ArkPSA
Arkansas Political Science Association

Sixty Years after *Brown* v. *Board of Education*: The Role that Moderate Justices' Played on the Warren Court in Closely Divided and Salient Cases
Author(s): Paul D. Foote and Leann Lacy
Source: *The Midsouth Political Science Review*, Volume 16, 2015, pp. 45-72
ISSN: 2330-6882 [print]; 2330-6890 [online]
Published by: Arkansas Political Science Association
Website: http://uca.edu/politicalscience/midsouth-political-science-review-mpsr/

Sixty Years after *Brown* v. *Board of Education*: The Role that Moderate Justices' Played on the Warren Court in Closely Divided and Salient Cases

Paul D. Foote
Murray State University

Leann Lacy
Eastern Kentucky University

This article reveals the characteristics of moderate judicial behavior and seeks to determine the conditions under which moderate decision-making occurred on the Warren Court. The data in the study were derived from the Justice-Centered Court Database (1953-1969). The model's parameters are subjected to binominal logit regression analyses. This research contributes to the dialogue relating to whether institutional norms and external factors may have a significant effect on moderate judicial decision-making than on non-moderate judicial decision-making in the United States Supreme Court.

Introduction

The Warren Court is an interesting era to study because the Court decided a number of important constitutional issues during its time and those decisions continue to influence our daily lives (Urofsky 2001). According to author Bernard Schwartz (1990), the Warren Court led the movement to transform constitutional law in the "image of an evolving society" (399). Sixty years ago Chief Justice Earl Warren wrote the opinion in *Brown* v. *Board of Education of Topeka, Kansas* (1954) which eventually led to the integration of all public schools in the United States of America. The Warren Court established the image of the Supreme Court as a revolutionary body, a powerful force for social change (Powe 2000). A divided opinion, Judge Learned Hand wrote "cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends" (Hand 1958, 72). That is why Warren sought and gained a unanimous decision in *Brown I* and *Brown II* because the rulings reversed existing precedent and nullified several federal and state laws (Earl Warren Papers 2000). Warren, fearing that divisions on the Court would feed public resistance to the ruling, artfully crafted and negotiated a unanimous opinion (Klarman 2004). According to Jim Newton (2007) in *Justice For All: Earl Warren and the Nation He Made*, Warren "wanted a solid court, ideally a unanimous one, to speak with a single, clear voice on a matter of moral urgency"(313).

Moreover, Chief Justice John G. Roberts Jr. stated that "unanimity, or near unanimity, promotes clarity and guidance for the lawyers and for the lower courts trying to figure out what the Supreme Court meant" (Georgetown University Law Center Commencement Address 2006).

In 1954, Justice Stanley Reed agreed to join the Court's opinion in *Brown I*, therefore making the decision unanimous, explaining to his colleagues that "well, if you are going to vote that way, I'm not going to stand out" (Davis 2011, 3). Moreover in 1968, Justice Black changed his mind on a case involving union voting rules to avoid dissenting alone in *Wirtz* v. *Hotel Employees* (1968). Warren advised his colleagues to write opinions that laypeople could understand. He recommended that "opinions should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory" (Davis 2011, 13). However, in *Brown I* and *Brown II,* there was clear political resistance to the unanimous decisions, as well as those which are minimum winning (Brenner, Hagle and Spaeth 1990). During the sixth term of the Warren Court until the eighth term, coinciding with President Kennedy's election and subsequent assassination, there were a growing number of divided rulings (Guimera and Sales-Pardo 2011). In other words, from 1953 until the 1960 Court term, there were 563 dissenting opinions representing 70% of the total number of full opinions. In contrast from the 1961 until the 1969 Court term, the number of dissents increased to a total of 631 representing 78% of full opinions (*Harvard Law Review* Statistical Tables editions 1953-1969).

The question of judicial voting alignments has been an interesting and important issue in judicial politics (Hensley, Smith, and Baugh 1996). To analyze judicial alignments, scholars often categorize the justices on the Court into voting blocs on the basis of ideological behavior (Yung 2010). 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, 209). 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 Warren 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 (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. Edelman, Klein and Lindquist (2012) also discounted the usefulness of the attitudinal model concluding: "consensus on the Court cannot be explained by ideology alone; it often results from ideology's being outweighed by other influences on justices' decisions" (129).

There are three main models that explain how justices' decide cases. The first is the Legal Model which argues that legal factors serve as a constraint on the Court's decision-making process. The four components of the Legal Model are the following: precedent, plain meaning, intent of the framers (or legislators), and balancing. The model stresses that precedent acts as a constraint on justices' fulfilling their personal policy preferences. The plain meaning doctrine contends that judges rely on their decisions on the plain meaning of the pertinent language in a statute. The concept of framers' intent advocates that judges construe statutes and the Constitution according to the preferences of those who originally drafted and supported them. The final component of the Legal Model is balancing. This approach is used most often when individual claims are counter to the interests of society. Balancing may also occur when neither constitutional nor legal rights form a "seamless web" (Segal and Spaeth 1993, 52).

The second is the Attitudinal Model which maintains that judges decide disputes in light of the facts of the case vis-à-vis the sincere ideological attitudes and values of the judges (Schubert 1965; Segal and Spaeth 1993). The Model posits that particular institutional factors of the Court almost always allow the justices the ability to vote their sincere policy preferences in the decisions on the merits. The Attitudinal adherents cite several institutional factors that insulate the Court from public influence.

