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CHIEF JUSTICE ROBERTS AND THE SALIENCE OF ISSUES BEFORE THE
MODERN SUPREME COURT

by
Anna Lee Whisenant

A thesis submitted to the faculty of The University of Mississippi in partial fulfillment of
the requirements of the Sally McDonnell Barksdale Honors College.

Oxford
May 2016

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ABSTRACT

ANNA LEE WHISENANT: Chief Justice Roberts and the Salience of Issues Before the
Modern Supreme Court

(Under the direction of Douglas Rice)

This thesis studies whether the Roberts Court has been hearing more important issues than the Warren, Burger or Rehnquist Courts. I operationalize important issues as pre-decision salience and measure mentions of cases in the first section of two newspapers. The research shows that the Roberts Court has been hearing more important issues than the other modern Courts. I reason that the Roberts Court has been hearing more important issues because interest groups and individuals are turning to the Court to make policy. Because the Court is becoming a more important policymaking institution, scrutiny of the Supreme Court will increase.

TABLE OF CONTENTS

LIST OF TABLES.....	iv
CHAPTER I: INTRODUCTION.....	1
CHAPTER II: LITERATURE REVIEW.....	5
CHAPTER III: INTRODUCTION TO THE RESEARCH.....	19
CHAPTER IV: RESULTS.....	22
CHAPTER V: CONCLUSION.....	62
BIBLIOGRAPHY.....	68

LIST OF TABLES AND FIGURES

Figure 1 Median Saliency by Term.....23

Figure 2 Mean Saliency by Term.....25

Figure 3 Median Saliency by Term, Close Cases.....52

Table 1 Median Saliency by Chief.....24

Table 2 Mean Saliency by Chief.....27

Table 3 Median Saliency of Cases by Issue Area, by Court.....30

Table 4 Median Saliency by Chief, Close Cases.....51

Table 5 Percent of Cases Overturning Laws, by Chief.....54

Table 6 Median Saliency of Cases Overturning Laws, by Chief.....55

Table 7 Percent of Cases Reversing the Court’s Own Precedents, by Chief.....57

Table 8 Median Saliency of Cases Reversing the Court’s Own Precedent.....58

Table 9 Median Saliency of Ideological Leaning, by Chief.....60

I. Introduction

In the summer of 2015, Republican Presidential candidate Senator Ted Cruz called for a constitutional amendment that “would subject each and every justice of the United States Supreme Court to periodic judicial retention elections.”¹ Cruz’s call for judicial retention elections came just after two major Supreme Court decisions: *King v. Burwell* and *Obergefell v. Hodges*. In both cases, the Roberts Court handed down liberal decisions. In *King v. Burwell* the Court ruled that, pursuant to the language in the Patient Protection and Affordable Care Act, healthcare exchanges could be established both by states and by the federal government. Had the Court ruled that the language of the law did not allow the federal government to set up these exchanges, they would have effectively ended the Affordable Care Act. In *Obergefell v. Hodges* the Court ruled that the due process and equal protection clauses of the 14th Amendment to the Constitution guarantee same-sex couples the right to marry.

Cruz argued that the Court “has now forced the disaster of a health-care law called Obamacare on the American people and attempted to redefine an institution that was ordained by God.”² He called for justices to face judicial retention elections every eight years in order to hold the justices accountable to the people and to restore respect for the rule of law within courts. Cruz is a Harvard-trained constitutional lawyer that began his career clerking for Chief Justice William Rehnquist. He understands how the Court works and how it is changing. Cruz feels that, since his time clerking for Chief

¹ Cruz, Ted. "Constitutional Remedies to a Lawless Supreme Court." *National Review Online*. June 26, 2015. Accessed April 13, 2016.

² Zezima, Katie. "Ted Cruz Calls for Judicial Retention Elections for Supreme Court Justices." *Washington Post*, June 27, 2015. Accessed April 13, 2016.

Justice Rehnquist, the Court has started ruling on more important issues and has been engaging in “judicial tyranny.”³

In this thesis I examine the contention that the Roberts Court has been handling more important issues than did the other modern Courts: Warren, Burger and Rehnquist. On the one hand, the Roberts Court has decided a lot of cases that at least seem to be very important. *Obergefell v. Hodges* and *King v. Burwell* are just the most recent in a series of the Roberts Court’s seemingly important decisions. The Roberts Court has decided several cases challenging the Affordable Care Act: *NFIB v. Sebelius* (2012) and *Burwell v. Hobby Lobby* (2014). The Court overturned a provision of the Voting Rights Act in *Shelby County v. Holder* (2013). Even in 2010 the Roberts Court was making landmark decisions. In *Citizens United v. FEC* (2010), the Court greatly expanded the role of money in politics.

Though the Roberts Court has heard a lot of these important cases, it has not been making many “activist” decisions, especially when compared to the other modern Courts. The typical measures of a Court’s judicial activism are rates of overturning federal, state and local laws as unconstitutional and of altering the Supreme Court’s own precedent. Relative to other modern Courts, the Roberts Court has not been an “Activist Court.” The Warren Court overturned laws in 7.1% of the cases it decided, the Burger Court in 8.9% and the Rehnquist Court in 6.4%. By contrast, the Roberts Court overturned laws as unconstitutional in just 3.8% of the cases it decided.⁴ The Roberts Court is also not activist in overturning the Court’s own precedent, relative to the other modern Courts.

³ Cruz, Ted. "Constitutional Remedies to a Lawless Supreme Court." *National Review Online*. June 26, 2015. Accessed April 13, 2016.

⁴ Liptak, Adam. “How Activist Is the Supreme Court?” *New York Times*, October 12, 2013. Accessed January 26, 2016.

The Warren Court overturned the Supreme Court's own precedent in 2.4% of the cases it decided, the Burger Court in 2%, and the Rehnquist Court in 2.4%. The Roberts Court has only overturned the Court's own precedent in 1.7% of the cases it has decided. Though it is very uncommon for the Supreme Court to overturn its own precedent, the Roberts Court is doing so at a rate far lower than that of the Court under the leadership of any other modern Chief Justice.

Through my research I want to learn if the Roberts Court is hearing more important cases than other modern Courts. This will help reconcile the fact that the Roberts Court seems to have been making more important decisions with the fact that the Roberts Court has been less "activist" when it comes to overturning laws and the Court's own precedent. I am going to measure the importance of the issues coming before the Court in order to determine if the Roberts Court is hearing more salient cases than the Warren, Burger or Rehnquist Courts. For the purpose of this research, I operationalize importance as pre-decision salience to the media and the general public. I generate the pre-decision salience of a case by mentions in the first section of the *New York Times* and the *Washington Post*. This allows me to determine the median salience of the cases decided under the leadership of each Chief Justice. By comparing average salience from each of the modern Chiefs, I show that the Roberts Court has been deciding cases on more important issues than did the Supreme Court under the leadership under any of the other modern chief justices.

My paper begins with a literature review that contextualizes the modern Supreme Court. The literature review focuses first on the Roberts Court with a discussion of the ideological make up of the current Roberts Court and an explanation of how John Roberts

has handled his role as Chief Justice. The literature review then highlights some of the Roberts Court's landmark decisions on important issues and discusses how the Roberts Court has not been activist when compared with the modern Supreme Court under the leadership of other chief justices. Though most of the literature review focuses on contextualizing the Roberts Court, the end of the literature review focuses on the ideologies of and landmark cases from the Warren, Burger and Rehnquist Courts.

After the literature review, I introduce my research. I walk through the methods, explain why I chose the sources and definitions I did and explain limitations to the research. I then move into the results. I start off with the broadest results: the overall median and mean saliences. Both mean and median saliences can be used to measure the frequency with which a Court is taking on important issues. In this section I also explain why median salience offers the best measure for my research problem. The Roberts Court heard cases with a higher median salience than did cases heard by any of the other modern Courts. After the presentation of results, I move next to disaggregating median saliences of specific issue areas by Court. This shows what issue areas the different Chiefs were interested in and how that might have affected the median salience of their overall caseloads. I find a pattern. The Roberts Court is hearing the group of cases with the highest salience, followed by the Warren and Burger Courts and then the Rehnquist Court. Though there are a few exceptions to this pattern, an analysis of the issue areas does not show anything so apparent as to undercut the idea that the Roberts Court has been hearing more salient cases than did any of the other Courts.

After examining specific issue areas, I explain why I believe the Roberts Court has been hearing more salient cases than any other modern Court. More and more

interest groups are turning to the Court to make policy when the other institutions cannot or will not act to further their interests. This strategy was first emphasized during the Warren Court, but it has taken the past decades to align judicial and litigant strategy to allow the Supreme Court to be the policy-making institution it has become. I continue by offering corroborative support that this is why the Roberts Court is hearing more important cases than the Warren, Burger or Rehnquist Courts.

I begin the conclusion of my thesis by summarizing my findings, explaining limitations to my research, and identifying areas for future research on this topic. I end with a discussion of the implications of this research. Following the death of Justice Antonin Scalia in early 2016, there are a lot of eyes on the Supreme Court. The Court is known for being a powerful institution; however, this research shows that the Court today is playing more of a role on important issues than it ever has before as litigants seek to use the Court to push their policy agendas.

II. Literature Review

The Roberts Court – Makeup

John Roberts was appointed to the Supreme Court in 2005 to replace Chief Justice William Rehnquist, who Roberts had clerked for years before. Over the next ten years the composition of the Court, the agenda of the Court, and the decisions of the Court have changed. To understand whether the Roberts Court is tackling more important problems, it is important to first understand more about the Roberts Court.

The Roberts Court is made up of Chief Justice Roberts and eight associate justices: Antonin Scalia, Anthony Kennedy, Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer, Samuel Alito, Sonia Sotomayor and Elena Kagan. This, however, has

not always been the composition of the Roberts Court. Three new justices: Alito, Sotomayor and Kagan, have been appointed since Roberts began his role as Chief Justice. In 2006, Alito, a steadfast conservative, replaced the more moderate swing vote, Sandra Day O'Connor. Sotomayor replaced David Souter in 2009, and Kagan replaced John Paul Stevens in 2010. Neither of the two most recent appointments made a major difference in the overall ideological make up of the Court because Souter and Stevens were both reliably liberal, as are Sotomayor and Kagan.

Alito's replacing O'Connor, however, did affect the make-up of the Roberts Court in several ways. The Court lost a woman's vote, shifted more reliably to the right and got a new swing vote. Justice Kennedy, who had already been on the court for 21 years, became the swing vote upon O'Connor's retirement. Though they both fall ideologically in between the other eight justices, Kennedy and O'Connor are ideologically different. O'Connor tended to vote around the "center left" while Kennedy tends to vote around the "center right".⁵ O'Connor's retirement shifted the court further to the right than just the appointment of Alito.

The justices' can be classified into ideological groups using Segal-Cover and Martin-Quinn scores. Segal-Cover scores use newspaper editorials to measure Supreme Court nominees' qualifications and ideology. The Ideology Score is on a scale of 0-1 from most conservative to least conservative. The justices can be ranked from most conservative to most liberal using Segal-Cover scores: Scalia (.000), Alito (.100), Roberts

⁵ Adam Liptak, "Court Under Roberts Is Most Conservative in Decades," *New York Times* (July 2010).

(.120), Thomas (.160), Kennedy (.365), Breyer (.475), Ginsburg (.680), Kagan (.730) and Sotomayor (.780).⁶

Martin-Quinn scores offer another tool for measuring justices' ideologies. Martin-Quinn scores are a one-dimensional measure from liberal to conservative. Liberal justices are represented with negative scores, and conservative justices are represented with positive scores.⁷ Justices Thomas, Scalia and Alito have all consistently scored above 1. Chief Justice Roberts started his tenure at about 1.5 but has leaned to the left and fallen slightly below 1 in recent years. Justice Kennedy, the swing justice, was scoring between 1 and 0 until 2013 when he fell into the negative range. Justices Breyer, Kagan, Ginsburg and Sotomayor all score between -1 and -3.⁸

Garrett Epps, Supreme Court correspondent at *The Atlantic*, classified the justices into three blocs that fit closely with the Segal-Cover Ideology and the Martin-Quinn scores: hard right, conservative and moderate-to-liberal. Justices Clarence Thomas, Antonin Scalia and Samuel Alito make up the hard right bloc; Chief Justice John Roberts and Justice Anthony Kennedy make up the conservative bloc; and Justices Stephen Breyer, Sonia Sotomayor, Elena Kagan and Ruth Bader Ginsburg make up the moderate-to-liberal bloc.

The Role of the Chief

When studying the Roberts Court, it is easy to think of the court as a single being personified in John Roberts. The Roberts Court, however, is so much more than just "the

⁶ "The Selling of Supreme Court Nominees." *Choice Reviews Online* 33.06 (2012): Stony Brook University.

