

The Impact of New Justices: The U.S. Supreme Court and Criminal Justice Policy

by

Christopher E. Smith*

I. Introduction

The Supreme Court is an important policy-making institution. In criminal justice,¹ for example, the high court issues decisions affecting institutions, actors, and processes throughout the justice system, from police investigations² through corrections and parole.³ The Court's policy decisions affecting criminal justice are produced by the votes of the nine justices who select, hear, decide, and issue opinions in cases. It is widely recognized, and probably axiomatic, that the Supreme Court's decision-making patterns are determined by the Court's membership at any given moment in history.⁴ When five or more justices support a specific outcome in a case, they can form a majority to produce a decision that shapes constitutional law and judicial policy making.⁵ When one or more members of that majority retires or dies, the potential exists for the Court's decisions to move in a new direction on that issue if new appointees possess different attitudes, values, or judicial philosophies than those possessed by their predecessors.⁶ Because each justice's voting behavior is shaped by his or her attitudes and values,⁷ the case outcomes and judicial policies produced by the Supreme Court are a product of the mix of attitudes and values represented among the justices at the moment a particular issue is presented to the Court. When the mix of justices changes, so, too, can the constitutional rules that shape policy issues. In criminal justice, such rules affect police practices, conditions of confinement in jails and prisons, and other aspects of the criminal justice system.⁸

Although changes in the Supreme Court's decisions may be caused by issue change and by changes in the behavior of individual justices, membership change is generally regarded as the most obvious, measurable, and important source of change in constitutional law and judicial policy making.⁹ Scholars study the impact of membership change by comparing the Court's decision-making patterns during different eras.¹⁰ In addition, presidents and senators behave strategically in nominating and confirming (or not confirming) Supreme Court nominees based on predictions about a particular newcomer's likely impact on important issues.¹¹ Presidents, in particular, seek to shape constitutional law and judicial policy making by selecting new appointees whose votes and persuasiveness on the Court are expected to move decision making in directions that comport with the chief executive's values and policy preferences.¹² In the area of criminal justice, for example, President Nixon appointed Warren Burger to replace Chief Justice Earl Warren in 1969 because he wanted the Court to reduce the scope of criminal defendants' constitutional rights.¹³ Because Burger had a reputation as a "law and order" judge, Nixon hoped the new Chief Justice could lead the Court away from the liberal decisions and judicial policies produced during the Warren Court era.¹⁴

In drawing conclusions about the effects of membership change on the Supreme Court, scholars usually make gross comparisons of eras delineated by the tenures of chief justices. For example, there is a general consensus that "[t]he 'new' [Burger] Court was far less supportive of criminal rights than was Warren's [Court]."¹⁵ This conclusion can be supported by both an empirical examination of the Court's patterns of support for individuals' rights¹⁶ and by a qualitative examination of the doctrines and precedents produced during each era.¹⁷ Although these macro-level comparisons of Supreme Court eras provide useful historical perspectives about the development of constitutional law and judicial policies, they generally do not shed light on the precise impact of individual appointees who changed the Court's composition. In fact, comparisons of eras defined by the tenures of chief justices credit single entities (e.g., "the Warren Court") with decisions produced by Supreme Courts comprised of very different people. For example, the Warren Court of 1954 was quite different from the Warren Court of 1968, because the latter Court included six justices (Harlan, Brennan, Stewart, White, Fortas, and Marshall) who were not members of the former Court.¹⁸ Similarly, the Burger Court of 1982 had four justices (Rehnquist, Powell, Stevens, and O'Connor) who were not members of the Burger Court of 1970.¹⁹

Every new appointee to the Supreme Court generates curiosity and speculation about how the newcomer will affect the high court's decisions and concomitant societal policies based on judicial interpretation of constitutional law and federal statutes. In order to undertake a precise examination of the effects of composition change on the Supreme Court, this article attempts to identify, measure, and analyze the impact of individual newcomers by examining changes in the Court's criminal justice decisions.

Traditional analysis of Supreme Court eras overlooks composition changes within those eras. However, focusing on individual justices provides a basis for assessing the nature and timing of changes in judicial policy making, as well as the effectiveness of individual presidents in shaping constitutional law by using their power to make judicial appointments. The use of criminal justice issues provides a focus for developing and illuminating this experimental analytical approach.

II. Analytical Approach

New appointees to the Supreme Court, like any other individual justices, have their greatest impact when their votes determine the outcomes of cases.²⁰ By casting a decisive vote on a divided Court, a justice may literally make a single-handed decision about the direction of constitutional law.²¹ Because of the potential impact of a single justice's vote, possibilities exist for significant changes in constitutional law when new appointees join the Court, especially when those new appointees have different values than their immediate predecessors.²² However, even if a new appointee possesses different values and attitudes than his or her predecessor, those new values have little discernible impact on law and public policy unless they help to move the Court in a particular direction.²³ A new appointee may vote entirely differently than his or her predecessor, but if that vote is merely one among two, three, or four dissenting votes or among six, seven, eight, or nine majority votes, then the new appointment has not had a measurable impact on the Court

other than changing the size of a continuing majority bloc. The size of the Court majority supporting a particular precedent, doctrine, or policy may be different, but the addition of the new appointee has not created immediate change.