The decision making of moderate justices on the Court may be best conceptualized by the third theoretical model. According to the Strategic Model, 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. Justices use particular tactics, such as bargaining, personal friendship, and sanctions on other justices, to reach their own policy preferences through opinions (Murphy 1973).

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, 336). 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. Gaines* v. *Canada* (1938), *Sipuel* v. *Oklahoma State Regents* (1948), *McLaurin* v. *Oklahoma* (1950) and *Sweatt* v. *Painter* (1950), 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" (470).

Baird (2004) speculates that politically salient decisions will affect the justices' legitimacy more than a simple increase in the number of ordinary cases. Baum (2008) argued that justices might avoid specific decisions that promote highly unpopular policies. Moreover, Epstein and Knight (1998) 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.

Largely ignored by scholars is 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 salience (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 Warren Court. I seek to understand how precedent affects moderate judicial behavior on the Court in high as well as 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.

Literature

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. 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. Baum (2008) 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). Thus, moderate justices are less likely to overturn precedent in salient cases and adhere to precedent when their vote is pivotal to a minimum winning coalition.

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.

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, Curry, and Marshall 2011, 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, Curry, and Marshall 2011, 211).

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. The Court and the President more closely watch salient issues. In contrast, decision-making by the Court in less salient issue areas tends to be more responsive to Congress and to precedent. Baum (2008) 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 (2008) 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 (2008) 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. Pacelle, 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" (Pacelle, Curry, and Marshall 2011, 206). Moreover, Pacelle, Curry, and Marshall (2011) contend that the Court may follow precedent when cases "fall in a zone of indifference or when congressional or presidential antennae are raised" (205). By acting in this way, the Court can buy some goodwill that can be spent on issues it is concerned about (Pacelle, Curry, and Marshall 2011, 205).

The Jurisprudential Styles of Moderate Justices on the Warren Court

In the following section, my goal is to illuminate the characteristics of moderate decision-making in the analysis of the jurisprudential styles of Justices' Reed, Stewart and White on the Warren Court. 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. Moderate justices are more distressed about public scrutiny

than swing justices (Schmidt and Yalof 2004, 211) who either sit on the judicial "fence" or are simply persuasive at forming five justice majorities. Therefore, 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. During the Warren Court era, Justice Marshall Harlan II was a "restraining force during a period of rapid change," because he was "distrustful of abrupt change, comfortable with accustomed rules and practices, and therefore reluctant to revise the judgments of predecessors," and had "a profound respect for precedent" (Dorsen 1969, 249-250 and 257). There is a tendency for judicial moderates to excessively ruminate over the consequences of their votes in closely divided cases.

Scholars attempting to identify swing votes on the Court have solely focused on the frequent movement of particular justices between two opposing ideological blocs (Blasecki 1990; Schultz and Howard 1975; *Stanford Law Review* 1949). In contrast to moderate judicial behavior, a swing voter must divide his deciding votes roughly evenly between the two blocs. "If one overwhelming supports one bloc over the other, he becomes a relatively strong member of that bloc and no longer satisfies the definition of the swing vote" (Blasecki 1990, 534). 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. Brenner (1982) analyzed five-member original coalitions in civil liberties cases on the Warren Court and found that assignment of the majority opinion to the justice who was both marginal and "pivotal" (a justice defined as the one furthest ideologically from the opinion assigner in five-member original coalitions) tended to produce final decisions and majority opinions that received more than five votes than when another justice was chosen as opinion writer (209). 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. The following section will also buttress the important aspects of the model's parameters later in the research methodology segment of the paper.

Justice Stanley Reed

Reed was considered a "moderate progressive" and often provided the critical fifth vote in split rulings. He authored more than 300 opinions, and Chief Justice Warren Burger said "he wrote with clarity and firmness" (Bickel 1986, 78). According to a study by the *Stanford Law Review* (1949), Justice Reed's vote is usually counted with the majority in close cases. "Statements that Justice Reed is the swing man on the present Court seem less accurate than the statement that he swings the same way nearly all the time-to the right" (*Stanford Law Review* 1949, 722). The *Stanford Law Review* calls for a more substantial study to determine whether Justice Reed holds the balance of power on the Supreme Court.

Lauderdale and Clark (2012) acknowledged that due to his lack of a consistent ideological position on issues, Reed was considered a moderate during his 19-year tenure on the Court. Justice Reed was on the left on issues of interstate relations, economic activity, and due process and further to the right on issues of privacy, criminal procedure, and civil rights.

Justice Potter Stewart

Schwartz (1993) noted that Justice Stewart was a "moderate with a pragmatic approach to issues that polarized others" (272). At the end of Warren's tenure, Stewart remained the Court's "leading moderate" (Schwartz 1993, 272). Yarbrough (1991) claims that Justice Stewart's moderate voting record is easily documented. Two fundamental components in Stewart's jurisprudence contribute towards reconciling the apparent inconsistencies in his *Connecticut* v. *Griswold* (1965) and *Roe* v. *Wade* (1973) positions. Stewart "placed a high premium on adherence to precedent" (Yarbrough 1991, 376) and his position in *Roe* can be seen as his acceptance of the precedent established in *Griswold*. According to Jeffries (1994), Stewart like Powell was a "centrist and no ideologue" (377). Justice Stewart's jurisprudence of moderation was noted in questions of standing, justiciability, and the scope of the state action concept (Yarbrough 1991). Stewart voted with the liberal justices in freedom of expression cases involving First and Fourteenth Amendments. After Justices Warren and Fortas stepped down from the Court, followed two years later by Black and Harlan, Stewart turned from a moderate to a swingman or median voter on the Burger Court (Jeffries 1994).

