A STUDY OF CHIEF JUSTICE ROBERTS' LEADERSHIP ON THE CURRENT SUPREME COURT

by

DANIEL J. HOPPE, JR., ESQ.

(Under the Direction of Teena Wilhelm)

ABSTRACT

John Roberts, during his tenure as Chief Justice, has sought different objectives than those suggested by academics, politicians, and commentators. Unlike his predecessors of the last 75 years, Roberts has used the tools at his disposal to morph the Court's decision-making by using his institutional leadership. These tools include, but are not limited to, according justices more equality, using the conference to find justices who foster unanimity, focusing on specialization, and using the tool of summary disposition to deal with basic error questions. I present a circumstantial argument that Roberts, as Chief Justice, has sought to promote the Court as an institution, even at times over his individual ideological preferences; I dispel the notion that his behaviors occur because of his moderate/swing preference, and I examine the tools he has used to achieve these goals.

INDEX WORDS: Supreme Court, Chief Justice, leadership

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DEDICATION

This thesis is dedicated to my wife, Nessa, who chose to stand by me when many others would have left. Without her love and support, this would not only not have happened, it would not mean what it does.

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CHAPTER 1

INTRODUCTION

John Roberts, during his tenure as Chief Justice, has sought different objectives than those suggested by academics and commentators. Unlike his predecessors of the last 75 years, Roberts has used the tools at his disposal to morph the Court using his institutional leadership. These tools include, but are not limited to, according justices more equality, using the conference to find justices who foster unanimity, focusing on specialization, and using the tool of summary disposition to deal with basic error questions. This work is a circumstantial argument that Roberts, as Chief Justice, has sought to promote the Court as a whole, even at times over his individual ideological preferences; I dispel the notion that these instances occur because of his moderate/swing preference, and I examine the tools he has used to achieve these goals.

When first nominated for a seat on the Court in 2005, Chief Justice John Roberts was supposed to be Associate Justice Roberts. During his testimony, as usual for a nominee, he noted that "Judges and Justices are servants of the law, not the other way around." He used the analogy of an umpire, quite different from the role of an activist political organization: "Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules" (U.S. Congress 2005, 55). Similarly, Justice Neil Gorsuch, in his Senate Judiciary Committee testimony, argued, "In my decade on the bench, I have tried to treat all who come to court fairly and with respect....My decisions have never reflected a judgment about the people before me — only my best judgment about the law and facts at issue in each particular case... For the truth is, a judge who likes every outcome he reaches is probably a pretty bad judge,

stretching for the policy results he prefers rather than those the law compels" (U.S. Congress 2017, 67). However, when would-be Associate Justice Roberts became nominee Chief Justice, the common words often used to evade the ire of the Senate became more than boilerplate and became a focus on the use of the Court as one of error-correction and deference, rather than *only* policy making. As the Chief Justice, Roberts said he would encourage members of the Court to subordinate their "views of the correct jurisprudential approach and evaluate those views in terms of [their] role as a judge" and the institutional interest in "achieving consensus and stability" (Rosen 2007). Roberts continued his line of thinking *after* confirmation. In an interview in 2006, Roberts remarked, "I think that every [J]ustice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they're writing separately, about the effect on the Court as an institution" (Rosen 2007).

Early commentators often complained that the Supreme Court under Justice Roberts has not followed this path and has been ideologically fractured and one of the most conservative in history (Calabresi and Von Drehle 2009; Liptak 2013). The commentators' positions appear to be logically consistent with the attitudinal model, which states that Justices will vote in cases to suit their ideological position (Segal and Spaeth 2002).

However, this model is directly at odds with the Chief Justice's stated goals of creating a Court that functions as an umpire, not master, of the law. This thesis seeks to examine Roberts' leadership role and its effect on the Court. I not only argue that Roberts has achieved results that are closer to his goals of clear messaging to lower Courts and an image of a collegial body less subject to credible attack, I also explain what tools he has used to do so. Despite this success, there is ample evidence that in contentious cases, the attitudinal model remains paramount on the Court. However, the number of 5-4 decisions too is decreasing. In short:

> "[Five-to-four] decisions do exist, and there is no shortage of opinions, even critically important decisions, that make a lot of political sense, but very little legal sense. Justices of the Supreme Court are imperfect, and all too often are motivated by ideological principles rather than the principles of jurisprudence. But it is wrong to see the entirety of the Court in this light: For every 5-4 decision that polarizes American society, there are dozens of unanimous and near unanimous decisions that provide clarity to the lower courts" (Bloom 2017).

A. Given the Court, There Have Been Odd Shifts in Expected Decision Making

First, the numbers are clear: "The court issued liberal decisions in 56 percent of cases in the 2014 term, its third year of doing so after four years in the conservative column, according to the Supreme Court Database, and the New York Times" (Pavolik et al. 2015). As Pavolik et al. note, "[t]he final percentage is the highest since the era of the notably liberal court of the 1950s and 1960s led by Chief Justice Earl Warren. The closest contenders are the previous term and the one that started in 2004 and ended with the announcement of Justice Sandra Day O'Connor's retirement" (ibid.) Has the attitudinal model lost some of its explanatory power, are justices more moderate, or is there something else occurring? There is the possibility of individual judicial maximization, where there are costs and benefits in the selection of cases, scope of holdings, ideology (a factor of salience), values of the identity and validity of the court, bargaining costs and collegialism (Epstein, Landes, and Posner 2013). Unlike a pure model, this possibility recognizes the Coase theorem[1] that there are bargaining costs in making decisions. However, in certain cases,

[1] The Coase theorem states "that when there are conflicting property rights, bargaining between the parties involved will lead to an efficient outcome regardless of which party is ultimately awarded the property rights, as long as the transaction costs associated with bargaining are negligible."

there are questions as to whether there are times that ideology (in more salient cases) or ideological position may dominate, but these are not the majority of cases (Lazarus 2015). Assuming a Chief Justice who places a high value on the legitimacy of the institution of the Court, and the mechanisms available to influence judicial decision making, in low- to medium-salience cases, these tools and goals would be significant and could outweigh personal preference in ideology.

This possibility is reaffirmed by the fact that the Roberts Court has achieved the highest degree of unanimity and lowest degree of 5-3 or 5-4 split decisions of Courts in the Spaeth Database. Roberts' desire for a more united Court, in perception perhaps as much as reality, has yielded results. Almost 30 percent of the Court's orally argued decisions in the period of 1946 to 2009 were decided unanimously, trending from 21 percent in 1946 to 1952 (the Vinson court) to 34 percent since 2005 (the Roberts court) (Epstein et al. 2000, 2-3). Additionally, the canard that these are easy cases is disposed of by Rule 10, which necessitates conflict or novel issues for the acceptance of cases, as well as the Court's extremely low acceptance rate. If Roberts was a pure policy maximizer, why not take more cases that can be pushed through on a 5-4 or 5-3 vote along the lines of his own personal preference?

