SUPREME COURT DECISION-MAKING: AN ANALYSIS OF THE COURT’S CRIMINAL DOCKET AND THE ROLE OF IDEOLOGY

BRIAN CARL BAAK, B.A.

Thesis Advisor: SENCER ECER, PH.D

ABSTRACT

The academic literature is rife with articles discussing the Supreme Court’s criminal jurisprudence; however, what quickly becomes clear from the literature is the disconnect between legal academics’ understanding of the Court and political scientists’ understanding of the Court. This thesis seeks to add to the small body of research that has attempted to bridge the gap by combining the methods of political science with a more legalistic understanding of Court behavior.

This thesis aims to test the hypothesis that whether the Court hearing a case is generally viewed as “liberal” or “conservative” says very little about the percentage of cases coming out favorably to a criminal defendant over the long run, when other factors are controlled for. However, in contrast to this hypothesis, the results of the probit model found that the ideology of the Supreme Court majority is indeed an important factor in its decision-making in criminal cases. This suggests that, as a policy matter, the resources devoted to the confirmation process by interest groups represents a sensible strategy.
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I. INTRODUCTION

On July 1, 2005, Justice Sandra Day O’Connor sent President George W. Bush a letter indicating her intention to step down from the United States Supreme Court. Two months later, a second vacancy opened up with the death of Chief Justice William Rehnquist. Thus began the latest round of political theater that has become the Supreme Court nominating process. When the dust settled and the Senate votes were finally cast, John G. Roberts Jr. and Samuel Alito were sworn in as the next Chief Justice and Associate Justice of the Supreme Court. But not before millions of dollars had been spent by interest groups and the nomination of one of President Bush’s original nominations—Harriet E. Miers—had been sunk.

Two crucial assumptions underscore the entire spectacle surrounding Supreme Court confirmations. The first is that courts exercise real power; that is, the Supreme Court matters. Gerald Rosenberg, in *The Hollow Hope*, discusses the questions of if and when courts can achieve significant social reform, where the “constrained court” model finds it unlikely that courts are so situated as to bring about important change and the “dynamic” model holds that the lack of electoral constraints on the institution makes major change possible. When it comes to confirmation battles, the academic literature almost seems irrelevant—the actions of the president, senators, and interest groups make it clear that all subscribe to the dynamic court model.

The second important assumption, mentioned by Gregory Caldeira and John Wright, is that the battle over nominations only makes sense if one believes that
judges pursue ideological agendas. While at this point one can only speculate as to how Justices Roberts and Alito will be remembered or as to what sort of justice Harriet Miers would have made, the events surrounding their nominations indicate that the President, the Senate, and interest groups all believed that the past actions of the nominees provided a strong indicator of how they would decide cases in the future. Despite Bush’s assurances that he “knew the heart” of Harriet Miers, her incredibly bare record made other conservatives wary of how she would vote once on the court.

This thesis seeks to add to the academic debate surrounding this second assumption:

To what extent does a justice’s ideology matter? After all, every first-year law student learns about *stare decisis*, Latin for “to stand by things decided.” At least theoretically it should be this accumulated wisdom of past decisions as embodied in precedent—rather than individual ideology—that is guiding the results of cases. Yet the amount of time and money invested in modern-day Supreme Court nominations by a variety of political actors suggests that many, if not most people, believe that other, less legalistic factors, better capture Supreme Court voting behavior. This thesis concludes that, as a policy matter, the resources devoted to the confirmation process are far from wasteful because ideology does play a role—interest groups and politicians are wise to devote time, money, and political capital to the Supreme Court nominating process.

The following statistical analysis aimed to quantify the debate by focusing on the Supreme Court’s decisions in criminal cases over the last fifty years. It seemed
possible that a quantitative and more systematic look at the Court’s criminal docket would reveal that in the aggregate and over time, there exists a great deal more consistency to the Court’s resolution of cases than is commonly perceived. The media attention focused on such hot-button issues as the death penalty could potentially skew our impression of the Supreme Court as a whole. The precise reason these cases are headline-grabbers is because they are divisive, on the Supreme Court no less than anywhere else. My thesis—premised on the belief that decision-making process is likely a more complicated phenomenon than most people acknowledge—aimed to test the hypothesis that whether the Court hearing a case is generally viewed as “liberal” or “conservative” says very little about the percentage of cases coming out favorably to a criminal defendant over the long run.

While my findings suggest that other factors besides justice ideology matter, my findings also clearly refute my primary hypothesis. The majority ideology of the Supreme Court strongly correlates with the likely outcome in criminal cases. That is, the ideologies of the justices are an important determinant of case outcomes. However, other influences should not be ignored—my model reveals that the political party affiliation of the president, the direction of the lower court decision, and the procedural history of the case also appear to have a meaningful effect on case outcomes at statistically significant levels.
II. LITERATURE REVIEW

What quickly becomes clear from the literature is the disconnect between legal academics’ understanding of the Court and political scientists’ understanding of the Court. It is not so much that they always come out in different places but rather that they seldom even recognize the existence of the other’s body of literature. Generalizing, legal academics tend to really delve into the nuances of the case law in search of common threads or themes; statistics, if used at all, occupy a secondary role to the main analysis. Political scientists, on the other hands, rely primarily on statistical models to describe court behavior and devote little attention to the language of any particular opinion; procedural aspects of court decision-making also receive less consideration.