Stewart has also been classified as a swing-voter. Stewart generally demonstrated a pro-First Amendment position, but he voted with the right bloc with enough frequency to sustain a proper description as a swing-voter (Schultz and Howard 1975). Moreover, in the right-to-counsel cases and jury cases, in which Justice Stewart swung to some degree, the swing voter factor was the determining factor in the outcome of only a few cases. For instance, Stewart cast the decisive vote in *Elkins* v. *United States* (1960), which eliminated the "silver platter doctrine" and laid the groundwork for the Court's precedent-setting exclusionary rule decision in *Mapp* v. *Ohio* (1961). According to Schultz and Howard's study, Stewart was the only member of the Court who switched his vote between the blocs to any significant degree.

Lauderdale and Clark (2012) found that Stewart was a "regular median or pivotal justice" during the 1970s (860). Whittington (2005) wrote that Stewart often voted with the minority during the latter years of the Warren Court but exercised considerable influence at the center during the Burger Court.

Justice Byron White

Schwartz (1993) claimed that White was a "moderate" on the Warren Court. According to Jeffries (1994), Justice White baffled Supreme Court pundits who predicted he would vote consistently with the Court's liberal bloc. White's positions on major issues were varied-conservative on some and liberal on others. Abraham (1992) maintained that White's swing-vote stance most likely represented a deliberative jurisprudential role. In addition, Greenhouse (1990) noted that White "filled the role of the Court's swing justice" (E3). Epstein and Jacobi (2008) data results indicated that White's votes were most consequential when "breaking ties in close cases and authoring opinions in highly salient disputes" (67-68). Lauderdale and Clark (2012) found that White served as a "pivotal justice" with regularity during the 1970s and became a "moderate justice" soon after Justice O'Connor's ascendance to the Court (864).

Schultz and Howard (1975) disagreed with White's classification as a swing-voter. Although Justice White's behavior illustrated swing-vote characteristics in cases involving sex discrimination, race, and three limited areas of criminal law (habeas, jury, and right-to-counsel cases), he voted with the left bloc in only 28% of the closely decided social rights cases (Schultz and Howard 1975). According to White's biography written by the Library of Congress, he enunciated no single judicial philosophy however judicial

restraint occasionally emerged as a feature of his reasoning (Byron R. White Papers 2003).

Justice John Marshall Harlan II

According to Tushnet (1993), Justice John M. Harlan is not a "right-wing justice as he is sometimes conceived but rather someone much closer to the center, a moderate figure avoiding extremes" (110). Moreover, Harlan's personality embodied a moderate philosophy in that it emphasized the central role that legal procedure plays in assuring judicial and legislative objectivity (Tushnet 1993). According to Hale (1990), a moderate bloc was formed by Clark, Harlan, Whittaker and Frankfurter, who agreed 86% to 93% of the time of that bloc. Harlan adhered more closely to precedent, and was more reluctant to overturn legislation, than many of his colleagues on the Court. In many other cases, however, Harlan found himself in dissent. Schwartz (1990) noted that Harlan dissented in some of the Warren Court's most important decisions. Harlan was usually joined by the other members of the Court's moderate wing, Justices Potter Stewart, Tom Clark, and Byron White (Yarbrough 1992). Schwartz (1990) agreed that Harlan had been the leading conservative in the last years of the Warren Court and he dissented from some of its most important decisions. "Respect for the Courts," Harlan once wrote to another Justice, "is not something that can be achieved by fiat" (Schwartz 1990, 376). The true conservative, Harlan maintained support for *stare decisis*, typically following precedents against which he had originally voted.

Justice Tom C. Clark

Lauderdale and Clark (2012) noted that Clark was commonly considered a judicial moderate, because his record demonstrated that he did not hold positions "mapped cleanly onto traditional left-right politics" (857). Justice Clark was the author of the majority opinion for the landmark *Mapp* v. *Ohio* (1961) decision. He is identified as a moderate justice for writing a "draft adopting the agreed-upon analysis with Justices William Brennan and Hugo Black. He suggested that *Mapp* represented an opportunity to make the exclusionary rule doctrine consistent throughout the nation. With their agreement, Clark assembled a narrow majority, transformed the opinion, and overturned Dollree Mapp's conviction" (Wohl 2011, 1).

Epstein and Jacobi (2008) data suggested that Justice Clark was influential throughout the late 1950s, but especially in the 1959 Term. Clark

was known for his crucial votes in business cases. Spaeth (1963) wrote "it is not too much to say that on issues of economic liberalism, as Clark went, so went the Court" (89). Furthermore, Lewis (1960) emphasized the pivotal role played by both Clark and Stewart by designating them as the "swing men on the Supreme Court" (1).