Given the larger proportion of unanimous decisions, Roberts has moved closer to his goals of providing clear messaging to lower Courts and an image of a collegial body less subject to credible attack. I will provide a plausible explanation for this movement. Given his tools, I argue that unanimity is a function of institutional processes implemented by the Chief Justice and adopted by the Court during this period. I address the tools used by Chief Justice Roberts to achieve these goals, inconsistencies between models, and possible counter explanations that may render the single voice pyrrhic. There is indeed a goal of clear messaging to lower Courts and an image of a collegial body that would correct clear errors and decide remaining certain cases in a

way resembling the attitudinal model. The Chief Justice has staked his reputation on some of the largest cases to preserve the legacy of the Court as a deferential institution. This approach has led to later commentators, discussed below, questioning the "extremism" of the Court and some calling for re-evaluation (e.g., Calabresi and Von Drehle 2009; Liptak 2013).

B. The Institutional Leader of the Court

Robert Dahl once wrote, "To consider the Supreme Court of the United States strictly as a legal institution is to underestimate its significance in the American political system. For it is also a political institution, an institution, that is to say, for arriving at decisions on controversial questions of national policy" (Dahl 1957). Today, many have naïvely extrapolated that argument to mean that the Supreme Court is merely "a political institution," and the Roberts Court a merely conservative one (Calabresi and Von Drehle 2009; Liptak 2013). Such a limited point of view is incorrect, as the Chief Justice has fostered a collegial environment by taking from and yet at times differing from his modern predecessors, using a variety of methods and norms to seek to have the Court speak as often as possible with a single or strong voice, and to defer to the powers of other branches in political disputes.

The start of the institutional theory of Roberts' leadership began when John Roberts went from nominee for a seat on the Court to the choice for the Chief Justice. Unlike the general theories described below, this is a theory of leadership and not a means of predicting the Court's yea or nay votes. As noted earlier, Justices Roberts and Gorsuch both gave speeches regarding the Court following the law, but common wisdom and a reading of opinions in their careers raise questions about their differences in goals and the direction they view their roles as taking. I argue that when would-be Associate Justice Roberts became nominee for Chief Justice, the words initially used to soothe the Senate morphed into a functioning core of strategic action and a return to the use of the

Court as one of addressing error, rather than one *dominated* by policy making. The umpire is more like a replay system, where the egregious balls and strikes that are called incorrectly are remedied, and error correction takes a higher priority than grasping opportunities to make large ideological moves, even those moves that may be favored by Roberts.

This leadership role addresses the choice of cases, opinion assignment, coalition building, limitations on answering constitutional questions, providing clear guidance to lower courts, showing deference in political disputes, and even the Chief's own turning on his ideology in certain consequential cases. While I am not so naïve to claim that the Court is not affected by ideology, the leadership of Justice Roberts is producing minimalist decisions on areas of wide agreement that produce attitudinal results claiming a majority of "liberal" decisions on what should be a predominantly conservative Court.[2]

[2] A minimal decision is one that by definition does not advance the law far beyond its current point. A maximal decision would be one that overturns or fundamentally changes existing law.

CHAPTER 2

A REVIEW OF JUDICIAL MODELING

It would be impossible to address Roberts' actions without a brief review of the models of judicial decision-making. Both the attitudinal model and strategic choice (and the rational-choice subset) are theories based on the idea that judges are not mechanical in determining case decisions. Indeed, both posit that the law itself, and the concept of *stare decisis* – the core of the legal model used in law schools and followed for centuries – are not the decisive factor in predicting judicial outcomes. These models differ starkly, however, in both the value and the impact of interpersonal action, long-term strategic goals, and institutional context, such as legal arguments and norms. However, both evolved from a common intellectual foundation that challenged the legal model that dominated discourse well into the twentieth century.

In 1948, C. Herman Pritchett authored his seminal work, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937–1947*. Based on his qualitative and descriptive research of the Court, he determined that a variety of factors influenced decision making, including, but not limited to, the law. He recognized that "policy questions were the most powerful, but others exerted significant influence as well" (ibid.). In additional research, Pritchett continued to examine the Supreme Court, finding that institutional factors and motivations, limited by alternatives, existing law and the nature of the Court, also influenced outcomes (Maveety 2003).

There should not be a naïve assumption that, in deciding cases, justices are completely free to vote their own preferences or that a voting record necessarily mirrors a justice's inner convictions. Nor is there the assumption, which would be even more naïve, that a "Supreme Court

justice merely 'looks up the law' on a subject and applies it to the case in hand….[T]he rules and the traditions of the Court supply institutional preferences with which his own preferences must compete….He has free choice, but among limited alternatives and only after he has satisfied himself that he has met the obligations of consistency and respect for settled principles which his responsibility to the Court imposes upon him" (Pritchett 1954, 186-188).

Walter Murphy expanded on Pritchett's work in 1964's *Elements of Judicial Strategy.* However, Murphy's work, like that of many scholars at the time on Courts, was largely qualitative and/or descriptive and was not tested quantifiably. Similarly, even the shift in the legal model failed to address quantifiable testing in any significant manner, leaving it vulnerable to critique without better statistical models. The continued disagreements by both schools, as well as the absence of quantifiable data, resulted in studies on the social background hypothesis, role and small group hypotheses – but, most significantly, helped give rise to the ideological theory of the attitudinal model (Maveety 2003).

A. The Legal Model

The legal model reflects that the Court decides cases based upon precedent and is bound by *stare decisis*. The legal model is best understood as flowing from *Marbury v. Madison* (Segal and Spaeth 2002). The general perspective of this model is "the belief that, in one form or another, the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent" (ibid. 48). Segal and Spaeth show antipathy to the legal model's theory that judges decide cases "in significant part on the plain meaning of the pertinent language" (ibid. 53). As noted by Pavone, citing the above work, "English as a language lacks precision…legislators and framers of constitutional language typically fail to define their terms…one statutory or constitutional

provision or court rule may conflict with another…[and] identical words in the same or different statutes need not have the same meaning" (Pavone 2015; Segal and Spaeth 2002, 53-54). Pavone echoes this point, saying, "'It is not clear [from the Constitution's open-ended language] that the Framers intended that their intent be binding;' and legislative intent, following Kenneth Arrow's impossibility theorem establishing that every method of preference aggregation violates at least one principle required for reasonable and democratic decision making, is frequently 'meaningless'" (Pavone 2015, 2).

It is not the purpose of this research to argue that *stare decisis*, the core of the legal model, has resurged as the dominant theory. What I will argue here is that it is being used to limit case selection (cert pool and Rule 10), limit the impact of decisions (*Ashwander v. TVA)*, and as a means of correcting obvious error without open debate (summary disposition).

B. The Attitudinal Model

Roughly at the time of Murphy's work, Glendon Schubert (1965), as well as Pritchett and Spaeth, laid the additional foundation for the attitudinal model and conducted some of the earliest game theory models on Courts.[3] This position is examined and promoted by Rohde and Spaeth (1976), who assert that "each member of the Court has preferences concerning the policy questions faced by the Court, and when the justices make decisions they want the outcomes to approximate as nearly as possible those policy preferences" (72). Rohde and Spaeth also argued that the structure of the Supreme Court gives individual justices great freedom "to base their decisions solely upon personal policy preferences for a number of reasons: (1) the lack of electoral

[3] Schubert argued that justices had ideal ideological points among a multidimensional spectrum and that these points represent their own true, personal attitudes, which he called i-points (Schubert 1965, 27). More significantly, he stated that "the decision of the Court in *any case* will depend upon whether the case dominates, or is dominated by, a majority of i-points" (ibid. 38. [emphasis added]).

accountability, (2) the lack of ambition for higher office, and (3) the fact that the Supreme Court is the court of last resort" (ibid.). Unlike the later strategic and rational choice models, issues such as coalition building, the process of granting certiorari, Congressional reaction to overreaching decisions, and the concept that 4 of 9 prior Chief Justices were Associate Justices are not relevant to the ultimate decision-making process. *This is not to claim that prior experience is irrelevant to ideology*. However, ideology dominates. Furthermore, the theory that a Chief Justice would sacrifice any ideological preference (i-point) unless forced to do so is not even considered realistic under the attitudinal model.

