Obscenity, Libertarian Values, and Decision Making in the Supreme Court

Kevin T. McGuire

American Politics Research 1990; 18; 47
DOI: 10.1177/1532673X9001800103

OBSCENITY, LIBERTARIAN VALUES, AND DECISION MAKING IN THE SUPREME COURT

KEVIN T. McGUIRE
Ohio State University

The degree to which the Supreme Court has been willing to support the libertarian claims of obscenity litigation has varied substantially since the High Tribunal first addressed the issue. By the admission of the justices themselves, the law of obscenity has proven to be problematic, at best. In this analysis, a model is developed that accounts for the voting behavior of the justices in obscenity cases. The results suggest that the High Court is especially sensitive to the states' aim of eradicating obscene materials. Although the increased conservatism of the bench has made the justices less prone to vote against the government, there is evidence of support for the liberal position, particularly when the argument is made by some organized interest. The justices, although not necessarily protective of those against whom the government acts, recognize the need to balance the necessity of serving legitimate governmental interests against the potential threat to free expression.

Few issues have proven as problematic for the Supreme Court as obscenity. Deciding how best to control obscene expression as well as what constitutes it has produced a host of opinions among the justices. The members of the High Tribunal have often expressed their collective frustration with such litigation. Labeling it the "intractable obscenity problem," Justice John M. Harlan Jr., noted that "the subject of obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication" (*Interstate Circuit v. Dallas* 1968, 704-705). Scholars also have been critical of the Supreme Court's treatment of obscenity over the years (see, e.g., Dietz and Taylor 1975; Lockhart 1975; Schauer 1976). At best, it is a puzzling part of the Supreme Court's jurisprudence. Has the Supreme Court decided cases in the law of

Authors' Note: I am grateful to Lawrence A. Baum and Gregory A. Caldeira for helpful suggestions on earlier versions of this article.

AMERICAN POLITICS QUARTERLY, Vol. 18 No. 1, January 1990 47-67

obscenity in a haphazard manner, as the justices and commentators have suggested, or have the justices responded consistently to stimuli in the cases and the external environment?

Based on cases in the law of obscenity decided by the High Court from 1957 to 1985, I shall argue that there is indeed a systematic pattern to the decision making which underlies the Court's outward appearance of discord. Specifically, I address the question of whether an empirical model can be constructed that will account for the variation in the voting patterns of the Supreme Court justices in litigation on obscenity. The results suggest that case-specific variables, such as the level of governmental participation or the methods of obscenity control, are factors to which the justices respond. In addition, the justices take into account claims made by both parties, and the presence of briefs amicus curiae provide a clearer picture of obscenity decision making in the Court.

Until quite recently, scholars had done very little systematic and empirical analysis about how and why the Supreme Court makes decisions on the merits (but see Kort 1957). Segal's (1984, 1986) work on search and seizure was an important contribution to the institutional research on the High Bench because he demonstrated the Court's responsiveness to recurring case patterns in a specific area of the law. The application of this type of model to obscenity litigation is important not only for what it says about the development of obscenity law, but also for what it tells us about decision making on the Supreme Court generally.

Similar analyses, always using a dichotomous dependent variable, developed a considerable understanding of the Court's decisions to review cases, as well as the outcomes of those cases. For example, we know a great deal about the considerations that are weighed when accepting some cases for review to the exclusion of others (Caldeira and Wright 1988; Perry 1986; Songer 1979; Tanenhaus et al. 1963; Ulmer 1984). Likewise, for certain areas of the law, we have predictive models that accurately account for the Court's outcome (see, for example, Kort 1957; Segal 1984, 1986).

What makes such analyses so compelling is that they provide a systematic understanding of the forces acting on the Court, as well as how the High Bench responds to them. By focusing on the

Court's dichotomous choices, they do not, however, provide explanations of the variability of the collegial decision. In short, these scholars have explained who wins and why, while there remains the interesting prospect of exploring the question of who wins and *by how much.* The purpose of this analysis is to account for specific vote margins on the Supreme Court—not simply case outcomes—by examining the kinds of considerations that we have come to understand as influencing the case decisions for the Court as a whole. In so doing, I employ a measure of institutional support, namely the percentage of voting justices who support the liberal position in obscenity cases, as opposed to the dichotomous case outcome. By disaggregating votes, I hope to account for gradations in libertarian support that may be concealed in the examination of case resolutions.

This does not mean, of course, that there is no utility in studying case outcomes. To understand the High Court's reversal and affirmance decisions alone is clearly an important task. Yet it leaves open the question of what it is about the nature of some cases that inclines the Court to vote unanimously in some instances and divide more narrowly in others.