Comparing the criminal jurisprudence across the Warren, Burger, and Rehnquist Courts is a well-trodden field in legal academia, and Carol Steiker’s article (1996), “Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers,” provides a nice introduction to the on-going academic debate. Steiker begins by providing a lay of the academic landscape and is worth quoting at length to illustrate the relevancy of my thesis question:

In the almost thirty years since Nixon's victory, the Supreme Court's pulse-takers have offered periodic updates on the fate of the Warren Court's criminal procedure "revolution" in the Burger and Rehnquist Courts. The voluminous body of literature formed by these assessments presents something of a puzzle. The unanimity of projection about the future of the Warren Court's criminal procedure soon gave way to widespread disagreement about the nature and extent
of the response of the Burger and Rehnquist Courts. On the one hand, many commentators—usually admirers of the Warren court's handiwork—have lamented over the years about what they view as a wholesale repudiation of the Warren Court's work; their comments are full of words like "retreat," "decline," and "counter-revolution." At the very same time, other commentators—many of them also defenders of the Warren Court—have maintained that these laments are "overstated," and "considerably exaggerated" and that the basic structure of the Warren Court's criminal procedure jurisprudence is firmly "entrenched." As one critic of the Warren Court recently has bemoaned, "The voice that continues to urge repentance [from the Warren Court's criminal procedure] today is truly 'the voice of him that crieth in the wilderness.'"

Steiker, more concerned with looking at the substantive ways in which the Court under Burger and Rehnquist has parted company from the path paved by the Warren Court, seeks to avoid this debate by simply asserting that the “Supreme Court has profoundly changed its approach to constitutional criminal procedure since the 1960s at least in the following fairly limited (but obviously important) sense . . . [that] in the last three decades, the Court has granted review to and found in favor of criminal defendants much less frequently than it did in the heyday of the Warren Court.” With its limited recourse to empirical measures and focus on how the substance of decisions has varied over time, Steiker’s article is representative of much legal scholarship in this area. However, my interest extends beyond mere descriptive statistics, and I use a model that attempts to provide a richer understanding of the factors in play in the Court’s criminal law jurisprudence.

Another characteristic article in the field has recently been provided by Stephen Smith in “The Rehnquist Court and Criminal Procedure” (2002). This
article, exploring the development of constitutional criminal procedure under the
Rehnquist Court, particularly as compared to the Warren Court, ultimately concludes
that the Rehnquist Court successfully scaled back many of the generously liberal
constitutional interpretations of the Warren Court without resulting to the actual
overturning of precedent. Warren won in that “[c]riminal procedure remains
thoroughly constitutionalized, with rules of federal constitutional law covering
virtually every aspect of the criminal justice system”; yet Rehnquist won in that
“[d]isfavored Warren Court doctrines were altered through case-by-case adjudication.”
Smith devotes much of the paper to exploring this case law and explicating how
opinions of the Rehnquist Court achieved these results.

However, Smith’s discussion also offers counter-examples of pro-criminal
defendant outcomes from a court with a reputation for favoring law and order. For
example, he notes that the Burger Court did not mark a dramatic departure from the
Warren Court’s treatment of criminal law:

While making some strides in that direction . . . the Burger Court never
seriously jeopardized its predecessor’s legacy. Although the Burger
Court chipped away at certain Warren Court precedents, it actually
expanded others in important ways. It even invalidated capital
punishment as then administered nationwide—not exactly the “law and
order” results Nixon had promised.

While my research question is at least partially premised on the idea that
anecdotal evidence of a Court’s liberal or conservative bias might cloud the true
empirical picture when cases are aggregated, it is interesting to note anecdotal
evidence, like that mentioned above, that cuts the other way and demonstrates a
“conservative” Court acting liberally, for example. This simply suggested that a true
empirical accounting of a Court’s record was necessary to better capture the effect (or
non-effect) in criminal cases of replacements on the Court.

One attempt to bridge that gap and combine a law professor’s perspective with
the tools of the political scientist was recently proffered by Ward Farnsworth of
Boston University. Similarly interested in trying to gauge the impact of ideology on
Supreme Court jurisprudence, Farnsworth (2005) took a novel approach to the subject.
He began with a belief that interpretive issues regarding constitutional cases and
statutory cases are different—that one has a “theory” of constitutional law may not say
much about how they resolve statutory questions. So, focusing on fifty years of
criminal cases1 (1953-2002), he looked at justices’ votes in non-unanimous criminal
law cases. A correlation between their votes in constitutional cases and
nonconstitutional cases would raise questions and suggest that ideology is playing a
part. Farnsworth found a very high partial correlation between the two, with a Pearson
correlation coefficient of 0.97.

This provides support for the attitudinalist hypothesis (favored by many
political scientists) that a justice’s vote simply reflects his or her ideological
preference. But Farnsworth notes that the point is not that decisions are “all politics”;

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1 Broadly defined here to include “appeals from criminal convictions, questions of search and seizure,
disputes over the rules of evidence or of criminal procedure, civil rights claims brought by prisoners
against their keepers, and many others: any cases where the government has been on one side with an
accused or convicted defendant on the other.”
“the better interpretation is that every close case provokes competition between a justice’s preferences on the one hand and the legal materials on the other.” Looking further into the case law, Farnsworth finds that “quasi-factual” disputes are really the means that allow for differences and the introduction of ideology into the decision-making process. He calls these the “mechanisms of ideological decision”—cases that call for a “balancing test” or involve a “common sense” component, e.g., to what degree did the evidence matter? Disagreements “are framed as disputes over the meaning or application of law . . . but legal materials turn out to provide little guidance for their resolution and they easily end up expressing the judge’s own controversial opinion about what result in the case makes most sense.”

This article provides a sophisticated view of court behavior and provides a valuable contribution to the field, but its statistical analysis remains rudimentary—extending only to running correlation and variance checks. The exclusion of unanimous opinions from his analysis would also seem likely to introduce bias to his results. My hope was to pick up on his attempt to bridge the gap between law professors and social scientists by applying some different statistical techniques—namely, logit and probit models—to the issue, while still incorporating the legal academy’s analytic framework.