The best summation of this theory comes from the authors Segal and Spaeth: "The attitudinal approach posits that justices vote strictly according to their individual ideologies—no strategic or institutional considerations enter into justices' calculi. Decisions are unfiltered reflections of the Court's ideology and, accordingly, *justices' ideologies should be the only significant predictors of Supreme Court Ruling*" (Bergara et al. 1999, 2-3 [emphasis added]). In this model, the use of legal reasoning is secondary to the main goal of achieving one's personal ideological preference. *Stare decisis* is useful but will be discarded by Justices when it does not fit their own ideological preferences. Judicial reasoning aims to create a legal structure so that lower courts will be bound to follow justices' attitudinal preferences.

C. Strategic Choice

The attitudinal model dominated academic focus on the judiciary for more than two decades, and in many ways still does. Political scientists began focusing on the earlier work of Pritchett and Murphy in the 1990s, which led to an evolution of the attitudinal model that recognizes the value of ideology but posits that other significant factors exist in both predicting and reviewing the actual behavior of Supreme Court justices.[1] The most succinct definition of this

model comes from Epstein and Knight (1998), who advanced three arguments: "(1) social actors make choices in order to achieve certain goals, (2) social actors act strategically in the sense that their choices depend on their expectations about the choices of other actors, and (3) these choices are structured by the institutional setting in which they are made" (626).[4]

A similar variant of this is found in rational choice theory, which operates in this situation as microeconomics and basic game theory. It is assumed that individuals have stable but differing preferences. The "rational choice theories argue that justices have an assortment of stable but contrasting ideologies. When on the Court, justices vote on cases with the aim of enacting policies that best reflect their ideological preferences. In essence, justices' preferences can be characterized by a well-behaved ideological utility function that obtains a maximum at a particular policy outcome and decreases monotonically as outcomes move away from that maximum (the individual's ideal policy)" (Bergara et al. 2003, 249). However, the Court, like a sample of nine consumers, does have near-perfect and imperfect substitutes. Additionally, different ideological points may carry more weight for some individuals than for others. Thus, there is a possibility that trading mechanisms can occur and benefits may be construed to yield to lesser preferences or those that may be seen as unreachable *at the time.* Furthermore, like the uncertain issues in strategic theory, rational choice claims to be able to use mathematical tools to examine Congressional pressure in decision making. As Bergara et al. (2003) note, "[t]he strategic approach assumes that the Court can actually forecast which decisions would prompt Congress to act. Uncertain or unknown preferences are easily implementable" (274). Thus, actors could achieve a larger

[4] In *The Choices Justices Make*, the same authors reviewed cases in Justice Brennan's register in the 1983 term and landmark cases decided under the Burger Court from 1969 to 1985. The authors empirically showed that certain justices (including Brennan) advanced their personal agendas in strategic voting from the cert period all the way through coalition building.

maximum utility on their overall preferences by not using ideological or positional preference as the sole metric of decision making in each case or even at each stage of a case.

The background for a utilization model in strategic choice or rational choice theory is not new. Strategic choice and rational choice theory address the potential of a utility-maximizing theory on each vote and how far a justice is willing to push the law (i.e., overturn or vastly extend vs. hard Constitutional avoidance). As Epstein, Landes, and Posner (2012) note, "[i]t has also been hypothesized that when the ideological stakes are small, a combination of dissent aversion with legalistic commitments is likely to override the ideological preferences of the Justices. Extreme proponents of the attitudinal model notwithstanding, Supreme Court Justices are not plausibly regarded as completely indifferent to such legalistic norms as *stare decisis*; a rampant disregard of precedent would unsettle the law and reduce the authority of the Justices by making them seem just politicians in robes" (702).

Use of more than ideology in research highlights the fundamental shift in theories. The attitudinal model views the Justices as "politicians in robes" (O'Scannlain, 2015). However, upon review of justices' papers, recent non-ideological explained decisions such as the Supreme Court decisions in *U.S. v. Arizona* and *NFIB v. Sebelius*, which will be discussed at length below, and the increasing percent of unanimous decisions despite Rule 10, it appears that the attitudinal model may not best explain the behavior of the 2005 to 2016 Court. As noted by Epstein and Knight (2015), "justices may be primarily seekers of legal policy, but they are not unsophisticated actors who make decisions based on their ideological attitudes. Instead, judges are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, of the choices they expect others to make, and of the institutional context of which they act" (1).

Assuming the Chief is seeking strategic bargaining to achieve the goals listed above, it is necessary to outline the tools that make him unique as a Justice. In doing so, I seek to highlight Justice Roberts' choices and use of these tools. However, at no point should the reader assume that these tools were not available or not, at times, used by prior Chief Justices. This overview merely highlights how Chief Justice Roberts has used these tools.

CHAPTER 3

THE TOOLS OF THE CHIEF

A. The Cert Pool

While voting and writing have produced a large impact, Chief Justice Roberts has also used institutional tools to achieve his goals. An example of this approach is a tool that he inherited from prior Courts, the cert pool. Roberts has been fortunate that the cert pool also coincides with incentives in achieving his vision of the Court, continuing the trend of selecting fewer cases despite an increase in appeals. Indeed, while the Rehnquist Court handled 73 argued cases in its most "leisurely year," Roberts has managed to drop below that number in seven of ten terms despite the growing number of total appeals to the Supreme Court. This decline shows an even firmer hand by the pool in limiting what comes before the Court and fits Roberts' style of only deciding Article III merits cases as necessary. It is important to note that the Chief Justice himself issues cases to the various pools of clerks, a quiet but potentially important level of power.

Ward and Weiden also highlight an interesting point in the pool – a lack of partisanship. As they put it, the pool removes candor from cert review. Comparing memos drafted for particular Justices with pool memos, they concluded, "clerks who wrote only for their own [J]ustice were more candid in the past, particularly with recommendations and political analyses, than are current clerks who write one memo for eight [now seven] [J]ustices who occupy different positions on the ideological spectrum" (Ward and Weiden 2007, 124). Ward and Weiden find in the past that

"remarkable ideological congruence" existed between clerks and their Justices.[5] However, Ward and Weiden (2007) conclude that this is less the case today since now all clerkship applicants apply to all Justices, not limiting themselves to those with whom they might most agree ideologically (55-59).

Ward and Weiden do not dispute that ideology is a factor in the selection of law clerks, but rather focus on its much smaller role than that suggested by Peppers. To measure the role of ideology in clerk selection, the authors surveyed former law clerks and used a Likert scale to rank seven criteria in terms of the importance to their justice's hiring selection (Ward and Weiden 2007, 276). Among these, ideology ranked dead last, accumulating a total of five votes in the top three criteria among the 182 clerks who responded (Ward and Weiden 2007, 69).