Obscenity is an area of the Supreme Court's docket particularly well-suited to the model formulated here. First, the issue of obscenity is an especially salient one; indeed, it is a judicial arena in which political scientists (e.g., Kobylka 1987) and legal scholars (e.g., Kalven 1960; Lockhart and McClure 1954; Schauer 1976) have undertaken observation and analysis. Second, by the Court's own admission, it has had considerable difficulty in dealing with the issue of obscenity. Students of the Court can readily observe the host of opinions among the justices that this issue has generated. And the cases themselves show substantial variation in their voting outcomes. Third, very much like the finding of Segal (1984, 1986) in the law of search and seizure, cases in the law of obscenity seem to consistently raise many of the same issues and facts. These recurring issues include, among others, claims based on the First Amendment, questions of due process of law, and the violation of community standards.

A MODEL OF OBSCENITY SUPPORT

Segal's (1984, 1986) successful analysis of the Supreme Court's search and seizure cases is a compelling demonstration of how the justices respond to unique case facts. In other jurisprudential categories, such as involuntary confessions (see Kort 1973) and the right to counsel (see Kort 1957), models of judicial decision making based on recurring case considerations also have been successful. Under the larger rubric of fact-pattern analysis, the specification of this model involves separating the estimators into three distinct categories: case facts, litigant claims, and extralegal case considerations. The case fact-pattern variables are those directly related to obscenity litigation. As such, they may be reasonable reflections of those factors that the justices deem to be relevant considerations, such as which governmental actors and regulations are most appropriate for obscenity control, as well as the medium that carries the alleged obscene expression. Of course, the justices often disagree about the most relevant considerations and may actually take quite opposite positions.[1]

In selecting litigant claims, I have chosen contentions that represent a general cross section of the types of allegations made by the parties in cases on obscenity. These do not represent the only claims made by the government and libertarian litigants, but because the model posits that these claims are of import, however, I have made an effort to include those claims that might be construed as substantively reasonable (i.e., nonfrivolous).

Finally, the extralegal estimators incorporated into the analysis are those factors that, while not necessarily a direct function of the controversies, may exercise meaningful influence on the level of obscenity support. Here, the equation is controlled for the changing ideological composition of the High Bench. Furthermore, I postulate that amici activity is a factor that contributes to the voting behavior of the justices.

The statistical analysis is based on all obscenity cases that were decided on the merits by the U. S. Supreme Court from 1957 to 1985 (n = 85). Given the difficulties that the members of the Court have expressed in defining obscene expression, some readers will no doubt have reservations with the cases included in the analysis. In

general, I have tried to select only those cases in which a government is attempting to eliminate some form of allegedly lascivious expression. For example, if a community attempted to enjoin the showing of a motion picture because of the film's alleged prurient appeal, the case was included. Conversely, if a community promulgated a zoning ordinance, relegating adult theatres to a specified region of the city, such a case was not included in the data set. Cases that involved offensive—not obscene—speech, such as *Cohen v. California* (1971), were excluded as well.

The data come from two sources: 1) written briefs submitted to the Court prior to a decision on the merits, reprinted in *Briefs and Records of the United States Supreme Court,* and 2) judgments and opinions, printed in *United States Reports.*[2] The Court decided some 68% of these cases in the liberal direction (i.e., in favor of libertarian litigants who oppose governmental regulation of allegedly obscene materials). By comparison, the average percentage of the justices favoring the libertarian position was 69%. (For the distributions of the variables in the analysis, see Appendix.)

There is, of course, ample precedent for employing data such as these in the study of litigation before the courts. The reliance on case characteristics in judicial decision-making models has often proven to be quite illuminating (see Croyle 1983; Hagan 1974; Kort 1957, 1973; Partridge and Eldridge 1978; Segal 1984, 1986).

CASE FACTS

Level of Government

Because of the homogeneity of small locales, minority viewpoints are at particular risk. Madison (1787) said as much in *The Federalist Papers*, No. 10. Indeed, the tyranny of local majorities in obscenity litigation is a fact to which the Supreme Court has evinced great sensitivity. Conversely, in cases in which the federal government is involved, we would expect the least support from the Supreme Court for allegedly obscene expression. This is true for a number of reasons. First, the federal government is generally afforded quite favorable consideration by the Court (Caplan 1987; Segal and Reedy 1988). In addition, because the regulation of mo-

rality has traditionally been considered among the states' "police powers," the federal government generally leaves the regulation of obscenity to others. Thus, when the federal government becomes involved in obscenity litigation, it is generally to preserve some broad, compelling governmental interest. This would include such areas as the prevention of illegal importations or the protection of the integrity of the postal system. Finally, the federal government simply has shown more sympathy to the preservation of civil rights than have states or communities (Bullock and Lamb 1982).

Coefficient estimates utilizing dummy variables for individual levels of governmental participation reveal that support for libertarian claims in obscenity litigation is consistent with this hypothesis. Not only are the sizes of coefficients increasingly greater as one moves from national to local involvement, but there are also considerable differences among those estimates. Thus it is reasonable to argue that the level of governmental participation may exercise some influence on the High Bench's vote levels in obscenity cases. This variable is coded as 1 for cases in which the United States was a party, 2 when a state was involved, and 3 when a community was engaged in obscenity litigation.

