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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 Supreme Court Database* Justice-Centered Data (2005-2014) and subjected to binominal logit regression analysis. The study's findings challenge the assertions of political and legal writers that Chief Justice Robert has adopted a more moderate position on the Court. The conclusion considers whether the recent passing of Justice Scalia may convince either Roberts or Kennedy to moderate their conservative leanings when joining with liberal majorities in closely divided cases to shape not only the scope of the opinion but also to preserve the Court's institutional legitimacy.

Introduction

The Roberts Court is an interesting era to study because the Court decided a number of important constitutional issues in the past few years and those decisions continue to influence our lives. One example is Chief Justice Robert's pivotal vote in the *National Federation of Independent Business (NFIB) v. Sebelius* ruling. As similar to Chief Justice John Marshall's strategic ruling in *Marbury v. Madison* (1803), Roberts shrewdly used his decision in *NFIB v. Sebelius* to "defuse a potential political storm" that preserved the prestige of the Court while expanding the legal philosophy of national supremacy (White 2012, 371). 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). The Chief Justice had worried publicly about the acute ideological divisions on the Court and the impact these have on its institutional legitimacy (Clayton and Christensen 2008). Jeffrey Rosen described the chief justice as a "fierce defender of the Court and its institutional legitimacy" (Farias 2016). Moreover, "the chief has made it clear how much he cares about preserving the court's legitimacy in these polarized times, and this term will be a real test of that vision" (Rosen 2007). If the Chief Justice adopts a moderate approach to deciding cases, is it to convince the public that the Supreme Court is above ideology in order to preserve institutional legitimacy?

This article analyzes the voting behavior of both Chief Justice Roberts and Justice Kennedy due to their "pivotal positions on the Court, controlling its decisions in most major constitutional cases" (Clayton and Christensen 2008; Clayton and McMillan 2012). Following Roberts key vote in *NFIB v. Sebelius*, some legal analysts claimed that Roberts may be establishing his authority over the Court and displacing Kennedy as the "pivotal justice" (Tribe

2012; Winkler 2012). Each year becomes "tougher to label Roberts. As chief justice, he must balance his judicial philosophy against the court's and his own legacy" (Wolf 2015). With the untimely death of Justice Scalia, Roberts will have to decide what role he wants to play, whether he should moderate his views to remain in the majority, or be confined to "a conservative minority" on the Court (Stern 2016).

When siding with the majority, the role of the Chief Justice permits him to assign the majority author. This gives Roberts significant control over the direction of the Court. During his career, Roberts has had more 5-4 splits than any other chief justice in Court history (Lapidos 2012).

For 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, the Chief Justice joined the majority 73% of the time in eight of the eleven 5-4 decisions (*Harvard Law Review* 2014). However for the 2014-2015 Court term, Roberts joined the majority only 30% in ten 5-4 decisions (*Harvard Law Review* 2015).

Nevertheless, many Supreme Court observers call the contemporary Court the "Kennedy Court," because Justice Kennedy is often described as the median justice (Cole 2015). The pivotal vote on the current Supreme Court usually belongs to Kennedy, who in closely divided cases is in the majority leaning conservative. Conversely, Kennedy has voted liberal more than conservative in 5-4 cases during the current term (Parlapiano, Liptak, and Bowers 2015). During the 2014-2015 Court term, Justice Kennedy voted 70% of the time with the majority in the ten 5-4 cases. Moreover, Justice Kennedy was in the majority in 5-4 cases more than any other justice at 87% during the 2012-2013 Court term. 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 percent of the time and the liberal wing 26 percent of the time (Red State: The Supreme Court in Review, 7/1/2013). Clayton and Salamone (2014, 740) concluded that Justice Kennedy will continue to be the "pivotal justice and the Court "remains very much Kennedy's Court rather than Roberts." Furthermore, in 5-4 decisions Roberts is infrequently a swing vote and nearly always votes with the conservative bloc of justices (Clayton and Salamone 2014, 747).

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 (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.

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 ideological middle of the Court by analyzing the judicial behavior of the two most consequential justices.

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 (2002) 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, 179) 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."