Clayton and McMillan take a different tack, noting that each Justice has multiple options when making a decision, including joining with the Court, dissenting with or without writing a separate opinion, or concurring with or without writing a separate opinion. They add that "[w]riting separately presents a cost: a Justice must expend resources and time that he or she might otherwise devote to activities on or off the Court. It also distracts from the Court's institutional role in providing a clear and stable understanding of the law. On the other hand, writing separately offers Justices the ability to express themselves as individuals" (Clayton and McMillan 2013, 26). This multiplicity of options again raises the question of a potential utility function. Addressing this function would require access to Justices' personal papers, as well as cert information potentially from clerks. This equation is a question raised but is beyond the scope of this thesis.

[5] See Peppers and Zorn, "Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment" (2008), who find through statistical analysis that "the ideological profile of the Justice" is the most significant predictor of the ideological make-up of the Justice's law clerks.

The key change of the cert pool occurred before Justice Roberts' tenure, with the general adoption of the cert pool in 1973, during the Burger Court, although it was first established in 1972 at the suggestion of Justice Lewis Powell. Each law clerk in the pool is assigned petitions for certiorari to review, analyze and make a recommendation on whether the court should grant review. The recommendation is circulated to each justice in the pool (Stras 2007; Weiss 2007). The original pool constituted a mere majority of the justices and was heavily criticized by Justice Stevens (Maduro 1998). Prior to Justice Gorsuch joining the court, the Roberts Court cert pool swelled to eight members, with only Justice Alito declining to participate. The percentage of recommendations for review by the cert pool decreased as more justices began to participate in the pool.

The increase in membership in this pool led to a causation that could be construed as collegiality. Stras found that "[i]n the 1984 and 1985 terms, when only six justices participated in the pool, clerks recommended review in 2.5 percent of the cases. By 1991 and 1992, eight justices participated, and the percentage of recommendations for review dropped to 1.4 percent. At the same time, the amount of disagreement between the cert pool and the court decreased, from 1.46 percent of the cases in 1984 and 1985 to .86 percent for the 1991 and 1992 terms" (Weiss 2007).

The cert pool also leads to unanimity and decreased concurrences. In the Ley et al. study, two covariates stand out for their negative direction: use of the certiorari pool and access to computers. Use of the certiorari pool and access to computers decreases the expected number of written concurrences per year per Justice by 15% and 18%, respectively (Ley, Searles, and Clayton 2013, 120).

Having touched on these issues, I note several others that should be addressed in this process regarding which cases gather four votes:

1) The nature of initial memoranda, which combines with the third issue;

2) A shift in power of the clerks, both by design and by the decreased number of cases;

3) A desire to signal that a Justice is well equipped to provide the preferred result of the Chief Justice

a. not only from an ideological perspective,

b. but in tune with the Chief's preference for narrow, consensus decisions,

c. ability to hold a majority,

d. and specialization;

4) Familiarity with structures of arguments that previously gained voters for certiorari;

5) Potential type of case selection.

First, the memoranda drafted by clerks for the cert pool play an important role because they are fundamentally different. Without a pool, a clerk is more likely to state more candid opinions directly related to her Justice's ideologically preferred position (according to the attitudinal model), whereas a memorandum shared for eight of the justices is seeking to achieve a position that will meet the goals the Chief embodies in issue number three. Therefore, in those cases that are accepted, the justices are first seeing the case from a perspective that is not tailored to their own specific view but inherently a view toward building a consensus beyond mere ideology. This characteristic does not mean that clerks are wholesale abandoning the ideology of the Justice they serve or that such ideology does not remain of paramount importance; it does mean that clerks are not only writing for an audience with differing ideological points but also staking out possible positions that could ensure not only a favorable majority but assignment of the decision itself.

This phenomenon has combined with a massive shift in Supreme Court case selection. The recent decline in the Court's plenary docket marks a massive reduction in cases from a contemporary high of 155 signed opinions in October Terms 1982 and 1983, having limited its decisions to nearly half of that over the past five years (Stras 2007; 2010). Reviewing the cases selected shows that this limitation touches "upon nearly all facets of the Court's docket" (Stras 2007). This reduction in case load is occurring even though the Justices have substantially more resources and have increased to a new peak of relying on their law clerks to screen cases and draft opinions. As the total agenda narrows, decisions made have more effect on a Justice's role in the term, which, based on both anecdotal evidence and numerical trends, portends a possible greater or lesser role for the clerk's Justice to make a significant mark in future terms. This relationship will be discussed in a later portion of this thesis.

Third, there is both circumstantial and numerical evidence that the Chief Justice chooses particular Justices to author salient cases based on past behaviors (Lazarus 2015): "Currently the chief justice [sic] decides which cases should be placed on a list for cert discussion, and the other justices make additions by descending level of seniority" (Weiss 2008), yet, as one clerk noted, "by the time it gets down to the lowest in seniority, the conversation is essentially over" (Mauro 2008). As will be discussed later, numbers suggest that for choice of cases that are granted cert, the emergence of certain choices are not based on seniority or ideology, although salience plays an important role. Furthermore, since the early twentieth century, the Rule of Four has required the assent of at least four justices for a certiorari petition to receive full review by the Supreme Court.[6]

[6] This rule changed during the 1970s, when justices began to cast "Join-3" votes. It appears these have decreased and, despite the significance of these votes, scholars have simply treated them as votes to grant review. This research indicates that votes "show that collegiality and uncertainty

An additional factor that has impacted the cert pool is the presence of familiarity. Lawyers who have been able to structure their arguments according to an accepted method are frequently re-invited to future Court arguments. A recent review by The College of William & Mary Law School notes, "One fact a clerk may highlight in the memo is the presence of a prominent, highly regarded lawyer who's involved in the case;" as George Washington law professor Morrison notes, "clerks may be reluctant to back an inexperienced lawyer, fearing that doing so might lead to the acceptance of a case that's poorly presented or based on a moot legal question. Playing it safe spares the court the embarrassment of having to dismiss a flawed case after it has been fully argued. Conversely, the clerks know which advocates the justices respect and admire" (354). In the same review, Yale Professor Eugene Fidell warned about potential consequences of such reactions, noting a possibility of a specialty bar skewing the Court's agenda and the look of impropriety, stating, "There is something disturbing, on a symbolic level, about an important national institution looking like an inside-the-Beltway club" (Biskupic, Roberts, and Shiffman 2015).

While cases featuring a former Supreme Court clerk had risen to approximately 60 percent of those heard by the Rehnquist Court, it continued a steady rise after 2005 and eclipsed 80 percent in 2012 and 2014. Similarly, cases featuring an oral advocate who had clerked for a sitting justice rose to 40 percent by 2005 and exceeded that number every year but one between 2007 and 2014. However, it should be noted since that this study included government lawyers, the solicitor general effects may skew the numbers to a degree, although the degree is not known.[7]

drive the decision to cast Join-3 votes and that it is inappropriate to pool Join-3 and Grant votes together" (see Black and Owens 2009). The authors dispute this closed analysis and suggest and alternative coding practices for agenda-setting scholars (ibid.).

[7] The presence of the Solicitor General continues to be a statistically significant factor in the grant of cert, although the presence of Amicus briefs, noted by Caldera, has been an open question (Hughes 2014).