Forum

How the alleged obscenity is expressed may affect the manner in which the Court votes. Motion pictures, for example, are a highly explicit medium, and as such are more likely to offend the sensibilities of those who view them. In turn, this may well lead to diminished levels of support for the libertarian position. Books, conversely, leave much to the imagination, and, perhaps more important, are clearly among the most accepted forms of expressing ideas. The publication of a magazine might well be thought of as falling somewhere between books and films. Although lacking the visual impact of a motion picture, a magazine may still contain a more patently offensive element than might be found in a more literary setting. Thus I argue that when obscenity litigation involves magazines, the margins of support for the libertarian position will tend to fall between those cases involving books and those cases in which films are at issue.

In many cases, the issue is whether the materials in question are obscene under the law.[3] I expect that, when the justices do make such determinations, film will militate against the theatre owners, (i.e., its coefficient should be negative), and the medium of the printed word should redound to the benefit of the defenders of the First Amendment.[4] When the justices were rendering a decision as to whether the materials in question were obscene, I coded the presence of these corresponding forums as follows: 1 for films, otherwise 0; 1 for magazines, otherwise 0; and 1 for books, otherwise 0.

Regulation

The methods by which governments seek to eliminate obscenity vary in their breadth and severity. It is reasonable to suggest, therefore, that the methods of regulation may be responsible for varying degrees of support for the purveyors of alleged obscenity. Prosecutions are perhaps the most innocuous of obscenity abatement measures. They take the form of the state seeking enforcement of a presumably valid law, subsequent to its violation. There are, however, more problematic regulations.

One method of control available to the state is the pursuit of an injunction. When the law empowers a court to proscribe the dissemination of obscene materials, it vests the issue of obscenity control in the hands of an independent third party. For this reason, an injunction is the least offensive regulation, apart from a prosecution. The nature of the injunction, however, raises the spectre of a prior restraint of expression, an issue for which the Court has little enthusiasm.[5] I hasten to add that an injunction need not be exercised as a prior restraint or need it be permanent; it may be utilized to forbid future dissemination of obscene materials, once they are determined to be such. Moreover, injunctions may also be temporary in nature.

The seizure of allegedly obscene materials seems to introduce an element of greater objectionability. It too is not necessarily utilized as a prior restraint; it differs from injunctions in that it need not be obtained through independent judicial judgments. Under such circumstances, there is a greater likelihood that otherwise legitimate, protected expression may be caught within the net of a police seizure.

Some statutory schemes require that certain materials, generally motion pictures, be subject to a government license. These programs, although constituted under law, permit the government to require submission and approval of such materials prior to their public availability. In this case, the government has the power to disapprove of any film it deems to be unfitting, prior to exhibition. Such measures come close to approximating a censor, and thus arguably become the regulation with the least support among the justices.

Coefficients of dummies for these regulations show that support for the libertarian position is quite consonant with these intuitions. Controlling for the terms of the injunction (temporary v. permanent) suggests that the justices do not respond any differently to one form than another. By contrast, once I control for those injunctions that were prior restraints, there is a considerable disparity in the estimates. In fact, of all the typologies of regulations, these coefficients suggest that injunctions as prior restraints are viewed by the justices as the most restrictive governmental form of obscenity abatement.

This variable assumes a value of 0 for cases involving prosecutions. It equals 1 when a nonprior restraint injunction was the method of regulation pursued by the government, and 2 for cases in which there were seizures of obscene materials. When the regulatory scheme is a licensing program, the variable is given a value of 3. In the presence of injunctions of prior restraint, the variable assumes a value of 4.

CLAIMS OF LITIGANTS

Governmental Claims

There are a number of claims that the state may bring to bear in an attempt to persuade the Court on the merits of its case. These claims are not uniformly compelling; in fact, the justices may feel that some contentions do little to advance the state's cause. It is reasonable, however, to posit that the assertion of a number of legitimate state interests could muster greater opposition against obscene expression.[6]

Allegations of harm suffered as a direct result of obscenity may generate greater support by the Supreme Court for the state. If the

government asserts that the obscene materials have eroded the morals of the community, for example, libertarian support is likely to wane. Similarly, when the government claims that the bookseller has violated community standards, the Supreme Court may respond with lesser support. An assertion that the purveyors of questionable magazines or motion pictures are engaged in pandering to a lascivious element may also generate greater sympathy for the state's case. Further, the argument that the exposure of the public to such materials brings about some antisocial behavior may also make voting with the state an easier prospect.

For the presence of the following claims made by the government in its written briefs, these variables were assigned a value of 1: erosion of morals, violation of community standards, pandering, and effecting antisocial behavior; otherwise, 0.

