of post-treatment bias; (E) the measure of the Court’s politics; (F) the relative importance (or, more pointedly, unimportance) of the causal effect of war; and (G) the neglect of the lower federal courts.

A The Inclusion of War-Related Cases

Almost needless to write, our results lend strong support to the crisis thesis: The Supreme Court is, in fact, significantly more likely to rule against claims of rights and liberties during wartime than it is during peacetime. One potential criticism of this finding is that by including in our dataset “war-related” cases—those directly connected to the war effort and that might directly affect its outcome—we may have stacked the deck toward a finding in favor of the thesis. That is because war-related cases may be (a) more likely to be decided against the rights litigant and (b) more likely to be decided during wartime.

On the one hand, we could simply dismiss this critique as an example of post-treatment bias. War-related cases are a consequence of war and thus we should not control for them if we are looking at the complete causal effect of war. On the other hand, because many proponents of the crisis thesis argue that the war effect works on “ordinary” cases,³⁵⁷ it seems prudent to segregate war-related cases to test the breadth of the thesis.

Doing so is no simple task. It requires a case-by-case determination as to whether a case was connected to the war effort or not, which is somewhat akin to deciding dispositively whether the claim at stake falls within the executive’s war power that as “Commander in Chief of the Army

as we explain in what follows.

³⁵⁵We outline some of the research possibilities directly below. We especially commend studies of lower courts since they are playing an extremely consequential role (at least in the short term) in evaluating federal measures to deal with terrorism. The cases identified in *infra* Table 9 are only the first examples; many more are now working their way into the legal system or up the federal ladder. For lists, see http://www.lchr.org/us_law/loss/cases/court_cases.htm (last accessed December 3, 2003); <http://news.findlaw.com/legalnews/us/terrorism/cases/> (last accessed December 3, 2003).

³⁵⁶See *infra* Part IX.

³⁵⁷See Gross, *supra* note 4; Emerson, *supra* note 14.

and Navy”³⁵⁸ he shall “take Care that the Laws be faithfully executed.”³⁵⁹ Moreover, as we noted earlier,³⁶⁰ defining the pool of cases that are war-related risks endogeneity: the Court may be more likely to invoke the war powers doctrine or discuss the nature of the current crisis when it is providing a rationale for a decision contra to the claims of the rights litigant.³⁶¹

We can, however, avoid the endogeneity issue by ignoring the rationale for the Court’s decision, and focus instead on the nature of the controversy. Accordingly, for the purpose of responding to this potential point of critique, we coded each case as war-related or not on the basis of whether the controversy was a direct result of the crisis and whether it could plausibly have had an impact on the war effort. Examples include wartime draft cases, war protest cases, and takings for military purposes, as well as courts martial for activity occurring during a war in a war zone (e.g., crimes in England during WWII, but not crimes in Oklahoma during Vietnam). Other illustrations are suits involving deportation, relocation and citizenship questions that are a direct result of war.³⁶²

After coding each case, we extracted the 134 war-related suits from our database with the goal of determining whether war continues to exert a causal effect on the remaining suits. The basic finding of this analysis is that support for the crisis thesis is not the result of including war-related cases. In other words, and just as Gross,³⁶³ Emerson,³⁶⁴ and others have suggested, the Supreme Court substantially reduces its support for “ordinary” civil rights and liberties cases during wartime.³⁶⁵ This finding holds true even if we expand our definition of a war-related case to include any suit that was a direct result of war, regardless of whether or not the controversy could plausibly have affected the war effort.³⁶⁶

While the presence of war exerts a clear effect on “ordinary” cases, curiously we do not find the same effect for the 134 cases connected to the crisis at hand. That is, if we analyze only war-related suits, we cannot explain the Supreme Court’s support for rights and liberties on the basis of whether or not a war was ongoing. But neither can we account for the outcomes of these cases via any other standard covariate of Court decisions (including the direction of the lower court’s decision and the Court’s ideology). So, while an explanation for the outcomes in the war-related cases may exist, we cannot, theoretically or empirically, identify one.

B The Analysis of All Civil Rights and Liberties Cases

If one potential criticism of our study is that we included cases that we should have excluded (war-related cases), another is bound to be the converse: that our inclusion of all 3,345 civil rights

³⁵⁸U.S. CONST. art. II, §2, cl. 1.

³⁵⁹U.S. CONST. art. II, §3.

³⁶⁰See *supra* Part IV.

³⁶¹As we noted earlier, *supra* note 217, perusing briefs filed in the cases to identify whether or not they are war related is not feasible. Another possibility would be to examine decisions of the lower courts. This would do little, however, to circumvent the endogeneity problem with respect to the lower courts, nor would it enable us to examine the broader quantity of interest as to the general war effect in which courts may not explicitly justify their decisions in terms of the ongoing crisis.

³⁶²Because we recognize some subjectivity as to what constitutes a war-related case, we provide the data on our website so others can assess what we have done and conduct alternative tests with their preferred codings.

³⁶³Gross, *supra* note 4.

³⁶⁴Emerson, *supra* note 14.

³⁶⁵These results are available on our web site.

³⁶⁶Examples include the Emergency Price Control Act of 1942 and the Alien Property Custodian Act.

and liberties cases presents a sweeping and overexpansive test of the crisis thesis. Some inevitably will suggest that the effect of a crisis manifests itself only in cases that pertain directly to that crisis, and not in all cases involving rights and liberties,³⁶⁷ though, as we just noted, that does not appear to be the case. Others may question any analysis that treats all cases alike, and fails to give extra weight to landmark disputes, such as *Korematsu* and *Quirin* (aside from deeming them “salient” or not).³⁶⁸

To these points of critique, we note that the general effect of war on civil rights and liberties cases is precisely the quantity of interest in our study. And to that effect our finding is substantial: War has a causal effect across the board, even when the outward characteristics of a case may not be directly related to the war effort.

This result would hardly surprise long-time adherents of the crisis thesis, such as Emerson, who mapped the effect of wars onto a series of legal areas, some related to the crisis and some not.³⁶⁹ And it would hardly startle contemporary writers, such as Stuntz, who argues that “Justices are likely to think about the effect of their decisions on the fight against terrorism even when the underlying cases involve more *ordinary* sorts of policing.”³⁷⁰ Gross, as we noted earlier, concurs: “judicial decisions made in the context of fighting terrorism will also apply in the more general (and regular) context of criminal law and procedure” and “when judges decide ‘*ordinary*’ criminal cases, they will take into consideration the impact of their rulings on the fight against terrorism.”³⁷¹ Our findings bolster these ideas: The effect of war holds across wide areas of constitutional law, even beyond “ordinary criminal cases,” perhaps because the justices take into consideration the indirect effects of their rulings on the war effort.

Illustrative of this dynamic at work may be the Court’s recent decision in *Grutter v. Bollinger*,³⁷² in which the justices considered the constitutionality of the University of Michigan Law School’s affirmative action program. While *Grutter* seems wholly unrelated to events ensuing in the wake September 11th and of domestic consequence only, consider the first question Justice Ginsburg asked of the petitioner during oral arguments in the case:

May I call your attention in that regard to the brief that was filed on behalf of some retired military officers who said that to have an officer corps that includes minority members in any number, there is no way to do it other than to give not an overriding preference, but a plus for race. It cannot be done through a percentage plan, because of the importance of having people who are highly qualified. What is your answer to the argument made in that brief that there simply is no other way to have Armed Forces in which minorities will be represented not only largely among the enlisted members, but also among the officer cadre?³⁷³

³⁶⁷See, e.g., Tushnet, *supra* note 13, at 276-278; Mark A. Graber, A Two-way Street: Civil Liberties and Military Tension 7 (Aug. 8, 2003) (unpublished manuscript, on file with author).

³⁶⁸Tushnet, *supra* note 13, at 277.

³⁶⁹See Emerson, *supra* note 14.

³⁷⁰Stuntz, *supra* note 245, at 2140 (our emphasis).

³⁷¹Gross, *supra* note 4, at 1095 (our emphasis).

³⁷²123 S. Ct. 2325 (2003).

³⁷³Transcript of oral arguments in *Grutter v. Bollinger*, No. 02-241. Available at: www.supremecourtus.gov/oral_arguments/argument_transcripts/02-241.pdf (last accessed on December 2, 2003).

In so raising this point, Justice Ginsburg highlighted the implications of the case—again, a domestic rights dispute—for national defense and security.³⁷⁴ Justice O’Connor, in her opinion for the Court in *Grutter* too emphasized these implications³⁷⁵—with the media suggesting, both at the time of oral arguments³⁷⁶ and when the Court announced its decision,³⁷⁷ that the effect on the armed forces played an important, if not pivotal, role in O’Connor’s (and the Court’s) disposition of the case.

Our investigation examines precisely these types of effects: In a counterfactual world without war, how would the Court decide a broad range of cases, which may or may not have “obvious” implications for national security? In light of our results, the clear response to the question of whether our definition of civil liberties and rights is overly broad is that, in fact, it is the causal effect that is surprisingly broad.

C Omitted Variables

In Part V C, we explained that tests of the crisis thesis must take into account (that is, “control for” or “hold constant”) other factors (not simply the presence or absence of war) that may affect case outcomes and that are causally prior to the chief explanatory variable, war. Our study followed this rule, controlling for factors such as the political composition of the Court and the relative salience of a case. But there are four others that some may think we ought to have incorporated: the severity of war, public opinion and Congress, the groups targeted by the government, and selection effects. Let us consider each.

³⁷⁴The apparent role that the military played fits comfortably in a long literature exploring the role of amicus briefs and interest groups in Supreme Court decision making. See, e.g., Lee Epstein, *Courts and Interest Groups*, in *AMERICAN COURTS* (John G. Gates & Charles A. Johnson ed., 1990); Kevin T. McGuire & Gregory A. Caldeira, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda-Setting in the Supreme Court*, 87 *AM. POL. SCI. REV.* 717 (1993).

³⁷⁵123 S. Ct. at 2340 (noting that “[h]igh-ranking retired officers and civilian military leaders assert that a highly qualified, racially diverse officer corps is essential to national security”).

³⁷⁶See, e.g., Linda Greenhouse, *Justices Look for Nuance in Race-Preference Case*, *N.Y. Times*, April 2, 2003, at A1 (noting that opponents to affirmative action “found the justices more concerned about a world . . . where senior military officers describe affirmative action as essential for national security” and finding that “it was obvious that of the 102 briefs filed in the two cases, [the military brief] was the one that had grabbed the attention of justices across the court’s ideological spectrum.”); and Charles Lane, *O’Connor Questions Foes of U-Michigan Policy*, *Wash. Post*, April 2, 2003, at A1 (noting the argument in the amicus brief that “the fighting capability of the multiethnic U.S. military depends on minority officers produced through affirmative action at the service academies” and that “[u]nstated, but obvious, was the broader context: the current battle for a Muslim country’s liberation being waged by multiethnic U.S. Army and Marine platoons.”).

³⁷⁷See, e.g., Linda Greenhouse, *The Supreme Court: Affirmative Action*, *N.Y. Times*, June 24, 2003, at A1 (noting that Sandra Day O’Connor’s opinion “cited a number of briefs . . . with particular emphasis [on] two dozen retired senior military officers and former commandants of the service academies”); Linda Greenhouse, *The Supreme Court: The Justices; Context and Court*, *N.Y. Times*, June 25, 2003, at A1 (noting that “[t]he context provided by the briefs from Fortune 500 companies, senior military officers, and colleges and universities big and small, public and private, quite clearly won the day for Michigan”); *What do U-M court rulings mean?*, *Detroit News*, June 24, 2003, at 11A (quoting Dennis Archer, president-elect of the American Bar Association as stating that the *Grutter* decision “serves to strengthen the military academies”); Charles Lane, *Affirmative Action for Diversity Is Upheld*, *Wash. Post*, June 24, 2003 (noting that “[s]eemingly more influential than the Bush administration’s views were briefs filed by large U.S. corporations and by former military officials . . . The military leaders, including Desert Storm commander Gen. H. Norman Schwarzkopf, told the court that military cohesion, and, hence, national security hinged on an integrated officer corps produced by diverse military academies and ROTC programs.”).