More closely in line with my planned analysis is Lim’s “An Empirical Analysis of Supreme Court Justices’ Decision Making” (2000). This article examines the effect of stare decisis on the outcome of Supreme Court cases. While
there is certainly overlap between the issues explored in his thesis and those that I plan to explore, Lim’s approach—while broader than mine in that it is not limited to the area of criminal law—is in other senses narrower.

Lim (2000) makes several useful insights into how we should think about stare decisis, but his focus on the role of precedent in decision-making leads him to neglect some of the other factors that might have an influence on court behavior and decision-making. For example, his models do not account for federalism differences (is it a state or federal court under review?) or the more general political atmosphere in which the court is operating (which party is in power?)—both of which were found to be statistically significant factors in my model. Additionally, data availability restrictions due to the nature of his precedent variable limit his data set to case outcomes during the Rehnquist Court.

Lim draws upon Spaeth’s “The Original United States Supreme Court Judicial Database 1953-2005 Terms”\(^2\) for several variables, but to create a variable for precedent, he used the “Shepard’s Citations, Judicial Database” to track relations between cases. The article primarily addresses the difficulty of teasing out the effect of stare decisis on case outcomes; that justices will oftentimes have voted in the case that becomes precedent presents a problem of whether to attribute the latter vote to stare decisis or simply an ideological preference that has remained consistent between cases. Lim signifies this difference by distinguishing between institutional stare

\(^2\) See Part III, *infra.*
decisis and individual stare decisis. By tracking individual justices’ votes between cases and looking at how the majority changes (or does not), Lim can see how much of the later vote reflects judicial preference and how much is actually a respect for precedent. This is done by running models with and without an individual stare decisis term derived from the random utility model.

Lim utilizes a logit model as well as a linear probability model in his analysis. The models use dependent variables for ideology of the justice, precedent, lower court decision, and legal issue involved to look at whether the justice’s vote in the particular case was “liberal” or “conservative.” By just looking at the model that does not capture individual stare decisis, precedent is statistically very significant while the ideology of the justice is not across most natural courts. Even when the individual stare decisis term is added to the model, where an individual justice has not had a prior opportunity to rule on a matter, the institutional precedence continues to be statistically significant. Where a justice has had a prior opportunity to vote on a similar matter, the results are more ambiguous; however, for many natural courts, the model shows that individual stare decisis would trump institutional stare decisis.

From the variation across natural courts, Lim infers that for smaller bodies like the Supreme Court, it really matters which incumbent justice is replaced by which new justice. It is quite natural to observe that there frequently have been vehement political debates related to a Supreme Court justice’s nomination by the president and getting consent from the Senate. Each political entity tries to nominate a new justice who has views as close to its own as possible or who is a surrogate, that is, affiliated with the same political party.
Because Lim (2006) did not look directly at how variation on the Court affects the outcome in cases pertaining to criminal rights—rather, he suggested that where an ideological preference is shared by justices, they are more likely to follow the earlier precedents of those colleagues, ensuring continuity in outcomes—it still seemed possible to find consistency in criminal cases between courts. While not a direct refutation of my hypothesis, then, Lim’s inference still ran counter to my hypothesis that a change in justices (or the ideology of the court majority) does not lead to variation across courts in regard to criminal procedure cases. However, my findings ultimately pointed towards a rejection of my hypothesis and provided support for Lim’s conclusions.

Finally, my analysis proposed to build upon the earlier work of Epstein, Walker, and Dixon (1989).ix Meant as a corrective to earlier research by political scientists seen as losing an “appreciation for much of what the traditional scholars valued,” Epstein et al. (1989) sought to reintroduce institutional factors into the discussion of voting behavior. They used: (1) political party affiliation to capture ideology of the court; (2) a time lag of the dependant variable, t-1, to capture attitude stability/stare decisis; (3) a dummy variable for party of the president to reflect the political environment; and (4) the proportion of the docket given to criminal justice cases in any year to operationalize policymaking priorities. Looking at criminal rights cases from 1946 to 1986, they found that their model had substantial explanatory
power. Specifically, all of these variables were statistically significant and, when standardized, the policymaking priorities variable (4) was most influential and the political environment variable least influential (3).

At a basic level, my thesis serves simply as an update of Epstein et al. (1989), but utilizing a different database so as to embrace all terms of the Warren, Burger, and Rehnquist courts. Like Epstein et al., the coefficients on my variables for court ideology and political environment are significant. In addition though, I explore other factors ignored by these authors. While they purported to be giving new life to institutional factors in determining case outcomes—a by-product of their coding—their models were still very limited. I thought there were other measurable/quantifiable institutional factors such as lower court disposition and court under review that could also possess explanatory power. In addition, I wished to explore their measure of court ideology more carefully. I found it troubling that using party affiliation as a proxy for ideology—as done by Epstein et al. (1989), as well as by Lim (2000)—creates anomalous results such as coding the liberal (by almost any measure) Chief Justice Warren as a conservative because of his Republican party affiliation. However, my own models and coding revealed that the use of a different proxy for ideology led to no measurable difference in parameter coefficients.
III. DESCRIPTION OF DATA SOURCE AND REGRESSION MODEL

Following the lead of Epstein et al. (1989), I used econometric techniques such as logit, probit, and linear probability models to explore what changes in the Supreme Court composition meant for the actual litigants having their case heard before the Court. To test my hypothesis, I relied on “The Original United States Supreme Court Judicial Database 1953-2005 Terms,” which is continually updated and managed by Harold J. Spaeth, a professor at Michigan State University.\textsuperscript{x} This database is widely used by scholars interested in exploring empirical questions pertaining to the Supreme Court.\textsuperscript{xi} While it contains a wealth of information, I have found it necessary to supplement the database with an additional variable to capture court ideology.