⁷ Silver, Nate. "Supreme Court May Be Most Conservative in Modern History." *FiveThirtyEight*. New York Times, March 29, 2012. Accessed February 16, 2016.

⁸ Martin, Andrew D., and Kevin M. Quinn. "Martin-Quinn Scores : Measures." The University of California, Berkeley, School of Law.

Court.” It is the individual justices who work together or work against one another to make or keep changes from happening. Chief Justice Roberts says of his position: “I have the same vote as everybody else. I can’t fire them if they disagree with me. I can’t even dock their pay.”⁹

Though Roberts offered a humble description of his role, the Chief Justice does have important procedural duties that could affect the cases the Court decides to hear and the decisions the Court hands down. The Chief Justice is considered the most senior member of the Court and has a number of procedural powers. It is the role of the Chief to make the discuss list – the list of cases that will be discussed at long conference – and the dead list – the list of cases that will not be discussed at long conference. (Cases can move from the dead list to the discuss list if one Justice wants to do so.) The Chief sorts most of the 9,000 cases that petition for certiorari into the dead list and some of them onto the much shorter discuss list. By nature of his seniority, the Chief is the first to speak and vote at conference. Though these few procedural and administrative powers may not seem like much, they give the Chief unmatched influence on the cases that come before his or her Court.

Landmark Decisions of the Roberts Court

Because of these shifts, the Roberts Court, especially in its first five years, was understood by the public to be one of the most conservative Courts ever. The court as a whole was conservative, and so were the individual justices making up the court. Four of the six most conservative Justices since 1937 serve on the Roberts Court: Thomas, Scalia, Alito and Roberts. Kennedy, the swing vote, is the tenth most conservative justice

⁹ Liptak, Adam. "Roberts on Supreme Court's Changing Face (Beards Optional)." *New York Times*. November 23, 2015. Accessed January 28, 2016.

since 1937.¹⁰ In a 2007 interview, retired Justice John Paul Stevens spoke to the fact that the Court was shifting to the right. He said, “Including myself, every judge who’s been appointed to the court since Lewis Powell (appointed in 1971) has been more conservative than his or her predecessor. Except maybe Justice Ginsburg. That’s bound to have an effect on the court.”¹¹ It is important to remember that Stevens was consistently liberal and that he made these remarks before either Sotomayor or Kagan went through the appointment process.

An analysis of the Court’s overall trends from 2005-2010 show that, despite a handful of exceptions, the Roberts Court is “notably conservative”. Based on their decisions and votes, the Roberts Court is further right than both the Burger and Rehnquist Courts. From 2005-2010 the Roberts Court issued conservative decisions 58% of the time while the two Courts that immediately preceded it both issued conservative decisions 55% of the time. Not surprisingly, the Warren Court was much further to the left than any of the courts following, issuing conservative decisions just 34% of the time.¹²

Though the Roberts Court and the individual justices serving on the Court were so conservative from 2005-2010, there has been a change in the public’s perception of the Court in the last five years. Some of the court’s recent decisions on same-sex marriage (*Obergefell v. Hodges*, 2015; *US v. Windsor*, 2013), housing discrimination (*Texas Department of Housing and Community Affairs v. The Inclusive Communities project*,

¹⁰ Liptak, Adam. "Roberts on Supreme Court’s Changing Face (Beards Optional)." *New York Times*. November 23, 2015. Accessed January 28, 2016.

¹¹ Rosen, Jeffrey. "The Dissenter, Justice John Paul Stevens." *New York Times*, September 22, 2007. Accessed January 28, 2016.

¹² Liptak, Adam. "Court Under Roberts Is Most Conservative in Decades." *New York Times*. July 24, 2010. Accessed January 28, 2016.

Inc., 2015), and the Affordable Care Act (*NFIB v. Sebelius*, 2012; *King v. Burwell*, 2015) make it seem like the court is shifting to the left.

These few instances of liberal decisions oftentimes overshadow the many conservative rulings the Roberts Court has handed down over the past few years. The court ended the 2014 – 2015 term, the most liberal term of the Roberts Court, with conservative ruling on the death penalty (*Glossip v. Gross*) and a series of environmental cases. The justices seemed to have voted ideologically on these cases, with the justices in the hard-right and conservative blocs voting together against the justices in the moderate-to-liberal bloc. Throughout Roberts' tenure, the Court has consistently handed down conservative rulings on a number of important cases, even in the past 5 years. The Roberts Court has been conservative on campaign finance (*Citizens United v. FEC*, 2010), race discrimination (*Shelby County v. Holder*, 2013) and gun rights (*DC v. Heller*, 2008; *McDonald v. Chicago*, 2010).¹³

The Editorial Board at the *New York Times* argues that, despite the handful of liberal decisions over the last few years, the justices as a whole have not made a leftward shift. The *Times* argues that if these liberal decisions “reflect any particular trend, it is not a growing liberalism, but rather the failure of hard-line conservative activists trying to win in court what they have failed to achieve through legislation.”¹⁴ Conservative interest groups are increasingly turning to the courts to make policy in their failure when the legislative and executive branches will not do so. The policies the other branches are unwilling or unable to act on are being brought to the courts with the hope that the branch

¹³ Parlapiano, Alicia, Adam Liptak, and Jeremy Bowers. "The Roberts Court's Surprising Move Leftward." *New York Times*, January 22, 2015. Accessed February 1, 2016.

¹⁴ The Editorial Board. "The Activist Roberts Court, 10 Years In." *New York Times*, July 4, 2015. Accessed January 26, 2016.

free from outside control will address these issues that are often very far to the right and have already been addressed before.

In a discussion of the Roberts Court's ideological shift, it is important to remember that the court is the sum of nine justices, not just an individual being. If one justice shifts ideologically on just one issue it may seem like the entire court has shifted, especially if that ideological shift comes on a case that ends up with a 5-4 vote, cases that tend to get more attention, anyway. And sometimes these votes on major cases that seem like ideological shifts are actually just exceptions to their typical voting pattern. Justice Kennedy, the swing vote, plays jump rope with the line between conservatism and liberalism in his voting to the point that his voting pattern does not make sense on ideological grounds. "The transcendence-and-fulfillment Kennedy of *Obergefell* voted for Confederate flag license plates, judicial campaign-fund solicitation and lethal injection."¹⁵ While Kennedy, who won liberal audiences over with his rhetoric in the *Obergefell* decision, voted in the conservative bloc on so many of these important cases, Thomas, the most conservative justice to have served on the court in modern times voted in the liberal majority on the confederate license plate issue (however, his vote was for reasons of Constitutional interpretation rather than ideology).

Activism on the Roberts Court

The Roberts Court did not use the cases brought by the conservative interest groups as an opportunity to engage in judicial activism, but that may have more to do with the Roberts Court's tendency away from activist decisions rather than the actual

¹⁵ Epps, Garrett. "The New Divisions in the U.S. Supreme Court." *The Atlantic*. Atlantic Media Company, July 1, 2015. Accessed January 26, 2016.

cases themselves. Over the past ten years, the Roberts Court has not been activist in the traditional sense of the word though it may seem they have.

Justices Ginsburg and Scalia do not agree on much, but in 2013 they agreed that the Roberts Court was “guilty of judicial activism”; however, “if judicial activism is defined as the tendency to strike down laws, the court led by Chief Justice John G. Roberts is less activist than any court in the last 60 years.”¹⁶ In 2013, when Ginsburg and Scalia agreed on the Court’s activism, the public also perceived the court as activist.

This misconception by the public and even some of the justices is likely because of the attention being received by the court’s few activist decisions. In 2010 the Court struck down part of the Bipartisan Campaign Reform Act of 2002 in *Citizens United v. FEC*; in 2013 it struck down part of the Voting Rights Act in *Shelby County v. Holder* and the Defense of Marriage Act in *US v. Windsor*. These cases are all about important issues that the public generally cares about. These few cases are getting so much media attention because they are so salient.

These decisions, however, are exceptions to the Roberts Court’s tendency toward judicial restraint. The Warren Court (1953-1969) overturned federal, state and local laws almost twice as often as has the Roberts Court, and the Burger Court was even more activist. Though the Rehnquist Court was less activist than the two courts preceding it, it was more activist than the Roberts court has been. (Warren Court struck down laws in 7% of its cases; Burger was 9%; Rehnquist 6.4% and Roberts 4%.)

Though the Roberts Court is not necessarily activist in the traditional sense of overturning laws, there does seem to be “an element of politics in his rulings” (2013).

¹⁶ Liptak, Adam. “How Activist Is the Supreme Court?” *New York Times*, October 12, 2013. Accessed January 26, 2016.

Justice Ginsburg said, “we trust the democratic process, so the court is highly deferential to what Congress does”, but she went on to argue that some laws require special scrutiny. She referenced Footnote Four in the 1938 Supreme Court Decision *United States v. Carolene Products*, which holds that the court must be vigilant when fundamental rights are at stake.¹⁷

The Roberts Court is not meeting the traditional benchmarks for “activism” even though it seems like it is. My thesis research seeks to determine if the Roberts court is choosing to hear more salient cases, cases that are more important, in order to have more of an impact without necessarily being “activist” and overturning laws. Even though the Roberts Court is not activist, it could be having a bigger impact on policy than traditional measures pick up.

Preceding Courts: Warren, Burger and Rehnquist

Earl Warren served as chief justice of the United States Supreme Court from 1953 – 1969. The court produced many great decisions under Warren’s reign. There is no way to know how the court would have decided certain cases without the Warren’s leadership, but some of the court’s landmark decisions owe their being to Chief Justice Warren’s unwavering commitment to justice. “To Warren, the Supreme Court was a temple dedicated to justice.”¹⁸

Despite Warren’s leadership style and commitment to justice, some of the Warren Court’s signature decisions likely would have come to be without his leadership. *Brown v. Board of Education* (1954) was already in front of the court when Warren was

¹⁷ Liptak, Adam. “How Activist Is the Supreme Court?” *New York Times*, October 12, 2013. Accessed January 26, 2016.

¹⁸ Fortas, Abe. "Chief Justice Warren: The Enigma of Leadership." *The Yale Law Journal* 84.3 (1975): 405-12. *JSTOR [JSTOR]*.

appointed. The NAACP Legal Defense Fund had been laying the groundwork against the use of the “separate but equal” doctrine in education for years in a series of cases dealing with discrimination in higher education. Given the court’s unwillingness to accept the “separate but equal” principle in higher education discrimination cases such as *Sweatt v. Painter* (1950) and *McLaurin v. Oklahoma State Board of Regents* (1950), the court’s unanimous decision in *Brown* was to be expected.

The unanimous decision in *Gideon v. Wainwright* (1963), another of the Warren Court’s landmark cases, likely would have been reached on precedential grounds alone, regardless of Warren’s leadership. *Hamilton v. Alabama* (1961) held that defendants in capital cases had an undeniable right to counsel, which easily applied itself to the *Gideon* decision. What is interesting about *Gideon* is that a prisoner’s handwritten petition was granted certiorari. Unlike *Brown*, it would have been easy for the court to have ignored this petition. The Warren Court’s willingness to take on the tough issues that could easily have been ignored is one of their most important characteristics.

The Warren Court was willing not only to take on civil rights infringements but also to address issues of federalism. In *Baker v. Carr* (1962) and *Reynolds v. Sims* (1964), the Warren Court established the “one man, one vote” principle. They addressed an issue that could have been considered non-justiciable because of its political nature, but Warren saw that basic right to suffrage was being infringed upon and his court stepped in.

In *Mapp v. Ohio* (1961) the Warren Court took a liberal stance on criminal law and established the exclusionary rule. The six justices in the majority thought such a rule to be the only way to ensure law enforcement respected the Fourth Amendment’s

protections against unreasonable search and seizure. *Miranda v. Arizona* (1966) was another of the Warren Court's triumphs in the area of criminal law. The Warren Court established the right to privacy in *Griswold v. Connecticut* (1965). The Court derived this right to privacy from the penumbras of the Constitution. Though *Griswold* dealt with contraceptives and a woman's right to privacy around reproduction, the right to privacy can be applied to so many different legal areas. *Griswold* is also an especially noteworthy decision because it laid the groundwork for *Roe v. Wade*, which was decided by the Burger Court eight years later in 1973. These decisions were rooted in constitutional interpretation rather than precedent and show the Warren Court's willingness to step off the path of precedent and make decisions necessary to ensure justice.

The Warren Court is the most liberal of the recent courts. The other courts being studied issued conservative decisions almost 60% of the time, but the Warren Court issued conservative opinions just 34% of the time.¹⁹ In addition to being relatively far to the left, the Warren Court was also willing to exercise judicial activism. Justices on the Warren Court struck down federal, state and local laws in 7% of its cases.²⁰

The Warren Court's consistent defense of the Constitution and pursuit would not have happened without the leadership of Chief Justice Warren.

