

Moderate Behavior on the Roberts Court

Paul D. Foote, Ph.D.
Murray State University
Assistant Professor of Political Science
Department of Political Science & Sociology
pfoote@murraystate.edu
270-809-4578

The completion of this paper would not have been possible without the assistance of Professor Lee Epstein of Washington University in St. Louis.

The 2015 Meeting of the Western Political Science Association April 2nd-4th at Caesar's Palace Hotel in Las Vegas, Nevada.

Abstract

This article reveals the characteristics of moderate judicial behavior and seeks to determine the conditions under which moderate decision-making occurs on the Roberts Court. The data in the study were derived from the Justice-Centered U.S. Supreme Court Database (2005-2014). The model's parameters are subjected to descriptive and inferential statistical analysis. This research contributes to the dialogue relating to whether institutional norms and external factors may have a significant greater effect on moderate judicial decision-making than on non-moderate judicial decision-making in the United States Supreme Court.

The Roberts Court is an interesting era to study because the Court decided a number of important constitutional issues in the last few years and those decisions continue to influence our daily lives. Since his pivotal vote in *National Federation of Independent Business v. Sebelius* ruling, Chief Judge John G. Roberts, Jr. has been perhaps the most high profile figure in the judiciary, not only because he is the highest ranking member, but also due to his more moderate ideological course which often positions him as a decisive vote on important cases (Savage 2013; Gerstein 2013). In 2012, Roberts surprised conservatives when he joined with Justice Kennedy and the liberal block of justices to rule that the federal government, not the states, controls the enforcement of the immigration laws, a decision that blocked most of Arizona's immigration law (Savage 2013, 1). Moreover, conservatives continue to be appalled by Robert's record, including his defection from Justice Scalia in the *United States v. Windsor* case and the opinion Robert's authored in the *Hollingsworth v. Perry* case (Gerstein 2013, 2). Also known as the Proposition 8 case, Roberts in *Hollingsworth v. Perry* joined with liberal Justices Ginsburg, Breyer and Kagan to hold the proponents of the California ballot measure banning same-sex marriage had no standing to appeal.

When siding with the majority, his role as the Chief Justice permits him to assign the majority author. This gives Roberts significant control over the direction of the Court. During the 2012-2013 term, Roberts voted 62% with the majority in thirteen out of twenty-one 5-4 decisions (Harvard Law Review 2013). Moreover, during the 2013-2014 Court term, Chief Justice Robert's joined the majority 73% of the time in eight of the eleven 5-4 decisions (Harvard Law Review 2014). During his career, Roberts has had more 5-4 splits than any other Chief Justice in Court history. Since 2012, Roberts has 22.2% versus 20.3% for William Rehnquist, 16.9% for Warren Burger, 11.7% for Earl Warren and 15 for Fred Vinson (Lapidos 2012, 1). These

percentages denote that the Roberts Court are more divided than its predecessors (Appendix Figure 1).

Notwithstanding the aforementioned facts, many Supreme Court observers call the contemporary Court the “Kennedy Court,” because Justice Kennedy is often described as the median justice (Alfano 2009, Cole 2006). During the Court’s 2012-2013 Term, Justice Kennedy was in the majority in 5-4 cases more than any other justice at 87%. There were 23 cases decided 5-4 during that term. Kennedy was in the majority in 20 of them. In the 5-4 decisions, Kennedy sided with the conservative bloc 43% of the time and the liberal wing 26% of the time. Therefore, Kennedy was the swing vote 69% of the time in 5-4 decisions (Red State: The Supreme Court in Review, 7/1/2013). In this paper, I will analyze the ideological voting behavior of the justices’ on the Roberts Court to ascertain which exemplify moderate ideological direction.

The question of judicial voting alignments has been an interesting and important issue in judicial politics (Hensley, Thomas, Christopher E. Smith, and Joyce A. Baugh 1997). To analyze judicial alignments, scholars often categorize the justices on the Court into voting blocs on the basis of ideological behavior (Jost 1995; Biskupic 1992). To comprehend such power, political scientists have studied the behavior of justices who pivot between two competing positions, as that tension may result in fluidity in individual votes (Hagle and Spaeth 1991; Maltzman and Wahlbeck 1996.) The position that the moderates hold at the ideological center may tend to “tip or swing” the Court one way or the other (Schmidt and Yalof 2004). Thus, in closely divided cases the votes cast by the moderate center justices determine the balance of power on the Court.

The purposes of this article are to reveal the characteristics of moderate judicial behavior and to determine the conditions under which moderate decision-making occurred on the Roberts

Court. In comparing existing models of judicial decision making, I indicate that while the attitudinal model is relevant to ideologically driven justices, it does not sufficiently illustrate the judicial behavior of all of the justices on the Court. Justices are sensitive to both internal and external strategic concerns (Epstein and Knight 1998; Wahlbeck, Spriggs, and Maltzman 1998). While acknowledging that attitudes influence the development of law, Richards and Kritzer (2002) argue that law can also influence the decisions of the Court these effects are not purely attitudinal.

Baird (2004) speculates that politically salient decisions will affect the justices' legitimacy more than a simple increase in the number of ordinary cases. Baum (2006) argued that justices might avoid specific decisions that promote highly unpopular policies. Epstein and Knight (1998, 159-77) argued that justices avoid overturning precedents and introducing new issues into cases because the public perceives such decisions as inappropriate. Pacelle, Curry and Marshall (2011) found that the Court's need to protect its legitimacy serves as a restraint on the institution. Their results indicate that institutional contexts, norms, and rules matter. For instance, both endogenous and exogenous factors included "some fidelity to legal precedent, a shared desire to foster the Court's legitimacy, and respect for coordinate branches of government" (Pacelle, Curry and Marshall 2011, 213). In addition, Fowler and Jeon's (2008) research demonstrated that the Court has a shared desire to protect its legitimacy in that it is careful to ground overruling decisions in past precedent, and the diligence it exercises increases the importance of the decision that is overruled.

Until recently, scholars have ignored a systematic analysis of whether justices in the ideological center of the Court are affected differently than justices on the ideological extremes in cases of high salient (great public scrutiny) versus cases of low salience (minimal public

scrutiny). Moderate justices may be more concerned about following precedent than ideologically bloc justices when a case is widely scrutinized in the media. Therefore, this study examines the moderation on the Court by analyzing the judicial behavior of justices on the Roberts Court. I seek to understand of how precedent affects moderate judicial behavior on the Court in high as compared to low salient closely divided cases. My model will predict under certain conditions when moderate justices tend to join the Court's majority to uphold precedent and when they do not.

Knight and Epstein (1997) suggested that further research should determine under what conditions and to what degree the norm of *stare decisis* actually affects the choices of individual justices. In addition, they ask what explains the norm's persistence over time. Knight and Epstein point out that "no matter how one counts the number of alterations of precedent, the numbers border on the trivial" (Knight and Epstein 1997, 172). Knight and Epstein contend that the lack of correlation between the distribution of precedents and the distribution of preferences on the Court presents an opportunity for precedent to have a constraining effect on judicial decisions.

Brenner and Stier (1996) concurred with Epstein and Knight's assertion that further research is needed regarding the conditions associated with following precedent. These scholars found that forty-seven percent of the time four centrist justices on the Court conformed to precedent, even though the precedent was contrary to their previous votes in the major cases. They concluded that their findings demonstrated that *stare decisis* is "not yet dead on the Supreme Court." Hansford and Spriggs II (2006) argued that the interpretation of precedent is affected by the interaction of ideological preferences and the vitality of precedent. The vitality of precedent can change over time as the Court positively or negatively interprets it.