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:

MJ PREC MAJ/PL (f) = ~CS (NYT+ CQ) +MWC+JIDEO+E

Where:
MJ = Moderate Justices voting
PREC = Uphold Precedent
MAJ/PL= Majority or Plurality
CS = Case Salience of an issue (Derived from Epstein and Segal (2000)).
NYT = The *New York Times* Indicator (Derived from Epstein and Segal (2000) 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 and 4-3 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. 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). 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). 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). 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 moderate decision-making in highly salient rather than lower salient cases.

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 both constitutional and statutory cases. This is because constitutional cases are usually of higher salience than federal statutory cases.

In addition, Eskridge (1991) maintained that the Supreme Court has long held that statutory precedents are entitled to a greater *stare decisis* effect than either constitutional or common law precedents, in part because Congress and not the Court should have the primary responsibility for overriding statutory precedents. On the basis of the foregoing research, I propose the following hypothesis:

Hypothesis 2: Moderate justices tend to not favor one ideological direction over another when joining the majority to uphold precedent in higher than lower salient constitutional and 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. 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).

Hypothesis 3: Moderate justices are likely to not ideologically favor one direction over another when joining the majority to support precedent in highly salient civil rights cases.

Methods

In this study, the data comes from the U.S. Supreme Court Justice Centered Database and covers the Court terms from 1953 until 1969 (Gibson 1996). The Justice Centered Database indicates when an individual justice deviates from the majority and includes every case decided by the Court. The dependent variables are both the moderate justices' conservative and liberal votes to uphold precedent when joining the Court's majority or not. In Lauderdale and Clark's (2012) article, moderate justices' were classified based upon their ideological voting in civil rights and economic cases.

To evaluate the degree of moderation on the Warren Court, I included an ideological component to the dependent variable. If the justice's 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 one for when the justice votes in a conservative direction when joining the majority to uphold precedent and zero when voting in a liberal 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 Warren 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.

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 the case's oral arguments. According to the strategic model, each justice will consider the intentions of others on the Court before casting their vote. When a moderate justice learns that a minimum winning coalition is coalescing to overturn a precedent, they tend to vote with the majority to uphold the Court's precedent. O'Brien (1996) stated that "the usefulness of voting strategies depends on how the justices vote" (294). If the vote is not minimum winning, the moderate justice may not join the majority to uphold precedent.

The minimum winning coalition variable 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.) Therefore, minimum winning coalitions are those decided by a 5-4 or a 4-3 vote. Rohde (1972) and Brenner, Hagle, and Spaeth (1990) concluded from an examination of Warren Court civil liberties decisions that, absent a threat from an external group, opinion coalitions tend to be a minimum winning coalition of 5 members and where the threat is present, maximum winning (eight or nine members). Moreover, Brenner, Hagle and Spaeth (1990) inspected the docket books of Justices Burton, Clark, and Brennan and identified 299 minimum winning coalitions that were defined as 5-4 or 4-3 coalitions.

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 United States Reports* labels syllabus by reporter of decisions, appears in the official *United States Reports* immediately after the date of decision and before the main opinion in the case. James L. Gibson (1996), principal investigator for The United States Supreme Court database, used this summary to determine the legal provisions at issue because it is a "reasonably objective and reliable indicator" (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.

A typical exception is where the Court determines the constitutionality of a federal statute or where judge-made rules are applied to determine liability under various federal statutes, including civil rights acts, or the propriety of the federal courts' use of state statutes of limitations to adjudicate federal statutory claims (Spaeth et al. 2015).

Both the civil rights and the economic case variables were developed from the issue area variable labeled civil rights and economic activity in the database. 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, sit-in demonstrations, debtors' rights, deportation, employability of aliens, sex discrimination, Indians, juveniles, rights of illegitimates, rights of handicapped, residency requirements and liability.

Economic activity variable was coded one if it fit that type of case and zero otherwise. The variable included such cases as antitrust, mergers, bankruptcy, sufficiency of evidence, legal remedies available to injured persons or things, liability that concerned punitive damages and that was governmental or nongovernmental, state tax, state regulation of business, federal regulation of securities, environmental protection of natural resources, corruption, zoning, arbitration and federal consumer protection. Economic activity is largely commercial and business related; it includes tort actions and employee actions vis-a-vis employers.

For the coding of the case salience variable, I relied on Epstein and Segal (2000) 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" (1130). Moreover, Cook (1993) analyzed 15 different measures and found that the list compiled by *Congressional Quarterly's (CQ) Guide to the U.S. Supreme Court* was a concise but a "reliable authority for research on contemporary decisions" (1136). Although Harold Spaeth has utilized the *Lawyers Edition* to identify significant non-constitutional cases, Cook (1993) 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. In a recent article, Lewis and Rose (2014) states that judicial scholars have used "landmark" decisions reported in *CQ's Guide to the U.S. Supreme Court* as a proxy measures of salience. Since *CQ's* list of major cases extends back to 1946, I was able to analyze the entire Warren Court era. Therefore, the data covers the Court terms from Warren's first term in 1953 until his retirement in 1969. 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 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 *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. In their research, Brenner and Arrington (2002) concurred that cases on the *CQ* list are more likely to be salient than cases on the *New York Times* list because the former consists of one-third of

the number of cases. Relying solely on the *New York Times* will increase the overall number of salient cases in the analysis. 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. The decision to restrict the moderate model to the aforementioned variables was based upon the contention that moderates adhere to precedent when a case is salient and pivotal to the formation of a minimum winning coalition.