Libertarian Claims

Those who defend allegedly obscene expression can with plausibility mount a number of defenses against the government. Indeed, we may postulate that certain claims bring about increases in support for allegedly obscene expression. When the owners of theaters or operators of bookstalls make some constitutional claim against the government, there may be an increased incentive for the Court to vote against the state. Asserting that one's First Amendment privileges have been impinged or that a police search violated one's expectation of privacy could well promote larger margins against the government. Further, obscenity litigants often assert that the state has erroneously taken action against a magazine or film that possesses redeeming literary value. Where such claims are made, the publishers may receive greater support from the justices. Because the Court does not protect obscenity, the justices may not treat allegations of substantive rights violations as they would in other cases of free expression. For, as the justices have stated, the suppression of obscenity by the government poses no threat to the First Amendment (see *Chaplinsky v. New Hampshire* 1942; *Roth v. United States* 1957).

Although assertions of substantive violations of law may be less compelling allegations, claims of procedural errors by the state may

be the most likely ground on which libertarians stake their claims against the government. One such argument, common to obscenity litigation, is an assertion that the state failed to demonstrate scienter, that is, the state took action against a bookstall operator or theatre owner without first demonstrating that the defendant was aware that the materials in question were legally obscene.[7] Violations of the claimant's right to due process of law may also lead to greater scrutiny of governmental activity. This in turn may translate into greater support for libertarian values.

For the presence of the following claims made by parties to the alleged obscenity, these variables were given a value of 1: First Amendment, privacy, and due process of law violations; redeeming literary value to the expression; and no showing of scienter; otherwise, 0.

EXTRALEGAL CONSIDERATIONS

Amicus Curiae Participation

Interest groups may pursue their goals before the Supreme Court by following a number of avenues (Ivers and O'Connor 1987; O'Connor and Epstein 1981-82). In the area of obscenity litigation, one prominent interest group activity is the filing of amicus curiae briefs (Kobylka 1987).

In many civil liberties cases, the claimants who appear as defenders of the First Amendment are, in the words of one American Civil Liberties Union attorney, "scurvey little creatures" (see Casper 1972, 167). Oftentimes, smut peddlers and panderers merely serve as vehicles for resolving complex constitutional questions. It is unlikely that the Court has much sympathy for the litigants themselves. The justices, therefore, will presumably look for a presentation of an outside interest to demonstrate the value of a given case. Kobylka (1987) notes a wide variety of libertarian groups participating in obscene litigation before the Court. These organizations include the American Civil Liberties Union, the Adult Film Association of America, the American Booksellers Association, and the Council for Periodical Distributors. That such groups are willing to devote the time and financial resources to briefs amicus curiae should serve no-

tice as to the broader interests that may be raised by a case. How the Court distinguishes between the plainly prurient and important constitutional considerations, therefore, is articulated as amicus curiae.

Our model posits that as the number of libertarian amicus briefs increases relative to the number of briefs favoring the government's position, support for the liberal position will also increase. We know that amicus briefs tend to have an effect on the Court's case selection decisions (see Caldeira and Wright 1988). There is also evidence that briefs amicus curiae affect the resolution of decisions on the merits (Ivers and O'Connor 1987). Here the model tests whether amici have similar implications for case resolution in the law of obscenity. By consensus, one special amici, the Solicitor General of the United States, exercises a considerable degree of influence by virtue of his participation (Caplan 1987; Segal and Reedy 1988). This is true for the certiorari stage of litigation (Caldeira and Wright 1988) as well as decisions on the merits (Segal and Reedy 1988).[8] The amicus variable is a measure of the difference between the number of amicus briefs filed for the obscenity parties and the government. In order to apply a more standard measure, the variable is expressed in the model as the natural log of this difference.

Change in Court Membership

Scholars have come to note the importance of taking into account the fluctuations in the High Court's membership when estimating an empirical model of the institution's decision making (Baum 1988; Segal 1984). To that end, in the analysis I control for the growth in conservatism on the Court, which began with the appointments made by President Nixon. In the abstract, increases in the increments of conservatism among the justices on the High Tribunal should produce a general dissipation of support for the libertarian position.

This variable takes on an initial value of 0 during the Warren Court and increases by a value of 1 with the appointments of Burger, Blackman, Powell, Rehnquist, Stevens, and O'Connor. Thus the variable ranges from 0 to 6. (For a similar measure employed in analysis of the Supreme Court, see Segal 1984.)

DEPENDENT VARIABLE

Support for obscenity litigants is operationalized initially as the number of justices voting in favor of the liberal position. Because not all cases involve the participation of the full nine-member bench, however, that number is then divided by the total number of justices participating in a given case.

RESULTS

The analysis demonstrates that decision making in obscenity litigation is quite complex. We find variables from across a broad range of predictors contributing to the explanatory capacity of the model. Table 1 presents the results from the regression analysis of support for libertarian values. These results are by no means conclusive, but they are generally consistent with the hypotheses—in some instances, significant to the degree of suggesting confirmation. The fit—R^2 = .43—is adequate. More important, the model of institutional support yields considerable substantive information about the manner in which the justices resolve the issues posed by obscenity litigation.[9]

The level of government involved in the litigation appears as a strong predictor of libertarian support (t = 2.15, p<.019). For cases in which the United States takes part, we can expect minimal sympathy for libertarian values. By comparison, states are less likely to generate votes for their side, and when localities make their claims against obscenity, one can anticipate that the justices will collectively accord such governments less deference. Clearly, it appears to be the case that the justices see the national government's attempts to eradicate obscenity in a more favorable light than those of states or individual communities. When the United States participates as a party to an action, the libertarian claimant can expect to garner some 18% less support for its cause than if a community were involved in the case.