He provided an essence, an attitude, which set the tone and quality of the Court's work. In a sense, he was a simple man. His constant question was: Is this right or wrong? His answer was always firmly rooted in a

¹⁹ Liptak, Adam. "Court Under Roberts Is Most Conservative in Decades." *New York Times*. July 24, 2010. Accessed January 28, 2016.

²⁰ Liptak, Adam. "How Activist Is the Supreme Court?" *New York Times*, October 12, 2013. Accessed January 26, 2016.

profound sense of justice and human dignity, and in a simple and uncomplicated conception of the essential, noble meaning of our Constitution's precepts.²¹

Warren's time on the Court, much like the Supreme Court building, itself, is a great reminder that the court's sole duty is to seek "equal justice for all."

Upon Chief Justice Warren's retirement in 1969, Warren Burger was named Chief Justice. Burger served as Chief Justice for the United States Supreme Court from 1969 – 1986. Throughout his tenure as chief, it was not uncommon for a case to go undecided at the end of a term simply because he had failed to get a decent opinion from one of his colleagues. Linda Greenhouse references *INS v. Chadha* (1982) as "the most egregious example of this phenomenon."²² Heard in the 1982 term, *Chadha* was not decided until 1983. Burger was unsure of how to decide the case. Legally speaking, the legislative veto was a violation of separation of powers, but Burger was concerned about the practical implications of such a decision. He never assigned the opinion. Supreme Court scholars consider Burger's behavior in the *Chadha* case "an astonishing failure of leadership."²³

Burger always wanted to dominate the opinion assignment process. Chief Justices get to assign the opinion if they are in the majority. Burger would often withhold his vote in order to control opinion assignment. A review of former justice Harry

²¹ Fortas, Abe. "Chief Justice Warren: The Enigma of Leadership." *The Yale Law Journal* 84.3 (1975): 405-12. *JSTOR [JSTOR]*.

²² Greenhouse, Linda. "How Not to Be Chief Justice: The Apprenticeship of William H. Rehnquist." *University of Pennsylvania Law Review* 154.6 (2006): 1365-372. *JSTOR [JSTOR]*.

²³ Greenhouse, Linda. "How Not to Be Chief Justice: The Apprenticeship of William H. Rehnquist." *University of Pennsylvania Law Review* 154.6 (2006): 1365-372. *JSTOR [JSTOR]*.

Blackmun's papers suggests that Blackmun suspected Burger of voting in the majority in order to assign the opinion with the intention eventually to abandon his majority vote.

The Burger Court, much like the Warren Court before, was activist. The Burger Court overturned federal, state and local laws in 9% of the decisions it handed down.²⁴ The Court shifted to the right under Burger's leadership and issued conservative decisions 55% of the time.²⁵ The Burger Court ruled the death penalty as it was being applied by the state of Georgia unconstitutional in 1972 (*Furman v. Georgia*) but allowed the death penalty with more narrow restrictions just four years later (*Gregg v. Georgia*). The Court ruled, following in line with the Warren Court's decision in *Brown*, that busing was an appropriate method by which to integrate schools (*Swann v. Charlotte-Mecklenburg Board of Education*, 1971).

The decisions in *Furman* and *Swann* were notably liberal and broke from the Burger Court's typical conservatism; however, the Burger Court's most notable decision came in 1973. In *Roe v. Wade*, the Court held that women's constitutional right to privacy extended their decision to have an abortion. Though the Burger Court is remembered as a conservative Court, *Roe v. Wade* set an incredibly liberal precedent that is still at issue today. The decision in *Roe* was so liberal, in fact, that Justice Ginsburg has criticized the *Roe* decision for going too far too fast.²⁶ Warren Burger left the Court much more conservative than when he joined, but his Court also left all of the lower courts with an incredibly liberal precedent in *Roe*.

²⁴ Liptak, Adam. "How Activist Is the Supreme Court?" *New York Times*, October 12, 2013. Accessed January 26, 2016.

²⁵ Liptak, Adam. "Court Under Roberts Is Most Conservative in Decades." *New York Times*. July 24, 2010. Accessed January 28, 2016.

²⁶ Muller, Sarah. "Liberal Justice Ruth Bader Ginsburg Says *Roe v. Wade* Went Too Far." *Msnbc.com*. NBC News Digital, October 2, 2013. Accessed February 17, 2016.

When Chief Justice Burger retired in 1986, associate Justice William Rehnquist was named Chief Justice and served until 2005. Before moving up to the role of chief, Rehnquist served as an associate justice on the Burger Court for fourteen years. Serving under Chief Justice Burger for fourteen years seems to have affected his leadership style. He was everything Burger was not. Burger questioned the implications of his decisions and even described himself as “fragile”. Rehnquist worried much less about what people thought of him. Greenhouse argues that “Rehnquist took Burger as a negative model, and that his apprenticeship – which, needless to say, has only become an apprenticeship in retrospect – helped him learn how *not* to be Chief Justice.”²⁷

Rehnquist was often irritated with Burger’s leadership style. Burger’s long conference hearings, where the justices review petitions for certiorari, would last upwards of a week whereas Rehnquist tried to finish long conference in less than a workday. Upon his death in 2005, Justice Ginsburg called Chief Justice Rehnquist “the fairest, most efficient boss I have ever had.” Rehnquist was fair in opinion assignment. He tallied the votes and assigned the opinion if he was in the majority, but left it to the senior-most justice in the majority if not.

The Rehnquist Court continued the Burger Court’s shift to the right by handing down conservative opinions 55% of the time²⁸, but they only overturned laws in 6.4% of their cases.²⁹ One of the most important cases the Rehnquist Court heard was *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), a challenge to restrictions

²⁷ Greenhouse, Linda. "How Not to Be Chief Justice: The Apprenticeship of William H. Rehnquist." *University of Pennsylvania Law Review* 154.6 (2006): 1365-372. *JSTOR [JSTOR]*.

²⁸ Liptak, Adam. "Court Under Roberts Is Most Conservative in Decades." *New York Times*. July 24, 2010. Accessed January 28, 2016.

²⁹ Liptak, Adam. "How Activist Is the Supreme Court?" *New York Times*, October 12, 2013. Accessed January 26, 2016.

women were facing when attempting to get an abortion. The *Roe* precedent applied to this case, and this conservative Court was given the opportunity to overturn one of the most liberal precedents of the modern court. Chief Justice Rehnquist was in an interesting position: he had been one of just two dissenters in *Roe*. *Planned Parenthood* established the undue burden standard of scrutiny for a woman's right to an abortion, somewhat of a win for the conservatives and somewhat of a save for abortion-rights activists. The *Planned Parenthood* decision was interesting, but all in all, the Rehnquist Court was consistently conservative and did not tend to overturn decisions.

III. Introduction to the Research

The goal of my research is to determine whether the Roberts Court has been hearing more important issues than the three Courts immediately preceding it. I hypothesize that the Roberts Court has been hearing more salient cases than the Warren, Burger and Rehnquist Courts because interest groups are bringing more important issues to the Roberts Court than were brought to any other Court, and because there is a solid group of justices on the Court that, depending on the issue and expected ruling on the case, are going to be strategically receptive to this.

In order to test which Courts have been hearing more salient cases, it is important to define salience. This is particularly challenging.³⁰ For the purposes of this research specifically, I operationalize importance as pre-decision salience to the media and to the general public. If the justices want to take on more important cases, then they are going to take on cases that the general public views as important.

³⁰ Clark, Tom S., Jeffrey R. Lax, and Douglas Rice. "Measuring the Political Salience of Supreme Court Cases." *Journal of Law and Courts* 3.1 (2015): 37-65.

Media coverage is currently the dominant indicator of case salience. Epstein and Segal pioneered this approach in 2000 when they argued that coverage on the front page of the *New York Times* was a good measure of a case's salience.³¹ For the purpose of this thesis, I will be using coverage in the first section of the *New York Times* and the *Washington Post* to measure case salience. Gathering data from the *New York Times* and the *Washington Post* offers diversity in hopes of generating a truer salience measure. The *New York Times* is one of the most renowned national papers, and the *Washington Post* has an interesting focus on politics that makes front-page coverage of Court cases more likely. Using these newspapers is also beneficial because of their ideological biases. The *New York Times* is known to have a liberal bias, and the *Washington Post* is known to have a conservative bias. Analyzing both newspapers helps to ensure that there will not be an ideological bias in the articles being studied.

There are certainly some limitations to this measure. Coverage in the first section of either of these newspapers is very selective and dependent on a number of factors other than just salience. Other newsworthy events could take first section coverage away from a case that would otherwise be salient enough to have appeared in the first section. Gathering data from multiple newspapers attempts to address this limitation. Using articles from the entire first section rather than just the front page of these newspapers for data collection purposes is another attempt to combat the issue of limited space. Space is obviously much more limited on the front page than it is in the entire first section.

Using coverage in the first section of these newspapers as a measure of salience also assumes that issues that are important to the general public, and, therefore, the media

³¹ Epstein, Lee, and Jeffrey A. Segal. 2000. "Measuring Issue Salience." *American Journal of Political Science*.

are also important to the justices. However, this concern is addressed by the hypothesis that the justices want to take on cases that the public sees as important because those are the issues that can make the Court more important.

To gather the data, I used the search engine Lexis-Nexis to search both the *Washington Post* and the *New York Times* for instances of articles that mention the phrase “Supreme Court” and appear in the first section of the newspaper. An automated reader program then analyzes the articles collected for mentions of specific cases and matches the articles to specific cases. Then the articles are sorted based on oral argument and decision dates of the case or cases it mentions. The articles are sorted in to one of four categories of coverage: (1) early coverage, articles published up to a week before the oral arguments; (2) argument coverage, articles published either one week before or one week after oral arguments; (3) pending coverage, articles published one week after oral arguments and before the decision is handed down; and (4) decision coverage, articles published after the decision is handed down through a year after the decision is handed down.

Something to consider when analyzing the data is that the software analyzes the newspaper articles for specific mentions of the cases and misses any unspecific references to the cases. For instance, an article from 2015 about the “same-sex marriage” case in front of the Supreme Court that does not specifically name *Obergefell v. Hodges* would not add to the salience of *Obergefell*. This could make salience numbers for some cases lower than they actually would be if these “unnamed mentions” counted to their salience. This could explain the surprisingly low salience for cases like *Obergefell v. Hodges* (-1.270), *U.S. v. Windsor* (-2.328) and *NFIB v. Sebelius* (-1.586).

IV. Results

The goal of my research is to find whether the Roberts Court has been hearing more salient cases than the other modern Courts: Warren, Burger and Rehnquist. I hypothesized that the Roberts Court has been hearing more salient cases. Review of the data shows that the Roberts Court has heard cases with a higher median salience than the Warren, Burger or Rehnquist Courts.

Median Salience

This graph (Figure 1) shows the median salience by year of the cases the Court heard from 1955 to 2014. The y-axis shows Median Salience and the x-axis shows the October Term. Each point on the plot represents the median salience of all of the cases the Court heard in a year. Supreme Court terms last from the first Monday in October through the next June. October Term denotes the year immediately before the year in which the Court handed down the decision on a case. *Obergefell v. Hodges*, for instance, was decided in June of 2015, so the October Term for that case would be 2014. The October Term is not necessarily the year the Court decided to grant certiorari to a case because certiorari can be granted throughout the Court's term, not just at the beginning, and, for some cases, the Court cannot reach a decision by the end of a term, so they carry over to the next term. The dashed gray lines separate the four Courts being studied: Warren, Burger, Rehnquist and Roberts; these lines fall on the years in which there was a change in Chief: 1969, 1986 and 2005.

Median Salience by Term

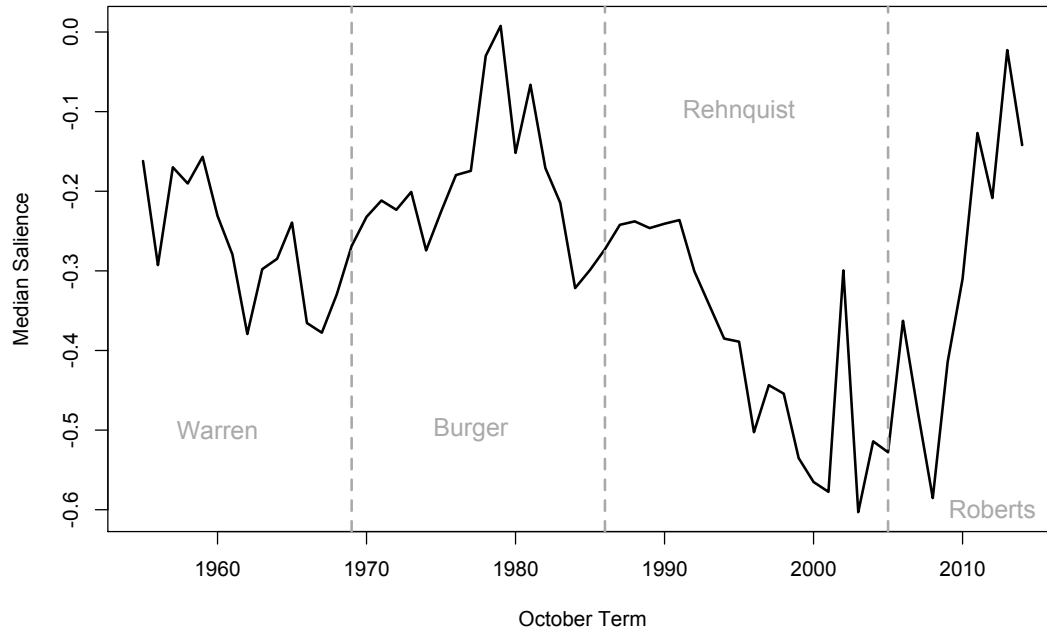


Figure 1. Median salience by October Term: median salience of the cases decided each October Term (1955-2014).