Results and Analyses

Table 1: Justice Reed's vote in Salient Cases on the Warren Court (1953-1969)[1]

Independent	Conservative Voting	Δ in Prob	Liberal Voting	Δ in Prob
Constant	-7.260 (.165)		-7.476 (.186)	
High Case Salience	-15.330 (1698.8)	-.001	-1.035 (1.016)	-.001
Low Case Salience	-.618 (.487)	.000	-.423 (.332)	.001
Minimum Winning Coalition	.953* (341)	.001	-.678 (.462)	-.001
Constitutional Cases	1.120* (.380)	.002	2.361*** (.291)	.007
Federal Statute Cases	1.303*** (.308)	.003	2.724*** (.256)	.011
Civil Rights Cases	.525 (.439)	.002	.108 (.341)	.003
Economic Cases	1.057** (.316)	.004	.592* (.239)	.009
Chi-Square	65.002		198.056	
Log Likelihood	1157.718		1476.069	

N=245; *: p<0. 05; **: p<0. 01; ***: p<0.001; standard errors in parentheses

Table 2: Justice Stewart's vote in Salient Cases on the Warren Court (1953-1969)

Independent	Conservative Voting	Δ in Prob	Liberal Voting	Δ in Prob
Constant	-5.932 (.086)		-5.871 (.084)	
High Case Salience	-.628 (.460)	-.002	-.087 (.264)	-.001
Low Case Salience	-.573 (.461)	.001	-.112 (.266)	.001
Minimum Winning Coalition	1.020*** (.163)	.006	-1.324*** (.274)	-.003
Constitutional Cases	1.666*** (.159)	.014	2.782*** (.120)	.051
Federal Statute Cases	1.844*** (.129)	.016	2.782*** (.120)	.047
Civil Rights Cases	-.201 (.226)	.007	.505 (.135)	.043
Economic Cases	.377* (.167)	.009	.501*** (.127)	.029
Chi-Square	313.520		833.110	
Log Likelihood	3751.532		5182.801	

N=1,143; *: p<0. 05; **: p<0. 01; ***: p<0.001; standard errors in parentheses

[1] In all tables, dependent variable: Justice voted with majority to uphold precedent. 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. Results using SPSS and Excel.

Table 3: Justice White's vote in Salient Cases on the Warren Court (1953-1969)

Independent	Conservative Voting	Δ in Prob	Liberal Voting	Δ in Prob
Constant	-6.349		-6.116	
High Case Salience	-16.578 (1706.0)	-.5	-.041 (.277)	-.004
Low Case Salience	-.068 (.242)	.000	.215 (.136)	.001
Minimum Winning Coalition	.280 (.264)	.001	-2.455*** (.504)	0
Constitutional Cases	1.794*** (.197)	.008	2.927*** (.132)	.048
Federal Statute Cases	1.830*** (.162)	.009	2.697*** (.121)	.034
Civil Rights Cases	-.029 (.272)	.006	.838*** (.142)	.043
Economic Cases	.029 (.230)	.009	.881*** (.137)	.029
Chi-Square	161.193		759.312	
Log Likelihood	2516.935		4402.947	

N=854; *: p<0. 05; **: p<0. 01; ***: p<0.001; standard errors in parentheses

Table 4: Justice Harlan's vote in Salient Cases on the Warren Court (1953-1969)

Independent	Conservative Voting	Δ in Prob	Liberal Voting	Δ in Prob
Constant	-5.340		-5.504	
High Case Salience	-.812 (.420)	-.18	.107 (.221)	.08
Low Case Salience	.112 (.146)	.004	.186 (.113)	.004
Minimum Winning Coalition	1.239*** (.139)	.26	-1.720*** (.339)	-.39
Constitutional Cases	1.008*** (.155)	.22	2.272*** (.121)	.37
Federal Statute Cases	1.509*** (.107)	.31	2.272*** (.099)	.39
Civil Rights Cases	.041 (.171)	.13	.262* (.125)	.28
Economic Cases	.201 (.139)	.18	.319** (.113)	.26
Chi-Square	322.315		677.195	
Log Likelihood	5269.360		5761.150	

N=1,356; *: p<0. 05; **: p<0. 01; ***: p<0.001; standard errors in parentheses

Table 5: Justice Clark's vote in Salient Cases on the Warren Court (1953-1969)

Independent	Conservative Voting	Δ in Prob	Liberal Voting	Δ in Prob
Constant	-5.695		-5.547	
High Case Salience	-.900* (.435)	-.22	-.270 (.270)	-.06
Low Case Salience	.183 (.149)	.05	.207 (.111)	.035
Minimum Winning Coalition	1.103*** (.140)	.23	-.389* (.164)	.23
Constitutional Cases	1.586*** (.149)	.31	2.304*** (.118)	.30
Federal Statute Cases	1.883*** (.114)	.36	2.755*** (.091)	.35
Civil Rights Cases	.109 (.173)	.19	.640*** (.123)	.32
Economic Cases	.223 (.147)	.22	1.174*** (.100)	.38
Chi-Square	445.763		1103.811	
Log Likelihood	4646.512		6655.874	

N=1,516; *: p<0. 05; **: p<0. 01; ***: p<0.001; standard errors in parentheses

When comparing all of the aforementioned tables, not one of the so-called moderate justices acted more constrained by precedent in highly salient than lower salient constitutional cases. According to Tables 4 and 5, only Justices Harlan and Clark were more likely to uphold precedent when joining the minimum winning coalitions in lower salient cases. However, Harlan and Clark only demonstrated this behavior when voting in a

conservative rather than a liberal ideological direction. Moreover, the data results demonstrate in Table 4 that Justice Harlan was more likely to adhere to precedent when voting in a liberal rather than a conservative direction in highly salient types of cases. This finding supports the portrayal of Harlan as a "moderate figure" and the first hypothesis's description of moderate decision-making (Tushnet 1993, 110). Nevertheless, the overall results in Table 4 neither support the second nor the third hypotheses. Harlan's voting behavior may be a testament to the Chief Justice's skills of persuasion and bargaining for unanimous votes.

