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## ARTICLES

### THE SUPREME COURT DURING CRISIS: HOW WAR AFFECTS ONLY NON-WAR CASES

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*Does the U.S. Supreme Court curtail rights and liberties when the nation's security is under threat? In hundreds of articles and books, and with renewed fervor since September 11, 2001, members of the legal community have warred over this question. Yet, not a single large-scale, quantitative 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 over the past six decades and employing methods chosen and tuned especially for this problem, our analyses demonstrate that when crises threaten the nation's security, the justices are substantially more likely to curtail rights and liberties than when peace prevails. Yet paradoxically, and in contradiction to virtually every theory of crisis jurisprudence, war appears to affect only cases that are unrelated to the war. For these cases, 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. On the other hand, we find no evidence that cases most directly related to the war are affected.*

*We attempt to explain this seemingly paradoxical evidence with one unifying conjecture: Instead of balancing rights and security in high stakes cases directly related to the war, the justices retreat to ensuring the institutional checks of the democratic branches. Since rights-oriented and process-oriented dimensions seem to operate in different domains and at different times, and often suggest different outcomes, the predictive factors that work for cases unrelated to the war fail for cases related to the war. If this conjecture is correct, federal judges should consider giving less*

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*weight to legal principles established during wartime for ordinary cases, and attorneys should see it as their responsibility to distinguish cases along these lines.*

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 all circumstances. . . .

. . . .  
 . . . When peace prevails, and the authority of the 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*<sup>1</sup>

We uphold the exclusion order. . . . 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 govern-

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www.sunysb.edu/polsci/jsegal/indexbody.html) is Distinguished Professor and Chair of the Department of Political Science at Stony Brook University. An earlier version of this Article was presented at the 2005 Midwest Political Science Association Conference, at which it won the *Pi Sigma Alpha Award* for the best paper at the conference, and the *Robert H. Durr Award* for the best paper applying quantitative methods to a substantive problem. A replication dataset with all information necessary to replicate the empirical results in this Article is available at <http://GKing.Harvard.edu/data.shtml#crisis>. For research support, we thank the National Science Foundation (SES-0112072, SES-0241369), the National Institute of Aging (P01 AG17625-01), and Washington University School of Law. For their comments on earlier drafts of this Article, our thanks go to Jim Alt, Ian Ayres, Randy Calvert, Jim Greiner, Kosuke Imai, Dale Jorgenson, Mike Kang, Jack Knight, Andrew D. Martin, Kevin Quinn, Steve Smith, Harold J. Spaeth, Nancy Staudt, and Elizabeth Stuart and the workshop participants at Columbia University, Florida International University, Georgetown University, Harvard University (the Political Economy research workshop and the Econometrics research workshop), New York University, Stony Brook University, University of Southern California, University of Missouri, and Washington University. We also express our gratitude to William J. Dixon and Thomas G. Walker for providing some 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 Gary King's Advanced Quantitative Research Methodology class at Harvard 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.

<sup>1</sup> 71 U.S. (4 Wall.) 2, 120–21, 123–24 (1866).

mental 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*<sup>2</sup>

## INTRODUCTION

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

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<sup>2</sup> 323 U.S. 214, 219–20 (1944).

<sup>3</sup> *Milligan*, 71 U.S. (4 Wall.) at 123–24. We invoke the terms “emergency and peril,” “commotions,” and “crisis” here to signify major international events, including war, that threaten the security of the nation. In Part III.B, we provide more precise definitions.

<sup>4</sup> This also corresponds with Oren Gross, who noted 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.” Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *YALE L.J.* 1011, 1043–44 (2003) (citations omitted); see also Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 *U. PITT. L. REV.* 767, 769–72 (2002) (discussing war/emergency paradigms).

<sup>5</sup> *Korematsu*, 323 U.S. at 220; see also, e.g., Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 *WIS. L. REV.* 837, 841–49 (discussing crisis decisionmaking); Charles Fairman, *The Law of Martial Rule and the National Emergency*, 55 *HARV. L. REV.* 1253, 1287–89 (1942) (arguing that courts must recognize constitutional war powers and practical reality of war and limit judicial interference); John P. Frank, *Ex parte Milligan v. The Five Companies: Martial Law in Hawaii*, 44 *COLUM. L. REV.* 639, 639 n.2 (1944) (citing critics of *Milligan*); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 *YALE L.J.* 489, 489–90 (1945) (discussing martial rule and Japanese internment).

<sup>6</sup> Cicero’s phrase was “*silent enim leges inter arma*” (“when arms speak, the laws are silent”). 14 *CICERO, Pro T. Annio Milone Oratio*, in *PRO MILONE—IN PISONEM—PRO SCAURO—PRO FONTEIO—PRO RABIRIO POSTUMO—PRO MARCELLO—PRO LIGARIO—PRO REGE DEIOTARIO* 16–17 (N.H. Watts trans., Harvard Univ. Press 6th prtg. 1979) (n.d.).

many suggest that it is,<sup>7</sup> then *Milligan* provides a counter punch: During war the law speaks loudly.<sup>8</sup>

While the Court did not cite *Milligan* in its *Korematsu* decision,<sup>9</sup> and subsequently has repudiated at least the “racist basis” of *Korematsu*, it has overruled neither decision.<sup>10</sup> Both apparently remain valid law.<sup>11</sup> But this is 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*.<sup>12</sup> Indeed, the belief

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<sup>7</sup> See generally WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998) (surveying history of civil rights and liberties during wartime); MARTIN S. SHEFFER, *THE JUDICIAL DEVELOPMENT OF PRESIDENTIAL WAR POWERS* (1999) (discussing expansion of war powers in U.S. history); Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 U. HAW. L. REV. 649, 649–50 (1997) (concluding that Court has historically countenanced executive powers during war).

<sup>8</sup> In 1866, the *New York Times*, 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.” *Military Trials of Civilians in Loyal States*, N.Y. TIMES, Dec. 18, 1866, at 1.

<sup>9</sup> *Korematsu*, 323 U.S. 214 (1944).

<sup>10</sup> Grossman, *supra* note 7, at 650. While it is true that the U.S. Supreme Court has not overruled itself, a federal district court vacated *Korematsu*’s original conviction in *Korematsu v. United States*, 584 F. Supp. 1406, 1409, 1420 (N.D. 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 (codified at 50 U.S.C. §§ 1989–1989b-9 (2000)).

<sup>11</sup> See, e.g., David P. Currie, *The Constitution in the Supreme Court: Civil War and Reconstruction, 1865–1873*, 51 U. CHI. L. REV. 131, 133–39 (1984) (discussing *Milligan* in context of Reconstruction); Edwards, *supra* note 5, at 843 (noting that “the Supreme Court has yet to overrule or repudiate *Korematsu*”); Dean Masaru Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, 4 ASIAN PAC. AM. L.J. 72, 77 (1996) (noting that “the Court continues to cite and rely on *Korematsu* in modern cases”).

<sup>12</sup> See Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 795, 806 (2004) (“[M]ost scholars now recognize that ‘the real legacy of *Ex parte Milligan* is confined between the covers of constitutional history books. The decision itself has had little effect on history.’” (quoting MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 184 (1991))). President Roosevelt’s Attorney General, for example, counseled him that “[p]ractically, . . . the *Milligan* case is out of the way and should not again plague us.” Michal R. Belknap, *A Putrid Pedigree: The Bush Administration’s Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 477 (2002) (alteration in original) (quotation marks omitted).

Some discount the importance of *Milligan* altogether, arguing that it cannot be taken to stand for the proposition that 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 times of war and peace. See, e.g., 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 in Part V addresses both these concerns by providing an explicit and

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April 2005]

THE SUPREME COURT DURING CRISIS

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that the Court acts to suppress rights and liberties under conditions of threat is so widely accepted in post–September 11 America,<sup>13</sup> and has been so widely accepted since the World War I period,<sup>14</sup> that most

exogenous framework for distinguishing war and peace cases, as well as a transparent measurement of the causal effect of war on case outcomes.

<sup>13</sup> See, e.g., Floyd Abrams, *The First Amendment and the War Against Terrorism*, 5 U. PA. J. CONST. L. 1, 5, 10–11 (2002) (arguing that war on terror requires yielding some privacy and Fourth Amendment rights); Gross, *supra* note 4, at 1014–17, 1034–37 (discussing constitutional tradeoffs imposed by violent crises and Court’s response); Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL’Y 441, 441–42 (2002) (discussing constitutional tradeoffs of rights of Americans after September 11); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 2–5 (2002) (noting that deference to executive discretion in name of national security can permit racial scapegoating); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1259–60 (2002) (postulating that times of war are not appropriate times to tamper with fundamental constitutional rights and laws); Anthony Lewis, *Civil Liberties in a Time of Terror*, 2003 WIS. L. REV. 257, 264–66 [hereinafter Lewis, *Civil Liberties*] (discussing history of civil liberties in times of war); Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 284–87 (asserting that threats to constitutional framework will become part of national landscape); Anthony Lewis, *Marbury v. Madison v. Ashcroft*, N.Y. TIMES, Feb. 24, 2003, at A17 (opining that in times of war, courts have abdicated their function of guarding liberties); Richard A. Posner, *Security Versus Civil Liberties*, ATLANTIC MONTHLY, Dec. 2001, at 46 (discussing balance of security and liberties under constitutional law); Judith Resnik, *Invading the Courts: We Don’t Need Military ‘Tribunals’ to Sort Out the Guilty*, LEGAL TIMES, Jan. 14, 2002, at 34 (arguing against military tribunals); Sanford Levinson, *What Is the Constitution’s Role in Wartime?: Why Free Speech and Other Rights Are Not as Safe as You Might Think* (Oct. 17, 2001) (noting that “the Constitution is often reduced at best to a whisper during times of war”), at [http://writ.findlaw.com/commentary/20011017\\_levinson.html](http://writ.findlaw.com/commentary/20011017_levinson.html).

<sup>14</sup> Some trace the idea back to Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 932–34 (1919) [hereinafter Chafee, *Speech in War Time*] (noting that freedom of speech has been subject to widespread curtailment during wartime). For supporting work published subsequent to Chafee, see generally RALPH S. BROWN, JR., *LOYALTY AND SECURITY* (1958); ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* (1941) [hereinafter CHAFEE, *FREE SPEECH*]; THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970) [hereinafter EMERSON, *SYSTEM OF FREEDOM*]; *FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT* (Harold L. Nelson ed., 1967); IRVING HOWE & LEWIS COSER, *THE AMERICAN COMMUNIST PARTY* (Frederick A. Praeger Inc. 1962) (1957); MICHAEL LINFIELD, *FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR* (1990); PAUL L. MURPHY, *THE MEANING OF FREEDOM OF SPEECH* (1972); J.G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (1951); REHNQUIST, *supra* note 7; CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* (1951); JEROME H. SKOLNICK, *THE POLITICS OF PROTEST* (1969); Abrams, *supra* note 13; Thomas Church, Jr., *Conspiracy Doctrine and Speech Offenses: A Reexamination of Yates v. United States from the Perspective of United States v. Spock*, 60 CORNELL L. REV. 569 (1975); Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court’s Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945); Norman Dorsen, *Foreign Affairs and Civil Liberties*, 83 AM. J. INT’L L. 840 (1989); Edwards, *supra* note 5; Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964); Thomas I. Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975 (1968) [hereinafter Emerson, *Freedom of Expression*]; Ted Finman & Stewart Macaulay,

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observers no longer debate whether the Court, in fact, behaves in this way. Instead, the discussions are over how this came about or whether the Court should embrace a “crisis jurisprudence.” As Norman Dorsen puts it:

[N]ational security[ ] has been a graveyard for civil liberties for much of our recent history. 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.<sup>15</sup>

This is a strong claim, and one strongly endorsed by a large fraction of the analysts who have examined the relationship between Court decisions and threats to 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 war-times that they would not support during periods of peace?

We raise these questions because—despite the crisis thesis’s resilience—no study has rigorously assessed it: Virtually all evidence in its favor comes from isolated anecdotes or descriptions of a few highly selected Court decisions rather than from systematic analyses of a broad class of cases. 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 because the crisis thesis continues to provide fodder for debate. A number of judges,<sup>16</sup> along

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*Freedom to Dissent: The Vietnam Protests and the Words of Public Officials*, 1966 WIS. L. REV. 632; Margaret A. Garvin, *Civil Liberties During War: History’s Institutional Lessons*, 16 CONST. COMMENT. 691 (1999); Grossman, *supra* note 7; Harry Kalven, Jr., *Ernst Freund and the First Amendment Tradition*, 40 U. CHI. L. REV. 235 (1973); Roscoe Pound, *Civil Rights During and After the War*, 17 TENN. L. REV. 706 (1943); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1207 (1983); Rostow, *supra* note 5; Justice William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, Address at the Law School of Hebrew University (Dec. 22, 1987) (transcript available at [http://www.brennancenter.org/resources/downloads/nation\\_security\\_brennan.pdf](http://www.brennancenter.org/resources/downloads/nation_security_brennan.pdf)).

<sup>15</sup> Dorsen, *supra* note 14, at 840.

<sup>16</sup> See, e.g., *United States v. United States Dist. Court*, 444 F.2d 651, 664 (6th Cir. 1971) (“It 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.”); ABE FORTAS, *CONCERNING DISSENT AND CIVIL DISOBEDIENCE* 38 (1968) (“It 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 Communism or revolution, they have sought to suppress the rights of dissenters.”); Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 149 (2002) (“[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.”).

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with a handful of commentators,<sup>17</sup> 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. We call this view the “*Milligan* thesis.” Many more, though, question the breadth and depth of the crisis thesis, with one group claiming that its reach extends to all cases pertaining to rights and liberties,<sup>18</sup> 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.<sup>19</sup> Debate also exists over the duration of the crisis effect. Some suggest that the

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In their off-bench writings, Justices Brennan and Rehnquist both emphasize the Court’s decision in *Korematsu*, 323 U.S. 214 (1944), and other cases that flow directly from war or other emergencies and endorse some form of the crisis thesis. REHNQUIST, *supra* note 7, at 224–25; Brennan, *supra* note 14.

<sup>17</sup> One of these commentators, Harold Koh, noted:

In 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 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.

Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT’L L.J. 23, 23 (2002); see also Mary L. Dudziak, *The Supreme Court and Racial Equality During World War II*, 1996 J. SUP. CT. HIST. 35, 37–45 (discussing Supreme Court antidiscrimination cases during World War II); Geoffrey R. Stone, *Civil Liberties in Wartime*, 28 J. SUP. CT. HIST. 215, 243 (2003) (“[I]t is often said that the Supreme Court will not decide a case against the government on an issue of military security during a period of national emergency. . . . In fact, however, this does not give the Court its due.”); Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT’L J. CONST. L. 296, 312–24 (2003) (discussing examples of Court supporting personal liberties during Cold War and specifically contrasting U.S. to Soviet Russia); George P. Fletcher, *War and the Constitution*, AM. PROSPECT, Jan. 1, 2002, at 26 (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”); Linda Greenhouse, *Judicial Restraint: The Imperial Presidency vs. the Imperial Judiciary*, N.Y. TIMES, Sept. 8, 2002, § 4, at 3 (asserting that judiciary has played “restraining role” on executive authority in war on terrorism and that “[e]ven judges whose every instinct is to defer to plausible claims of national security have recoiled”).

<sup>18</sup> See, e.g., EMERSON, SYSTEM OF FREEDOM, *supra* note 14, at 56 (stating that war tensions created serious infringements on freedom of expression); see also Resnik, *supra* note 13, at 34 (“[I]n times of war, courts often do not protect against incursions on civil liberties.”).

<sup>19</sup> 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, for example, ROSSITER, *supra* note 14, at 54; Lobel, *supra* note 4, at 774–75, 781–90, drawing parallels between modern and historical Courts that “adopt[ed] an extremely deferential ‘reasonableness’ standard of review” during World War II, “support[ed] the extension of emergency authority” during the Cold War and Vietnam War eras, and more recent efforts by the government to circumvent courts altogether; and John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167,

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justices suppress rights only while a war is ongoing, while others argue that the curtailments linger well after the threat has subsided.<sup>20</sup>

These debates continue to date for good reason: No one has yet attempted a large-scale systematic study aimed at addressing the factual underpinnings of the crisis thesis. It has been only in the last decade or so that scholars have developed the high-quality data and statistical tools required to conduct such a study. With those data and tools now in place, we undertake to put the crisis thesis to the test.<sup>21</sup>

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” or in relative peace.<sup>22</sup> Our findings provide the first systematic support for the exist-

182–87, 287–90 (1996), discussing the constitutional origins of traditional judicial deference to the Executive’s exercise of its war powers.

<sup>20</sup> Compare Gross, *supra* note 4, at 1073–75 (discussing temporal fluidity of emergency and normalcy), with Tushnet, *supra* note 13, at 279–80 (discussing social learning in context of wartime civil liberties infringements). See also Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 610–26 (2003) (discussing ratchets).

<sup>21</sup> The timing could not be more auspicious. In the aftermath of September 11, members of the 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 role of the federal judiciary in the war on terrorism. See, e.g., THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM (Richard C. Leone & Gregory Anrig Jr. eds., 2003) (discussing effects of September 11 on civil liberties); Barak, *supra* note 16 (discussing importance of judges as protectors of civil liberties); Symposium, *Civil Liberties in a Time of Terror*, 2003 WIS. L. REV. 253 (compiling lectures on effect of wartime and terror on civil liberties); Symposium, *Civil Liberties in Times of War*, 28 J. SUP. CT. HIST. 215 (2003) (collecting articles discussing Supreme Court jurisprudence in times of war); James E. Coleman, Jr. & Barry Sullivan, *Foreword*, 65 LAW & CONTEMP. PROBS. 1 (2002) (examining Bill of Rights after September 11); Viet D. Dinh, *Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL’Y 399 (2002) (discussing Department of Justice’s efforts to incapacitate terrorists and President’s creation of military tribunals after September 11); Gross, *supra* note 4, at 1014–27 (discussing judicial responses to times of crisis); Heymann, *supra* note 13, at 456 (discussing capacity of courts to deal with post-September 11 risks to civil liberties); Joo, *supra* note 13, at 2 (discussing racial scapegoating); Katyal & Tribe, *supra* note 13 (discussing military tribunals); Lewis, *Civil Liberties*, *supra* note 13 (discussing perceived threat to civil liberties of Bush administration’s response to September 11); Lobel, *supra* note 4 (comparing war-time executive and judicial powers throughout U.S. history); Greenhouse, *supra* note 17 (suggesting that judiciary restrained Executive in wake of September 11); Levinson, *supra* note 13 (urging public debate aimed at influencing Congress rather than reliance on judiciary to protect civil liberties).

<sup>22</sup> This 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, e.g., INTERNATIONALIZATION AND DOMESTIC POLITICS 6 (Robert O. Keohane & Helen V. Milner eds., 1996); Peter Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 INT’L ORG. 881, 881–82 (1978).

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tence 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.*<sup>23</sup> On the other hand, contrary to what every proponent of the crisis thesis has so far suggested, *while the presence of war does affect cases unrelated to the war, there is no evidence that the presence of war affects cases directly related to the war.*

We discuss this seemingly counterintuitive finding on two levels. First, at the theoretical level, we posit that the Supreme Court decides cases most related to war from an institutional-process perspective rather than from a first-order balancing of security and liberty rights. Because the institutional-process dimension is mostly unrelated to conventional rights-oriented conceptions, the presence of war does not necessarily tilt the Court in favor of security for war-related cases. Conversely, in cases unrelated to war, the Court seeks to balance security and liberty interests, as scholars have commonly conjectured, and the presence of war does tilt the Court in favor of security. Second, at the normative level, our findings indicate that the Court should give legal principles established while a war is ongoing less precedential weight. Practicing 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,”<sup>24</sup> while at the same time preserving the integrity of the judicial process during times of war.

We begin, in Parts I and II, with the crisis thesis and examine its supporting literature, why the Court might respond to threats to the national security by suppressing rights, and what kind of evidence exists for this outcome. While less consensus exists in the literature about what types of cases are likely to be affected by war, virtually all supporters of the crisis thesis suggest that the effect is strongest for cases most directly related to war. Part III explains the basic approach we bring to the debate, defining the concepts of a “crisis” and war-related cases, describing the set of civil rights and liberties cases we analyze, and discussing alternative explanations and confounding factors for which we account. In Part IV, we introduce a statistical framework for testing causal inference that may prove par-

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<sup>23</sup> This finding, as we explain in Parts V and VI, 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. See *infra* Parts V–VI. 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, 4–5 (1984) (arguing that cases will proceed to trial when plaintiff has about fifty percent chance of winning).

<sup>24</sup> *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

ticularly useful in empirical legal studies.<sup>25</sup> In Parts V and VI, we deploy this method to examine empirically six decades of Supreme Court decisions. Our results present a puzzle to both adherents and detractors of the crisis thesis alike: War does not appear to affect cases most directly related to the conflict. Consequently, we discuss a more encompassing theory that may explain these results and further evidence consistent with this account. Finally, we discuss our primary implications in Part VII.

## I

### POLITICAL AND JUDICIAL RESPONSES TO WAR

Proponents of the crisis thesis argue that 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,<sup>26</sup> 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 national security, they are in less accord over the justices’ responses. 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.

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<sup>25</sup> Specifically, we employ matching in order to assess the causal effect of war. This method relies to a lesser degree on restrictive functional form and distributional assumptions than traditional regression-based models, and has been widely and successfully employed in a variety of academic fields to estimate causal inferences. See, e.g., PAUL R. ROSENBAUM, *OBSERVATIONAL STUDIES* 77–80 (2d ed. 2002); JEFFREY M. WOOLDRIDGE, *ECONOMETRIC ANALYSIS OF CROSS SECTION AND PANEL DATA* 603–44 (2002); 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 W. Holland, *Statistics and Causal Inference*, 81 *J. AM. STAT. ASS’N* 945, 945–61 (1986); Daniel E. Ho, Kosuke Imai, Gary King & Elizabeth A. Stuart, *Matching as Nonparametric Preprocessing for Reducing Model Dependence in Parametric Causal Inference* (2004) (unpublished manuscript, available at <http://gking.harvard.edu/files/matchp.pdf>).

<sup>26</sup> Oren 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).

### A. Political Responses to War

When societies confront crises, they respond in different ways. Sometimes they use military force to attack their aggressors; sometimes they do not.<sup>27</sup> Sometimes they impose economic sanctions; sometimes they do not.<sup>28</sup> Sometimes they undertake diplomatic efforts; sometimes they do not.<sup>29</sup> But, as many studies reveal, one response is essentially universal: In times of emergency—whether arising from wars, internal rebellions, or terrorist attacks—governments tend to suppress the rights and liberties of persons living within their borders.<sup>30</sup> They may respond in this way out of a desire to pre-

<sup>27</sup> See, e.g., ROBERT GILPIN, *WAR AND CHANGE IN WORLD POLITICS* 9–49 (1981) (proposing theory of differential growth of power to explain war and change in international political system); KALEVI J. HOLSTI, *PEACE AND WAR: ARMED CONFLICTS AND INTERNATIONAL ORDER 1648–1989*, at 1–24 (1991) (describing causes of war and developing framework to explain variation in conflict).

<sup>28</sup> See Daniel W. Drezner, *Bargaining, Enforcement, and Multilateral Sanctions: When Is Cooperation Counterproductive?*, 54 *INT'L ORG.* 73, 73–78 (2000) (examining determinants of sanctions cooperation); Lisa L. Martin, *Credibility, Costs, and Institutions: Cooperation on Economic Sanctions*, 45 *WORLD POL.* 406, 407 (1993) (noting that international cooperation on economic sanctions varies widely).

<sup>29</sup> See ANDREAS HASENCLEVER ET AL., *THEORIES OF INTERNATIONAL REGIMES* 8–22 (1997) (reviewing regime theory); ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 49–64 (1984) (defining international cooperation); STEPHEN M. WALT, *THE ORIGINS OF ALLIANCES* 17–49 (1987) (reviewing factors that impact alliance formation); Emanuel Adler & Michael Barnett, *Introduction and Theoretical Overview*, in *SECURITY COMMUNITIES* 1 (Emanuel Adler & Michael Barnett eds., 1998) (discussing theory of security communities); Judith Goldstein et al., *Introduction: Legalization and World Politics*, in *LEGALIZATION AND WORLD POLITICS* 1, 1–16 (Judith Goldstein et al. eds., 2001) (examining role of legalization as form of cooperation in world politics); James D. Morrow, *Modeling the Forms of International Cooperation: Distribution Versus Information*, 48 *INT'L ORG.* 387, 387–90 (1994) (positing game theoretic model of international cooperation).

<sup>30</sup> See, e.g., Cecil T. Carr, *Crisis Legislation in Britain*, 40 *COLUM. L. REV.* 1309, 1311 (1940) (reviewing British experience with legislation during national crises and “extraordinarily wide powers which have been conferred on the executive”); Cecil T. Carr, *A Regulated Liberty: War-Time Regulations and Judicial Review in Great Britain*, 42 *COLUM. L. REV.* 339, 344–55 (1942) (reviewing British judicial review of wartime detention and noting that “Parliament . . . expressly created the power of the executive to intern suspects without trial”); Dinh, *supra* note 21, at 399–400 (noting roots of perceived necessity to curtail liberties in crises); Henry J. Fletcher, *The Civilian and the War Power*, 2 *MINN. L. REV.* 110, 122–23, 126–30 (1918) (discussing U.S. and British domestic curtailments of liberties during World War I); 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, 120–39 (2001) (reviewing interrogation practices in light of crises in Israel, Britain, United States, and Canada); Heymann, *supra* note 13, at 443–53 (noting varying options of fighting war on terror that all entail sacrifices of individual liberty); Karl Loewenstein, *Legislative Control of Political Extremism in European Democracies*, 38 *COLUM. L. REV.* 591, 591–622 (1938) (reviewing legislative measures to repress subversive activities in United States and surveying measures in European democracies to suppress fascism); Herbert Marx, *The Emergency Power and Civil Liberties in Canada*, 16 *MCGILL L.J.* 39, 43–56 (1970) (reviewing history of martial

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sent a unified front to outsiders, their perception that cleavages are “dangerous,”<sup>31</sup> or, of course, their belief that national security and military “necessity” must outweigh liberty interests if government is to be protected and preserved.<sup>32</sup>

Whatever the reason, the United States is no exception to this rule.<sup>33</sup> Indeed, America’s history is replete with executive and legislative 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

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law in Britain, United States, and Canada); John Lord O’Brian, *Restraints upon Individual Freedom in Times of National Emergency*, 26 CORNELL L.Q. 523, 525–35 (1941) (reviewing suppression of liberties during World War I); Stone, *supra* note 17, at 215–41 (reviewing history of civil liberties in wartime and noting that “[i]n time of war . . . we respond too harshly in our restriction of civil liberties”); Eugene Wambaugh, *War Emergency: A General View*, 30 HARV. L. REV. 663, 663–67 (1917) (describing British World War I emergency legislation); Shirin Sinnar, Note, *Civil Liberties in Great Britain and Canada During War*, 55 HARV. L. REV. 1006, 1006–18 (1942) (discussing civil liberties during war in Britain and Canada).

<sup>31</sup> As 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.

Editorial, *The Ashcroft Smear*, WASH. POST, Dec. 7, 2001, at A40 (alteration in original).

<sup>32</sup> See, e.g., William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 2–10 (2000) (describing necessity of more aggressive government investigations into threats to national security); Emerson, *Freedom of Expression*, *supra* note 14, at 55–56 (describing why war leads governments to curtail rights); Fairman, *supra* note 5, at 1302 (“Government in an emergency presents a special and extreme aspect of administrative action. The public necessity is greater, the opportunity for inquiry and deliberation much less. . . . [For this reason, courts] will in the same spirit give fair scope to the constitutional power to wage war.”); J. Edgar Hoover, *Alien Enemy Control*, 29 IOWA L. REV. 396, 396 (1944) (defending necessity of aggressive FBI tactics in response to “the threat from within to our security” posed by “[l]arge numbers of those of foreign birth in our midst” during World War II); 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, 178–79, 186 (1982) (acknowledging that “derogations” from certain rights may be necessary when national security is truly at stake but warning that this rationale is too often used as pretext for political oppression).

<sup>33</sup> As 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, at 31 (Alexander Hamilton) (Terence Ball ed., 2003).