Figure 1 provides a visual depiction of the changes in the salience of the cases the Court has been taking on. The Warren and Burger Courts pretty consistently took on salient cases, but, when Rehnquist was promoted to Chief, there is a clear drop-off in median salience. In its first few years, the Roberts court, much like the Rehnquist Court, was not hearing many salient cases. However, right around 2008, there is a huge jump in the median salience of the cases the Court was hearing, and that increase was not just a one-year occurrence. Since that jump, the salience of the cases the Roberts Court has been hearing has consistently been higher than was the median salience of the cases the Roberts Court heard in its first three years.

Median Saliency by Chief³²

Court	Median Saliency
Warren	0.043
Burger	0.059
Rehnquist	0
Roberts	0.089

Table 1. Median saliency by Chief Justice: median saliency of the cases decided under the leadership of each modern Chief Justice (Warren, Burger, Rehnquist and Roberts).

The table above shows the median saliency for each Court. The median saliency for a Court is the median of the saliency of each of the cases heard under the leadership of that Chief Justice. The Roberts Court heard cases with a much higher median saliency than did any of the preceding Courts. The Rehnquist Court, the Court immediately before the Roberts Court, heard cases with a median saliency far lower than that of the cases heard by any of the other Courts. The median saliency of cases heard by the Warren Court and the median saliency of the cases heard by the Burger Courts were very close and fell between the median saliency of the cases heard by the Rehnquist and the cases heard by the Roberts Court.

Mean Saliency

Figure 1 and Table 1 show measures of median saliency by October Term and by Court, respectively. The mean saliency can also be measured for each Court and each term. Below, Figure 2 shows the mean saliency of the cases decided by the Court each term from 1955 to 2015. The y-axis shows Mean Saliency and the x-axis shows the October Term in which the case was handed down. The October Term is the year in which the term in which a decision is handed down began. The dashed gray lines

³² All values are standardized by setting Chief Justice Rehnquist's values to zero.

separate the four Courts being studied: Warren, Burger, Rehnquist and Roberts; these lines fall on the years in which there was a change in Chief: 1969, 1986 and 2005.

Mean Salience by Term

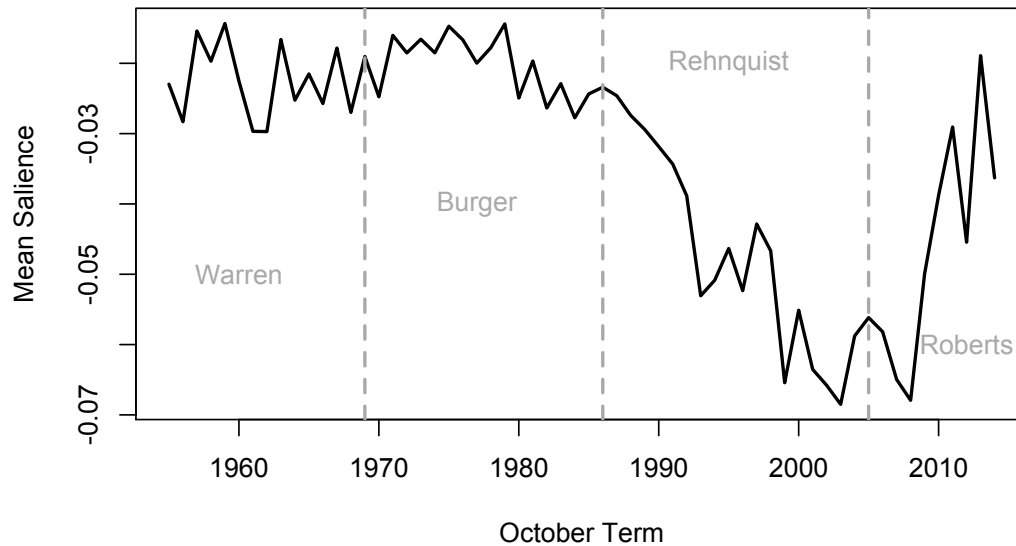


Figure 2. Mean salience by October Term: mean salience of the cases decided each October Term (1955-2014).

This graph (Figure 2) shows the mean salience of the cases decided by the Court each term from 1955 to 2015. The y-axis shows Mean Salience and the x-axis shows the October Term in which the case was handed down. The October Term is the year in which the term in which a decision is handed down began. The dashed gray lines separate the four Courts being studied: Warren, Burger, Rehnquist and Roberts; these lines fall on the years in which there was a change in Chief: 1969, 1986 and 2005.

Figure 2 gives provides a visual depiction of how the mean salience of cases the Court decides has changed by year and follows a similar pattern as the Median Salience by Year graph. When the Court's median salience went up, the mean salience typically

went up, as well. In the early 1990s, when there was a sharp drop off in the median salience of cases the Rehnquist Court, there is also a sharp drop off in the mean salience. The Warren and Burger Courts are consistently toward the top of the graph; there may be a slight variance in salience by year, but the Warren and Burger courts were hearing cases that were, on average, more salient. When Rehnquist took over as Chief Justice there was an immediate, sharp drop off in the mean salience of the cases the Court was deciding. The Rehnquist Court consistently heard cases that were, on average, less salient than any other Court. The first few years after the switch from Rehnquist to Roberts Court saw cases with low salience; however, in about 2008, there is a huge jump in the mean salience of the Court's cases, and the Roberts Court has consistently been hearing more salient cases, on average, since that jump.

It is important to note that the plots for median salience by year and mean salience by year follow the same pattern. The cases heard by the Warren and Burger Courts had consistently high median saliences and mean saliences. There is a sharp drop off in both median salience and mean salience in 1986, the year Rehnquist became Chief Justice, and the median and mean saliences are consistently low throughout the Rehnquist years. Both mean and median saliences are low in the first few years of the Roberts Court; however, there is a big increase around 2008 in both median salience and mean salience. The median and mean saliences by year are consistently high for the last few years of the Roberts Court.

Mean Salience by Chief

Court	Mean Salience
Warren	0.021
Burger	0.023
Rehnquist	0
Roberts	-0.004

Table 2. Mean salience by Chief Justice: mean salience of the cases decided under the leadership of each modern Chief Justice.

The table (Table 2) below shows the mean salience for each of the Courts (Warren, Burger, Rehnquist and Roberts). The mean salience for each Court finds the mean of the salience for each case a Court decided. The mean salience for the Warren Court and for the Burger Court is much higher than the mean saliences for the Rehnquist Court and for the Roberts Court. The Burger Court has the highest mean salience while the Roberts Court has the lowest. The mean saliences for all of the Courts are all much higher than the median saliences. The cases the Warren Court heard, for instance, have a median salience of -0.222 and a mean salience of -0.022. The increase from median salience to mean salience was about the same for each of the Courts.

Mean v. Median

It makes sense that there is such a difference in the mean and median of the saliences for each of the Courts. The median of a group of numbers is calculated by ordering the entire set of numbers from smallest to largest and picking the number that falls in the middle; the mean of a group of numbers is calculated by finding the sum of the entire set of numbers and dividing the sum by the number of numbers. Outliers affect the mean of a set of numbers; this is why the mean salience is higher than median salience for each of the courts. It is unlikely that there are going to be any outliers on the low end of a salience. There are a lot of cases every year that the Court decides that get

almost no media coverage and probably not any media coverage in the first section of the paper. There are, however, a few cases that get a lot of coverage from before they are granted cert through after the Court hands down their decision. These cases are outliers, their coverage is atypical of most of the cases the Court is hearing, and they make a Court's mean salience a lot higher than that same Court's median salience. Studying mean salience does not provide an accurate reflection of the work the Court is doing.

For the purpose of this research, I am interested in the totality of the work each Court has done. Studying the median salience of a Court's cases provides us with a better picture of the work the Court is actually doing. The purpose of this research is to find out whether the Roberts Court is hearing more salient cases. In asking this question, I wanted to know about all of the cases the Roberts Court was deciding, not just a few. Median salience is the best measure for this research. Studying median salience by Court and by year allows me to see if a Court has been taking on more salient caseloads and not just focus on if a Court has been hearing one or two more salient cases. Using mean salience as the measure would skew for a few very important cases regardless of the salience of the caseload as a whole. I believe that it is important to measure the salience of the caseload as a whole in order to see what kind of cases a Court is taking on.

Another reason median salience is a useful measure is that it allows us to see the direction in which the Roberts Court is headed without being weighed down by the first few years. In Roberts' first few years as Chief, the Roberts Court was not taking on many salient cases; however, in the last eight years or so, the Roberts Court has been taking on increasingly salient cases. The mean salience of the cases the Roberts Court has heard since 2005 is much lower than the mean salience for any of the other Courts,

especially the Warren and Burger Courts. But as Figures 1 and 2 shows us, there has been a recent jump in the salience of cases the Roberts Court has been hearing. Studying the median salience of the cases the Court has heard since 1955 is the most effective way to answer my research question and find out if (and guess at why) the Roberts Court has been deciding more salient cases than the Warren, Rehnquist and Burger Courts.

Issue Areas

One way to better understand the decisions the Court is making and how important the cases that are being decided are is to study how salience of cases varies by issue area as the Chief Justice changes. Cases can be sorted into one of fourteen public policy issue groups: criminal procedure, civil rights, First Amendment, due process, privacy, attorneys, unions, economic activist, judicial power, federalism, interstate relations, federalism, interstate relations, federal taxation, miscellaneous and private action. Cases are divided into an issue area based on the Court's syllabus as to what issue the Court decided as coded by Harold Spaeth and his team in the Supreme Court Database project.³³ I found the median salience for each of these issue areas by Chief Justice.

³³Spaeth, Harold, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, and Sara C. Benesh. 2016 Supreme Court Database, Version 2015 Release 03. URL: <http://Supremecourtdatabase.org>

Median Salience of Cases by Issue Area, by Court

Chief	Median Salience
Criminal Procedure	
Warren	0.015
Burger	0.057
Rehnquist	0
Roberts	0.067
Civil Rights	
Warren	0.018
Burger	0.041
Rehnquist	0
Roberts	0.102
First Amendment	
Warren	-0.782
Burger	-0.724
Rehnquist	0
Roberts	0.235
Due Process	
Warren	0.005
Burger	0.054
Rehnquist	0
Roberts	0.059
Privacy	
Warren	-0.253
Burger	-1.015
Rehnquist	0
Roberts	-0.635
Unions	
Warren	0.114
Burger	0.076
Rehnquist	0
Roberts	0.158
Economic Activity	
Warren	0.145
Burger	0.134
Rehnquist	0
Roberts	0.117
Judicial Power	
Warren	0.184
Burger	0.217
Rehnquist	0
Roberts	0.184
Federalism	
Warren	0.039
Burger	0.006
Rehnquist	0
Roberts	0.034

Table 3. Median salience by Chief Justice and issue area: median salience of the cases as categorized into an issue area and decided under the leadership of each modern Chief Justice.

The first issue area studied is criminal procedure. Criminal procedure “encompasses the rights of the persons accused of crime, except for the due process rights of prisoners.”³⁴ Though the Warren Court has one of the lower median saliences for cases classified as the criminal procedure issue area, the Warren Court decided many of the notable cases in this issue area. In *Mapp v. Ohio* (1963), the Court held that any evidence gathered in violation of the “unreasonable searches and seizures” clause of the Fourth Amendment could not be used in state criminal prosecution. *Mapp* incorporated the exclusionary rule to all 50 states and was very salient: 6.186828. *Mapp* was over six points more salient than the median salience of the cases the Warren Court decided. In 1963 the Warren Court granted certiorari to Clarence Earl Gideon, a prisoner that wrote his petition in pencil on prison stationary. In the case of *Gideon v. Wainwright*, the Court incorporated the right to counsel. Now, states have to provide counsel to represent criminal defendants who cannot afford their own. Because a prisoner wrote the petition for *Gideon v. Wainwright*, it is not surprising that this case also had a salience well below the median for all of the cases in this issue area: -4.046. The Court held in *Miranda v. Arizona* (1966) that a defendant’s rights to consult with an attorney and against self-incrimination had to be made known to the defendant prior to custodial interrogation. The “Miranda Warning” is the very well known application of this case; however, the salience of *Miranda v. Arizona* from the decision to grant certiorari to a year after the decision is below the median salience of all of the cases the Warren Court heard: -2.679.