For example, the replacement of retiring liberal Justice Thurgood Marshall by new conservative Justice Clarence Thomas made a dramatic change in the decision-making by the occupant of that particular seat on the Court. In the years immediately preceding his retirement, Marshall had been the Court's most liberal justice on constitutional rights issues by supporting individuals in their battles with the government in nearly ninety percent of cases.²⁴ By contrast, Thomas immediately became a consistent member of the Court's most conservative voting bloc in his initial terms on the Court.²⁵ Despite the differences in their judicial values as reflected in their voting behavior and support for individuals' rights,²⁶ Thomas's presence on the Court did not lead to an increase in conservative outcomes in civil rights and liberties cases.²⁷ The Court already had a conservative majority when Thomas arrived,²⁸ so he could not have the same impact as the previous newcomer, David Souter, who replaced liberal Justice William Brennan when the Court was more evenly divided.²⁹

In order to identify the extent to which new appointees changed law and policy, there must be an examination of the "polarized" cases in which the Court was so deeply divided that the shift of a single vote could determine the case outcome.³⁰ In these cases, a new appointee can, in effect, single-handedly determine the outcome of a case by deciding which of the opposing four-member blocs to join. If the newcomer joins a bloc other than the one which his or her predecessor would have joined, then the newcomer has produced change. Thus, as a first step in evaluating the impact of new appointees, all 5-4 decisions in formally decided criminal procedure cases (using case citations) from 1957 through 1993 were identified for analysis by using the Supreme Court Judicial Data Base.³¹

A. Differences Between Departing Justices and Their Replacements

Newcomers have an impact on the law and policy whenever they are among the five members of the majority in a 5-4 decision. In such circumstances, their votes, like those of their colleagues in the majority, are essential determinants of case outcomes. If, however, the newcomer votes in the same manner as his or her predecessor would have voted, then the Court's new composition has not produced doctrinal or policy change. Any doctrinal or policy changes resulting from such decisions would stem from the other two sources of change, either changing decisions by an incumbent justice or changes in the nature of the issues presented to the Court.³² In order for a new appointee to produce change, that appointee must vote differently than his or her predecessor would have voted. Because it is impossible to know with certainty how a departed justice would have voted in any given case,³³ an estimate of differences was calculated by comparing the voting records of departing justices and their replacements.

Drawing from the Supreme Court Judicial Data Base, Table 1 shows each justice's percentage of support for individuals' claims in formally decided, nonunanimous criminal

procedure cases.³⁴ Nonunanimous cases were used because such cases, by dividing the justices, presumably illuminate most clearly the differences in justices' attitudes, values, and voting behavior.³⁵ Justices with low percentages supported the government most frequently and are often labeled as "conservative" in analyses of Supreme Court decision making. Conversely, those with high percentages are usually labeled as "liberal" for frequently supporting individuals' claims about constitutional rights.³⁶

Table I

DIRECTION AND CASE OUTCOME CREDIT FOR NEW JUSTICES based on difference between retiring justices' and their immediate successors' support for individuals' claims in criminal justice cases, 1957-1993

Retiree % Support Newcomer % Support Difference Multiplier Direction and % credit

Reed_23 Whittaker 41 +18 3 +54

Burton_29 Stewart 45 +16 3 +48

Whittaker_41 White 33 -8 3 -24

Frankfurter_44 Goldberg 77 +33 3 +100

Goldberg_77 Fortas 83 +6 3 +18

Clark_33 Marshall 80 +47 3 +100

Warren_74 Burger 19 -55 3 -100

Fortas_83 Blackmun 42 -41 3 -100

Black_70 Powell 28 -42 3 -100

Harlan_38 Rehnquist 15 -23 3 -69

Douglas_89 Stevens 64 -25 3 -75

Stewart_45 O'Connor 28 -17 3 -51

Burger_19 Scalia 26 +7 3 +21

Powell_28 Kennedy 29 +1 3 +3

Brennan_76 Souter 44 -32 3 -96

As indicated in Table 1, the new appointee's career percentage of support for individuals in nonunanimous criminal justice cases was compared with the departing justice's career percentage of support for individuals. If the new appointee's percentage was higher than the predecessor's, then the newcomer was more liberal than his or her predecessor in such cases, while a lower percentage indicated that the new appointee was more conservative. These differences were then used to estimate the extent to which the newcomer could be credited with changing outcomes in 5-4 cases.

Because the justices' career percentages in Table 1 reflected all nonunanimous criminal procedure cases, they included decisions in which the Court was not deeply divided but merely had one or two dissenters. By contrast, the 5-4 decisions in the universe of cases to be examined represent those instances where the Court is most strongly divided. Such cases polarize the justices and presumably exacerbate differences between justices who, while agreeing with each other in many cases, are not strongly like-minded and may be most likely to disagree when the Court is deeply divided.³⁷ Thus a multiplier was introduced to reflect the accentuated differences presumably produced in such polarized cases.