The results of the regression indicate that the method chosen to control obscene expression also leads to variation in support for the state. The regulation variable is testimony to the fact that, while

TABLE 1
Libertarian Support in Supreme Court Obscenity Litigation

Variable	*B*	*b*	*t*	*Significance*
Intercept		.43	2.33	.022
Level of Government	.23	.11	2.15	.019
Film	−.09	−.08	−.83	.204
Magazine	.17	.13	1.54	.064
Book	.02	.01	.14	.443
Regulation	.26	.05	2.36	.010
Governmental Claims				
Erosion of morals	−.19	−.18	−1.69	.048
Community standards	−.09	−.07	−.74	.230
Pandering	−.14	−.17	−1.30	.099
Antisocial effects	−.08	−.10	−.75	.228
Obscenity claims				
First Amendment violation	−.22	−.16	−1.94	.028
Privacy violation	−.06	−.07	−.57	.285
Literary value	.07	.04	.59	.559
Due process violation	.18	.11	1.90	.031
No scienter showing	.13	.09	1.17	.123
Amicus curiae briefs	.19	.38	1.92	.030
Change in court membership	−.34	−.04	−2.64	.005

$R^2 = .43$
Adjusted $R^2 = .29$
df = 68
n = 85

obscenity is an unprotected form of expression, the justices may find it easier to support some methods of obscenity abatement than others. Thus the analysis shows that when the state selects a more prohibitive regulatory scheme, it does so at the expense of votes on the High Bench. Although a government may find a reasonable margin of justices supporting the prosecutions of obscenity offenders, when a city opts for an injunction (without a prior restraint) against the exhibition of a film or the state police seize magazines from the shelves of a bookstore, an increasingly larger proportion of the Court will vote against such actions. While a licensing program appears to produce a greater proportion of libertarian support, the most

exacting of judicial scrutiny is reserved for the injunctions of prior restraint. When this regulation is present, obscenity litigants receive 20% more support over what one could expect, given the most innocuous of governmental measures.

Consistent with our beliefs about the nature of the medium through which alleged obscenity is expressed, the results show that films tend to generate 8% less support among the justices. This result is reasonable, given the graphic nature of motion pictures. By contrast, the justices seem to have a greater tolerance for the medium of print. Both magazines and books have positive estimates. Surprisingly, magazines enjoy 12% greater support than books when the justices render judgments on whether the materials may be classified as obscene.

An assessment of the impact of the governmental claims made in the written briefs indicate that when other factors hold constant, the justices are somewhat responsive to such allegations. Claims that the obscenity has eroded the morals of the jurisdiction (t = 1.69, p<.048) generate measurably lower levels of obscenity support. When such a charge is leveled by the government, obscenity litigant support wanes by nearly 20%.

While an allegation of direct harm may predispose a greater proportion of the justices to vote with the state, the balance of governmental assertions vary in their capacities to affect support for state actions. When the government posits that exposure to obscenity produces some antisocial behavior, the publisher's case is eroded by 10%. Further, a 17% diminution in the bookseller's vote margin can be expected when a pandering complaint is made in the state's brief, while materials alleged to violate community standards have a negligible effect on the High Bench.[10]

On the other hand, the justices do not appear to be uniformly persuaded by the claims of the purveyors of obscene materials. As expected, the claim of infringement of substantive rights by the government was not heeded by the justices. Claims of violations of free expression or privacy expectations are most unconvincing to the members of the High Tribunal, producing 16% and 7% less support, respectively. While alleging the literary significance of one's film or publication does appear to garner a modicum of support, the coefficient is insignificant.

Assertions such as privacy violations or free speech abridgements may well be present in the justices' briefs, but the reasons for voting against the state are captured by other estimators within the model. The fact that these coefficients predict negatively is evidence that the allegations themselves are not taken seriously by the justices. Similarly, the allegation of redeeming literary merit fares no better. Apparently, the justices *do* know obscenity when they see it, and the claim that a film or magazine is of literary significance does not alter their decisions. In short, the facts of a case incline a justice to vote in favor of allegedly obscene expressions, not a concomitant constitutional claim.

Conversely, maintaining that one's procedural rights have suffered at the hands of the state appears to be an effective strategy for the obscenity litigants. The justices, while not necessarily supportive of the dissemination of obscene literature, appear to be sensitive to the fact that, when the state does seek to eradicate obscenity, it must do so under a prescribed course of action. For example, if the state prosecutes a bookstall operator who has no knowledge of the obscene nature of his merchandise, one should expect to see 9% greater support—minimal though it may be—than in other cases. Alleging violations of due process produces slightly greater obscenity litigant support than does the scienter claim ($t = 1.90$, $p<.031$).