There are also individuals who have argued or criticized the pool as a means of influencing case choice, although such an argument would require that the grants of power to clerks have reached such heights that they are acting independently of the agency by a significant degree. Douglas Berman (2005) has argued, for example, that the Supreme Court would be overwhelmed by death penalty cases due to the clerks' "dealing with the diktats of the federal sentencing system while clerking on a circuit court, before they get to the Supreme Court" (Berman 2005). As the previous skepticism suggests, the cert pool has not reached such a level of power and prestige (which would also be contrary to the Chief's desired goals). This concern is contradicted by Stras (2007) and the numbers on the docket itself. The Court has decided only eight cases in the past decade regarding the constitutionality of the death penalty, and Stras has found a decline over all types of cases (Stras 2007; 2010).

With the exception of Justice Thomas, all the members in the cert pool have seen a significant ideological shift to the left of equal nature. This shift suggests that the attitudinal model may still be correct, but strategic bargaining has led to a statistical bias that has moved the court since the justices remain in similar positions vis-à-vis one another (Paralpiano, Liptak, and Bowers 2015). Furthermore, the clerks are strategic actors who reinforce Roberts' minimalist tendencies. Statistically, Stras, who clerked for Thomas in 2002, says that many Supreme Court clerks are more comfortable recommending denial of a cert petition: "Really, it's sort of the safer play to recommend a deny because you're less often proved wrong;" University of Virginia's Professor Stephen F. Smith, also a former clerk for Thomas, agreed (Ward 2007).[8]

This tendency provides some explanation why Justice Alito does not tend to shift with seven of the remaining eight members of the Court. Justice Alito left the cert pool in 2008. This

[8] See http://www.abajournal.com/magazine/article/clerks_avoid_getting_their_digs_in

effect may be further studied by examining the future behavior of Justice Gorsuch, who has chosen not to be part of the pool (Liptak, 2017). If the Alito example has weight because of the pool effects, one should expect Gorsuch to either remain immune to the shifts in the Court or eventually to join the pool.

B. Opinion Assignment

The shift in "liberal decisions" raises questions of whether unanimity and Court shift is merely as issue of drift or one of leadership as well. One area in which we can examine this is the assignment of opinions. Prior to Chief Justice Roberts, the Chief had always maintained the greatest number of written decisions over terms, which was unsurprising since the Chief, or most senior member of the majority, chooses who writes the decision.

With a Chief in the majority over 85 percent of the time, ideological preference would produce a different outcome. Since three members of the Court have more conservative Martin Quinn scores than the Chief Justice, and the fourth most conservative Justice agreed with him 92 percent of the time (SCOTUSblog, 2006-2015), Roberts should be free, according to the attitudinal model, to write at his ideological preference point in a large number of cases. Therefore, unless the Chief was willing to yield his preferred favorite ideological point to achieve something else, such as a unified Court and view of the institution, he would continue to write the most decisions himself. This difference is Roberts' main carrot: he grants an equal number of opinions, albeit not necessarily identical in degree of importance, to all members of the Court, which is a new approach that cedes power to Justices who are far from his overall ideological preference or seniority. A Justice who strays too far from the norms Roberts seeks to achieve could be subject to reduced decisions and, even worse, be shut out of the process as a junior justice. This possibility is

discussed in more detail in the later chapter about the Chief's adherence to the *Ashwander* doctrine and avoiding Constitutional questions.

1. Numerical Equality

Chief Justice Roberts' record in achieving numeric equality in opinion assignments is better than that of any prior Chief Justice. Chief Justices before Vinson did not seek numeric equality, and Vinson himself did not make equality an important factor in opinion assignments until his final years as Chief (Lazarus 2015, note 12).

During October Term 1925, Chief Justice William Howard Taft authored 37 opinions, while the median number of opinions for the associate Justices was only 21 (Frankfurter and Hart 1932, 264). Even when the Chief Justice did write near the median, 23 to 22 in 1927, he was stingy with certain colleagues, leaving just 8 for Justice Van Devanter and 9 for Justice Sutherland. In 1930, Chief Justice Hughes was closer to the median in his writing but still exceeded the number by a third and also relegated justices to the theoretical bench (Frankfurter and Hart 1932).

However, Chief Justice Roberts has attained "maximum numeric equality" in assigning opinions to Justices each term, "to an extent unmatched by any prior Chief Justice" (Lazarus 2015, note 12). The change over the decades has been noted, but Roberts' commitment to numeric equality is so keen that it allows observers to identify instances when a Justice who originally had the opinion of the Court subsequently lost the majority because of later changes in voting (Lazarus 2015, note 83, 119-20).

As noted earlier in the commentary by Clayton and McMillan, there are costs and benefits of expressing oneself as a Justice via concurrence. An additional and highly important way of building a reputation on the Court, both policy-wise and as a means of a bargainer who should be assigned key decisions, is the simple act of being afforded the ability to write decisions even on

the smaller matters. Furthermore, the Chief Justice, in limiting his own writings, shows a humility that encourages a collegial court.

2. Favored Justices – Ideological and Structural

The Chief's assignments, however, are not merely a product of a desire for numeric parity or disfavor in his own writings. In the assignment of both the salient, higher-profile cases and the closely divided cases, the Chief's assignments favor Justices Kennedy and Alito and disfavor Justice Ginsburg some and Justice Sotomayor more so (Lazarus 2015). The shared ideology of Justices Kennedy and Alito with the Chief Justice explains this favoritism in part, but not completely. The Chief also disfavors Justice Thomas, does not favor Justice Scalia, and assigns in a manner that relatively favors Justice Breyer and shows an increasing potential to favor Justice Kagan (ibid.). In these respects, the Chief seems highly motivated to make assignments to those in the majority whom he believes can write more narrowly and are better able to maintain (and not lose) the majority established at conference with minimal potential issues, which is why he likely disfavors assignments of higher-profile and closely divided cases on a relative basis to other conservative Justices (Lazarus 2015).

Importantly, Roberts uses his assignment authority to promote the institutional objectives that may not have been his priority had he been selected to his original position as a justice instead of as the Chief (Liptak, Symposium). Based on his opinion assignment behavior, it appears that Roberts attempts to avoid the impression that decisions are merely political or ideological, instead urging them to reflect his "calling of balls and strikes" and producing decisions based on legal principle. As Lazarus (2015) notes, "Unlike prior Chiefs, Chief Justice Roberts does not assign himself more opinions than all other justices on the Court, does not avoid writing decisions in closely divided cases, and assigns himself a proportionate share of the duller cases – all perhaps as

a symbolic expressions of his stated preference for judicial modesty" (note 87). It is debatable whether this is a carrot-and-stick approach or one of pure holding the line. I explore this approach later in this thesis.