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perceived “enemies.”<sup>34</sup> The “ink had barely dried on the First Amendment,”<sup>35</sup> as Justice Brennan once observed, when Congress passed two restrictive legislative enactments: the Sedition Act,<sup>36</sup> which prohibited speech critical of the United States, and the Enemy Alien Act,<sup>37</sup> which empowered the President to detain or deport alien enemies<sup>38</sup> and which the government has used during declared wars to stamp out political opponents.<sup>39</sup> During the Civil War, President Abraham Lincoln took steps to suppress “treacherous” behavior, most notably by suspending habeas corpus, out of the belief “that the

<sup>34</sup> See Norman Dorsen, *Introduction*, in *OUR ENDANGERED RIGHTS*, at xi (Norman Dorsen ed., 1984) (discussing government’s exclusion of press from Grenada invasion in October 1983); MURPHY, *supra* note 14, at 3–10 (mapping developments and setbacks to free speech between World Wars I and II); REHNQUIST, *supra* note 7, at 218–22 (comparing Congressional and Executive response to declared wars); Brennan, *supra* note 14, at 2–6 (reviewing history of government suppression of dissent in times of crisis); Paul G. Casell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and “Off-the-Record Wars,”* 73 *GEO. L.J.* 931, 931–45 (1985) (surveying history of press coverage of military operations up to Grenada invasion and discussing constitutionality of press restrictions); Chafee, *Speech in War Time*, *supra* note 14 (noting widespread government curtailment of free speech during World War I); Frank B. Cross & Stephen M. Griffin, *A Right of Press Access to United States Military Operations*, 21 *SUFFOLK U. L. REV.* 989, 990–1007 (1987) (discussing history of press coverage of military operations up to Grenada invasion); David P. Currie, *The Constitution in the Supreme Court: The Second World War, 1941–1946*, 37 *CATH. U. L. REV.* 1, 4–27 (1987) (surveying cases affecting rights of criminally accused); Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 *WM. & MARY BILL RTS. J.* 105, 105–36 (1998) (discussing restraints on free speech during Civil War); *Developments in the Law—The National Security Interest and Civil Liberties*, 85 *HARV. L. REV.* 1130 (1972) [hereinafter *Developments in the Law*] (surveying effects of classification of government documents, surveillance, and emergency powers on civil liberties); Emerson, *Freedom of Expression*, *supra* note 14, at 975 (noting that war creates strains on system of freedom of expression); Stone, *supra* note 17, at 215 (discussing regrettably harsh restrictions on civil liberties during times of national crisis); Note, *The Internal Security Act of 1950*, 51 *COLUM. L. REV.* 606 (1951) (surveying Act and its effects on civil liberties); Rostow, *supra* note 5, at 491 (discussing weakening of basic civil liberties).

<sup>35</sup> Brennan, *supra* note 14, at 2.

<sup>36</sup> Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired 1801).

<sup>37</sup> Act of July 6, 1798, ch. 66, 1 Stat. 577 (current version at 50 U.S.C. §§ 21–24 (2000)).

<sup>38</sup> *Id.*

<sup>39</sup> See David Cole, *Enemy Aliens*, 54 *STAN. L. REV.* 953, 990 (2002) [hereinafter Cole, *Enemy Aliens*] (“The Roosevelt Administration used the Enemy Alien Act during World War II to round up, question, and detain thousands of German, Italian, and Japanese aliens.”); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 *HARV. C.R.-C.L. L. REV.* 1, 15 (2003) [hereinafter Cole, *The New McCarthyism*] (“Presidents invoked the Enemy Alien Act during the War of 1812, World War I, and World War II . . . .”); J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 *N.Y.U. L. REV.* 1402, 1405–24 (1992) (discussing history and application of Enemy Alien Act). In response to the Alien and Sedition Acts, James Madison asserted that “perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.” MORTON H. HALPERIN & DANIEL HOFFMAN, *FREEDOM VS. NATIONAL SECURITY: SECRECY AND SURVEILLANCE*, at ix (1977).

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nation must be able to protect itself in war against utterances which actually cause insubordination.”<sup>40</sup> Prior to America’s entry into World War I, President Woodrow Wilson “predicted a dire fate for civil liberties should we become involved.”<sup>41</sup> With passage of the Espionage Act of 1917<sup>42</sup> and the Sedition Act of 1918,<sup>43</sup> Wilson’s prediction was realized—with Wilson as a prime accomplice. World War II brought yet more repressive measures, most notably executive orders limiting the movement of and providing for the internment of Japanese Americans.<sup>44</sup> The Korean War and the supposed “communist menace”<sup>45</sup> resulted in an “epidemic of witch-hunting, paranoia, and political grandstanding” directed against “reds” across the country.<sup>46</sup> And Vietnam was accompanied by governmental efforts to silence war protests.<sup>47</sup> Thus, in the United States, “[t]he struggle between the needs of national security and political or civil liberties has been a continual one.”<sup>48</sup>

Of course, politicians would have a difficult time enacting and implementing such curtailments on rights and liberties if those measures lacked public support.<sup>49</sup> But that has not been the case during

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<sup>40</sup> LEE EPSTEIN & THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE* 210 (4th ed. 2001) (quoting CHAFEE, *FREE SPEECH*, *supra* note 14, at 266). Earlier during the Civil War, after Major General John Fremont of the Union Army proclaimed that all slaves owned by Confederates in Missouri were free, the *New York Times* noted presciently, “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 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: “Can 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 President Abraham Lincoln to Senator Orville H. Browning (Sept. 22, 1861), in *ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865*, at 268, 269 (Don E. Fehrenbacher ed., 1989).

<sup>41</sup> Carl Brent Swisher, *Civil Liberties in War Time*, 55 *POL. SCI. Q.* 321, 321 (1940).

<sup>42</sup> Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219 (current version at 18 U.S.C. § 2388 (2000)) (prohibiting any attempt to “interfere with the operation or success of the military or naval forces of the United States . . . [,] to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces . . . , or [to] willfully obstruct the recruiting or enlistment service of the United States”).

<sup>43</sup> Act of May 16, 1918, ch. 75, 40 Stat. 553 (prohibiting uttering, printing, writing, or publishing of anything disloyal to government, flag, or military forces of United States) (repealed 1921).

<sup>44</sup> See *Korematsu v. United States*, 323 U.S. 214, 215–17 (1944).

<sup>45</sup> LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 331 (2002).

<sup>46</sup> *Id.* at 331–32.

<sup>47</sup> See LINFIELD, *supra* note 14, at 113–56 (discussing civil liberties infringements accompanying Vietnam War).

<sup>48</sup> *Developments in the Law*, *supra* note 34, at 1133; see also Stone, *supra* note 17, at 242–45 (noting long struggle of weighing national security with individual liberty).

<sup>49</sup> On foreign policy decisions and public opinion, see generally *THE DOMESTIC SOURCES OF AMERICAN FOREIGN POLICY: INSIGHTS AND EVIDENCE* (Eugene R. Wittkopf

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April 2005]

THE SUPREME COURT DURING CRISIS

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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,<sup>50</sup> soars in the face of international crises.<sup>51</sup> This “rally effect”<sup>52</sup> gave Franklin Roosevelt a twelve-point increase after the Japanese attacked Pearl Harbor, John Kennedy a thirteen-point lift during the Cuban Missile Crisis, and George H.W. Bush a fourteen-point boost when Iraq invaded Kuwait.<sup>53</sup> As Figure 1 shows, in the wake of September 11, 2001, George W. Bush’s approval rating jumped a record-setting thirty-five points, from fifty-one percent on September 7 to eighty-six percent on September 14.

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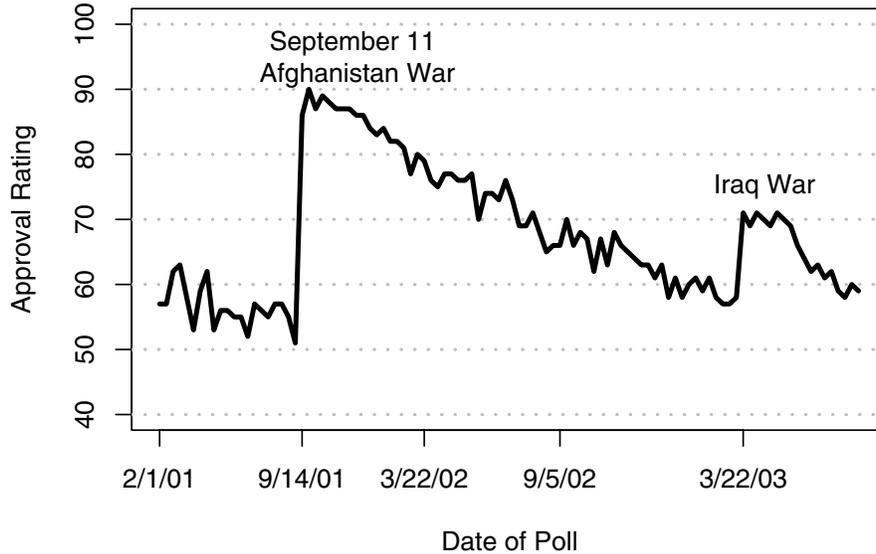
& James M. McCormick eds., 3d ed. 1999), surveying how domestic media, interest groups, and the intelligence community affect U.S. foreign policy; OLE R. HOLSTI, *PUBLIC OPINION AND AMERICAN FOREIGN POLICY* (1996), showing the stability of public opinion towards foreign policy and reactions to external events; and RICHARD SOBEL, *THE IMPACT OF PUBLIC OPINION ON U.S. FOREIGN POLICY SINCE VIETNAM: CONSTRAINING THE COLOSSUS* (2001), arguing that public opinion constrains but does not set U.S. foreign policy.

<sup>50</sup> MURPHY, *supra* note 14, 283 (discussing President Truman’s calls to strengthen national security as Cold War tensions increased). R

<sup>51</sup> So, 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.

<sup>52</sup> See, e.g., RICHARD A. BRODY, *ASSESSING THE PRESIDENT: THE MEDIA, ELITE OPINION, AND PUBLIC SUPPORT* 45–78 (1991); JOHN E. MUELLER, *WAR, PRESIDENTS, AND PUBLIC OPINION* 208–13 (1973); Richard A. Brody, *International Crises: A Rallying Point for the President*, *PUB. OPINION*, Dec.–Jan. 1984, at 41; Samuel Kernell, *Explaining Presidential Popularity*, 72 *AM. POL. SCI. REV.* 506, 509–10, 512–13, 518 (1978); Lee Sigelman & Pamela Johnston Conover, *The Dynamics of Presidential Support During International Conflict Situations: The Iranian Hostage Crisis*, 3 *POL. BEHAV.* 303, 303 (1981).

<sup>53</sup> For more on rally effects, see *infra* note 206. R



**Figure 1:** Percentage of Americans approving of the way George W. Bush is handling his job: The “rally effect” generated by September 11, 2001.<sup>54</sup>

Survey data also reveal a public supportive of specific efforts on the part of political actors to curtail rights and liberties. Consider Americans’ response to September 11.<sup>55</sup> As Table 1 shows, all but one restriction on rights designed to furnish the government with significant authority to combat terrorism—the indefinite detainment of terrorist suspects without charging them—attained the support of a substantial majority of respondents.<sup>56</sup>

<sup>54</sup> Between February 1, 2001, and February 2, 2003, the Gallup Organization fielded eighty-three 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 of respondents approving of his performance. September 14, 2001, is the date of the first Gallup poll fielded after September 11, 2001. The data may be found in David W. Moore, *Bush Approval Rating Remains at 70% Level* (May 1, 2003), at <http://www.gallup.com/poll/content/default.aspx?ci=8308> (last visited Nov. 13, 2004).

<sup>55</sup> Coleman & Sullivan, *supra* note 21, at 5 (“It is equally 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.”).

<sup>56</sup> What we do not know 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, 43 (2004) (emphasis

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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.<sup>57</sup>

*B. The Court's Response to War*

In light of the public opinion data, it should not be a surprise that the U.S. Justice Department undertook many of the activities listed in Table 1,<sup>58</sup> or that Congress passed and the President signed the USA Patriot Act of 2001,<sup>59</sup> which also contains some of these measures. Nor should we be surprised that legislators, with the backing of the President, proposed the Patriot Act in the first instance.<sup>60</sup> Such a

added). 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. See DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 168 (2002) (discussing ethnic profiling).

<sup>57</sup> The survey had 603 total respondents. The question was: "In order to reduce the threat of terrorism in the U.S., 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 National Public Radio/Kaiser Family Foundation/Kennedy School of Government survey conducted from October 31, 2001, to November 12, 2001. The results are available at [http://www.npr.org/programs/specials/poll/civil\\_liberties/civil\\_liberties\\_static\\_results\\_4.html](http://www.npr.org/programs/specials/poll/civil_liberties/civil_liberties_static_results_4.html) (last visited Oct. 30, 2004). Subsequent polls show that Americans, on average, do not believe that the government's war on terrorism is impinging on their liberties. From September 25 to September 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% of respondents deemed the efforts a "major" or "minor" intrusion; 80% said they were "not an intrusion"; 3% had no opinion. ABC News, Telephone Poll, Question 001 (Oct. 1, 2002), WL, Public Opinion Online, Question ID No. USABC.100102 R43.

<sup>58</sup> See, e.g., Dinh, *supra* note 21, at 401-05; see also *infra* Part VII.

<sup>59</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections in numerous titles of U.S.C.).

<sup>60</sup> In the aftermath of September 11, 2001, a large amount of commentary has addressed the efforts of the political branches of government to suppress rights. See generally Diane B. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455 (2003) (examining effects of post-September 11 restraints on liberties on rule of law); Avidan Y. Cover, Note, *A Rule Unfit for All Seasons: Monitoring Attorney-Client Communications*

response to an “emergency” on the part of elected officials is not an anomaly.

In contrast to the President and Congress, the Supreme Court lacks an electoral connection and is supposedly insulated from public pressure. While it can take years for lawsuits connected to conflicts to make their way to the nation’s highest tribunal, does the Supreme Court nevertheless respond *contemporaneously* to crises? The answer to this question falls generally under one of two rubrics: (a) the *Milligan* thesis of the Court as a guardian of immutable rights, leading the Court to *depart* dramatically from the preferences of the public and elected officials; and (b) the crisis thesis, reflecting *Korematsu*, that the Court’s response mirrors that of the citizenry and its leaders.

Proponents of the *Milligan* thesis stress *difference*: While the balance of American society rallies around the flag in times of crisis, the Court takes a more deliberate approach, electing to protect rather than curtail rights and liberties.<sup>61</sup> The justifications for this claim, as we explain in Part II, are constitutional, institutional, and behavioral in nature, but each begins with the design of the federal judiciary as juxtaposed against the political branches of government. Because the justices hold life-tenured positions, they are freer than elected officials to ignore public opinion.<sup>62</sup> 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 influences. The Court would be a force for legal stability. It would decide cases, not on the basis of politics, but according to the *law*<sup>63</sup> and would “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.”<sup>64</sup>

Many prominent legal scholars and jurists, from Geoffrey R. Stone,<sup>65</sup> to George Fletcher,<sup>66</sup> to Justice Abe Fortas,<sup>67</sup> have subscribed

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*Violates Privilege and the Sixth Amendment*, 87 CORNELL L. REV. 1233 (2002) (discussing Bureau of Prisons rule allowing monitoring of inmates’ communications with attorneys); Note, *Patriotic or Unconstitutional: The Mandatory Detention of Aliens Under the USA Patriot Act*, 55 STAN. L. REV. 1419 (2003) (arguing that mandatory detention of aliens violates Due Process Clause).

<sup>61</sup> For supporting work, see *supra* notes 16–17.

<sup>62</sup> We adopt some of the material in this paragraph from LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE* 2 (1992).

<sup>63</sup> This is not to say that constitutional sources for a crisis jurisprudence fail to exist; they, in fact do, as we elaborate in Part II.

<sup>64</sup> THE FEDERALIST NO. 78, at 381 (Alexander Hamilton) (Terence Ball ed., 2003).

<sup>65</sup> Stone, *supra* note 17, at 222–23, 243.

<sup>66</sup> See Fletcher, *supra* note 17, at 26, 29.

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to the *Milligan* thesis of the Court as a guardian of rights in times of war, and not as a suppressor of those very rights. But far more commentators, and just as influential ones at that—including important legal academics, such as Zechariah Chafee Jr.,<sup>68</sup> Thomas I. Emerson,<sup>69</sup> and Sanford Levinson;<sup>70</sup> social scientists, such as Edward Corwin<sup>71</sup> and Joel Grossman;<sup>72</sup> and many federal judges<sup>73</sup>—have advanced the

<sup>67</sup> See FORTAS, *supra* note 16, at 38–39 (pointing to *Taylor v. Mississippi*, 319 U.S. 583 (1943), where “[a]lthough we were in a desperate war against Nazi Germany, the Supreme Court in 1943 reversed the conviction of persons who distributed literature condemning the war and the draft and opposing the flag statute”).

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<sup>68</sup> CHAFEE, *Free Speech*, *supra* note 14, at 97 (“[I]t is extremely ominous for future wars that the Supreme Court at the close of the World War was so careless in its safeguarding of 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.”).

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<sup>69</sup> Emerson, *Freedom of Expression*, *supra* note 14, at 975.

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<sup>70</sup> Levinson, *supra* note 13.

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<sup>71</sup> EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 177 (1947).

[I]n 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 regaining its lost freedom in quieter times.

*Id.*

<sup>72</sup> Grossman, *supra* note 7, at 649 (“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.”).

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<sup>73</sup> See, e.g., Edwards, *supra* note 5, at 844.

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Though it is perhaps the most graphic example of crisis-driven decisionmaking 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 proportions. Its reverberations [echo] for years, in the lives of those directly affected and in the distorted and disjointed development of First Amendment doctrine.

*Id.*

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% of 435 cases involving matters of criminal procedure. With no other justice did Brennan so often disagree; only with Thurgood Marshall (33.6%) did Rehnquist conflict more frequently than he did with Brennan. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 556–65 tbl.6-6 (2003). Yet Rehnquist and Brennan agreed on the existence of crisis jurisprudence. As Rehnquist has written: “[T]here 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. Similarly, Brennan has noted:

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When I think of the progress we have made . . . , I look upon our system of civil liberties with some satisfaction, and a certain pride. There is considerably less to be proud about . . . when one reflects on the shabby treatment civil liberties have received . . . during times of war . . . .

crisis thesis. Whether writing in the early 1900s,<sup>74</sup> the early 2000s,<sup>75</sup> or eras in between,<sup>76</sup> 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, an effect that is widely perceived to be stronger for cases directly related to the war. The Court's response to wars is the same as that of the rest of American society: It too endorses the efforts of elected officials to suppress rights and does *not* "guard" the Constitution.<sup>77</sup>

Chafee, Emerson, Levinson, Corwin, and the others take little issue with the general argument of the crisis thesis, but variation exists over the reach of the thesis and the duration of its effect. Some commentators assert that its reach is 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* 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).<sup>78</sup> Emerson's analysis demonstrates that even if a particular case is not related directly to the ongoing crisis, the effect of that crisis may spill over to an otherwise "ordinary" dispute.<sup>79</sup> Others, however, suggest that the crisis thesis's reach is far more circumscribed. To these commentators, the Court engages in crisis jurisprudence only in especially salient disputes (such as *Korematsu*), in particular classes of cases (such as those raising questions about criminal procedure, or the rights of conscientious objectors, aliens, and war protestors), or in litigation to which the U.S. government is a party.<sup>80</sup> Debate also exists over the duration of the effect of wars and other threats to the nation's security, with one school asserting that the justices suppress

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Brennan, *supra* note 14, at 1.

<sup>74</sup> See, e.g., Chafee, *Speech in War Time*, *supra* note 14 (commenting on restrictions on speech during World War I).

<sup>75</sup> The literature on the courts and civil liberties in the wake of September 11, 2001, is voluminous. See, e.g., sources cited *supra* notes 13, 21.

<sup>76</sup> See, e.g., sources cited *supra* note 14.

<sup>77</sup> See Lewis, *Civil Liberties*, *supra* note 13, at 270 ("Through much of U.S. history, in times of war and tension, the courts have bent to claims of presidential power.").

<sup>78</sup> EMERSON, SYSTEM OF FREEDOM, *supra* note 14, at 55–56; see also Resnik, *supra* note 13.

<sup>79</sup> Or, as Gross, writing about the current war against terrorism, put it, "[W]hen 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 (emphasis added).

<sup>80</sup> See *supra* note 19.

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April 2005]

THE SUPREME COURT DURING CRISIS

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rights only while a war is ongoing, and a second claiming that the curtailments endure and may even grow in intensity over time.<sup>81</sup>

## II

### EXISTING SUPPORT FOR THE CRISIS AND *MILLIGAN* THESES

If the crisis thesis is correct, then we should ask: Why might the Court curtail rights and liberties during times of crisis? Proponents of the thesis offer three general sets of explanations: constitutional, institutional, and behavioral. For each of these explanations, proponents of the *Milligan* thesis offer theoretically parallel counterarguments.

In the first three Sections of this Part, we analyze the three sets of theoretical explanations for the reaction anticipated by the crisis and *Milligan* theses. In Section D, we examine the empirical basis on which these explanations rest. This examination reveals that, even though the vast majority of studies have validated some version of the crisis thesis, empirical support for any one is weak or nonexistent.

#### A. *Constitutional Mechanisms*

Eric Posner and Adrian Vermeule have argued that there are two dominant views about the “proper role of the Constitution” during times of crisis: “The accommodation view is that the 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.”<sup>82</sup>

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 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.<sup>83</sup>

Supporters of the crisis thesis presumably would agree with Posner and Vermeule. To them, as we show 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

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<sup>81</sup> For a review of this debate, see Posner & Vermeule, *supra* note 20, at 610–26.

<sup>82</sup> *Id.* at 606, 608.

<sup>83</sup> Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies 2–3* (n.d.) (manuscript, on file with the *New York University Law Review*).

them to relax constitutional guarantees, such that, in line with the thesis, they often repress rights (or “accommodate” the interests of government) during wartime.

### 1. War Powers

For supporters of the crisis thesis, the war powers of the elected branches of government constitute a starting point for the analysis of the Court’s response to emergencies. These commentators maintain that the Constitution demands judicial deference to the Executive and the legislature during times of international crisis.<sup>84</sup> Such a reading of the war powers doctrine might follow from the Constitution’s explicit grant of emergency powers to the Executive<sup>85</sup> and the legislature<sup>86</sup> and its silence with regard to the judiciary.<sup>87</sup> It also follows, accom-

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<sup>84</sup> See Downs & Kinnunen, *supra* note 12, at 390 (“The 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 liberty and security may properly shift . . . .”); Posner, *supra* note 13, at 46 (describing balancing process of liberty and security interests); Justice Stephen G. Breyer, Liberty, Security, and the Courts, Speech to the Association of the Bar of the City of New York (Apr. 14, 2003) (noting that liberty interests must be balanced with government responses to threats and crises) (transcript available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_04-15-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_04-15-03.html)).

<sup>85</sup> Specifically, 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,” *id.* art. II, § 2, cl. 1, and that the President shall “take Care that the Laws be faithfully executed,” *id.* art. II, § 3.

<sup>86</sup> See, e.g., *id.* art. I, § 8, cl. 1 (granting Congress power to “provide for the common Defence”); *id.* art. I, § 8, cl. 10 (granting Congress power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”); *id.* art. I, § 8, cl. 11 (granting Congress power to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”); *id.* art. I, § 8, cl. 12 (granting Congress power to “raise and support Armies”); *id.* art. I, § 8, cl. 13 (granting Congress power to “provide and maintain a Navy”); *id.* art. I, § 8, cl. 14 (granting Congress power to “make Rules for the Government and Regulation of the land and naval Forces”); *id.* art. I, § 8, cl. 15 (granting Congress power to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”); *id.* art. I, § 8, cl. 18 (granting Congress 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”); *id.* art. I, § 9, cl. 2 (granting Congress power to suspend writ of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it”).

<sup>87</sup> See, for example, *Hirabayashi v. United States*, 320 U.S. 81 (1943), in which the Court held:

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

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modationists assert, from the fact that the elected branches, not the courts, are best equipped to cope with the emergency at hand. If the Court failed to recognize this fact, if it failed to treat the Constitution as a flexible document<sup>88</sup>—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,” a notion the justices have rejected on more than one occasion.<sup>89</sup>

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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.

*Id.* at 93 (citations omitted); 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.”).

<sup>88</sup> This notion of a flexible Constitution may be traced back to Justice John Marshall’s observation that “it is a constitution we are expounding,” and it is “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) (emphasis omitted); see also BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 81, 85–86 (1921) (discussing “fluid and dynamic conception which underlies the modern notion of liberty” and noting case of *American Coal Mining Co. v. Special Coal & Food Commission*, 268 F. 563 (D. Ind. 1920), for finding that regulatory power can be derived from emergency of war); STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM* 27–58 (1996) (discussing notions of constitutional change and endorsing definition of 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.* 1029, 1045 (1977))); PAUL W. KAHN, *LEGITIMACY AND HISTORY* 65–96 (1992) (discussing reaction of constitutional theory to curtailments of rights during Civil War and shift towards evolutionary model of Constitution); Tushnet, *supra* note 13, at 281–82 (distinguishing between balancing and categorical approaches towards interpreting civil liberties); Breyer, *supra* note 84 (noting that jurisprudence in times of crisis is characterized by “equilibrium that is right in principle” and “will yield flexibility in practice”).

<sup>89</sup> *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.” *Hirabayashi*, 320 U.S. at 93 (citation omitted). Griffin makes the same point:

The 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.

GRIFFIN, *supra* note 88, at 60. The Court has echoed this sentiment with respect to military tribunals:

An 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.

*Ex parte Quirin*, 317 U.S. 1, 28–29 (1942). On broad forms of general regulation, see *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 141–42 (1948), finding that the war power extended to a wide range of economic regulation and sustaining the war power as applied to a rental regulation. Consider also President Lincoln’s famous words: “Must a govern-

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Adherents of the guardian view of the Constitution bring an entirely different perspective to this line of cases, emphasizing the role the Court has played in *allocating* war powers under the constitutional separation of powers, rather than simply *deferring* to the government.<sup>90</sup> In support, they point to *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>91</sup> in which the Court considered the constitutionality of President Truman's seizure of the steel mills—an action he took during the Korean War to avert a nation-wide strike of steel workers. Truman claimed that both the inherent constitutional powers of the Executive and those incident to the President's role as Commander-in-Chief justified the seizure,<sup>92</sup> explicitly asserting that the strike would “jeopardize our national defense.”<sup>93</sup> Yet, quite to the contrary of exhibiting deference to the assertion of military power, the Court found the seizure unconstitutional under either theory, asserting that it constituted an act of law-making power vested in “Congress alone in *both good and bad times*.”<sup>94</sup>

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.”<sup>95</sup> Supporters of the guardian view of the Constitution are

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ment, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?” Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1809–1865, at 421, 426 (Roy P. Basler ed., 1953) (emphasis omitted).

<sup>90</sup> See, e.g., *Reid v. Covert*, 354 U.S. 1, 40 (1957) (“We should not break faith with this Nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution.”).

<sup>91</sup> 343 U.S. 579 (1952).

<sup>92</sup> *Id.* at 587.

<sup>93</sup> *Id.* at 583. The connection between steel production, national defense, and the ongoing Korean War are spelled out more explicitly in the preamble of Truman's Executive Order. See Exec. Order No. 10,233, 3 C.F.R. 425 (1951) (authorizing Secretary of Commerce to seize steel plants).

<sup>94</sup> *Youngstown*, 343 U.S. 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 (Douglas, J., concurring).

<sup>95</sup> *Id.* at 637 (Jackson, J., concurring). 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 635, 637; (b) “[w]hen the President acts in absence of either a congressional grant or denial of authority” then “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” and “Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution,” *id.* at 637–38.

quick to note that when the Court undertakes this duty, the crisis thesis's prediction 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 crisis is to ensure that the government's use of its war powers follows constitutional principles.

In response, proponents of the crisis thesis claim that *Youngstown* is an exception to a long string of cases in which the Court has deferred to the President. Some cases, such as *Korematsu*, pertain directly to the war effort, but others have extended into the larger realm of foreign affairs.<sup>96</sup> For example, in *United States v. Curtiss-Wright Export Corp.*,<sup>97</sup> the Court upheld President Roosevelt's arms ban, stressing the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."<sup>98</sup> Since the conduct of warfare falls within this field, supporters of the crisis thesis argue that the Court should be willing to endorse repressive governmental action during times of war on the grounds that such actions are within the Executive's "plenary and exclusive power."<sup>99</sup> The justices could achieve this end by laying out a rationale, as they did in *Curtiss-Wright*, or by invoking the polit-

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<sup>96</sup> See THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 58 (1992) ("[T]he midst of military hostilities [is] the one circumstance in which some form of judicial reticence might seem warranted."). See generally MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990) (arguing for role of constitutionalism in foreign policy); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* (1990) (arguing for more judicial intervention in foreign affairs); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972) (delineating role of Constitution in U.S. foreign relations); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* (1990) (arguing that Iran-Contra was failure of unchecked executive power and arguing for balanced institutional participation between executive, legislative, and judiciary in foreign affairs).

<sup>97</sup> 299 U.S. 304 (1936).

<sup>98</sup> *Id.* at 320.

<sup>99</sup> Strict-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:

"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*, 66 *FOREIGN AFF.* 284, 285 (1987) (alterations in original) (quoting *Youngstown*, 343 U.S. at 637). 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 branch or legislature.

ical question doctrine.<sup>100</sup> 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” leads it to general deference to the President.<sup>101</sup>

## 2. *Civil Rights and Liberties*

In addition to the war powers doctrine, accommodationists argue that the Court’s approach to civil rights and liberties during periods of war contributes to a crisis jurisprudence. Accommodationists note that the Constitution explicitly allows Congress to suspend the writ of habeas corpus in time of invasion or rebellion when “the public Safety shall require it,”<sup>102</sup> and the concern for public safety arises in a time of war. But some analysts say that even when the writ is not at issue, 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 rights and liberties. First, the justices might “defer to emergency policy once they determine that an emergency exists.”<sup>103</sup> In other words, the government would need not justify its policy with reference to any interest, compelling or otherwise. Second, the justices may invoke one of many standards of review to test the constitutionality of security measures. In such a case, the presence of a crisis would make the standard easier to meet. Take, for example, the case of equal protection. In *Korematsu*, the Court justified curtailments based on racial classifications as a “[p]ressing public necessity” of the military power to prevent espionage and sabotage.<sup>104</sup> Under modern equal protection doctrine, it could do much the same by deeming “national security” an interest sufficiently compelling to justify discrimination against “enemy” groups.