A. DEPENDENT VARIABLE—PROPORTION OF CRIMINAL RIGHTS DECISIONS FAVORING THE DEFENDANT (\textit{DIR})

Following the lead of several other researchers, my dependent variable is the proportion of criminal rights decisions favoring the defendant.\textsuperscript{xii} While the choice of criminal rights over other substantive areas of the law is largely arbitrary, there are good reasons for its use. First, the nature and degree of shifts in the Supreme Court’s criminal law jurisprudence has been the subject of much academic writing over the past several decades.\textsuperscript{xiii} As noted in the literature review, legal scholars have come to no firm agreement on the degree to which the Court’s criminal procedure jurisprudence has changed over time. Second, as noted by Farnsworth (2005), these
cases “raise all sorts of legal issues but can be seen to involve a common set of policy stakes: the courts have to referee disputes, often of a zero-sum character, over the advantages to be enjoyed by the government and the accused or convicted defendant.”xiv Finally, as also mentioned by Farnsworth, criminal cases tend to make up a significant portion of the Court’s docket every year, providing a sample size well-suited to statistical analysis (see Figure 1, below).xv

The Spaeth Database contains a substantive law variable that codes cases by issue, including “criminal procedure.” According to the codebook, criminal procedure “encompasses the rights of persons accused of a crime, except for the due process
rights of prisoners.” The more specific area of the law is also coded (e.g., search and seizure, double jeopardy), allowing for even more finely sliced cuts of the data.

Furthermore, each case outcome is coded for its ideological leaning (either “liberal” or “conservative”) under the dir variable; for criminal cases, dir=1 is the “liberal” direction, meaning pro-person accused or convicted of crime, or denied a jury trial. As illustrated in Figure 2, in absolute terms and without controlling for other factors, the Supreme Court clearly reveals a conservative trend after a high-watermark for pro-criminal defendant outcomes in 1967.

**FIGURE 2**

**Criminal Docket Breakdown by Outcome**

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The sample size of criminal cases during this time period is 1776. The mean for criminal case outcomes equals .45. That is, 45% of all criminal cases in the sample resulted in a liberal outcome.

B. **INDEPENDENT VARIABLES**

*liberal*

My chief independent variable of interest, it is designed to capture the Court majority’s ideology. It is an aggregation of the ideology of individual justices using the method developed by Segal and Cover (1989)\(^{xvi}\) and updated by Epstein and Segal (2005).\(^{xvii}\) This method determines ideology by looking to statements about Supreme Court nominees in editorials of four major newspapers\(^{xviii}\) prior to Senate confirmation. An objective measure that gets around the endogeneity of using the case outcomes themselves to determine ideology, it is not without its own difficulties. As I am primarily interested in an objective gauge of ideology that matches “common perception” of justice ideology, the use of the Segal-Cover methodology would seem to fail in some instances (e.g., Justice Breyer gets a conservative score). However, it does correct for some of the problems with using political party affiliation as a proxy for ideology (e.g., under the Segal-Cover method, Chief Justice Warren gets a liberal score).\(^4\)

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\(^3\) See Appendix A for further explanation of the variables and Appendix B for descriptive statistics.

\(^4\) As explained in Appendix A, the choice between the Segal-Cover method and the party affiliation method ends up being a distinction without a difference.
**crimdock**

This variable is the proportion of cases each term that pertain to the criminal docket. While dramatic changes in the number of criminal cases the court is hearing could reflect priorities of the president (see the next variable), it could also reflect the independent judgment or agenda of the Court. However, the direction of this variable is difficult to predict because a large criminal docket could signify either a liberal or conservative Supreme Court agenda.

**dempres**

This variable identifies the political party of the president during the term of the decision. *Dempres* equals “1” where a Democrat is in power and “0” where a Republican is in power. While the president cannot force the Supreme Court to take a case, through the Office of the Solicitor General the president can certainly push an agenda and signal policy-making preferences. Additionally, to the extent public opinion factors into Supreme Court decision-making, it seems like the party affiliation of the president serves as a rough indication of the political climate. For these reasons, it seems likely that there are more conservative outcomes in criminal cases during Republican administrations than Democratic administrations.

**ct_origin**

This variable describes whether the case originated in state or federal court (ignoring distinctions between trial/appellate/supreme court levels of review), which could have a bearing on the ultimate outcome in the case. While a case could end up in
federal court simply because it occurred on federal land, this variable could also
capture differences between the types of criminal cases that get prosecuted in federal
court rather than state court. If a case arises on a writ of habeas corpus (which will
often be true in criminal cases), the Spaeth database defines the case as originating in
federal, rather than state court. This perhaps helps account for the fact that almost
two-thirds of the criminal cases appear to originate in federal court.

This variable takes a value of “1” for federal cases and a value of “0” for state
cases.

c\_source

The “ct\_source” variable identifies the court whose decision the Supreme
Court is reviewing. It may capture discrepancies between the likelihood of affirming
cases arising from state courts versus federal courts of appeal. It seems possible that
the quality of judges in state court systems—whom often have to run for office in
elections—is less consistent than in the federal judiciary, making reversal more
likely. The variable takes the value of “1” if the source of the case is a federal
appeals court and “0” otherwise.

first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, dc

This group of dummy variables is meant to provide a more detailed look at the
c\_source data by controlling for intra-court differences among the federal courts of

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5 For example, white collar crimes are more likely to end up in federal court. Alleged violations of
federal securities laws will be tried in federal court.
appeal. For example, the Ninth Circuit has the highest percentage of judges appointed by Democrats and is often seen as out of sync with the conservative tilt of the current Supreme Court, thus leading to a higher reversal rate in the Supreme Court than other circuits.