One aspect of obscenity litigation that figures prominently in the decisional calculus of the justices is the filing of briefs amicus curiae. Specifically, the results show that, on balance, the greater the number of amicus briefs favoring the liberal position relative to the number of briefs favoring the government, the greater the amount of voting support the alleged obscenity can expect to receive from the justices ($t = 1.92$, $p<.030$). The balance in favor of liberal amici corresponds to as much as 40% greater support. Thus, as an addition to the expanding body of judicial research demonstrating that amicus briefs have agenda-setting capacities, these results show that amici may play a measurable role in the resolution of cases.

Finally, the analysis demonstrates that as Chief Justice Burger and the appointees who followed in his wake made their way onto the Court, there have been significant decreases in the number of justices who are willing to vote against the government in obscenity cases ($t = 2.64$, $p<.005$). The cumulative effect of the six conserva-

tive appointments has been to diminish support for libertarian values among the justices by 24%. This variable does not necessarily explicate judicial decision making per se, but membership change does illuminate the costs to obscenity litigants of conservative appointments to the Supreme Court. Indeed, the Burger Court relaxed the standards for obscenity and eased the burdens of the state when it sought to eliminate such materials. Further, by controlling for membership change on the Court, I am able to estimate the independent effects of the individual case factors. Clearly, there has been a major change in the number of justices who are willing to view those criteria in a light favorable toward the support of alleged obscenity.

Having examined the effects of the estimators on the High Court's libertarian support in the law of obscenity, I now turn to an assessment of their relative importance. After standardization, one finds that the level of government seeking obscenity abatement, as well as the means by which such an end is pursued, are matters of considerable importance to the Court. Which level of government is the most appropriate decision maker, as well as the reasonableness of the methods employed by the state in its efforts, exercise comparatively stronger influence.

Of the three forum variables, magazines appear to receive the lion's share of the justices' determinations of nonobscenity. Films, as expected, were viewed by the justices with the most exacting scrutiny; in general, they were more likely to find motion pictures to be obscene. Why books—a classic medium of legitimate expression—do not generate greater levels of support is puzzling. It may be that only those books that are particularly prurient ever have need to appeal to the Court. If books are the medium most likely to be found not obscene, then, all things being equal, only the most patently offensive books should fail to prevail in a lower court.

With respect to the claims which the litigants make before the High Court, the betas show varying levels of importance. Again, the analysis indicates that, on balance, the governmental claims tend to play a slightly larger role in the decision-making process. This most likely reflects the deference that the justices extend to the government, when they perceive such claims as serving compelling state interests. Protecting the moral fabric of a community and guarding against lascivious exploitation are especially viable concerns.[11]

On the side of the obscenity litigants, the best line of defense appears to be that the state failed to afford proper attention to one's procedural rights. Failure to demonstrate prior knowledge of the obscene nature of the bookstall's merchandise (beta = .13), and inattentiveness to due process of law (beta = .17) tend to garner sympathy for obscenity litigants. Beyond that, however, the justices show sensitivity to little else.

The most robust of the betas reported here (–.34) suggests that much of the Court's support can be understood as a function of the increased conservatism of its membership. As the law of obscenity has evolved over time, the Court has only made its doctrine more stringent, facilitating the relative ease with which the government may proceed against potential obscenitors.

On the other hand, the healthy beta reported for the amicus curiae variable (.19) suggests that the justices see the degree to which organized interests are willing to commit their resources to a case as an important indicator of the relative merits of the causes which they advance, whether they be pro- or antiobscenity.

CONCLUSION

The degree to which the Supreme Court has been willing to support allegedly obscene expression has varied substantially since the High Tribunal first tackled the issue. While obscenity is an unprotected form of expression, in many instances the justices are willing to vote in support of the bookstall or theatre. Factors, such as the kind of regulation which the government employs or which level of government is participating, enter into the calculus of the justices and affect their decision making. Similarly, the forum through which the message is made available may be a constraining force for members of the Court, making it easier or more difficult to support the liberal position. While turnover on the bench has produced a greater intolerance for such materials, the extralegal factors continue to act as important influences when the votes are cast on alleged obscenity. Not the least among such factors is the participation of organized interests via briefs amicus curiae.

When the litigant's allegations do enter into the case calculus, the justices are far more likely to rely on the claims made by the government. This is clearly apparent from the analysis and the decisions of the Court as well. As Chief Justice Burger wrote for the majority in *Paris Adult Theatre I v. Slaton* (1973), "(While) there is no conclusive proof of a connection between antisocial behavior and obscene material, (a legislature) could quite reasonably determine that such a connection does or might exist . . . (thus) a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality'." In effect, we find the justices utilizing a version of the original "clear and present danger" test, in which the state did not necessarily have to demonstrate illegal consequences resulting from a speech as a justification for punishing it.