A multiplier of three was chosen based on the example of Justice Souter's replacement of Justice Brennan during the 1990 term. In previous research, I have argued that because Brennan supported individuals' claims so consistently at the end of his career, his replacement, Souter, deserved credit for changing case outcomes in all of the Court's conservative 5-4 decisions in the term following Brennan's retirement.³⁸ The difference between Souter and Brennan in all nonunanimous cases was -32, but if Souter deserved credit for all of the conservative outcomes in 5-4 cases, then a multiplier of three must be introduced to reflect Souter's 100% credit.³⁹

B. Credit for Decisive Votes Creating New Outcomes

All of the 5-4 criminal procedure decisions were evaluated to determine the number of cases in which a new justice supplied a decisive (i.e., majority) vote. Each justice's cases were counted for the "natural court" period prior to appointment of the next new justice in other words, the entire period in which the justice was the Court's newcomer.⁴⁰ For some justices, this time period lasted only one term. For others, it lasted for several terms. In instances of two justices appointed during the same year (i.e., White and Goldberg in 1962, and Powell and Rehnquist in 1971), the justices were regarded as sharing the same natural court time period. The cases were analyzed further to determine how many decisive votes were delivered by the newcomer in the direction of change identified when comparing the new appointee with his or her predecessor.⁴¹ As indicated in Table 2, the multiplier-determined credit score from Table 1 was used to estimate how many new case outcomes were determined by the newcomer's vote. Credited cases were rounded to the nearest whole number. These are the number of cases in which the newcomer is presumed to have changed the Court's decision by voting differently than his or her predecessor would have voted, based on the comparison and adjustment of voting records

in Table 1. Souter, for example, was credited with one hundred percent of the conservative 5-4 decisions based on his credit score of "-96," while Stewart was credited with only half of the liberal 5-4 decisions during his initial natural court era based on his credit score of "+48."

III. The Impact of New Justices on Criminal Justice Cases

The final column in Table 2 indicates the number of criminal case outcomes directly attributable to each new justice. Clearly, the replacement of one justice with a newcomer who possesses differing values and policy preferences does not automatically produce changes in the Supreme Court's decisions. Chief Justice Warren Burger's treatment of criminal justice issues, for example, was significantly more conservative than that of his predecessor, Earl Warren (see Table 1). However, Burger's presence on the Supreme Court did not immediately impact case outcomes because his liberal colleagues were sufficiently dominant to preclude the development of 5-4 cases that would create the opportunity for Burger to cast a decisive vote.⁴² A new justice's impact is determined by the Court's composition, not just by the newcomer's differences with his or her predecessor. If the Court is not divided on criminal justice issues (or other issues), the newcomer's presence will not change the Court's decisions.

Table 2

JUNIOR JUSTICES' IMPACT ON POLARIZED CRIMINAL JUSTICE CASES, 1957-1993

Justice	Direction	# Decisions	Credit Score	# Credited of Change Cases
Whitaker	Liberal	3	+54	2
Stewart	Liberal	6	+48	3
White	Conservative	3	-24	1
Goldberg	Liberal	8	+100	8
Fortas	Liberal	6	+18	1
Marshall	Liberal	2	+100	2
Burger	Conservative	No relevant polarized cases	N/A	0
Blackmun	Conservative	6	-100	6
Powell	Conservative	15	-100	15

Rehnquist Conservative 15 -69 11

Stevens Conservative 2 -75 2

O'Connor Conservative 22 -51 11

Scalia Liberal 2 +21 <1

Kennedy Liberal 0 +3 0

Souter Conservative 6 -96 6

Thomas Conservative 4 -100 4

A. The Conservatizing Impact of Newcomers Since the 1970s

The largest numbers of decisive votes that changed criminal justice case outcomes were cast by conservative justices: Powell (15), Rehnquist (11), and O'Connor (11). The totals provide an indication of the direction of Supreme Court decision making during the 1970s and 1980s when Republican presidents had the opportunity to replace retiring justices from the liberal Warren Court era. These figures do not, however, provide an accurate picture of the *relative impact* of various individual justices, because the impact of these three conservatives was enhanced by the relatively long periods of time in which they were the Court's most junior justices (four years (1971-1975) for Powell and Rehnquist, and five years (1981-1986) for O'Connor).

Table 3 standardizes the justices' impact by dividing each justice's credited cases by the number of months during which they each were the Court's newcomer. Thus the figures represent the number of cases per month in which the justice, as the Court's most junior member, cast a decisive vote in a direction different from that of his or her predecessor. For justices who were appointed during the late spring or summer, the number of freshman months was calculated from the first month (October) in which the newcomer would have taken part in oral arguments and case decisions. As indicated by Table 3, four conservative newcomers (Souter, Powell, Rehnquist, and Blackmun) each had greater impact than any liberal newcomer. New liberal appointees generally had only modest immediate impacts on the Court's criminal procedure decisions. Thus, from this data it appears that the Warren Court's "due process revolution" was generated primarily by new decisions from a continuing nucleus of relatively liberal justices. These justices were appointed prior to 1957 and reacted in new ways to a progression of cases defining Fourth, Fifth, and Sixth Amendment rights. By contrast, several conservative justices appointed by Presidents Nixon, Reagan, and Bush caused immediate changes in the high court's decisions on criminal justice issues. The biggest immediate impact was produced by the appointment of Souter, the conservative replacement for one of the Court's most liberal justices, Brennan.

Table 3

JUNIOR JUSTICES' RELATIVE DIRECTIONAL IMPACT DURING INITIAL NATURAL COURT PERIOD, 1957-1993 (number of credited polarized cases divided by number of decision-making months in natural court period).