1 The Severity of War

The measure we used to capture “war” is rather blunt: A war existed or it did not. As such, it is possible that we have oversimplified the concept,³⁷⁸ that we should have been more attentive to the gradients of war—from full peace to total war—as they may have differential effects on the Court’s treatment of civil rights and liberties. The Persian Gulf War, for example, arguably presented less of a security threat to the United States than World War II, and concordantly, the case for the necessity of curtailing rights and liberties more compelling in the latter than in the former. Another distinction along these lines may be whether Congress formally declared war (a “constitutional” war).³⁷⁹ Perhaps the Supreme Court is more deferential to the government when the legislature has explicitly authorized the battle. Justice Douglas suggested as much in *New York Times Co. v. United States*,³⁸⁰ in which he denounced the government’s national security claims on the ground that “[n]owhere are presidential wars authorized.”³⁸¹

Yet recall that we explicitly matched cases on Supreme Court terms, enabling us to generate individual causal estimates for every war—constitutional or not—undertaken since 1941.³⁸² Moreover, since our original definitions of a crisis tapped gradations of war,³⁸³ we were able to explore the degree to which different types of threats affect the Court. As it turns out, we find that the crisis thesis holds most robustly for the common and incontrovertible definition of war—as a large-scale militarized dispute. And, even within that category of “war,” we can observe differences among wars perhaps based on their severity. As Figure 13 shows, for example, the effect of World War II on the justices appears to have been more consistent and stronger than the Korean War. In short, our matching models already address this concern, making rather unnecessary the inclusion of separate variable to capture war-specific distinctions.

2 Public Opinion and Congress

The relative support that the public and Congress lend to the war effort constitute two other covariates of Court decisions for which we did not explicitly account, even though a plausible case could be made that we should have done so. Beginning with the public, it is possible that the more uniform and enthusiastic its support, the more likely the justices would be to defer to the government. In *Ex Parte Quirin*, for example, the Court faced tremendous pressure from the public and the elected branches of government to clear the way for the execution of the eight Nazi saboteurs; the justices, seemingly succumbing to this pressure, issued their per curiam order within twenty-four hours of oral argument.³⁸⁴ In contrast comes *New York Times Co. v. United States*,³⁸⁵

³⁷⁸See, e.g., Goldsmith & Sunstein, *supra* note 125 (distinguishing World War II as a “total war” whereas 9/11 has “seen none of the mobilization and sacrifice . . . that characterized World War II”).

³⁷⁹U.S. CONST. art. I, §8, cl. 11. See also *New York Times v. United States*, 403 U.S. 713, 722 (1971) (Douglas, J., concurring) (noting that “the war power stems from a declaration of war” and that “[n]owhere are presidential wars authorized”).

³⁸⁰403 U.S. 713 (1971).

³⁸¹*Id.* at 723 (Douglas, J., concurring).

³⁸²See *supra*, Figure 13.

³⁸³See *supra* Part IV

³⁸⁴See, e.g., Goldsmith & Sunstein, *supra* note 125, at 264 (noting that politicians, the media and most of the public insisted on capital punishment for the saboteurs).

³⁸⁵403 U.S. 713 (1971).

in which Justice Douglas noted in dicta that a “debate of large proportions goes on in the Nation over our posture in Vietnam” and the documents obtained by the *New York Times* were “highly relevant to the debate.”³⁸⁶

For three reasons, however, it is unlikely that the inclusion of a variable designed to capture public support for the war would alter our findings. First, we already, to some degree, have taken this factor into account via our measure of case salience, which provides information about the extent of public scrutiny over the case. Second, in Part II, we presented widely accepted evidence of the “rally-effect” that has accompanied the outset of virtually every modern war. While such rallies affect the public, we find that they do not influence the Court. Furthermore, since a rally effect could itself be a causal effect of war, it may even introduce post-treatment bias to condition on it.³⁸⁷ Finally, by matching cases that are close in time, we arguably have accounted for unobserved shifts in public opinion, such as the widespread skepticism of the presidency following Watergate and the Vietnam War.

Turning to Congress, it is possible to make a case that its intent with respect to a particular executive action is an omitted covariate.³⁸⁸ As Justice Jackson noted in *Youngstown Sheet & Tube Co. v. Sawyer*,³⁸⁹ “Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”³⁹⁰ Even so, our neglect of this variable is unlikely to lead to a spurious causal estimate. First, to the degree that congressional authorization in areas of civil liberties and rights is greater during times of war because of war, controlling for this variable would certainly lead to post-treatment bias. For example, if we only matched cases arising out of the Espionage Act of 1917,³⁹¹ an act passed largely because of a war, we would have incorrectly controlled for a result of the war. Congressional intent itself is shaped by war, and to the extent that judicial deference is a function of congressional intent, this constitutes a causal effect of war.³⁹²

Second, it is unlikely that much variation exists from case to case in the “implied will” of Congress. Its sentiment rather is much more likely to affect cases in the same way as public opinion: as a reservoir of good or bad will with respect to the particular conflict.³⁹³ A possible exception here is the Vietnam war, which brought dramatic shifts in public as well as congressional opinion. Nonetheless, since we have matched cases on proximate terms, our analysis accounts, at least in part, for these effects.³⁹⁴

³⁸⁶Id. at 724 (Douglas, J., concurring).

³⁸⁷See Part VIII for a discussion of post-treatment bias.

³⁸⁸For a strategic approach focusing on the interactions of political institutions, see, e.g., Mario Bergara, Barak Richman & Pablo T. Spiller, *Modeling Supreme Court Preferences in a Strategic Context*, 28 LEG. STUD. Q. 247 (2003).

³⁸⁹343 U.S. 579 (1952).

³⁹⁰Id. at 635. See also *supra* note 101.

³⁹¹The Espionage Act of 1917, Act of June 15, 1917, ch 30, title I, section 3, 40 Stat 219.

³⁹²We could change the quantity of interest here to the causal effect of war on the Supreme Court excluding any effect of war on congressional intent. It is not clear, however, that this is a more meaningful quantity of interest, since it would be difficult to observe.

³⁹³See Gregory A. Caldeira, *Public Opinion and The U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139 (1987).

³⁹⁴Only dramatic swings in congressional intent in pre- and post-war periods could lead to substantial bias of our causal estimates.

3 The Us-Them Dichotomy

Yet another omitted covariate may be the degree to which the government aims its emergency provisions at “outsiders.”³⁹⁵ If restrictions on civil rights and liberties affect a distinct group (e.g., the German spies in *Quirin*), the Court may be more inclined to uphold the restrictions. If, however, the government takes aim at a less readily identifiable group (e.g., arguably individuals that provide material support to terrorist organizations³⁹⁶), the Court may be more inclined to strike down its provisions. To the extent that executive actions since September 11th have exhibited the latter character of unclearly specifying the violations and the violators, our findings may overestimate the degree to which the Rehnquist Court will suppress rights.

And, yet, so far we find little evidence of the current Court’s immunity from a crisis effect. Actually, we observe quite the opposite: Our systematic examination of the effect of the first major military effort in the wake of September 11th—the war in Afghanistan—on the Rehnquist Court, shows that the justices of today are responding to war in much the same way as did their counterparts who decided *Quirin*.

4 Selection Effects

It is of course well known that cases reaching litigation (rather than settling out of court) are biased samples of the universe of litigatable cases; in particular, the Priest-Klein model of litigation predicts that plaintiffs only will go into litigation if they believe that they have roughly a fifty percent chance of winning.³⁹⁷ Translating this finding to our study, if parties understand that they are unlikely to prevail in particular civil rights and liberties suits because of the “crisis effect,” different cases will reach the Supreme Court in wartime than during peacetime.³⁹⁸

If this is so, then surely we should have incorporated variables designed to control for particular features of the cases. Recall, however, that we present evidence, in Part V C demonstrating that the facts of Fourth Amendment search and seizure cases do not differ systematically across war and peace cases. And more investigations into those results reveal that, if anything, we have underestimated of the causal effect of war. Specifically, to determine the sensitivity of the statistical model, we examined the expected bias of omitting case fact variables. Under this analysis, the only case fact that is significantly correlated with war *and* affects the probability of a decision favorable

³⁹⁵See, e.g., Cole, *Enemy Aliens*, *supra* note 41 (noting that war threatens the liberties of noncitizens first); Cole, *The New McCarthyism*, *supra* note 41 (describing the vague conceptualizations of wrongdoing in the war on terrorism); Gross, *supra* note 4, at 1082-89 (discussing the “us—them” dialectic of emergency powers and noting that emergency powers are more likely to be conferred when the “other” is well-defined); Downs & Kinnunen, *supra* note 12, at 404 (noting that “[i]t is easier to play loose with civil liberties . . . when only the most unpopular are affected”).

³⁹⁶See Cole, *The New McCarthyism*, *supra* note 41. Of course, whether this characteristic is readily identifiable may be contested.

³⁹⁷This prediction is contingent on the decision standard, the parties’ uncertainty of estimating case quality, and the degree of stake asymmetry across the parties.

³⁹⁸This possible selection effect may be further exacerbated in a study of Supreme Court decisions because the certiorari process is a formal institution by which the justices select cases, exerting greater control over their agenda than in any other appellate court. So even if the selection effect does not manifest itself at the stage of a party’s decision to appeal, a similar effect could influence the justices’ decision to grant cert. Of course, we could argue that the justices are relatively constrained in making that decision., but many constitutional and public choice theories suggest otherwise.

to the criminally accused is the search of a car; such searches are 0.35 less likely to be upheld by the Court. But because they are also 0.14 less likely to appear before the Court during times of war, the inclusion of this covariate would perhaps lead to a greater effect of war.

Which takes us to a more general response to this critique: If it is correct, then, overall, our analyses have probably *underestimated* the causal effect of war. That is, if cases grow more and more extreme owing to overzealous prosecution efforts during wars, and the Court is still far more likely to decide them against the rights claimant—as our results show that it is—then the causal effect is probably far larger than our estimate of .15. Only by demonstrating that cases are less severe during times of war would this critique have merit. But, to our knowledge, no commentator has advanced this claim and, even if one did, our empirical analysis casts serious doubt on it.

Of course, we appreciate concerns that we have only assessed the importance of case characteristics in one issue area (albeit perhaps one more likely than most to have manifest distinctions during war and peace), and that their effect may be stronger in other legal areas. We also understand arguments, at the extreme, that all case facts constitute omitted covariates leading to a spurious causal effect. Along these lines comes the famous Baldus study on capital punishment,³⁹⁹ which included some 354 variables designed to tap case facts, such as the religion of the defendant and whether the defendant committed the offense for retribution against a police officer.⁴⁰⁰ We applaud such proposed approaches of matching on further case facts as another way to assess the robustness of our findings. More generally, while we have presented estimates that we believe take into account the most prominent confounding covariates, it would certainly be a worthwhile and laudable venture to subject these findings to further tests. The crucial point is that in so doing scholars should employ a method that does not inherently introduce bias.⁴⁰¹ Because matching is a general approach to drawing causal inferences that meets this criterion, it may prove fruitful and well suited for additional investigations of the crisis thesis, as well as for analyses of other legal phenomena.

D Post-Treatment Bias

As we have stated in many spots throughout this article, omitted covariates are always a worry in empirical research. Another concern is something of the converse; namely, controlling for variables that are themselves effects of war, thereby biasing the estimate of the causal effect. If a war affects lower court decision making, for example, we should not match on how lower courts decided the case. Alternatively, if a war affects newspapers by decreasing the probability that they will cover Supreme Court decisions, we should not match on the relative salience of the cases.⁴⁰²

These arguments are not without merit. In order to sustain the first critique, however, a commentator would need to concede by assumption that the lower courts systematically are affected

³⁹⁹DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990).