<sup>100</sup> On the political question doctrine, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 365–85 (3d ed. 2000).

<sup>101</sup> *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.

<sup>102</sup> The 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 “Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it”); see also Tushnet, *supra* note 13, at 301.

<sup>103</sup> Posner & Vermeule, *supra* note 20, at 606–07.

<sup>104</sup> 323 U.S. 214, 216 (1944).

Equal protection is not 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 well shift during times of perceived threats,<sup>105</sup> as could the definition of a “clear and present danger” in First Amendment litigation.<sup>106</sup> 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 outcomes of litigation involving rights and liberties hinge on the presence of such a crisis. At the least, many justices have admitted the limitations of constitutional safeguards when the security of the nation is at risk.<sup>107</sup>

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 lower nor greater during wartime than during periods of peace. But even relaxing the strict view, as may be the case when the justices force the government to supply a compelling justification for its policy, would not lead to the near-certain deference the crisis thesis anticipates. Quite the opposite: In light of the uphill battle the government faces in order to supply a sufficiently compelling reason to justify restrictions on fundamental liberties, the justices almost always strike them down.<sup>108</sup>

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<sup>105</sup> Justice Breyer, in fact, has focused on the shifting interpretation of “reasonableness” in times of crisis. See *This Week with George Stephanopolous* (ABC television broadcast, July 6, 2003) (transcript available at [http://www.transcripts.tv/search/do\\_details.cfm?ShowDetailID=20454](http://www.transcripts.tv/search/do_details.cfm?ShowDetailID=20454)).

<sup>106</sup> This 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 that 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).

<sup>107</sup> See *id.*; see also *Korematsu*, 323 U.S. at 216 (“[A]ll 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 . . .”). For another case that demonstrates more attenuated reasoning, see *Minersville School District v. Gobotis*, 310 U.S. 586, 595 (1940), ruling that a mandatory flag salute was constitutional. *But see* *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640–42 (1943) (overruling *Gobotis* because it overemphasized national unity).

<sup>108</sup> See Posner & Vermeule, *supra* note 20, at 608–09.

The response from the opposing camp is that the strict approach is primarily normative in nature and fails to capture the realities of Court decisionmaking.<sup>109</sup> Very few justices, they say, have analyzed the Constitution exclusively (or even nearly so) through a literalist lens, and even those who have invoked this approach made exceptions in the case of war or other threats to national security. Hugo Black's opinion for the Court in *Korematsu* is a prime example.<sup>110</sup> Moreover, as *Korematsu* also may illustrate, even when the Court requires the government to supply a compelling justification for its policies, the government is not the automatic loser that some proponents of the "strict" account make it out to be.<sup>111</sup>

It thus remains 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. Each side has a compelling theoretical argument, but neither has the empirical data to end the debate.

### B. Institutional Mechanisms

In addition to constitutional mechanisms, various institutional mechanisms—especially the Court's need for legitimacy and the role of stare decisis in fulfilling that need—might explain the Court's response to crises. Again, these explanations could cut both ways, and proponents of the crisis thesis rely on the rejoinder that competing views work largely in theory and not in fact. We now 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 assert that the Court builds and maintains its legitimacy by protecting the rights and liberties that the government attempts to usurp.<sup>112</sup> It is this view of the Court, they aver, that best reflects the basic institutional design of the judiciary and, furthermore, that per-

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<sup>109</sup> See Posner & Vermeule, *supra* note 83, at 3.

<sup>110</sup> See, e.g., EPSTEIN & WALKER, *supra* note 40, at 24–25 (“Hugo Black is most closely associated with [literalism]. During his thirty-four-year tenure on the Court, Justice Black reiterated the literalist philosophy.”).

<sup>111</sup> See *supra* note 107.

<sup>112</sup> See, e.g., FORTAS, *supra* note 16, 35–44 (describing model where “courts have the ultimate responsibility of striking the balance between the state’s right to protect itself and its citizens and the individual’s right to protest, dissent, and oppose”); Barak, *supra* note 16, at 149 (discussing judges’ responsibility during war time).

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April 2005]

THE SUPREME COURT DURING CRISIS

29

meates decision after decision, with *Milligan* but one among many prominent examples.<sup>113</sup>

Because the Court, on this account, remains a force for rights and liberties when society “is disturbed by civil commotion,”<sup>114</sup> it not only protects rights, it also plays the role of “republican schoolmaster” during times of war,<sup>115</sup> educating the public and its leaders about the importance of preserving rights and liberties. Over time, these lessons accumulate to the point where they trigger a “generally ameliorative trend,”<sup>116</sup> or what some call a “libertarian ratchet,”<sup>117</sup> wherein the government learns from its past attempts to suppress rights.<sup>118</sup> As Jack Goldsmith and Cass R. Sunstein explain: “[C]ompared to past wars led by Lincoln, Wilson, and Roosevelt, the Bush administration has, thus far, diminished relatively few civil liberties. Even a conservative executive branch, it seems, is influenced by the general trend towards civil liberty protections during wartime.”<sup>119</sup>

To supporters of the guardian view, the Court does not generate suppressive doctrine during times of war. Indeed, doing so would undermine 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.

<sup>113</sup> For other examples, see FORTAS, *supra* note 16, at 35–44, citing Vietnam War– and World War II–era incidents, as well as the protection of Communist speech rights; and Stone, *supra* note 17, at 243–44, discussing cases during World War II.

<sup>114</sup> *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 124 (1866).

<sup>115</sup> As Franklin and Kosaki explain, “The conception of the Court as republican schoolmaster generally reflects the notion that the Court, through its explication of the law and its high moral standing, may give the populace an example of the way good republicans should behave.” Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 752 (1989). Some suggest that the justices themselves cultivated this role. See, e.g., Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127, 177–80. And there is some evidence that they have succeeded. See, e.g., Valerie J. Hoekstra & Jeffrey A. Segal, *The Shepherding of Local Public Opinion: The Supreme Court and Lamb’s Chapel*, 58 J. POL. 1079, 1079, 1096–97 (1996) (demonstrating that Court can affect public opinion when information is high but salience is low).

<sup>116</sup> REHNQUIST, *supra* note 7, at 221.

<sup>117</sup> See Posner & Vermeule, *supra* note 20, at 622–25; see also Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 285 (2002) (describing ratchet effect favoring “more expansive civil liberties during wartime”).

<sup>118</sup> See, e.g., Tushnet, *supra* note 13, at 294–95 (proposing social learning hypothesis that “[t]he threat to civil liberties posed by government actions has diminished in successive wartime emergencies”).

<sup>119</sup> Goldsmith & Sunstein, *supra* note 117, at 288.

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2. *Ratchets and Dosages*

For proponents of the crisis thesis, libertarian ratchets, as well as the more general view that the institutional design of the judiciary frees it to stand above the political fray and protect rights and liberties in wartime, are more theoretical concepts than practical ideas. To these commentators, the justices understand that, irrespective of their lack of a direct electoral connection, they must bend to the preferences of members of Congress, the President, or public opinion<sup>120</sup>—and, accordingly, suppress rights and liberties during crises even if suppression is not their sincere desire.<sup>121</sup> Should the Court fail to accommodate these other actors, it likely would 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 justices.<sup>122</sup> These responses would make it more difficult for the Court to achieve its short-term policy or jurisprudential goals and would erode the judiciary’s *legitimacy* in the long run.<sup>123</sup> 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

<sup>120</sup> For a recent statement on public opinion and the Supreme Court, see Jeffrey Rosen, *How to Reignite the Culture Wars*, N.Y. TIMES, Sept. 7, 2003, Magazine at 48, 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 Helmut Norpoth et al., *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711 (1994) (debating Mishler and Sheehan’s claim that public opinion directly influences Supreme Court).

<sup>121</sup> See, e.g., Dorsen, *supra* note 14, at 844 (noting 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 (“[C]ourts may well succumb to the understandable pressure to rationalize the inevitable with the constitution; judges . . . 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.”).

<sup>122</sup> See, e.g., GRIFFIN, *supra* note 88, at 45 (“If 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 et al., *The Supreme Court as a Strategic National Policy Maker*, 50 EMORY L.J. 583, 584–85 (2001) (describing institutional constraints to strategic Court); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 376–78 (1992) (discussing ways Congress can strike at Court).

<sup>123</sup> On legitimacy and constitutional theory, see generally KAHN, *supra* note 88, surveying the difficulty of resolving self-government within a constitutional framework. See also 1 LOUIS FISHER, *AMERICAN CONSTITUTIONAL LAW: CONSTITUTIONAL STRUCTURES* 69–82 (2d ed. 1995) (discussing constraints on judicial review).

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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?<sup>124</sup>

Grossman suggests that the Justices in *Korematsu* were forced to consider President Roosevelt's response to an adverse decision. Apparently, though, pressure from the same administration in the Nazi saboteur case, *Ex parte Quirin*,<sup>125</sup> avoided any need for Court members to cull subtle and not-so-subtle historical signals.<sup>126</sup> According to Turley:

[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 FDR intended to have all eight men shot if the Court did not acknowledge [his] authority, warning that they had to avoid such a "dreadful" confrontation.<sup>127</sup>

In a similar vein, President George W. Bush's Justice Department leveled threats against appellate courts it believed to have contravened anti-terrorism measures passed in the wake of September 11. For example, after the Fourth Circuit ruled that Zacarias Moussaoui, the defendant facing trial for the September 11 attacks, should be allowed to interview a captured Al Qaeda member as a potential wit-

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<sup>124</sup> Grossman, *supra* note 7, at 682.

<sup>125</sup> 317 U.S. 1 (1942).

<sup>126</sup> On 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 the 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 leges silent* . . . is not true today. . . . [L]iberties are safe, even in a state of total global war. Nothing could more clearly prove that the Constitution stands than yesterday's 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 Governs*, WALL ST. J., July 30, 1942, at 6. Similarly, Arthur Krock noted in the *New York Times* that the Supreme Court's decision to intervene in *Quirin* "will brighten the American history of a time when Cicero's 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 peace." Arthur Krock, *The Issues of Law and Fact in Sabotage Case*, N.Y. TIMES, July 30, 1942, at A20; see also Raymond Moley, *Congress Alone Can Now Prevent an Alarming and Dangerous Breach in the Constitution*, WALL ST. J., Sept. 11, 1942, at 6 ("[L]et's omit such generalities as Cicero's 'inter arma silent leges.' For laws are not silent in war—not in the United States at any rate.").

<sup>127</sup> Jonathan Turley, *Quirin Revisited: The Dark History of a Military Tribunal*, NAT'L L.J., Oct. 28, 2002, at A17, available at <http://www.nlj.com/oped/102802turley.shtml>.

ness to his case,<sup>128</sup> the Justice Department defied the order in the name of national security. It also threatened to move the prosecution to a military tribunal.<sup>129</sup>

What these stories suggest is that when the political branches credibly threaten to circumvent or ignore disliked outcomes, the Supreme Court is well advised to exercise “passive virtues.”<sup>130</sup> Rather than squandering its resources on “ineffective judgments,”<sup>131</sup> the Court assumes a more deferential stance in these circumstances. Institutional legitimacy thereby may become an implicit decision calculus that leads justices to issue decidedly different opinions during times of war.<sup>132</sup>

In addition, 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 over time, 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.<sup>133</sup>

From this logic, advocates of the crisis thesis assert that one of two possibilities relating to precedent established during wartime results: (a) “statist ratchets,” sometimes termed “lingering effects,”<sup>134</sup> or (b) “dosages.”<sup>135</sup> The first seems to follow from Justice Jackson’s dissent in *Korematsu*, which warns that:

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<sup>128</sup> *United States v. Moussaoui*, 333 F.3d 509, 513–14 (4th Cir. 2003).

<sup>129</sup> See Philip Shenon, *U.S. Will Defy Court’s Order in Terror Case*, N.Y. TIMES, July 15, 2003, at A1.

<sup>130</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111, 112–98 (2d ed. 1986).

<sup>131</sup> Conference, *The Proper Role of the United States Supreme Court in Civil Liberties Cases*, 10 WAYNE L. REV. 457, 477 (1964).

<sup>132</sup> See, e.g., ROSSITER, *supra* note 14, at 1–10.

<sup>133</sup> See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 163–77 (1998); Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1021–22 (1996).

<sup>134</sup> Posner & Vermeule, *supra* note 20, at 612; see also JOHN E. FINN, *CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW* 54 (1991) (“Desperate measures have a way of enduring beyond the life of the situations that give rise to them.”).

<sup>135</sup> See Gross, *supra* note 4, at 1090–92 (discussing how each crisis may be accompanied by increasing dosages of emergency measures); cf. Cole, *The New McCarthyism*, *supra*

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April 2005]

THE SUPREME COURT DURING CRISIS

33

[O]nce a judicial opinion rationalizes [a government] order 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.<sup>136</sup>

In other words, once justices articulate doctrine “accommodating” the crisis, that doctrine “become[s] entrenched over time and thus normalized and made routine.”<sup>137</sup> 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 its 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. Or, as Gross puts it:

What 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 . . . .<sup>138</sup>

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.

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.<sup>139</sup> When President Wilson predicted a “dire fate” for civil liber-

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note 39, at 2 (“A historical comparison reveals not so much a *repudiation* as an *evolution* of political repression.”).

<sup>136</sup> *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

<sup>137</sup> Gross, *supra* note 4, at 1090.

<sup>138</sup> *Id.* at 1091.

<sup>139</sup> THE FEDERALIST NO. 78, at 378 (Alexander Hamilton) (Terrence Ball ed., 2003).

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ties on the eve of World War I, he also anticipated that “[t]he spirit of ruthless brutality would enter into the very fiber of national life, infecting Congress, the courts, administrative officers and the people at large. Freedom of speech and the press would go in spite of protective constitutional provisions.”<sup>140</sup> Franklin D. Roosevelt also seemed unconcerned 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.”<sup>141</sup> Even today, while George W. Bush may be sufficiently mistrustful of the nation’s courts to order that noncitizens suspected of terrorism appear before military tribunals,<sup>142</sup> he has expressed little doubt that federal judges will support the war on terrorism.

The institutional version of the crisis thesis supports President Bush in his beliefs about the judiciary. At the same time, the views of President Bush demonstrate why crisis-thesis detractors emphasize the institutional importance of judicial vigilance.<sup>143</sup> Each side thus has a strong theoretical argument, and in Part V we will demonstrate which has the stronger factual case.

### C. Rallying Round the Flag

The final mechanism used to explain crisis jurisprudence stresses the behavioral response of justices 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 because the justices believe that during times of crisis they must exercise an especially watchful care over rights and liberties.<sup>144</sup> Supreme Court Justice Abe Fortas expressed this view when he proclaimed, “It is the courts—the independent judiciary—which have, time and again, rebuked the legislatures and executive authorities when, under the

<sup>140</sup> Swisher, *supra* note 41, at 321 (citation omitted).

<sup>141</sup> REHNQUIST, *supra* note 7, at 224.

<sup>142</sup> See Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001), *reprinted in* 10 U.S.C.A. § 801 (West Supp. 2004).

<sup>143</sup> *But see* SHEFFER, *supra* note 7, at 170–75 (discussing Congress); Dorsen, *supra* note 14, at 840, 848–50 (suggesting that federal legislature might be in better position than judiciary to curb presidential efforts to repress rights); Levinson, *supra* note 13 (“If we cannot look to the Court to protect our civil liberties in the coming years, we can at least ask Congress to do so.”); *see also* CHAFEE, FREE SPEECH, *supra* note 14, at 139 (“Congress alone can effectively safeguard minority opinion in times of excitement.”).

<sup>144</sup> See Barak, *supra* note 16, at 149 (“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 . . . I must take human rights seriously during times of both peace and conflict.”).

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stress of war, emergency, or fear of . . . revolution, they have sought to suppress the rights of dissenters.”<sup>145</sup>

Adherents of the crisis thesis, however, deem these the views of a few isolated judges who recount an idealized story about courts rather than one that reveals realities of the bench.<sup>146</sup> Those realities shore up the existence of a behavioral mechanism, but one very different from that which Fortas describes: 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 rights. On this mechanism, it is entirely possible 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 a national emergency. Grossman again suggests as much: “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.”<sup>147</sup> 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.”<sup>148</sup> Whatever they deem it, though, the overall message is the same: In times of urgency, a justice’s underlying preferences toward rights and liberties move to the right, resulting in behavior that falls well in line with the crisis thesis.

D. Existing Empirical Support

Those advocating a guardian view of the Constitution would take issue with this behavioral prediction,<sup>149</sup> just as they have critiqued the constitutional and institutional mechanisms that may lead to a crisis jurisprudence. Even those advancing the idea of a crisis jurisprudence would find fault with various features of the three explanations we have just reviewed. An obvious one centers on the mixed expectations the explanations establish with regard to the reach and duration of the crisis thesis—issues of considerable debate, as we mentioned earlier, even among those who adhere to the thesis. For example, if justices become super-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, seem to

<sup>145</sup> FORTAS, *supra* note 16, at 38.

<sup>146</sup> See *infra* text accompanying notes 155–57.

<sup>147</sup> Grossman, *supra* note 7, at 672–73.

<sup>148</sup> GROSS, *supra* note 26, at 491 (quotation marks omitted); see also CLINTON ROSSITER & RICHARD P. LONGAKER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 91 (expanded ed. 1976).

<sup>149</sup> See *supra* note 16.

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suggest quite a different expectation: that curtailments of rights would continue well after the duration of the crisis. Similar 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.

Yet, even with these various problems, the crisis thesis is sufficiently convincing to the vast majority of members of the legal community that one version or another has made its way into judicial opinions<sup>150</sup> and off-the-bench writings of Court members.<sup>151</sup> It even supplies a framework around which constitutional law casebooks organize their discussions of rights and liberties.<sup>152</sup>

But what is the empirical basis underlying this support for the idea that the Court rallies around the flag in times of war? Scores of studies have examined the crisis thesis, with many concluding in favor of some version of it.<sup>153</sup> In fact, in deflecting various challenges to the thesis, as we noted throughout Parts III.A–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.”<sup>154</sup>

On the other hand, empirical support for the crisis thesis in any one study is flimsy. It consists not of systematically derived data and carefully designed and executed analyses, but rather of anecdotal evidence from a handful of highly selected Court decisions.

In an effort to show that Court members get 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;<sup>155</sup> of some who were “active proponent[s] of [governmental] war policies;”<sup>156</sup> and of others who chastised colleagues inclined to support individual liberties, rights, or justice

<sup>150</sup> See, e.g., *Skinner v. Ry. Labor Executives Ass’n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting) (“History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.”).

<sup>151</sup> See REHNQUIST, *supra* note 7, at 224–25 (noting validity of version of *inter arma silent leges*); Brennan, *supra* note 14, at 1 (noting “shabby treatment” of civil liberties during war).

<sup>152</sup> See, e.g., WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* (11th ed. 2001); WILLIAM COHEN & DAVID J. DANIELSKI, *CONSTITUTIONAL LAW: CIVIL LIBERTY AND INDIVIDUAL RIGHTS* (4th ed. 1997).

<sup>153</sup> See sources cited *supra* notes 13–14.

<sup>154</sup> Posner & Vermeule, *supra* note 83, at 3.

<sup>155</sup> Grossman, *supra* note 7, at 672.

<sup>156</sup> Rabban, *supra* note 14, at 1331.

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April 2005]

THE SUPREME COURT DURING CRISIS

37

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 a thing to do with legal arguments and should not have been said in this Court. It is a very unpatriotic statement to make."<sup>157</sup>

The strength of the second form of evidence, the jurisprudential analysis of a handful of selected Court cases, is more *apparent* than *real*.<sup>158</sup> 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.<sup>159</sup> 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."<sup>160</sup> In other instances, the investigator matches cases decided before and after the crisis to explore differences in the Court's jurisprudence.<sup>161</sup> For those advancing the crisis thesis, those pairings typically involve four cases that fit the thesis well: *Ex parte Quirin*<sup>162</sup> and *Korematsu v. United States*<sup>163</sup> on the one side (both decided during crises and both repressive of rights),<sup>164</sup> and *Ex parte Milligan*<sup>165</sup> and *Duncan v. Kahanamoku*<sup>166</sup> on the other (both decided after the crisis subsided

<sup>157</sup> EPSTEIN & WALKER, *supra* note 40, at 210.

<sup>158</sup> See generally REHNQUIST, *supra* note 7 (conducting historical review of select cases involving civil liberties during wartime); Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65 (1998) (comparing Warren Court's general liberalism with less activist approach to Vietnam-related cases); Chafee, *Speech in War Time*, *supra* note 14, at 960-71 (analyzing string of lower court and Supreme Court decisions in connection with Espionage Act of 1917); Dorsen, *supra* note 14 (conducting historical review of select cases involving civil liberties during wartime); Emerson, *Freedom of Expression*, *supra* note 14 (discussing periods of history marked by serious infringements on freedom of expression as result of war); *Developments in the Law*, *supra* note 34 (discussing judicial checks on use of speech restrictions, executive secrecy, government surveillance, and emergency powers); Swisher, *supra* note 41 (providing survey of civil liberty restrictions during World War I).

<sup>159</sup> Garvin, *supra* note 14, at 693-706.

<sup>160</sup> *Id.* at 706.

<sup>161</sup> See, e.g., Currie, *supra* note 34, at 37.

<sup>162</sup> 317 U.S. 1 (1942).

<sup>163</sup> 323 U.S. 214 (1944).

<sup>164</sup> See, e.g., Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 61 (1980) (noting that Supreme Court justices "enlisted in the national military effort, embracing attitudes which would render constitutionally guaranteed civil liberties vulnerable").

<sup>165</sup> 71 U.S. (4 Wall.) 2 (1866).

<sup>166</sup> 327 U.S. 304 (1946).

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and both supportive of rights). Chief Justice Rehnquist's analysis of civil liberties in wartime provides an example:

[T]he 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.<sup>167</sup>

Focusing research and analysis on *Quirin*, *Korematsu*, and *Milligan* may seem sensible: They are landmark rulings of acute historical, legal, and cultural importance. It is also true, as Garvin<sup>168</sup> and Rehnquist<sup>169</sup> explain, that analyses of particular cases can be useful vehicles for developing more general explanations of phenomena—here, of the effect of crises on Court decisions. At the same time, though, the ability to draw reliable inferences from a handful of randomly selected cases hinges on whether researchers have conducted their analyses in accord with a set of the rules of inference.<sup>170</sup>

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, we do not know if the authors of the research avoid the inadvertent introduction of selection bias. We thus have no information 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 aberration in the history of Supreme Court decisionmaking? Without systematic evidence about the rules of selection, this question remains unanswered and the veracity of the research remains unknown. More to the point, it is possible—as our discussion of constitutional mechanisms foreshadowed—that the disagreement over the empirical validity of the crisis thesis stems from the distinct cases that proponents and detractors choose to support their claims.

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<sup>167</sup> REHNQUIST, *supra* note 7, at 224.

<sup>168</sup> Garvin, *supra* note 14, at 706.

<sup>169</sup> REHNQUIST, *supra* note 7, at 224.

<sup>170</sup> GARY KING ET AL., DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 49–50 (1994) (showing how principles of valid research design apply equally to qualitative as well as quantitative research). See generally Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002) (delineating rules for drawing accurate inferences in empirical legal scholarship).

To understand the severity of potential bias, consider the views of Chief Justice Rehnquist, who finds the crisis thesis to be descriptively valid,<sup>171</sup> and of Justice Fortas, who espouses the contrary view of the Court as a guardian of rights.<sup>172</sup> Chief Justice Rehnquist focuses primarily on landmark cases decided during the Civil War, and World Wars I and II. 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.<sup>173</sup> 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.<sup>174</sup> Perhaps these diametrically opposed conclusions about Court behavior may be reconciled 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.<sup>175</sup>

This is not the only area into which selection bias creeps. Another comes in the way that commentators define—or more pointedly, do not define—a “crisis.” Without being explicit about what constitutes a crisis, 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 Co. v. Sawyer*,<sup>176</sup> whereas proponents simply discount the Korean War (from which *Youngstown* flows) as falling under the rubric of a “crisis.”

Perhaps the worst form of this bias would manifest itself if the justices invoked jurisprudential doctrines of emergency power only when they decided *ex ante* to rule against a rights claim. In that situation, a jurisprudential analysis is susceptible to being endogenous,<sup>177</sup> and the inference of a crisis effect could be spurious. This would be akin to studying the effectiveness of a drug by selecting only individuals who promoted the drug treatment to their friends. We may find

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<sup>171</sup> REHNQUIST, *supra* note 7, at 224.

<sup>172</sup> FORTAS, *supra* note 16, at 38 (“It is the courts—the independent judiciary—which have, time and time again, rebuked the legislatures and executive authorities when, under the stress of war, emergency, or fear of Communism or revolution, they have sought to suppress the rights of dissidents.”).

<sup>173</sup> REHNQUIST, *supra* note 7, at 225.

<sup>174</sup> See FORTAS, *supra* note 16, at 39 (“Time and again, the Court has rebuked and rejected efforts to deprive people of their jobs in state and federal governments for their mere beliefs or mere membership in unpopular or even essentially subversive groups.”).

<sup>175</sup> For more on this point, see *infra* Part III.C.2.

<sup>176</sup> 343 U.S. 579 (1952).

<sup>177</sup> On endogeneity, see WOOLDRIDGE, *supra* note 25, at 50–51.

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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 only invoke the crisis thesis to curtail rights, we can learn little about the crisis thesis in general by examining only those particular cases.

Selection bias constitutes one violation of the rules of inference. Another occurs in those studies 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 seek to make causal claims (e.g., a war *causes* the 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.<sup>178</sup> For example, if politics plays a role in explaining Supreme Court decisions, then failure to attend to the Court's changing ideological and political composition could lead to an incorrect assessment of the true jurisprudential effect of wars.<sup>179</sup> Seen in this way, scholars asserting that *Korematsu* was an aberration and that more typically the Court safeguards rights during wartime ought to 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 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

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<sup>178</sup> KING ET AL., *supra* note 170, at 168–74; Epstein & King, *supra* note 170, at 76–80. Omitted variable bias occurs when the estimation technique excludes variables that (a) affect the outcome and (b) are 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 that  $E(Y) = X_1\beta_1 + X_2\beta_2$ . Our estimate of the effect of war on the outcome, when excluding  $X_2$ , would be  $E(b1) = \beta_1 + \phi\beta_2$ , where  $\phi$  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.,  $\phi = 0$ ).

<sup>179</sup> Political scientists and legal academics have long documented the effect of the political preferences of the justices on the decisions they reach. For recent examples, see Lee Epstein et al., *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L.J. 783 (2003); and Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004). See also *infra* Part III.C.2.

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 times of war and peace. This is akin to studying the causal effect of smoking on cancer by examining only smokers. An appropriate investigation requires a control group.<sup>180</sup>

Commentators focus on landmark cases because they are the cases of interest. So, for instance, because President George W. Bush invoked *Ex parte Quirin* and a handful of other decisions<sup>181</sup> to justify his order establishing military commissions,<sup>182</sup> 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, we have no understanding of the magnitude of the impact of war (in other words, we cannot assess the relative accuracy of the crisis thesis); nor can we examine whether the landmark disputes are the result of factors unrelated to the crisis at hand, such as the political ideology of the justices, the relative salience of the dispute, or even the resolution reached in the lower courts—factors that many scholars suggest affect Court decisionmaking.

### III

#### IDENTIFYING THE CRISES, CASES, AND CONFOUNDING FACTORS

Judged on the basis of its supporting evidence and credible challenges to its validity, the crisis thesis falls short of being a well-supported theory about the Court's role in wartime. It is rather a hypothesis 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

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<sup>180</sup> On the fundamental notion of the counterfactual in assessing causal inferences, see Michael E. Sobel, *Causal Inference in the Social and Behavioral Sciences*, in *HANDBOOK OF STATISTICAL MODELING FOR THE SOCIAL AND BEHAVIORAL SCIENCES 1* (Gerhard Arminger et al. eds., 1995); and 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*, 152 *U. PENN. L. REV.* 1517 (2004) (discussing counterfactual inference in context of single observation).

<sup>181</sup> See A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 *WIS. L. REV.* 309, 311–17.

<sup>182</sup> See Military Order of Nov. 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 3 *C.F.R.* 918 (2001), *reprinted in* 10 *U.S.C.A.* § 801 (West Supp. 2004).

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. 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 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 (a) in which parties claimed a deprivation of their rights or liberties, (b) which the Supreme Court resolved on the merits, (c) whether in times of international urgency or not, and (d) whether directly related to the crisis or not, over the last six decades (1941–2001 terms).