Liberal Impact Score

Goldberg .22

Whittaker .20

Marshall .08

Fortas .04

Stewart .03

Scalia .02

Kennedy 0

Conservative Impact Score

Souter .50

Powell .31

Rehnquist .23

Blackmun .23

O'Connor .18

Thomas .16

White .03

Stevens .03

Burger 0

B. Impact on Notable Cases

An alternative method for assessing the impact of new justices is to add a qualitative assessment of the importance of the changed outcomes attributable to the newcomers' decisive votes. Table 4 contains a listing of the notable case decisions credited to each newcomer.⁴³ Notable cases were identified as those cited in two prominent criminal

justice textbooks, *Criminal Procedure: Law and Practice*⁴⁴ and *The American System of Criminal Justice*.⁴⁵ These textbooks were chosen to provide benchmarks for notable cases because, unlike law school casebooks or hornbooks that provide encyclopedic citations to Supreme Court decisions, they selectively cite cases and include both recent and historical precedents of importance. Other methods employed by scholars for identifying notable cases,⁴⁶ such as using highlighted cases from the covers of Advance Sheets of the *United States Supreme Court Reports, Lawyers' Edition*⁴⁷ would be too inclusive and lack the selectivity and perspective of the established authors who produced the chosen textbooks.

When notable cases are highlighted, it becomes clear that several key liberal precedents established by the Warren Court were, indeed, determined by the appointment of new justices. Newcomer Potter Stewart cast the decisive vote in *Elkins v. United States*,⁴⁸ which eliminated the "silver platter doctrine" and arguably provided an important step in laying the groundwork for the Court's monumental exclusionary rule decision in *Mapp v. Ohio*⁴⁹ one year later. As a junior justice, Arthur Goldberg provided decisive votes in *Malloy v. Hogan*,⁵⁰ which incorporated the right against self-incrimination, and *Escobedo v. Illinois*,⁵¹ which invalidated a confession obtained outside of the presence of defense counsel. These crucial building-blocks provided the basis for the controversial decision in *Miranda v. Arizona*⁵² which rested on the decisive vote of newcomer Abe Fortas. Fortas's vote also helped to expand the right to counsel in post-indictment line-ups when the Court was deeply divided in *United States v. Wade*.⁵³

Conservative newcomers cast decisive votes to shift legal doctrine and judicial policies in directions that gave greater flexibility to police and prosecutors. As the junior justice, Harry Blackmun's vote created the initial breach in the *Miranda* doctrine by permitting the use of statements taken in violation of *Miranda* for impeachment purposes when defendants testify.⁵⁴ Newcomers Lewis Powell and William Rehnquist cast decisive votes to permit nonunanimous jury verdicts⁵⁵ and deny the right to counsel at preliminary line-ups.⁵⁶ Justice John Paul Stevens cast a decisive vote to permit prosecutors to threaten defendants with additional charges during plea negotiations.⁵⁷ In later years, newcomer David Souter's vote changed the standard for judging Eighth Amendment cases concerning prison conditions,⁵⁸ permitted detainees to be held for forty-eight hours prior to probable cause hearings,⁵⁹ and established that coerced confessions could be regarded as "harmless error."⁶⁰ Shortly thereafter, Clarence Thomas provided the decisive vote for quick reversal of a double jeopardy precedent established by the Court only a few years earlier.⁶¹

C. Implications of Freshman Justices' Impacts

As indicated by the foregoing examination of 5-4 criminal cases, individual appointees to the Supreme Court can have an immediate impact on the Court's decisions shaping criminal justice law and policy. The extent of this impact is most clearly revealed by comparing the voting patterns of new appointees with those of their immediate predecessors. A new justice can, in effect, single-handedly change doctrines by casting

votes differently than his or her predecessor, but only when the Court is deeply divided over specific issues.

The Supreme Court's most significant impact on the criminal justice system occurred when the Warren Court produced "what can only be described as a constitutional revolution, generated by a group of justices who were perhaps the most liberal in American history."⁶² This "revolution" was clearly driven by a core group of justices appointed prior to 1957 (Black, Douglas, Warren, and Brennan), who each supported individuals' claims in 70 percent or more of nonunanimous criminal justice cases (see Table 1). As indicated by the analysis of 5-4 decisions, this core group received pivotal support from new appointees in creating key precedents concerning exclusion of evidence, self-incrimination, and right to counsel. In fact, it was literally these four core justices, plus a newcomer, that determined the Court's decisions in six of the eight notable liberal decisions listed in Table 4:⁶³ *Green v. United States*,⁶⁴ *Elkins v. United States*,⁶⁵ *Wong Sun v. United States*,⁶⁶ *Malloy v. Hogan*,⁶⁷ *Escobedo v. Illinois*,⁶⁸ and *Miranda v. Arizona*.⁶⁹

With the exception of Chief Justice Burger, the appointees nominated to the Supreme Court by Republican presidents to replace retiring Warren Court justices each impacted law and policy in criminal justice. Although every member of the Burger Court was not thoroughly conservative on criminal justice issues (see Blackmun's and Stevens's percentages in Table 1), each appointee was more conservative than the Warren Court justice whom he or she replaced. Thus, each new justice shifted the Court's majority further away from vindication of individuals' claims in the criminal justice cases that came before the high court. As indicated in Table 4, each of these appointees made key contributions to the enunciation of new conservative precedents that were part of an accelerating trend toward favoring greater freedom for police and prosecutors to gather and present evidence. By contrast, the two justices (Scalia and Kennedy) appointed by Republican presidents to replace Burger Court justices (Burger and Powell) had little immediate impact. They served essentially to replace the conservative votes of their predecessors. Ironically, although they were appointed by an agenda-conscious, conservative president, Ronald Reagan, who "engaged in the most systematic ideological or judicial philosophical screening of judicial candidates since the first Roosevelt administration,"⁷⁰ they were both marginally more liberal than their predecessors in 5-4 criminal justice cases (see Table 1).