⁴⁰⁰David C. Baldus et al., *Charging and Sentencing of Murder and Voluntary Manslaughter Cases in Georgia, 1973-1979*, Inter-university Consortium for Political and Social Research, No. 9264, 2001.

⁴⁰¹On bias, see the discussion in *infra* Part III D and Epstein & King, *supra* note 181.

⁴⁰²We are indebted to Mark Tushnet for pointing out this potential source of post-treatment bias. See Tushnet, *supra* note 13, at 277-78. On the other hand, Figure 9 does not appear to lend much support to this “crowding out” hypothesis.

by the presence of a war. Which, in turn, would suggest that the crisis thesis cuts far deeper into the federal court system than most have suggested. This is a significant assertion that (to our knowledge) lacks systematic support. On the other hand, it is hardly an implausible one as our analysis of the U.S. Courts of Appeals (to come in Part VIII G) shows.

For now, though, it is worth noting that whether we include or exclude lower court decisions, case salience, or both from our matching models, the causal effect of war remains substantial and statistically significant at all conventional levels.⁴⁰³ In short, the effect is robust to this plausible complaint of post-treatment bias.

E The Measurement of the Court's Politics

Some may be concerned with our use of the Segal & Cover scores to measure the politics of the Court. Previous critiques, for example, have noted that because Segal and Cover devised them from newspaper editorials written at the time of nomination, the scores tend to fare poorly for those justices who experienced a change in their jurisprudence over time (such as Justice Harry Blackmun).⁴⁰⁴

We appreciate these and other concerns about the scores.⁴⁰⁵ But they do not bear on our project since we did not attempt to explore individual justices' response to crises but rather the Court's. To conduct that exploration, we required a broad measure of the Court's ideology—one capable of, for example, detecting the large shift that occurred in the 1970s.⁴⁰⁶ Minor errors in the scores of individual justices, such that they exist, are not likely to have a substantial effect on the measure we ultimately developed.

Nonetheless, to assess the robustness of our results, we investigated a variety of alternatives to the Segal & Cover scores. Whether we (a) exclude the scores and match on term indicators,⁴⁰⁷ (b) match on ideology estimates derived from decisions in areas other than civil rights and liberties,⁴⁰⁸ or (c) match on Martin & Quinn's moving ideal points,⁴⁰⁹ the causal effect of war persists.

⁴⁰³For example, even in our most conservative model (one-to-one matching on common support, without replacement), we find an average treatment effect (ATE) of -9% (SE=3%) by excluding salience, an ATE of -8% (SE=3%) by excluding lower court decisions, and an ATE of -7% (SE=3%) by excluding both salience and lower court decisions, compared to baseline ATE of -11% (SE=3%) when all covariates are included.

⁴⁰⁴For documentation of Justice Blackmun's changing views, see Lee Epstein, et al., *Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices*, 60 J. POLITICS (1998) 801; for a critique of the Segal & Cover scores, see Epstein & Mershon, *supra* note 262.

⁴⁰⁵See *supra* note 262.

⁴⁰⁶See Figure 14.

⁴⁰⁷See Table 7, Methods D & E, or a matching model matching on lower court decisions, term, term², salience and dummy for pre-1975, with replacement.

⁴⁰⁸We thank Andrew Martin and Kevin Quinn for estimating these scores for us. On the assumptions that (a) war does not affect non-civil rights and liberties cases and that (b) ideal points are non-separable and therefore correlated among issue areas, these measures would be an alternative measure of political ideology. These "but-for scores" are correlated with the Segal & Cover scores at 0.43.

⁴⁰⁹As we suggested in *supra* note 262 these scores are ill-suited for our purposes since they are defined endogenously by using judicial votes to derive ideal points. See Martin & Quinn, *supra* note 262. This matching model matched on the Martin & Quinn score, term, Martin & Quinn², term², term*Martin & Quinn, with exact matching on lower court decisions and salience, on common support, with replacement.

F The Relative Importance of the Causal Effect of War

In responding to a draft of this article, the constitutional law scholar, Mark Graber, wrote: “From reading some of the literature, I would expect that the Supreme Court never protects civil liberties in times of war . . . [Your estimate of the causal effect of war]— 15%—is important, but what you also demonstrate is that protection does not go out the window entirely.”⁴¹⁰

What Professor Graber implicitly raises is an important question: While there is a clear difference in Court treatment of rights and liberties during times of war and peace, just how substantial is the effect?

The answer, in some sense, depends on the Court itself. To see this, assume that it is replete with ultra left-of-center justices, such that the majority always supports litigants claiming a deprivation of their rights. For that Court the effect of war would be small, though not zero. Rather than rule in favor of such litigants in 100 out of 100 cases, we would anticipate the proportion to drop to .85 (or 85 out of 100 cases). Now consider a set of extremely conservative justices—one that never rules in favor of the criminally accused, alleged victims of discrimination, war protestors, and other rights litigants. If such a Court ever existed, then the causal effect of war would be zero: the presence of a war would have no effect on case outcomes as the justices would simply continue to rule against rights claimants in each and every case.

But this sort of extreme right-of-center Court never has existed, or, at least, never has existed in modern-day America. Figure 6, which depicts the political ideology of the median justice, suggests as much; and the data in Figure 14, which illustrates the actual proportion of U.S. Supreme Court decisions supporting the rights, liberties, or justice claim, lends even more support. To be sure, we observe a good deal of variation in the proportion—note, for example, the unparalleled levels of liberalism in the 1960s (in the .80 range, or 80 of 100 cases in support of the rights claimant). But never has the Court been so dominated by conservatives that the proportion dipped below .30 (or 30 of 100 cases decided in favor of the party alleging a rights infringement). Rather, that figure has hovered around a moderate .48 since the 1941 term.

⁴¹⁰E-mail correspondence from Mark Graber to Lee Epstein, October 21, 2003. On file with the authors.

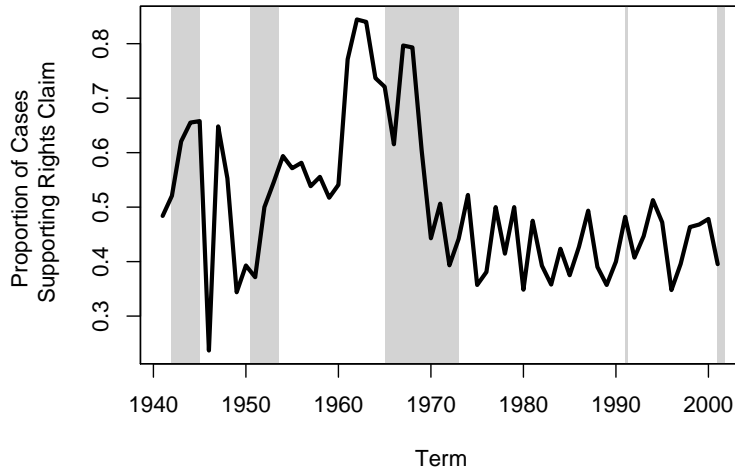


Figure 14: The proportion of U.S. Supreme Court decisions supporting rights, liberties, or justice claims, 1941-2001 terms. The line depicts the proportion of support. The gray shading depicts terms during which the Court heard disputes during a war period.⁴¹¹

It is in light of the contemporary, rather temperate patterns in decision making depicted in Figure 14 that the importance of our findings move into relief: Assuming that the past is the best indicator of the future, the causal effect of war of 15 percent is substantial.

G The Neglect of Lower Courts, and Some Preliminary Evidence in the Wake of September 11th

But what of the rest of the federal judiciary? Is the effect of war as substantial on, say, the U.S. Court of Appeals as it is on the Supreme Court? We raise these questions because in light of September 11th, some might suggest that we have overly restricted our study by assessing the crisis thesis against Supreme Court decisions only; that, to date, it has been the lower federal courts—and not the U.S. Supreme Court—that have resolved terrorism-related suits.⁴¹²

To this, we offer two responses. First, our purpose was to explore the crisis thesis as it pertains to the court for which it was developed, the U.S. Supreme Court. Indeed, prior to September 11th there was little, if any, discussion of the effect of wars and other threats to the national security on the U.S. Courts of Appeals—and probably for good reason: At least some of the explanations for the existence of a crisis effect in the Supreme Court do not transport easily to the other tribunals.⁴¹³ It is arguably the case, for example, that the institutional mechanisms we detailed in Part III B are far more severe for the politically visible apex of the American judiciary than they are for the (relatively) politically insulated appellate courts.

Second, at least in the contemporary context, the federal appellate courts are overwhelmingly

⁴¹¹We derived the proportion of support from the U.S. Supreme Court Database, with `analu=0 or 1; dec.type=1, 6, or 7; value=1-6; dir=0 or 1.`

⁴¹²For a list of the circuit court cases, see *infra* Table 9. Of course, these cases are working their way up to the Supreme Court, with the justices already granting certiorari to *Rasul v. Bush*, 03-334; *Al Odah v. United States*, 03-343; and *Hamdi v. Rumsfeld*, 03-6696.

⁴¹³See *supra* Part III.

Republican in composition: In eight of the twelve circuits, as Table 8 shows, judges appointed by Republican presidents well outnumber Democratic appointees. What this may suggest, if we believe the vast literature indicating that Republican judges tend to be to the ideological right of their Democratic counterparts,⁴¹⁴ is that the effect of the current crisis will be more muted at the appellate level. After all, the majority of judges on these courts already are oriented toward the government in cases involving rights, liberties, and justice—and will, in all likelihood, simply continue to rule in this manner regardless of the existence of a crisis or not. By the same token, in circuits in which Democrats dominate, we also might expect a more muted reaction to threats to the nation’s security, though not an entirely negligible one. For even if these judges always rule in favor of rights litigants when peace prevails, they too will exhibit behavior in line with the crisis thesis and, thus, occasionally hold for the government (perhaps as often as 15 in 100 cases rather than 0 in 100) should our results for the U.S. Supreme Court generalize to the federal circuits.

Circuit (Partisan Composition)	Probability of a Panel of:			
	Three Republicans	Three Democrats	Two Republicans	Two Democrats
1 st (4 Republicans; 2 Democrats)	0.20	0.00	0.60	0.20
2 nd (5 Republicans; 8 Democrats)	0.03	0.20	0.28	0.49
3 rd (6 Republicans; 6 Democrats)	0.09	0.09	0.41	0.41
4 th (8 Republicans; 4 Democrats)	0.25	0.02	0.51	0.22
5 th (11 Republicans; 4 Democrats)	0.36	0.01	0.48	0.15
6 th (6 Republicans; 6 Democrats)	0.09	0.09	0.41	0.41
7 th (8 Republicans; 3 Democrats)	0.34	0.01	0.51	0.15
8 th (7 Republicans; 3 Democrats)	0.29	0.01	0.53	0.18
9 th (9 Republicans; 17 Democrats)	0.03	0.26	0.24	0.47
10 th (7 Republicans; 5 Democrats)	0.16	0.05	0.48	0.32
11 th (6 Republicans; 5 Democrats)	0.12	0.06	0.45	0.36
D.C. (5 Republicans; 4 Democrats)	0.12	0.05	0.48	0.36
(Mean)	0.17	0.07	0.45	0.31

Table 8: The partisan composition of the U.S. Courts of Appeals. The partisanship is based on the political party of the appointing president. Each cell represents the probability of panel composed of a particular combination of Democratic and Republican judges across the appellate courts, assuming random assignment of three judge panels.⁴¹⁵

⁴¹⁴See, e.g., Jeffrey A. Segal, *Decision Making on the U.S. Courts of Appeals*, in CONTEMPLATING COURTS (Lee Epstein ed. 1995); Ronald Stidham, Robert A. Carp, & Donald R. Songer, *The Voting Behavior of President Clinton’s Appointees*, 80 *Judicature* 19 (1996); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *YALE L. J.* 215 (1998).