Much has been made of the Court's protracted struggle to come to terms with the constitutional conundrum. To the extent that these results disentangle the matter, they provide some degree of clarity as to which issues the justices regard as most critical in obscenity case resolution, as well as how they respond to those issues. Thus our understanding of obscenity, from a constitutional standpoint, may be informed by the kinds of consideration raised here.

Appendix

Means and Standard Deviations for Variables in Model of Libertarian Support

Variable	*Mean*	*Std. Dev.*
Percent obscenity support	.69	.27
National government	.20	.40
State government	.67	.47
Local government	.13	.34
Film	.13	.34
Magazine	.13	.34
Book	.13	.34
Seizure	.31	.46
Injunction	.11	.31
License	.11	.31
Erosion of morals	.08	.28
Community standards	.58	.50
Pandering	.05	.21
Antisocial effects	.05	.21
First Amendment violation	.85	.36
Privacy violation	.05	.21

Appendix Continued

Variable	*Mean*	*Std. Dev.*
Literary value	.38	.49
Due process violation	.24	.43
No scienter showing	.18	.38
Amicus briefs favoring obscenity litigants	.65	1.25
Amicus briefs opposing obscenity litigants	.29	.57

NOTES

1. For example, the hypothesis tested regarding the level of governmental participation is contrary to the position taken by Justice Harlan, who felt that the First Amendment required greater scrutiny of federal, as opposed to state, actions. Further, the majority view among the justices is that each level of government should be afforded equal consideration.

2. Obscenity cases were identified in *United States Law Week*. Per curiam case were included in the analysis; in such cases, the vote was recorded as unanimous, unless dissents or recusals were so noted in the *United States Reports*. Any justice who "concurred in part and dissented in part" was treated as voting with the majority, regardless of whether the decision was in favor of or against obscenity litigants.

3. Although virtually all of the cases in the sample involve one of these three forums, the Court actually examined the materials and held as to whether they were obscene in slightly less than 40% of the cases.

4. Interestingly, there is evidence for this hypothesis previously recognized by the federal bench. One judge, in studying a group of the Supreme Court's obscenity decisions, found that, generally speaking, the more explicit the medium, the more likely the justices were to find in favor of the government (see *Hoffman v. United States* 1971).

5. One should note that other areas of constitutional law demonstrate that the Court is particularly sensitive to injunctions when they are exercised as prior restraints (see, for example, *New York Times Co. v. United States* 1971).

6. The governmental claims employed in the model do not represent the universe of state allegations; preliminary specifications of the model, however, suggested that not all made a meaningful contribution to the equation. Thus those claims that were the most theoretically as well as empirically justifiable have been utilized.

7. To demonstrate scienter is to show guilty knowledge, that is, "previous knowledge of a state of facts which it was (the defendant's) duty to guard against" (Black 1979, 1207). Hence, with respect to the scienter question, the governmental regulator may well take action against an individual on the basis of obscenity distribution, only to have the Court find against the state for lack of an official prior showing that the material was obscene (see, for example, *Smith v. California* 1959).

8. When the Solicitor General does file an amicus brief on behalf of a governmental counterpart, the state may well enjoy enhanced support for its cause. In my sample, the Solicitor General filed amicus briefs in only two cases. So inclusion of the Solicitor General as an amicus in my model is not practical as a substantive or statistical matter. These briefs are, of course, subsumed under the general amicus variable. Exploratory regressions that treat the Solicitor General as a distinct amici in the equation strongly suggest that the unique status of the "tenth justice" extends to obscenity cases as well. But reliance on an estimator with such a re-

stricted variance would impute far too much statistical significance to two amicus curiae briefs.

9. If we compare the logit estimates for this model with these results, we find that virtually all of the estimators for both equations run in the same direction. Those that appear significant in the logit model reach roughly the same levels of predictability using ordinary least squares.

10. Prior to *Miller v. California* (1973), the "contemporary community standards" prong of the obscenity test announced in *Roth v. United States* was effectively interpreted as referring to a hypothetical national community. The Burger Court subsequently clarified this definition so as to permit juries to take into account the particular standards of the communities in which the alleged obscene materials were proferred. Taking this change into account statistically produces no marked differences in the coefficients. Controlling for pre- and post-*Miller* claims reveals relatively uniform treatment of this allegation across time.

11. Although the community standards and antisocial effects estimates do not achieve overall statistical significance, there are notable instances in which the Court has given careful consideration to such claims (see *Mishkin v. New York* 1966, and *New York v. Ferber* 1982, respectively).

REFERENCES

Baum, Lawrence. 1988. Measuring policy change in the U. S. Supreme Court. *American Political Science Review* 82:905-12.

Black, Henry Campbell. 1979. *Black's law dictionary*. St. Paul: West Publishing Company.

Bullock, Charles S., III, and Charles M. Lamb. 1982. Toward a theory of civil rights implementation. *Policy Perspectives* 2:376-93.