The Burger Court heard two cases dealing with the death penalty. The first case, *Furman v. Georgia* (1972) held that the death penalty was unconstitutional as it was

³⁴ Spaeth, Harold, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, and Sara C. Benesh. 2016 Supreme Court Database, Version 2015 Release 03.

being applied. Georgia rewrote their death penalty laws in response to the *Furman* decision, and the constitutionality of those laws was heard in *Gregg v. Georgia* (1974). The Burger Court held in *Gregg* that the death penalty, as applied, did not violate the Eighth Amendment protections against “cruel and unusual punishments”. Interestingly, *Furman* had a higher salience (-1.843) than did *Gregg* (-2.707). Both of these cases, however, fell below the median salience for criminal procedure cases heard by the Burger Court.

The Rehnquist Court did not hear any notable criminal procedure cases, and had the lowest median salience of all the Courts for the criminal salience cases it did hear. Most recently, the Roberts Court held in *Glossip v. Gross* (2014) that use of a certain drug concoction did not violate the Eighth Amendment. Unlike most of the other notable criminal procedure cases, *Glossip v. Gross* has a salience higher than the median salience of the other criminal procedure cases heard by the Roberts Court: 2.839.

The next issue area is civil rights. The Supreme Court Database defines civil rights as including “non-First Amendment freedom cases which pertain to classifications based on race, age, indigency, voting, residency, military or handicapped status, gender, and alienage.” The Roberts Court has the highest median salience of cases in this issue area. The Warren Court heard the group of civil rights cases with the lowest median salience of these four courts. This is somewhat surprising considering the Civil Rights movement happened while Warren was Chief Justice.

In *Swann v. Charlotte-Mecklenburg Board of Education* the Burger Court held that busing was an allowable remedy to school segregation. This case furthered the decision in *Brown v. Board* (1954) that school segregation was unconstitutional. Though

this case came to the Court because of the decision in the very notable *Brown, Swann* had a surprisingly low salience at -2.378. One of the most recent Civil Rights cases is *Shelby County v. Holder* (2013). The Roberts Court decided that Section 5 of the Voting Rights Act, which required certain states to get clearance from the federal government before making changes in voting laws, was unconstitutional. Though this case is noted as a landmark decision, it had a very low salience: -2.272. Despite the relatively low salience of these notable civil rights cases, the Burger and Roberts Courts heard the groups of cases with the highest median saliences.

The third issue area examines cases dealing with First Amendment issues. First Amendment issue includes any cases directly dealing with this constitutional amendment and cases involving the application of the First Amendment. There is a huge difference in the median salience between the two early Courts and the two later Courts. The First Amendment cases the Warren and Burger Courts heard had a pretty normal median salience relative to the median overall salience and median salience for other issue areas for other Courts. The First Amendment cases the Rehnquist and Roberts Courts heard had a very high median salience relative to the median salience of cases in other issue areas.

In *Texas v. Johnson* (1989) the Rehnquist Court ruled that actions are protected speech under the First Amendment. This case was not too salient, relatively: 1.511. In 2010 the Roberts Court ruled in *Citizens United v. FEC* that spending is an action that is also protected as speech under the First Amendment and that First Amendment protections extended to corporations. The impact of the *Citizens United* decision on campaigning has been huge, but the salience of the *Citizens United* decision, 2.321, was high but not as high as would be expected for such a dynamic decision.

The fourth issue area is due process. Due process cases classified as such are limited to non-criminal cases. The cases the Burger and Roberts Courts heard in the due process issue area had a higher median salience than did the cases heard by the Warren and Rehnquist Courts; however, median salience was consistently pretty low among the Courts.

The next issue area cases can be classified into is privacy. Privacy can be treated as a subset of civil rights, but, because of the frequency with which privacy cases arise, it is best as its own category. The main privacy cases that are going to be “salient” are probably going to be abortion cases; however, digital privacy could come to be an issue the Court will handle frequently. The median salience for all privacy cases is consistently high across all the Courts save the Burger Court. This is interesting because the Burger Court decided *Roe v. Wade*, which is probably the most notable privacy case the Supreme Court has ever heard.

In *Griswold v. Connecticut* (1965), the Warren Court ruled that there is a constitutionally protected right to privacy even though no such right is enumerated in the Constitution. This case had a relatively normal median salience of 1.467 and laid the groundwork for future privacy cases such as *Roe v. Wade*. In *Roe* (1973), the Burger Court decided that a woman’s right to privacy extends to her right to obtain an abortion. *Roe* is one of the most notable cases of the modern Court, but it is not as salient as one would expect considering its notoriety: 2.356. The Rehnquist Court reconsidered women’s right to an abortion in *Planned Parenthood v. Casey* (1992). The Court upheld a woman’s constitutional right to have an abortion, but moved away from the trimester framework established in *Roe*. Much like *Roe*, *Planned Parenthood* is a very notable

case with a somewhat “normal” salience” 2.788. These abortion cases are a good example of interest groups turning to the Court for policy change when other branches are unwilling or unable to move policy in the direction the interest group would like.

Not all of the privacy cases the Court has heard deal with abortion. In 2003, the Rehnquist Court struck down anti-sodomy laws in Texas and 13 other states with their decision in *Lawrence v. Texas*. This decision made same-sex sexual activity legal throughout the country; however, it was not too salient of a case: 1.657. Though the issue area of privacy as a whole has relatively high median saliences across the Courts, the individual saliences of notable privacy cases are not that high.

I now move to the issue area of attorneys. This issue area deals with attorney compensation and licensing and is proven not to be a very salient issue area. The median saliences of the cases heard in each issue area are consistently low despite changes in Chief Justice. The Burger and Roberts Court have the highest median saliences, followed closely by the Warren Court. The cases decided by the Rehnquist Court have the lowest median salience of all the Courts in the “Attorneys” issue area.

I now move to the issue area of unions. Cases are classified as the union issue area if they handle union activity. This can be classified with economic activity, but for these purposes they are included in their own category. The median salience of the cases decided under each of the Chiefs is inconsistent. The Roberts Court has the highest median salience by far for cases it decided in the Unions issue area. The cases decided by the Warren Court have a median salience about .04 below those decided by the Roberts Court; the cases decided by the Burger Court have a median salience about .04

below those decided by the Warren Court; and, again, the cases decided by the Rehnquist Court have a median salience well below those decided by any of the other Courts.

Economic activity is the next issue area studied. Economic activity is business related; it includes commercial torts and employee actions against their employers. Unions could be classified into this category; however, consistent with the Supreme Court Database, unions make up their own issue area. The median saliences of the cases decided by the Warren, Burger and Roberts Courts all fall right around -0.2. The median salience of the cases decided by the Rehnquist Court falls well below the median saliences of the cases decided during the tenure of the other three Chiefs. The Rehnquist Court consistently heard cases with a lower median salience than its modern counterparts, and that holds true for the economic activity issue area.

Judicial power, the ninth issue area, concentrates on the judiciary's own power. Because many of these cases have to do with federal and state court relationships, this could also be included in the federalism category; for the purposes of this research, judicial power is included as its own issue area. The median saliences for judicial power cases are relatively low. The Burger Court has the highest median salience for this issue area, and the median saliences for the judicial power cases decided by the Warren and Roberts Courts are almost the exact same. The median salience of the judicial power cases decided by the Rehnquist Court is less than that for any of the other three Courts. As we have seen, the Rehnquist Court has consistently decided cases with a much lower median salience than any other Court. This holds true for the judicial power issue area, but the difference between the median salience for the Rehnquist Court and the median saliences of the other Courts is much greater in this issue area than the others. The

median salience of the cases decided by the other three Courts is almost double that of the Rehnquist Court.

Federalism involves cases that deal with conflicts and relationships between federal and state governments save federal and state court relationships. There is a surprising consistency over the years of the federalism cases the Court has decided to hear; the median salience for federalism cases for each of the Chief Justices is relatively low. Though the issue area of federalism as a whole has a pretty low salience, a few of the individual cases within the federalism issue area have very high saliences. *South Dakota v. Dole*, for instance, has a salience of 5.066. This case was likely getting a lot of attention because it involves a state government directly challenging the federal government. The Rehnquist Court heard a handful of notable federalism cases dealing specifically with Congress' use of the commerce clause to regulate the states. In *U.S. v. Lopez* (1995) the Court ruled that Congress's use of the commerce clause as justification for the Gun-Free School Zones Act; in *U.S. v. Morrison* (2000), the Rehnquist Court ruled that the Violence Against Women Act was an overstep of Congressional powers. Though *Lopez* and *Morrison* were similar cases, there was a wide range between their saliences: 1.205 and 6.993, respectively. *South Dakota v. Dole* (1987) was another federalism case decided by the Rehnquist Court. The Court upheld a Congressional statute that withheld federal highway funds from states that did not have a minimum drinking age of 21; the Court decided in favor of expanded powers for the federal government. This case had a very high salience: 5.066.

The final issue area analyzed is private action. Of the four Courts studied, only the Roberts Court has decided cases in the private action issue area. Private action was

actually the main issue area the Court dealt with before passage of the Judges' Bill of 1925. Private action "relates to disputes between private persons involving real and personal property, contracts, evidence, civil procedure, torts, wills and trusts, and commercial transactions."³⁵ The Judge's Bill gave the Court control over its own docket, and, since then, the Court has not handled private action very frequently. For some reason, the Roberts Court has chosen to take on a number of private action cases. The private action cases that the Roberts Court did choose to grant certiorari have a high median salience: 0.2688.

Some cases are, by their nature, more "interesting" than others. Using first-section coverage in the *New York Times* and the *Washington Post* as measure for salience may make it seem like some issue areas are more important than others when, in reality, those issue areas are just more interesting and understood by the general public than others. For instance, cases in the privacy issue area, which includes abortion, are likely to get more coverage, especially first-section coverage, than most cases dealing with federal taxation or federalism. Though this is important to note, this discrepancy in coverage by issue area is not problematic in measuring the issue areas the Court has taken on over time and Chief Justices. Federal taxation probably will not get that much coverage; however, the coverage will likely be consistent with changes in the Court.

Certain issue areas may also be coming to the Court in lesser or greater numbers by nature of cultural or political shifts. Notice that in First Amendment issue area the median salience for the cases decided by both the Roberts Court and the Rehnquist Court

³⁵ Spaeth, Harold, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger, and Sara C. Benesh. 2016 Supreme Court Database, Version 2015 Release 03.

is positive while the median salience for the cases decided by both the Warren Court and the Burger Courts is negative.

This could have to do with a shift in society's interpretation of the First Amendment. People could be paying more attention to cases dealing with all aspects of the First Amendment: freedom of speech, press, religion, and so on. If society's understanding of and interest in the First Amendment is broadening, newspapers are likely to cover it more. If society's view of the First Amendment changes with the Court's view of the First Amendment, the Court is going to be taking on more cases for that issue areas right as that issue area is getting more first-section coverage.

The Roberts Court especially, is getting into unmarked territory as First Amendment issues begin to arise in the digital world and as social media becomes a more and more important platform for debate. In *Elonis v. US* (2014), the Roberts Court ruled that in order to convict someone of threatening speech, the prosecution has to show that there was a subjective intent to threaten. This is an important case to consider because the threats in question were made on social media, a medium lacking context, as are so many other potentially "threatening" comments. The public wanted to know how the First Amendment was going to apply to speech on social media, and they were watching throughout the life of the *Elonis* case. Though *Elonis* was not that salient of a case (-1.457), the Roberts Court knew that it was on an important, evolving issue area and decided to hear it.

A pattern presents itself throughout most of the issue areas: the group of cases heard by the Roberts Court in any given issue area had the highest median salience, the groups of cases heard by the Warren and Burger Courts had very similar median

saliences and fell just a little bit short of the median salience of the cases the Roberts Court heard, and the group of cases in each issue area decided by the Rehnquist Court almost always have the lowest median salience. Though there are a few exceptions to the pattern, an analysis of the issue areas does not show anything so apparent as to undercut the idea that the Roberts Court has been hearing more salient cases than did any of the other Courts.

Why? – The Court as a Policymaking Tool

In all, we have evidence that the Roberts Court has been hearing more salient cases than the Warren, Burger and Rehnquist Courts. Why is that the case? A possible explanation is juridification: interest groups' move to the courts for policy making.³⁶ Separation of powers allows the judicial branch to be independent from the executive and legislative branches. Though justices are nominated by the President and approved by the Senate, once in office, members of the Court are free from outside pressures that constantly affect the other two branches. Justices serve for life, so they do not have to worry about reelection or answering to the general public. This lifetime tenure keeps the justices from being swayed by popular opinion and allows the Court to protect minorities from the rule of the majority.