\(diss\)

This variable captures the existence of a dissent on the court whose decision the Supreme Court is reviewing. Whether judges on the court whose decision is under review disagreed on the matter \((diss = 1)\) might say something about what the Supreme Court is likely to do. It suggests that these are “closer cases” or tougher calls, which might make it easier for justices to vote their ideological preferences. The database possibly overstates the number of unanimous lower court opinions \((diss = 0)\) because it only looks to the majority opinion for evidence that there was a dissent.

\(lctagreement\)

Did the court under review by the Supreme Court affirm/reverse/remand the decision of the court it reviewed? Where there has been consistency between the trial court and appellate review (affirm) it seems more likely the Supreme Court would also affirm, regardless of ideological preferences. I created this dummy variable to take a value of “1” if the lower court disposition was “affirm” (true about 60% of the time) and “0” otherwise.

\(lctdir\)
This variable uses the same categories as my dependent variable, but gauges the ideological leaning of the decision of the lower court. Was the determination of the case by the court under review “liberal” or “conservative”? This variable is “1” if the decision was liberal, meaning pro-person accused or convicted of crime, or denied a jury trial.

oraldec

It seems possible that the duration of time (in days) between oral argument and the date the decision is handed down could say something about the likely result in the case. Perhaps a long timeframe indicates a tough case in which the Supreme Court has struggled to cobble together a majority. This appears to cut both ways—a tough case could make it easier to simply vote for one’s ideological preference, or the difficulty of finding common ground to reach a majority could lead to the scuttling of ideology.

C. THE THEORETICAL MODEL

\[ DIR = \beta_0 + \beta_1 \text{LIBERAL} + \beta_2 \text{DEMPRES} + \beta_3 \text{CRIMDOCK} + \beta_4 \text{DISS} + \beta_5 \text{LCTDIR} + \beta_6 \text{LCTAGREEMT} + \beta_7 \text{ORALDEC} + \beta_8 \text{CT\_SOURCE} + \beta_9 \text{CT\_ORIGIN} + \epsilon \]
IV. RESULTS

A. PRELIMINARY ISSUES

In running the regressions, a series of questions pertaining to coding and model specification warranted immediate attention. First among them was the coding of my main independent variable of interest, liberal. During a brief stretch of the Burger Court, the composition of the Court consisted of four liberals and four conservatives, making it unclear how to code the court majority variable. However, a set of regressions revealed that whether they were coded as “1” (liberal) or “0” (conservative) had no discernible effect on the model—unsurprising, considering that this period accounted for only five cases pertaining to criminal rights. I ultimately coded liberal as “0” for this period of the court; it seems easier to think of liberal as equal to “1” if a majority of the court is liberal and “0” otherwise.

A second concern, relating to possible multicollinearity between ct_source and ct_origin led to the decision to drop these variables from the model. The issue arises because a case will not originate in federal court and then end up in state court on appeal. However, the reverse in not true: if the case originates in state court, then the court source variable could be either state or federal. A series of regressions looking at these variables as well as the set of circuit court dummies showed that multicollinearity did seem to exist. I determined that the procedural history of the case could be better captured with an interaction term, fedfed, equal to “1” if the case was heard solely in federal courts and “0” otherwise. This variable still allows for
exploration of differing Supreme Court treatment of criminal cases arising from state
courts and federal courts while avoiding the multicollinearity pitfall of using both
\textit{ct\_source} and \textit{ct\_origin} in the model.

The final preliminary question pertained to a data limitation of the \textit{oraldec}
variable. Meant to capture meaningful variation in the length of time between the date
of oral argument and the date of decision, it leads to the loss of about 250 cases that
were decided per curiam and without oral argument. Dropping this variable from the
model leads to some fairly dramatic changes in the magnitude of the coefficients (but
not the sign of the coefficients) on \textit{crimdock} and \textit{lctagreeemt}. Lacking a theoretical
justification for why these variables should be correlated with \textit{oraldec}, I believe the
movement in the coefficients is simply owing to the addition of 250 new observations
to the data set. The potential loss of these additional cases, together with the relatively
weak theoretical justification for the inclusion of an \textit{oraldec} variable in the first place
(no strong rationale exists for believing that a case outcome hinges on the duration of
deliberations) has led me to drop \textit{oraldec} from the model.

\textbf{B. THE FINAL MODEL}

Incorporating the above changes creates the following final model:

\[
\text{DIR} = \beta_0 + \beta_1\text{LIBERAL} + \beta_2\text{DEMPRES} + \beta_3\text{CRIMDOCK} + \beta_4\text{DISS} + \\
\beta_5\text{LCTDIR} + \beta_6\text{LCTAGREEMT} + \beta_7\text{FEDFED} + \epsilon.
\]

Table 1 displays the probit coefficients, robust standard errors, and marginal
effects of the model.\textsuperscript{xx}
Immediately noticeable is that the coefficient on *liberal* is statistically significant at the 99% level. That is, holding other variables in the model constant, on average, a liberal Supreme Court (where a majority of the Supreme Court has a liberal ideology) is 12.7% more likely than a conservative Supreme Court to produce a liberal outcome in criminal cases. This runs contrary to my hypothesis—it appears that even when criminal cases are looked at in the aggregate and other factors are controlled for,
the ideological disposition of the Court majority correlates pretty strongly with the likely disposition of the case.