C. Strict Adherence to Rule 10 and Procedural Deadlines

With the reduction in cases selected, the Roberts Court has focused on Supreme Court Rule 10. This rule lists the reasons why the Court might choose to grant certiorari and states that a relevant factor is whether a state court of last resort or federal court of appeals "has entered a decision in conflict with the decision" of another such court on a federal question. In 1995, Rule 10 was amended to provide that the Supreme Court's review should be limited to conflicts on an "important federal question" (Stern et al., 2002). Nonetheless, the presence of a conflict remains by far the most important criterion in the Court's case selection; the "importance" of the question is decidedly secondary. Stern and Gressman note that "the Court continues to grant certiorari in many cases that do not appear to be 'certworthy' for any reason other than the existence of a conflict, real or alleged" (Stern and Gressman, note 191). Rule 10 states:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> - (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> - (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
> - (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

As noted previously, in 1995, Rule 10 was amended to provide that the Supreme Court's review should be limited to conflicts on an "important federal question" (Frost 2008). It stands to reason that a Supreme Court motivated by attitudinal goals would be inclined to take advantage of the conflict norms of Rule 10, particularly if the court is composed of activist judges, since it encourages a more political role for the Court. However, statistics actually show a slight decrease in the percent of conflict cases taken by the Rehnquist court from right before the Rule 10 change to a sample ten years later. The percentage of conflict-based cases was over 68 percent during the 1993 to 1995 terms of the Rehnquist court (Hellman 1996), but dropped more than eight percentage points during the 2003 to 2005 terms (Stras 2010).

In a recent study by Metroka in 2017, the grant of certiorari for free speech cases during the Roberts Court was examined, and no statistical significance was found for the political membership of the lower Courts or the outcome (conservative/liberal) in free speech cases. However, that same study did find a statistically significant relationship for granting cert in matters in which a conflict exists. The Roberts Court's reliance on Rule 10 seems to trump ideological factors. Indeed, Metroka (2017) noted, "[w]hile unobserved, strategic voting may play a role in some cases, at this aggregate level a Court motivated by political outcomes might generally be expected to deny certiorari at a greater rate for conservative decisions, or decisions issued by GOP-appointed appellate judges" (236). The presence of conflict was the largest significant explanatory factor in the decision to grant cert (ibid.).

Additionally, under Roberts, the rules have greater focus. According to Elwood, "We've seen from recent terms that the court is willing to tolerate as few as seven cases in a sitting in order

to avoid expedited briefing….Former Chief Justice William Rehnquist wouldn't have flinched at expediting briefing by several weeks" (Robinson 2017). In fact, "expedited briefing became commonplace towards the end of the Rehnquist Court…But we really haven't seen very much expedited advocacy and this impairs the court's decision-making process" (ibid.). Indeed, such actions push decisions further until they are ripe, and they often become less politically charged over time. Again, this approach limits the "damage" that could be done in cases that have not reached a stage where they could still be politically resolved or decided on less than fully developed facts and arguments. Such is also true of both the procedural choices of Roberts and *Ashwander* as well.

This lack of expedited briefing may be because the Chief Justice, who himself argued several cases before the high court, likely appreciates how hard it is to finish up briefing on a tight schedule while also preparing for oral argument, as Elwood notes (Robinson 2017). Roberts may also believe that expedited briefing diminishes the quality of advocacy. Regardless, as a result, Bloomberg shows the effects of these tools on cases argued – a consistent diminishment of cases decided at odds with an entity seeking to appropriate political influence, and one geared toward being a limited court of error *in comparison to preceding courts.*

D. Normalized Use of Summary Disposition

One long-noted puzzle of summary reversals is that the Supreme Court has viewed the very point of its discretionary certiorari jurisdiction as enabling it to resolve important legal issues—and avoid being a court for the correction of errors—while summary reversals target lower court decisions that strike the Court as clearly erroneous. Roberts has again used this technique to manage a Court of error reversal. Hartnett's 2010 study provides illumination on this technique: as stated in *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (per curiam), Justice Roberts claims that

the Supreme Court "intervene[s] here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents;" elsewhere, he writes that a case is "plain from the face of the…opinion that it failed to apply the correct prejudice inquiry we have established" (Hartnett 2010, 613). In other cases, as Hartnett notes, the Court observed that the lower court decision is "as inexplicable as it is unexplained" and has "no basis," or that it was contrary to "clear precedents" that are "so well settled . . . that this Court may proceed by summary disposition" (ibid.).

A brief explanation of the structural use and course brevity can be seen from cases. In defending its action in a 28 U.S.C. § 295 case, the Court noted, "No designation and assignment of a circuit or district judge in active service shall be made without the consent of the chief judge or judicial council of the circuit from which the judge is to be designated and assigned."[9] In *Presley v. Georgia*, 558 U.S. 209, 209–13 (2010) (per curiam), a fact-intensive case, the Court explained that it "has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law" (Hartnett 2010, 614). Bentele argues in his commentary that these opinions "are written in a tone more appropriate to scold a naughty child" (Hartnett 2010, 614).

In summary dispositions, rather than follow the typical course of granting the petition and scheduling the case for briefing and oral argument, the Court will grant the petition and decide the case on the merits simultaneously, dispensing with further procedure. Unlike regular decision-on-the-merits opinions, summary dispositions are not announced from the bench by their author and are generally per curiam. These orders raise different questions of transparency and

[9] See *Spears v. United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting). See also *CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 840 (2009) (per curiam) ("The ruling of the Tennessee Court of Appeals, and the refusal of the trial court to give an instruction, were clear error.")

consistency (see Baude 2010). However, summary reversals have now become so regular that they are commonplace. Indeed, the current edition of the Shario et al. (2012) treatise reports that "there appears to be agreement that summary disposition is appropriate to correct clearly erroneous decisions of lower courts" (62). The numbers support this assertion. The Roberts Court, despite handling fewer cases, has averaged seven summary dispositions per term, with a maximum of thirteen (SCOTUSblog, Statpack 2017). In no year during the Rehnquist Court era did the Court ever exceed that number, averaging less than 5 such dispositions from 1999 to 2004 despite handling more cases than the Roberts Court.

The Chief's use of these tools is for a reason. Under a strict attitudinal model, the reason would be to compel decisions aligned with the Chief's preferences. While the Chief certainly has preferences, his conduct cannot be adequately explained by these alone. His voting record reflects one of moderate conservatism on the Court, but the use of these tools and the information and case studies below suggest that his actions serve an institutional goal of providing legitimacy to the Court.

CHAPTER 4

INSTITUTIONAL LEADERSHIP VS. MODERATION

The ideological assumptions of the attitudinal model lead to an activist Court that accepts cases to advance its ideology and pursues an agenda to maximize its policy preferences. This perspective conflicts with the minor increase in the number of cases coded as liberal after being reviewed using the model over recent years (see SCOTUSblog). I have argued that Roberts, during his tenure as Chief Justice, has sought different objectives than those suggested by the attitudinal model. He has had some success, in a manner that may appear at odds with the attitudinal model. However, unlike his predecessors of the last 75 years, Roberts has used the tools at his disposal to morph the Court by using his institutional leadership.

Roberts does not function as a moderate/swing vote with a three and four Justice wing. This does not mean that his views are or are not necessarily centrist in the legal community, merely that they are centrist for the nine members of the Court for each given term. For example, Roberts and Kennedy shared opinions over 90 percent of the time over recent terms (SCOTUSBlog 2009-2015). Aside from his writing behavior, examined below, at first glance, Roberts' Martin Quinn score[10] and agreement rate with Kennedy would place him in an ideal position to get to his i-point. He is notably to the left of the Thomas, Scalia, Alito grouping and to the right of the Breyer, Kagan, Ginsburg, Sotomayor set of Justices.[11]

[10] This refers to how a Justice votes vis-á vis the rest of the Court. This is discussed further below.