In regards to judicial philosophy, moderates are more likely to adopt a role of judicial restraint that leads to strategic behavior and concern for legitimacy. Judicial restraint respects the checks and balances of the co-equal branches of the federal government by not asserting

"judicial supremacy" over Congress's capacity to protect the rights of the public welfare (Zietlow 2007). During Reconstruction, Congress passed the Thirteenth, Fourteenth, and Fifteenth Amendments to abolish slavery and provide equal rights protections. In the 1930s, Congress passed New Deal legislation such as the Wagner Act, which created a right by statute for workers to organize into a union and engage in collective bargaining. It also passed the Fair Labor Standards Act, which included the right to earn a minimum wage. In the 1960s, Congress passed the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Also in the 1960s, Congress passed anti-poverty laws such as Medicaid and Medicare. And most recently, Congress passed the Affordable Care Act and the Lilly Ledbetter Equal Pay Act (Bathija 2014). One of the purposes of judicial restraint is to permit the elected branches of government to protect the rights of the citizenry.

Nevertheless, ideology is considered to be a significant factor in cases of high salience on the Supreme Court (Unah and Hancock 2006, 18). These ideological influences differ by the level of case salience (Lewis, and Rose 2014). Since the media considers ideological concerns in cases of high salience, this study must include an ideological component in the moderate judicial decision-making model. Moreover, lacking a firm ideological predilection contributes to moderate justices' susceptibility to external pressures in cases that are salient.

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, 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 and 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. 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, 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" (2001, 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 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." 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, Curry, and Marshall 2011, 211). Pacelle Jr., Curry, and Marshall 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" (Pacelle, Curry, and Marshall 2011, 206). Moreover, they contend 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 about which it is concerned (Pacelle, Curry, and Marshall 2011, 204-5).

Theoretical Approaches

The decision making of Chief Justice Roberts may be best conceptualized by the theoretical approach of the Strategic Model. The model cogently explains the rationale behind the chief justice's adoption of a moderate posture on the Court. Since the passing of Justice Scalia and the political intransigence in the Senate, Roberts has strategically sought consensus by moderating his conservative predilections by joining the liberal side in closely divided decisions and thereby shaping the content and scope of the majority opinion. Some of his liberal votes may

be strategic, a component of what legal scholar Richard Hasen calls Roberts' "long game" (Winkler 2015, 36). Moreover, Chief Justice Roberts' crucial 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. The chief justice seems determined to "avoid extreme measures by the Court and tries to lower the temperature of the Court's rhetoric" (Shapiro 2014, 5). Court reporter Chris Gentilviso of the *Huffington Post* stated that "with his Court's reputation on the line, one source suggested that the chief justice became 'wobbly' in the eyes of his conservative counterparts" (Kreig 2012). Therefore, the power of the Court "ultimately rests with other political institutions and public opinion" (O'Brien 1996; Richards, and Kritzer 2002). This article postulates that moderate justices' are constrained by precedent when adjudicated cases are both highly salient and minimum winning coalitions.

Epstein and 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 purse 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. For instance, the moderation of Roberts voting record in particular constitutional civil rights cases is according to the strategic model the result of high salience of the cases in the media and concerns about protecting the prestige of the Court by upholding precedent regardless of the political pressures from the political system.

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, 7-8, 49-78).

Epstein and Knight (1998) 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. 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." 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). Perhaps, a constraint is apparent to the Court during a crisis of whether to overturn a precedent or not (Segal, and 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.

Baird (2004) speculates that politically salient decisions will affect the justices' legitimacy more than a simple increase in the number of ordinary cases. Baum (2002) 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.

Knight and Epstein (1996) 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 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 (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. 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.

The Moderate Judicial Decision-Making 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 institutional norm of *stare decisis* constrain the decision-making of the moderate justice more in minimum winning coalitions than in other voting alignments?

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 ideologically voting alignments to a more substantive analysis of the external factors that contribute to the relevance of precedent to the moderates on the Court.