Caldeira, Gregory A., and John R. Wright, 1988. Organized interests and agenda setting in the U. S. Supreme Court. *American Political Science Review* 82:1109-28.

Caplan, Lincoln. 1987. *The tenth justice.* New York: Alfred A. Knopf.

Casper, Jonathan D. 1972. *Lawyers before the Warren Court: Civil liberties and civil rights, 1957-1966*. Urbana: University of Illinois Press.

Chaplinsky v. New Hampshire. 1942. 315 U. S. 568.

Cohen v. California. 1971. 403 U. S. 15.

Croyle, James L. 1983. Measuring and explaining disparities in felony sentences: Courtroom work group factors and race, sex, and socioeconomic influences in sentence severity. *Political Behavior* 5:135-53.

Dietz, Robert L., and Allan B. Taylor, eds. 1975. Note: Community standards, class actions, and obscenity under *Miller v. California. Harvard Law Review* 88:1838-74.

Hagan, John. 1974. Extra-legal attributes and criminal sentencing: An assessment of a sociological viewpoint. *Law and Society Review* 8:337-63.

Hoffman v. United States. 1971. 470 F. 2d. 386.

Interstate Circuit v. Dallas. 1968. 390 U. S. 676.

Ivers, Gregg, and Karen O'Connor. 1987. Friends as foes: The amicus curiae participation and effectiveness of the American Civil Liberties Union and the Americans for Effective Law Enforcement in criminal cases, 1969-1982. *Law and Policy* 9:161-78.

Kalven, Harry. 1960. The metaphysics of the law of obscenity. In *1960 Supreme Court Review*, edited by Philip B. Kurland. Chicago: University of Chicago Press.

Kobylka, Joseph F. 1987. A court-related context for group litigation: Libertarian groups and obscenity litigation. *Journal of Politics* 49:1061-78.

Kort, Fred. 1957. Predicting Supreme Court decisions mathematically: A quantitative analysis of the "right to counsel" cases. *American Political Science Review* 51:1-12.

———. 1973. Regression analysis and discriminant analysis: An application of R. A. Fisher's theorem to data in political science. *American Political Science Review* 67:555-59.

Lockhart, William B. 1975. Escape from the chill of uncertainty: Explicit sex and the First Amendment. *Georgia Law Review* 9:533-87.

Lockhart, William B., and Robert C. McClure. 1954. Literature, the law of obscenity, and the Constitution. *Minnesota Law Review* 38:295-395.

Madison, James. (1787) 1961. *The Federalist papers.* New York: New American Library of World Literature.

Miller v. California. 1973. 413 U. S. 15.

Mishkin v. New York. 1966. 383 U. S. 502.

New York v. Ferber. 1982. 458 U. S. 747.

New York Times Co. v. United States. 1971. 403 U. S. 713.

O'Connor, Karen, and Lee Epstein. 1981-82. Amicus curiae participation in the U. S. Supreme Court: An appraisal of Hakman's folklore. *Law and Society Review* 16:311-20.

Paris Adult Theatre I v. Slaton. 1973. 413 U. S. 49.

Partridge, Anthony, and William B. Eldridge. 1978. The Second Circuit sentencing study. In *American court systems: Readings in judicial process and behavior.* San Francisco: W. H. Freeman.

Perry, H. W., Jr. 1986. Deciding to decide in the U. S. Supreme Court: Bargaining, accommodation, and roses. Paper presented at the annual meeting of the American Political Science Association, Washington.

Roth v. United States. 1957. 354 U. S. 476.

Schauer, Frederic F. 1976. *The law of obscenity.* Washington, DC: Bureau of National Affairs.

Segal, Jeffrey A. 1984. Predicting Supreme Court cases probabilistically: The search and seizure cases, 1962-1981. *American Political Science Review* 29:461-79.

Segal, Jeffrey A. 1986. Supreme Court Justices as human decision makers: An individual-level analysis of the search and seizure cases. *Journal of Politics* 48:938-55.

Segal, Jeffrey A., and Cheryl D. Reedy. 1988. The Supreme Court and sex discrimination: The role of the Solicitor General. *Western Political Quarterly* 41:553-68.

Smith v. California. 1959. 361 U. S. 147.

Songer, Donald. 1979. Concern for policy outputs as a cue for Supreme Court decisions on certiorari. *Journal of Politics* 41:1185-94.

Tanenhaus, Joseph, Marvin Schick, Matthew Muraskin, and Daniel Rosen. 1963. The Supreme Court's certiorari jurisdiction: Cue theory. In *Judicial decision making,* edited by Glendon Schubert. New York: Free Press.

Ulmer, S. Sidney. 1984. The Supreme Court's certiorari decisions: Conflict as a predictive variable. *American Political Science Review* 78:901-11.

Kevin T. McGuire is a Ph.D. candidate in political science at Ohio State University. His research interests are focused on lawyers who have appeared before the United States Supreme Court. During 1988-89 he served as an editorial intern for the American Political Science Review.