[11] Roberts is closer to the first two than the second in both MQ scores and agreement.

In short, a moderate/swing Chief Justice would, as a swing vote, lead to 5-4 or 6-3 decisions on his or her preferences. There would be a larger number of cases both accepted and decided for his or her preferences. We observe an institutional leadership style in Roberts' use of tools that sometimes translates to outcomes distant from his preferred position. Additionally, he has not been the swing vote, despite his remarkably high agreement percentage with Justice Kennedy (SCOTUSBlog 2009-2015).

Roberts' leadership style has been noted by commentators as focusing on routine and consensus: "It's not just on the tough cases. And it's easier to do it if you get into the habit of doing it as a matter of routine" (Rosen 2007). Furthermore, "just because a case ends up unanimous doesn't mean that's how it started. The vote may be divided in conference, and yet if you think it's valuable to have consensus on it, you can get it, and … once you do it in a little case, you can move on to get it in big ones" (Rosen 2007).

William M. Jay once noted that "[t]here is broad agreement across ideological lines, sometimes surprisingly broad, on some important areas of the law" (Liptak 2017). By 2014, NPR had guests, including Lawrence Tribe, noting, "If one looks at this court, it's striking what [Chief Justice] John Roberts and his eight colleagues accomplished this year, roughly two-thirds of the cases decided unanimously. You would have to go back all the way to 1940 to find a similar time period in which the Justices so often agreed on things at the bottom line. And, sure, there were disagreements among reasoning and so on, but this is a striking example of the Chief Justice and his eight colleagues saying to the country, look, I'm looking at other branches of government. They're not working quite that well. They're very divisive. This is an area that's worked pretty well, that worked really well, the colleagues on both sides of the aisle at the court coming to common agreement on the bottom line" (Ketal 2014).

Roberts has chosen to work on building up the institution through a series of actions as the Chief. I have posited that Roberts was sincere when he voiced his concern about acute ideological divisions on the Court and the impact these have on the legitimacy of the institution (Clayton and Christensen 2008, cited by Foote 2016). Jeffrey Rosen has consistently noted that "the Chief has made it clear how much he cares about preserving the court's legitimacy in these polarized times" and is a "fierce defender of the Court and its institutional legitimacy" (de Vogue 2016).

Roberts is not a mere moderate, as posited by Foote. He agrees with scholars who note "there are a few characteristics that define moderate justices. First, they typically have less extreme ideological preferences. Second, they demonstrate a tendency to uphold precedent rather than overturn it. Third, moderates typically vote with an ideological bloc, but do not do so in a reliable manner to predict the outcome in closely divided cases. Moderate justices adopt an issue-by-issue or case-by-case approach rather than one based on rigid ideological concerns. Since moderate justices lack a firm ideological predisposition, they are more likely to be influenced by external pressures in cases that are salient" (Foote 2016, 6).

I disagree with Foote, who classifies Roberts as a moderate. A moderate/swing Justice would vote on one side as frequently as the other in *any salient or non-salient case regardless of how the law turned.* Indeed, a moderate Justice would, *for purposes of that Court*, have a 0.50 Martin Quinn Score.[12] On the perceived conservative Court, the Chief Justice and Justice Kennedy are to the right of this mark. Furthermore, while clearly having conservative ideological preferences, Roberts has engaged in a series of consistent strategic behaviors during his tenure that have often superseded them – in *upholding law and low salience cases, i.e. the cases of error,*

[12] The score is tied directly to the Court itself. A 0.50 is a swing Justice. If the Court was filled with Alitos and Thomases, this 0.50 score would represent a jurist with quite conservative views.

including protection of the Court as an institution, stability, minimalism and incrementalism. We can look to his record to see how often Roberts votes with conservatives and liberals. In 2010, Roberts agreed with Justice Clarence Thomas, deemed the most conservative by the Martin-Quinn assessment, 89 percent of the time, and with conservative Justice Samuel A. Alito, Jr,. 96 percent of the time. That same year, he agreed with Justice Elena Kagan 69 percent of the time and Justice Ruth Bader Ginsburg 65 percent of the time. By 2015, Roberts agreed with Thomas 75 percent of the time and with Alito 84 percent of the time. He agreed with Kagan 87 percent of the time and with Ginsburg 78 percent of the time (SCOTUSblog 2017).

Martin-Quinn scores reflect how a Justice votes with the Court, by term. They are not consistent term to term but depend on the make-up of the Court and the cases heard during a term. Thus, "Roberts voted with liberals in 8 percent of the cases in the 2006 and 2007 terms. After that the percentage varied from 6 percent to 31 percent, ending at 28 percent in the 2014 term before Justice Antonin Scalia's death created a yearlong vacancy on the court" (Weiss 2017). However, Justice Kagan is a dramatically different Justice than Stevens. This shift does not reflect so much a shift of Roberts as it does his position vis-à-vis Kagan. Furthermore, there has been no statistically significant increase in agreement between Roberts and Ruth Bader Ginsburg (see SCOTUSblog 2005-2017). Indeed, the shift appears to show a mere bias in MQ scores, and Roberts and Ginsburg remain exactly as far apart as ever (Silver 2016).

Roberts' scores (and Kennedy's) have not become markedly less conservative, although there is a clear shift in the Court's MQ scores for seven Justices (including both) from 2009 to 2014. These are almost perfectly shifted, remaining in a near-perfect line for the seven justices. Thus, I argue that this pattern is more evidence that Roberts and his colleagues created an inclusive court, which except for high-salience questions, has limited its own political power and sought

narrow solutions to fewer cases – which is the opposite of what a Chief Justice motivated solely by ideology would pursue. Judicial norms under the Roberts Court have kept older traditions and blended new behaviors to create a Court that more frequently speaks with one voice, giving credence to the less political view of the Court espoused by Justice Roberts. First is the use of the doctrines of Constitutional avoidance. Next, there has been a strengthening of the cert pool in granting hearings. Limiting grants of cert despite these ideological changes allows the decisions of appellate courts to stand. While this approach may result in effective affirmations, drifting further from Roberts' and the conservatives' ideal ideological point or of the liberal bloc in cases, it fits with Roberts' position of overturning laws in only the most extreme circumstance (Liptak 2013; see also Table I below). I will argue, given the tools at his disposal, that Roberts has used the carrot and the stick – most notably the carrot – to lead the Court in this direction.

Next, the Chief Justice, when in the majority, has the right to assign decisions. If Roberts was in the majority frequently and ideology was the dominant factor, he should assign himself the most decisions, as his ideology would be his preferred i-point. Additionally, justices further from his ideal ideological point should receive fewer assignments. However, the opposite is true. Despite almost always being in the majority (roughly 86 percent of the time), Roberts instead spreads case assignments largely in balance.