⁴¹⁵The data on partisan composition are as of June 20, 2003 (derived from from <http://www.allianceforjustice.org/> (last accessed on June 20, 2003)). Assuming random assignment of federal appellate judges to panels, we calculated the probabilities by simple probability rules. The probability of p_i of a panel composition i of three judges=

$$\frac{\binom{N_r}{k_r} \binom{N_d}{k_d}}{\binom{N_R + N_D}{3}}$$

where N_R represents the total number of Republican judges in that circuit, and N_D represents the total number of

For these reasons, we do not view our neglect of post-September 11th cases resolved by the lower courts as a serious limitation of our study; more to the point, that omission does no damage to our conclusion about the causal effect of war on the Supreme Court.

On the other hand, plausible responses exist to both reasons for that omission. One is that even though some of the justifications offered in support of the crisis thesis may not apply to the lower courts, others—such as jurisprudential factors and notions of judicial patriotism—could influence decision making on the appellate bench. Another is that even though Republicans dominate the circuit courts, the probability, as Table 8 shows, of a panel consisting exclusively of Republican (or Democratic) appointees is relatively low. Hence, the causal effect of war may be greater than simplistic counts of the numbers of Republicans and Democrats might suggest. To see this we need only assume, as the scholarly literature suggests, that panels with a partisan mix of judges are less reflexive, ideologically speaking, in their decision making.⁴¹⁶ If this is so, we might expect to observe federal appellate panels composed of Republicans and Democrats (that is, the vast majority of panels, as Table 8 shows) producing substantially fewer decisions supporting rights than they would in the absence of a crisis.

We do not assess this claim systematically here, as once again the primary purpose of this article is to explore the Supreme Court’s response to crises. But preliminary evidence, presented in Table 9, is suggestive. There we depict the fifteen disputes growing out of the war on terrorism that reached the nation’s federal courts of appeals.⁴¹⁷ Note that the government suffered major defeats in three—*Detroit Free Press v. Ashcroft*,⁴¹⁸ *Padilla v. Rumsfeld*,⁴¹⁹ and *Gherebi v. Bush*⁴²⁰—two of which (*Detroit Free Press* and *Gherebi*) were resolved by the only two panels composed exclusively of Democrats and two of which (*Padilla* and *Gherebi*) were decided well after President Bush announced the end of hostilities in the most recent large-scale militarized conflict growing out of September 11th, the war in Iraq.⁴²¹ Notice too that in the three cases heard by all-Republican panels, the government prevailed in part or in full. In light of the purported relationship between partisanship and decision making, these findings come as little surprise.⁴²²

Democratic judges in that circuit; k_r represents the number of Republican judges on the i th panel, and k_d represents the number of Democratic judges on the i th panel. See SHELDON ROSS, A FIRST COURSE IN PROBABILITY 24-63 (6th ed., 2002).

⁴¹⁶Indeed, Cross and Tiller go so far as to propose “a requirement that every three-member circuit court panel be politically split, with each containing judges appointed by both Republican and Democratic Presidents” with the explicit goal of increasing the likelihood of more moderate “ideological outcomes.” See Cross & Tiller, *supra* note 414, at 215, 216.

⁴¹⁷We also include U.S. Foreign Intelligence Surveillance Court of Review, which reviews decisions of the Foreign Intelligence Surveillance Court.

⁴¹⁸303 F. 3d 681 (2002).

⁴¹⁹2003 U.S. App. LEXIS 25616 (2003).

⁴²⁰2003 U.S. App. LEXIS 25625 (2003).

⁴²¹Both *Gherebi* and *Padilla* were handed down on December 18, 2003; President Bush announced the end hostilities in Iraq on May 2, 2003.

⁴²²There are, though, some surprises in these cases; for example, the dissent filed by Judge Susan B. Graber (a Clinton appointee) in *Gherebi*. See Table 9.

⁴²³As of December 3, 2003. Sources: http://www.lchr.org/us_law/loss/cases/court_cases.htm (last accessed 1/31/04); <http://news.findlaw.com/legalnews/us/terrorism/cases/> (last accessed 1/31/04).

Case	Circuit/Panel	Outcome
1. Coalition of Clergy v. Bush, 310 F. 3d 1153 (2002); cert. denied (2003)	<u>Ninth Circuit</u> : Noonan (Reagan), Wardlaw (Clinton), Berzon (Clinton)	<u>In favor of the government</u> : Found that the petitioners lack standing to file a petition for a writ of habeas corpus on behalf of non-U.S. citizens detained in camps in Guantánamo Bay. Berzon concurred.
2. Center for National Security Studies v. Department of Justice, 2003 U.S. App. LEXIS 11910 (2003)	<u>District of Columbia Circuit</u> : Sentelle (Reagan), Henderson (GHW Bush), Tatel (Clinton)	<u>In favor of the government</u> : Ruled that the U.S. government can withhold information on people detained as part of its war on terrorism, including their names, their attorneys' names, and the dates of arrest, detention, and release. Tatel dissented.
3. Detroit Free Press v. Ashcroft, 303 F. 3d 681 (2002)	<u>Sixth Circuit</u> : Keith (Carter), Daughtrey (Clinton), Carr (Clinton)	<u>Against the government</u> : Held that the U.S. government cannot direct U.S. Immigration Judges to close their proceedings to the press and public (including family members of the deportee) in certain "special interest" (terrorism-related) cases.
4. Ghorebi v. Bush, 2003 U.S. App. LEXIS 25625 (2003)	<u>Ninth Circuit</u> : Reinhardt (Carter), Shadur (Carter), Graber (Clinton)	<u>Against the government</u> : Held that the government cannot hold uncharged noncitizens (captured during the Afghan war) on a naval base on Guantánamo Bay, Cuba in indefinite detention while denying them access to courts. Graber dissented.
5. Hamdi v. Rumsfeld, 294 F.3d 598 (2002)	<u>Fourth Circuit</u> : Wilkinson (Reagan), Wilkins (Reagan), Traxler (Clinton)	<u>In favor of the government</u> : Ruled that the federal public defender lacks a sufficiently significant relationship with Hamdi—who was declared by President Bush to be an "enemy combatant"—to satisfy a prerequisite for next friend standing.
6. Hamdi v. Rumsfeld, 296 F.3d 278 (2002)	<u>Fourth Circuit</u> : Wilkinson (Reagan), Wilkins (Reagan), Traxler (Clinton)	<u>In favor of the government</u> : Found the district court in error when it ordered the government to allow counsel to give the Public Defender unmonitored access to Hamdi.
7. Hamdi v. Rumsfeld, 316 F. 3d 450; rehearing denied and rehearing en banc denied 337 F. 3d. 335 (2003); cert. granted (2004)	<u>Fourth Circuit</u> : Wilkinson (Reagan), Wilkins (Reagan), Traxler (Clinton)	<u>In favor of the government</u> : Ruled that the U.S. government need not produce of various materials regarding Hamdi's status as an alleged enemy combatant; the declaration submitted by the government is a sufficient basis upon which to conclude that the President has "constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution."
8. In re: Sealed Case No. 02-001, 310 F. 3d 717 (2002)	<u>U.S. Foreign Intelligence Surveillance Court of Review</u> : Guy (Reagan), Silberman (Reagan), Leavy (Reagan)	<u>In favor of the government</u> : Held that the U.S. government may adopt procedures to enable FBI counterintelligence officers to share FISA information with criminal prosecutors
9. North Jersey Media Group v. Ashcroft, 308 F.3d 198 (2002)	<u>Third Circuit</u> : Becker (Reagan), Scirica (Reagan), Greenberg (Reagan)	<u>In favor of the government</u> : Ruled that the U.S. government can direct U.S. Immigration Judges to close their proceedings to the press and public (including family members of the deportee) in certain "special interest" (terrorism-related) cases. Scirica dissented.

Table 9: The war on terrorism in the U.S. Courts of Appeals.⁴²³

Case	Circuit/Panel	Outcome
10. <i>Odah v. U.S.</i> 321 F. 3d 1134 (2003); cert. granted (2003)	<u>District Columbia Circuit</u> : Randolph (GHW Bush), Garland (Clinton), Williams (Reagan)	In favor of the government: Wrote that “the privilege of litigation” does not extend to the alien suspected terrorists and Taliban members in military custody at the U.S. naval base on Guantánamo Bay, Cuba.
11. <i>Padilla v. Rumsfeld</i> , 2003 U.S. App. LEXIS 25616 (2003)	<u>Second Circuit</u> : Pooler (Clinton), Parker (GW Bush), Wesley (GW Bush)	Against the government: Wrote that “the President does not have the power under Article II of the Constitution to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat.” Wesley dissented in part and concurred in part.
12. <i>United States v. Awadallah</i> , 349 F. 3d 42 (2003)	<u>Second Circuit</u> : Carman (Reagan), Jacobs (GHW Bush), Straub (Clinton)	In favor of the government: Held that the federal material witness statute can be applied to the defendant, who may possess information about the September 11 th terrorist attacks. Also reversed the district court’s decision that the FBI’s unreasonable searches and seizures on September 20 and 21, 2001, before Awadallah was arrested as a material witness, require suppression at trial of certain statements and physical evidence. Straub filed a concurring opinion.
13. <i>United States v. Moussaoui</i> , 2002 U.S. App. LEXIS 14970 (2002)	<u>Fourth Circuit</u> : Wilkins (Reagan), Williams (GHW Bush), Gregory (Clinton)	In favor of the government: Denied a petition for emergency issuance of extraordinary writs of mandamus, prohibition and injunction filed by Moussaoui—a suspect in the September 11 hijackings. Gregory agreed that the court should deny all relief requested in the petition, except for the request of Moussaoui’s lawyer to meet with his client prior to Moussaoui’s attempt to enter a guilty plea.
14. <i>United States v. Moussaoui</i> , 2002 U.S. App. LEXIS 16530 (2002)	<u>Fourth Circuit</u> : Wilkins (Reagan), Williams (GHW Bush), Gregory (Clinton)	In favor of the government: Dismissed Moussaoui’s appeal of several trial orders entered against him.
15. <i>United States v. Moussaoui</i> , 2003 U.S. App. LEXIS 9170 (2003)	<u>Fourth Circuit</u> : Wilkins (Reagan), Widener (Nixon), Niemeyer (GHW Bush)	Split decision: Held that all classified information involved in Moussaoui’s appeal will remain under seal but gave the public access to unclassified materials in after court redacts those materials “with the aid of Government’s submissions.”

What is interesting, though, are the ten cases decided by mixed panels: In nine, the court decided against the rights plaintiff. This held for the one panel on which two Democratic appointees sat, as well as for the eight dominated by Republicans.⁴²⁴ So too, even when Republicans controlled the majority, the lone Democrat typically failed to dissent from his colleague’s opinion—despite (or, perhaps, because of) the use the opinion made of the current crisis to justify the holding.⁴²⁵ Consider, for example, Judge Edward R. Becker’s opening words in *North Jersey Media Group v. Ashcroft*,⁴²⁶ in which the court addressed the question of whether the federal government can direct U.S. Immigration Judges to close their proceedings to the press and public:

This case arises in the wake of September 11, 2001, a day on which American life changed drastically and dramatically. The era that dawned on September 11th, and the war against terrorism that has pervaded the sinews of our national life since that

⁴²⁴Note that Padilla is an exception in several ways: the panel, composed of two Republican appointees, ruled against the government.

⁴²⁵The exceptions, as indicated in the table, are Judge Tatel in *Center for National Security Studies v. Department of Justice*, 2003 U.S. App. LEXIS 11910 and Judge Gregory (in part) in *United States v. Moussaoui*, 41 Fed. Appx. 686.

⁴²⁶303 F. 3d 198 (2002).

day, are reflected in thousands of ways in legislative and national policy, the habits of daily living, and our collective psyches. Since the primary national policy must be self-preservation, it seems elementary that, to the extent open deportation hearings might impair national security, that security is implicated in the logic test. When it is factored in, *given due consideration to the attorney general's statements of the threat*, we do not believe that the Richmond Newspapers logic prong test favors the media either.⁴²⁷

Judge Becker is not alone; in virtually all the appellate court opinions September 11th and the ensuing military conflicts moved to center stage. Clearly, the current crisis pervades the minds of these judges, just as it does many other Americans'.