Moderate Judicial Decision-Making Model:

MJ MAJ PREC JIDEO (f) = ~HCS (NYT+ CQ) +MWC+LT+E

Where: MJ = Moderate Justices voting

PREC = Uphold Precedent

MAJ= Majority

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

HCS = High 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).

LT= Law Types (Legal provisions included constitutional, federal statute or civil rights)

E=Error probability

Analysis by Lauderdale and Clark 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 (2012, 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 found that "among important considerations in anticipating the decisions of the U.S. Supreme Court are justices' ideological orientations and case salience" (2006, 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) 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 due to public legitimacy concerns in higher rather than lower 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 found that civil rights and individual liberties cases tend to be more coherent than the economic cases in their development. 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 claim that the ACLU and NAACP are two organizations with considerable expertise and issue-based credibility in the civil rights policy realm (2006, 19). On the basis of the foregoing research, I propose the following hypothesis:

Hypothesis 2: Judicial moderates' are not likely to favor one ideological direction over another when joining the majority in minimum winning coalitions to uphold precedent in highly salient constitutional and civil rights cases due to a concern for institutional legitimacy.

Research Design and Data

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.

To evaluate the degree of moderation, I included an ideological component to the dependent variable. If the justices' vote is not predominately in one ideological direction than another, then the behavior is considered 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 Chief Justice Roberts and Justice Kennedy's voting record on the Roberts Court.

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. 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 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, indigence, 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 (Epstein, and Segal 2000, 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.

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 and 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 and 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 *New York Times* 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.

Results

Table 1 Chief Justice Roberts vote to join the Majority to Uphold Precedent in Salient versus Non-salient Cases, 2005-2014

Independent Variables Column	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 in conservative versus liberal case rulings; *: p<0. 05; **: p<0. 01; ***: p<0.001 N=770

Table 2 Justice Kennedy's vote to join the Majority to Uphold Precedent in Salient versus Non-salient Cases on the Roberts Court (2005-2014)

Independent Variables Column	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 in conservative versus liberal case decisions; *: p<0.05; **: p<0.01; ***: p<0.001 N=80

In comparison, Tables 1 and 2 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 direction. In table 1, Chief Justice Roberts' predicted probabilities for high case salience when voting in a conservative direction demonstrated only a slight positive increase for every one standard deviation change in the independent variable. While in Table 2 the predicted probabilities statistical change for the high case salience variable is nonexistent for Kennedy as compared to Roberts under similar conditions.

Contrary to the first hypothesis, both justices had a greater likelihood to join the majority to uphold precedent in lower rather than higher salient minimum winning coalitions. Moreover, the predicted probabilities in Tables 1 and 2 do not validate the second hypothesis because Roberts and Kennedy were more likely to join the majority to uphold precedent when voting in a liberal direction in low salient constitutional cases. Interestingly, the predicted probabilities were dissimilar in civil rights cases. Whereas Kennedy demonstrated a greater statistically significant likelihood to vote liberal in civil rights cases, Roberts was more conservative in civil rights cases.

Chief Justice Roberts may be demonstrating strategic behavior when upholding precedent in lower rather than higher salient cases due to his concerns with preserving institutional legitimacy. If Roberts is more likely to overturn precedent in cases of high salience, the media and public may perceive the Supreme Court as a policy-driven institution. The appearance of

issue policy preferences could diminish the public's perception and thus the legitimacy of the Supreme Court as a legal institution.

According to Tables 1 and 2, precedent does not affect the ideological direction of the justices' vote in statutory cases. Roberts and Kennedy's voting behavior in less salient federal statute cases may indicate a responsiveness to Congress and to precedent because more salient issues are more closely watched by the president (Pacelle, Curry, and Marshall 2011). Typically, justices eschew overturning precedents and introducing new issues into cases because the public views such decisions as unsuitable (Epstein and Knight 1998). Neither Roberts nor Kennedy demonstrated a moderate voting record in constitutional and civil rights cases. Alternatively, the justices showed a tendency to favor the conservative over the liberal direction when joining the majority in minimum wining coalitions to uphold precedent in highly salient constitutional and civil rights cases.