Such a focus enables us to scrutinize the key observable implication of the crisis thesis: When the nation's security or its soldiers are at risk, the justices should be less likely to rule in favor of criminal defendants, war protestors, and other litigants who allege violations of their rights. Likewise, a focus on outcomes not only allows us to assess the competing view of the Court as a guardian of rights in wartime, but also permits the exploration of more nuanced versions of the crisis thesis itself, including whether international emergencies affect only cases that are especially salient, that are directly connected to the emergency, or in which the federal government participates. Finally, we also 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 importance and their resolution in the lower courts.

Determining the importance of these factors and, more generally, conducting all the various explorations of case outcomes necessitate the acquisition of data on the Court's treatment of claims centering on *rights and liberties* (the chief dependent variable of our study) and *the relative state of urgency with regard to threats to America's national security* (the explanatory variable of primary interest).<sup>183</sup> With these

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<sup>183</sup> In 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 170, at 35.

data in hand, we 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 straightforward.<sup>184</sup> This database, which many scholars have used to study law and judicial politics,<sup>185</sup> 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 the Appendix shows, Spaeth classifies civil rights and liberties cases into six broad categories: criminal procedure, civil rights, First Amendment, due process, privacy, and attorney rights.<sup>186</sup> For

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As is commonly known, “correlation is not causation,” and so even if we find an association between the key causal variable (crises) and the dependent variable (Court decisions), we must “control” for other factors that may affect Court treatment of rights, liberties, and justice claims to provide anything close to a causal interpretation. 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 170, at 76–80. We undertake this challenge in Part V.

<sup>184</sup> The database and the documentation necessary to use it are available at <http://www.polisci.msu.edu/pljp/supremecourt.html> (last visited Oct. 30, 2004).

<sup>185</sup> See, e.g., EPSTEIN ET AL., *supra* note 73, at 253 (relying on Spaeth database); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 253, 279–356 (2002) (assessing different models of Supreme Court decisionmaking relying on Spaeth database); Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301, 1305 n.8, 1324–45 (2002) (relying on Spaeth database to assess theories of federalism in Rehnquist Court); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1483–91 (2001) (relying on Spaeth database to investigate institutional context of Court); Youngsik Lim, *An Empirical Analysis of Supreme Court Justices' Decision Making*, 29 J. LEGAL STUD. 721, 733–48 (2000) (employing Spaeth database to assess stare decisis); Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 506 & n.139 (2001) (using Spaeth dataset to assess voting proximity between justices); cf. Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1188–91 (2002) (criticizing aspects of Spaeth database).

<sup>186</sup> Spaeth 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 (issue 504). Civil rights includes non-First Amendment freedom cases which pertain to classifications based on race (including American Indians), age, indigency, voting, residency, military

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example, he identifies *Korematsu*<sup>187</sup> as a civil rights case, *Ex parte Quirin*<sup>188</sup> as a criminal procedure case, and *Dennis v. United States*,<sup>189</sup> 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."<sup>190</sup> In issues pertaining to criminal procedure, civil rights, First Amendment, due process,<sup>191</sup> privacy, and attorneys, a case is classified as liberal if the outcome favored: the person accused or convicted of a 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; disclosure under the Freedom of Information Act and related federal statutes, except for employment and student records; or attorney rights.<sup>192</sup>

Following Spaeth's coding rules and with his guidance, we backdated the dataset to include the 1941–52 terms and updated it to include the 2001–02 term.<sup>193</sup> With these additional data we were able

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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 (variable 24). . . . Due process is limited to non-criminal guarantees . . . .

HAROLD J. SPAETH, THE ORIGINAL UNITED STATES SUPREME COURT JUDICIAL DATABASE 1953–2002 TERMS: DOCUMENTATION 41, <http://www.artsci.wustl.edu/~polisci/epstein/courses/supctU/sctcode.pdf> (last visited Jan. 18, 2005).

<sup>187</sup> 323 U.S. 214 (1944).

<sup>188</sup> 317 U.S. 1 (1942).

<sup>189</sup> 341 U.S. 494 (1951).

<sup>190</sup> SPAETH, *supra* note 186, at 51.

<sup>191</sup> One exception that might be relevant in our context is the fact that the outcomes in due process cases are coded as liberal when the ruling goes against the government, except for Takings Clause cases, where such outcomes are scored as liberal when pro-government. This might not make much sense in the context of war-related military takings, and so we explored the robustness of our findings to recoding the takings cases, with no substantive changes.

<sup>192</sup> SPAETH, *supra* note 186, at 51–52.

<sup>193</sup> Using Spaeth's terms, the *analu* (the unit of analysis) for this study equals zero (case citation) and *dec\_type* (the type of decision) equals one or seven (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). The Appendix provides more details on the types of cases included in these categories.

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April 2005]

THE SUPREME COURT DURING CRISIS

45

to incorporate into our analyses terms coinciding with World War II and the Korean War, as well as the recent military conflict in Afghanistan.<sup>194</sup>

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, and the ideological direction of a Court decision,<sup>195</sup> many now have converged on the 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.<sup>196</sup> Second, while previous studies have focused on particular cases, ours is an effort to analyze the breadth of the effect of war and other threats to the nation's security. 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 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,<sup>197</sup> we can determine whether the war effect might exist in all cases or only in a particular subset.

### B. The Crises

Defining what constitutes an international crisis or a war is crucial.<sup>198</sup> Is a “crisis” solely a “constitutional war,” that is, a war fought pursuant to a congressional declaration of war,<sup>199</sup> or is that term broad enough to encompass a long-term military effort or a prolonged state of crisis? The literature's emphasis on cases such as *Milligan*<sup>200</sup> and *Korematsu*<sup>201</sup> suggests a long-term military effort, but an exclusive

<sup>194</sup> The 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://GKing.Harvard.edu/data.shtml#crisis>.

<sup>195</sup> See, e.g., CARDOZO, *supra* note 88, at 76–80.

<sup>196</sup> See *supra* note 185.

<sup>197</sup> See *infra* Appendix.

<sup>198</sup> Even the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541–1548 (2000)), provides no definition of what constitutes “hostilities.” See Henkin, *supra* note 99, at 300 (“Above all, the [War Powers R]esolution suffers gravely from a lack of any definition of ‘hostilities’ . . .”).

<sup>199</sup> See 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, which was 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.

<sup>200</sup> 71 U.S. (4 Wall.) 2 (1866).

<sup>201</sup> 323 U.S. 214 (1944).

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focus on “war,” whether formally declared or otherwise, would eliminate what many specialists in international law view as major international crises, such as the Berlin Blockade—and, of course, September 11.

Because these definitional distinctions represent normative choices rather than verifiable fact,<sup>202</sup> we develop three explicit definitions of crisis.<sup>203</sup> The first is the absence or presence of war<sup>204</sup> (with wars defined as World War II, the Korean, Vietnam, and Gulf Wars, and the recent war in Afghanistan).<sup>205</sup> The second is four other international conflicts that specialists have labeled as “major” (the Berlin Blockade, the Cuban Missile and the Iran-Hostage crises, and September 11). The third measure—the presence or absence of a “rally effect” in the form of a ten-point (or greater) surge in presidential popularity caused by an international event—may be less obvious, but it taps a “crisis” as social scientists have employed that term.<sup>206</sup>

<sup>202</sup> See, e.g., Gross, *supra* note 4, at 1089–96 (noting five reasons for 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 (Michael Howard & Peter Paret eds. & 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.* JOHN KEEGAN, A HISTORY OF WARFARE 3–12 (1993) (asserting that “[w]ar is not the continuation of policy by other means” and proposing cultural theory of war). Even Keegan’s framework, however, does not help to clarify a definition of crises for our purpose here.

<sup>203</sup> We 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 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 *infra* Part V.

<sup>204</sup> Following the vast majority of literature in this area, war periods do not include the Cold War, the War on Drugs under the Reagan administration, or the War on Poverty under the Johnson administration. *But cf.* Edwards, *supra* note 5, at 844–48 (considering Cold War and 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.

<sup>205</sup> Since it remains unclear whether we should code the entire period after September 11 as war, we pursue both coding schemes here. See, e.g., Tushnet, *supra* note 13, at 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 acts of terrorism “unmistakably bear the characteristics of war”).

<sup>206</sup> Beginning with World War II, rally effects have occurred sixteen times, fourteen of which (not surprisingly) involved international events. (The two that did not centered on the Lewinsky scandal and President Clinton’s impeachment.) In each case, the President’s popularity jumped at least ten points, with George W. Bush receiving the biggest boost (thirty-five points), and the surges endured anywhere between five and forty-one weeks. For this study, we include only the fourteen international events. For a complete list, see

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April 2005]

THE SUPREME COURT DURING CRISIS

47

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.<sup>207</sup>

Gathering data on the three measures of crisis requires knowing when each crisis began and ended. Since that information is readily available,<sup>208</sup> we were left with only one task: determining whether the Supreme Court made its decision during a crisis period (for each measure of crisis). We could peg the existence 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 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. This decision is typically determined by an initial vote taken within a few days of oral arguments in a case,<sup>209</sup> unlike the rationale of the opinion.<sup>210</sup> 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.<sup>211</sup>

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David W. Moore, *Bush Job Reflects Record "Rally" Effect* (Sept. 18, 2001), at <http://www.gallup.com/poll/content/?ci=4912> (last visited Jan. 19, 2005).

<sup>207</sup> In 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.

<sup>208</sup> The 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 11, the dates for the major crises are from the International Crisis Behavior Project. Michael Brecher & Jonathan Wilkenfeld, *International Crisis Behavior Project, 1918–2001* (ICPSR Study No. 9286, 2004), at <http://www.icpsr.umich.edu>. September 11 began on 9/11/01 and continues through the 2001 term, the last in our database. Dates for rally events are derived from Moore, *supra* note 206.

<sup>209</sup> See EPSTEIN & KNIGHT, *supra* note 133, at 118–35 (including information on Court's internal decisionmaking procedures).

<sup>210</sup> To see the logic behind our choice, consider September 11 and assume (even though the Court's 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, and therefore theoretically subject to change, alterations in Court disposition (e.g., from an affirmance to a reversal), as we note in the text, are quite rare.

<sup>211</sup> Saul Brenner, *Fluidity on the United States Supreme Court: A Reexamination*, in *AMERICAN COURT SYSTEMS* 479, 482 (Sheldon Goldman & Austin Sarat eds., 2d ed. 1989); Lee Epstein & Jack Knight, *Documenting Strategic Interaction on the U.S. Supreme Court* 8–22 (1996) (unpublished manuscript, available at <http://www.artsci.wustl.edu/~polisci/lawcourt/archive> (last visited Jan. 26, 2005)). For some exceptions to this general rule, see

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Lastly, we also sought to measure whether each case in our dataset was related to a conflict. While less consensus exists in the literature about how related to the war the case needs to be for decisions to become more conservative; whether this effect applies to all cases, even unrelated to the war, during wartime; and how long past the end of the war the effect persists, all supporters of the crisis thesis seem to believe that the effect is stronger for cases more related to the war, compared to ordinary cases.

That said, we might be skeptical of the susceptibility of measuring “war-relatedness.” Determining *ex ante* whether a case is crisis related is not always obvious.<sup>212</sup> At the least, we could not make that determination on the basis of whether the Court found the ongoing 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. This might be tantamount to deciding dispositively whether the claim at stake falls within the Executive’s war power that as “Commander in Chief of the Army and Navy”<sup>213</sup> he shall “take Care that the Laws be faithfully executed.”<sup>214</sup> 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.<sup>215</sup>

Bearing these caveats in mind, we designed a bright-line coding scheme that was randomly cross-checked by our research team to assess whether a case was directly related to war or not, based on the *facts of the case*. Focusing on the facts of the case partially addresses the fear that in some cases the Court might invoke the war-powers doctrine only when providing a rationale for deciding against parties alleging a violation of rights. We reviewed all 3344 cases in our dataset. A case was coded as related to the war if (a) the controversy

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EDWARD LAZARUS, *CLOSED CHAMBERS* 470–78 (1998), describing Justice Kennedy’s switch in *Casey*.

<sup>212</sup> See, e.g., Gross *supra* note 4, at 1095 (“[W]hen judges decide ‘ordinary’ criminal cases, they will take into consideration the impact of their rulings on the fight against terrorism.”).

<sup>213</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>214</sup> *Id.* art. II, § 3.

<sup>215</sup> A possible approach to circumventing this drastic problem of endogeneity would be to examine systematically briefs filed by the parties to the cases as they 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. 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.

began during the war and (b) the genesis of the case was the war itself. For example, war-related cases include wartime draft cases, war protest cases, military takings, courts martial for activity occurring during a war in a war zone,<sup>216</sup> deportation, citizenship, and relocation cases resulting from the war, and war-related suits under the Emergency Price Control Act of 1942 and the Alien Property Custodian Act.<sup>217</sup> This coding yields 134 war-related cases. While imperfect, we believe this coding scheme captures the more fine-grained category of cases of particular interest to scholars of the crisis jurisprudence.

Measure of Crisis	Percentage of Cases		
	All	Related to War	Unrelated to War
War	23	2	21
War, Plus Major Conflicts	28	2	26
Rally Effect	9	0	9
Total	32	2	30

**Table 2:** Proportion of U.S. Supreme Court cases involving rights, liberties, and justice (1941–2001 Terms) that occur during crises and are related to the war ( $N = 3344$ ).<sup>218</sup>

Table 2 documents the results of these research decisions, summarizing our measures on the 3344 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 (i.e., war, war and international crisis, and a rally effect). As we can observe, decisionmaking in times of international urgency is not the norm for the Court. A majority of cases fall into none of our measures, and combining the indicators does not change the picture. Overall, the justices decided thirty-two percent ( $n = 1067$ ) of the 3344 cases while a war, major conflict, or rally event was in place. On the other hand, crisis decisionmaking is hardly a rare event. The first two measures—“War” and “War, Plus Major Conflicts”—were present during roughly a quarter of the cases. As for “Rally Effects,” nine percent may be small but the number of cases ( $n = 292$ ) is sufficiently large to enable

<sup>216</sup> For example, this might include crimes by servicemen in England during World War II, but not crimes by servicemen in Oklahoma during the Vietnam War.

<sup>217</sup> McCarthy-era cases were not coded as war-related cases unless there was a direct link to a war.

<sup>218</sup> The 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 184, 193. “War” includes World War II and the Korean, Vietnam, Gulf, and Afghan Wars. See *supra* note 204. “War, Plus Major Conflicts” includes Wars and the Berlin Blockade, Cuban Missile Crisis, and Iran-Hostage Crisis. See *supra* notes 204–05. “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 206–07.

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meaningful analysis and, thus, to explore the potential effect of rallies on the Court. Breaking these cases up by war-related and unrelated cases in the far-right columns, we see that only a small proportion of all cases are a direct result of the war. Only two percent of all the cases (n = 62) are decided during war and related to the war. In fact, out of all the cases arising out of the war (n = 134), over half are decided during peace.

### C. Confounding Factors

In order to conduct a systematic analysis of the crisis thesis, we must take into account (that is, “control for” or “hold constant”) other factors that may affect case outcomes (and that are causally prior to the chief explanatory variable, crisis).<sup>219</sup> Simple comparisons might assume 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. But all factors that might affect case outcomes (other than the presence or absence of a crisis) may not be the same (i.e., constant) during periods of war and peace. 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 most prominent potentially “confounding” factors according to the extant literature. These include the *characteristics of cases* that come to the Court during times of war and peace,<sup>220</sup> the *political composition* of the Court hearing those cases,<sup>221</sup> *salience* of the case, the ruling and composition of *lower courts*, and *time effects*.

#### 1. The Characteristics of Cases

A primary potential confounding factor suggested by several contemporary essays on the effect of war on judicial decisions<sup>222</sup> relates to

<sup>219</sup> See *supra* note 183.

<sup>220</sup> For articles discussing the effect of war on the legal environment and on the kinds of cases reaching the Supreme Court, see, for example, Robert S. Chang, *(Racial) Profiles in Courage, or Can We Be Heroes Too?*, 66 ALB. L. REV. 349, 352–64 (2003), discussing differential Americanization during war; Cover, *supra* note 60, at 1234–35, noting changes to the rules governing attorney-client communications with the war on terror; Joo, *supra* note 13, at 32–42, discussing the racial dimension of law enforcement induced by terrorism; David Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 831–32 (2003), noting a change in enforcement priorities due to the war on terror; and Sidak, *supra* note 39, at 1416–19, discussing detentions under the Alien Enemy Act during World War II.

<sup>221</sup> See *supra* note 179.

<sup>222</sup> See *supra* note 220.

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the well-known selection effects of litigation,<sup>223</sup> 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, 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.<sup>224</sup> If the types of cases are related to our measures of crisis, then it could confound simple analyses.

To see why, think about the Fourth Amendment’s guarantee against unreasonable searches and seizures—an oft-cited exemplar of constitutional protection that governments attempt to skirt during war times.<sup>225</sup> 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).<sup>226</sup> From those same studies, we also have a reasonably good sense of how the various features affect the probability of the Court striking down or upholding a search.<sup>227</sup>

Figure 2 lists these features—eleven critical facts pertaining to search and seizure cases, along with the impact empirical investigations<sup>228</sup> have shown them to have on the Court (when compared to a 0.5 baseline probability of a decision favoring the defendant).<sup>229</sup> Con-

<sup>223</sup> See Priest & Klein, *supra* note 23, at 4–5 (arguing that parties only proceed to litigation when chance of winning is at least fifty percent).

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<sup>224</sup> For supporting literature, see *supra* note 220.

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<sup>225</sup> See, e.g., Dorsen, *supra* note 14, at 847–48 (discussing steel mill seizure in *Youngstown*); Michael P. O’Connor & Celia Rumann, *Going, Going, Gone: Sealing the Fate of the Fourth Amendment*, 26 *FORDHAM INT’L L.J.* 1234, 1234–35 (2003) (discussing investigation powers granted to Executive after September 11 that intrude upon Fourth Amendment rights); William J. Stuntz, *Local Policing After the Terror*, 111 *YALE L.J.* 2137, 2138–42 (2002) (discussing implications for Fourth Amendment of greater post-September 11 police powers).

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<sup>226</sup> See, e.g., SEGAL & SPAETH, *supra* note 185, at 316–18; Jeffrey A. Segal, *Predicting Supreme Court Decisions Probabilistically: The Search and Seizure Cases, 1962–1981*, 78 *AM. POL. SCI. REV.* 891, 895–98 (1984).

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<sup>227</sup> See SEGAL & SPAETH, *supra* note 185, at 318.

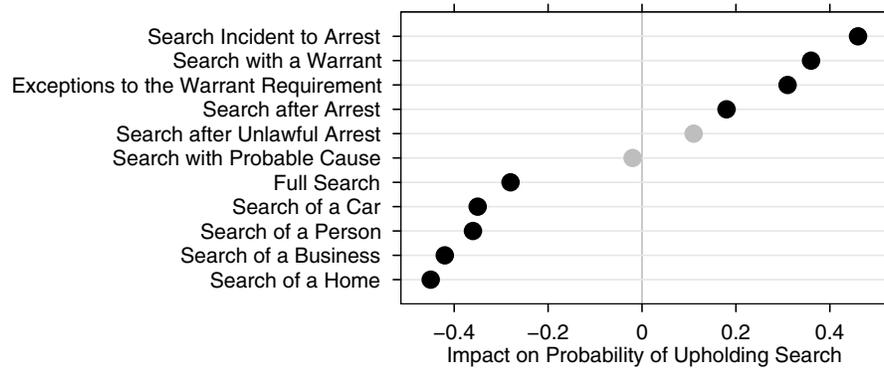
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<sup>228</sup> *Id.*

<sup>229</sup> Note 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; the predicted probability is of course always bounded between 0 and 1. See, e.g., GARY KING, *UNIFYING POLITICAL METHODOLOGY: THE LIKELIHOOD THEORY OF STATISTICAL INFERENCE* 97–110 (1989); WOOLDRIDGE, *supra* note 25, at 453–69; Gary King et al., *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 *AM. J. POL. SCI.* 347, 355 (2000).

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sider, 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. The figure is consistent with existing legal principles suggesting that 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<sup>230</sup>); searches after lawful arrests receive less favorable treatment from the justices; and searches after unlawful arrests are the least likely of all “arrest” searches to be upheld.



**Figure 2:** Facts relevant to the Supreme Court’s adjudication of Fourth Amendment cases and the impact of the facts on the predicated probability of the Court upholding the search. Grey circles indicate statistically insignificant impacts. For example, a search incident to arrest increases the probability by 0.46 that a search will be upheld, compared to a baseline probability of 0.5.<sup>231</sup>

Now suppose it is 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 2). As the Court begins to adjudicate these “unlawful arrest” cases,<sup>232</sup> rather than, say,

<sup>230</sup> See SEGAL & SPAETH, *supra* note 185, at 318.

<sup>231</sup> This is a graphical depiction of data in SEGAL & SPAETH, *supra* note 185, at 318, which contains the statistical model from which they 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.

<sup>232</sup> This category applies to cases in which the facts are such that the justices typically strike down the search.

“incident to arrest” cases,<sup>233</sup> 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 the face of extant legal principles—to articulate a position that favors the defendants.

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 <sub>t-1</sub>	.360 (1.88)	.415 (.188)*	.476 (.156)*
Constant	-1.26 (.393)*	-1.18 (.395)*	-1.17 (.367)*
Adj. R <sup>2</sup>	.20	.17	.22
N	32	32	32

**Table 3:** Time series assessments of the impact effect of international crises on the severity of case characteristics. \* indicates p = .01.<sup>234</sup>

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,<sup>235</sup> hypothesizing that this average should increase during times of war if, in fact, the government is overzealous in its prosecution efforts.<sup>236</sup> We then ran time-series models to assess the hypothesis, with Table 3 depicting one specification of an ordinary

<sup>233</sup> This category applies to cases in which the facts are such that the justices typically uphold the search.

<sup>234</sup> The database used to conduct this analysis is available on our web site at <http://GKing.Harvard.edu/data.shtml#crisis>. For the crisis measures, “War” includes World War II and the Korean, Vietnam, Gulf, and Afghan Wars; “War, Plus Major Conflicts” includes Wars and the Berlin Blockade, Cuban Missile Crisis, and the Iran-Hostage Crisis; “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 206–08. We calculated the severity levels of searches from the same coefficients used to calculate the probabilities in Figure 2. Because negative values are associated with more extreme searches, the case-severity account predicts significantly negative coefficients on our crisis measures.

<sup>235</sup> Figure 2 illustrates the facts we included.

<sup>236</sup> We also estimated a series of models that assessed the effect of international crises on the severity of case facts at the case (rather than term) level. After controlling for the political ideology of the Court—a crucial variable, as we explain in Part III.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.

least squares with a variable representing the lag of “case severity” on the right-hand side.<sup>237</sup>

We can draw several conclusions from this table,<sup>238</sup> 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: There is a lack of any detectable impact of the crises variables on the extremity of cases on the Court’s docket.

Fact	Effect on Y	Bias Direction	War		War & Crises		Rally	
			Mean Diff.	OLS	Mean Diff.	OLS	Mean Diff.	OLS
Search with a warrant	<b>0.36</b>	Pos.	0.05	0.06	0.03	0.01	<b>-0.16</b>	-0.17
Search with probable cause	-0.02	Pos.	-0.13	-0.14	<b>-0.14</b>	-0.14	-0.11	-0.09
Search of a person	<b>-0.36</b>	Pos.	-0.02	0.02	0.04	0.12	0.09	0.11
Search of a home	<b>-0.45</b>	Neg.	0.07	0.05	0.02	-0.05	-0.16	-0.18
Search of a car	<b>-0.35</b>	<b>Pos.</b>	<b>-0.14</b>	-0.10	<b>-0.14</b>	-0.09	0.16	0.18
Search of a business	<b>-0.42</b>	Neg.	0.02	-0.08	-0.02	-0.10	-0.08	-0.09
Search after unlawful arrest	0.11	Neg.	<b>-0.15</b>	-0.13	<b>-0.09</b>	-0.03	0.01	0.05
Search incident to arrest	<b>0.46</b>	Neg.	-0.04	<b>-0.11</b>	-0.00	-0.00	0.02	0.02
Search after arrest	<b>0.18</b>	Pos.	0.01	-0.18	-0.03	<b>-0.14</b>	-0.02	-0.04
Full search	<b>-0.28</b>	Pos.	-0.02	<b>-0.19</b>	-0.03	-0.14	0.09	0.09

**Table 4.** This table presents mean differences along crises measures as well as least squares regression coefficients controlling for political ideology of the Court and lower court decisions. A statistically positive figure indicates that cases containing the fact occur more often during crises than tranquility. (Means test for “Exception to the warrant requirement” is not calculated because the variable is not binary.) The “Effect on Y” refers to the estimated effect of the fact on the probability of a liberal decision given a baseline probability of .5 as graphically presented in Figure 2. The “Bias Direction” indicates the direction of omitted-variable bias of propensity score matching due to excluding covariates of these search and seizure facts, using the mean difference for War. “Pos.” refers to a positive bias of the estimated impact of war, meaning that an estimate ignoring these case facts underestimates the negative effect of war on the probability of a liberal decision, while “Neg.” refers to a negative bias on war. Bold indicates that an estimate is twice as large as its standard error.

More evidence against the characteristics of cases as confounding factors can be gleaned from Table 4, which presents mean differences of all relevant facts for all Fourth Amendment cases. In order for these facts to represent confounding variables, they must be correlated with our measure of crisis, indicated by the bold figures in the

<sup>237</sup> We are not able to separate our analyses by war-related and ordinary cases here because the number of war-related search and seizure cases in this subset of the data is too low.

<sup>238</sup> One interesting conclusion is that the case facts heard by the Court are generally not random, as judged by the lagged severity coefficients.

right panel of the table. Recall, however, that even when the data is random, we still expect a statistically significant relationship to occur one in ten times, for a significance level of 0.10. This appears to be the case here, providing little evidence that the correlation is more than random. Moreover, even if we take those facts that appear to differ across war and peace cases, they do not systematically point toward more or less severe fact patterns.

From these analyses, it appears that wartime cases had fact patterns with about the same level of severity as peacetime cases, even after controlling for the history of severity on the Court.

## 2. *The Political Composition of the Court*

Unlike case severity, the political composition of the Supreme Court has differed substantially in times of war and peace.<sup>239</sup> Specifically, owing to the confluence of several historical phenomena—the dominance of the Democratic Party during long periods of the 20th century and the resulting appointment of relatively liberal justices,<sup>240</sup> 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 (i.e., liberal) justices than those deciding cases during times of peace.

To see this point, we first 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,<sup>241</sup> we rely here on the

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<sup>239</sup> For the importance of this factor, see *supra* note 179.

<sup>240</sup> See *infra* Figure 3.

<sup>241</sup> For a review of many of these measures, see generally Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 261 (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 170, at 74–75 (discussing 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, *Estimation and Inference Are Missing Data Problems: Unifying Social Science Statistics via Bayesian Simulation*, 8 POL. ANALYSIS 307 (2000); Simon Jackman, *Multidimensional Analysis of Roll Call Data via Bayesian Simulation: Identification, Estimation, Inference and Model Checking*, 9 POL. ANALYSIS 227 (2002). 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. ANALYSIS 134 (2002); and ANDREW D. MARTIN & KEVIN M. QUINN, PATTERNS OF SUPREME COURT DECISION-MAKING, 1937–2000 (Ctr. for Statistics & Soc. Scis., Working Paper No. 26, 2002), available at <http://www.csss.washington.edu/Papers/wp26.pdf>. This measure is not well suited for our purposes, however, since Martin and 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 used votes from all Supreme Court cases

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most widely used one: the ideology scores that Jeffrey A. Segal and Albert Cover have assigned to each justice serving since the 1930s.<sup>242</sup>

Segal-Cover scores have proven to be highly accurate predictors of judicial votes, especially in the areas of civil liberties and rights<sup>243</sup> and in the 1941–2001 terms.<sup>244</sup> They 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 the justices’ nominations to the Court and their confirmations.<sup>245</sup>

except those involving 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 nonseparable and therefore correlated among issue areas. We make these assumptions in Part VII, where we employ these alternative measures (provided by Martin and Quinn) to analyze the robustness of our results.

<sup>242</sup> Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559–60 (1989). Indeed, these scores figure prominently into many studies of judicial decisions. See, e.g., Epstein et al., *supra* note 122, at 602–04 (testing institutional-constraint account of strategic voting using Segal-Cover scores); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 624 n.61, 629 n.102, 633 n.130, 665 & n.255 (1991) (examining influence of congressional preferences on Supreme Court statutory decisions); Barry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123, 135 (2003) (examining congruence between Supreme Court and congressional preferences). One commentator, though, has criticized the method employed in 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 88, at 132–33. 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 decisionmaking. See, e.g., Epstein & Mershon, *supra* note 241, at 261–70 (examining utility of Segal-Cover scores).

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<sup>243</sup> Epstein & Mershon, *supra* note 241, at 272.

<sup>244</sup> Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 817–22 (1995) (discussing strong predictive power of Segal-Cover scores for cases involving civil liberties and economic issues).

<sup>245</sup> Specifically, as Segal and Cover tell it:

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 that explicitly ascribe moderation to the nominees or those that ascribe both liberal and conservative values.

Segal & Cover, *supra* note 242, 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. See *supra* note 241. 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.