Defining Moderate Judicial Behavior

There are a few characteristics that define moderate justices. First, they typically have less extreme ideological preferences. Second they demonstrate a tendency to uphold precedent rather than overturn it (Pacelle, Curry, and Marshall 2011). Third moderates typically vote with one of the ideological blocs but not in a reliable manner to determine the outcome in closely divided cases. Moderate justices adopt an issue-by-issue or case-by-case approach rather than one based on rigid ideological concerns. Since moderate justices lack a firm ideological predisposition, they are more likely to be influenced by external pressures in cases that are salient. External pressures consist of public legitimacy concerns, Congressional statutory action, and media attention. In contrast the more ideological justices have well defined policy preferences and goals (Segal and Spaeth 1993). When confronted in a case with whether a precedent ought to be overturned or not, moderates are primarily concerned with whether the public will view the Court's decision as legitimate. Moderate justices are more concerned about public scrutiny and attention than their Court associates, and they are more likely to uphold precedent when a case is highly salient than when it is not. Pacelle, Curry, and Marshall (2011) argue that moderate justices are confronted with societal pressure or a "crisis" when a case exemplifies issue salience in the media. Thus, they are less likely to overturn precedent in salient cases and adhere to precedent when their vote is pivotal to a minimum winning coalition. Baum (2006) maintains that Supreme Court justices are most likely to take the Court's legitimacy into account when the Court is under unusually strong pressure. Mishler and Sheehan (1996) argued that moderate justices are of "special concern not only because they are more likely to change their attitudes or adjust their votes in

response to political urgencies, but also because they occupy critical positions on the Court (179).”

What sets moderate justices apart from their more ideological colleagues is that they seek to retain institutional legitimacy by being mindful of the prestige of the Court and the overall stability of the political system. Since the Court lacks the power to implement its decisions, it is inclined to be mindful of the public’s perceptions (Biskupic and Witt 1997). Precedent is an integral aspect of institutional legitimacy, which becomes particularly significant in salient cases where the prestige of the Court is placed in jeopardy. Some scholars maintain that the prestige of the Court decreases when the Court overturns precedent because of the appearance of the triumph of policy preference over law (Miceli and Cosgel 1994). Thus, moderate justices are less likely to overturn precedent in salient cases. They are, furthermore, most likely to adhere to precedent when their vote is pivotal to a minimum winning coalition. Even when controlling for judicial ideology and the ideological direction of the case, the moderate justices will exemplify this peculiar type of judicial behavior.

For the purpose of this study, the defining difference between a moderate and a swing justice is that a moderate will demonstrate a tendency to uphold precedent rather than overturn it (Pacelle, Curry, and Marshall 2011). Moderate justices are more distressed about public scrutiny than swing justices (Schmidt & Yalof 2004, 211) who either sit on the judicial “fence” or is simply persuasive at forming five justice majorities, moderates are more likely to uphold precedent when a case is highly salient than when it is not. One characteristic that separates moderate justices from their more ideological colleagues is that they seek to retain institutional legitimacy by being mindful of the prestige of the Court and the overall stability of the political system. Scholars attempting to identify swing votes on the Court have solely focused on the

frequent movement of particular justices between two opposing ideological blocs (*Stanford law Review* 1949; 718, Schultz and Howard 1975 and Blasecki 1990, 533). Previous studies that have attempted to define “swing” justices have not directly considered whether upholding or altering precedent was a significant factor in the voting. According to Edelman and Chen (2001) sophisticated index to voting in cases with a 5 member majority, the “most dangerous justice” is the one who holds the swing position and “aligns their political preferences with the Court’s ideological center of gravity” (101). Schmidt and Yalof (2004) revised the methodology of swing voting to encompass more specific subject areas that may reveal more about the nature of an individual justice’s jurisprudence. However, Schmidt and Yalof (2004) did not focus in their subset of cases whether precedent may have been overturned or not.

Moderates believe that overturning precedent should require broad support in order to ensure institutional prestige. Pacelle, Curry, and Marshall (2011) claim that there is support for the concept that justices’ in the center will be more inclined to pay attention to precedent and defer to Congress and the agency in their decisions. Justices within the two extreme ideological blocs are more concerned with “policy goals than anything else and likely feel that the Court can survive a few political scraps” (Pacelle Jr., et.al. p. 211). This reasoning is based upon the premise that one or more of the centrists will protect the Court and thus the more ideological bloc justices feel “free to defect from these institutional concerns” (Pacelle Jr., et.al. p. 211). Pacelle Jr., Curry, and Marshall (2011) found that precedent does matter in statutory and economic cases. In the latter, the Court apparently is intent on adhering to precedent with the hope of concentrating on more salient issues. In this way, the Court can “optimize agenda space for more salient issues and exercise judicial activism.” (p.206) Moreover, Pacelle Jr. (2011) contends that the Court may follow precedent when cases “fall in a zone of indifference or when

congressional or presidential antennae are raised.” By acting in this way, the Court can buy some goodwill that can be spent on issues it is concerned about (Pacelle Jr., et.al. 2011, 204-205).

Theoretical Model

Justices modify their positions by considering a “normative constraint” in order to render a decision as close as possible to their desired outcome (Knight and Epstein 1996). A norm supporting a respect for precedent can serve as such a constraint. If the Court establishes rules that the people will neither respect nor obey, the efficacy of the Court is undermined. In this way, a norm of stare decisis can constrain the actions of those Court members who do not share the view that justices should be constrained by previous decisions (Eskridge 1991; Knight 1992). Perhaps, a constraint is apparent to the Court during a crisis of whether to overturn a precedent or not (Howard 2001). On whether to uphold precedent or not in a case, the dual effect of issue salience and minimum winning coalitions are key factors weighing on the decision-making of the so-called moderate justices’ on the Court.

Pacelle, Curry, and Marshall (2011) argue that decision-making is a function of issue salience. More salient issues are more closely watched by the Court and the president. In contrast, decision-making by the Court in less salient issue areas tends to be more responsive to Congress and to precedent. Baum (2006) claims that judges who care about their portrayal in the media may avoid positions that might be criticized by the media and retreat from positions that already were criticized. Baum (2006) speculates that moderate conservatives may be more susceptible than strong conservatives to the influence of liberal-leaning audiences. Paul Collins (2008) finds that justices with extreme ideologies show more stable voting behavior as compared to their more moderate counterparts. In addition, Collins concludes that this voting behavior manifests itself especially strongly in salient cases. Furthermore, Unah and Hancock (2006)

found that justices rely significantly more on ideological preferences when deciding high salience cases than low salience ones.

The Strategic Model

The decision making of moderate justices on the Court may be best conceptualized by the theoretical approach of the Strategic Model. Lee Epstein and Jack Knight (1998) view justices as strategic decision-makers that acknowledge that their ability to obtain goals depends on the institutional context in which they act. Court opinions like *Brown I* and *Roe v. Wade* purposively reshaped public policy when the justices voted together to pursue institutional strategies (Davis 2011, 13). The influence of the *Roe* precedent was emphasized in *Planned Parenthood of Southeastern Pennsylvania v. Casey* when the justices painstakingly pointed out that they believe that the norm of stare decisis influences relations between the Court and society. The overuse of the power to overturn precedent could possibly undermine the Court's authority and legitimacy and therefore erode the impact of its opinions. The Court may also feel constrained to follow precedent so that its decisions are respected by future Courts. According to David O'Brien (1996), denied the power of the sword or the purse, the Court must cultivate its institutional prestige. The Court's prestige depends on preserving the public's view that justices derive their decisions on interpretations of the law, rather than on their personal policy preferences. According to several media sources, Chief Justice Roberts swing vote in the *National Federation of Independent Businesses v. Sebelius* case may indicate that the chief justice pays attention to media coverage and the public spotlight of the Court. *Huffington Post's* author Chris Gentilviso, "with his Court's reputation on the line, one source suggested that the chief justice became "wobbly" in the eyes of his conservative counterparts" (Gentilviso July 1, 2012). Therefore, the

power of the Court “ultimately rests with other political institutions and public opinion” (O’Brien 1996; Richards and Kritzer 2002).