One interesting feature of the Supreme Court caseload that could not be controlled for is the manner in which the Supreme Court selects cases. Aside from the rare case in which the Court has original jurisdiction under the Constitution, the Supreme Court is a discretionary appeal—meaning it only hears cases where four justices have agreed to a grant of certiorari. The vote on whether to accept a case remains secret, so there is currently no means of comparing the vote in the decision to grant certiorari with the ultimate vote in the case. It seems plausible, however, that justices could act strategically and, having a sense of where they and the other justices stand on the ultimate resolution of the case, only vote in favor of granting certiorari in cases where they believe the final outcome will align with their preferences. If true, the Supreme Court criminal docket could suffer from a selection bias that causes liberal to overstate the role of ideology, or at least conflate two discrete effects: (1) the role of ideology in case selection; and (2) the role of ideology in case outcome.

Somewhat surprisingly, the coefficient on crimdock is not significant. This runs counter to the findings of Epstein et al. (1989), which not only found this variable to be significant, but also the most influential factor of those they studied. I believe the explanation for this lies in the greater breadth of my data set. Their study ended in 1986, whereas my data set includes almost twenty additional years of criminal cases decided by a Court with a conservative majority. While a high proportion of criminal
cases on the Supreme Court docket might signify a policymaking agenda, it does not signal whether that agenda is liberal or conservative. The Warren Court jurisprudence likely dominated the effect noticed by Epstein et al., thus showing a correlation between liberal outcomes and a large criminal docket. However, with the Rehnquist Court paving a more conservative path since then, the effect has likely been to wash out the relationship between the size of the criminal docket and the ideological bent of the decisions.

On the question of the role of the political climate in Supreme Court decision-making, my results do provide support for the findings of Epstein et al. (1989). Holding other variables in the model constant, on average, a criminal case is 11.5% more likely to result in a liberal outcome when there is a Democrat in the White House rather than a Republican. This is significant at the 99% level. One should be cautioned against thinking this is generally the result of recent appointments to the Supreme Court by the sitting president. Such appointments occur rarely and even more rarely upset the political balance of the Court. The more plausible explanation is that the President, through the Office of the Solicitor General (OSG), has the ability to help set the Supreme Court agenda and is a persuasive advocate before the Court—it has been documented that the Supreme Court is more likely to grant certiorari in cases where the OSG has filed a brief in support of the motion. This contention is further supported by a correlation check on \textit{lctdir} and \textit{dempres} which reveals a statistically significant inverse relationship at the 99% level. That is, where the President is a
Democrat, for example, the Supreme Court is more likely to hear cases that were decided in a conservative direction by the lower court. Given the Supreme Court’s general propensity toward reversing decisions (see the discussion of \textit{letdir}, below), this suggests that in a Democratic administration the Court is more likely to take lower court decisions with a conservative outcome and reverse them (and the same process would hold in a Republican administration). Additionally, to the extent that the political climate and public sentiment factors into decisions, the party of the president serves as a useful proxy for the mood of the country.

The negative coefficient on \textit{letdir} supports the inference that the Supreme Court is taking cases to reverse them: holding other variables in the model constant, on average, a criminal case is almost 34\% more likely to result in a conservative outcome in the Supreme Court where the outcome of the court under review was liberal rather than conservative. The reverse is also true of course, and, intuitively, this makes sense. The Court hears only a relatively small number of the potential appeals each term, and where justices agree with the lower court disposition, it often will make little sense (other than to disagree with the reasoning, if not the outcome) to “waste” precious space on the docket to simply affirm that the lower court decided the case correctly. This is significant at the 99\% level.

The coefficient on the \textit{fedfed} interaction term is also significant at the 99\% level. This suggests that the procedural posture of the case—generally ignored by other scholars—does matter. Holding other variables in the model constant, on
average, a criminal case that was heard exclusively in federal courts is 9% more likely to result in a conservative outcome at the Supreme Court than a case that was heard in state court at some point. While not entirely clear why a solely federal case is more likely to result in a conservative outcome, a partial explanation could be a greater Supreme Court sympathy or liberality toward the types of criminal charges generally brought in state court. Another possible explanation, given the Court’s tendency to reverse the lower court decision, is that lower federal courts are more liberal than state courts.

Finally, the model does not provide any support for the idea that disagreement over the case outcome by the lower courts—whether inter-court (ltagreement) or intra-court (dis)—effects the Supreme Court disposition of the case. Even if such dissent on the lower courts in a good indicator of “tough” cases, that does not appear to correlate with the cases being decided in a particular ideological manner.

V. POLICY IMPLICATIONS AND CONCLUSION

The results from the probit model suggest that several discrete factors are in play in Supreme Court decision-making in criminal cases. In particular, my hypothesis—that common perceptions fed by high profile cases cause people to overestimate the role of ideology in the larger run of cases—finds no support in the model. Indeed, even when controlling for other factors, the ideological makeup of the court appears to have a strong bearing on the likely outcome of the case. However,
while this finding lends additional credence to the attitudinal theory of Supreme Court decision-making and the popular view of Supreme Court justices as political actors in their own right, one should not lose sight of the other implications of my regression model.

The political party affiliation of the president, the direction of the lower court decision, and the procedural history of the case also appear to have a meaningful effect on case outcomes at statistically significant levels. In other words, the ideological makeup of the Court does not tell the whole story. Additional factors—institutional, procedural, political—should not be ignored, as they so often are by political scientists. It should be noted that a limitation on my data set is the inability to capture the linkage of earlier cases with the outcome in later cases. It seems very probable that the precedential value of these earlier decisions, in the form of stare decisis, would also have proved a statistically significant factor, as was found by Lim (2000), but my model fails to account for this. In sum, the decision-making process for any justice likely involves a multitude of considerations, some conscious and some subconscious, and anyone commenting on the Supreme Court should tread carefully in presuming that a single factor such as ideology explains everything.