Interest groups often turn to the Court when the executive or legislative branches are unlikely to act in their favor. The legislative and executive branches are swayed by the general public because they are elected by the general public once every 2, 4 or 6 years. The views of representatives, senators and the president also tend to align with those of the majority because that is who does the voting. The majority chooses who is in

³⁶ The concept of juridification will be explained further later in this section.

Congress and the White House. The majority directly chooses two-thirds of the branches of government; they choose the two branches that can actively make laws as they deem necessary. The legislative branch, however, was purposefully designed to encourage gridlock. Because of this, it is very difficult to move legislation, especially controversial legislation, through Congress. If any legislation does make it to the President, he has veto power and can choose to strike down any legislation he does not agree with. The President also has the ability to pass executive orders, so the President has both the power to block legislation through the veto and the power to “legislate” without any check on his power through executive orders.

The President has a lot of policymaking powers. Because of this, interest groups whose ideas differ from those of the President and the majority of the general public can turn to the Court as a policymaking institution. The Court should not be subject to outside influences, and the Courts decisions are applied throughout the country and cannot be undone without a Constitutional Amendments, a reversal by the Court itself or statutory changes. I believe that interest groups are turning to the Court as a legislative vehicle when the legislative and executive branches are not in their favor but the Court is in their favor.

The Court cannot actively make policy, rather it says what is and is not constitutional based on the cases brought before it. In his book *Law's Allure*, Gordon Silverstein writes about juridification, interest groups' move to the Court as a policy-making institution. Silverstein defines juridification as “relying on legal processes and

legal arguments, using legal language, substituting or replacing ordinary politics with judicial decisions and legal formality.”³⁷

Juridification only happens under certain circumstances. No interest group is going to seek out the Court to get their policy passed unless they have to. Using the Court as a policy-making institution is expensive, takes a long time and is not a sure thing. Interest groups turn to the Court when it is the only realistic option for getting their interest represented. Silverstein argues that interest groups juridify when there are institutional barriers or political barriers. Segregation is an example of an instance in which there were institutional barriers. Most laws allowing segregation were state or local laws. It would have been very difficult for interest groups such as the NAACP to reverse these discriminatory state laws without the Court. Rights for the criminally accused are policy issues that face insurmountable political barriers. Voters do not like when politicians are “soft on crime”, so politicians are unlikely to support any criminal rights legislation so as to not upset voters. Juridification has been a successful vehicle for policymaking for criminal rights advocates through cases such as *Gideon v. Wainwright*, *Mapp v. Ohio*, and *Miranda v. Arizona*.

Because juridification only happens under certain circumstances, courts with higher median saliences did not necessarily try to hear more salient cases; it could have been that the Court was the policy-making institution through which it was most likely for interest groups to get policy passed in their interest. The hypothesis that interest groups turn to the Court as a policymaking institution when no other branch is willing to act in their interest would explain why there was such a sharp change in the Roberts

³⁷ Silverstein, Gordon. *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (Cambridge: Cambridge UP, 2009.)

Court around 2008. Barack Obama was elected President in 2008. At that time, conservative Republican George Bush was President, and the Court was pretty solidly conservative, as well; the Justices at the time were conservative Justices Scalia, Thomas, Alito, Kennedy and the Chief, and liberal Justices Stephens, Ginsburg, Breyer and Sotomayor.

Barack Obama was elected in 2008 a month after the long conference had already been held and the majority of the petitions for certiorari had already been granted. He was inaugurated in January of 2009, and there is a slight bump in median salience of the cases decided in 2008 (-0.585) to the median salience of the cases decided in 2009 (-0.414). There was another slight jump in the median salience of the cases the Roberts Court decided in 2010 (-0.310); however, the biggest increase came in 2011 when the Roberts Court was deciding cases with a median salience of -0.127. Since this jump, the Roberts Court has consistently been hearing cases with a higher median salience.

George Bush was President for the first three years of the Roberts Court, so both the executive and judicial branches were conservative. The executive branch was not readily serving liberal interests, but there was no benefit for them to turn to the Court because the Court was also conservative and unlikely to serve their liberal interests. After Obama had been in office for a few years and gotten liberal legislation, such as the Affordable Care Act, passed through Congress and signed into law, conservative interest groups were turning to the Court to challenge liberal legislation and try to further their conservative interests.

Different provisions of the Affordable Care Act have been challenged three times: *NFIB v. Sebelius* (2011), *Burwell v. Hobby Lobby* (2013) and *King v. Burwell* (2015).

The conservative groups that brought these cases to the Court were obviously expecting the Court to make a conservative decision. The Court actually upheld the Affordable Care Act in *NFIB v. Sebelius* by a 5-4 vote. Chief Justice Roberts voted with the liberal justices (Ginsburg, Breyer, Sotomayor and Kagan) rather than the conservative bloc as was expected. The Court struck down the Affordable Care Act's contraceptive mandate in *Burwell v. Hobby Lobby* by a 5-4 vote along ideological lines. Chief Justice Roberts and Justice Kennedy surprised conservative interest groups again when they voted with the liberal justices in favor of an interpretation of the Affordable Care Act that would allow for subsidies for federally and state-run healthcare exchanges. All the Affordable Care Act cases got a lot of media attention and were very salient, but the Roberts Court did not always rule the way conservative interest groups were expecting.

Using the explanation that the Court takes on more salient cases when a majority of justices are favorable to an interest to which the executive and legislative branches are not favorable works well to explain the high levels of salience for the Warren and Burger Courts. The cases that were most salient for the Warren and Burger Courts were not basic policy questions that came along with fit easily into ideological molds. The shift to the Courts to answer ideological questions started with the Warren and Burger Courts. The "important" Warren and Burger Court cases were some of the first instances of interest groups using the Court to make policy. In addition to being cases about "important" issues, a lot of the cases the Warren and Burger Courts were hearing were getting so much attention because they were the first real moves to the Court for policy change.

In 1954, after years of groundwork by the NAACP Legal Defense Fund, the Warren Court decided in *Brown v. Board* that separate was inherently unequal and ordered the integration of schools across the country. The NAACP Legal Defense Fund had to turn to the Court for this decision because the institutional barriers keeping them from being able to achieve policy success were insurmountable. This very important case, and its companion case, *Brown v. Board (II)* (1955), were brought to the Court because the NAACP knew that was the route they had to take; the legislative or executive branches were not going to be able to do anything to address the problem of segregation, so the NAACP did what they had to do – they took their problem to the Court and got the change they deserved. Though this research does not measure the salience of cases decided before 1955, it is still important to mention the original *Brown v. Board* case because of how influential it was in inspiring other interest groups to move to the Court for their policy needs.

In 1962 the Court established the “one person, one vote” doctrine in the decision of *Baker v. Carr*. The Court ruled that the way legislative districts were being split up at the time was unfair. Constituents in the districts that were underrepresented by the geographic distribution of representation in 1962 had to turn to the Courts for a solution because the other branch that could redraw district lines was the legislative branch; the members of the legislative branch at the time would have been negatively impacted by the one person, one vote doctrine, so it is very unlikely that districting based on population would ever have come to be without the Court. The Court’s influence with its decision in *Baker v. Carr* was sweeping – the legislative districts of every state in the country had to be redistricted in compliance with the one person, one doctrine, and the

resulting changes in representation have indirect policy influences even today.

Underrepresented urbanites had to turn to the Court to get the policy change they deserved when no other branch would have been able to serve their interest.

A lot of the cases that have gone before the modern Supreme Court are at the Court because the parties involved were trying to get the change they believed they deserved. Interest groups go to the Courts when no other institution is able to serve their interest well. Oftentimes, cases brought by interest groups when they have no other options are more salient than other cases. Because of this, the median salience of cases heard in a term is higher when the Court has a different ideological leaning than the other branches. When the Court and the other branches have the same ideological leaning and are likely to act in the same way, interest groups do not have the option to turn to the Court when the other branches would not act in their interest because the Court would not either. Because of this, fewer salient cases are coming to the Court in these terms.

Also, interest groups' movement to the Court as a policy-making institution was a slow process. The NAACP Legal Defense Fund began the process with *Brown v. Board* in 1954, and a few other interest groups followed suit; however, it took some time for this to become a viable strategy. Over time, interest groups have realized how successful juridification can be, especially when no other legislative branch offers a viable option. It also took some time for justices to be receptive to the idea of interest groups using the Court for policy making. Now, justices are more receptive to the idea of juridification and have started to strategically grant certiorari to cases while considering the effect their decisions will have. Over the past 50 years, interest groups have learned how to approach the Court strategically, and justices have figured out which cases to grant

certiorari to further their best interests. Once both the justices and the interest groups began fully to understand the process of juridification, more interest groups began moving to the Court and more justices became receptive to the idea of the Court as a policy-making institution. Once this balance was struck, the Court began hearing more and more salient cases.

The Warren and Burger Courts have a higher mean salience relative to the other Courts than median salience relative to the other Courts because they were consistently taking on a few very important cases such as *Brown v. Board*, *Baker v. Carr* and *Roe v. Wade* rather than having an entire caseload of somewhat salient cases. This distinction goes back to the discussion of using mean or median as the measure for salience.

Through my research I am interested in finding out if any Court actively sought out a more “important” docket. A Court that has selected a few important cases may have a high mean salience but not necessarily sought out an important docket.

William Rehnquist served as an Associate Justice on the Burger Court, and he often disagreed with his Chief’s leadership style. When Rehnquist was promoted to Chief Justice in 1986, he wanted to run the Court differently than had his predecessor. Rehnquist and Burger had different personalities and leadership styles. Burger was combative, saw enemies everywhere, even on the Court, and strategically voted so that he could always assign the majority opinion. Rehnquist, on the other hand, did not take differences between himself and other members of the Court as personally Burger did. Burger took the ceremonial roles that come with the title of Chief very seriously, but Rehnquist only participated in as much of the pageantry of the Court as he had to.

Under the leadership of Chief Justices Warren and Burger the Court was writing opinions on just about 200 cases a term. Rehnquist cut that number in half. The Rehnquist Court only wrote opinions for about 70 cases a term. The Roberts Court has continued with the tradition of only deciding about 70 cases a term. Chief Justice Rehnquist ran an efficient Court. His leadership style and tendency toward efficiency and away from the ways of the Burger Court likely affected the salience of the cases the Rehnquist Court took on.³⁸

This is a possible explanation because chief justices do have more than just administrative and ceremonial powers. The Chief Justice makes the dead list and the discuss list every year. If Rehnquist did not want to hear as many salient cases he could just put highly salient cases on the dead list or keep less important cases from the dead list. Though the Chief does not have the sole final power in granting certiorari to groups, his dead and discuss lists can be very influential in deciding the cases that do end up before the Court. The Chief Justice also talks first in conference and votes first in whether to grant a case cert or not. The Chief has the first say on every petition that comes before the Court; he has the first opportunity to sway his associate justices to vote to grant or deny cert. The Chief has a lot of power in determining which cases to decide. The Rehnquist Court had a much lower median salience and mean salience than did the Burger Court, so it is possible that through his leadership position and administrative influence as Chief Justice, Rehnquist was able to actively discourage his Court from pursuing a very salient caseload.

³⁸ Greenhouse, Linda. "How Not to Be Chief Justice: The Apprenticeship of William H. Rehnquist." *University of Pennsylvania Law Review* 154.6 (2006): 1365-372. *JSTOR [JSTOR]*.

Chief Justice Rehnquist also brought a major shift in judicial philosophy to the Court. Rehnquist valued the idea of dual federalism. He believed that the federal government had a limited amount of power, but that most power should be held by the states. Rather than hearing cases that could have an important influence on federal policy, Rehnquist sent cases back to the states. He tried to lead a restraintist Court and did not want to have a lot of power. Rehnquist's staunch belief in keeping power out of the federal government explains why the Rehnquist Court consistently heard cases with the lowest median salience. Rehnquist did not think it was the role of the highest federal court in the land to be making important policy decisions that should be left up to state governments, so he tried as hard as he could to keep his Court from hearing those cases.

In addition to Rehnquist's shift away from Chief Justice Burger's leadership style and judicial philosophy, the separation of powers explanation fits nicely with the Rehnquist Court. The Rehnquist Court was a consistently conservative Court, and a Republican was in the White House for thirteen of the nineteen years Rehnquist was Chief. For the majority of the Rehnquist years, it was not necessary for conservative interest groups to turn to the Court to make policy in their favor because the Executive Branch was already representing their interests, and it was not beneficial for liberal interest groups to turn to the Rehnquist Court because the Rehnquist Court was very unlikely to rule in their favor.