According to strategic model adherents, justices are policy-seekers who use precedent and other legal rules in a strategic way to persuade others to believe in the significance of the tenets of the Legal Model. Unlike the attitudinal model, the strategic model promotes a rational choice perspective that characterizes the justices as rational actors working within a political context they “attempt to navigate and manipulate (Davis 2011, 5).” There are four main parts to the strategic model. First, justices are considered to be primarily followers of legal policy, not unconstrained actors who make decisions based solely on their own ideological attitudes. Second, justices are strategic actors who realize that their ability to reach their goals depends on the knowledge of the preferences of other justices on the Court. Third, the model focuses on the choices the justices expect others to make. Fourth, the institutional contexts in which the justices act are significant to the model. Justice use particular tactics, such as bargaining, personal friendship, and sanctions on other justices, to reach their own policy preferences through opinions (Murphy 1973, pp. 7-8, 49-78).

Epstein and Knight believe that the model stipulates that strategic decision-making is about interdependent choice; an individual’s action is a function of her expectations about the actions of others. The Court does not make policy in isolation from the other main actors in government; the justices must moderate their decisions by what they “can do” (Eskridge 1991). Justices need to consider not only the preferences of their colleagues but also the preferences of other political actors, including Congress and the President’s constitutional checks and balances, and even the public. Although the Court had been consistently narrowing the effect of the separate but equal doctrine in a succession of education cases including *Missouri ex. Rel. Canada v. Gaines*, *Sipuel*,

McLaurin and Sweatt, the Congress and southern public were not receptive to the magnitude of the *Brown* rulings. When justices proceed too quickly or too far in their interpretation of the Constitution, the public's acceptance of the Court's legitimacy is placed in jeopardy. As James Gibson (1989) sufficiently states, "Judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do."

For example, in the *Casey* decision the moderates' O'Connor, Kennedy and Souter considered the reliance people placed in the rule of law in *Roe* and whether overturning the *Roe* precedent would create special hardships. Chief Justice Rehnquist noted, in his *Roe v. Wade* dissent, that the Court didn't claim that *Roe* was a correct interpretation of the Constitution. And the doctrine of stare decisis doesn't require that a new case adopt the same incorrect interpretation of the Constitution as the original case. Although the *Planned Parenthood of Southeastern Pennsylvania v. Casey* ruling altered the *Roe* precedent from endorsing a trimester plan to favoring a viability approach which included additional state regulations of abortion, the essential holding of a right to abortion within the first three months of a pregnancy was upheld with the assistance of the moderate justices. The joint opinion revealed that the moderates feared that the Court's legitimacy would be placed in jeopardy by overturning *Roe*: "To examine under the fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question" (Kahn 1999, 180). According to Ronald Kahn, the *Casey* decision illustrated that, because of the Court's institutional standing in the political system and the justices' conceptions of their personal obligations, a commitment to precedent takes priority over a more instrumental approach to the law.

Moderate Judicial Model

In this study, I examine whether the norm of *stare decisis* serves as a greater constraint to moderate judicial decision-makers than their more ideological counterparts when cases are both highly salient and closely divided on the Court. On the basis of the above review of the literature, I develop the following research questions:

1. Does the institutional norm of *stare decisis* constrain the decision-making of the moderate justice more in highly salient than in lower salient cases?
2. Does the norm of *stare decisis* constrain the decision-making of the moderate justice in minimum winning coalitions?

The answer to these two questions leads to a more accurate assessment of the norm's relevance to the Strategic Model and also contributes to the diverse academic debate on the subject. Furthermore, the research questions focuses the study away from consideration solely of vote counts in closely divided decision to a more substantive analysis of the external factors that contribute to the relevance of precedent to the moderates on the Court.

I build on the defense of the legal and strategic models with the following model:

$$MJ \text{ PREC MAJ} (f) = \sim CS (NYT + CQ) + MWC + JIDEO + E$$

Where: MJ = Moderate Justices voting

PREC = Uphold Precedent

MAJ = Majority

CS = Case Salience of an issue (Derived from Epstein and Segal 2000).

NYT = The *New York Times* Indicator (Derived from Epstein and Segal 2000 article but measured differently in high versus low salient cases).

CQ = *Congressional Quarterly* Indicator.

MWC= Minimum Winning Coalition (Minimum winning coalitions are those decided 5-4 vote that reverses the decision of the lower court).

JIDEO= Justices' Ideology (The direction of the individual justices' votes reveals whether the justice's vote was liberal or conservative).

E=Error probability

Lauderdale and Clark (2012) analysis revealed that during any given term the identity of the prominent median justice varies from case to case, depending on the substantive issue in the case (847). The authors found that variation in justices' preferences across substantive issues results in case-to-case fluctuation in who serves as the median justice (Lauderdale and Clark 2012, 860). In addition, Unah and Hancock (2006) found that "among important considerations in anticipating the decisions of the U.S. Supreme Court are justices' ideological orientations and case salience" (20). The authors did not find evidence that reliance on *stare decisis* is "altogether dead in the Supreme Court" (Unah and Hancock 2006, 20). Their results confirm that ideology is a stronger decisional factor in high salience cases than in low salience ones (Unah and Hancock 2006, 18). Furthermore, Lewis and Rose (2014) results suggest that the influence of attitudes on Supreme Court decisions differs by the level of case salience. They found that the explanatory power of the attitudinal model diminishes significantly in non-salient cases (Lewis and Rose 2014, 27). Based upon the preceding discussion, I state the following hypothesis:

Hypothesis 1: The norm of *stare decisis* is more likely to act as a constraint to judicial moderates' decision-making in highly salient cases that are minimum winning coalitions.

Pacelle, Curry, and Marshall (2011) argue that judicial behavior is a function of substantive preferences and structural considerations. They argue that constitutional cases provide fewer constraints than statutory cases. Therefore, rather than taking the ideological activist initiative in

constitutional cases, moderate justices are expected to act attitudinally even handily when joining the majority to uphold precedent in constitutional cases. This is because constitutional cases are usually of higher salience than federal statutory cases.

Pacelle, Curry, and Marshall (2011) found that civil rights and individual liberties cases tend to be more coherent than the economic cases in their development (112). In other words, they are more salient to the U.S. Supreme Court than are economic cases. Interest groups bring cases or file *amicus curiae* briefs more in civil rights and individual liberties cases than in economic cases (Pacelle, Curry, and Marshall 2011, 112). The ACLU and NAACP are among several interest groups presenting a political agenda in the Supreme Court. Unah and Hancock (2006) claim that the ACLU and NAACP are two organizations with considerable expertise and issue-based credibility in the civil rights policy realm (19). On the basis of the foregoing research, I propose the following hypothesis:

Hypothesis 2: The moderate justices' tend to not favor one ideological direction over another when joining the majority in minimum winning coalitions to uphold precedent in highly salient civil rights and constitutional cases.

Methods

In this study, the data comes from the U.S. Supreme Court Justice Centered Database and covers the Court terms from 2005 until 2014. The Justice Centered Database indicates when an individual justice deviates from the majority and includes every case decided by the Court. The model's parameters are subjected to binominal logit regression analysis. The dependent variables are both the moderate justices' conservative and liberal votes to uphold precedent when joining the Court's majority or not.

To evaluate the degree of moderation on the Roberts Court, I included an ideological component to the dependent variable. If the justices' vote is predominately more in one ideological direction than another, then the behavior is not considered ideologically moderate for the purposes of this study. The variables are coded zero for when the justice votes in a liberal direction when joining the majority to uphold precedent and one when voting in a conservative manner. To analyze the dependent variable I created a new variable by merging existing variables in the database. I focused only on the aspect of the alteration of precedent variable that indicates there was "no formal alteration of precedent" (as defined in the Codebook) in the case outcome. I also merged the direction of individual justice's vote variable with the join the majority or not variable. The direction of individual justice variable indicates whether the justice's vote was liberal or conservative. This variable, like the preceding one, creates a separate variable for each of the justices who have sat on the Roberts Courts.

I included the following independent variables from the Justice Centered Database in my model: minimum winning coalition, case salience, constitutional cases, federal statutes, civil rights cases, and economic cases. Minimum Winning Coalition has the value of one when the number of justices in the majority voting coalition of the precedent exceeded those in the minority by only one, and zero otherwise. The variable indicates whether the case was decided by a margin of one vote. (Tied votes are not considered because they have no majority or plurality opinion and as such automatically affirm the lower court's decision without further ado.) Minimum winning coalitions are those decided by a 5-4 vote. According to the strategic model, each justice will consider the intentions of others on the Court before casting their vote. The minimum winning coalition variable is not endogenous to the model because each justice discovers their colleagues vote predilections during the Court's conference discussions following

a case's oral arguments. When a moderate justice learns that a minimum winning coalition is coalescing to overturn a precedent, they tend to vote with the other justices' to uphold Court precedent.