Table 4

JUNIOR JUSTICES' IMPACT BY NUMBER OF NOTABLE POLARIZED CASES WITH OUTCOMES DETERMINED BY NEWCOMERS' VOTES, 1957-1993

LIBERAL

Justice Number Cases

Goldberg 3 Wong Sun v. United States (1963)
Malloy v. Hogan (1964)
Escobedo v. Illinois (1965)

Fortas 2 Miranda v. Arizona (1966)
United States v. Wade (1967)

Marshall 1 Foster v. California (1969)

Stewart 1 Elkins v. United States (1960)

Whittaker 1 Green v. United States (1957)

Scalia 0 N/A

Kennedy 0 N/A

CONSERVATIVE

Justice Number Cases

Powell 6 (joint) Kirby v. Illinois (1972)
Johnson v. Louisiana (1972)
Apodaca v. Oregon (1972)
Rehnquist United States v. Russell (1973)
Cady v. Dombroski (1973)
United States v. Edwards (1974)

Souter 4 Riverside v. McLaughlin (1991)
Arizona v. Fulminante (1991)
Wilson v. Seiter (1991)
Harmelin v. Michigan (1991)

O'Connor 3 Hudson v. Palmer (1984)
New York v. Class (1985)
California v. Ciraolo (1986)

Stevens 2 Bordenkircher v. Hayes (1978)
Gannett v. Depasquale (1979)

Blackmun 2 Harris v. New York (1971)
United States v. White (1971)

Thomas 2 United States v. Dixon (1993)
Graham v. Collins (1993)

Burger 0 N/A

White 0 N/A

IV. Conclusion

By examining the discernible impact of new appointees in 5-4 decisions, the development of law and policy making in each Court era can be better understood. The Supreme Court's legacy during any era is not produced in any specific moment, but is built through case decisions that develop, change, and eliminate doctrines and policies. All of the Court's justices participate in this evolutionary process, but new appointees can play a pivotal role in defining case outcomes when their judicial values differ from those of their predecessors and they arrive at the high court at a moment when the justices are deeply divided about important issues.

* Associate Professor of Criminal Justice, Michigan State University. A.B., Harvard University, 1980; M.Sc., University of Bristol (U.K.), 1981; J.D., University of Tennessee, 1984; Ph.D., University of Connecticut, 1988. I gratefully acknowledge my indebtedness to Thomas Hensley of Kent State University for obtaining the relevant data for me. Ed Banks provided assistance with the organization of the data from the cases. The data are drawn from the Supreme Court Judicial Database, Harold J. Spaeth, Principal Investigator (ICPSR study number 9422).

1. *See, e.g.*, John F. Decker, *Revolution to the Right: Criminal Procedure Jurisprudence During the Burger-Rehnquist Court Era* vii (1992).

In rapid fire succession, the Warren Court issued opinion after opinion that in one way or another increased suspects' rights to be free of unreasonable searches and seizures, avoid self-incrimination and double jeopardy, and benefit from various trial guarantees, including assistance of counsel and confrontation of the accuser. The net effect of these judicial developments was to move the criminal justice system from an institution that emphasized law enforcement as the paramount, if not sole, goal to one where due process and presumption of innocence concerns were viewed as equally important to the conviction of the guilty.

Id.; *see also*, Larry W. Yackle, *The Habeas Hagioscope*, 66 S. Cal. L. Rev. 2331, 2348-2349 (1993) ("In the Warren Court years, by contrast, the Fourteenth Amendment was read to incorporate most of the safeguards in the Bill of Rights. Accordingly, by the mid-1960s lots of federal claims were available to state convicts, who could petition for the writ of habeas corpus in order to vindicate those claims in federal court.").

2. *See, e.g.*, Christopher E. Smith, *Police Professionalism and the Rights of Criminal Defendants*, 26 *Crim. L. Bull.* 155, 158 (1990) ("The greatest judicial pressure for police reform and professionalization came with the controversial decisions defining criminal defendants' rights during the Warren era.").

3. *See, e.g.*, Jack E. Call, *The Supreme Court and Prisoners' Rights*, 59 *Fed. Probation* 36, 36 (March 1995) ("In the late 1960s, however, the United States Supreme Court began to involve itself [in prisoners' rights issues]. Since then, the Supreme Court has decided more than 30 cases dealing with the rights of the incarcerated.").

4. For example, in the Warren, Burger, and Rehnquist Court eras, the Supreme Court made different kinds of decisions and established a different reputation for liberalism or conservatism. The Warren Court (1953-1969) has been regarded as producing "[w]hat can only be described as a constitutional revolution, generated by a group of justices who were perhaps the most liberal in American history." Thomas Walker & Lee Epstein, *The Supreme Court of the United States: an Introduction* 19 (1993). "By contrast, members of the Burger Court [1969-1986] selected cases in order to cut back, if not reverse, the [liberal] direction of Warren Court policy-making." David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 205 (3d ed. 1993). As a further contrast, "[t]he transformed [Rehnquist] Court no longer sees itself as the special protector of individual

liberties and civil rights for minorities." David G. Savage, *Turning Tight: The Making of the Rehnquist Supreme Court* 453 (1992).