In Table 1, Justice Reed demonstrated a greater ideological probability difference when voting liberal in all types of cases. The high standard errors are likely the result of the relatively low number of cases and Reed's retirement after only three years on the Warren Court. Table 2 shows that Stewart's voting behavior does not comport with the hypotheses in the study. Regardless of ideological direction in Table 5, Justice White was more likely to support precedent in cases of lower than higher salience. The results demonstrate that when White and Clark voted in a liberal rather than a conservative direction, they were significantly more likely to respect precedent in civil rights and economic cases than in constitutional and federal statute cases. This may be the result of the prevalent liberal trend in civil rights cases during the tenure of Chief Justice Warren.

Discussion of Results

The results not only are contrary to the moderate model's predictions but seem to confirm Spaeth and Segal's (1999) finding that justices are more likely to defer to precedent in cases that are less important. Although not statistically significant, the overall results in Tables 3 through 5 for the low case salient variable appear to better approximate moderate behavior than for the high salient case counterpart. Therefore, low rather than high case salience may be one of the key conditions of moderate decision-making. Lewis and Rose (2014) asserted that a low salient case provides a decision environment conducive to compromise and consensus. The justices are not as likely to approach cases with "firm and fixed positions, anchored by ideology" (Lewis and Rose 2014, 29). Justices may be more willing to look for common ground, adapting their opinions to accommodate the concerns of their colleagues.

In this study, the minimum winning coalition variable was not a strong indicator of moderate behavior on the Warren Court. Moreover, both the

statutory and constitutional case variables proved to be weak indicators of moderate judicial behavior. On the other hand, depending on the individual justice the civil rights and economic variables did vary in direction and statistical significance.

The findings do not support Schwartz (1993) assessment that Stewart is a leading moderate on the Warren Court. Neither does it agree with Lauderdale and Clark's (2012) description of Reed as a moderate during his tenure on the Court. Alternatively, the findings do tend to support the qualitative descriptions of Harlan as a judicial moderate. However, there may be alternative reasons to explain why moderate justices were more likely to join a liberal majority than a conservative one on civil rights and economic cases. One explanation may be the difficulty of constructing a conservative majority on a liberal court. Chief Justice Warren's leadership skills were quite effective in forming majority coalitions that led to liberal decisions that significantly altered the nation's criminal justice system.

Conclusion

The regression analyses revealed that not one of the moderate justices voting behavior precisely followed the dictates of the model. Contrary to law related articles and major metropolitan newspaper accounts, Justices Reed, Stewart, and White did not display moderate behavior. This may be due to the effectiveness of Chief Justice Warren's leadership skills and the magnitude of the dramatic changes that the Court's rulings had on the nation's social fabric. Overall, Justices Harlan and Clark's statistical results best approximated moderate voting behavior.

One caveat of quickly endorsing the findings in Table 1 is that the chi-square results and log likelihood statistics for Justice Reed are comparably quite low. This may be the result of the smaller sample size of cases for Reed as compared to those of Stewart and White on the Warren Court. However, students and scholars of judicial politics will as a result of this work gain a better understanding of moderate judicial behavior in both salient and minimum winning cases.

In future research efforts, I plan to recode the dependent variable for each justice according to the ordinal scale of moderation's parameters. I did not have the time to do so in this study. In addition, I intend to apply the moderate judicial model to the Burger Court era. A major characteristic of the Burger era was the "absence of a common understanding of mission held

by all of the justices" (Schwartz 1990, 399). Furthermore, 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)" (Schwartz 1990, 400).

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*. 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. I believe the authors erred when they excluded 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 (2014) 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.

References

Abraham, Henry J. 1992. *Justices and Presidents: A Political History of Appointments to the Supreme Court*. 3rd ed. New York: Oxford University Press.

Baird, Vanessa. 2004. "The Effect of Politically Salient Decisions on the U.S. Supreme Court's Agenda." *The Journal of Politics* 66: 755-772.

Baum, Lawrence. 2008. *Judges and Their Audiences: A Perspective on Judicial Behavior.* Princeton: Princeton University Press.

Bickel, Alexander M. 1986. *The Least Dangerous Branch: the Supreme Court at the Bar of Politics.* 2nd edition, Binghamton, NY: Vail-Ballou Press, Inc.

Biskupic, Joan and Elder Witt. 1997. *Guide to the US Supreme Court*. 3rd edition, Washington, D.C.: CQ Press.

Blasecki, Janet L. 1990. "Justice Lewis F. Powell: Swing Voter or Staunch Conservative?" *Journal of Politics* 52: 530-547.