The constitutional cases variable was derived from the law type variable labeled "legal provisions considered." This variable identified the constitutional provision(s), statute(s), or court rule(s) that the Court considered in the case. The basic criterion to determine the legal provision(s) that a case concerns is a reference to it in at least one of the numbered holdings in the summary of the *United States Reports*. This summary, which the *Lawyers' Edition* of the U.S. Reports labels Syllabus by Reporter of Decisions," appears in the official Reports immediately after the date of decision and before the main opinion in the case. Harold Spaeth used this summary to determine the legal provisions at issue because it is a "reasonably objective and reliable indicator" (The United States Supreme Court Database 1953-1968, 32).

The federal statutes variable was coded one if a federal statute and zero otherwise. The federal statutes variable was also derived from the law type variable. The coding for this variable was whether the case was a labeled a federal statute or not. A case which challenges the constitutionality of a federal statute, court or common law rule will usually contain at least two legal bases for decision: the constitutional provision as well as the challenged statute or rule.

The Civil Rights variable includes non-First Amendment freedom cases which pertain to classifications based on race (including American Indians), age, indigency, voting, residency, military or handicapped status, gender, and alienage. Within the Civil Rights classification, the variable identifies cases associated with the Voting Rights Act of 1965, ballot access, desegregation of schools, employment discrimination, affirmative action, deportation, sex discrimination, Indians, juveniles, rights of illegitimates, residency requirements and liability.

For the coding of the case salience variable, I relied on Epstein and Segal article on *Measuring Issue Salience*. The authors utilized the Index to the *New York Times* and LEXIS to create the *NYT* measure. A salient case (1) led to a story on the front page of the Times on the day after the Court handed it down, (2) was the lead or “headline” case in the story, and (3) was orally argued and decided with an opinion (p.73). Vanessa Baird (2004) claimed that the New York Times was a valid measure of contemporaneous evaluations of the case’s political salience. According to Beverly Cook (1993), a minimum of two authorities must be utilized in order for a case to be considered salient “since to accept a single authority would introduce idiosyncratic standards.” Moreover, Cook analyzed 15 different measures and found that the list compiled by Congressional Quarterly was a concise but a “reliable authority for research on contemporary decisions” (Cook 1993, 1136). Although Harold Spaeth has utilized the Lawyers Edition to identify significant non-constitutional cases, Cook claims that the Lawyers Edition is a questionable source due to the lack of identifiable scholars who take responsibility for the cases selected. Brenner and Arrington (2002) evaluated the usefulness of both the *NYT* and *CQ* lists for the purposes of measuring salience on the Court. They found that cases on both lists were more likely to be salient than cases on only one list. The moderate judicial scale will now be examined descriptively to identify moderate characteristics and traits.

This is not the first study to gauge the level of case salience with two distinct indexes. As somewhat similar to previous research, I classified cases as “highly salient”, if they appeared in the *New York Times* and are listed in *Congressional Quarterly’s* list of major cases. Both Epstein & Segal (2000) and Baird (2004) measured issue salience by relying solely on the basis of the front page of the New York Times. However, Brenner & Arrington (2002) concluded that a researcher who wants a short list of the most salient cases might select the cases that appear on

both the CQ list and the NYT list. The combined list earned the highest scores in their bivariate and multivariate testing. In contrast, a case is coded “low salience”, if it appears in the *New York Times* but is not included in *Congressional Quarterly*. Annually the *CQ Press* selects the major cases for the Supreme Court’s term based on such factors as the rulings’ practical impact; their significance as legal precedent; the degree of division on the Court and the level of attention among interest groups, experts, and news media. Relying solely on the *New York Times* will increase the overall number of salient cases in the analysis. In their research, Brenner and Arrington (2002) concurred that cases on the *CQ* list are more likely to be salient than cases on the *NY Times* list because the former consists of one-third of the number of cases. The *NYT* list of salient cases was only based upon the opinion of a single court reporter and editor rather than subject to analysis of several political and legal factors.

In the next section of the paper, I evaluate the degree of moderation on the Roberts Court by descriptively measuring the left-right ideological gap of the individual justices. Table 1 shows the overall number and percentage of liberal versus conservative rulings. The percentage difference of the ideological gap is included in the table to illustrate that a 10% or less difference is an indication of moderation on the Roberts Court. In Table 2, I compare the mean and standard deviation differences of the key variables of high case salience and minimum winning coalition from the moderate judicial model presented on pages 13 and 14. In Tables 3 through 12, the logit regression analyzes for each justice on the Roberts Court lists the coefficients, standard errors and predicated probabilities for each of the variables in the moderate judicial model.

Results and Analyses

Table 1

Justice Name	Number & Percentage of Liberal Rulings	Number & Percentage of Conservative Rulings	Percentage Difference	Total Number of Cases
John Paul Stevens	194 (56%)	151 (44%)	12%	345
Antonin Scalia	287 (39%)	452 (61%)	22%	739
Clarence Thomas	254 (36%)	455 (64%)	28%	709
Anthony Kennedy	350 (44%)	457 (56%)	12%	807
Ruth Bader Ginsburg	357 (55%)	294 (45%)	10%	651
Stephen Breyer	347 (53%)	313 (47%)	6%	660
John G. Roberts	317 (41%)	453 (59%)	18%	770
Samuel Alito	252 (37%)	426 (63%)	26%	678
Sonia Sotomayor	211 (57%)	159 (43%)	14%	370
Elena Kagan	152 (55%)	122 (45%)	10%	274

Source: U.S. Supreme Court Database

Table 2

Justice Name	Mean	Mean Difference	Standard Deviation	Standard Deviation Difference
<i>John Paul Stevens</i>				
Liberal Direction				
-High Case Salience	.0016	.0001	.125	.005
Conservative Dir.				
-Minimum Winning Coalition	.0019	.0014	.043	.021
-High Case Sal.	.0015		.120	
-MWC	.0005		.022	
<i>Antonin Scalia</i>				
Liberal Direction				
-High Case Sal.	.02	.03	.12	.11
-MWC	.0016	.0037	.04	.03
Conservative Dir.				
-High Case Sal.	.05		.23	
-MWC	.0053		.07	

<i>Clarence Thomas</i>				
Liberal Direction				
-High Case Sal.	.02	.03	.14	.09
-MWC	.0016	.0040	.04	.03
Conservative Dir.				
-High Case Sal.	.05		.23	
-MWC	.0056		.07	
<i>Anthony Kennedy</i>				
Liberal Direction				
-High Case Sal.	.04	.01	.20	.02
-MWC	.0034	.0023	.06	.01
Conservative Dir.				
-High Case Sal.	.05		.22	
-MWC	.0057		.07	
<i>Ruth Ginsburg</i>				
Liberal Direction				
-High Case Sal.	.04	.02	.19	.06
-MWC	.04	.02	.19	.06
Conservative Dir.				
-High Case Sal.	.02		.13	
-MWC	.02		.13	

<i>Stephen Breyer</i>				
Liberal Direction				
-High Case Sal.	.04	.02	.19	.05
-MWC	.04	.02	.19	.05
Conservative Dir.				
-High Case Sal.	.02		.14	
-MWC	.02		.14	
<i>CJ John Roberts</i>				
Liberal Direction		.		
-High Case Sal.	.03	.02	.16	.07
-MWC	.002	.04	.04	.03
Conservative Dir.				
-High Case Sal.	.05		.23	
-MWC	.006		.07	
<i>Samuel Alito</i>				
Liberal Direction				
-High Case Sal.	.01	.04	.12	.11
-MWC	.0011	.0044	.03	.04
Conservative Dir.				
-High Case Sal.	.05		.22	
-MWC	.0055		.07	