This is not, of course, to say that September 11th will have an equally apparent, observable impact on every jurist, in every case; as we have explained throughout, the judges' ideological baseline will play a role in determining the extent of the impact. We can say the same of the magnitude of the ensuing crisis. Along these lines, it is perhaps not so surprising, as we just noted, that the two most recent circuit court battles (*Gherebi* and *Padilla*) ended in defeat for the administration. Both came well after the President announced the end of hostilities in Iraq.⁴²⁸

What we do want to suggest instead is that the events of September 11th and its outgrowths already are manifesting themselves in, and influencing, American jurisprudence. That influence will be clearest for appellate courts that are moderate in their political orientation or have moderating influences. But even for those replete with strong partisans or ideologues, the actual impact of the crisis will not be negligible. Judges already possessing a by-and-large law-and-order orientation—an orientation scholars associate with Republican appointees—may very well move to the right should the United States undertake further large-scale military efforts in its war on terrorism, while those with a commitment to defendants' rights—mainly Democrats, according to the literature—may very well depart occasionally from that commitment.

IX SEPTEMBER 11TH AND BEYOND: THE IMPLICATIONS OF OUR STUDY

That American judges vote in accord with their politics is not news; for over six decades now, scholars have emphasized the role that partisanship plays in decision-making.⁴²⁹ That courts move uniformly, persistently, and significantly to the right when the nation is in war, however, is news. While commentators long have speculated that various mechanisms lead judges to suppress rights and liberties during times of crisis,⁴³⁰ a smaller but equally vocal group has countered that the Court acts to the contrary, by serving as a guardian of those rights and liberties.⁴³¹ In between these two camps sit many others who have offered variants of one view or the other.⁴³²

Our study puts this debate on firmer empirical ground: We find that those asserting a strong and deep influence of wars on the Court have the better case. Indeed, the effect of war and other

⁴²⁷308 F.3d 198, at 202 (our emphasis).

⁴²⁸See *supra* note 421.

⁴²⁹See, e.g., C. Herman Pritchett, *Divisions of Opinion among Justices of the U.S. Supreme Court*, 35 AM. POL. SCI. REV. 890 (1941); GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946-1963* (1965); Segal & Spaeth, *supra* note 195.

⁴³⁰For these works, see *supra* note 14; for the mechanisms, see *supra* Part III.

⁴³¹For supporting works, see *supra* note 16 and *supra* note 17.

⁴³²For a sampling, see Part II.

international crises is so substantial that it may surprise even those commentators who have long argued that the Court rallies around the flag in times of crisis.

Our investigation also suggests that as long as the war on terror continues in a severity comparable to previous wars, we should see a sharp turn to the right in the civil rights and liberties decisions of the Court.⁴³³ And on this proposition, evidence already is beginning to mount. Anecdotal support comes from the justices themselves. In separate speeches delivered after September 11th, Justices Scalia, O'Connor and Breyer openly admitted the potential repercussions of the crisis on the Court's rights jurisprudence. As Justice Scalia put it, "The Constitution just sets minimums. Most of the rights that you enjoy go way beyond what the Constitution requires," and in times of war "the protections will be ratcheted right down to the constitutional minimum."⁴³⁴ Justice O'Connor concurred with this general sentiment, claiming that "restrictions on our personal freedom" wrought by the war on terrorism, "will cause us to re-examine some of our laws pertaining to criminal surveillance, wiretapping, immigration and so on."⁴³⁵ And while Justice Breyer noted that "the Constitution does apply 'in time of war as in time of peace,'" he further conceded that in wartime "circumstances change, thereby shifting the point at which a proper balance is struck."⁴³⁶ He later elaborated that "no one would like to make a decision that harms national security."⁴³⁷

Yet more compelling evidence of a post-September 11th effect on the judiciary comes from this study. In Part VII B, we demonstrated that the Rehnquist Court, however conservative it may be, moved even further to the right during the war in Afghanistan. And in Part VIII we described our investigation into appellate court litigation. While that analysis is highly preliminary, the results point to tribunals that are not altogether anxious to question the President's authority, at least not during large-scale military efforts.

It is in light of the federal judiciary's apparent inclination to follow a crisis jurisprudence in the aftermath of September 11th—not to mention our study's finding of the persistent, consistent, and substantial causal effect of war on the U.S. Supreme Court throughout most of the 20th century—that the major policy implications of our study move to the fore. First, given the willingness of the justices to suppress rights in times of crisis, the current presidential administration ought reconsider its strategy of maneuvering around the federal courts to fight its war on terrorism. Second, given the extent to which the justices curtail rights during periods of threat to the nation's security, federal judges ought give less weight to legal principles established while a war is ongoing, and attorneys should see it as their responsibility to distinguish cases along these lines. In what follows we elaborate on both.

⁴³³On forecasting the Rehnquist Court's reaction to the war on terror, see Lewis *supra* note 13, at 271 (noting that "[w]e may all try to guess where a headstrong Supreme Court will come down on the Bush administrations attempt to brush constitutional rights aside in the war on terrorism").

⁴³⁴Quoted in "Justice Scalia Addresses Wartime Constitutional Rights," March 19, 2003. Available at <http://www.cnn.com/2003/LAW/03/19/scalia.speech.ap/index.html> (last accessed on June 10, 2003).

⁴³⁵For a summary of O'Connor's speech, see Linda Greenhouse, *O'Connor Foresees Limits on Freedoms*, N.Y. Times, September 29, 2001, 5B.

⁴³⁶Stephen G. Breyer, Liberty, Security, and the Courts, Speech to the Association of the Bar of the City of New York (April 14, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_04-15-03.html.

⁴³⁷This Week (ABC television broadcast, July 6, 2003). Breyer further described that "[t]he difficulty in these cases is to use words in the Constitution like unreasonable search to decide whether these arguments that favor security as opposed to those that favor less restriction on liberty, how the balance should be struck, nobody wants to harm security and nobody wants unnecessarily you see to prevent people from doing what they'd like to do."

A The Bush Administration and the Courts

Virtually since September 12, 2001 the Bush administration has pursued a strategy of maneuvering around the federal courts as it wages its war on terrorism.⁴³⁸ The steps it has taken are many in number but include establishing military tribunals to try suspected terrorists,⁴³⁹ monitoring communications between lawyers and September 11th detainees in the absence of a federal court order,⁴⁴⁰ holding foreign nationals suspected of terrorism at a U.S. naval base at Guantánamo Bay, Cuba to avoid challenges in the federal courts, issuing regulations to stay any order by an immigration judge that authorizes the release of aliens until the Board of Immigration Appeals reaches a decision on the order, and detaining material witnesses without allowing them access to their attorneys.⁴⁴¹

That these are part and parcel of a strategy to bypass the ordinary courts is beyond doubt; the administration has admitted as much.⁴⁴² It seems to believe that the benefits of the strategy are substantial, ranging the protection of information that ostensibly is sensitive to national security to the ability to reduce substantially the probability of a costly court setback in its effort to conduct the war by all means necessary.

What our findings suggest, however, is the benefits of pursuing this “extra-legal” strategy may be far less than the administration apparently believes; even more to the point, the political costs may very well outweigh the legal benefits. That is because, in all likelihood, the very judiciary the administration is attempting to bypass will (should further militarized disputes ensue) become an ally in its war on terrorism. Surely, this is the major lesson of our study with regard to the U.S. Supreme Court, and it is a lesson that may transport to the federal appellate courts as well.⁴⁴³ But, even if it does not, it is likely that only a limited number of circuit court panels will oppose the administration’s position. That is because a large majority (roughly 62 percent⁴⁴⁴) will be composed exclusively or nearly so of Republicans—that is, of jurists who are generally more conservative than their Democratic counterparts and who will, if the justices of the Rehnquist

⁴³⁸See, e.g., see Cover, *supra* note 62; Jan C. Ting, *Unobjectionable But Insufficient—Federal Initiatives in Response to the September 11 Terrorist Attacks*, 34 *CONNECTICUT LAW REVIEW* 1145 (2002); John W. Whitehead & Steven H. Aden, *Forfeiting ‘Enduring Freedom’ for ‘Homeland Security’*, 51 *AM. U. L. REV.* 1081 (2002).

⁴³⁹Military Order of November 11, 2001, Detention, Treatment, and Trial of Certain Non Citizens in the War Against Terrorism, 66 *Fed. Reg.* 57,833 (Nov. 13, 2001); DoD Presents Procedural Guidelines For Military Commissions, Department of Defense Press Release, Mar. 21, 2002, available at <http://www.defenselink.mil/news/Mar2002/n03212002.200203213.html> (last accessed on June 1, 2003). Persons covered by this order include non-U.S. citizens determined to be members of al Qaeda or others involved in international acts of terrorism or who knowingly harbor terrorists.

⁴⁴⁰National Security; Prevention of Acts of Violence and Terrorism, 28 *C.F.R.* Parts 500 and 501, 66 *Fed. Reg.* 55,061, 55,064 (Oct. 31, 2001), published by the Bureau of Prisons of the Justice Department.

⁴⁴¹For the details of these actions, see Cover, *supra* note 62; Ting, *supra* note 438; Whitehead & Aden, *supra* note 438. For other examples, see http://www.lchr.org/us_law/loss/loss_main.htm (last accessed on June 1, 2003) and Table 9.

⁴⁴²See Linda Greenhouse, *It’s a Question of Federal Turf*, *N.Y. Times*, November 12, 2003, 1 (describing the “judges keep out” fence the Bush administration has sought to erect); see also Brief for the Respondents in Opposition, *Rasul v. Bush*, No. 03-334 and *Odah v. United States*, No. 03-343, On Petitions for a Writ of Certiorari (in which the Solicitor General claimed that because “this litigation challenges the President’s military detentions while American soldiers and their allies are still engaged in armed conflict overseas against an unprincipled, unconventional, and savage foe . . . the potential for interference with the core war powers of the President is . . . acute. . . [The] courts should not interfere . . .” (brief available at: <http://conlaw.usatoday.findlaw.com/supreme.court/briefs/03-334/03-334.resp.html> [last accessed on December 8, 2003])).

⁴⁴³See Table 9.

⁴⁴⁴We derived this figure by summing the means of the “Three Republicans” and “Two Republicans” columns of Table 8.

Court are any indication, veer even further to the right should additional large-scale militarized disputes ensue.

Of course, it is true that a small probability exists that the administration will draw an appellate panel composed exclusively of Democrats;⁴⁴⁵ in fact, that has already occurred in *Detroit Free Press v. Ashcroft* and *Gherebi v. Bush*—with government lawyers paying the expected price: the panels ruled against their position. And perhaps it was in anticipation of the Detroit Free Presses and the Gherebis that President Bush and other members of the executive branch took the steps they did to bypass the federal courts. The administration (especially the U.S. Justice Department) seems to view these as part of a rational strategy to achieve their goal of obtaining convictions against, or otherwise detaining, suspected terrorists.

Calling into doubt the marginal benefit of but a few setbacks in the circuit courts (which, of course, government lawyers may very well be able to rectify via the U.S. Supreme Court), however, are the substantial costs the administration may pay should it persist in pursuing this extra-legal strategy. Primarily, these costs center on public sentiment: As study after study has indicated, Americans have, at least since the early 1900s, exhibited a decided lack of tolerance for executive efforts to meddle with the Court.⁴⁴⁶ Many Presidents have learned this the hard way but perhaps none more so than Franklin D. Roosevelt. However much citizens supported his New Deal programs (and opposed the Court's efforts to undercut them), public opinion polls indicate that they disliked the President's plan to "pack" the Court with justices of his choosing.⁴⁴⁷

What this episode, and several others scholars have identified, indicates is a "resistance" on the part of Americans to attempts to alter or undermine *their* federal courts—a resistance so strong that it often renders such attempts doomed to failure. This was true of Franklin D. Roosevelt's court-packing scheme but George W. Bush's attempts to bypass the courts may be even more counterproductive. While Roosevelt sought to change and, in some sense, delegitimize an enemy—a Court at odds with his views—Bush's efforts may even amount to emasculating an ally—a Court that is far more likely to be in line with his policies.