Discussion

Roberts is one of the most high profile figures 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 (Gerstein 2013; 2013). The *New York Times* legal staff analyzed rulings from 1946 to 2014, and found that under Roberts the court has demonstrated an incipient pattern of political moderation. Under Roberts the "scales of justice have weighed-in on the liberal side four out of ten years, including the past three years" (Parlapiano, Liptak, and Bowers 2015). Justice Kennedy and/ or Chief Justice Roberts have joined the liberal wing to affirm more liberal lower-court rulings in health care, housing and same-sex marriage cases that have attracted significant media exposure (Nyhan 2015).

Nevertheless, the empirical results in this study have run counter to the dictates of the hypotheses and reaffirms Spaeth and Segal's (1999) finding that justices are more likely to defer to precedent in cases that are less important. The findings reveal that moderation on the Court may be prevalent when voting in low salience cases, rather than high salience ones. More significantly, this study contradicts the assertions made by Supreme Court commentators that Chief Justice Robert's has adopted a more moderate ideological tone on the Court. The analysis demonstrated 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. Unlike the results for low case salience, the finding for high case salience was not statistically significant.

Justice Kennedy more accurately represents the swing justice role than the moderate one. Swing justices either sit on the judicial "fence" or are adept at forming minimum winning coalitions (Schmidt, and Yalof 2004, 211). This research supports the *Supreme Court Review's* contention that Kennedy is the "current swing vote" in several of the Court's most controversial cases (*Supreme Court Review* 2016). Kennedy provided the fifth vote in *Florence v. Board of Chosen Freeholders of the County of Burlington* (2012), *Citizens United v. FEC* (2010), *District of Columbia v. Heller* (2009) and *Boumediene v. Bush* (2008). Kennedy receives media attention because he is the swing justice and is regarded as more responsible for outcomes in controversial cases than the other justices (*Supreme Court Review* 2016).

The current term's judicial vacancy may have altered Roberts voting behavior. The Chief Justice may moderate his conservative leanings in closely divided cases to join a liberal majority to shape the decision by assigning the opinion to himself and writing it as narrowly as possible (Stern 2016). The Chief Justice asserted that the Court has best served itself when individual justices have been willing to subordinate their own agendas to build judicial consensus and

institutional legitimacy" (Rosen 2007). Additionally, Justice Elena Kagan stated that "I give credit to the chief justice, who I think in general is a person concerned about consensus building, and I think all the more so now" (Liptak 2016). To maintain his leadership role as Chief Justice, Roberts is likely to continue to moderate his views to remain in the majority of the Court" (Stern 2016). The results of this study suggest that Chief Justice adopts a more moderate to conservative approach to create a public impression that the Court is indifferent to policy considerations in order to preserve institutional legitimacy.

The data results have indicated that the Chief Justice is a more ideologically leaning moderate than as specified in this article. Roberts occasionally sides with the liberal justices but mostly sides with the Court's conservative justices (*Supreme Court Review* 2016). The Chief Justice sided with the liberal justices in *Jones v. Flowers* (2006), *United States v. Comstock* (2010) and *National Federation of Independent Business v. Sebelius* (2012). In contrast to Justice Kennedy's vote in *NFIB. v. Sebelius*, the Chief Justice's decision to join with the liberal justices was to protect the institutional legitimacy of the Court in a case of high issue salience. Robert's vote in favor of the federal government in *NFIB v. Sebelius* buttresses Baum's (2006) postulate that justices might avoid specific decisions that promote highly unpopular policies. Furthermore, precedent did not serve as a constraint to either Roberts or Kennedy who have demonstrated a greater likelihood to vote in a conservative than a liberal direction in highly salient closely divided cases.

To increase content validity, the case salience variable could be expanded in future research to include additional major metropolitan newspaper indicators. Lewis and Rose 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* (2014, 37). These newspapers were selected on the basis of circulation size, geographical diversity, and ideological diversity. However, Lewis and Rose neglected to include the *Wall Street Journal (WSJ)* newspaper because it was not included in the *LexisNexis* database of newspaper articles (2014, 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 Unites 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 further research, I intend to apply a revised version of 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.

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