5. Indeed, the formation of a new majority can lead to the swift reversal of precedents. In 1991, after the appointment of Justice David Souter, the Supreme Court issued a decision permitting victim impact testimony in capital sentencing proceedings (*Payne v. Tennessee*, 501 U.S. 808 (1991)), reversing precedents established only two and four years earlier. See *South Carolina v. Gathers*, 490 U.S. 805 (1989); *Booth v. Maryland*, 482 U.S. 496 (1987).

6. See Lawrence Baum, *The Supreme Court* 155 (4th ed. 1992) ("Although shifts in the positions of sitting justice can produce major policy changes on the Court, more often such changes result from new appointments to the Court. Membership change is probably the most important source of policy change on the Court.").

7. See Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (1993) (detailed study of the influences on Supreme Court justices' decision making that finds attitudes and values to be the most significant influences).

8. See, e.g., Yale Kamisar, *The "Police Practice" Phases of the Criminal Process and the Three Phases of the Burger Court*, in *The Burger Years: Rights and Wrongs in the Supreme Court, 1969-1986* 143, 145 (Herman Schwartz ed., 1987) ("Thus, Chief Justice Burger announced his retirement just when the so-called Burger Court seemed to have hit its pro-police stride at last, just when he and his colleagues were demonstrating, after a number of years in which the government had experienced only mixed success, that criminal procedure is indeed 'the part of the Court's work most susceptible to swings of the pendulum after a change of personnel.'" (citation omitted).

9. Baum, *supra* note 6, at 155.

10. See Christopher E. Smith & Thomas R. Hensley, *Assessing the Conservatism of the Rehnquist Court*, 77 *Judicature* 83 (1993) (study comparing decision-making during the Warren, Burger, and Rehnquist Court eras).

11. See Henry J. Abraham, *Justices And Presidents: A Political History Of Appointments To The Supreme Court* (3d ed. 1992) (a review of the presidential motivations and career experiences that led each justice to be appointed to the Supreme Court).

12. See Baum, *supra* note 6, at 41 ("Presidents recognize that the capacity of their appointees to help shape the Court's policies is among their major legacies."); O'Brien, *supra* note 4, at 65 ("Because justices serve for life, they furnish a President with historic opportunities to influence the direction of national policy well beyond his own term.").

13. Abraham, *supra* note 11, at 296-97.

14. See Charles M. Lamb, *Chief Justice Warren E. Burger: A Conservative Chief for Conservative Times*, in *The Burger Court: Political And Judicial Profiles* 129, 151 (Charles M. Lamb & Stephen C. Halpern eds., 1991) ("Although President Nixon was undoubtedly disappointed by Burger's decisions on some constitutional issues, surely he was proud of the chief's general performance in the area of criminal procedure. . . . The chief's sympathetic views toward the prosecution were especially obvious in his criminal procedure dissents, which were typically his most forceful and eloquent opinions.").

15. Walker & Epstein, *supra* note 4, at 20.

16. See Thomas R. Hensley, Christopher E. Smith, & Joyce A. Baugh, *The Changing Supreme Court: Civil Rights And Liberties* Chaps. 9-12 (forthcoming, January 1997, manuscript on file with the authors).

17. Kamisar, *supra* note 8, at 143-68.

18. Sheldon Goldman, *Constitutional Law: Cases and Essays* 130 (2d ed. 1991).

19. *Id.* at 148.

20. Justices' impact on case decisions is not limited to the effects of their votes because they can also influence case outcomes by, for example, persuading or alienating other justices. Baum, *supra* note 6, at 156-62.

21. In the controversial right to privacy case of *Bowers v. Hardwick*, 478 U.S. 186 (1986), concerning Georgia's anti-sodomy criminal statute, Justice Lewis Powell intended to provide the fifth vote for invalidating the law after oral arguments, but he later changed his mind and actually provided the fifth vote for precisely the opposite result. See Peter Irons, *The Courage of Their Convictions* 391 (1988). In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the challenge to systemic racial discrimination in capital sentencing, memoranda in Justice Thurgood Marshall's personal papers reveal that Justice Scalia accepted the social science evidence demonstrating the existence of racial discrimination submitted by death penalty opponents. His acceptance of this evidence should have made him cast the fifth vote to invalidate capital punishment in Georgia and might very likely have eliminated the death penalty in the United States. For some unknown reason, however, Scalia actually cast the decisive fifth vote in support of the death penalty and never wrote any opinion explaining why he chose to ignore the persuasive evidence of racial discrimination. See Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies From the Perspective of Justice Antonin Scalia's McCleskey Memorandum*, 45 *Mercer L. Rev.* 1035 (1994).

22. U.S. Senators and interest groups recognize the looming possibilities for change when a new appointee possesses different judicial values than the justice that he or she is replacing. This recognition can produce significant differences in the levels of political conflict involved in the confirmation processes for various justices. For example,

conservative Reagan appointees Robert Bork and Antonin Scalia had very different experiences in the confirmation process:

There are two primary for Scalia's relatively easy confirmation proceedings. First, he was regarded as a conservative replacing another conservative, namely Chief Justice Burger. Thus Scalia's nomination was not perceived as changing the ideological balance of power on the high court. Bork, by contrast, was nominated to replace Justice Lewis Powell, a supporter of abortion rights and the architect of compromise opinions approving affirmative action in some contexts. Therefore, liberal senators feared that Bork would tilt the Court too far in favor of conservative decisions.