Seen in this way, the administration would be wise to seek the judiciary's endorsement of its war-related measures, rather than attempt to maneuver around it. Shifting its strategy in this way not only would enable the administration to deter a substantial public backlash,⁴⁴⁸ but also would work to legitimate its policies—assuming that federal jurists will, by and large, support its efforts in the face of further large-scale military operations. Affirmations from the federal bench, but especially the Supreme Court, could send a reassuring message to the public that, despite the concerns of expressed by some "civil libertarians and law professors,"⁴⁴⁹ the government's response to September 11th falls within an acceptable constitutional range. In light of literature suggesting that the Court can effectively play the role of "republican schoolmaster,"⁴⁵⁰ educating the public about what is and is not appropriate government behavior, such a message from the Court would

⁴⁴⁵The probability is .1747. See Table 8.

⁴⁴⁶See Gregory A. Caldeira, *Courts and Public Opinion*, in *THE AMERICAN COURTS: A CRITICAL PERSPECTIVE* (John B. Gates & Charles A. Johnson ed. 1991); Caldeira, *supra* note 393.

⁴⁴⁷See *supra* note 393.

⁴⁴⁸One sign that the administration already may be shifting its strategy for this very reason came in December 2003. After months of refusing the requests of Yasar Esam Hamdi, an American detained as an enemy combatant, to meet with his attorney, the Pentagon changed its mind. Neil Lewis, Sudden Shift on Detainee, *N.Y. Times*, December 4, 2003, A1, deemed the Pentagon's decision "less of a substantive change than merely a calculated gesture to help the administration shield its policies from criticism and reversal by the courts."

⁴⁴⁹See, e.g., Cole *supra* note 41; Lewis *supra* note 13.

⁴⁵⁰See *supra* note 123.

only work to the administration's advantage.

There is yet another benefit to an alternation in strategy on the part of the administration: Supreme Court decisions supporting the President's response to September 11th would serve as precedent for lower courts confronted with cases growing out of the war on terrorism. Indeed, if our primary finding about the effect of crises on case outcomes translates into a doctrinal willingness to defer to the government, the precedential value of Court decisions could be quite substantial. Foregoing the opportunity for such developments constitutes a serious liability in the administration's current extra-legal policy posture.⁴⁵¹

B *Stare Decisis* in Times of War and Peace

In *The Nature of the Judicial Process*, Justice Benjamin Cardozo described the importance of *stare decisis* in this way:

If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was a defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights.⁴⁵²

Our investigation suggests that Cardozo's general conception of *stare decisis* does not always hold; in fact, a case decided yesterday when peace prevailed has a substantial probability of being "decided differently" today when a state of war exists.⁴⁵³

If this is so, then from our results flow an important implication relating to *stare decisis*: Members of the legal community should hold an on-going crisis as a material distinguishing fact in determining the authority of a case. Specifically, during times of peace, judges ought bestow less precedential authority on cases decided during times of war, and vice versa. Further, attorneys should see it as their responsibility to distinguish cases along these lines.⁴⁵⁴

This recommendation may resolve the problem, as Tushnet puts it, of war being "something like an elephant in the living room . . . try as they might, judges are quite unlikely to be able to ignore

⁴⁵¹Of course, commentators might respond that it is precisely the threat of circumventing the courts that is the root cause of judicial deference. Yet, given the widespread effect of war across cases in which the government neither implicitly nor explicitly threatened to move the proceedings to a military tribunal or bypass the courts in other ways, as well as the lack of evidence suggesting that the government's participation in a lawsuit (whether as a party or as an amicus curiae) affects levels deference, this is unlikely.

⁴⁵²Cardozo, *supra* note 93, 33-34 quoting WILLIAM G. MILLER, *THE DATA OF JURISPRUDENCE* 335 (1909).

⁴⁵³This suggests that the ebb-and-flow model of accommodation delineated by Gross, in which "in times of crisis, we can expect expansive judicial interpretations of the scope of police powers, with the concomitant contraction of individual rights," may be an accurate description of empirical reality. Gross, *supra* note 4, at 1060.

⁴⁵⁴This is not a recommendation, we hasten to note, with which Cardozo himself probably would have taken much issue. Even though he pointed to the important role *stare decisis* plays in establishing expectations, he argued that precedent should be relaxed when "it was the product of institutions or conditions which have gained a new significance or development with the progress of the years." Cardozo, *supra* note 93, 151. Surely a condition of severe crisis may constitute grounds for relaxing or downgrading the authority of a case in times of tranquility. Moreover, acknowledging the difference between cases decided during war and peace resolves potential inconsistencies in the case law, dispelling the danger that Justice Cardozo described as "the tendency or a principle to expand itself to the limit of its logic." Cardozo, *supra* note 93, 51.

the elephant’s presence,”⁴⁵⁵ by explicitly requiring the acknowledgement of the circumstances of war. In other words, our prescription provides a framework for balancing security and liberty interests under different crisis-related contexts without relying on the judges themselves to refrain “from giving in to an understandable urge to make exercises of emergency powers compatible with constitutional norms . . . to avoid normalizing the exception”⁴⁵⁶ —an “urge,” like Tushnet’s “elephant,” that our study suggests they are unlikely to resist.

On the other hand, because our approach does not entail “normalizing the exception,” but rather recognizing it explicitly for its precedential value, it is distinct from proposals commending a return to “first principles”⁴⁵⁷ and use of the “prerogative power”⁴⁵⁸ during times of crisis and necessity. Along these lines comes Gross’s model of extra-legal measures, in which the government “go[es] outside the legal order, at times even violating otherwise accepted constitutional principles.”⁴⁵⁹

We see serious problems with such an “extra-legal” approach. First, it risks a lack of accountability of the executive for the duration of a crisis.⁴⁶⁰ Our approach, in contrast, while providing the executive with some leeway during times of war, eliminates the potential problems of authoritarianism and lawlessness inherent in the extra-legal model. It also ensures that the executive is accountable even in times of crisis.⁴⁶¹

A second problem with extra-legal measures is that they play directly into the fear that Justice Jackson expressed in *Korematsu*: “once a judicial opinion rationalizes a [government] order [curtailing rights] to show that it conforms to the Constitution...the Court for all time has validated

⁴⁵⁵Tushnet, *supra* note 13.

⁴⁵⁶Tushnet, *supra* note 13, at 307.

⁴⁵⁷Niccolò Machiavelli, *THE PRINCE* (trans. Harvey C. Mansfield, Univ. Chicago Press 2d ed. 1998) (n.d.); Niccolò Machiavelli, *THE DISCOURSES* (Bernard Crick ed., Leslie J. Walker. S.J. trans., Penguin Books 1998) (n.d.). Machiavelli spoke of the role of virtù in establishing and maintaining the state, arguing that by the necessity of fortune, great rulers must at times of crisis bring the state back to its first principles. Machiavelli, *The Discourses*, at 385-92, 386, 388 (claiming that the “return to original principles” or the reconstitution of the government meant “instilling men with that terror and that fear with which they had instilled them when institution it.”). He notes that:

The principal foundations that all states have, new ones as well as old or mixed are good laws and good arms. And because there cannot be good laws where there are not good arms, and where there are good arms there must be good laws, I shall leave out the reasoning on laws and shall speak of arms.

Machiavelli, *The Prince* 48. In other words, for Machiavelli, necessity trumps law.

⁴⁵⁸John Locke, *SECOND TREATISE OF GOVERNMENT* 83-88 (C.B. Macpherson ed., Hackett Publishing 1980) (1690). Locke echoes Machiavelli’s conception of necessity in the conception of prerogative power, namely the “power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it.” *Id.* at 84. In Locke’s conception this power “never is questioned” and the only remedy remains “an appeal to heaven.” *Id.* at 84, 87.

⁴⁵⁹Gross, *supra* note 4, at 1097.

⁴⁶⁰To be fair, Gross proposes an ex post ratification mechanism of any extra-legal measures, arguing that this would contain executives. Yet this could fall prey to similar dangers of accountability, since executives might only seek further intensification of crises to maintain power and emergency measures. and, as such, presents the possibility of a slippery slope to authoritarianism.

⁴⁶¹By maintaining the doctrine of separation of powers in wartime, our approach evades the fear stated so eloquently by Justice Brandeis:

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 240, 293 (1926).

[a] principle [that] then lies about like a loaded weapon ready for the hand of any authority . . . ”⁴⁶² By explicitly acknowledging the distinction between precedent established during times of war and peace, our approach would have the opposite effect: It would serve to allay fears that doctrine resulting from the application of a crisis jurisprudence lie about ”like a loaded weapon.”

To be sure, our findings suggest that such fears, to the extent they exist, are probably overwrought, since the Court, however implicitly, is already deciding “war” and “peace” cases differently. Seen in this way, all our recommendation accomplishes, some might argue, is the instantiation of a jurisprudential principle that judges now follow. This may be so but neither scholarly commentators nor the judges themselves have acknowledged that courts make this distinction, which may explain why proposals about how the judiciary should respond to September 11th continue to flood legal journals and the op-ed pages of newspapers. But even if judges already do distinguish cases based on a crisis context, we do not regard requiring them to make the implicit explicit as trivial or inconsequential. For until judges state their intent to distinguish cases along the dimension we propose, neither the legal community, nor the public, can hold them accountable to that principle. It should thus be the responsibility of all members of that community—but especially practitioners—to see it as their affirmative duty to distinguish cases on the basis of whether or not the Court decided them during a time of war, irrespective of whether the precedential case related directly to a war effort.⁴⁶³

X CONCLUSION

In a brief attempting to convince the U.S. Supreme Court to open the federal courts to prisoners at Guantánomo Bay, the World War II detainee Fred Korematsu urged the justices:⁴⁶⁴

to make clear that, even in wartime, the United States does not abandon fundamental liberties in the absence of convincing military necessity. Our failure to hold ourselves to this standard in the past has led to many of our most painful episodes as a nation. We should not make that mistake again.⁴⁶⁵

Whether a mistake or not, our study suggests that it is highly unlikely that courts will decline “to abandon fundamental liberties” in times of severe threats to the nation’s security.⁴⁶⁶ Indeed, if our results indicate anything, it is that the judiciary is no panacea for wartime curtailments on civil rights: the justices of the U.S. Supreme Court seem to feel little responsibility to “rebuke the

⁴⁶²Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J. dissenting). See also Edwards, *supra* note 5, at 841 (noting that “[o]nce validated by the courts, emergency curtailments of constitutional rights take on legal lives of their own”).

⁴⁶³Such claims, of course, ought cut both ways: attorneys should scour “war” cases for support in times of war, and “peace” cases for support in times of peace. But they need not distinguish on the basis of the types of wars—a distinction, our study suggests, that does not concord with the historical reality. On the other hand, our results suggest that attorneys should avoid making analogies between the existence of indisputable armed conflict (i.e., all major wars of the 20th century) and rally events.

⁴⁶⁴Korematsu was the defendant in *Korematsu v. United States*, 323 U.S. 214 (1944).

⁴⁶⁵Brief of Amicus Curiae Fred Korematsu in Support of Petitioners in *Al Odah v. United States*, No., 03-343 and *Rasul v. Bush*, No. 03-334.

⁴⁶⁶By this we do not mean to offer a prediction for this particular set of cases; it would difficult to do so based on our analysis of historical trends. We are rather only reiterating the general result of our study: that the causal effect of war is so persistent and consistent that it has led to a substantial and significant reduction in rights during nearly all war periods.

legislative and executive authorities when, under the stress of war [those authorities] have sought to suppress the rights of dissenters,” as Justice Abe Fortas once wrote or as *Ex parte Milligan* counsels; they have rather acted in accordance with the maxim of *inter arma silent leges*, just as the crisis thesis anticipates and as *Korematsu v. United States* suggests.