Whoever appoints the next Supreme Court Justice will have to make a very strategic decision. Since Justice Antonin Scalia's death in February of 2016, the Court has balanced out. Four justices lean to the right: Thomas, Alito, Roberts and Kennedy, and four justices lean to the left: Breyer, Kagan, Sotomayor, Ginsburg. The next Justice

will shift the Court in one direction. When the Court's ideology is known, the way the Court is going to vote on issues is also pretty clear. More and more interest groups will start moving to the Court to make policy if they know the Court is going to make policy that is favorable to them. These groups will turn to the Court regardless of who runs the executive and legislative branches because they know how the Court will act and that the Court will act. Any shift in ideology that comes from an appointment will last for a while because justices have lifetime tenure. An appointment at the beginning of a President's terms could affect the ideological make up of the Court for decades, and the ideological make up of the Court affects the entire policymaking process.

Corroborative Support

Thus far, we have evidence that the Court took on more salient issues during the Roberts era, and I have argued this is a function of litigant strategy in using the Courts to pursue policy change, or juridify. If one believes litigant and justice strategy is shaping the shift in the salience of the caseload before the Court, one should also expect changes in the outcomes of these cases. The measure for salience used in this research only takes into account pre-decision coverage. I now turn to post-decision measures to see further how outcomes change across the tenures of modern chiefs. This is supportive evidence because the pre-decision salience across all sorts of outcomes is always higher. This suggests that the Court may be doing less of these things (i.e. overturning precedent, voting 5-4, etc.), but, when it does, it does so on an important issue.

5-4 Cases

Another interesting group of cases to study are cases that resulted in a 5-4 decision. Finding the median salience of these "close" cases allows us to see how the

saliency of cases varies as they are more divisive. So many of the cases heard every year are decided 9-0. If a case is 5-4, the justices are obviously split on how the case should be decided. If five justices are voting one way and the other four justices are voting the other way on a case, this case is likely more interesting and debatable from the beginning than are cases that are decided 9-0. If these cases are more interesting to the justices, they may be more interesting to the public and the newspapers and have a higher median saliency.

Median Saliency by Chief, Close Cases

Chief	Median Saliency
Warren	0.032
Burger	0.048
Rehnquist	0
Roberts	0.087

Table 4. Median saliency by Chief Justice for Close Cases: median saliency of the cases decided under the leadership of each modern Chief Justice (Warren, Burger, Rehnquist and Roberts) by a vote of 5-4.

The Roberts Court, again, has the highest median saliency of all the Courts for “close” cases, cases decided by just one vote. The Burger Court has next highest median saliency followed closely by the Warren Court. The Rehnquist Court, by 0.03, has the lowest median saliency for close cases of all of the Chiefs: Warren, Burger, Rehnquist and Roberts. The Rehnquist Court has consistently had low median saliences across issue areas, case types and over years.

The median saliences of the close cases heard by each Chief matches up pretty closely with the median saliences of all of the cases heard by each Chief. These median saliences of the close cases, however, do not line up with that of all cases when measuring by year rather than by Chief.

Median Salience by Term, Close Cases

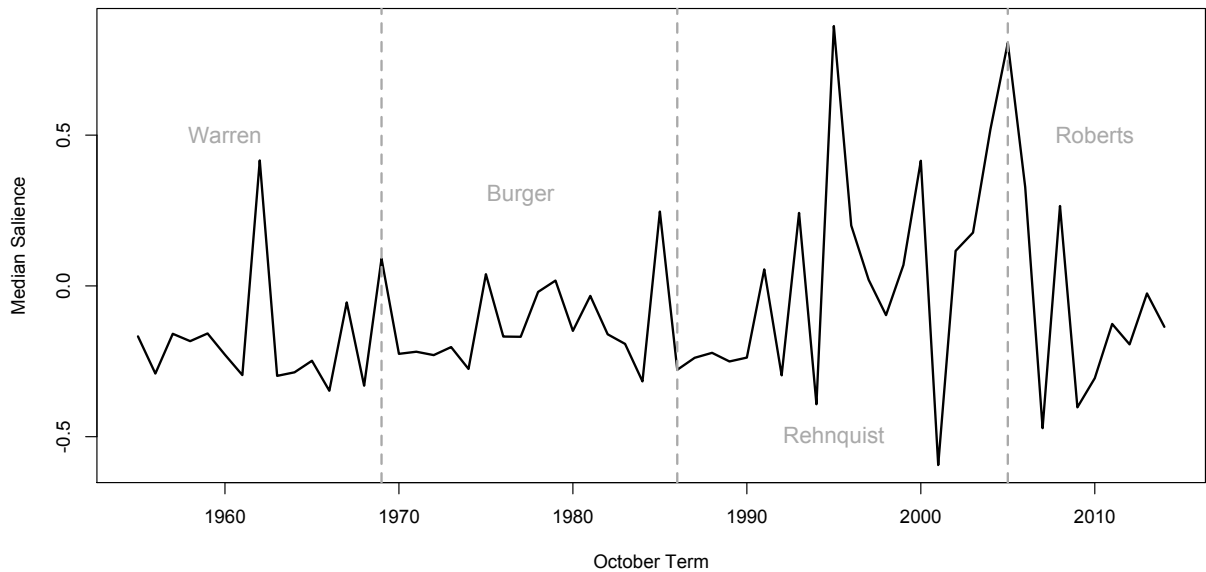


Figure 3. Median salience of close cases by October Term: median salience of the cases decided by a vote of 5-4e each October Term (1955-2014).

Figure 3 is a plot of the median salience of the close cases heard each term from 1955 to 2015. The y-axis shows Median Salience and the x-axis shows the October Term in which the case was decided. The dashed gray lines separate the four Courts being studied: Warren, Burger, Rehnquist and Roberts. These dashed lines fall on the years in which there was a change in chief: 1969, 1986 and 2005. This graph does not look like the Median Salience by Term graph that plotted the median salience of all of the cases heard each year. There is no consistency in the median salience of the close cases from year to year like there was in the median salience of all the cases from year to year. The median salience for all of the cases was consistently high for the Warren and Burger Courts, went very low during Rehnquist's tenure as chief, and went back up after the first

few years of the Roberts Court. The median salience for close cases is all over the board and changes, sometimes by quite a bite, from year to year.

I think the reason the median salience for close cases is so inconsistent with the median salience of all the cases from year to year but the median salience for close cases by Chief seems to match up with the median salience for all cases by Chief is that justices and litigants cannot know for sure what the vote on a case is going to be when deciding to grant that case certiorari. Several terms of decisions under a Chief's rule will bring the median salience closer to the Chief's overall median salience than one year's worth of cases.

Overall, these trends fit in with the rest of my research: the Roberts Court is hearing more salient cases than the Warren, Burger and Rehnquist Courts. The Roberts Court hears cases that are salient across the board, so it makes sense that their closely decided cases also have a high median salience. Litigants today are choosing to take their issues to the Roberts Court because they know that no other institution will be able to help them resolve their issue. The close cases salience numbers show that litigants are coming to the Court even if they are not sure how the Court is going to rule on their issue. Sending their issue to an uncertain destiny at the Court is a risk interest groups are willing to take to see policy change.

Constitutionality

The system of checks and balances allows for the Supreme Court to overturn Congressional, state and local legislation as unconstitutional. When the Court is hearing a case about the constitutionality of a law, it can either rule it unconstitutional, rule sections of the law unconstitutional or leave it as is. The Court does not usually overturn

laws on their constitutionality, but oftentimes, especially when rulings are unfavorable to vocal interest groups, the Court will be label “activist”. The Burger Court is the most activist Court studied, and it only overturned laws in about 9% of the cases it decided.

Percent of Cases Overturning Laws, by Chief³⁹

Chief	Overturing
Warren	7.1
Burger	8.9
Rehnquist	6.4
Roberts	3.8

Table 5. Percent of cases overturning laws, by chief: percent of cases decided during the tenure of each modern Chief Justice (Warren, Burger, Rehnquist and Roberts) that overturns a law.

Table 5 shows the percent of cases decided that overturned laws by each Court. The Burger Court overturned laws in a higher percentage of cases than did any other Court. The percentage of cases in which a law was overturned in both the Warren and Rehnquist Courts is not too far away from that percentage for the Burger Court. The Roberts Court overturned laws in a very low percentage of the cases it decided. By the traditional measure of activism, the Robert Court is, by far, the most inactive.

I think this is especially interesting in light of our research that the Roberts Court has heard cases with a higher median salience than the other Courts. The Roberts Court, the Court that has been hearing the most salient cases, is also the Court that has been overturning the lowest percentage cases per term. This shows that salience is a different way to measure the impact the Court is having on society.

It is important to remember that a Court can be “activist” and have an affect on policy without ruling laws unconstitutional. Because the Supreme Court is the highest Court in the land any precedent they set applies to all other courts. If the Supreme Court

³⁹ Liptak, Adam. “How Activist Is the Supreme Court?” The New York Times, 12 Oct. 2013. Web. 26 Jan. 2016.

decides that a certain piece of legislation is constitutional, that precedent applies to all lower courts; the Court has made policy, but it has not ruled anything unconstitutional. This goes back to justices' strategies. Justices strategically grant certiorari to cases that will have a big impact on policy. Justices' strategy is not in overturning laws as unconstitutional, but rather in setting precedent and making policy.

Median Salience of Cases Overturning Laws, by Chief

Chief	Constitutional	Federal	State	Local
Warren	0.055	-0.989	-0.408	-1.047
Burger	0.070	-0.874	-0.395	-0.841
Rehnquist	0	0	0	0
Roberts	0.089	-0.131	-0.255	0.713

Table 6. Median salience of cases overturning laws, by Chief: median salience of the cases, as decided by each modern Chief Justice, that rule laws constitutional or that overturn federal, state and local laws.

The second column, "Constitutional", measures the median salience for the group of cases which did not result in any declarations of unconstitutionality. The third column, "Federal", measures the median salience for the group of cases in which the Court declared a federal law unconstitutional. The fourth column, "State", measures the median salience for the group of cases in which the Court declared a state law unconstitutional. The final column, "Local", measures the median salience for the group of cases in which the Court declared a local law unconstitutional. The salience for these different categories is split up with changes over the

The first sets of cases are the cases in which the Court made no declaration of unconstitutionality. It makes sense that the cases the Roberts Court did not overturn have the highest median salience because the Roberts Court overall has the highest median salience, and that Court did not typically overturn cases. Despite the Roberts Court having the highest median salience for all of the cases in which a law was deemed

constitutional, the median salience for every Court in this area is very consistent. The Roberts Court's median salience comes just shy of -0.2, and all of the other Courts fall somewhere in the -0.2 range.

In the cases in which a federal law was overturned as unconstitutional, the Rehnquist Court has the highest median salience, followed closely by the Roberts Court. Both of these median saliences are very high. The Warren and Burger Courts both have lower median saliences for cases in which they ruled a federal law unconstitutional. For the set of cases that overturned a state law as unconstitutional the Rehnquist Court had the highest median salience by a lot. The Rehnquist Court was the only Court with positive median salience for that set of cases. The median salience of cases in which the Roberts Court overturned a state law as unconstitutional was just shy of 0 and the median saliences for the Warren and Burger Courts were very close and a little bit lower than that of the Roberts Court.

The median saliences for the cases by Chief that declared a local law unconstitutional are surprisingly high. The cases in which the Roberts Court declared a local law unconstitutional have a very high median salience, and those cases for the Burger and Rehnquist Courts also have positive median saliences. The Warren Court has the lowest median salience for this group of cases of all the Courts, but it is the highest median salience for any group of cases (constitutional or federal, state or local unconstitutional) the Warren Court decided. One would think that a federal law's unconstitutionality would get more press coverage and be more salient than a state or local law; however, local laws actually have the most consistently high median saliences across Chief Justice.

The Rehnquist Court is so surprisingly high for cases in which a law (federal, state or local) was declared unconstitutional. This is surprising considering that, for most of the other groups of cases being measured for median salience, the Rehnquist Court has consistently been the Court that heard the least salient cases of all the Courts. The Rehnquist Court was not the most “activist” Court studied, but it makes sense that the cases in which they did rule a law unconstitutional were so atypically salient. It is interesting to study how the salience of cases the Courts as divided by Chief Justice heard changes with declarations of constitutionality or unconstitutionality and with changes in the institution (federal, state or local) that implemented the law.

Precedent

In addition to striking down federal, state and local laws as unconstitutional, overturning the Supreme Court’s own precedent is another measure of judicial activism. The Supreme Court’s precedent is applied to all lower courts in the country, so the Court is very hesitant to overturn its own precedent. Any cases that result in a flip in precedent are going to be important. Below, Table 7 shows the percent of cases as decided in each Chief’s tenure that reversed the Court’s own precedent.

Percent of Cases Reversing the Court’s Own Precedents, by Chief⁴⁰

Chief	Overturning
Warren	2.4
Burger	2.0
Rehnquist	2.4
Roberts	1.7

Table 7. Percent of cases reversing the Court’s own precedent, by chief: percent of cases decided during the tenure of each modern Chief Justice (Warren, Burger, Rehnquist and Roberts) that overturns the Court’s own precedent.