<i>Sonia Sotomayor</i>				
Liberal Direction				
-High Case Sal.	.03	.03	.16	.06
-MWC	.0002	.0018	.04	.03
Conservative Dir.				
-High Case Sal.	.00		.10	
-MWC	.0020		.01	
<i>Elena Kagan</i>				
Liberal Direction				
-High Case Sal.	.02	.01	.14	.04
-MWC	.0017	.0014	.04	.02
Conservative Dir.				
-High Case Sal.	.01		.10	
-MWC	.0003		.02	

Source: U.S. Supreme Court Database

According to the descriptive statistical results in Table 1, Justices Breyer, Ginsburg and Kagan ideological percentage differences on the Roberts Court were ten percent or less. When analyzing the parameters of the model in Table 2, Justices Stevens, Kennedy and Kagan's comparison of mean differences most closely resembles the parameters of the moderate judicial decision-making model. The mean ideological difference for the aforementioned justices when comparing the High Case Salience (HCS) variable is only .01. The Minimum Winning Coalition (MWC) variable mean difference is only .0014 when comparing ideological direction for both

Justices Kagan and Stevens. According to the standard deviation differences between the HCS and MWC variables, the ideological gap difference is lesser for Justice Kennedy than Justices Kagan and Stevens. The lesser standard deviation of the mean indicates that Kennedy's ideological voting difference is more consistent in cases of high salience and closely divided votes than the other justices on the Roberts Court. However, Kennedy has a slightly greater tendency to uphold precedent when voting in a conservative direction in highly salient and minimum winning coalitions. In contrast, both Kagan and Stevens are more likely to vote in a liberal direction to support precedent in high salient and closely divided cases.

Surprisingly, Tables 1 and 2 indicate that Justice Kagan ideological differences best approximate moderate decision-making. Some Court observers consider Justice Kagan to be a liberal on the Roberts Court (Winkler 2013). Tushnet argues that Kagan is the justice most likely to reach across the aisle and become a true leader of the Roberts Court (2013, 94). In Table 2, both Justices Breyer and Ginsburg display only a .02 mean ideological difference for both the HCS and MWC variables. Unlike the other justices in Table 2, Breyer and Ginsburg's mean and standard deviation value difference gap is the same number. This may indicate that the data have a skewed distribution and the standard deviation is grossly inflated and is not a valid measure of variability to use.

Table 3: Chief Justice Roberts vote to join the Majority to Uphold Precedent in Salient versus Non-salient Cases (2005-2014)

Independent	Roberts's Conservative Voting	Change in Probabilities	Roberts's Liberal Voting	Change in Probabilities
Constant	-6.013		-6.332	
High Case Salience	.350 (.425)	.001	-.404 (.451)	-.001
Low Case Salience	.870* (.394)	.003	1.251** (.381)	.004
Minimum Winning Coalition	.108 (.119)	.000	-1.113*** (.204)	-.001
Constitutional Cases	2.409*** (.234)	.026	3.458*** (.234)	.047
Federal Statute Cases	2.709*** (.128)	.034	3.051*** (.145)	.029
Civil Rights cases	.767*** (.164)	.003	.681*** (.189)	.001
Chi-Square	694.3		626.9	
Log Likelihood	5236.9		3750.3	

Dependent variable: Justice voted with majority to uphold precedent; *: $p < 0.05$; **: $p < 0.01$; ***: $p < 0.001$ N=770

Probabilities represent the increase (or decline) in the probability that the justice joined the majority to uphold precedent for every one standard deviation change in the independent variable from 0 to 1 for dummy variables, holding all the other independent variables at their respective means. SPSS and Excel

Table 4: Justice Kennedy’s vote to join the Majority to Uphold Precedent in Salient versus Non-salient Cases on the Roberts Court (2005-2014)

Independent	Kennedy’s Conservative Voting	Change in Probabilities	Kennedy’s Liberal Voting	Change in Probabilities
Constant	-6.000		-6.286	
High Case Salience	.168 (.409)	.000	-.056 (.406)	.000
Low Case Salience	1.030* (.376)	.005	1.310*** (.364)	.005
Minimum Winning Coalition	.137 (.118)	.000	-.289 (.149)	-.001
Constitutional Cases	2.350*** (.238)	.025	2.876*** (.239)	.030
Federal Statute Cases	2.709*** (.127)	.035	2.832*** (.143)	.027
Civil Rights cases	.706*** (.166)	.003	.849*** (.178)	.002
Chi-Square	682.8		647.5	
Log Likelihood	5292.75		4115.95	

Dependent variable: Justice voted with majority to uphold precedent; *: p<0.05; **: p<0.01; ***: p<0.001 N=807

Probabilities represent the increase (or decline) in the probability that the justice joined the majority to uphold precedent for every one standard deviation change in the independent variable from 0 to 1 for dummy variables, holding all the other independent variables at their respective means. SPSS and Excel

In comparison, tables 3 and 4 illustrate that neither Chief Justice Roberts’ nor Kennedy followed the dictates of the first and second hypotheses. Both justices are more likely to uphold precedent in lower rather than highly salient cases when voting in a conservative direction within a minimum winning coalition. Although not statistically significant, both justices’ are more likely to support precedent and join a minimum winning coalition in highly salient cases when voting in a conservative rather than a liberal direction. In table 3, Chief Justice Roberts predicted probabilities statistic for high case salience when voting in a conservative direction demonstrates

only a slight positive increase for every one standard deviation change in the independent variable. While in Table 4 the predicted probabilities statistical change for the high case salience variable is nonexistent for Kennedy as compared to Roberts under similar conditions.

Table 5: Justice Stevens’s vote to join the Majority to Uphold Precedent in Salient versus Non-salient Cases on the Roberts Court (2005-2014)

Independent	Stevens’s Conservative Voting	Change in Probabilities	Stevens’s Liberal Voting	Change in Probabilitie s
Constant	-6.834		-6.906	
High Case Salience	.605 (.684)	.001	-.951 (.484)	-.001
Low Case Salience	1.144 (.622)	.002	1.654*** (.391)	.004
Minimum Winning Coalition	-1.449*** (.343)	-.001	-.189 (.196)	.000
Constitutional Cases	1.799** (.541)	.004	2.616*** (.366)	.013
Federal Statute Cases	2.307*** (.239)	.008	2.898 (.189)	.017
Civil Rights cases	.804** (.310)	.001	.949*** (.229)	.002
Chi-Square	180.2		377.03	
Log Likelihood	2129.06		2492.5	

Dependent variable: Justice voted with majority to uphold precedent; *: p<0.05; **: p<0.01; ***: p<0.001 N=345

Probabilities represent the increase (or decline) in the probability that the justice joined the majority to uphold precedent for every one standard deviation change in the independent variable from 0 to 1 for dummy variables, holding all the other independent variables at their respective means. SPSS and Excel

Although Table 2 provided descriptive evidence for Stevens’s moderation on the Roberts Court, the logit regression results in Table 5 do not support that contention. The statistical results demonstrate that Stevens’s is more likely to join the majority to uphold precedent when voting in a conservative rather than liberal direction in highly salient cases that are not minimum winning

coalitions. The change in predicated probabilities illustrate that Stevens’s has only a slightly greater chance to support precedent when voting conservative rather than liberal in highly salient cases.