That the Court fails to safeguard minority rights during large-scale militarized conflicts will be of some reassurance to commentators concerned with the allegedly countermajoritarian nature of judicial review:⁴⁶⁷ the justices of today are no more likely than their predecessors to thwart a presidential administration and a public bent on suppressing rights and liberties during times of war. But our results will provide little comfort to Fred Korematsu, his attorneys, and the many others who claim that war has tipped the balance too far in favor of security over liberty. For them, the new round of crisis-related litigation will, in all likelihood, bring yet more stinging defeats—but a long string of victories for the Bush administration should it undertake further military efforts in its battle against terrorism. Those disturbed by these odds ought consider turning to Congress, not the courts, to impose an effective check on the executive branch during times of war. For, as Justice Cardozo wrote nearly a century ago, “[i]t must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree of courts.”⁴⁶⁸

⁴⁶⁷Bickel, *supra* note 138, 111-98.

⁴⁶⁸Cardozo, *supra* note 93, 90 (quoting *Missouri, K. & T. R. Co. v. May*, 194 U.S. 267, 270 (1904)). See also Chafee, *supra* note 14.

APPENDICES

A THE (SPAETH) U.S. SUPREME COURT DATABASE'S CATEGORIZATION OF ISSUES

Criminal Procedure

010 involuntary confession
013 habeas corpus (cf. 704): whether the writ should issue rather than the fact that collateral review occurred. Note that this need not be a criminal case
014 plea bargaining: the constitutionality of and/or the circumstances of its exercise
015 retroactivity (of newly announced constitutional rights)
016 search and seizure (other than as pertains to 017 and 018)
017 search and seizure, vehicles
018 search and seizure, Crime Control Act
020 contempt of court
021 self-incrimination (other than as pertains to 022 and 023)
022 Miranda warnings
023 self-incrimination, immunity from prosecution
030 right to counsel (cf. 381-382)
040 cruel and unusual punishment, death penalty (cf. 106)
041 cruel and unusual punishment, non-death penalty
050 line-up (admissibility into evidence of identification obtained after accused was taken into custody, or after indictment or information)
060 discovery and inspection (in the context of criminal litigation only, otherwise 537)
070 double jeopardy
080 ex post facto (state)
100 extra-legal jury influences, miscellaneous: no question regarding the right to a jury trial or to a speedy trial (these belong in 190 and 191, respectively); the focus, rather, is on the fairness to the accused when jurors are exposed to the influences specified
 101 prejudicial statements or evidence
 102 contact with jurors outside courtroom
 103 jury instructions
 104 voir dire
 105 prison garb or appearance
 106 jurors and death penalty (cf. 040)
 107 pretrial publicity
110 confrontation (right to confront accuser, call and cross-examine witnesses)
-- subconstitutional fair procedure: nonsubstantive rules and procedures pertaining to the administration of justice that do not rise to the level of a constitutional matter. This is the residual category insofar as criminal procedure is concerned. Note that this issue need not necessarily pertain to a criminal action. If the case involves an indigent, consider 381-386.
 111 confession of error
 112 conspiracy (cf. 163)
 113 entrapment
 114 exhaustion of remedies
 115 fugitive from justice
 116 presentation of evidence
 117 stay of execution
 118 timeliness, including statutes of limitation
 119 miscellaneous
120 Federal Rules of Criminal Procedure, including application of the Federal Rules of Evidence in criminal proceedings.
--statutory construction of criminal laws: these codes, by definition exclude the constitutionality of these laws
 161 assault
 162 bank robbery
 163 conspiracy (cf. 112)
 164 escape from custody

165 false statements (cf. 177)
166 financial (other than in 168 or 173)
167 firearms
168 fraud
169 gambling
171 Hobbs Act; i.e., 18 USC 1951, not 28 USC 2341, the Administrative Orders Review Act, which is also "commonly known as the Hobbs Act." 96 L ed 2d 222, at 239.
172 immigration (cf. 371-376)
173 internal revenue (cf. 960, 970, 975, 979)
174 Mann Act
175 narcotics
176 obstruction of justice
177 perjury (other than as pertains to 165)
178 Travel Act
179 war crimes
180 sentencing guidelines
181 miscellaneous
190 jury trial (right to, as distinct from 100-107)
191 speedy trial
199 miscellaneous criminal procedure (cf. 504, 702)

Civil Rights

210 voting: does not extend to reapportionment and districting, which is 250, or to litigation under the Voting Rights Act, which is 211, or to durational residency requirements, which is 341. Entries are limited to cases raising constitutional questions regarding the right to vote; typically, but not exclusively, under the 15th or 14th Amendments.
211 Voting Rights Act of 1965, plus amendments
212 ballot access (of candidates and political parties)
220 desegregation (other than as pertains to 221-223)
221 desegregation, schools
222 employment discrimination: on basis of race, age, or working conditions. Not alienage, which is 272, or gender, which is 284.
223 affirmative action
230 sit-in demonstrations (protests against racial discrimination in places of public accommodation): to be sharply distinguished from protests not involving racial discrimination. The latter are coded as 451.
250 reapportionment: other than plans governed by the Voting Rights Act
261 debtors' rights (other than as pertains to 381-388): replevin, garnishment, etc. Typically involve notice and/or hearing requirements or the takings clause.
271 deportation (cf. 371-376)
272 employability of aliens (cf. 371-376)
283 sex discrimination: excluding employment discrimination which is 284
284 sex discrimination in employment (cf. 283, 222)
293 Indians (other than as pertains to 294)
294 Indians, state jurisdiction over
301 juveniles (cf. 321)
311 poverty law, constitutional: typically equal protection challenges over welfare benefits, including pension and medical benefits
312 poverty law, statutory: welfare benefits, typically under some Social Security Act provision. Excludes 321 and 331.
321 illegitimates, rights of (cf. 301): typically inheritance and survivor's benefits, and paternity suits
331 handicapped, rights of: under Rehabilitation Act and related statutes
341 residency requirements: durational, plus discrimination against nonresidents
-- military (cf. 441, 705)
 361 draftee, or person subject to induction

- 362 active duty
- 363 veteran
- __immigration and naturalization (cf. 172, 271-272)
 - 371 permanent residence
 - 372 citizenship
 - 373 loss of citizenship, denaturalization
 - 374 access to public education
 - 375 welfare benefits
 - 376 miscellaneous
- __indigents (cf. 311-312): procedural protections for indigents because of their indigency. Typically in matters pertaining to criminal justice.
 - 381 appointment of counsel (cf. 030)
 - 382 inadequate representation by counsel (cf. 030)
 - 383 payment of fine
 - 384 costs or filing fees
 - 385 U.S. Supreme Court docketing fee
 - 386 transcript
 - 387 assistance of psychiatrist
 - 388 miscellaneous
- 391 liability, civil rights acts (cf. 616-617): tort actions involving liability that are based on a civil rights act
- 399 miscellaneous civil rights (cf. 701)

First Amendment

- 401 First Amendment, miscellaneous (cf. 703): the residual category for all First Amendment litigation other than the free exercise or establishment clauses
- 411 commercial speech, excluding attorneys which is 544
- 415 libel, defamation: defamation of public officials and public and private persons
- 416 libel, privacy: true and false light invasions of privacy
- 421 legislative investigations: concerning "internal security" only
- 422 federal internal security legislation: Smith, Internal Security, and related federal statutes
- 430 loyalty oath (other than in 431-434)
- 431 loyalty oath, bar applicants (cf. 546, 548)
- 432 loyalty oath, government employees
- 433 loyalty oath, political party
- 434 loyalty oath, teachers
- 435 security risks: denial of benefits or dismissal of employees for reasons other than failure to meet loyalty oath requirements
- 441 conscientious objectors (cf. 361-362): to military service
- 444 campaign spending (cf. 650): financing electoral costs other than as regulated by the Taft-Hartley Act. Typically involves the Federal Election Campaign Act.
- 451 protest demonstrations (other than as pertains to 230): demonstrations and other forms of protest based on First Amendment guarantees other than the free exercise or establishment clauses
- 455 free exercise of religion
- 461 establishment of religion (other than as pertains to 462)
- 462 parochiaid: government aid to religious schools, or religious requirements in public schools
- 471 obscenity, state (cf. 706): including the regulation of sexually explicit material under the 21st Amendment
- 472 obscenity, federal

Due Process

- 501 due process, miscellaneous (cf. 431-434): the residual code for cases that do not locate in 502-507
- 502 due process, hearing or notice (other than as pertains to 503 or 504)
- 503 due process, hearing, government employees
- 504 due process, prisoners' rights

- 505 due process, impartial decision maker
- 506 due process, jurisdiction (jurisdiction over nonresident litigants)
- 507 due process, takings clause

Privacy

- 531 privacy (cf. 416, 707)
- 533 abortion: including contraceptives
- 534 right to die
- 537 Freedom of Information Act and related federal statutes

Attorneys

- 542 attorneys' fees
- 544 commercial speech, attorneys (cf. 411)
- 546 admission to a state or federal bar, disbarment, and attorney discipline (cf. 431)
- 548 admission to, or disbarment from, Bar of the U.S. Supreme Court

Unions

- 553 arbitration (in the context of labor-management or employer-employee relations) (cf. 653)
- 555 union antitrust: legality of anticompetitive union activity
- 557 union or closed shop: includes agency shop litigation
- 559 Fair Labor Standards Act
- 561 Occupational Safety and Health Act
- 563 union-union member dispute (except as pertains to 557)
- __ union-management disputes (other than those above) 575
- bargaining
 - 576 employee discharge
 - 577 distribution of union literature
 - 578 representative election
 - 579 antistrike injunction
 - 581 jurisdictional dispute
 - 582 right to organize
- 599 miscellaneous union

Economic Activity

- 601 antitrust (except in the context of 605 and 555)
- 605 mergers
- 611 bankruptcy (except in the context of 975)
- 614 sufficiency of evidence: typically in the context of a jury's determination of compensation for injury or death
- 615 election of remedies: legal remedies available to injured persons or things
- 616 liability, governmental: tort actions against government or governmental officials other than actions brought under a civil rights action. These locate in 391.
- 617 liability, nongovernmental: other than as in 614, 615, 618
- 618 liability, punitive damages
- 621 Employee Retirement Income Security Act (cf. 587)
- 626 state tax (those challenged on the basis of the supremacy clause and the 21st Amendment may also locate in 931 or 936)
- 631 state regulation of business (cf. 910, 911)
- 636 securities, federal regulation of
- 638 natural resources—environmental protection (cf. 933, 934)
- 650 corruption, governmental or governmental regulation of other than as in 444
- 652 zoning: constitutionality of such ordinances
- 653 arbitration (other than as pertains to labor-management or employer-employee relations (cf. 553)
- 656 federal consumer protection: typically under the Truth in Lending; Food, Drug and Cosmetic; and Consumer Protection Credit Acts
- __ patents and copyrights

- 661 patent
- 662 copyright
- 663 trademark
- 664 patentability of computer processes
- federal transportation regulation
 - 671 railroad
 - 672 boat
 - 673 truck, or motor carrier
 - 674 pipeline (cf. 685)
 - 675 airline
- federal public utilities regulation (cf. 935)
 - 681 electric power
 - 682 nuclear power
 - 683 oil producer
 - 684 gas producer
 - 685 gas pipeline (cf. 674)
 - 686 radio and television (cf. 687)
 - 687 cable television (cf. 686)
 - 688 telephone company
- 699 miscellaneous economic regulation