Christopher E. Smith, Justice Antonin Scalia and the Supreme Court's Conservative Moment 27 (1993).

23. Many studies of first-term justices examine each justice in isolation and do not look comprehensively at all new justices' impact on law and policy. See Albert Melone, *Revisiting the Freshman Effect Hypothesis: The First Two Terms of Justice Anthony Kennedy*, 74 *Judicature* 6 (1990); Thea F. Rubin & Albert P. Melone, *Justice Antonin Scalia: A First Year Freshman Effect?*, 72 *Judicature* 98 (1988); John M. Scheb II & Lee Ailshie, *Justice Sandra Day O'Connor and the "Freshman Effect,"* 69 *Judicature* 9 (1985).

Studies that examine more than one first term justice tend to analyze the justices' voting patterns and opinion-writing behavior rather than the newcomers' impact on law and policy. See Terry Bowen & John M. Scheb II, *Reassessing the "Freshman Effect": The Voting Bloc Alignment of New Justices on the United States Supreme Court, 1921-90*, 15 *Pol. Behav.* 1 (1993); Terry Bowen & John M. Scheb, II, *Freshman Opinion Writing on the U.S. Supreme Court, 1921-1991*, 76 *Judicature* 239 (1993); Robert Dudley, *The Freshman Effect and Voting Alignments: A Reexamination of Judicial Folklore*, 21 *Am. Pol. Q.* 360 (1993); Saul Brenner, *Another Look at Freshman Indecisiveness on the United States Supreme Court*, 16 *Polity* 320 (1983); Edward Heck & Melinda Hall, *Bloc Voting and the Freshman Justice Revisited*, 43 *J. Pol.* 852 (1981); see also David W. Allen, *Voting Blocs and the Freshman Justice on State Supreme Courts*, 44 *W. Pol. Q.* 727 (1991).

24. Smith & Hensley, *supra* note 10, at 86.

25. During his first term, Thomas's seventy-five percent agreement rate in nonunanimous cases with the Court's most conservative justices, William Rehnquist and Antonin Scalia, formed the basis for the strongest three-member voting bloc on the Court. Christopher E. Smith & Scott Patrick Johnson, *The First-Term Performance of Justice Clarence Thomas*, 76 *Judicature* 172, 174 (1993). During his third term, Thomas's eight-two percent agreement rate with Scalia created the strongest two-justice voting pair on the Court. Christopher E. Smith et al., *The First-Term Performance of Justice Ruth Bader Ginsburg*, 78 *Judicature* 74, 75 (1994).

26. In contrast to Marshall's 88.5 percent for individuals in civil rights and liberties cases, Thomas initially supported individuals in only 30 percent of such cases. Smith & Hensley, *supra* note 10, at 86.

27. Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court-Packing Efforts of Presidents Reagan and Bush*, 57 Albany L. Rev. 1111, 1126 (1994).

28. During Thomas's initial term, the Court already had six other justices who supported individuals in fewer than fifty percent of civil rights and liberties cases: William Rehnquist, 22.7 percent; Antonin Scalia, 22.6 percent; Anthony Kennedy, 36.5 percent; Sandra O'Connor, 36.9 percent; Byron White, 37.2 percent; and David Souter, 42.6 percent. Smith & Hensley, *supra* note 10, at 86.

29. Souter cast decisive votes in several cases that would likely have had different outcomes if Justice Brennan had remained on the Court. Scott P. Johnson & Christopher E. Smith, *David Souter's First Term on the Supreme Court: The Impact of a New Justice*, 75 *Judicature* 238, 239 (1992). *See also infra* note 38 and accompanying text.

30. Studies of appellate courts have shown that cases which divide courts and cause conflict can be useful vehicles for analyzing judicial decision making. *See, e.g.*, Christopher E. Smith, *Polarization and Change in the Federal Courts: En Banc Decisions in the U.S. Courts of Appeals*, 74 *Judicature* 133 (1990) (study of *en banc* decisions in federal appellate courts).

31. The Supreme Court Judicial Data Base is available to scholars through the Inter-University Consortium for Political and Social Research at the University of Michigan. *See* Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 *Judicature* 103 (1989). The universe of cases for this study includes only those classified under the "Criminal Procedure" issue area. Criminal justice cases classified under the "Due Process" issue area were not included.

32. Lawrence Baum, *Membership Change and Collective Voting Change in the United States Supreme Court*, 54 *J. Pol.* 3, 56 (1990).

33. It is notoriously difficult to conclude with any certainty about how a Supreme Court justice will or would have decided a case or issue in which the justice did not or has not yet participated in the decision. *See* Christopher E. Smith & Kimberly A. Beuger, *Clouds in the Crystal Ball: Presidential Expectations and the Unpredictable Behavior of Supreme Court Appointees*, 27 *Akron L. Rev.* 115 (1993) (case studies of justices who failed to influence the Court in the manner anticipated by their appointing presidents). Although many justices vote in fairly consistent patterns, justices will frequently surprise outside observers by voting in unexpected ways on particular issues. *See* Christopher E. Smith, *Supreme Court Surprise: Justice Anthony Kennedy's Move Toward Moderation*, 45 *Okla. L. Rev.* 459 (1992) (analysis of Justice Kennedy's surprising votes to maintain a right of choice for abortion and preclude sponsored prayers at public school graduations).