Table 6: Justice Scalia’s vote to join the Majority to Uphold Precedent in Salient versus Non-salient Cases on the Roberts Court (2005-2014)

Independent	Scalia’s Conservative Voting	Change in Probabilities	Scalia’s Liberal Voting	Change in Probabilities
Constant	-6.008		-6.403	
High Case Salience	.353 (.426)	.001	-.373 (.471)	-.001
Low Case Salience	.865* (.393)	.003	1.298** (.399)	.004
Minimum Winning Coalition	.047 (.121)	.000	-.895*** (.201)	-.001
Constitutional Cases	2.400*** (.238)	.026	3.044*** (.276)	.029
Federal Statute Cases	2.754*** (.126)	.035	3.039*** (.150)	.028
Civil Rights cases	.727*** (.165)	.002	.491* (.205)	.000
Chi-Square	696.597		506.7	
Log Likelihood	5223.55		3513.44	

Dependent variable: Justice voted with majority to uphold precedent; *: p<0.05; **: p<0.01; ***: p<0.001 N=739

Probabilities represent the increase (or decline) in the probability that the justice joined the majority to uphold precedent for every one standard deviation change in the independent variable from 0 to 1 for dummy variables, holding all the other independent variables at their respective means. SPSS and Excel

Table 7: Justice Thomas’s vote to join the Majority to Uphold Precedent in Salient versus Non-salient Cases on the Roberts Court (2005-2014)

Independent	Thomas’s Conservative Voting	Change in Probabilities	Thomas’s Liberal Voting	Change in Probabilitie s
Constant	-6.011		-6.533	
High Case Salience	.208 (.409)	.000	-.122 (.557)	.000
Low Case Salience	.997 (.376)	.004	.926 (.485)	.003
Minimum Winning Coalition	.101 (.120)	.000	-.712*** (.202)	-.001
Constitutional Cases	2.331*** (.242)	.024	2.959*** (.300)	.025
Federal Statute Cases	2.754*** (.126)	.036	3.177*** (.155)	.030
Civil Rights cases	.723*** (.164)	.003	.313 (.223)	.001
Chi-Square	703.9		428.3	
Log Likelihood	5249.4		3191.6	

Dependent variable: Justice voted with majority to uphold precedent; *: p<0.05; **: p<0.01; ***: p<0.001 N=709

Probabilities represent the increase (or decline) in the probability that the justice joined the majority to uphold precedent for every one standard deviation change in the independent variable from 0 to 1 for dummy variables, holding all the other independent variables at their respective means. SPSS and Excel

Table 8: Justice Breyer’s vote to join the Majority to Uphold Precedent in Salient versus Non-salient Cases on the Roberts Court (2005-2014)

Independent	Breyer’s Conservative Voting	Change in Probabilities	Breyer’s Liberal Voting	Change in Probabilities
Constant	-6.192		-6.292	
High Case Salience	.888 (.659)	.002	-.195 (.429)	.000
Low Case Salience	.088 (.607)	.000	1.127** (.380)	.004
Minimum Winning Coalition	-1.414*** (.236)	-.001	-.366* (.153)	-.001
Constitutional Cases	2.808*** (.287)	.026	3.192*** (.223)	.042
Federal Statute Cases	2.714*** (.154)	.023	2.836*** (.145)	.028
Civil Rights cases	.870*** (.201)	.002	.949*** (.177)	.003
Chi-Square	463.081		647.2	
Log Likelihood	3866.9		4081.4	

Dependent variable: Justice voted with majority to uphold precedent; *: p<0.05; **: p<0.01; ***: p<0.001 N=660

Probabilities represent the increase (or decline) in the probability that the justice joined the majority/plurality to uphold precedent for every one standard deviation change in the independent variable from 0 to 1 for dummy variables, holding all the other independent variables at their respective means. SPSS and Excel

Although Justice Breyer displayed only a 6% ideological gap difference in Table 1, the statistical results in Table 8 do not support the tents of the moderate judicial model. Breyer is more likely to join the majority to respect precedent when voting conservative rather than liberal in highly salient cases that are not considered minimum winning coalitions. The change in predicated probabilities for Breyer’s conservative voting in cases of high salience was only slightly greater than when he votes in a liberal direction.

Table 9: Justice Ginsburg’s vote to join the Majority to Uphold Precedent in Salient versus Non-salient Cases on the Roberts Court (2005-2014)

Independent	Ginsburg’s Conservative Voting	Change in Probabilities	Ginsburg’s Liberal Voting	Change in Probabilitie s
Constant	-6.282		-6.254	
High Case Salience	.263 (.611)	.000	.039 (.442)	.000
Low Case Salience	.483 (.534)	.001	.967* (.397)	.003
Minimum Winning Coalition	-1.602*** (.266)	-.002	-.366* (.151)	-.001
Constitutional Cases	2.962*** (.295)	.027	3.128*** (.223)	.041
Federal Statute Cases	2.984*** (.149)	.027	2.814*** (.223)	.028
Civil Rights Cases	.529* (.209)	.001	.953*** (.175)	.003
Chi-Square	477.2		651.2	
Log Likelihood	3626.8		4193.4	

Dependent variable: Justice voted with majority to uphold precedent; *: p<0.05; **: p<0.01; ***: p<0.001 **N=651**

Probabilities represent the increase (or decline) in the probability that the justice joined the majority to uphold precedent for every one standard deviation change in the independent variable from 0 to 1 for dummy variables, holding all the other independent variables at their respective means. SPSS and Excel

Justice Ginsburg’s statistical data results in Table 9 lend some credibility to the previous findings in Table 1. Ginsburg tends to join the majority and uphold precedent in both high and low salient cases regardless of ideological direction. However, the change in probabilities in cases of lower salience increases more when she votes in a liberal rather than a conservative direction. In the liberal voting column, the low case salience variable is statistically significant. Therefore, Ginsburg is more likely to support precedent in cases of low rather than high salience that are not minimum winning coalitions.

Table 10: Justice Alito's vote to join the Majority to Uphold Precedent in Salient versus Non-salient Cases on the Roberts Court (2005-2014)

Independent	Alito's Conservative Voting	Change in Probabilities	Alito's Liberal Voting	Change in Probabilities
Constant	-6.090		-6.546	
High Case Salience	.197 (.428)	.000	-.610 (.525)	.000
Low Case Salience	.934* (.395)	.003	1.128** (.424)	.003
Minimum Winning Coalition	.185 (.1210)	.001	-1.115*** (.233)	-.001
Constitutional Cases	2.391*** (.243)	.024	3.285*** (.281)	.032
Federal Statute Cases	2.739*** (.1300)	.034	3.051*** (.161)	.024
Civil Rights Cases	.725*** (.169)	.002	.742*** (.209)	.002
Chi-Square	654.8		481.9	
Log Likelihood	4975.4		3113.6	

Dependent variable: Justice voted with majority to uphold precedent; *: $p < 0.05$; **: $p < 0.01$; ***: $p < 0.001$ N=678

Probabilities represent the increase (or decline) in the probability that the justice joined the majority/plurality to uphold precedent for every one standard deviation change in the independent variable from 0 to 1 for dummy variables, holding all the other independent variables at their respective means. SPSS and Excel

Table 11: Justice Sotomayor’s vote to join the Majority to Uphold Precedent in Salient versus Non-salient Cases on the Roberts Court (2005-2014)

Independent	Sotomayor’s Conservative Voting	Change in Probabilities	Sotomayor’s Liberal Voting	Change in Probabilitie s
Constant	-6.909		-6.746	
High Case Salience	1.309 (1.93)	.002	1.743 (1.045)	.006
Low Case Salience	-.508 (1.024)	-.001	-.630 (1.020)	.000
Minimum Winning Coalition	-2.482*** (.516)	-.001	-.314 (.192)	.000
Constitutional Cases	3.219*** (.369)	.017	3.041*** (.285)	.024
Federal Statute Cases	2.913*** (.208)	.011	2.736*** (.187)	.016
Civil Rights Cases	.910** (.265)	.001	.870*** (.231)	.002
Chi-Square	302.3		348.1	
Log Likelihood	2112.9		2737.5	

Dependent variable: Justice voted with majority to uphold precedent; *: p<0.05; **: p<0.01; ***: p<0.001 N=370

Probabilities represent the increase (or decline) in the probability that the justice joined the majority/plurality to uphold precedent for every one standard deviation change in the independent variable from 0 to 1 for dummy variables, holding all the other independent variables at their respective means. SPSS and Excel

In Table 11, Justice Sotomayor’s results do not support the dictates of the hypotheses. The change in probability statistic demonstrates that Sotomayor is more likely to join the majority to uphold precedent when voting in a liberal rather than a conservative direction in cases of higher than lower salience. However, the standard error statistic for the high case salience variable in the liberal voting column is greater than other variable statistical results. This statistic reduces the overall accuracy of the findings.