Judicial Power

- comity, criminal and First Amendment (cf. 712): propriety of federal court deference to ongoing state judicial or state or federal quasi-judicial proceedings, the abstention doctrine, exhaustion of state provided remedies
 - 701 civil rights
 - 702 criminal procedure
 - 703 First Amendment
 - 704 habeas corpus
 - 705 military
 - 706 obscenity
 - 707 privacy
 - 708 miscellaneous
- 712 comity, civil procedure (cf. 701-708): propriety of federal court deference to ongoing state judicial or state or federal quasi-judicial proceedings, the abstention doctrine, exhaustion of state provided remedies
- 715 assessment of costs or damages: as part of a court order
- 717 Federal Rules of Civil Procedure, including application of the Federal Rules of Evidence and the Federal Rules of Appellate Procedure in civil litigation
- 721 judicial review of administrative agency's or administrative official's actions and procedures
- 731 mootness (cf. 806)
- 741 venue
 - no merits: use only if the syllabus or the summary holding specifies one of the following bases
- 751 writ improvidently granted: either in so many words, or with an indication that the reason for originally granting the writ was mistakenly believed to be present
- 752 dismissed for want of a substantial or properly presented federal question
 - 753 dismissed for want of jurisdiction (cf. 853)
 - 754 adequate non-federal grounds for decision
 - 755 remand to determine basis of state court decision
 - 759 miscellaneous
- standing to sue
 - 801 adversary parties
 - 802 direct injury
 - 803 legal injury
 - 804 personal injury
 - 805 justiciable question
 - 806 live dispute
 - 807 parens patriae standing
 - 808 statutory standing
 - 809 private or implied cause of action

- 810 taxpayer's suit
- 811 miscellaneous
- judicial administration (jurisdiction of the federal courts or of the Supreme Court) (cf. 753)
 - 851 jurisdiction or authority of federal district courts
 - 852 jurisdiction or authority of federal courts of appeals
 - 853 Supreme Court jurisdiction or authority on appeal from federal district courts or courts of appeals (cf. 753)
 - 854 Supreme Court jurisdiction or authority on appeal from highest state court
 - 855 jurisdiction or authority of the Court of Claims
 - 856 Supreme Court's original jurisdiction
 - 857 review of non-final order; i.e., allegation that the decision below is not a final judgment or decree, or that it is an interlocutory judgment (cf. 753)
 - 858 change in state law (cf. 755)
 - 859 federal question (cf. 752)
 - 860 ancillary or pendent jurisdiction
 - 861 extraordinary relief
 - 862 certification (cf. 864)
- 863 resolution of circuit conflict, or conflict between or among other courts
 - 864 objection to reason for denial of certiorari (cf. 862)
 - 865 collateral estoppel or res judicata
 - 866 interpleader
 - 867 untimely filing
 - 868 Act of State doctrine
 - 869 miscellaneous
 - 870 Supreme Court's certiorari jurisdiction
- 871 jurisdiction, authority of states and territorial courts
- 899 miscellaneous judicial power

Federalism

- 900 federal-state ownership dispute (cf. 920)
- 910 federal pre-emption of state court jurisdiction: almost always found in the context of labor union activity. Does not involve constitutional interpretation. Rests rather on a primary jurisdiction rationale.
- 911 federal pre-emption of state regulation (cf. 631): rarely involves union activity. Does not involve constitutional interpretation.
- 920 Submerged Lands Act (cf. 900)
- national supremacy: in the context of federal-state conflicts involving the general welfare, supremacy, or interstate commerce clauses, or the 21st Amendment. Distinguishable from 910 and 911 because of a constitutional basis for decision.
 - 930 commodities
 - 931 intergovernmental tax immunity
 - 932 marital property, including obligation of child support
- 933 natural resources (cf. 638)
 - 934 pollution, air or water (cf. 638)
 - 935 public utilities (cf. 681-688)
 - 936 state tax (cf. 626)
 - 939 miscellaneous
- 949 miscellaneous federalism (cf. 294, 701-708, 712, 754-755, 854, 858, 860)

Interstate Relations

- 950 boundary dispute between states
- 951 non-real property dispute between states
- 959 miscellaneous interstate relations conflict

Federal Taxation

- 960 federal taxation (except as pertains to 970 and 975): typically under provisions of the Internal Revenue Code

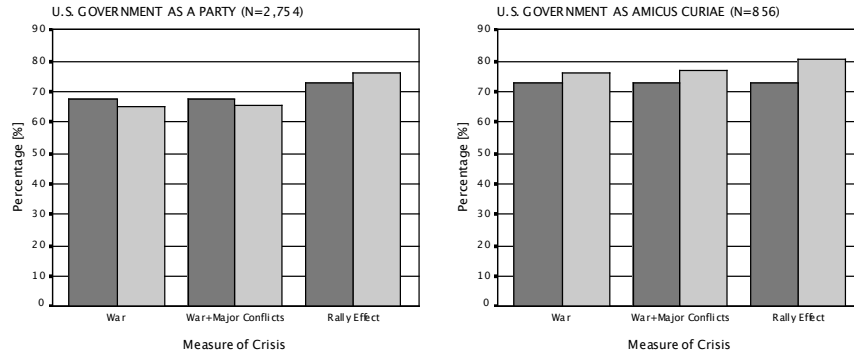
970 federal taxation of gifts, personal, and professional expenses
975 priority of federal fiscal claims: over those of the states or private entities 979 miscellaneous federal taxation (cf. 931)

Miscellaneous

980 legislative veto
989 miscellaneous

Source: <http://www.polisci.msu.edu/pljp/supremecourt.html> (last accessed on December 3, 2003). Note that for our analyses of all civil rights, liberties, and justice cases, we include cases categorized as Criminal Procedure, Civil Rights, First Amendment, Due Process, Privacy, and Attorneys. These are the categories that Spaeth, the creator of the database, and other social scientists typically use to define “Civil Liberties and Rights.” See, e.g., Epstein et al., *supra* note 76

B U.S. SUPREME COURT DECISIONS SUPPORTING THE U.S. GOVERNMENT



The darker bars indicate the absence of a crisis (e.g., the country was not at war) at the time the Court heard oral arguments in the cases; the lighter bars indicate the presence of a crisis. We obtained data on the Supreme Court's decisions from U.S. Supreme Court Judicial Database (backdated by the authors) with `analu=0`, `dec.type=1` or `7`, and `values=1-6` (see *supra* notes 194, 202, and 203). For the crisis measures, War includes World War Two, and the Korean, Vietnam, Gulf, Afghan Wars; War, Plus Major Conflicts includes War and the Berlin Blockade, Cuban Missile, and Iran-Hostage; Rally Effects are periods during which the President's popularity rises by ten points or more as a result of an international event (see *supra* notes 215 and 218 for more details). For U.S. Government as a Party, we used `party1` and `party2` variables in the U.S. Supreme Court Database; amicus curiae data were collected by the authors.

C SAMPLE MATCHING ALGORITHM: OPTIMAL NEAREST NEIGHBOR ONE-TO-ONE
MATCHING WITH REPLACEMENT

1. Generate propensity score.
2. Check balance of pre-treatment covariates. If an imbalance exists, reestimate the assignment model Step 4 by adding higher order terms and interactions. Continue until obtaining a balance in pre-treatment covariates.
3. Optional: Discard control units with propensity scores below the minimum score of treated units (note, other forms of discarding may be suitable).
4. Optional: Re-estimate propensity score e .
5. To match units:
 - (a) Calculate the absolute difference between propensity score of the *non-matched* treated unit with the highest propensity score (unit i) and all control units.
 - (b) Match units i and j , where:

$$|(e_i | T = 1) - (e_j | T = 0)| < |(e_i | T = 1) - (e_k | T = 0)| \forall k \neq j.$$
 - (c) In the instance multiple control units are within the minimum distance, draw randomly to match one of those control units.
6. Continue Steps 5(a)-(c) until all treated units are matched.
7. Calculate the average treatment effect on the treated for the sample ATE_s :

$$ATE_s = \frac{1}{N_T} \sum_{i=1}^{N_T} \{(Y_i | T = 1) - (Y_m | T = 0)\}$$

where N_T represents the number of treated units, Y_i refers to treated units, and Y_m refers to the control unit matched i .

8. To estimate the point estimate and variance of ATE bootstrap the donor pool B times and repeat for each bootstrapped sample, storing the estimated average treatment effect ATE_s from each bootstrap.
9. Finally, calculate quantities of interest from the distribution of bootstrapped ATE_s , where the point estimate for the average treatment effect on the treated is:

$$ATE = \frac{1}{B} \sum_{s=1}^B ATE_s$$

and the variance is:

$$Var(ATE) = \frac{1}{B-1} \sum_{s=1}^B (ATE - ATE_s)^2$$

D A SUBCLASSIFICATION/REGRESSION ADJUSTMENT ALGORITHM FOR A BINARY OUTCOME VARIABLE

1. Generate propensity score.
2. Construct 10 blocks defined by the deciles of the propensity score for the treated group where to obtain balance in the pre-treatment covariates:
 - (a) split imbalanced blocks further, and/or
 - (b) respecify the assignment model to take into account interactions and squares of imbalanced covariates.
3. Discard control units with propensity scores below the minimum score of treated units.
4. Re-estimate propensity score and regenerate blocks without the discarded units (optional).
5. For units within each substratum:
 - (a) Estimate the logistic model, regressing the binary outcome on the propensity scores and the treatment indicator. (If sample sizes permit, this logistic model may also be estimated using all covariates.)
 - (b) Generate a posterior distribution of the parameters from this model, drawing 1000 simulated values of β , where *sim* represents each simulated set of parameters.
 - (c) For each substratum and one draw of the parameters β from the posterior distribution, impute the missing potential outcomes $Y_i(1) | T_i = 0$ and $Y_i(0) | T_i = 1$ with a logistic regression, where:

$$Y_i(1) | T_i = 0 = \frac{1}{1 + \exp(-X_i^t \beta)}$$

and

$$Y_i(0) | T_i = 1 = \frac{1}{1 + \exp(-X_i^c \beta)}$$

where the superscripts *c* and *t* represent the counterfactual treatment indicator of control and treatment, respectively.

- (d) Calculate the treatment effect for all units in the substratum

$$TE_d = \begin{pmatrix} (Y(1) | T = 1) \\ (\hat{Y}(1) | T = 0) \end{pmatrix} - \begin{pmatrix} (\hat{Y}(0) | T = 1) \\ (Y(0) | T = 0) \end{pmatrix}$$

where *d* represents the subscript for the decile and TE_d is a vector of treatment effects for all *i* units in the substratum, $(Y(1) | T = 1)$ and $(Y(0) | T = 0)$ represent vectors of observed potential outcomes, and $(\hat{Y}(1) | T = 0)$ and $(\hat{Y}(0) | T = 1)$ represent vectors of imputed potential outcomes.

- (e) Calculate the average treatment effect for the substratum conditional on the set of simulated parameters $ATE_{d,sim}$:

$$ATE_{d,sim} = \frac{1}{n_d} \sum_{i=1}^{n_d} TE_{i,d}$$

where n_d represents the number of units in the substratum, and $TE_{i,d}$ refers to the treatment effect for each unit *i* in substratum *d*.

- (f) Repeat Steps (c)-(e) for all draws of β .
- (g) Calculate the average treatment effect for the substratum across all simulated parameters ATE_d :

$$ATE_d = \frac{1}{1000} \sum_{sim=1}^{1000} ATE_{d,sim}$$

- (h) Calculate the variance of ATE_d for that substratum:

$$Var(ATE_d) = Var(ATE_{d,sim})$$

6. Repeat Steps (a)-(h) to generate ATE_d and $Var(ATE_d)$ for all substrata.
7. Having completed each of the above steps for each substratum, calculate the overall average treatment effect ATE:

$$(ATE) = \sum_{d=1}^{10} \left\{ \left(\frac{n_{d,t}}{N_t} \right) (ATE_d) \right\}$$

.

where $n_{d,t}$, represents the number of treated units in each substratum d and N_t represents the total number of treated units across all substrata.

8. Finally, calculate the overall variance of the ATE:

$$Var(ATE) = \sum_{d=1}^{10} \left\{ \left(\frac{n_{d,t}}{N_t} \right)^2 (Var(ATE_d)) \right\}$$

.