To return to where I started, what does this all mean for Supreme Court confirmation battles? While in my results I have tried to emphasize that ideology is but one of several important factors, a clear implication of my findings is that interested parties are far from irrational in devoting vast resources to the debate over
Supreme Court nominees. Of the factors bearing on Supreme Court decision-making, political actors seem most likely to influence the process at the nominating stage by ensuring a justice of the correct ideological persuasion gets the job. The impetus for involvement in Supreme Court vacancies is often strong feelings about a particular issue such as the death penalty or abortion; but given that ideology seems to color the more run-of-the-mill criminal cases too, getting the “right” nominee onto the Supreme Court could pay political dividends in a myriad of issues for years to come.

Finally, a future research question would be to build upon the current model and see if the results vary for other substantive areas of the law. Presumably, the same basic factors help to shape Supreme Court decision-making irrespective of subject matter, although it seems plausible that for some of the more arcane areas of the law the ideology of the court majority (liberal) would matter less. But I conjecture that for other prominent areas of the law, particularly those pertaining to civil liberties, the regression results would look quite similar.
APPENDIX A

Variable Identification

<table>
<thead>
<tr>
<th>Variable</th>
<th>Variable Id</th>
<th>Explanation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Docket Number</td>
<td>Docket</td>
<td>This is the unit of analysis, and to correctly identify this variable, I set the variable analu [the unit of analysis variable] = 1 or 2.</td>
</tr>
<tr>
<td>Decision Type</td>
<td>Dec_type</td>
<td>To get all cases with an opinion or judgment, including judgments affirmed by an equally divided court, this variable must be set so that dec_type=1, 2, 4, 5, 6, and 7. It excludes memorandum cases, which deal with motions and petition requests, not case outcomes.</td>
</tr>
<tr>
<td>Issue</td>
<td>Issue</td>
<td>Identifies the context in which the legal basis for decision appears. It aims to capture more the subject matter of the controversy, based on the Supreme Court’s own statements as to what the case is about. An issue should not apply to more than one legal provision. “Criminal procedure” is one of the 13 major groupings of issues—includes rights of persons accused of crime (issues 010-199), except for due process rights of prisoners (504).</td>
</tr>
<tr>
<td>Origin of Case</td>
<td>Origin/ Ct_origin</td>
<td>This variable describes whether the case originated in state or federal court, which could have a bearing on the ultimate outcome in the case. If a case arises on a writ of habeas corpus</td>
</tr>
</tbody>
</table>
which will often be true in criminal cases), the Spaeth database defines the case as originating in federal, rather than state court. Origin takes on 178 unique values; I have grouped them into dummy variables taking the value of 1 for federal courts (not distinguishing between federal district court & appeals court) and 0 for state court (not distinguishing between state trial, appellate, and supreme courts). Fifty-one cases were missing a value for this variable, but using LexisNexis I was able to look at the procedural history of each case and code it appropriately.

| Source of Case | Source/ Ct_source | The “source” variable identifies the court whose decision the Supreme Court is reviewing. It may capture discrepancies between the likelihood of affirming cases from state court versus federal court as well as intra-court differences. This variable takes on 120 unique values. Like the origin variable, I have grouped them into dummy variables; the ct_source variable takes the value of 1 if the source of the case is a federal court and 0 otherwise. I have also created dummy variables for each of the federal courts of appeal (with the state court cases plus 49 federal district court cases serving as the baseline) to flesh out possible intra-court |
Lower Court Disagreement | Diss
--- | ---
Whether judges on the court whose decision is under review disagreed on the matter might say something about what the Supreme Court is likely to do. It suggests that these are “closer cases” or tougher calls, which might make it easier for justices to vote their ideological preferences. It possibly overstates the number of unanimous lower court opinions because the Spaeth coding instructions say that only the majority opinion was looked at for evidence that there was a dissent. I have also corrected a string of coding errors in the Spaeth database. There were 96 missing values owing to the accidental coding of recent decisions that had “No Dissent” as “.” rather than “0.”

Disposition of Case Whose Decision the Supreme Lodis/Lctagreemt | Did the court under review by the Supreme Court affirm/reverse/remand the decision of the court it reviewed? Where there has been consistency between the trial court and appellate review (affirm) it seems more likely
the Court would also affirm, regardless of ideological preferences. The *lodis* variable takes on twelve unique values: for my purposes, I have created a dummy variable equal to one if the court affirmed (*letagreement=1*) and equal to zero otherwise (reverse, remand, vacate, dismiss). The missing values are for cases that either come to the Supreme Court on original jurisdiction or straight from the trial court.

| Court Reviewed | 
| Court Would Also Affirm, Regardless of Ideological Preferences. The *lodis* Variable Takes On Twelve Unique Values: For My Purposes, I Have Created A Dummy Variable Equal To One If The Court Affirmed (*letagreement=1*) And Equal To Zero Otherwise (Reverse, Remand, Vacate, Dismiss). The Missing Values Are For Cases That Either Come To The Supreme Court On Original Jurisdiction Or Straight From The Trial Court. |

| Direction of Lower Court’s Decision | Lctdir
| Was Determination Of Case By Court Under Review “Liberal” Or “Conservative.” This Variable Uses The Same Categories As My Main Variable Of Interest, But Gauges The Ideological Leaning Of The Decision Of The Lower Court. For Criminal Cases, Liberal=1 And Means Pro-Person Accused Or Convicted Of Crime, Or Denied A Jury Trial. |

| Length of Time Between Oral Argument and Decision | Oraldec/ Meanoraldec
| It Is Possible That The Duration Of Time (In Days) Between Oral Argument And The Date The Decision Is Handed Down Could Say Something About The Likelihood Of The Justices To Vote Their Ideological Preferences. I Have Created A Variable, *oraldec*, By Subtracting The Oral Argument Date Variable From The Decision Date (Dec-Oral) To Capture This Timeframe. I Have Also Created A Dummy Variable, *meanoraldec* To Capture More Meaningful Fluctuations In The |
duration of time between oral arguments and the decision date. It equals one if the duration of time is greater than the mean and equal to zero otherwise.