Table 12: Justice Kagan’s vote to join the Majority to Uphold Precedent in Salient versus Non-salient Cases on the Roberts Court (2005-2014)

Independent	Kagan’s Conservative Voting	Change in Probabilities	Kagan’s Liberal Voting	Change in Probabilities
Constant	-7.229		-7.088	
High Case Salience	17.2 (2713.4)	1.000	17.2 (2776.6)	.999
Low Case Salience	-16 (2713.4)	-.001	-16 (2776.6)	-.001
Minimum Winning Coalition	-2.06*** (.471)	-.001	-.206 (.217)	.000
Constitutional Cases	3.278*** (.401)	.013	3.311*** (.298)	.022
Federal Statute Cases	3.106*** (.226)	.010	2.639*** (.225)	.010
Civil Rights Cases	.623* (.303)	.000	.800** (.279)	.001
Chi-Square	248.6		255.9	
Log Likelihood	1669.2		2066.7	

Dependent variable: Justice voted with majority to uphold precedent; *: p<0.05; **: p<0.01; ***: p<0.001 N=274

Probabilities represent the increase (or decline) in the probability that the justice joined the majority/plurality to uphold precedent for every one standard deviation change in the independent variable from 0 to 1 for dummy variables, holding all the other independent variables at their respective means. SPSS and Excel

Although Tables 1 and 2 illustrate that Justice Kagan’s behavior on the Roberts Court fits the parameters of the moderate judicial model, the data results in Table 12 does not clearly support that claim. Kagan is as likely to join the majority to support precedent in cases of high rather than low salience regardless of her ideological voting direction. The high standard error and predicated probability statistics for both the high and low case salience variable diminishes the overall accuracy of the findings. Since Kagan is the newest member of the U.S. Supreme Court, her unit of analysis (the number of cases) is less than the other justices on the Roberts Court.

Conclusion

The results have run counter to the dictates of the hypotheses and seem to confirm Spaeth and Segal's (1999) finding that justices are more likely to defer to precedent in cases that are less important. Nevertheless, the findings in this study contradict the assertions made by political and legal writers that Chief Justice Robert's has adopted a more moderate ideological tone on the Court. The analysis of data shows that both Roberts and Kennedy are more likely to join the majority coalition of justices to respect precedent when voting conservative in highly salient cases. The results in Table 8 lend minimal support to a news column that claims that Ginsburg was "always called a moderate" or that feminists thought she was "too moderate" (Goodman 2007). The most surprising results were included in Tables 1 and 2 which showed that Justice Kagan's voting behavior best approximated moderate decision-making on the Roberts Court. The findings may lend some support to the Tushnet thesis that Justice Kagan is the justice most likely to "reach across the aisle as a judicial moderate." One caveat towards endorsing Tushnet's thesis is that the logit regression results in Table 12 were inconclusive due to the comparably lower number of cases for both Kagan and Sotomayor.

To increase content validity, the case salience variable could be expanded to include additional major metropolitan newspaper indicators. Lewis and Rose (2014) developed a measure of case salience based on coverage of Supreme Court cases found in any section of seven newspapers: *the New York Times*, *Washington Post*, *USA Today*, *Philadelphia Inquirer*, *Chicago Sun Times*, *Dallas Morning News*, and *San Jose Mercury News* (37). These newspapers were selected on the basis of circulation size, geographical diversity, and ideological diversity. However, Lewis and Rose (2014) neglected to include the *Wall Street Journal (WSJ)* newspaper because it was not included in the *LexisNexis* database of newspaper articles (37). I believe it

was a mistake to exclude the *WSJ* from their study. The *WSJ* is an international daily newspaper with a special emphasis on business and economic news and the largest weekly circulation in the United States. The intentional omission of the *WSJ* from Lewis and Rose's article diminishes the effectiveness of their work to measure economic case salience. Since the liberal-leaning *New York Times* may give more coverage to liberal decisions (Brenner and Arrington, 2002), the ideological rival conservative-leaning *WSJ* may offer more coverage to conservative decisions and ideologically balance the construct validity of the case salience variable.

In addition, I tend to apply the moderate judicial model to the Burger Court era. The Burger Court is an intriguing era to examine because the "centrist bloc tended to more pragmatic, resisting consistent adherence to either the right (Burger and Rehnquist) or the left (Brennan and Marshall)" (Schultz 1998). Unlike the Warren Court, a major characteristic of the Burger era was the absence of a common understanding of mission held by all of the justices.

References

- Baird, Vanessa. "The Effect of Politically Salient Decisions on the U.S. Supreme Court's Agenda." *The Journal of Politics* 66 (2004): 755-772.
- Baum, Lawrence. *Judges and Their Audiences*. Princeton: Princeton University Press, 2002.
- Bickel, Alexander M. *The Least Dangerous Branch: the Supreme Court at the Bar of Politics*. 2nd edition, Binghamton, NY: Vail-Ballou Press, Inc. 1986.
- Biskupic, Joan. *The Supreme Court Yearbook, 1990-1991 edition*. Washington, D.C.: CQ Press, 1992.
- Biskupic, Joan and Elder Witt. *Guide to the US Supreme Court*. 3rd edition, Washington, D.C.: CQ Press, 1997.
- Brenner, Saul, and Marc Stier, "Retesting Segal and Spaeth's Stare Decisis Model." *American Journal of Political Science* 40 (1996): 1036-1048.
- Brenner, Saul, and T. S. Arrington, "Measuring Saliency on the Supreme Court: A Research Note," *Jurimetrics* 43 (2002): 99.
- Brisbin and A. Richard. "Slaying the dragon: Segal, Spaeth and the function of law in Supreme Court decision making." *American Journal of Political Science* 40 (1996): 1004-1017.
- Clawson, Rosalee, Elizabeth Kegler, and Eric Waltenburg. "The Legitimacy-conferring Authority of the U.S. Supreme Court an Experimental Design." *American Politics Research* 29 (2001): 566-591.
- Cook, Beverly. "Measuring the significance of U.S. Supreme Court Decisions." *Journal of Politics* 55 (1993): 1127-1139.
- Collins, Paul M., Jr. "The Consistency of Judicial Choice." *The Journal of Politics* 70 (2008): 861-873.
- Dahl, Robert A. "Decision Making in a Democracy: The Supreme Court as a National Policy Maker." *Journal of Public Law* 6 (1957): 279.
- Davis, Richard. *Justices and Journalists: The U.S. Supreme Court and the Media*. New York, N.Y.: Cambridge University Press, 2011.
- Epstein, Lee and Jack Knight. *The Choices Justices Make*. 1st edition, Washington, D.C.: CQ Press, 1998.
- Epstein, Lee and Jeffrey A. Segal. "Measuring Issue Saliency." *American Journal of Political Science* 44 (2000): 66-83.