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From these analyses, Segal and Cover devised a scale of judicial political ideology, which ranges from -1.0 (the most conservative) to 0 (moderate) to +1.0 (the most liberal),<sup>246</sup> such that each justice receives a score within this range. For example, William J. Brennan received a score +1.0; Scalia's is -1.0, while O'Connor's is a more moderate -0.17.<sup>247</sup> But, because we are interested in examining the political composition of the Court as a whole, rather than the policy preferences of particular justices, we used the Segal-Cover scores to calculate the ideology of the median justice serving on each Court<sup>248</sup> for each year in our analysis.<sup>249</sup> This technique is consistent with public-choice and jurisprudential theories emphasizing the importance of the swing vote,<sup>250</sup> as well as contemporary commentary stressing the critical role Justice O'Connor (and, to a lesser extent, Justice Kennedy) has played on the Court by casting key votes in many consequential cases.<sup>251</sup>

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<sup>246</sup> Segal & Cover, *supra* note 242, at 559. In subsequent analyses in which we employ propensity score matching, *see supra* Part V, we rescale this by adding the minimum of the score of the median justice to the scores, so that the ordering of the Segal-Cover score is invariant to a square transformation. R

<sup>247</sup> For a list of the Segal-Cover scores for all justices, see EPSTEIN ET AL., *supra* note 73, at 485 tbl.6-1. R

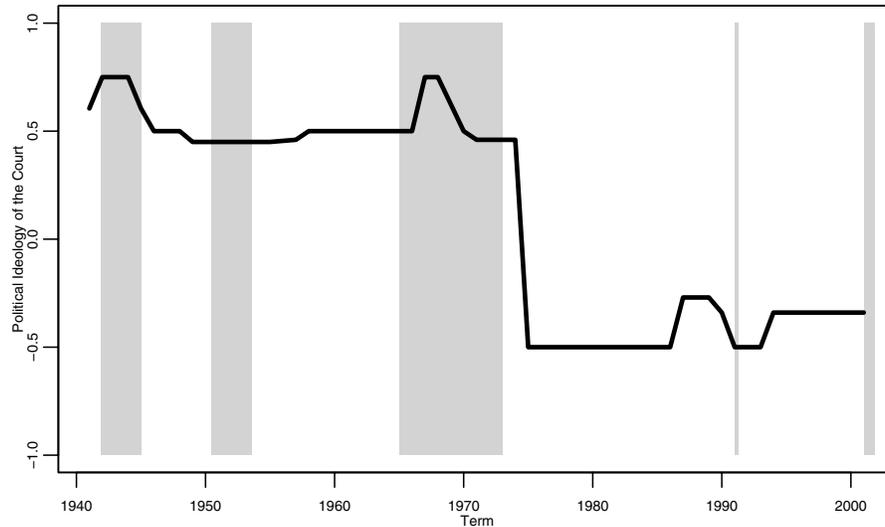
<sup>248</sup> We define median as the middle justice, such that four justices are more liberal and four are more conservative.

<sup>249</sup> The reason for choosing the median justice has a clear and obvious grounding in the public-choice literature on strategic decisionmaking. *See* DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* 18 (1958) (demonstrating that median voter controls outcome of any majority vote); Duncan Black, *On the Rationale of Group Decision-Making*, 56 J. POL. ECON. 23, 26-27 (1948) (further demonstrating importance of median voter); Andrew D. Martin et al., *The Median Justice on the U.S. Supreme Court*, N.C. L. REV. (forthcoming 2005) (proposing systematic approach for identifying median justice), available at <http://epstein.wustl.edu/research/medianjustice.pdf>.

<sup>250</sup> *See, e.g.*, Mario Bergara et al., *Modeling Supreme Court Strategic Decision Making: The Congressional Context*, 28 LEGIS. STUD. Q. 247, 249, 253 (2003) (employing median-justice theory in analyzing effects of institutional constraints on Supreme Court decision-making); Epstein & Mershon, *supra* note 241, at 276 (noting general inability of Segal-Cover scores to identify median justice); R. Randall Kelso & Charles D. Kelso, *Swing Votes on the Current Supreme Court: The Joint Opinion in Casey and Its Progeny*, 29 PEPP. L. REV. 637, 638-39 (2002) (discussing role of swing Justices O'Connor, Kennedy, and Souter in 5-4 Supreme Court decisions between 1997 and 2000); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 41-42 (1997) (testing separation-of-powers model with data on median justice's position). The role of the pivotal justice is deeply rooted in the theory of the median voter. *See also* Harold Hotelling, *Stability in Competition*, 39 ECON. J. 41, 53-57 (1929) (discussing general tendency for "excessive conglomeration" near median position). R

<sup>251</sup> *See, e.g.*, Associated Press, *Affirmative Action Case Puts Judges in Spotlight*, CHI. TRIB. REDEYE EDITION, Apr. 1, 2003, at 36 (describing Justices O'Connor and Kennedy as "perennial swing voters"); Editorial, *A Moderate Term on the Court*, N.Y. TIMES, June 29, 2003, Week in Review, at 12 (noting Justice O'Connor's status as "court's critical swing vote"); Charles Lane, *Supreme Court: On the Sidelines, for Now*, WASH. POST, Sept. 30, 2001, at A5 (describing Justice O'Connor as "perennial swing voter").

Figure 3 depicts these Court “swings” with years on the horizontal axis and the median liberalness on the vertical axis. These data are also consistent with commonly held intuitions about particular Court eras.<sup>252</sup> Note, for example, the high level of liberalism during the Warren Court years (1953–1968 terms) and the decrease that occurs thereafter as an increasing number of justices appointed by Republican Presidents Richard M. Nixon, Ronald Reagan, and George H.W. Bush ascended to the bench.



**Figure 3:** 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 indicated on the vertical axis measure liberalness, ranging from 1.0 (most liberal) to -1.0 (most conservative).<sup>253</sup> The grey shading depicts terms during which the Court heard disputes during a war period.

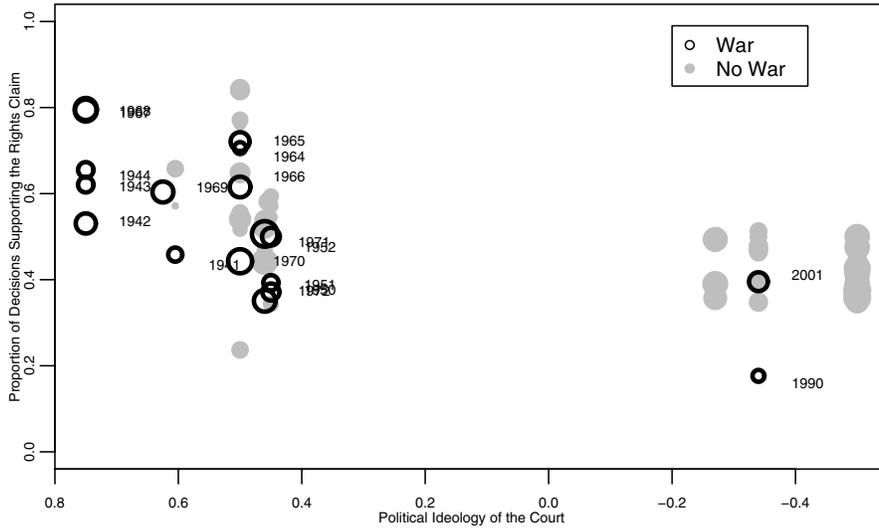
Note the grey shading in Figure 3, indicating terms during which wars were ongoing.<sup>254</sup> The vast majority of wartime Courts were dis-

<sup>252</sup> For ideological characterizations of particular Courts, see, for example, HOWARD GILLMAN, *THE VOTES THAT COUNTED 185–89* (2001), discussing the ideological composition of the Court in the context of the disputed 2000 presidential election; William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 374–77 (1991), discussing the Court’s ideological position relative to Congress in the years 1967–90; and Thomas W. Merrill, Childress Lecture, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 *ST. LOUIS U. L.J.* 569, 590–601 (2003), discussing the “attitudinal model” of the first and second Rehnquist Courts.

<sup>253</sup> The Segal-Cover scores are available in EPSTEIN ET AL., *supra* note 73, at 242–43 tbl.3-12.

<sup>254</sup> From 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.

proportionately liberal. We confirm these results with Figure 4, which depicts 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-Cover scale). Note that while right-of-center justices dominated during many terms, as indicated by the grey circles, a crisis was in effect during only two (the Gulf and Afghan Wars), as indicated by the white circles. Significantly for our study, liberal justices controlled during all others.



**Figure 4:** The preponderance of left-of-center Courts during times of war: the empirical distribution of the data. N=3344. The diameter of each circle is scaled by the number of cases decided in the Term, with an average of roughly fifty-five cases decided each term.<sup>255</sup>

The conclusion we reach from Figures 3 and 4—that the political composition of the Court during times of war and peace has varied rather dramatically—damages any analysis that assumes that relevant features of the judicial decisionmaking environment remained constant over the past six decades and during periods of crisis and tranquility and invalidates any analysis of the effect of war that fails to control for ideology.

<sup>255</sup> We obtained data on the Supreme Court’s decisions from the U.S. Supreme Court Judicial Database (backdated by the authors) with *analu* = 0, *dec\_type* = 1 or 7, values = 1–6. See *supra* notes 184, 193–94. War includes World War II and the Korean, Vietnam, Gulf, and Afghan Wars. See *supra* notes 204–05, 208 and accompanying text. The political ideology of the Court is based on the Segal-Cover score of the median justice. See *supra* text accompanying notes 248–49.

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3. Case Salience

Another possible confounding factor is that the crisis effect might manifest itself only in particularly salient cases.<sup>256</sup> Indeed, this may be the lesson of our discussion of public opinion effects.<sup>257</sup> It further reflects the view in the literature that the Court feels the impact of international emergencies not in “routine” cases of rights, liberties, and justice but only in those cases that are particularly salient or important to decisionmakers of the day.<sup>258</sup>

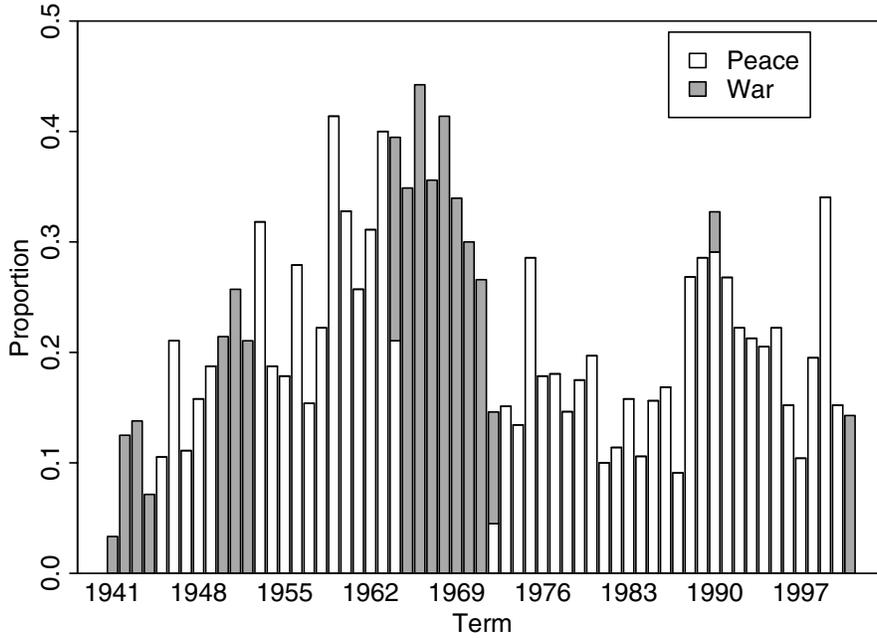


Figure 5: Proportion of U.S. Supreme Court decisions in the areas of rights, liberties, or justice that are salient, 1941–2001 Terms. 711 of the 3344 cases of rights, liberties, and justice decided during the period under analysis are salient. The white bars indicate the absence of a crisis (e.g., the country was not at war) at the time the Court heard oral arguments in the cases; darker bars indicate the presence of a crisis.<sup>259</sup>

<sup>256</sup> See *supra* note 19.

<sup>257</sup> See *supra* Part I.

<sup>258</sup> See *supra* text accompanying notes 78–81.

<sup>259</sup> We obtained data on the Supreme Court’s decisions from the U.S. Supreme Court Judicial Database (backdated by the authors) with *analu* = 0, *dec\_type* = 1 or 7, values = 1–6. See *supra* notes 184, 193–94. War includes World War II and the Korean, Vietnam, Gulf, and Afghan Wars. See *supra* notes 204–05, 208, and accompanying text. 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 Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 66–67 (2000). For a listing of these cases, see *Measuring Issue Salience: List of Salient U.S. Supreme Court Cases*, at <http://epstein.wustl.edu/research/saliencycase.pdf>.

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To incorporate this into our analysis, 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.<sup>260</sup> Because Epstein and Segal sought to assess contemporaneous salience (as does this study), this measure is suited ideally to our purposes.<sup>261</sup> Moreover, as Figure 5 shows, there appears to be a sufficient number of salient cases to enable a systematic analysis on this dimension. Overall, 711 of the 3344 civil liberties cases (roughly 21%) were covered on the front page of the *Times*, with 199 of the 711 (roughly 28%) occurring in the midst of war and the remaining 512 (72%), reported in times of peace.

#### 4. Lower Courts

An additional possible confounding factor is the changing dynamics in the lower courts. This is especially true in light of the well-documented propensity of the justices to accept cases in order to reverse the holding of the tribunal directly below.<sup>262</sup> The presence of a war or other international crisis may very well affect lower court judges, too, and we ought to consider this possibility by including and then excluding their decisions in our analyses.

We therefore incorporated into our model the outcome reached in the lower court (i.e., whether it reached a liberal or conservative outcome).<sup>263</sup> The logic behind this choice is simple. Suppose we were seeking to explain the decisions of a liberal Supreme Court, such as the Court that sat in 1965.<sup>264</sup> 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

<sup>260</sup> Epstein & Segal, *Measuring Issue Salience*, *supra* note 259, at 66–67, 72 (2000). For a list of the salient cases, see *Measuring Issue Salience: List of Salient U.S. Supreme Court Cases*, *supra* note 259.

<sup>261</sup> By contemporaneous salience, we mean that the actors (justices) thought the issue (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* 8–33 (1991) (measuring contemporary issue salience for congressional committee “exposure probes” by examining whether issue received front-page coverage in the *New York Times*); Epstein & Segal, *supra* note 259, at 67 (arguing contemporaneous media coverage provides “reproducible, valid, and transparent method of assessing whether the particular actors under investigation view an issue as salient or not”).

<sup>262</sup> SEGAL & SPAETH, *supra* note 185, at 253–55. During only four terms since 1946 (1946, 1951, 1953, 1993) has the 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 73, at 228–29, tbl.3-6.

<sup>263</sup> We obtained this information from the U.S. Supreme Court Judicial Database. See *supra* note 184. The variable is coded as *lctdir*.

<sup>264</sup> See *supra* Figure 3.

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claiming a deprivation of his or her rights regardless of whether that party was the appellant or the appellee. However, in light of that propensity, we would expect even a left-of-center Court occasionally to reverse left-of-center lower court decisions.<sup>265</sup>

5. Time Effects

Finally, broad time effects, including ideological shifts in the executive and legislative branches,<sup>266</sup> as well as in legal culture,<sup>267</sup> may also be confounding factors. To control for these, we take into account the term in which the Court made its decision and draw comparisons between peace and wartime cases that are as close in time as can be found.

IV  
STATISTICAL METHODS

We now address how to incorporate these factors in our analysis. We do so by introducing nonparametric matching, a statistical framework for causal inference that is now fairly standard in a variety of scholarly disciplines<sup>268</sup> but does not appear to be well known in law schools or in the broader legal community.

<sup>265</sup> We also consider an alternative hypothesis that the crisis thesis may not readily admit, namely that war may similarly affect the lower courts. See *infra* Part V.

<sup>266</sup> See, e.g., Bergara et al., *supra* note 250, at 248 (finding that justices adjust their decisions to presidential and congressional preferences); Eskridge, *supra* note 252, at 334 (suggesting that Court subjugates preferences of enacting Congress in favor of current Congress); Eskridge, *supra* note 242, at 617 (same); Merrill, *supra* note 252, at 573 (discussing thesis that Court is subject to resistance from or modification by Congress and Executive).

<sup>267</sup> See, e.g., Goldsmith & Sunstein, *supra* note 117, at 281–84.

<sup>268</sup> See, e.g., 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 321–46 (Joseph L. Gastwirth ed., 2000); 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 et al., *Characterizing Selection Bias Using Experimental Data*, 66 ECONOMETRICA 1017 (1998); James J. Heckman et al., *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 2005), available at <http://www.princeton.edu/~kimai/research/index.html>; 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); Donald B. Rubin, *Estimating Causal Effects of Treatments in Randomized and Nonrandomized Studies*, 66 J. EDUC. PSYCHOL. 688 (1974); Daniel E. Ho, Kosuke Imai, Gary King & Elizabeth A. Stuart, *Matching as Nonparametric Preprocessing for Improving Parametric Causal Inference* (Oct. 13, 2004) (unpublished manuscript, available at <http://www.princeton.edu/~kimai/research/index.html>) [hereinafter Ho et al., *Improving Parametric Causal Infer-*

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April 2005]

THE SUPREME COURT DURING CRISIS

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### A. A Definition of the Causal Effect of War

Our inferential goal is to estimate the degree to which wars cause the Court to suppress rights and liberties in ways it would not during times of peace. Estimating this causal effect is inherently about counterfactual inference: We care about what the outcomes of cases decided during a war would be but for the presence of the war.<sup>269</sup> We are not interested in whether the Court has made more liberal decisions during times of war than the Court did in times of peace, since this might be due to the coincidence that liberal justices have tended to be on the Court more often during wartime. We instead need to determine the effect of war for any given Court composition, set of case facts, time period, and other relevant factors. This is what distinguishes a causal statement from a descriptive one.

In a research environment without any constraints, generating an estimate 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.<sup>270</sup>

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  $i(i = 1, \dots, n)$ .<sup>271</sup> Now denote the presence or

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ence]; Daniel E. Ho & Kosuke Imai, The Impact of Partisan Electoral Regulation: Evidence on Ballot Effects from the California Alphabet Lottery, 1978–2002 (Oct. 28, 2004) (unpublished manuscript, available at <http://www.princeton.edu/~kimai/research/index.html>); Daniel E. Ho & Kosuke Imai, Nonparametric Randomization Inference with Natural Experiments: An Analysis of Ballot Effects in the 2003 California Recall Election (Sept. 18, 2004) (unpublished manuscript, available at <http://www.princeton.edu/~kimai/research/index.html>).

<sup>269</sup> This conception of causation is closely related to the notion of but-for causation in other areas of the law. See H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW 109–29 (2d ed. 1985) (discussing *sine qua non* causation). One key to our investigation is that we view causation as probabilistic. For more on this distinction, see David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 83, 90–97 (2d ed. 2000), discussing statistical methods of determining causation.

<sup>270</sup> For more on this point, see KING ET AL., *supra* note 170, at 75–97, describing causal inference in social science; Epstein & King, *supra* note 170, at 36–37, describing counterfactual inference; and Holland, *supra* note 25, at 949–53, connecting philosophical and statistical frameworks of causal inference.

<sup>271</sup> This notation is standard in the literature on causal inference and program evaluation. See *supra* note 270 for examples of this literature.

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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, the case could *potentially* have occurred under war or 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 counterfactual inference in crisis jurisprudence was evident to Justice Jackson in *Korematsu*.<sup>272</sup> In a dissenting opinion, he noted: “If Congress in *peace-time legislation* should enact such a criminal law, I should suppose this Court would refuse to enforce it.”<sup>273</sup> In other words, in the counterfactual world in which President Roosevelt’s exclusion order<sup>274</sup> came before the Supreme Court during a time of peace, the Court would not have upheld the order. That is, Jackson’s belief was that  $Y_{Korematsu}(1) = 0$  while  $Y_{Korematsu}(0) = 1$ .<sup>275</sup>

Formally, we define the causal effect for each case as the difference between potential outcomes:

$$\tau_i = Y_i(1) - Y_i(0)$$

Within this framework, we explicitly incorporate the counterfactual state of the world, or the “treatment effect”<sup>276</sup>—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  $\tau_i$ .

<sup>272</sup> *Korematsu v. United States*, 323 U.S. 214, 242–48 (1944) (Jackson, J., dissenting).

<sup>273</sup> *Id.* at 243–44 (emphasis added).

<sup>274</sup> Civilian Exclusion Order No. 34, 7 Fed. Reg. 3967 (May 28, 1942).

<sup>275</sup> Another example of counterfactual inference is from *Schenck v. United States*, in which Justice Holmes noted that there are “things that might be said [and endured] in time of peace,” i.e.,  $Y_{Schenck}(0) = 1$ , that “when a nation is at war . . . will not be endured,” i.e.,  $Y_{Schenck}(1) = 0$ . 249 U.S. 47, 52 (1919). In other words, had Schenck printed similar leaflets to assert his rights against conscription during a time of peace, he likely would have 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.

<sup>276</sup> This 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).

Of course it is impossible to rerun history to estimate the counterfactual and obtain  $\tau_i$ —the causal effect for each particular case. This impossibility is known as the “fundamental problem of causal inference,”<sup>277</sup> which, in concrete terms, means that we cannot observe the counterfactual, such as the *Korematsu* decision during peacetime. In fact, for each case  $i$  we only observe  $Y_i(1)$  if  $T = 1$  and  $Y_i(0)$  if  $T = 0$ .

The predominant approach to causal inference is the use of parametric methods, such as regression analysis, to estimate the counterfactual.<sup>278</sup> Unfortunately, though, because regression analysis often makes assumptions that are unjustified in a legal setting,<sup>279</sup> it is not well-suited for the problem we confront. So we employ nonparametric matching, which uses the insights of random assignment to draw causal inferences in observational studies, while decreasing the role of onerous assumptions of conventional parametric estimates.<sup>280</sup> This technique was developed in statistics and has been applied widely in other disciplines,<sup>281</sup> but it does not yet enjoy much of a following in law; indeed, we know of not a single published study in a law review that has formally employed it.

Accordingly, we provide a brief explanation of matching techniques.

### B. Matching

The intuition behind matching is 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 whether the Court decided them during a war) to make that same causal assessment. In fact, obtaining a balance of covariates across “war” and “peace” cases is precisely the purpose of the hypothetical experiment we described above.

While legal academics have yet to invoke this precise approach, the idea of “matching” should be familiar to legal scholars. For

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<sup>277</sup> KING ET AL., *supra* note 170, at 79; Holland, *supra* note 25, at 947.

<sup>278</sup> For 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.

<sup>279</sup> For example, traditional ordinary least squares regression analysis makes 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 assumptions often remain unjustified in the analysis of social and legal phenomena.

<sup>280</sup> See Ho et al., *Improving Parametric Causal Inference*, *supra* note 268 (discussing matching as nonparametric preprocessing to make parametric assumptions more believable and to reduce model sensitivity).

<sup>281</sup> See sources cited *supra* note 268.

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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.<sup>282</sup> Likewise, Walker and Barrow matched male and female judges of similar backgrounds to determine whether women speak “in a different voice.”<sup>283</sup> 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 crisis), so that we can assess the effect of that key variable on Court outcomes. The intuition is that once we have conditioned on all relevant confounding factors, 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.

In Part III.C, we explicated general theoretical concerns associated with confounding factors, which we call  $X_i$ . From this discussion emerge several guidelines that informed 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,<sup>284</sup> 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 crises—which, for example, appears to be the

<sup>282</sup> Lee Epstein & C.K. Rowland, *Debunking the Myth of Interest Group Invincibility in the Courts*, 85 AM. POL. SCI. REV. 205, 209–10 (1991).

<sup>283</sup> Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 601–03 (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 25, Donald Rubin discusses this mantra of “no causation without manipulation.” Donald B. Rubin, *Which Ifs Have Causal Answers*, 81 J. AM. STAT. ASS’N 961, 962 (1986).

<sup>284</sup> See, e.g., EPSTEIN & WALKER, *supra* note 40, at 22–48 (legal and extralegal influences); SEGAL & SPAETH, *supra* note 185, at 288–89 (precedent), 310 (text and intent), 312–20 (fact patterns), 320–24 (judges’ attitudes), 326–49 (political environment), 410–11 (solicitor general), 416–24 (judicial restraint), 424–28 (public opinion); Eskridge, *supra* note 242, at 664; Merrill, *supra* note 252, at 572–74 (judicial ideology, need to obtain five-justice majority, resistance from or modification by Congress or Executive, changes in Court personnel); Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relation Decisions*, 23 RAND J. ECON. 463, 463 (1992) (suggesting that Court makes decisions to maximize judges’ ideological preferences and responds to pressure from interest groups).

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case for characteristics of the disputes<sup>285</sup>—excluding them from the analysis will not bias our estimates.

Having identified relevant confounding factors, we next needed to match the cases on those variables so that we could estimate the causal effect of war. This task would be easy if exact matches existed for all cases decided during wars. But that is not the case. To get a sense of the problem, suppose we begin with the first case in our database, which, say, was a salient case decided 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 the same values on the potentially confounding variables—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. In this way, matching would literally hold constant the effects of the potential confounding variable.

Since such an exact match might not exist in our database, this approach is insufficient: If it were the only one on which we relied, we would be unable to make use of the vast majority of our cases.<sup>286</sup>

To avoid wasting valuable data, we must then create matches that are not “exact” but as close to “exact” as possible. To do this we use a recent program, co-written by two of the present authors (Ho and King) along with Kosuke Imai and Elizabeth A. Stuart, that automates this process of balancing the covariates (with relevant options and diagnostic techniques).<sup>287</sup> To portray the results, we first summarize all the covariates in Figure 6 with a single variable called the “estimated propensity score.”<sup>288</sup> Estimated propensity scores constitute a one-variable summary of all the potential confounding covariates. It is calculated as the predicted values from a logistic regression of  $T$  on  $X$ . (If the logistic is the right form, then matching on the propensity

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<sup>285</sup> See *supra* Part III.C.

<sup>286</sup> This 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 to 170, depending on the approach we used.

<sup>287</sup> Daniel E. Ho, Kosuke Imai, Gary King & Elizabeth Stuart, MatchIt: Nonparametric Preprocessing for Parametric Causal Inference (2004) (unpublished manuscript, available at <http://gking.harvard.edu/matchit/>). For examples of alternative matching models for this study (some of which do not rely on propensity scores), see *infra* Table 7. See also Ho et al., Improving Parametric Causal Inference, *supra* note 268.

<sup>288</sup> See Paul R. Rosenbaum & Donald B. Rubin, *The Central Role of the Propensity Score in Observational Studies for Causal Effects*, 70 *BIOMETRIKA* 41, 41–49 (1983) (defining propensity score and deriving seminal result of propensity score as balancing score).

score is sufficient to balance all the covariates.<sup>289</sup>) Figure 6 plots propensity scores horizontally for cases decided during war on the top and those decided during times of peace on the bottom. 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, as can be seen visually in the figure with grey and black dots. Other approaches drop fewer cases and still others discard more.<sup>290</sup>

Despite these sorts of differences, the general aim of the matching approach is the same: to compare cases within the match to generate an unbiased estimate of the causal effect of war. Since this too is our overarching goal, we invoked a number of different approaches to generate the actual matches (including matching methods that do not use propensity scores).<sup>291</sup> Following this track enables us to determine, across a range of possibilities, the degree to which our results remain robust across different methods.

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<sup>289</sup> More formally, assuming strong ignorability of treatment assignment:

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

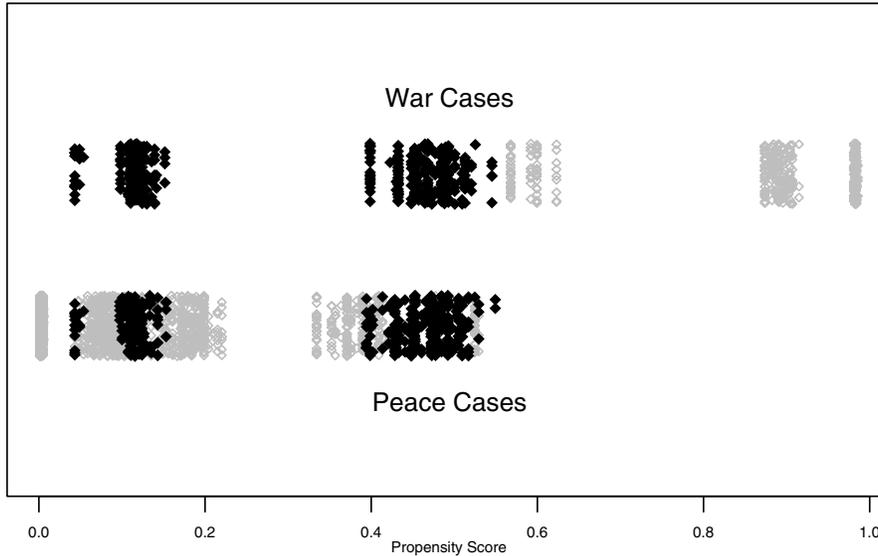
which is akin to the assumption of no omitted variables conditional on asserted in any regression analysis, Rosenbaum and Rubin have shown in a seminal result that matching on the propensity score is as bias-reducing as matching on the covariates themselves. In other words,

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

where  $e(X) = P(T = 1 \mid X)$  represented the propensity score. *See id.* at 49 (proving seminal result).