34. Cases were defined using published citations instead of docket numbers because sometimes several cases with different docket numbers and the same or similar issues are decided and announced in a single published-citation case.

35. Disagreements may exist in unanimous decisions, but unless they are articulated and explained in concurring opinions, it is impossible for outside observers to detect and assess the nature and scope of the intra-court conflicts.

36. Segal & Spaeth, *supra* note 31, at 104.

37. Every justice agrees with each of his or her colleagues in at least some nonunanimous cases during every Supreme Court term. *See* Smith et al., *supra* note 25, at 75. However, certain patterns tend to emerge in which specific justices tend to agree most frequently with only certain colleagues those who apparently share their values about the largest number of issues. *Id.*

38. Christopher E. Smith & Scott P. Johnson, *Newcomer on the High Court: Justice Souter and the Supreme Court's 1990 Term*, 37 S.D. L. Rev. 21, 39-41 (1992).

39. In Souter's case, the multiplier also helps to compensate for the gradual liberalization of his decision making. *See* Smith et al., *supra* note 25, at 77. Souter's career percentage in Table 1 is presumably higher than the percentage of liberal decisions in his performance as a new justice. *See* Johnson & Smith, *supra* note 29, at 239. Although the Souter-Brennan comparison provides the basis for the selection and introduction of the multiplier, the multiplier obviously does not fit precisely with the characteristics and career developments of other paired justices. Further development of this analytical technique may produce the need for the development of different multipliers for other policy issues or for assessing with greater precision the relationship between departing justices and their respective successors.

One of Justice Souter's seven cases, *Schad v. Arizona*, 501 U.S. 624 (1991), did not appear in the data and is not included in this study. It is apparently classified as a "Due Process" case rather than as a "Criminal Procedure" case in the Supreme Court Judicial Base.

40. *See* Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 *Judicature* 262 (1992).

41. "Direction of change" in this context means "liberal" (i.e., more supportive of individuals in civil rights and liberties cases) or "conservative" (i.e., more supportive of the government in civil rights and liberties cases). *See* Segal & Spaeth, *supra* note 31, at 104.

42. During Burger's initial term, the Court was still dominated by such liberal Warren Court justices as William O. Douglas, William Brennan, Thurgood Marshall, and Hugo Black. Goldman, *supra* note 18, at 148.

43. *United States v. Dixon*, 113 S.Ct. 2849 (1993); *Graham v. Collins*, 113 S.Ct. 892 (1993); *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Wilson v. Seiter*, 501 U.S. 294 (1991); *Riverside v. McLaughlin*, 500 U.S. 44 (1991); *Arizona v. Fulminante*, 449 U.S. 279 (1991); *California v. Ciraolo*, 476 U.S. 207 (1986); *New York v. Class*, 475 U.S. 106 (1986); *Hudson v. Palmer*, 468 U.S. 517 (1984); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *United States v. Edwards*, 415 U.S. 800 (1974); *Cady v. Dombrowski*, 413 U.S. 433 (1973); *United States v. Russell*, 411 U.S. 423 (1973); *Kirby v. Illinois*, 406 U.S. 682 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Harris v. New York*, 401 U.S. 222 (1971); *United States v. White*, 401 U.S. 745 (1970); *Foster v. California*, 394 U.S. 440 (1969); *United States v. Wade*, 388 U.S. 218 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Elkins v. United States*, 364 U.S. 206 (1960); *Green v. United States*, 355 U.S. 184 (1957).

44. Rolando V. Del Carmen, *Criminal Procedure: Law and Practice* (1995).

45. George F. Cole, *The American System of Criminal Justice* (7th ed. 1995).

46. Varied practices are employed by scholars who disagree about the best method for identifying "important" cases. See *Johnson & Smith, supra* note 29, at 242.

47. See Harold J. Spaeth, *Distributive Justice: Majority Opinion Assignments in the Burger Court*, 67 *Judicature* 299, 303 (1984).

48. 364 U.S. 206 (1960).

49. 367 U.S. 643 (1961).

50. 378 U.S. 1 (1964).

51. 378 U.S. 748 (1964).

52. 384 U.S. 436 (1966).

53. 388 U.S. 218 (1967).

54. *Harris v. New York*, 401 U.S. 222 (1971).

55. *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972).

56. *Kirby v. Illinois*, 406 U.S. 682 (1972).

57. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

58. *Wilson v. Seiter*, 501 U.S. 294 (1991).
59. *Riverside v. McLaughlin*, 500 U.S. 44 (1991).
60. *Arizona v. Fulminante*, 499 U.S. 279 (1991).
61. *United States v. Dixon*, 113 S.Ct. 2849 (1993).
62. *Walker & Epstein*, *supra* note 4, at 19.
63. In the two other cases, Hugo Black dissented in *United States v. Wade*, 388 U.S. 218 (1967), and *Foster v. California*, 394 U.S. 440 (1969), and he was replaced in the five-member majority by Tom Clark and Thurgood Marshall, respectively, in those cases.
64. 355 U.S. 184 (1957).
65. 364 U.S. 206 (1960).
66. 371 U.S. 471 (1963).
67. 378 U.S. 1 (1964).
68. 378 U.S. 478 (1964).
69. 384 U.S. 436 (1966).
70. Sheldon Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 *Judicature* 324, 326 (1987).