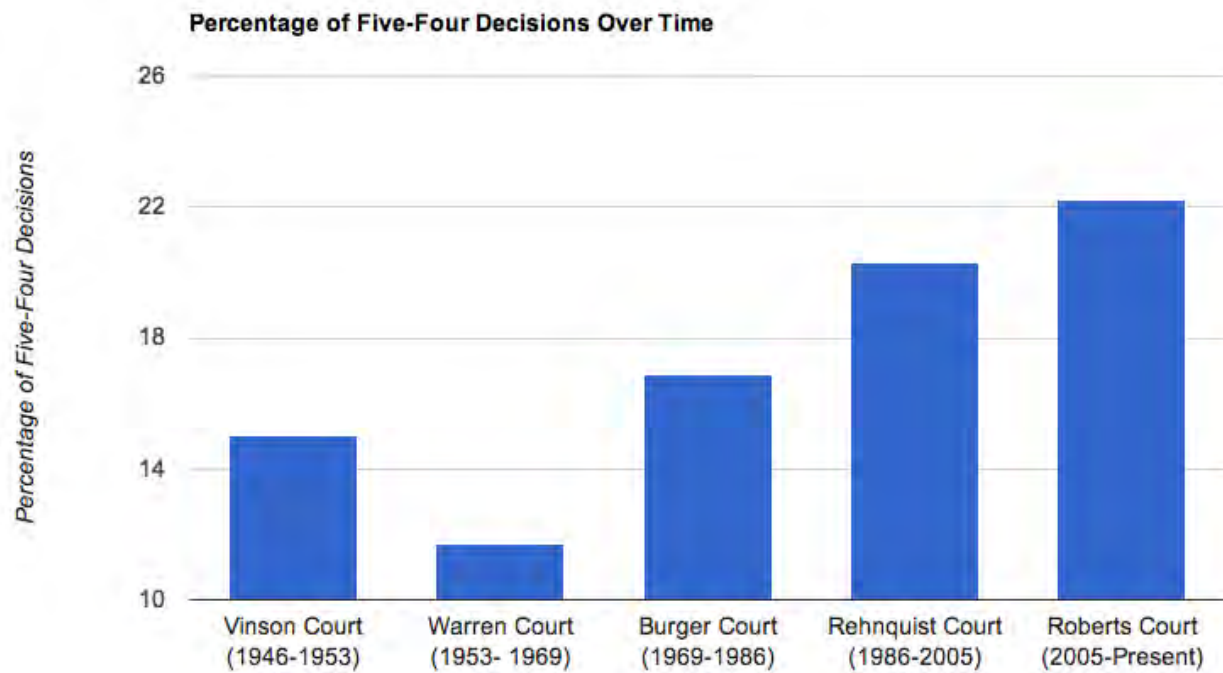
- Epstein, Lee and Tonja Jacobi. "Super Medians." *Stanford Law Review* 61: (2008).
- Eskridge, William N., Jr. "Overriding Supreme Court statutory interpretation decisions." *Yale Law Journal* 101 (1991): 331-417.
- James H. Fowler and Sangick Jeon. "The authority of Supreme Court precedent." *Social Networks* 30 (2008): 16-30
- Gerstein, Josh. "John Roberts, the high court's chief peacemaker." *Politico* (June 27, 2013): 1-4.
- Gibson, James L. "Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance." *Law and Society Review* 23 (1989):469-496.
- Gillman, Howard. "What's law Got to Do with It? Judicial Behavioralists test the 'legal Model' of Judicial Decision-Making." *Law & Social Inquiry* 26 (Spring 2001): 465-504.
- Goodman, Ellen. "The Transformation of Justice Ginsburg." *The Boston Globe* (June 29, 2013):1.
- Greenburg, Jan. *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court*. New York: Penguin 2007.
- Hand, Learned. *The Bill of Rights*. New York: Atheneum, 1958.
- Hansford, Thomas G. and James F. Spriggs, II. *The Politics of Precedent on the U.S. Supreme Court*. Princeton: Princeton University Press, 2006.
- Hensley, Thomas R., Christopher E. Smith and Joyce A. Baugh. *The Changing Supreme Court: Constitutional Rights and Liberties*. 1st edition. Wadsworth Publishing Company, 1996.
- Howard, Robert M. and Jeffrey Segal. "How Supreme Court justices respond to litigant requests to overturn precedent." *Judicature* 85 (2001): 148-157.
- Hudson, John. "The Supreme Court Is More Polarized Than Ever." *The Atlantic* (June 19, 2012): 1-2.
- Jost, Kenneth. *The Supreme Court Yearbook 1994-1995*. Washington, D.C.: CQ Press, 1995.
- Kahn, Ronald. Institutional Norms and Supreme Court Decision-Making: The Rehnquist Court on Privacy and Religion. In: *Supreme Court Decision-Making: New Institutional Approach*, 1st edition. Cornell W. Clayton and Howard Gillman (Eds.). 175-200. University of Chicago Press, 1999.
- Klarman, Michael J. *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*. New York: Oxford University Press, 2004.

- Knight, Jack and Lee Epstein. "The Norm of Stare Decisis." *American Journal of Political Science* 40 (1996): 1018-1035.
- Lapidos, Juliet. "Is the Supreme Court More Divided Than in the Past?" *The New York Times* (June 8, 2012): 1-2.
- Lewis, David and Roger P. Rose. "Case Salience and the Attitudinal Model: An Analysis of ordered and Unanimous Votes on the Rehnquist Court." *The Justice System Journal* 35 (2014): 27-44.
- Miceli, Thomas J. and Metin M. Cosgel. "Reputation and Judicial decision-making." *Journal of Economic Behavior and Organization* 23 (1994): 31-51.
- Mishler, William and Reginald S. Sheehan. "Public opinion, the attitudinal model and Supreme Court decision making: A micro-analytic perspective." *The Journal of Politics* 58 (1996): 169-200.
- Mondak, Jeffery J. "Institutional Legitimacy, Policy Legitimacy, and the Supreme Court." *American Politics Quarterly* 20 (1992): 457-77.
- "Mr. Justice Reed. Swing Man or Not?" *Stanford Law Review*, Vol. 1, No. 4 (Jun., 1949), pp. 714-729.
- Murphy, Walter F. *Elements of the Judicial Strategy*. Chicago, IL: University of Chicago Press, 1973.
- Pacelle, Richard L. Jr., Brett W. Curry, and Bryan W. Marshall. *Decision Making by the Modern Supreme Court*. Cambridge, MA: Cambridge University Press, 2011.
- Richards, Mark J. and Herbert M. Kritzer. "Jurisprudential regimes in Supreme Court decision making." *American Political Science Review* 96 (2002): 305-309.
- Rohde, David W. "Policy Goals and Opinion Coalitions in the Supreme Court," *Midwest Journal of Political Science* 16 (May, 1972), 208-224.
- Savage, Michael. "Supreme Court decisions test chief justice's moderate approach." *The Los Angeles Times* (June 22, 2013): 1-2.
- Schmidt, Patrick D. and David A. Yalof. "The swing voter revisited: Justice Anthony Kennedy and the first amendment right of free speech." *Political Research Quarterly* 57 (2004).
- Schultz, Bernard. "The Burger Court in Action" In *the Ascent of Pragmatism*. Oxford University Press, 1998.

- Segal, Jeffrey and Harold J. Spaeth. *The Supreme Court and the Attitudinal Model*. New York: Cambridge University Press, 1993.
- Segal, Jeffrey A. and Harold J. Spaeth. "The influence of stare decisis on the votes of US Supreme Court justices." *American Journal of Political Science* 40 (1996).
- Segal, Jeffrey A. and Harold J. Spaeth. "Norms, dragons and stare decisis: A response." *American Journal of Political Science* 40 (1996).
- Segal, Jeffrey A. "Ideological values and the votes of U.S. Supreme Court justices revisited." *The Journal of Politics* 57(1995): 812.
- Songer, Donald R. and Stefanie A. Lindquist. "Not the whole story: The impact of justice's values on Supreme Court decision-making." *American Journal of Political Science* 40 (1996): 1049-1063.
- Spaeth, Harold J. and Jeffrey Segal. *Majority rule or minority will: Adherence to precedent on the U.S. Supreme Court*. Cambridge, MA: Cambridge University Press, 1999.
- Tushnet, Mark. *In the Balance: Law and Politics on the Roberts Court*. New York, NY: W.W. Norton & Company, 2013.
- Unnah, Isaac and Ange-Marie Hancock. "Supreme Court Decision Making, Case Salience, and the Attitudinal Model." *Law & Policy* 28 (2006): 295-320.
- Walshbeck, Paul, James Spriggs, and Forrest Maltzman. "Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court." *American Journal of Political Science* (January 1998): 294-315.
- Winkler, Adam. "The Coming of the Kagan Court." *Slate* (October 6, 2013): 1-2.
- Wohl, Alexander. "Mapp v. Ohio Turns 50: If a moderate Texan could love the exclusionary rule, why can't judicial conservatives?" *Slate* (June 7, 2011): 1-2.
- .

Appendix

Figure 1: The Percentage of Five-Four Decisions by U.S. Supreme Court Era



Source: John Hudson. "The Supreme Court Is More Polarized Than Ever." *The Atlantic* (June 19, 2012): 1-2.