<sup>290</sup> *See infra* note 295 and Table 7.

<sup>291</sup> For the range of our estimates of the causal effect of war, see *infra* Table 7.



**Figure 6:** Sample jitter plot of “propensity scores,” a one-variable summary of all the covariates. Dark points indicate that cases were matched, while grey points indicate that cases were discarded.<sup>292</sup>

As we report in Part V, 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 the Court rendering decisions in favor of parties who allege an infringement of their rights.

## V EMPIRICAL RESULTS

Clearly, the cases decided during war are far more likely to have been resolved by a left-leaning Court. They are also substantially (a) less likely to have been decided in the liberal direction in the lower courts, (b) more likely to have been decided in earlier terms (which of course follows naturally from the fact that most wars occurred during the first half of the years which our data span), and (c) more likely to have been prominent in the media. We summarize these basic differences in Table 5, and then create our own matched dataset where the war and non-war cases are comparable and re-compute the same statistics.

<sup>292</sup> This figure presents a jitter plot of propensity scores, using propensity scores matching Table 7, *infra*.

	Mean Under War	Mean Under Peace	Standard Deviation	t-stat
<b>Lower Court</b>	0.30	0.46	0.49	8.79
<b>Politics</b>	1.01	0.37	0.49	-48.84
<b>Term</b>	1964.21	1976.94	15.71	21.48
<b>Saliency</b>	0.26	0.20	0.41	-3.54
<b>Pre-1975</b>	0.92	0.33	0.50	-44.55

**Table 5:** Summary statistics of overall sample. “Lower court” is coded as 1 if the lower court ruled in favor of a liberal outcome and 0 if conservative. “Politics” is the rescaled Segal-Cover score where a high score indicates a liberal judicial ideology. “Term” simply codes the term in which a case was decided. “Saliency” is coded as 1 if a case was nationally prominent and 0 otherwise. “Pre-1975” is an indicator variable for whether the case was decided before 1975.

As the statistics on the matched data in Table 6 indicate, the war and non-war cases in our matched dataset have means that are very close for all variables: As shown in the last column, reduction in bias occurs uniformly across all covariates, ranging from 34% to 99%. (A 100% bias reduction would indicate that we have matched exactly on all covariates, which we also report below.)

#### A. *The Causal Effect of War*

We now calculate the causal effect of war in several ways. The simplest is to compute the difference, across matched pairs, in the Court’s average support for rights and liberties claims during times of war and times of peace. In various ways, we also compute the difference after adjusting the slight imbalances remaining in the matched dataset, as shown in Table 6, with a traditional parametric approach based on a logistic model.

In all calculations of the causal effect of war, we used matching for the effect of war on ordinary cases and on cases related to the war, as discussed in Part III. We also pursued a large array of possible investigations into the joint effects of war and war-related cases, with the same substantive findings that we report here.

	Mean Under War	Mean Under Peace	Standard Deviation	t-stat	Bias Reduction
<b>Lower Court</b>	0.32	0.30	0.46	0.76	91.4%
<b>Politics</b>	0.86	0.87	0.29	-0.28	99.4%
<b>Term</b>	1967.64	1967.66	15.10	-0.02	99.9%
<b>Salience</b>	0.25	0.28	0.44	-0.96	72.9%
<b>Pre-1975</b>	0.85	0.86	0.35	-0.10	99.8%

**Table 6:** Summary statistics of matched cases for Model 4 of Table 7 for non-war cases, where “lower court” is coded as 1 if the lower court ruled in favor of a liberal outcome and 0 if conservative, “Politics” is the rescaled Segal-Cover score where a high score indicates a liberal judicial ideology, “Term” simply codes the term in which a case was decided, “Salience” is coded as 1 if a case was nationally prominent and 0 otherwise, and “Pre-1975” is an indicator variable for whether the case was decided before 1975.<sup>293</sup>

As the first set of columns in Table 7 demonstrates, for cases unrelated to any ongoing war, the probability of the Supreme Court deciding a case in favor of the litigant claiming an infringement of his or her rights decreases by about ten percentage points when a war is in progress. 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 still a substantial percentage.<sup>294</sup> 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 and 1991)—results in an even larger ATE of -16%.<sup>295</sup>

<sup>293</sup> In 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.

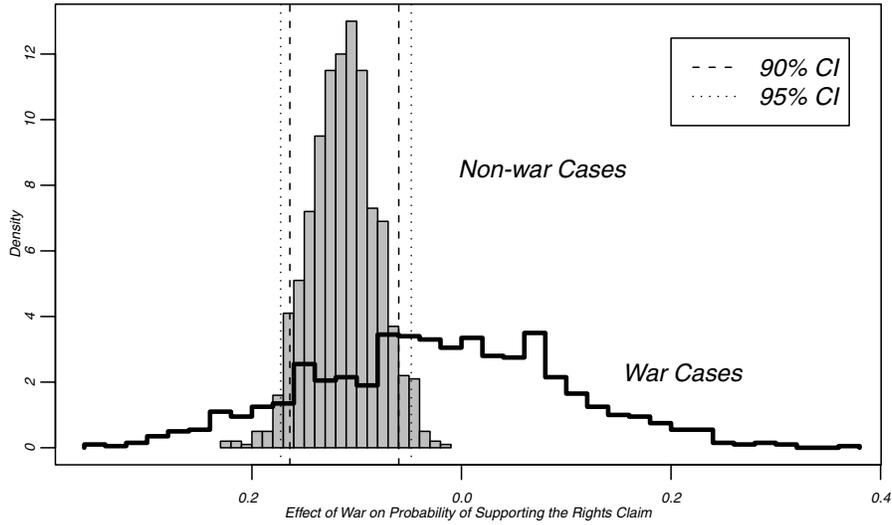
<sup>294</sup> This fails to take into account the smoothness of the Segal-Cover score and the relevance of time dynamics.

<sup>295</sup> The closer matches we require, the fewer cases are left in the analysis. 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 average treatment effect (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.

Method	Non-War Cases			War Cases		
	ATE	SE	N	ATE	SE	N
Logistic Model	-0.07	0.03	3210	0.09	0.09	134
Exact Matching Except for Term	-0.07	0.03	1549	0.08	0.11	88
Exact Matching	-0.16	0.07	209			
Propensity Score Matching	-0.11	0.04	814	-0.02	0.13	62
Propensity Score Matching (Logistic Adjustment)	-0.10	0.03	814	-0.01	0.12	62

**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. Model 1 presents estimated ATE from logistic regression of direction of judicial ideology, judicial ideology<sup>2</sup>, lower court direction, war, and an indicator variable for pre-1975 term, where the Segal-Cover score is rescaled such that the minimum score is 0. Model 2 matches cases exactly on all covariates except for term. Model 3 matches cases exactly on all covariates including term. Model 4 matches on the propensity score, where the assignment model is estimated by a logistic regression of war on the lower court decision, judicial ideology, term, salience, and pre-1975 indicator. Model 5 additionally adjusts matched cases with a logistic regression.

Since war has such a substantial effect on ordinary non-war cases, we might think that the effect of crises on war cases would be even more substantial. Indeed, most strands of the crisis thesis in the literature would predict that the effect of war should be largest for the crucial subset of cases that are a direct result of the war, and no published work we have found claims that effects are large for non-war cases but nonexistent for war cases. Yet the seemingly paradoxical finding of our analysis is that war does not have an effect on war-related cases. Indeed, as two of the models in the second set of columns in Table 7 show, the ATE is in the opposite direction, and in none of the models is the ATE statistically significant. Overall, *for cases directly related to an ongoing war, war has no detectable effect on Supreme Court decisionmaking.* In these cases, the Supreme Court is no more likely to support an infringement of an individual's civil liberties when a war is ongoing than when the country is at peace.



**Figure 7:** Histogram of the effect of war on civil rights and liberties cases for war cases and non-war cases. The vertical lines represent 90% and 95% confidence intervals of the effect on non-war cases. This figure shows that war affects non-war cases, but that the effect is negligible for war cases.<sup>296</sup>

Figure 7 summarizes our results by plotting a histogram in grey bars (with the vertical lines representing confidence intervals) of the posterior distribution of the ATE of war using ordinary (i.e., non-war) cases from the final model in Table 7.<sup>297</sup> Note that the distribution of the causal effect of war is clearly below zero (meaning that the effect of war on ordinary cases is to make the Court’s decisions more conservative), easily surpassing conventional statistical significance levels. Figure 7 also plots results for war cases by overlaying a histogram of estimated effects in this subset of the data. Compared to the grey histogram of non-war cases, which is shifted to the left of the origin, the histogram for war cases is indistinguishable from zero. The number of war-related cases is small, but this result still counters conventional wisdom, which predicts more robust effects than for non-war cases. If such large effects were there, our analysis would have found them. In addition, we conducted numerous verification checks by examining random samples of cases, comparing a random selection

<sup>296</sup> The distribution is simulated from models in the last row of Table 7. We obtained the data on the Supreme Court’s 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 184, 193–94. War includes World War II and the Korean, Vietnam, Gulf, and Afghan Wars. See *supra* notes 204–05 and accompanying text for more details.

<sup>297</sup> The posterior distribution of quantities of interest is a standard way to summarize inferences from a dataset from a Bayesian paradigm. See ANDREW GELMAN ET AL., *BAYESIAN DATA ANALYSIS* 37–39 (2d ed. 2004).

of briefs, and conducting other quantitative and qualitative checks. Given any version of either the crisis or the *Milligan* theses, this is a deeply puzzling result, challenging essentially all prior literature.

*B. Why War Does Not Affect War-Related Cases: A Conjecture*

Here, we offer a conjecture designed to explain why war would have a large effect on cases unrelated to the war but no effect on those related to the war. Our conjecture is based on an alternative theory that when cases are directly related to the war, the traditional liberal-conservative (or collective rights vs. individual rights, or security vs. liberty) dimension, inherent in the crisis and *Milligan* theses and operative in most of American politics, becomes less meaningful. For cases that are directly related to the war or conflict, the Court seeks to shift responsibility towards Congress and the Executive.

These results lead to an important jurisprudential conclusion, namely that, in the crisis context, the Supreme Court decides war-related cases on a different dimension than proponents of the crisis or *Milligan* theses would suggest. The Court does not decide cases on a rigid liberal-conservative dimension, but instead engages in a process-oriented mode of decisionmaking. Indeed, crisis decisionmaking involves a process-institutional framework of ensuring authorization from the democratic branches of government.<sup>298</sup> This idea coheres with the constitutional silence on the role of the courts in war, in contrast with explicit Article I and II grants of power to the legislature and Executive. Politically, this may be desirable for the justices, precisely because war-related cases present potentially severe threats to the judiciary's legitimacy.<sup>299</sup> Focusing on congressional authorization ensures the political legitimacy of a ruling.

As we noted in Part II.A, detractors of the crisis thesis emphasize that the Court has historically played the role of allocating war powers under the constitutional separation of powers, as it did in *Youngstown*.<sup>300</sup> Instead of exhibiting deference to the assertion of military power, the *Youngstown* Court found the seizure unconstitutional, inferring that the seizure constituted an act of lawmaking power vested in Congress alone.<sup>301</sup> As Justice Jackson noted: "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."<sup>302</sup> This would

<sup>298</sup> We developed this theory from our data, so its consistency with our empirical results cannot be considered an independent test.

<sup>299</sup> See Part III.B.1.

<sup>300</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>301</sup> *Id.* at 587–89.

<sup>302</sup> *Id.* at 635; see also *supra* note 95.

seem to question both the predictions of the crisis and *Milligan* theses. The Court defines its responsibility in times of crisis and for cases most closely related to the crises as ensuring that the allocation of power abides by constitutional principles.

This theory is also consistent with strands of the extant political science and law literatures.<sup>303</sup> Issacharoff and Pildes, who term the normative sides of the crisis and *Milligan* theses as “executive unilateralism” and “civil libertarianism” respectively, survey the most pivotal war-related cases and find that “the judicial approach to [security threats] has been, on the whole, more complex, and oriented toward different questions, than either executive unilateralists or civil libertarian idealists recognize.”<sup>304</sup> Instead of a pure dimension of security versus liberty, Issacharoff and Pildes suggest that “the courts have developed a process-based, institutionally-oriented (as opposed to rights-oriented) framework for examining the legality of governmental action in extreme security contexts.”<sup>305</sup> The extant theories that we test focus on the idea that the “debate over liberty versus security misses the most essential structure of [the crisis jurisprudence].”<sup>306</sup>

This dynamic can be seen in war-related cases that are central in the literature, such as *Ex parte Endo*<sup>307</sup> and *Youngstown*. In fact, as Issacharoff and Pildes note, *Endo* and *Korematsu* may be distinguished precisely on the degree of congressional authorization of executive actions, showing that the dimension may be separate and orthogonal to a more conventional liberal-conservative dimension.<sup>308</sup> Recent cases, such as *Hamdi v. Rumsfeld*,<sup>309</sup> *Rumsfeld v. Padilla*,<sup>310</sup> and *Rasul v. Bush*,<sup>311</sup> also demonstrate the Court’s interest in these process-based questions.<sup>312</sup>

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<sup>303</sup> For a strategic approach focusing on the interactions of political institutions, see, for example, Bergara et al., *supra* note 250.

<sup>304</sup> Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004).

<sup>305</sup> *Id.* at 5.

<sup>306</sup> *Id.* at 7.

<sup>307</sup> 323 U.S. 283 (1944).

<sup>308</sup> See Issacharoff & Pildes, *supra* note 304, at 19–25.

<sup>309</sup> 124 S. Ct. 2633 (2004).

<sup>310</sup> 124 S. Ct. 2711 (2004).

<sup>311</sup> 124 S. Ct. 2686 (2004).

<sup>312</sup> For further discussion of the Supreme Court’s recent decisions in *Padilla*, *Hamdi*, and *Rasul*, see *infra* Part VII.B.

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	Direct Effect	SE	$N_1$	$N_0$
Lower court, non-war case	-0.23	0.02	1377	1793
Lower court, war case	-0.17	0.12	23	51
Salient, non-war case	0.09	0.02	679	2474
Salient, war case	-0.11	0.13	25	45
Ideology, non-war case	0.15	0.03	202	3008
Ideology, war case	0.06	0.12	22	91

**Table 8:** Direct effects of other binary case variables for war cases and non-war cases, matching exactly on all other covariates. Ideology here is dichotomized by whether it takes on the highest observed value of the Segal-Cover score or not.  $N_1$  and  $N_0$  represent the number of observations matched.

If our alternative theory is true, we should find evidence that traditional determinants of judicial behavior, such as ideology, case salience, and lower court reversal, do not provide leverage over the subset of war cases. Table 8, which provides rough estimates consistent with this story, is a somewhat independent test of our theory. The table shows that while the Court decides cases that are salient and unrelated to the war more liberally, salience has no effect on war cases. Similarly, while the most liberal Court exhibits an increase of roughly fifteen percent for the probability of a liberal decision for ordinary cases, this effect is substantively small and statistically insignificant for war cases. This extraordinarily unusual finding for ideology, which is traditionally the most robust predictor of judicial behavior, strongly supports our notion that war cases may be of a different breed than almost all other cases that the Court decides.

A more direct way of assessing this alternative theory would be to measure the degree of institutional support for a particular decision of the Court. Two direct challenges present themselves here. 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 might lead to post-treatment bias. For example, if we only matched cases arising out of the Espionage Act of 1917,<sup>313</sup> 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.<sup>314</sup> Second, it would be hard to measure variation from case to case in the “implied will” of Congress. Its sentiment rather is much more likely to affect cases in

<sup>313</sup> Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219 (current version at 18 U.S.C. § 2388 (2000)).

<sup>314</sup> We 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.

the same way as public opinion: as a reservoir of good or bad will with respect to the particular conflict.<sup>315</sup>

Despite these measurement challenges, our conjecture may be the only theory that resolves the seeming paradox in a way that is consistent with the case law and academic literatures. That said, if our conjecture is right, it suggests that large strands of scholarship are incomplete on two fronts. First, war affects cases that may appear to be entirely unrelated to the war. Second, war does not affect the cases talked about most extensively in this scholarship.

### C. Other Possible Causal Effects of War

To the extent that war has no apparent causal impact on cases that deal directly with war, our evidence refutes both the crisis thesis (the effect should be larger in war cases than ordinary cases) and the *Milligan* thesis (the Supreme Court protects rights during war). Yet some support for the crisis thesis still exists in the finding that war has a significant impact on “ordinary” Supreme Court cases. In the following section, we consider the breadth and depth of this finding.

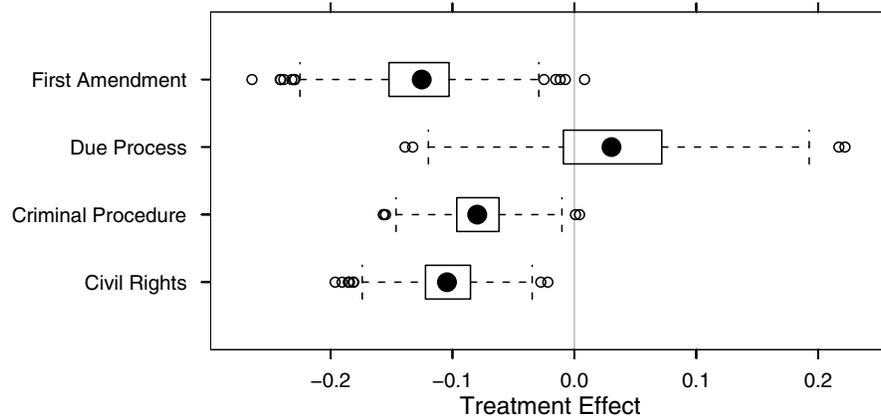
#### 1. The Effect on Particular Areas of the Law

Recall that several scholars have argued that the effect of war would not be felt in all cases of rights and liberties, but rather would be limited to particular areas of the law. In this section, we decompose our findings for ordinary cases unrelated to the war into four areas: criminal procedure, civil rights, First Amendment, and due process. (In our search for some effect of war on war-related cases, we also tried similar decompositions, but the noneffect was highly robust.)

Figure 8 presents boxplots, in which the boxes represent the spread of the estimated treatment effect, and the large dot represents 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 all of the boxes squarely to the left of the vertical line (which indicates no war effect).

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<sup>315</sup> A possible exception here is the Vietnam War, which brought dramatic shifts in public as well as congressional opinion.



**Figure 8:** The effect of wars on the outcomes of Supreme Court cases that are unrelated to the war in 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.<sup>316</sup>

These results are consistent with the substantial effect of war across all ordinary civil rights and liberties cases, demonstrated in Table 7. On the other hand, the effect varies considerably by the particular area under analysis. It is virtually nonexistent in due process cases, while it is quite large in those implicating the First Amendment. Indeed, in these cases, war decreases the probability of a liberal decision by roughly thirteen percent. This is an interesting finding and one that may explain why the crisis thesis has found such a comfortable home in the legal academy since the World War I era: Most of those early analyses focused on the First Amendment.<sup>317</sup> The result is also unsurprising in light of the litigation falling under the rubric of

<sup>316</sup> This is a boxplot 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
Criminal Procedure	-0.08	0.03	0.00	354
Civil Rights	-0.10	0.03	0.00	256
First Amendment	-0.13	0.04	0.00	154
Due Process	0.03	0.06	0.69	68

On simulation techniques for presenting results, see King et al., *supra* note 229. On boxplot techniques, see JOHN W. TUKEY, EXPLORATORY DATA ANALYSIS 39–41 (1977); and Robert McGill et al., *Variations of Box Plots*, 32 AM. STATISTICIAN 12 (1978).

<sup>317</sup> See, e.g., Chafee, *Speech in War Time*, *supra* note 14 (discussing war-time Court decisions in connection with Espionage Act of 1917, most restricting free speech). Subsequent studies focusing on the First Amendment include Emerson’s classic works. See *supra* note 14.

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April 2005]

THE SUPREME COURT DURING CRISIS

79

the First Amendment: suits involving the Alien Registration Act,<sup>318</sup> loyalty oaths, conscientious objectors, and protest demonstrations.<sup>319</sup> 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 prisoners' rights.

As Figure 8 also shows, war decreases the probability that the Court will find a violation of a litigant's civil rights (including claims of race and gender discrimination). This calls into question the assertions of some scholars that international crises lead to enhanced protection for minorities.<sup>320</sup> The effect of war on criminal procedure is slightly smaller, though still significant such that the likelihood of the Court ruling in favor of defendants drops by eight percent.

## 2. *The Effect over Time*

In our discussion of the institutional explanations for the presence (or absence) of a crisis effect,<sup>321</sup> 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 time,<sup>322</sup> so 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,"<sup>323</sup> 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

<sup>318</sup> The Alien Registration Act of 1940, ch. 439, § 2, 54 Stat. 670, 671 (current version at 18 U.S.C. §§ 2385, 2387 (2000)), made it a crime to "knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence." 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 and his co-defendants challenged the constitutionality of the Smith Act under the First Amendment, but the Court ruled against them. Legal historian Lawrence M. Friedman attributes their defeat, at least in part, to a war effect, asserting that "the outbreak of the Korean War undoubtedly hurt their cause and their case." FRIEDMAN, *supra* note 45, at 333. Our results lend general support to Friedman's speculation. R

<sup>319</sup> See *infra* Appendix.

<sup>320</sup> See PHILIP A. KLINKNER, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 4–6, 353 n.4 (1999); Dudziak, *supra* note 17, at 36–37; Scheppele, *supra* note 17, at 317–19. R

<sup>321</sup> See *supra* Part II. R

<sup>322</sup> See, e.g., Goldsmith & Sunstein, *supra* note 117, at 284–89; Tushnet, *supra* note 13, at 294–98. R

<sup>323</sup> See, e.g., Gross, *supra* note 4, at 1090–92. R

on, affecting the Court's resolution of suits in times of peace.<sup>324</sup> Learning, dosages, and statist ratchets are 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.

To explore these possibilities, we depict in Figure 9 the estimated causal effect of war on ordinary cases for each term in which a war occurred.<sup>325</sup> The circles represent matched pairs of cases (with the size of the circle drawn in proportion to the number of cases), with those in white indicating all the "war" mates in the pair and those in grey, all the "peace" 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.

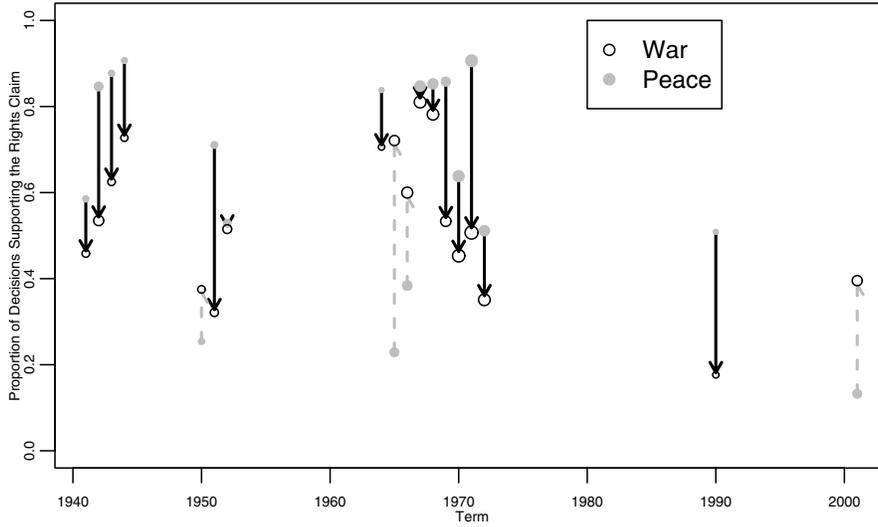
From this figure we can observe interesting variations in the causal effect of war on Court outcomes. Note, for example, the relatively small impact of the conflict in Vietnam (in the 1960s). Taking the nine Vietnam War terms collectively, the Justices became neither distinctly more nor less likely to 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 War appear to have become more willing to rule against litigants claiming a deprivation of their rights, though the sample size of these cases obviously is smaller. Indeed, however conservative were the majorities 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. What they fail to do is lend support to any of the time effects scholars have posited. In fact, Figure 9 provides no evidence of

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<sup>324</sup> See, e.g., Posner & Vermeule, *supra* note 20, at 610–22 (describing literature on statist ratchets).

<sup>325</sup> This figure is for illustrative purposes only, depicting results from one reasonable model that does not discard cases outside the range of the propensity scores (estimated by the logistic model) and 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, politics<sup>2</sup>, case salience ("salience"), a pre-1975 indicator ("bef75"), bef75\*salience, term\*salience, term\*politics<sup>2</sup>, term<sup>2</sup>, lower court\*salience, politics\*salience, politics\*lower court, lower court\*term<sup>2</sup>, salience\*term<sup>2</sup>. For information on these variables, see *infra* Part III.C. Other methods that we present drop certain terms of the Court due to common support and also correct for inexact matches by parametric adjustment, but nonetheless the substantive point of this Figure remains.



**Figure 9:** The effect of wars on the outcomes of Supreme Court cases in the areas of rights, liberties, and justice among cases unrelated to war: a comparison of matched pairs. Note how the effect for almost all matched pairs is to reduce the probability of a liberal decision in wartime.

any patterns of the effect of war, thereby casting large doubt onto the contradictory theories of learning and dosages.<sup>326</sup> While it is true that the effect appears to have been more robust in World War II, the Vietnam War also appears to have affected the Court’s decisions. 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, the rights jurisprudence appears to “bounce back” during peacetime.<sup>327</sup>

### 3. The Effect on the Government’s Claims

Earlier, we discussed the claims of some commentators 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.<sup>328</sup> Using the same matching methods, we examined (a)

<sup>326</sup> Granted, 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.

<sup>327</sup> Given 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 88, at 83–84 (noting need for presidents to sell domestic agendas on foreign policy crisis metaphors).

<sup>328</sup> See *supra* note 19.

whether the Court was in fact more likely to support the Government's position during war, and (b) whether this deference might be particularly acute for federalism cases, as some legal academics have suggested.<sup>329</sup> Our results show that the Court is not especially deferential to the United States in the specific area of federalism or, for that matter, in other types of suits.

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. 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,<sup>330</sup> however, we are hesitant to rely on this finding. Nonetheless, these findings call into question the commonly held notion that "whenever you see a national emergency, federalism disappears."<sup>331</sup>

Other approaches to assessing support for the U.S. government also turn up empty. For example, the Court is no more nor 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, conducting the same analysis for our crisis indicators, we find little impact of rallies on case outcomes. What this finding, taken with our other results, suggests is that the crisis thesis applies most directly to civil rights and liberties cases and that no deference is granted to the government.

## VI

### THREATS TO VALIDITY

While we have attempted to validate the crisis thesis in many ways, we have not explored all the possibilities, nor could we do so in a single article.<sup>332</sup> In what follows, we consider six potential critiques

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<sup>329</sup> See Linda Greenhouse, *Will the Court Reassert National Authority?*, N.Y. TIMES, Sept. 30, 2001, § 4, at 14 (noting opinion of academics that federalism conflicts at base with desire for strong national leadership to fight terrorism).

<sup>330</sup> Discarding incomparable cases from the sample of 295 federalism cases yields only sixty-eight matched cases.

<sup>331</sup> See Greenhouse, *supra* note 329 (quoting University of California at Berkeley Professor Robert C. Post, who has analyzed rise of nationalism during World War I).

<sup>332</sup> We outline some of the research possibilities in Part VI. 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. For war-related

April 2005]

THE SUPREME COURT DURING CRISIS

83

of our study: (a) the scope of cases considered; (b) the possibility of omitted variables; (c) the potential of post-treatment bias; (d) the measure of the Court's politics; (e) the relative importance (or, more pointedly, unimportance) of the causal effect of war; and (f) the neglect of the lower federal courts.

#### A. *Scope of Civil Rights and Liberties Cases*

First, we consider how the scope of cases we analyze affects our findings. Conventional wisdom implies that a crisis effect manifests itself only, mainly, or most strongly in cases that pertain directly to that crisis.<sup>333</sup> Hence, the inclusion of all ordinary civil rights and liberties cases might be seen as *overinclusive*, while the measure of war-related civil rights and liberties cases might be seen as *underinclusive*. Similarly, one might 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).<sup>334</sup>

We have offered several measures and a host of robustness checks to validate the crisis thesis, all yielding the same findings. In terms of overinclusiveness, the general effect of war on ordinary civil rights and liberties cases is a crucial 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 in ordinary cases is consistent with results from adherents of the crisis thesis, such as Thomas Emerson, who mapped the effect of wars onto a series of legal areas, some related to the crisis and some not.<sup>335</sup> It is also consistent with the published views of contemporary writers, such as William Stuntz, who argues that “[j]ustices 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.”<sup>336</sup> Oren Gross, as we noted earlier, concurs: “[W]hen judges decide ‘*ordinary*’ criminal cases, they will take into consideration the impact of their rulings on the fight against terrorism.”<sup>337</sup> Our findings bolster these ideas: The effects of war hold across wide areas of constitutional law, even beyond “ordinary crim-

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cases, see [http://www.lchr.org/us\\_law/loss/cases/court\\_cases.htm](http://www.lchr.org/us_law/loss/cases/court_cases.htm) (last visited Oct. 30, 2004) and <http://news.findlaw.com/legalnews/us/terrorism/cases/index.html> (last visited Oct. 30, 2004).