Brenner, Saul. 1982. "Strategic Choice and Opinion Assignment on the U.S. Supreme Court," *Western Political Quarterly* 35: 209.

Brenner, Saul, and Theodore S. Arrington. 2002. "Measuring Salience on the Supreme Court: A Research Note." *Jurimetrics* 43 (Fall): 99–113.

Brenner, Saul, Timothy Hagle, and Harold J. Spaeth. 1990. "Increasing the Size of Minimum Winning Original Coalitions on the Warren Court." *Polity* 23: 309-318.

Brown v. *Board of Education of Topeka, Kansas*. 1954. 347 U.S. 483.

Byron R. White papers, 1961-1992. 2003. *Library of Congress Press.*

Collins, Paul M., Jr. 2008. "The Consistency of Judicial Choice." *The Journal of Politics* 70: 861-873.

Connecticut v. *Griswold*. 1965. 381 U.S. 479.

Cook, Beverly. 1993. "Measuring the Significance of U.S. Supreme Court Decisions." *Journal of Politics* 55: 1127-1139.

Davis, Richard. 2011. *Justices and Journalists: The U.S. Supreme Court and the Media*. New York, N.Y.: Cambridge University Press.

Dorsen, Norman. 1969. "The Second Mr. Justice Harlan: a Constitutional Conservative." *New York University Law Review* 44: 249-250, 257.

Earl Warren Papers. 2000. Inventory F3640. California State Archives.

Edelman, Paul H. and James Ming Chen. 2001. "Most Dangerous Justice Rides Again: Revisiting the Power Pageant of the Justices." *Minnesota Law Review* 86: 1-131.

Edelman, Paul H., David Klein, and Stephanie A. Lindquist. 2012. "Consensus, Disorder, and Ideology on the Supreme Court," *Journal of Empirical Legal Studies* 9: 129.

Elkins v. *United States*. 1960. 364 U.S. 206.

Epstein, Lee and Tonja Jacobi. 2008. "Super Medians." *Stanford Law Review* 61: 37-99.

Epstein, Lee and Jack Knight. 1998. *The Choices Justices Make*. 1st edition, Washington, D.C.: CQ Press.

Epstein, Lee and Jeffrey A. Segal. 2000. "Measuring Issue Salience." *American Journal of Political Science* 44: 66-83.

Eskridge, William N., Jr. 1991. "Overriding Supreme Court Statutory Interpretation Decisions." *Yale Law Journal* 101: 331-417.

Fowler, James H. and Sangick Jeon. 2008. "The Authority of Supreme Court Precedent." *Social Networks* 30: 16–30

Georgetown University Law Center Commencement Address. 2006.

Gibson, James L. 1989. "Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance." *Law and Society Review* 23: 469-496.

Gibson, James L. UNITED STATES SUPREME COURT JUDICIAL DATABASE, PHASE II: 1953-1993. ICPSR version. Houston, TX: University of Houston [producer], 1996. Inter-university Consortium for Political and Social Research, Ann Arbor, MI [distributor], 1997. http://doi.org/10.3886/ICPSR06987.v1

Greenhouse, Linda. 1990. "A Divided Supreme Court Ends the Term with a Bang." *New York Times*, July 1, 1990 p. E3.

Guimerà, Roger and Marta Sales-Pardo. 2011."Justice Blocks and Predictability of U.S. Supreme Court Votes." *PloS ONE* 6: 6- 11.

Hale, F. Dennis. 1990. *Editorial Coverage of Reagan Supreme Court Nominees.* Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (72nd, Washington, DC, August 10-13, 1990).

Hand, Learned. 1958. *The Bill of Rights*. New York: Atheneum, 1958.

Harvard Law Review. November 1953-1969: Statistical Table I Unanimity.

Hensley, Thomas R., Christopher E. Smith and Joyce A. Baugh. 1996. *The Changing Supreme Court: Constitutional Rights and Liberties*.1st edition. Wadsworth Publishing Company.

Jeffries, John C. Jr. 1994. *Justice Lewis F. Powell, Jr.* New York: Charles Scribner's Sons.

Klarman, Michael J. 2004. *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*. New York: Oxford University Press.

Knight, Jack and Lee Epstein. 1996. "The Norm of Stare Decisis." *American Journal of Political Science* 40: 1018-1035.

Lauderdale, Benjamin E. and Tom S. Clark. 2012. "The Supreme Court's Many Median Justices." *American Political Science Review* 106: 847-866.

Lewis, Anthony. 1960. "Supreme Court Balance of Power Often Held by Clark and Stewart." *New York Times*, July 4, 1960 P. 1.

Lewis, David and Roger P. Rose. 2014. "Case Salience and the Attitudinal Model: An Analysis of ordered and Unanimous Votes on the Rehnquist Court." *The Justice System Journal* 35: 27-44.

Maltzman, Forrest and Paul J. Wahlbeck. 1996. "May it please the chief? Opinion assignments in the Rehnquist Court." *American Journal of Political Science* 40: 421.

Mapp v. *Ohio*. 1961. 367 U.S. 643.

McLaurin v. *Oklahoma*. 1950. 339 U.S. 637.

Miceli, Thomas J. and Metin M.Cosgel. 1994. "Reputation and Judicial Decision-making." *Journal of Economic Behavior and Organization* 23: 31-51.