⁴⁰ Liptak, Adam. “How Activist Is the Supreme Court?” *New York Times*, October 12, 2013. Accessed January 26, 2016.

The percent of cases reversing the Court's own precedent is very low. The Warren and Rehnquist Courts overturned precedent at the highest rates of all the Courts, and even they only overturned the Court's own precedent in about 2.4% of cases they decided. The Burger Court reversed the Court's own precedent at slightly lower rates than did the Warren and Rehnquist Courts, and the Roberts Court has reversed the Court's own precedent at even lower rates. It is not surprising that the percent of cases reversing the Court's own precedent is so low considering Justices have such a respect for *stare decisis* as a rule and are almost always going to follow precedent.

Median Salience of Cases Reversing the Court's own Precedent, by Chief

Chief	Precedent Altered	Precedent Not Overturned
Warren	0.044	0.037
Burger	0.060	0.047
Rehnquist	0	0
Roberts	0.086	0.100

Table 8. Median salience of cases reversing the Court's own precedent, by Chief: median salience of the cases, as decided by each modern Chief Justice, that alter the Court's own precedent and the cases that do not.

Table 8 shows the median salience of the cases that altered the Supreme Court's own precedent by Chief Justice. The second column shows the median salience of the cases in which the precedent was altered. The median saliences of these cases are pretty consistently low across chief. The cases in which the Rehnquist Court altered precedent had the lowest median salience of all the cases in which precedent was altered. The Roberts Court had the highest median salience of all the cases in which precedent was altered, but it is still relatively low.

The final column, "Precedent Not Overturned", measures the median salience for the cases in which there was no alteration to the Court's own precedent. The median saliences are slightly higher for each Chief Justice in the cases in which the precedent

remained unaltered than in the cases in which the Court's own precedent was altered. Again, the Roberts Court has the highest median salience for cases in which there was no alteration of precedent and the Rehnquist Court has the lowest median salience for cases in which there was no alteration of precedent. One would think that the median salience for the cases in which there was an alteration of precedent would be higher than the median salience for cases in which there was no alteration of precedent because it is so uncommon for the Court to reverse its own precedent. Even though it is so rare for the Court to alter its own precedent, the cases in which the Court did that were not as salient as the cases in which the Court did not alter its own precedent.

The Roberts Court is overturning the Supreme Court's own precedent at lower rates than the Court has under the leadership of any of the other modern Chief Justices. The cases in which the Roberts Court is deciding to alter the Court's own precedent are more salient than are those of any other Court. This fits with the idea of juridification. The justices on the Roberts Court are not strategically granting certiorari to cases so that they can alter the Supreme Court's own precedent; they are not trying to be an "activist" Court. The justices on the Roberts Court are simply concerned with addressing the issues in the cert pool than with judicial activism. More interest groups are taking their issues to the Court, and the justices are strategically granting certiorari to cases that they believe with further their own ideological interests. That the Roberts Court is overturning the Court's own precedent less than any other modern Court but the cases in which precedent is being altered (and the cases in which precedent is not being overturned) are more salient than those from any other Court fit with the idea of juridification.

Ideological Leaning

The Court's ideological leaning shifts as the justices change. The Warren Court is the most liberal Court we have studied. The Burger Court shifted somewhat to the right from the Warren Court, and the Rehnquist Court shifted even further to the right. The Roberts Court has been pretty consistently conservative, but has had the tendency to make liberal decisions. It is interesting to study the salience of the cases with ideological leanings that the Court decides. One would think that cases with ideologically liberal decisions that were decided by a liberal Court would have higher saliences than cases with ideologically conservative decisions that were decided by that same Court; it seems intuitive that justices strategically choose important cases if they know that those cases are going to be decided in the ideological direction they prefer.

Median Salience of Ideological Leaning, by Chief

Chief	Liberal	Conservative	No Leaning
Warren	0.046	0.034	0.347
Burger	0.062	0.055	0.224
Rehnquist	0	0	0
Roberts	0.077	0.102	0.263

Table 9 Median salience of ideological leaning, by chief: median salience of the cases, as decided by each modern Chief Justice, divided by ideological leaning: liberal, conservative or no leaning.

Table 9 shows the median salience of cases divided by their ideological leaning: liberal, conservative or no leaning and by Chief Justice. The second column measures the median salience of each case with an ideologically liberal decision. These decisions were clearly liberal. The liberal cases decided by the Roberts Court, a typically conservative Court, had the highest median salience of all the liberal decisions heard by the modern Courts. The Rehnquist Court, also a typically conservative-leaning Court, had the lowest median salience of cases with liberal decisions. The median saliences of

the cases decided with a liberal opinion by the Warren and Burger Courts were very similar despite the fact that the Warren Court is traditionally considered liberal and the Burger Court is traditionally considered more conservative.

The “Conservative” column shows the median salience for the decisions handed down by each Chief that are classified as conservative. Again, the Roberts Court has the highest median salience for this category. The Burger Court has the next highest median salience, and the Warren and Rehnquist Courts, a very liberal Court and a very conservative Court have the lowest median saliences. The final column shows the median salience for cases in which the decision had no ideological leaning. The Warren Court had the highest median salience of all the Courts for cases decided with no ideological leaning and the highest median saliences of all the groups of cases the Warren Court decided (liberal, conservative or no leaning) with the decisions with no leaning. The cases the Rehnquist Court decided with no ideological leaning have the lowest median salience by a lot. This is also the lowest median salience for any group of cases the Rehnquist Court decided at all.

The Roberts Court has the highest median saliences for cases decided with ideological leanings, both liberal and conservative. This evidence further corroborates the idea that the interest groups are turning to the Roberts Court for policy change when no other institution is able to give them that change. Litigants are turning to the Courts regardless of their ideology. Even if an interest group knows the Court is unlikely to rule in their interest, going to the Courts can be a valuable agenda-setting tool.

V. Conclusion

The Supreme Court has been hearing more cases dealing with more important issues under the leadership of Chief Justice Roberts than it did under the leadership of any of the other modern chiefs: Warren, Burger or Rehnquist. There are several explanations that can help explain why the salience of the caseload the Court was taking on varied with the Chief.

Some litigants may have pursued a legal course of action as an alternative to legislative or executive action. If an individual's interests are unlikely to be addressed as they wish by the majority of the legislative branch or by the executive branch for ideological reasons, and it is likely that the Court would rule in the individual's interest, that individual might choose to bring their important issue to the courts to get the results they want. When the executive and legislative branches have different ideological leanings from the judicial branch, it is more likely that individuals who expect the Court to rule in their favor will choose litigation. This separation of powers explanation fits well when explaining the consistently high median saliences of the yearly caseloads for the Warren and Burger Courts, somewhat explains the low median saliences of the caseload for the Rehnquist Court, and can explain the sharp increase around 2008 in the median salience of the Roberts Court caseload.

Despite the measure, the groups of cases being measured, or the results of the cases being measured the cases decided by the Rehnquist Court consistently had the lowest median salience. The separation of powers explanation somewhat explains why the Rehnquist Court consistently has such a low median salience, but the consistently low median salience of the Rehnquist Court caseload can primarily be explained by Chief

Justice Rehnquist's leadership style. Rehnquist was a big proponent of dual federalism and wanted to send important cases to the states rather than decide them at the federal level. Because the Rehnquist Court was sending most cases on important issues back to the states, the median salience of the Rehnquist Court's caseload is so much lower than that of the other Courts.

Juridification, the move to the Court to make public policy, best explains why the Roberts Court has consistently been hearing cases with a higher median salience.

Juridification was realized as a viable option in 1954. Litigants slowly began understanding how to use the Court to pursue their interests. Justices realized that the Court could have a bigger role in the policy making process, so they began strategically granting certiorari to more important cases. When litigants and justices both figured out how strategically to handle juridification, the Court began hearing cases dealing with more important issues. The big increase in 2008 in median salience of caseload of the Roberts Court caseload can likely be explained by the litigants and justices having a better understanding of how to juridify and how to handle juridification.

There is a strong pattern throughout the different groups of cases studied: the caseloads heard by Roberts Court have the highest median salience, the caseloads heard by the Warren and Burger Courts consistently have median salience that are very similar and fall just below that of the Roberts Court, and the caseloads heard by the Rehnquist Court consistently have the lowest median salience by a lot. This pattern is present for the overall median salience measure, throughout the median salience measures by issue area, and in the post-decision measures. The post-decision measures provide strong corroborative evidence for the juridification explanation of the high median salience of

the Roberts Court's caseload. The Roberts Court has the highest median salience for close cases, cases decided 5-4. Litigants are juridifying even though they cannot safely predict how the Court will rule. The Roberts Court has the highest median salience for cases decided with a conservative leaning and for cases decided with a liberal leaning. Litigants are juridifying regardless of their own and the Roberts Court's ideological leaning. The Roberts Court has the highest median salience for cases that overturned laws as unconstitutional and for cases that overturned the Court's own precedent despite the fact that the Roberts Court overturns laws as unconstitutional and overturns the Court's own precedent at much lower rates than any of the other Courts. Justices are strategically granting certiorari that they know deal with important issues. The Roberts Court is hearing cases that deal with more important issues than the Warren, Burger and Rehnquist Courts because litigants and justices have figured out the strategy behind bringing issues to the Court and granting certiorari to important cases.

There were limitations to this research. The text-analysis program that "read" the newspaper articles to look for mentions of cases only looked for mentions of case names. Any vague mention of a case went unrecorded, so some cases, such as the "same sex marriage case" (*Obergefell v. Hodges*) and the "Obamacare cases" (*NFIB v. Sebelius*, *Burwell v. Hobby Lobby*, *King v. Burwell*) very well may actually have been more salient than noted. This research also only noted changes in Chief Justice. While the Chief is the most influential member of the Court, associate justices still have influence over which cases the Court grants certiorari, and individual associate justices could have been responsible for significantly increasing or decreasing the median salience of the Court's caseload. Though it would be very complicated to measure changes median salience of

caseload with each change in Associate Justice, it would be an interesting and possibly important measure. Another limitation to this research is that the data can only tell us that the Roberts Court is deciding more salient cases than the Warren, Burger and Rehnquist Courts. The data cannot tell if that is a result of the justices on the Roberts Court actively seeking out more important issues, a result of the increased use of juridification or a result of both.

There is more research to be done in order to fully understand why the Roberts Court is taking on more salient cases than the other modern Courts. This study focused on the median salience of the combined total cases heard by each Court. Each of the articles collected from the *Washington Post* or the *New York Times* that used the phrase “Supreme Court” was analyzed for mention of specific cases and recorded based on those mentions. This measures whether the Supreme Court is choosing to hear more important cases, but an interesting addition to this research could study frequency of articles on the Court in general. An analysis of the frequency of articles on the Court that do not focus on specific cases could speak to how important the Court is perceived to be by the general public.

I used median salience to measure the importance of issues each Court was hearing; however, further research could study mean salience rather than median salience. Studying median salience gave me an idea of the importance of the caseload as a whole. Using mean salience instead of median salience to measure the importance of the cases before the Court could allow for a few especially important outlier cases to skew the salience. In this research I wanted to focus on the totality of the cases each Court was hearing, but, the Court could be considered to be taking on more important

issues by taking on one or two cases a term that are very important. Using this different measure could be used to corroborate to contradict the evidence and explanations in this paper.

The Roberts Court is still relatively new and will likely be “The Court” for quite a few more years. Because of this, any research on the Roberts Court and its legacy is evolving and incomplete. This research, however, shows that interest groups turn to the Court to make policy. This could prove very important throughout the nomination process for the next Supreme Court justice. Whoever is President at the time of the next nomination will, very likely, nominate someone ideologically similar to their party. If the next President gets to make two or three nominations they will be able to guarantee the Court’s ideology.

Interest groups have figured out the strategy behind juridification and have started bringing more important issues to the Court, and justices have become more receptive to the idea of juridification and have started strategically granting certiorari to these more important cases. If there is a Court with a definite ideological leaning, especially on certain issues, and a Congress that is still deadlocked, even more interest groups are going to turn to the Court to resolve policy issues.

The Supreme Court is a hugely important policy making institution. The justices on the Court right now have the power to influence more important policy issues than have justices at any other time. Presidential candidate and United States Senator Ted Cruz understands the impact the Court can have; that is why he has called for judicial retention elections. Senate Republicans understand the impact the Court can have; that is why they are trying to block President Obama’s nominee to replace Justice Scalia. This

research shows that more interest groups are taking their important issues to the Court, so the Court is going to continue gaining policymaking power. The President and the Senate are both going to try their hardest to ensure that the Supreme Court aligns with their own ideological beliefs because they understand that the Court is now and will continue to be a policymaking institution.

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