<sup>333</sup> See, e.g., Tushnet, *supra* note 13, at 276–78.

<sup>334</sup> *Id.* at 277.

<sup>335</sup> See EMERSON, SYSTEM OF FREEDOM, *supra* note 14, at 55–56 (dealing with main problem areas concerning freedom of expression as it related to war and defense).

<sup>336</sup> Stuntz, *supra* note 225, at 2140 (emphasis added).

<sup>337</sup> Gross, *supra* note 4, at 1095 (emphasis added).

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inal cases,” perhaps because the justices take into consideration the indirect effects of their rulings on the war effort.

The Court’s recent decision in *Grutter v. Bollinger*,<sup>338</sup> in which it considered the constitutionality of the University of Michigan Law School’s affirmative action program, may provide an example of this dynamic at work. While *Grutter* seems wholly unrelated to events ensuing in the wake of September 11 and of domestic consequence only, consider the 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?<sup>339</sup>

In so raising this point, Justice Ginsburg highlighted the implications of the case—again, a domestic rights dispute—for national defense and security.<sup>340</sup> Justice O’Connor, in her opinion for the Court in *Grutter*, also emphasized these implications, focusing, in part, on the case’s potential effect on the armed forces.<sup>341</sup> Indeed, these concerns ultimately played an important, if not pivotal, role in O’Connor’s disposition of the case.<sup>342</sup>

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<sup>338</sup> 539 U.S. 306 (2003).

<sup>339</sup> Oral Argument at 7, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02–241).

<sup>340</sup> The apparent role that the military played fits comfortably in the extensive literature exploring the role of amicus briefs and interest groups in Supreme Court decisionmaking. See 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, 722–24 (1993) (demonstrating influence of amicus curiae briefs on certiorari grants); see also Lee Epstein, *Courts and Interest Groups*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 335, 345–49 (John B. Gates & Charles A. Johnson eds., 1991) (discussing interest-group use of amicus curiae briefs to influence Court).

<sup>341</sup> *Grutter*, 539 U.S. at 331 (noting that “high-ranking retired officers and civilian leaders of the United States military assert that[ ] . . . a ‘highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security’” (quoting Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae in Support of Respondents 5, *Grutter*, 539 U.S. 306 (2003) (No. 02–241, 02–516))).

<sup>342</sup> See, e.g., Linda Greenhouse, *Context and the 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”); Linda Greenhouse, *Justices Back Affirmative Action by 5 to 4, but Wider Vote Bans a Racial Point System*, N.Y. TIMES, June 24, 2003, at A1 (noting that

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 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.

### B. Omitted Variables

In Part III.C, we explained that tests of the crisis thesis must take into account (that is, “control for” or “hold constant”) factors other than the presence of war that may affect case outcomes and that are related to and causally prior to the chief explanatory variable, war. We thus controlled 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. We consider each here.

#### 1. The Severity of War

The measure we used to capture “war” is crude: A war existed or it did not. It is possible that we have oversimplified the concept, that we should have measured 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.<sup>343</sup> 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 curtailing rights and liberties was more compelling during World War II. Another distinction along these lines may be whether Congress formally declared war (a

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Justice O’Connor’s opinion “cited a number of briefs from businesses, colleges and, with particular emphasis, two dozen retired senior military officers and former commandants of the service academies”); Charles Lane, *Affirmative Action for Diversity Is Upheld*, WASH. POST, June 24, 2003, at A1 (“Seemingly more influential than the Bush administration’s views were briefs filed . . . 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.”); *What Do U-M Court Rulings Mean?*, DETROIT NEWS, June 24, 2003, at 11A (quoting Dennis Archer, President-Elect of American Bar Association as stating that *Grutter* decision “serves to strengthen the military academies”).

<sup>343</sup> See, e.g., Goldsmith & Sunstein, *supra* note 117, at 280 (distinguishing World War II as “total war” whereas war on terror or Afghanistan War has “seen none of the mobilization and sacrifice (or call to sacrifice) that characterized World War II”).

“constitutional” war).<sup>344</sup> Perhaps the Supreme Court is more deferential to the government when the legislature has explicitly authorized the battle. Indeed, Justice Douglas suggested as much in *New York Times Co. v. United States*,<sup>345</sup> in which he specifically denounced the government’s national security claims on the ground that “[n]owhere are presidential wars authorized.”<sup>346</sup>

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.<sup>347</sup> The quantity we estimated was the *average* causal effect, and our methodology would be unbiased even if the actual effect varied over different types of war. Moreover, since our original definitions of crises include gradations of war,<sup>348</sup> we were able to explore the degree to which different types of threats affected 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, but not for simple rally effects. Finally, even within that category of “war,” we are able to observe differences among wars perhaps based on their severity. As Figure 9 shows, for example, the effect of World War II on the Justices appears to have been more consistent and stronger than the effect of the Korean War. In short, our matching models already address this concern, rendering unnecessary the inclusion of a separate variable to capture war-specific distinctions.

## 2. *Public Opinion*

The relative support that the public lends to the war effort constitutes another covariate of Court decisions for which we did not explicitly account. 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, perhaps succumbing to this pressure, issued their per curiam order within twenty-four hours of oral argument.<sup>349</sup> In contrast comes

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<sup>344</sup> See U.S. CONST. art. I, § 8, cl. 11; *N.Y. Times Co. v. United States*, 403 U.S. 713, 722 (1971) (Douglas, J., concurring) (“[T]he war power stems from a declaration of war. . . . Nowhere are presidential wars authorized.”).

<sup>345</sup> 403 U.S. 713 (1971).

<sup>346</sup> *Id.* at 722 (Douglas, J., concurring).

<sup>347</sup> See *supra* Figure 9.

<sup>348</sup> See *supra* Part III.B.

<sup>349</sup> See, e.g., Goldsmith & Sunstein, *supra* note 117, at 264 (noting that politicians, media, and most of public insisted on capital punishment for saboteurs).

April 2005]

THE SUPREME COURT DURING CRISIS

87

*New York Times Co. v. United States*,<sup>350</sup> in which Justice Douglas noted in dicta that a “debate of large proportions goes on in the Nation over our posture in Vietnam” and that the documents obtained by the *New York Times* were “highly relevant to the debate.”<sup>351</sup>

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 degree of public scrutiny over the case. Second, in Part I, we presented evidence of the “rally effect” that has accompanied the outset of virtually every modern war. While such rallies affect the public, investigating the rally effect by matching, 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.<sup>352</sup> Finally, by matching cases that are close in time, we arguably have accounted for some shifts in public opinion, such as the widespread skepticism of the presidency following Watergate and the Vietnam War.

### 3. *The Us-Them Dichotomy*

Another omitted covariate from our analysis may be the degree to which the government aims its emergency provisions at “outsiders.”<sup>353</sup> 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., individuals that provide material support to terrorist organizations<sup>354</sup>), the Court may be more inclined to strike down its provisions. To the degree that executive actions since September 11 have not specified clearly the violations and the violators, our findings may overestimate the degree to which the Rehnquist Court will suppress rights.

<sup>350</sup> 403 U.S. 713 (1971).

<sup>351</sup> *Id.* at 724 (Douglas, J., concurring).

<sup>352</sup> See *infra* Part VI.C for a discussion of post-treatment bias.

<sup>353</sup> See, e.g., Cole, *Enemy Aliens*, *supra* note 39, at 955 (noting that war threatens liberties of noncitizens first); Cole, *The New McCarthyism*, *supra* note 39, at 16–18 (describing immigration law in war on terrorism); Downs & Kinnunen, *supra* note 12, at 404 (“It is easier to play loose with civil liberties when only the most unpopular are affected.”); Gross, *supra* note 4, at 1082–89 (discussing “us-them” dialectic of emergency powers and noting that emergency powers are more likely to be conferred when “other” is well defined).

<sup>354</sup> See Cole, *The New McCarthyism*, *supra* note 39, at 8–15. Whether this characteristic is readily identifiable may be contested.

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#### 4. *Other Selection Effects*

It is well known that cases reaching litigation (rather than settling out of court) are biased samples. 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.<sup>355</sup> 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.<sup>356</sup> If this is so, then we should have incorporated variables designed to control for this selection process. However, as we found in Part III.C, the facts of Fourth Amendment search and seizure cases do not differ systematically across war and peace cases, indicating that no selection bias results from the presence of war.

Furthermore, from Table 4 we may conduct a rough sensitivity analysis to omitted covariates, which is often conducted to examine how robust the statistical model is to other covariates.<sup>357</sup> Our analysis might suggest that we have even underestimated the effect of war. The only case fact that is clearly correlated with war and affects the probability of a liberal decision appears to be the search of a car. And while a case that includes the search of a car is 0.35 less likely to be upheld by the Court, such cases are also 0.14 less likely to appear before the Court during times of war. The inclusion of this covariate or one like it if available would, if anything, lead to a greater effect of war.

Another issue is the relative severity or extremeness of cases which we omit. If cases grow more and more extreme owing to overzealous prosecution efforts on the government's part during wars, and the Court is still far more likely to decide them against the rights

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<sup>355</sup> Priest & Klein, *supra* note 23, at 4–5. This prediction is contingent on the decision standard, the parties' uncertainty of estimating case quality, and the degree of stake asymmetry across the parties.

<sup>356</sup> This 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 certiorari. We could argue that the justices are relatively constrained in the decision to grant certiorari, but much of constitutional theory and public choice theory would suggest that this is not the case.

<sup>357</sup> See, e.g., Charles F. Manski et al., *Alternative Estimates of the Effect of Family Structure During Adolescence on High School Graduation*, 87 J. AM. STAT. ASS'N 25 (1992); Paul R. Rosenbaum & Donald B. Rubin, *Assessing Sensitivity to an Unobserved Binary Covariate in an Observational Study with Binary Outcome*, 45 J. ROYAL STAT. SOC'Y 212, 212 (Series B, 1983).

April 2005]

THE SUPREME COURT DURING CRISIS

89

claimant—as our results show that it is—then the causal effect is probably larger than our estimates. 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 have only assessed the importance of case characteristics in detail in one issue area (albeit perhaps one more likely than most to have manifest distinctions during war and peace), and the effect may be stronger in other areas of the law. Moreover, any case facts, such as whether a First Amendment case involved commercial or political speech, could constitute important omitted covariates leading to a spurious causal effect.<sup>358</sup>

### C. Post-Treatment Bias

Omitted variable bias is always a worry in empirical research. Another concern is controlling for variables that are themselves effects of the war, thereby controlling away and thus biasing our estimate of the causal effect. If war affects lower court decisionmaking, for example, we should not match on how lower courts decided the case. Or 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.<sup>359</sup>

These arguments are not without merit. In order for the first problem to have an effect, we would need to show that the lower courts are affected by the presence of a war, which of course suggests that the crisis thesis cuts far deeper into the federal court system than has been proposed. It is worth additional research to find out.

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<sup>358</sup> For example, the famous Baldus study on capital punishment 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. See DAVID C. BALDUS ET AL., CHARGING AND SENTENCING OF MURDER AND VOLUNTARY MANSLAUGHTER CASES IN GEORGIA, 1973–1979 (Inter-Univ. Consortium for Political & Soc. Research, No. 9264, 2001); DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990). 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 certainly would be a worthwhile and laudable venture to subject these findings to further tests. The crucial point is that in order to do so scholars should employ a method that does not inadvertently introduce bias and takes seriously the identification of causal effects. On bias, see *supra* note 170 and accompanying text. Matching is a general approach to drawing causal inferences that may prove fruitful and well suited for additional investigations of the crisis thesis, as well as for the analysis of other legal phenomena.

<sup>359</sup> See Tushnet, *supra* note 13, at 277–78. On the other hand, Figure 5 does not appear to yield much support to this “crowding out” hypothesis.

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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.<sup>360</sup>

#### D. *The Measurement of the Court's Politics*

Some scholars have criticized Segal-Cover ideology scores since, because they were coded from newspaper editorials written before a justice ascended to the bench, the scores ignore changes in judicial ideology over time (such as occurred with Justice Harry Blackmun).<sup>361</sup> Segal-Cover scores are indeed measured once and then fixed, but even if a measure of ideology that changed over time were available including any changes that occurred after, and possibly as a result of, war would result in post-treatment bias.

In addition, our analysis depends on a measure of the ideology of the entire Court. The Segal-Cover scores could be improved upon, but at least random measurement errors in the scores of individual justices will have small effects on our measure of the Court's ideological position.

Although we have no better measure available, we were able to evaluate the robustness of our results in part. Whether we (a) exclude the scores and match on term indicators,<sup>362</sup> (b) match on ideology estimates derived from decisions in areas other than civil rights and liberties,<sup>363</sup> or (c) match on Martin and Quinn's moving ideal points,<sup>364</sup> our results appear to persist.

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<sup>360</sup> For example, with 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 the baseline ATE of -11% (SE = 3%) when all covariates are included. These estimates are for models that pool war cases and non-war cases, but substantially the same results remain when analyzing the cases separately.

<sup>361</sup> For a critique of the Segal-Cover scores, see Epstein & Mershon, *supra* note 241, at 281–84. For 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. POL. 801, 810 (1998), noting Blackmun's shifting jurisprudence.

<sup>362</sup> See *supra* Table 7.

<sup>363</sup> We 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 by 0.43.

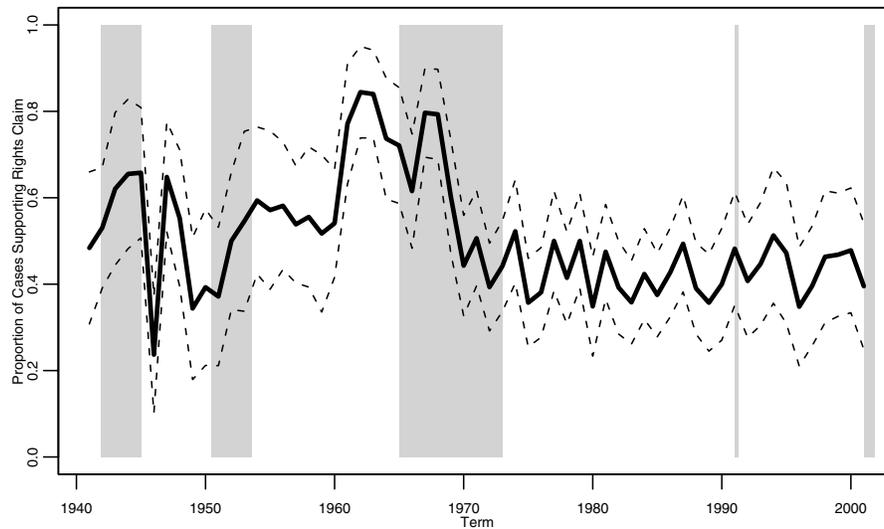
<sup>364</sup> As we suggested earlier, these scores are ill-suited for our purposes since they are defined endogenously by using judicial votes to derive ideal points. See *supra* note 241. To investigate this, we estimated the propensity score by a logit model with the Martin-Quinn score, term, Martin-Quinn, term, term\*Martin-Quinn as predictors. We then matched on

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*E. The Relative Importance of the Causal Effect of War*

While there is a clear difference in Court treatment of rights and liberties on non-war cases 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 .95 (or ninety-five 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 nearly zero: The presence of a war would have little effect on case outcomes as the justices would simply continue to rule against rights claimants in each and every case.



**Figure 10:** The proportion of U.S. Supreme Court decisions supporting rights, liberties, or justice claims, 1953–2001 terms. The line depicts the proportion of support. The grey shading depicts terms during which the Court heard disputes during a war period.<sup>365</sup>

But this sort of extreme right-of-center Court never has existed, or, at least, never existed in modern-day America. Figure 3, which

the estimated propensity score, with exact restrictions on lower court decisions and salience, imposing on common support by discarding outliers, with replacement.

<sup>365</sup> We 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. See *supra* notes 184, 193–94.

depicts the political ideology of the median justice, suggests as much. The data in Figure 10, which illustrate the actual proportion of U.S. Supreme Court decisions supporting a rights, liberties, or justice claim, lends more support. The proportion varies a lot—note, for example, unparalleled levels of liberalism in the 1960s (in the .80 range, or eighty 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 thirty of 100 cases decided in favor of the party alleging a rights infringement). Rather (and, on average), that figure has hovered around a moderate .49 since the 1953 term.

It is in light of the contemporary, rather temperate patterns in decisionmaking depicted in Figure 10 that the importance of our findings moves into relief: Assuming that the past is the best indicator of the future, the causal effect of war on non-war cases of ten percent is substantial.

*F. The Neglect of Lower Courts, and Some Preliminary Evidence in the Wake of September 11*

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? In the wake of September 11, have we overly restricted our analysis by assessing the crisis thesis against Supreme Court decisions only?

Our goal is to explore the crisis thesis as it pertains to the court for which it was developed, the U.S. Supreme Court. Prior to September 11 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.<sup>366</sup> For example, perhaps the institutional mechanisms we detailed in Part II.B are far more severe for the politically visible apex of the American judiciary than they are for the (relatively) politically insulated appellate courts.

In addition, at least in the contemporary context, the federal appellate courts are overwhelmingly Republican in composition: In eight of the twelve circuits, as Table 9 shows, judges appointed by Republican presidents outnumber Democratic appointees. What this may suggest, if we believe the literature indicating that Republican judges tend to be to the ideological right of their Democratic counter-

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<sup>366</sup> See *supra* Part II.

parts,<sup>367</sup> 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 presumably will continue to rule in this manner regardless of the existence of a crisis. 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 occasionally hold for the government (perhaps as often as one in ten cases rather than zero in 100) should our results for the Supreme Court generalize to the federal circuits.

Circuit (Partisan Composition)	Probability of a Panel of:			
	Three Republicans	Three Democrats	Two Republicans	Two Democrats
1st (4 Republicans; 2 Democrats)	0.20	0.00	0.60	0.20
2d (5 Republicans; 8 Democrats)	0.03	0.20	0.28	0.49
3d (6 Republicans; 6 Democrats)	0.09	0.09	0.41	0.41
4th (8 Republicans; 6 Democrats)	0.25	0.02	0.51	0.22
5th (11 Republicans; 4 Democrats)	0.36	0.01	0.48	0.15
6th (6 Republicans; 6 Democrats)	0.09	0.09	0.41	0.41
7th (8 Republicans; 3 Democrats)	0.34	0.01	0.51	0.15
8th (7 Republicans; 3 Democrats)	0.29	0.01	0.53	0.18
9th (9 Republicans; 17 Democrats)	0.03	0.26	0.24	0.47
10th (7 Republicans; 5 Democrats)	0.16	0.05	0.48	0.32
11th (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 9:** 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 a panel composed of a particular combination of Democratic and Republican judges across the appellate courts, assuming random assignment of three-judge panels.<sup>368</sup>

<sup>367</sup> See, e.g., Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2156–57 (1998); Jeffrey A. Segal et al., *Decision Making on the U.S. Courts of Appeals*, in CONTEMPLATING COURTS 227, 231–32 (Lee Epstein ed., 1995); Ronald Stidham et al., *The Voting Behavior of President Clinton’s Judicial Appointees*, 80 JUDICATURE 16, 19 (1996).

<sup>368</sup> The data on partisan composition are as of June 20, 2003 (derived from <http://www.allianceforjustice.org/> (last visited Nov. 2, 2004)). 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 =

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

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 decisionmaking on the appellate bench. Also, even though Republicans dominate the circuit courts, the probability, as Table 9 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 decisionmaking.<sup>369</sup> 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 9 shows) producing substantially fewer decisions supporting rights than they would in the absence of a crisis.

## VII IMPLICATIONS

That American judges vote in accordance with their political ideologies is not news: For over six decades, scholars have emphasized the role that partisanship plays in decisionmaking.<sup>370</sup> How war affects judicial decisionmaking, however, is news. While commentators long have speculated that various mechanisms lead judges to suppress rights and liberties during times of crisis,<sup>371</sup> 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.<sup>372</sup> In between these two camps sit many others who have offered variants of one view or the other.<sup>373</sup>

Our study puts this debate on firmer empirical ground: We find that neither side has it quite right. We find no effect of war on cases

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where  $N_R$  represents the total number of Republican judges in that circuit;  $N_D$  represents the total number of 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).

<sup>369</sup> Indeed, Cross and Tiller found that “a partisan split . . . clearly moderates [partisan] influences and makes doctrine more likely to be followed.” Cross & Tiller, *supra* note 367, at 2176. R

<sup>370</sup> See, e.g., GLENDON SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946–1963 (1965); SEGAL & SPAETH, *supra* note 185; C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court*, 35 AM. POL. SCI. REV. 890 (1941). R

<sup>371</sup> For these works, see *supra* note 14; for the mechanisms, see *supra* Part II. R

<sup>372</sup> For supporting works, see *supra* notes 16–17. R

<sup>373</sup> For a sampling, see *supra* Part I.

dealing directly with war. Yet, in ordinary cases, the effect of war and other international crises is substantial.

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 *ordinary* civil rights and liberties decisions of the Court.<sup>374</sup> Evidence supporting this proposition already is beginning to mount. Anecdotal support comes from the justices themselves. In separate speeches delivered after September 11, 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."<sup>375</sup> Justice O'Connor concurred with this general sentiment, claiming that the war on terrorism "will cause us to re-examine some of our laws pertaining to criminal surveillance, wiretapping, immigration and so on."<sup>376</sup> And while Justice Breyer noted that "the Constitution does apply 'in time of war as in time of peace,'" he conceded that in wartime "circumstances change, thereby shifting the point at which a proper balance is struck."<sup>377</sup>

With these sentiments in mind, and the present war on terror, we discuss two implications from our study. First, given the extent to which the justices curtail ordinary rights during periods of threat to the nation's security, federal judges ought to give less weight to legal principles established while a war is ongoing, and attorneys should see it as their responsibility to distinguish ordinary cases along these lines. Second, our theory challenges scholars to rethink normative assessments based on the simplifications of the crisis and *Milligan* theses.<sup>378</sup> Scholars and practitioners may gain by accounting for the institutional-process dimension in research and advocacy.

#### A. *Stare Decisis of Ordinary Cases*

We first develop implications on *stare decisis* from our finding of the pervasive effects of war on ordinary civil rights and liberties cases.

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<sup>374</sup> On forecasting the Rehnquist Court's reaction to the war on terror, see Lewis, *Civil Liberties*, *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 administration's attempt to brush constitutional rights aside in the war on terrorism." R

<sup>375</sup> Associated Press, *Justice Scalia Addresses Wartime Constitutional Rights* (Mar. 19, 2003), available at <http://www.cnn.com/2003/LAW/03/19/scalia.speech.ap/index.html>.

<sup>376</sup> For a summary of O'Connor's speech, see Linda Greenhouse, *In New York Visit, O'Connor Foresees Limits on Freedom*, N.Y. TIMES, Sept. 29, 2001, at B5.

<sup>377</sup> Breyer, *supra* note 84 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)). R

<sup>378</sup> See Issacharoff & Pildes, *supra* note 304, at 6-9. R

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.<sup>379</sup>

Our investigation suggests that Cardozo's general conception of stare decisis does not always hold. In fact, an ordinary case decided yesterday when peace prevailed has a substantial probability of being decided differently today when a state of crisis exists.<sup>380</sup>

If this is so, our results point to an important implication for stare decisis: Members of the legal community should hold an ongoing crisis as a material distinguishing fact in determining the authority of an ordinary case. Specifically, during times of peace, judges ought to bestow less precedential authority on cases decided during times of war. Further, attorneys should see it as their responsibility to distinguish cases along these lines.<sup>381</sup>

This recommendation resolves the problem that "[t]he circumstances of war are something like an elephant in the living room. . . . [T]ry as they might, judges are quite unlikely to be able to ignore the elephant's presence."<sup>382</sup> 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."<sup>383</sup>

<sup>379</sup> CARDOZO, *supra* note 88, at 33–34 (quoting WILLIAM GALBRAITH MILLER, *THE DATA OF JURISPRUDENCE* 335 (photo. reprint 1998) (1903)).

<sup>380</sup> This 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," Gross, *supra* note 4, at 1060, may be an accurate description of empirical reality.

<sup>381</sup> This 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 88, at 151. 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 of a principle to expand itself to the limit of its logic." CARDOZO, *supra* note 88, at 51.

<sup>382</sup> Tushnet, *supra* note 13, at 283.

<sup>383</sup> *Id.* at 307.

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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”<sup>384</sup> and use of the “prerogative power”<sup>385</sup> during times of crisis and necessity.

Along these lines, Gross has proposed a model of extralegal measures, in which the government “go[es] outside the legal order, at times even violating otherwise accepted constitutional principles.”<sup>386</sup> We see serious problems with such an extralegal approach. First, it risks a lack of accountability of the Executive for the duration of a crisis.<sup>387</sup> 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 extralegal model. It also ensures that the Executive is accountable even in times of crisis.<sup>388</sup>

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<sup>384</sup> NICCOLO MACHIAVELLI, *THE DISCOURSES* (Bernard Crick ed., Leslie J. Walker trans., Penguin Books 1998) (n.d.); NICCOLO MACHIAVELLI, *THE PRINCE* (Harvey C. Mansfield trans., Univ. of Chicago Press 2d ed. 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 in times of crisis bring the state back to its first principles. MACHIAVELLI, *THE DISCOURSES*, *supra*, at 385–90 (claiming that “return to . . . original principles” or reconstitution of government meant “instilling men with that terror and that fear with which they had instilled them when instituting 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*, *supra*, at 48. In other words, for Machiavelli, necessity trumps law.

<sup>385</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 83–88 (C.B. Macpherson ed., Hackett Publishing Co., Inc. 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,” *id.*, and the only remedy remains an “appeal to heaven,” *id.* at 87.

<sup>386</sup> Gross, *supra* note 4, at 1097.

<sup>387</sup> To be fair, Gross proposes an ex post ratification mechanism of any extralegal measures, arguing that this would constrain executives. Yet this approach 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.

<sup>388</sup> By 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, 293 (1926) (Brandeis, J., dissenting).

A second problem with extralegal measures is that they play directly into the fear that Justice Jackson expressed in *Korematsu*: “[O]nce a judicial opinion rationalizes [a government] order [curtailing rights] to show that it conforms to the Constitution, . . . the Court for all time has validated . . . [a] principle [that] then lies about like a loaded weapon ready for the hand of any authority . . .”<sup>389</sup> 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 crisis jurisprudence would lie about “like a loaded weapon.”

Our findings suggest that such fears are probably overwrought, since the Court, however implicitly, is already deciding ordinary “war” and “peace” cases differently. Seen in this way, all our recommendation accomplishes, some might argue, is the instantiation of a de facto 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 11 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 ordinary 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.<sup>390</sup>

### B. Institutional Process and the Enemy Combatant Cases

In this Section we look for additional evidence of our alternative theory by examining the recent enemy combatant cases arising from the war on terror. These cases are not contained in our dataset, so

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<sup>389</sup> *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting); see also Edwards, *supra* note 5, at 841 (“Once validated by the courts, emergency curtailments of constitutional rights take on legal lives of their own.”).

<sup>390</sup> Such claims, of course, ought to 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.

they provide *some* outside qualitative validation for our theory.<sup>391</sup> If our conjecture on the institutional-process dimension of the Court is correct, as a positive matter the Court should look towards Congress in the cases most directly related to war rather than concerning itself with first-order balancing of security versus liberty interests. In their own survey of war-related cases, Issacharoff and Pildes find that this captures much of the jurisprudence of the most prominent war-related cases.<sup>392</sup> We further find here that our alternative theory sheds some new light on the enemy combatant cases.<sup>393</sup> Commentators, evaluating these cases primarily on a rights-based spectrum, have disagreed sharply.<sup>394</sup> Yet in these opinions, the Court saw it as its responsibility to ascertain the degree of congressional approval of executive actions. Rather than simply balancing security and liberty interests, the political process and institutional interaction between Congress and the Executive proved crucial, whereas court-determined constitutional

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<sup>391</sup> We view the following analysis as providing suggestive evidence only. Much work remains to subject the institutional-process theory to empirical scrutiny. For example, given the criticisms of procedural theories as inevitably entailing substantive judgments, how does one clearly distinguish institutional-process from rights-oriented dimensions? How would we assess this in a transparent and replicable manner, in particular to compare ordinary and war-related cases (since we here select only war-related cases)? What other falsifiable hypotheses would we derive from this alternative theory? We view this as a particularly promising area where empirical and doctrinal approaches may mutually inform one another.

<sup>392</sup> Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime*, 2 INT'L J. CONST. L. 296, 300–19 (2004).