Mishler, William and Reginald S. Sheehan. 1996. "Public opinion, the Attitudinal Model and Supreme Court Decision Making: a Micro-analytic Perspective." *The Journal of Politics* 58: 169-200.

Missouri ex. Rel. Gaines v. *Canada*. 1938. 305 U.S. 337.

Murphy, Walter F. 1973. *Elements of the Judicial Strategy.* Chicago, IL: University of Chicago Press.

Newton, Jim. 2007. "*Justice For All: Earl Warren and the Nation He Made.*" Riverhead Books.

O'Brien, David. 1996. *Storm Center: The Supreme Court in American Politics*. New York: W.W. Norton and Company.

Pacelle, Richard L. Jr., Brett W. Curry, and Bryan W. Marshall. 2011. *Decision Making by the Modern Supreme Court*. Cambridge, MA: Cambridge University Press.

Powe, Lucas A. Jr. 2000. *The Warren Court and American Politics*. Cambridge: The Belknap Press of Harvard.

Richards, Mark J. and Herbert M. Kritzer. 2002. "Jurisprudential regimes in Supreme Court decision making." *American Political Science Review* 96: 305-309.

Roe v. *Wade*. 1973. 410 U.S. 113.

Rohde, David W. 1972. "Policy Goals and Opinion Coalitions in the Supreme Court," *Midwest Journal of Political Science* 16: 208-224.

Savage, David., ed. 2011. *Guide to the U.S. Supreme Court, 5th ed.* Washington, D.C: CQ Press. Doi: http://dx.doi.org/10.4135/9781483300559

Schmidt, Patrick D. and David A. Yalof. 2004. "The Swing Voter Revisited: Justice Anthony Kennedy and the First Amendment Right of Free Speech." *Political Research Quarterly* 57.

Schubert, Glendon A. 1965. *The Judicial Mind: the attitudes and ideologies of Supreme Court Justices,1946-1963*. Evanston, Ill.: Northwestern University Press.

Schultz, William, B., and Philip K. Howard. 1975. "The Myth of Swing Voting: An Analysis of Voting Patterns on the Supreme Court." *New York University Law Review* 50: 798-868.

Schwartz, Bernard. 1990. "The Burger Court in Action" In *The Ascent of Pragmatism*. Oxford University Press.

Schwartz, Bernard. 1993. *A History of the Supreme Court*. Oxford: Oxford University Press.

Segal, Jeffrey A. and Robert M. Howard. 2001. "How Supreme Court Justices Respond to Litigant Requests to Overturn Precedent." *Judicature* 85: 148-157.

Segal, Jeffrey and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. New York: Cambridge University Press.

Sipuel v. *Oklahoma State Regents*. 1948. 332 U.S. 631.

Spaeth, Harold J. 1963. "Warren Court Attitudes Toward Business: The "B" Scale." In *Judicial Decision-Making* ed. Glendon Schubert, 89. New York: Free Press.

Spaeth, Harold J., Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, and Sara C. Benesh. 2015 Supreme Court Database, Version 2015 Release 01. URL: http://Supremecourtdatabase.org

Spaeth, Harold J. and Jeffrey Segal. 1999. *Majority rule or minority will: Adherence to precedent on the U.S. Supreme Court.* Cambridge, MA: Cambridge University Press.

Stanford Law Review. 1949. "Mr. Justice Reed. Swing Man or Not?" Vol. 1, No. 4 (Jun., 1949), pp. 714-729.

Sweatt v. *Painter*. 1950. 339 U.S. 629.

Tushnet, Mark V. 1993. *The Warren Court in Political and Historical Perspective*. Richmond: University Press of Virginia.

Unah, Isaac and Ange-Marie Hancock. 2006. "Supreme Court Decision Making, Case Salience, and the Attitudinal Model." *Law & Policy* 28: 295-320.

United States Reports. vol. 1, 1754-vol. 528, 1998.

United States Supreme Court Reports, Lawyers' Edition. vol 1, 1790-vol. 186, 2013.

Urofsky, Melvin I. 2001. *The Warren Court: Justices, Rulings, and Legacy*. Washington, D.C.: ABC-CLIO, Inc.

Walhbeck, Paul, James Spriggs, and Forrest Maltzman. 1998. "Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court." *American Journal of Political Science*, 294-315.

Whittington, Keith E. 2005. "The Burger Court, 1969-1986: Once More in Transition." In *The United States Supreme Court: The Pursuit of Justice* ed. Christopher Tomlins, 300-302. Boston: Houghton Mifflin.

Wirtz v. *Hotel Employees.* 1968. 391 U.S. 492.

Wohl, Alexander. 2011. "Mapp v. Ohio Turns 50: If a Moderate Texan Could Love the Exclusionary Rule, Why Can't Judicial Conservatives?" *Slate,* 1-2.

Yarbrough, Tinsley E. 1991. "Justice Potter Stewart: Decisional Patterns in Search of Doctrinal Moorings." In *The Burger Court: Political and Judicial Profiles*, eds., Charles M. Lamb and Stephen C. Halpern, 375-406. Urbana: University of Illinois Press.

Yarbrough, Tinsley E. 1992. *John Marshall Harlan: Great Dissenter of the Warren Court*. New York: Oxford University Press.

Yung, Corey R. 2010. "Judges by the Company You keep: An Empirical Study of the Ideologies of Judges on the United States Courts of Appeals." *Boston College Law Review* 51: 1133-1207.