<table>
<thead>
<tr>
<th>Direction of Decision</th>
<th>Dir</th>
<th>Based on Issue variable for the case, was SC outcome liberal or conservative. For criminal cases, liberal=1 and means pro-person accused or convicted of crime, or denied a jury trial</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ideology of Court Majority</td>
<td>Liberal</td>
<td>New variable and chief independent variable; based on natural court variable to get chronology of when the court had a liberal majority and when it a conservative majority. There is a question as to what best serves as a proxy for ideology. Following, Cover and Segal (1989) I used pre-confirmation editorials in four leading newspapers to generate ideological scores for each justice. I thought this might serve as a useful alternative to political party affiliation as relied upon by Epstein, Walker, Dixon (1989). The use of the Cover-Segal method fixed some of the aberrations of the political party affiliation method, but also introduced new ones. As a practical matter, it turns out that the two methods diverge in only a few instances and because I am only interested in the ideology of the majority of the court, it makes no difference.</td>
</tr>
<tr>
<td></td>
<td>That is, this variable gets coded the same under either method.</td>
<td></td>
</tr>
</tbody>
</table>
APPENDIX B

Descriptive Statistics

<table>
<thead>
<tr>
<th>ct_origin</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 = State Court</td>
<td>610</td>
<td>34.35</td>
</tr>
<tr>
<td>1 = Federal Court</td>
<td>1166</td>
<td>65.65</td>
</tr>
<tr>
<td>Total</td>
<td>1176</td>
<td>100.00</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ct_source</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 = State Court</td>
<td>599</td>
<td>33.73</td>
</tr>
<tr>
<td>1 = Federal Court</td>
<td>1177</td>
<td>67.27</td>
</tr>
<tr>
<td>Total</td>
<td>1776</td>
<td>100.00</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Diss</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 = No Dissent</td>
<td>1372</td>
<td>77.25</td>
</tr>
<tr>
<td>1 = Dissent</td>
<td>404</td>
<td>22.75</td>
</tr>
<tr>
<td>Total</td>
<td>1776</td>
<td>100.00</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>lctagreemnt</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 = Other</td>
<td>641</td>
<td>39.13</td>
</tr>
<tr>
<td>1 = Affirm</td>
<td>997</td>
<td>60.87</td>
</tr>
<tr>
<td>Total</td>
<td>1638</td>
<td>100.00</td>
</tr>
<tr>
<td>. = Missing*</td>
<td>138</td>
<td></td>
</tr>
</tbody>
</table>

*cases for which there was no appellate review
<table>
<thead>
<tr>
<th>lctdir</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conservative</td>
<td>1107</td>
<td>62.44</td>
</tr>
<tr>
<td>Liberal</td>
<td>666</td>
<td>37.56</td>
</tr>
<tr>
<td>Total</td>
<td>1773</td>
<td>100.00</td>
</tr>
<tr>
<td>Missing</td>
<td>3</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>oraldec</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Mean</td>
<td>92.95</td>
<td></td>
</tr>
<tr>
<td>Standard Deviation</td>
<td>64.24</td>
<td></td>
</tr>
<tr>
<td>Range</td>
<td>0-769*</td>
<td></td>
</tr>
<tr>
<td>N = 1444; 332 missing (per curiam decisions that had no oral argument)</td>
<td>(*an outlier at 3679 was owing to a typo in the data set)</td>
<td></td>
</tr>
</tbody>
</table>
NOTES


v Carol S. Steiker, Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers, 94 MICH. L. REV. 2466 (1996)


x The database is available online at http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm


Jeffrey A. Segal & Albert D. Cover, Ideological Values and the Votes of U.S. Supreme Court Justices, 83 AM. POL. SCI. REV. (June 1989); Jeffrey A. Segal & Harold J. Spaeth, The Influence of Stare Decisis on the Votes of United States Supreme Court Justices, 40 AM. J. POL. SCIENCE 971 (1996); Jeffrey A. Segal et al., Ideological Values and the Votes of U.S. Supreme Court Justices Revisited, 57 J. POL. 812 (1995).

See, e.g., Kamisar, *supra* note 4; Dripps, *supra* note 4; Steiker, *supra* note 5.

See Farnsworth, *supra* note 7, at 68.

See id. Noticeable in Figure 1 is a decline in the total Supreme Court case load starting around 1990. For a discussion of the possible reasons for the decreasing docket, see Linda Greenhouse, *Case of the Dwindling Docket Mystifies the Supreme Court*, N.Y. TIMES, Dec. 7, 2006, at A1.


The *NEW YORK TIMES*, *Washington Post*, *Chicago Tribune*, and *Los Angeles Times*.

Over the past fifty years, state supreme courts have been reversed 57% of the time in the Supreme Court and federal appellate courts have been reversed 54% of the time. See “Disposition of Supreme Court Decisions on Certiorari or Appeal from State and Territory Supreme Courts, and from Federal Courts of Appeals, 1950-2006,” [http://web.mit.edu/keithw/www/statestats.html](http://web.mit.edu/keithw/www/statestats.html).

As the logit and LPM results are substantially the same as the probit results, I have chosen to only provide the probit results.

See John Dean, *The Olson Vote: Have Republicans Politicized the Solicitor General’s Office?*, FINDLAW, [http://writ.lp.findlaw.com/dean/20010525.html](http://writ.lp.findlaw.com/dean/20010525.html), May 25, 2001 (“While the Supreme Court generally grants certiorari (or review) in less than five percent of the petitions filed each year, the success rate of the Solicitor General's office in procuring Court review is usually near 75 percent.”).