<sup>393</sup> Much has been written about the decisions. For only a sprinkling of the variety of opinions, see, for example, Ronald Dworkin, *What the Court Really Said*, N.Y. REV. BOOKS, Aug. 12, 2004, at 26, arguing that commentators have exaggerated the defeat of the government position, but that enemy combatant decisions force the government to grant criminal-law protections to enemy combatants or to treat them as prisoners of war; Oona A. Hathaway, *The Court Puts the White House in Its Place*, NEWSDAY, June 29, 2004, at A33, asserting that, with enemy combatant rulings, “[t]he Supreme Court has rightly brought the White House back to Earth”; Robert Alt, *Dangerous Decision*, NAT'L REV. ONLINE (June 29, 2004), at <http://www.nationalreview.com/alt/alt200406291001.asp>, arguing that the enemy combatant decisions encourage forum shopping, increase caseloads, and “will have a deleterious effect on the military’s ability to carry out the war on terror” by “opening the courthouse doors to terrorists from every corner of the globe”; Neal Katyal, *Sins of Commissions*, SLATE (Sept. 8, 2004), at <http://www.slate.com/Default.aspx?id=2106406>, describing the military commissions in Guantanamo as “run[ning] roughshod over the American military justice system”; Andrew C. McCarthy, *A Mixed Bag*, NAT'L REV. ONLINE (June 30, 2004), at <http://www.nationalreview.com/mccarthy/mccarthy200406300915.asp>, describing the three enemy-combatant cases as “a mixed bag for the government: a tie, a shaky win . . . and a defeat that could be catastrophic”; and Thomas F. Powers, *When to Hold 'Em*, LEGAL AFF., Sept.–Oct. 2004, *available at* [http://www.legalaffairs.org/issues/September-October-2004/argument\\_powers\\_sep oct04.html](http://www.legalaffairs.org/issues/September-October-2004/argument_powers_sep oct04.html), arguing that the most important implication of the enemy combatant decisions is the development of a preventative detention policy.

<sup>394</sup> See sources cited *supra* note 393.

rights were less prominent.<sup>395</sup> In *Hamdi*, the Court was particularly concerned with the degree of congressional authorization of detention of enemy combatants, rejecting, with the exception of Justice Thomas's dissent, a broad interpretation of unilateral executive power. And in *Padilla* and *Rasul*, the Court, perhaps in an effort to protect itself, employed process-oriented rationales to the detriment of substantive determinations of first-order constitutional rights.

It is worth noting at the outset that we conceptually distinguish between an institutional-process method of adjudicating cases and the Court's analysis of a procedural question. Our theory suggests that war affects the former, but not the latter.

### 1. *Hamdi*

Consider the case of *Hamdi v. Rumsfeld*.<sup>396</sup> The U.S. military captured the petitioner Hamdi, an American citizen, on the battlefield in Afghanistan. The Government held Hamdi in custody in the United States on the basis of his classification as an "enemy combatant" for allegedly fighting with the Taliban against the United States. Hamdi's father brought a habeas action on behalf of his son, claiming that Hamdi was being held in violation of the Fifth and Fourteenth Amendments without access to counsel or the opportunity to contest his detention at trial. The district court ruled that Hamdi should be given access to counsel, but the Fourth Circuit reversed the order on the basis that it did not adequately consider the Government's security and intelligence interests, noting that the "Constitution's commitment of the conduct of war to the political branches of American government requires the court's respect at every step."<sup>397</sup> On remand, the Government presented a declaration from the Under Secretary for Defense Policy, Michael Mobbs, which stated that Hamdi was an enemy combatant (the Mobbs Declaration). The district court found the Mobbs Declaration insufficient and issued a production order to the Government to turn over materials for in camera review of the basis of Hamdi's detention.<sup>398</sup> On appeal, the Fourth Circuit sided with a much broader view of executive power, ruling that judicial inquiry is unwarranted when the detainee was captured in a zone of active combat.<sup>399</sup>

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<sup>395</sup> For a similar analysis of the institutional-process approach for the lower courts, see Issacharoff & Pildes, *supra* note 392, at 319–25.

<sup>396</sup> 124 S. Ct. 2633 (2004).

<sup>397</sup> 296 F.3d 278, 284 (4th Cir. 2002).

<sup>398</sup> 243 F. Supp. 527, 528, 533 (E.D. Va. 2002).

<sup>399</sup> 316 F.3d 450, 476 (4th Cir. 2003).

The Supreme Court, despite the fact that both briefs framed the question first in terms of the Constitutional question of executive powers,<sup>400</sup> focused on the degree of congressional authorization of detention powers. The habeas petition claimed that Hamdi's detention violated the Non-Detention Act, which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."<sup>401</sup> The Government maintained that (a) congressional authorization was not required because of plenary powers under Article II, and (b) that even if congressional authorization were required, congressional Authorization for Use of Military Force (AUMF) satisfied the Non-Detention Act.<sup>402</sup> In the Court's plurality opinion, Justice O'Connor, joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer, refused to reach the first-order claim of plenary executive powers.<sup>403</sup> Instead, Justice O'Connor found that the Non-Detention Act's exception clause was met by the AUMF, which authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."<sup>404</sup> The plurality reasoned that since the underlying justification for detention is to prevent hostile combatants from returning to the battlefield, detention powers were necessary and appropriate to fight the war, and hence implied under the AUMF.<sup>405</sup> In short, on the most important question presented by *Hamdi*, the Court shifted responsibility from itself to the political branches by deferring interpretation of unilateral Article II powers.

On the second issue of due process requirements for detention, the plurality, joined on the issue by Justices Ginsburg and Souter, ruled that a citizen held in the United States was entitled to a "meaningful opportunity to contest the factual basis for that detention

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<sup>400</sup> Brief for Petitioners at 10–14, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696) (arguing first constitutional question of detention and second whether detention is permissible under congressional statute); Brief for Respondents at 13–22, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696) (arguing first Article II powers and second congressional authorization).

<sup>401</sup> 18 U.S.C. § 4001(a) (2000).

<sup>402</sup> *Hamdi*, 124 S. Ct. at 2639.

<sup>403</sup> *Id.* at 2639 ("The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority . . .").

<sup>404</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

<sup>405</sup> *Hamdi*, 124 S. Ct. at 2641.

before a neutral decisionmaker.”<sup>406</sup> Employing a balancing approach, the Court rejected both the Government’s executive unilateralist position<sup>407</sup> and the civil libertarian stance of the district court that sought rights close to criminal trial protections.<sup>408</sup> Instead, the plurality held that Hamdi was entitled to notice of the factual basis for his classification as an enemy combatant and a fair opportunity to rebut the factual assertion. Yet, the plurality also ruled that these “proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”<sup>409</sup> The Court thereby suggested that hearsay and burden-shifting rules might be changed from standard criminal trials and that “appropriately authorized and properly constituted military tribunal[s]” could meet the procedural standards set out by the plurality.<sup>410</sup> While the holding in this second question of due process protections certainly hints at a more direct approach towards adjudicating constitutional rights, the Court rejected the Government’s and petitioner’s more extreme positions and was quick to emphasize the role of political institutions in the process. Citing *Mistretta v. United States*, the plurality noted that the Constitution “envisions a role for all three branches when individual liberties are at stake,”<sup>411</sup> and that absent congressional suspension of the writ, citizens are entitled to the procedural protection of being able to challenge the factual basis for detention. In short, the Court’s jurisprudence maintained as paramount the role of the political branches in the war on terror.

While concurring in the due process judgment of the plurality, Justice Souter, joined by Justice Ginsburg, dissented with respect to the plurality’s statutory analysis of the AUMF.<sup>412</sup> Analyzing the legislative history of the Non-Detention Act, Justice Souter found that the Act was intended to prevent detentions of the sort in *Korematsu*, that the Act codified a clear statement rule militating against vague authorizations of detentions, and that the stark tradeoff between security and liberty necessitates “an assessment by Congress” and “the need for a clearly expressed congressional resolution.”<sup>413</sup> Based on the leg-

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<sup>406</sup> *Id.* at 2635.

<sup>407</sup> *Id.* at 2650 (rejecting “the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts [during war]”).

<sup>408</sup> *Id.* at 2648.

<sup>409</sup> *Id.* at 2649.

<sup>410</sup> *Id.* at 2649, 2651.

<sup>411</sup> *Id.* at 2650.

<sup>412</sup> *Id.* at 2653 (disagreeing with plurality and finding that “[t]he Government has failed to demonstrate that the [AUMF] authorizes the detention complained of here even on the facts the Government claims”).

<sup>413</sup> *Id.* at 2654–55.

islative history, Justice Souter would have held that the Non-Detention Act was clearly intended to apply to wartime, that the AUMF did not clearly authorize detentions, and that the AUMF did not protect government actions under the laws of war.<sup>414</sup> Finally, citing the *Youngstown* proposition that “Presidential authority is ‘at its lowest ebb where the President acts contrary to congressional will,’” Justice Souter rejected the Article II constitutional claim.<sup>415</sup> It is instructive that Justice Souter’s opinion, concurring in part and dissenting in part, focuses not on the constitutional question of Article II powers as much as the crisis literature might suggest a priori. Instead, Justice Souter’s analysis is plainly consistent with an institutional-process approach, focusing overwhelmingly on the statutory analysis of congressional authorization and the need for bilateral endorsement of the exercise of war powers.

Further suggestive evidence of the fact that conventional ideological roles do not fit neatly over the jurisprudence of war-related cases is Justice Scalia’s dissent from the majority. Contrary to expectations based on ideological grounds, Justice Scalia is joined by Justice Stevens, holding that the Government can detain citizens only through the criminal system or the Suspension Clause.<sup>416</sup> This dissent criticized the plurality’s reliance on the AUMF, for the AUMF does not constitute a suspension of the writ. Moreover, the dissent found that the Court’s analysis wrongly empowers the Court to determine first-order rights of detainees.<sup>417</sup> The underlying assumption in Justice Scalia’s formalistic approach appears to be that a strict bifurcation of the criminal process and suspension of the writ would incite Congress to act if the public will so desired.<sup>418</sup> Justice Scalia’s conception of the judiciary during war rejects a rights-oriented constitutional balancing, that is “the view that war silences law . . . has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.”<sup>419</sup> The Court should not “fix” a legislature’s failure

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<sup>414</sup> *Id.* at 2655–59.

<sup>415</sup> *Id.* at 2659 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)).

<sup>416</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>417</sup> *Hamdi*, 124 S. Ct. at 2671–72 (concluding that AUMF does not “authorize[ ] detention of a citizen with the clarity necessary to satisfy the interpretive canon that statutes should be construed so as to avoid grave constitutional concerns” and that “the major effect of its constitutional improvisation is to increase the power of the Court”).

<sup>418</sup> *Id.* at 2673 (noting that “by repeatedly doing what it thinks the political branches ought to do [the Court] encourages their lassitude and saps the vitality of government by the people”).

<sup>419</sup> *Id.* at 2674.

to act or an Executive's inability to provide reasonable procedural safeguards for detainees. To do so would be to eviscerate the purpose of the Suspension Clause in mandating congressional support, i.e., to channel crisis decisionmaking to the politically accountable branches. Although at times described as such,<sup>420</sup> Justice Scalia's dissent fails to be squarely characterized as adopting a civil libertarian position. While the dissent certainly favors Hamdi in the outcome of the specific case, Justice Scalia envisions a drastically reduced role for the Court in adjudicating substantive rights questions (i.e., the plurality did not take the procedural institutional method far enough), and instead demands an explicit channeling of detention questions to bilateral endorsement by Congress and the Executive under the Suspension Clause.

The only opinion in *Hamdi* that remains primarily rights-oriented is that of Justice Thomas, who in essence endorses the executive unilateralist position of the crisis thesis and the Government: The "detention falls squarely within the Federal Government's war powers. . . . I do not think that the Federal Government's war powers can be balanced away by this Court."<sup>421</sup> Justice Thomas concluded that the courts are entirely unsuitable for reviewing detentions because of the lack of information and expertise in security and foreign affairs, the complexity of executive information in such cases, and the dominance of the political branches in security and foreign affairs.<sup>422</sup> And even if the balancing approach of the plurality, which Justice Thomas so eschews, were to be applied by him, Justice Thomas would find that the government interest in waging war is so compelling as to outweigh Hamdi's due process interests entirely.<sup>423</sup> Justice Thomas thereby appears to be the only one to bite at the broad Article II claim, despite paying lip service to congressional authorization.<sup>424</sup>

Overall, *Hamdi* illustrates quite well the potential prevalence of the institutional-process approach in war-related cases. While petitioners argued in large part that the citizen detentions under Article II were unconstitutional, the Court failed to reach the issue because of congressional authorization. Similarly, the Government also sought a broad affirmation of plenary Article II power, which was denied by the Court because of a lack of congressional suspension of the writ.

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<sup>420</sup> See McCarthy, *supra* note 393.

<sup>421</sup> 124 S. Ct. at 2674.

<sup>422</sup> *Id.* at 2676.

<sup>423</sup> *Id.* at 2683–85.

<sup>424</sup> *Id.* at 2678–80. Perhaps the reason for this short shrift to congressional intent lies in Justice Thomas's unwillingness to consider Congress's mandate of the Non-Detention Act.

April 2005]

THE SUPREME COURT DURING CRISIS

105

On both claims, the Court drew a narrow line between the *Milligan* and crisis theses, and instead of taking a strict rights-oriented approach, the Court focused on the institutional process of wartime decisionmaking.

## 2. *Padilla*

*Padilla* presented a similar fact pattern to *Hamdi*. The President designated Padilla, a U.S. citizen, an enemy combatant, charging that he had conspired with al Qaeda to commit attacks against the United States. Like Hamdi, Padilla was detained without formal charges or legal proceedings. Unlike Hamdi, he had been apprehended under a material witness warrant, on U.S. territory,<sup>425</sup> leading many to consider this as the case with more substantial ramifications for the war on terror. As in *Hamdi*, the Government argued for a strong executive unilateralist position under Article II,<sup>426</sup> while the petitioner asserted broad infringements of due process rights based on the conventional criminal process.<sup>427</sup>

The alternative theory sheds much light onto the dynamics of the *Padilla* decisions, particularly the lower court decisions.<sup>428</sup> The Southern District of New York held that while the President lacked inherent executive power in light of the Non-Detention Act, the AUMF authorized detentions of enemy combatants.<sup>429</sup> In analyzing the district court disposition, Issacharoff and Pildes note that the district court refused to adopt both the executive unilateralist position advocated by the Government and the civil libertarian view that Padilla deserved an ordinary criminal process. Instead, the district court, in a way emblematic of the institutional process theory, focused “on ensuring that there has been a bilateral institutional endorsement for the exercise of [war powers]” and minimized the determination of “its own . . . substantive content and application of ‘rights’ during wartime.”<sup>430</sup>

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<sup>425</sup> *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715 (2004).

<sup>426</sup> *Id.* at 2716.

<sup>427</sup> *Id.*

<sup>428</sup> For an exemplary analysis of the district court disposition of *Padilla*, see Issacharoff & Pildes, *supra* note 392, at 321–24. We extend the analysis here in two principal ways. First, we are able to analyze the enemy combatant decisions of the Supreme Court, for which the theory is most widely developed. Second, the recently decided cases enable us to apply the theory to more than just *Padilla*. See *id.* at 325 n.91. More broadly, our empirical evidence suggests that the institutional-process dimension is more independent for war-related cases than for run-of-the-mill cases.

<sup>429</sup> *Padilla v. Rumsfeld*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

<sup>430</sup> Issacharoff & Pildes, *supra* note 392, at 324.

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The Second Circuit affirmed in part and reversed in part, but the decision again exemplifies the institutional analysis that is the lynchpin of the alternative theory.<sup>431</sup> The court placed its analysis squarely within *Youngstown*:<sup>432</sup>

[W]hen the Executive acts, even in the conduct of war, in the face of apparent congressional disapproval, challenges to his authority must be examined and resolved by the Article III courts. . . . [W]hile Congress . . . may have the power to authorize the detention of United States citizens . . . the President, acting alone, does not.<sup>433</sup>

The Second Circuit thereby held that (a) the President lacked inherent executive power to detain citizens captured away from a combat zone since no detention authority had been granted by Congress, and that (b) the President lacked specific congressional authorization of detention to overcome the express mandate of the Non-Detention Act.<sup>434</sup> With respect to the second claim, the court rejected the Government's unilateralist position that the Non-Detention Act did not apply to the military and refused to read detention powers into the AUMF.<sup>435</sup>

The Supreme Court reversed the Second Circuit, finding, contrary to the lower court rulings, that the court lacked jurisdiction over Padilla's petition.<sup>436</sup> Though perhaps less exemplary of the institutional-process approach, the majority opinion penned by Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, first applied the immediate custodian rule that "the proper respondent to a habeas petition is 'the person who has custody over [the petitioner].'"<sup>437</sup> As a result, the majority held that only Commander Marr, the physical custodian of Padilla, was the proper respondent, not Secretary Rumsfeld.<sup>438</sup> Second, the Court applied the so-called district of confinement rule, which requires that the district court have jurisdiction over the custodian, to conclude that the Southern District of New York lacked jurisdiction.<sup>439</sup> Here the Court emphasized Congress's role in limiting jurisdiction by adding the "respective jurisdictions" clause to the habeas statute.

Justice Kennedy, joined by Justice O'Connor, concurred in the judgment but suggested that the custodian and confinement rules are

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<sup>431</sup> Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003).

<sup>432</sup> *Id.* at 710–24.

<sup>433</sup> *Id.* at 713, 715.

<sup>434</sup> *Id.* at 712, 723.

<sup>435</sup> *Id.* at 722–24.

<sup>436</sup> *Padilla*, 124 S. Ct. at 2722–24.

<sup>437</sup> *Id.* at 2717 (quoting 28 U.S.C. § 2242 (2000)) (alteration in original).

<sup>438</sup> *Id.* at 2715–22.

<sup>439</sup> *Id.* at 2722–24.

best conceived of as personal jurisdiction or venue questions that can be waived by the Government.<sup>440</sup> Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented from the majority, finding (a) that the custodian rule should be applied flexibly such that petitioner could name as respondent an individual with control over petitioner, and (b) that the Southern District could assert jurisdiction.<sup>441</sup>

While the lower courts epitomize the institutional-process approach, the Court's opinion in *Padilla* does not appear particularly representative of an institutional-process approach. One might interpret the opinion as the Court emphasizing procedural issues to avoid reaching the merits of a first-order constitutional question, a strategy that may be more prevalent for the highly sensitive cases most directly related to the war. Certainly one also cannot ignore the fact that the opinion was jointly issued with *Hamdi*, suggesting perhaps that having spelled out the merits in that case, the Court sought to buy some time for the political branches to respond before ruling on *Padilla*'s broader issue of detention of citizens captured at home.

### 3. *Rasul*

In *Rasul v. Bush*, the Court addressed whether the habeas statute<sup>442</sup> conferred jurisdiction to U.S. courts to consider challenges to detention of foreign nationals incarcerated at Guantanamo Bay who were captured abroad in hostilities with the Taliban.<sup>443</sup> The district court sided with the Government's claim that under *Johnson v. Eisentrager*<sup>444</sup> aliens detained outside of U.S. sovereign territories may not invoke habeas relief.<sup>445</sup> *Eisentrager* ruled that U.S. district courts did not have jurisdiction to hear habeas claims by German nationals imprisoned in Germany after having been captured in China during World War II.<sup>446</sup> The Court of Appeals for the D.C. Circuit affirmed the district court.<sup>447</sup>

Writing for the majority of the Court, Justice Stevens, joined by Justices O'Connor, Souter, Ginsburg, and Breyer, concluded that the district court had jurisdiction. The majority first distinguished

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<sup>440</sup> *Id.* at 2727–28 (Kennedy, J., concurring).

<sup>441</sup> *Id.* at 2733–34 (Stevens, J., dissenting).

<sup>442</sup> 28 U.S.C. § 2241(a) (2000) (authorizing district judges to grant writs of habeas corpus “within their respective jurisdictions”).

<sup>443</sup> 124 S. Ct. 2686, 2690 (2004).

<sup>444</sup> 339 U.S. 763, 784–85 (1950) (holding that U.S. courts did not have jurisdiction to hear habeas claims by foreign detainees captured in China and detained in Germany during World War II).

<sup>445</sup> *Rasul v. Bush*, 215 F. Supp. 2d 55, 65, 73 (D.D.C. 2002).

<sup>446</sup> 339 U.S. at 784–85.

<sup>447</sup> *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

*Eisentrager* on the grounds that the petitioners here were not nationals of enemy states, were not afforded a tribunal, and were held “in territory over which the United States exercises exclusive jurisdiction and control.”<sup>448</sup> The majority then held that *Eisentrager* pertained to constitutional, not statutory, habeas rights, and that *Braden v. 30th Judicial Circuit Court*<sup>449</sup> had subsequently established a statutory basis for jurisdiction as long as the custodian can be reached by service of process. *Braden* thereby established jurisdiction for the Guantanamo detainees. Consistent with an institutional approach that eschews the first-order determination of constitutional rights, the majority emphasized that Congress authorized federal district courts to have jurisdiction<sup>450</sup> and specifically interpreted the *statutory*, not *constitutional*, mandate of habeas jurisdiction.<sup>451</sup>

Concurring in the judgment, Justice Kennedy took issue with the Court’s conclusion that *Braden* overruled the statutory predicate of *Eisentrager*.<sup>452</sup> Instead, Justice Kennedy would have followed the framework of *Eisentrager*, conducting a factual inquiry as to whether judicial intervention was required. Acknowledging that “there is a realm of political authority over military affairs where the judicial power may not enter,”<sup>453</sup> the purpose of this inquiry would be to assess whether the circumstances permitted judicial interference with the “joint role of the President and the Congress[ ] in the conduct of military affairs.”<sup>454</sup> Within this framework, Justice Kennedy then would have distinguished *Rasul* on its facts—that Guantanamo is functionally within U.S. territory and far removed from hostilities, and petitioners were under indefinite detention without access to legal proceedings. Justice Kennedy would have thereby reached the same conclusion that federal jurisdiction was proper. While Justice Kennedy’s concurrence noted the role of the political branches in wartime, his brief analysis does not explicitly address the issue of legislative endorsement. Nonetheless, if the Court had adopted Justice Kennedy’s factual *Eisentrager* framework, the analysis certainly appears to contemplate such. While the majority, similar to Justice

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<sup>448</sup> *Rasul*, 124 S. Ct. at 2693.

<sup>449</sup> 410 U.S. 484 (1973).

<sup>450</sup> *Rasul*, 124 S. Ct. at 2692–93 (noting congressional mandate of habeas statute).

<sup>451</sup> *Id.* at 2695 (“Because subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager*’s resort to ‘fundamentals,’ persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review.”).

<sup>452</sup> *Id.* at 2699 (Kennedy, J., concurring).

<sup>453</sup> *Id.* at 2700.

<sup>454</sup> *Id.*

April 2005]

THE SUPREME COURT DURING CRISIS

109

Kennedy, factually distinguished *Eisentrager*, it did not rely on this factual inquiry, turning instead to the statutory analysis.

Justice Scalia, in a dissent joined by Chief Justice Rehnquist and Justice Thomas, sharply criticized the majority for its *Eisentrager* analysis, finding that *Eisentrager* squarely governed *Rasul*.<sup>455</sup> Justice Scalia rebuked the majority for its reading of the habeas statute: “Congress is in session. If it wished to change federal judges’ habeas jurisdiction from what this Court had previously held that to be, it could have done so.”<sup>456</sup> In short, just as in *Hamdi*, the Court failed to go far enough in channeling the institutional process.

## VIII

### CONCLUSION

The evidence we have compiled comprises the only large-scale, systematic, quantitative test of the crisis thesis to date. The large volume of prior literature devoted to this subject is entirely qualitative and discursive and, although it contains large volumes of useful description and considerable analytic wisdom, our evidence indicates that all prior causal inferences drawn about the crisis thesis in this literature are incorrect or, at best, incomplete.

Our evidence, which spans all civil liberties decisions over six decades, strongly suggests that the decisions made by the Supreme Court during wartime would have been systematically different if these same cases had been decided during peacetime. We show that war causes the Court to decide cases unrelated to the war in a markedly more conservative direction than they otherwise would. However, war appears to have no effect on the conservatism of the Court’s decisions in cases closely related to an ongoing military conflict. In those cases, the Court retreats from its usual rights versus security focus of decisionmaking to a focus on institutional process. By changing its focus to a mostly unrelated dimension, the effect of war on the conservatism of decisionmaking in war-related cases vanishes.

Contrary to the rhetoric of *Ex parte Milligan*, 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 legislative and executive authorities when, under the stress of war

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<sup>455</sup> *Id.* at 2703–04 (Scalia, J., dissenting) (suggesting idea that *Braden* overruled *Eisentrager* “would not pass the laugh test”); *see also id.* at 2706 (“Today’s opinion, and today’s opinion alone, overrules *Eisentrager* . . .”); *id.* at 2711 (characterizing majority’s opinion as “clumsy, countertextual reinterpretation that confers upon wartime prisoners greater habeas rights than domestic detainees,” a “monstrous scheme,” and “judicial adventurism of the worst sort”).

<sup>456</sup> *Id.* at 2711.

[those authorities] have sought to suppress the rights of dissenters.”<sup>457</sup> Nor have the justices acted entirely in accordance with Cicero’s maxim. During times of war, the Court does indeed speak, but it does so in a seemingly paradoxical manner, curtailing civil rights and liberties with more frequency in times of war than in peacetime and taking this action only in cases unrelated to war. In fact, ordinary civil rights and liberties cases are precisely the ones for which war has the most detectible impact.

In reviewing the enemy combatant cases, in particular, we find some suggestive support for our institutional-process theory explaining the war-related cases. Contrary to what political spin may suggest, none of the cases presented clear-cut victories for executive unilateralists or civil libertarians (i.e., crisis or *Milligan* thesis adherents). And contrary to what the crisis literature might suggest, the Court rarely turned to a direct balancing of first-order constitutional rights. Instead, the Court sought to protect itself by turning to the political branches in the war on terror.

In a brief in *Rasul*, the World War II detainee, Fred Korematsu<sup>458</sup> urged the Justices to

make clear that even in wartime, the United States . . . does not constrict 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.<sup>459</sup>

Our study suggests that in deciding whether to “constrict fundamental liberties” in war-related cases, the Court looks toward Congress. This institutional-process theory remains the strongest candidate for resolving our paradoxical empirical findings. Aside from increasing our understanding of the jurisprudence of cases most directly related to the war, the theory also bears other implications for research and practice. Political scientists may well reap the fruits from systematically examining further the dimensionality of judicial decisions and crisis decisionmaking in other contexts. Practitioners may want to emphasize statutory and legislative intent arguments more

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<sup>457</sup> FORTAS, *supra* note 16, at 38.

<sup>458</sup> Korematsu was the defendant in *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>459</sup> Brief of Amicus Curiae Fred Korematsu in Support of Petitioners at 28, *Al Odah v. United States/Rasul v. Bush*, 124 S. Ct. 1706 (2004) (No. 03-343) & 124 S. Ct. 2686 (2004) (No. 03-334).

April 2005]

THE SUPREME COURT DURING CRISIS

111

prominently in briefs. And more generally, our evidence suggests the importance of Congress in the war on terror.<sup>460</sup>

This brings mixed news to normative adherents of executive unilateralism and civil libertarianism alike. On the one hand, strong unilateral executive powers are still checked by the ebb and flow of congressional will. Nonetheless, majoritarian preferences are thereby left to prevail, often at the sacrifice of minority rights, when collective security appears most at risk. And areas to which civil libertarians have paid the least attention are vulnerable to infringement during wartime (indeed, perhaps *because* of this lacuna of attention).

Those disturbed by these odds ought to 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, “‘It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.’”<sup>461</sup>

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<sup>460</sup> For example, the administration of military tribunals in response to *Rasul* may well benefit, at least from the perspective of judicial enforcement, from eliciting congressional input. See Katyal, *supra* note 393 (noting that creation of American military justice system “should *not* be done without the deliberate and considered help of the Congress”); Benjamin Wittes, *Enemy Americans*, ATLANTIC MONTHLY, July–Aug. 2004, at 127, 135 (noting that blending of criminal justice and laws of war would “[i]deally . . . take place not in the courts but in Congress”).

<sup>461</sup> CARDOZO, *supra* note 88, at 90 (quoting *Mo., Kan. & Tex. Ry. Co. v. May*, 194 U.S. 267, 270 (1904)).

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APPENDIX  
THE 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.* 381–82)
- 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 extralegal 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 U.S.C. § 1951 (2000)
- 172 immigration (*cf.* 371–76)
- 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 100–07)
- 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 14th or 15th Amendments.

211 Voting Rights Act of 1965, plus amendments

212 ballot access (of candidates and political parties)

220 desegregation (other than as pertains to 221–23)

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 381–88): replevin, garnishment, etc. Typically involve notice and/or hearing requirements or the takings clause.

271 deportation (*cf.* 371–76)

272 employability of aliens (*cf.* 371–76)

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, 271–72)

371 permanent residence

372 citizenship

373 loss of citizenship, denaturalization

374 access to public education

375 welfare benefits

376 miscellaneous

\_\_indigents (*cf.* 311–12): 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.* 616–17): 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 431–34)

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.* 361–62): 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.* 431–34): the residual code for cases that do not locate in 502–07  
 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 decisionmaker  
 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

April 2005]

## THE SUPREME COURT DURING CRISIS

115

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.* 701–08): 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.* 681–88)  
936 state tax (*cf.* 626)  
939 miscellaneous  
949 miscellaneous federalism (*cf.* 294, 701–08, 712, 754–55, 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 visited Dec. 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 .