Besides sharing cert, using the carrot of according justices more equality, using the conference to find justices who foster unanimity, focusing on specialization, and using the tool of summary disposition to deal with basic error questions without larger conversations that could provoke dissent, the Chief has sought to reinforce the Court publicly as an apolitical brand that speaks with one voice. However, although I agree he is meeting his goals, the use of concurrences and the remaining splits in salient cases tend to show that on issues of high contention, the

attitudinal model is likely the most accurate predictor of judicial behavior (Foote 2017; Lazarus 2015). Finally, I ask whether we should be seeking maximum utility for a Justice rather than individual decisions based on policy preference. Unless cases are examined beyond a measure of yes and no, the attitudinal model is losing true predictive power under the Roberts Court. What is needed, but beyond the scope of this paper, is an equation that would use preferences but allow them to be shed for gains by "playing nice," correcting clear error, limiting decisions in which the Justice stands to have precedent away from ideological choice in salient decisions, and avoiding contentious losses by punting cases.

A review of certain key cases and the doctrine of Constitutional Avoidance enhances the view of Justice Roberts and his practices. Most significant amongst these cases is *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), which is discussed in the following chapter.

CHAPTER 5

ASHWANDER AND THE CONSTITUTIONAL AVOIDANCE DOCTRINE: ROBERTS AND MINIMALIST DECISIONS

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) was one of a series of cases involving challenges to the New Deal. Here, the argument centered on questions of the validity of contracts regarding the Wilson Dam and the Tennessee Valley Authority. Little did the participants know that it would carry enormous judicial importance in the corner of possible dicta of Justice Brandeis' concurrence. In this footnote, *Id.*, at 346, Justice Brandeis espoused a theory of judicial restraint effectively stating that federal courts should only decide an Article III Constitutional question when the facts demanded one. In determining whether this occurred, he set out the following judicial rules of procedure based upon the cases cited below:

> 1. The Court will not pass upon the constitutionality of legislation in a friendly, nonadversary, proceeding, declining because to decide such questions "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act. *Chicago & Grand Trunk Ry. v. Wellman,* 143 U. S. 339, 143 U. S. 345. Compare 49 U. S. *Veazie,* 8 How. 251; *Atherton Mills v. Johnston,* 259 U. S. 13, 259 U. S. 15.
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> 2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it." *Liverpool, N.Y. & P. S.S. Co. v. Emigration Commissioners,* 113 U. S. 33, 113 U. S. 39; *Abrams v. Van Schaick,* 293 U. S. 188; *Wilshire Oil Co. v. United States,* 295 U. S. 100. "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States,* 196 U. S. 283, 196 U. S. 295.
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> 3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, N.Y. & P. S.S. Co. v. Emigration Commissioners, supra;* compare *Hammond v. Schapp Bus Line,* 275 U. S. 164, 275 U. S. 169-172.

> 4. The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. *Siler v. Louisville & Nashville R. Co.,* 213 U. S. 175, 213 U. S. 191; *Light v. United States,* 220 U. S. 523, 220 U. S. 538. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground. *Berea College v. Kentucky,* 211 U. S. 45, 211 U. S. 53.
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> 5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. Tyler v. The Judges, 179 U.S. 405; *Hendrick v. Maryland,* 235 U. S. 610, 235 U. S. 621. Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained. *Columbus & Greenville Ry. v. Miller,* 283 U. S. 96, 283 U. S. 99-100. In *Fairchild v. Hughes,* 258 U. S. 126, the Court affirmed the dismissal of a suit brought by a citizen who sought to have the Nineteenth Amendment declared unconstitutional. In *Massachusetts v. Mellon,* 262 U. S. 447, the challenge of the federal Maternity Act was not entertained, although made by the Commonwealth on behalf of all its citizens.
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> 6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. *Great Falls Mfg. Co. v. Attorney General,* 124 U. S. 581; *Wall v. Parrot Silver & Copper Co.,* 244 U. S. 407, 244 U. S. 411-412; *St. Louis Malleable Casting Co. v. Prendergast Construction Co.,* 260 U. S. 469.
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> 7. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson,* 285 U. S. 22, 285 U. S. 62.

Despite its perceived death by liberal commentators, as discussed next, I will show that *Ashwander* is a bedrock of this Court. By 2010, some commentators were feverishly assaulting the Roberts Court, particularly the conservative bloc, for ignoring the *Ashwander* Doctrine and pursuing an ideological drive to answer broad political questions. One of the most prominent was Allen Shoenberger (2010), who noted, "[i]t is worth remembering that the first major declaration of unconstitutionality subsequent to *Marbury v. Madison* was *Dred Scott v. Sanford*, which moved

the struggle for the rights of slaves from verbal battles in Congress to actual battlefields like Manassas and Gettysburg…Dred Scott may not have been a sufficient cause of the War, or the only cause, but it was a cause, a major cause, and in the minds of Americans then it was at the very eye of the storm" (100). This is a fairly serious accusation. Not content with bashing Roberts' approach to *Ashwander*, Shoenberger continued: "constitutional decisions are the nuclear weapons of the judicial arsenal, and just as dangerous. The Roberts five appear oblivious. *Citizens United* flatly ignores the teaching of constitutional modesty set forth in *Ashwander*. The decision similarly ignores the caution of Justice Jackson in regard to the use of the Due Process clauses of the U.S. Constitution: 'Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable'" (Shoenberger 2010, 101). A decision based on the First Amendment, as *Citizens United* is, similarly leaves conduct ungoverned and ungovernable by both Congress and the States. Constitutional modesty "[p]rinciples rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws" (Shoenberger 2010, 100-101). This was hardly isolated pseudo-analysis.[13] As late as 2015, this argument persisted. The Roberts Court, according to critics, had engaged in their "own course of conservative judicial 'activism' that, while perhaps a stealthier version than that of the Warren Court, has at times been aggressive nonetheless," and "there are increasing signs that the movement is ready, once again, to embrace *Lochner* – although perhaps not in name – by recommitting to some form of robust judicial protection for economic rights. The signs come from prominent

[13] See, e.g., Alliance for Justice, *The Roberts Court and Judicial Overreach*, 2013, 6-8, highlighting *Citizens United* and *NFIB* as examples of "stealth judicial overreach"; Tonja Jacobi, *Obamacare as a Window on Judicial Strategy*, 80 Tenn. L. Rev. 763, 842 (2013), arguing the majority opinion in *NFIB* revealed "[Roberts] to be not a humble law applier, but a keen politico-legal strategist."

judges, from legal scholars, and from opinion leaders in the conservative political movement" (Colby and Smith 2015, 527). For the record, *Citizens United* was authored by Anthony Kennedy.

These assertions about the overly conservative nature of the Court are patently false when qualitatively reading the cases and reviewing the numbers of cases in which the law was overturned. Roberts strongly set the tone of *Ashwander* in one of his earliest cases, in a didactic and biting dissent regarding the grant of certiorari. Roberts began constraining the Court early, noting that the Court's opinion makes plain that certiorari to review these cases should never have been granted. As two members of today's majority once recognized, "traditional rules governing our decision of constitutional questions and our practice of requiring the exhaustion of available remedies ... make it appropriate to deny these petitions" (*Boumediene v. Bush II*, 53 U.S. 723, 128 S.Ct. 2229, 2231, citing Boumediene v. Bush *I*, 549 U.S. 1328, 1329, 127 S.Ct. 1725, 1727, 167 L.Ed.2d 757 (2007) (statement of Stevens and Kennedy respecting denial of certiorari)). Given the position in which these cases came to the Supreme Court of the United States, the Court should have declined to intervene until the D.C. Circuit had assessed the nature and validity of the congressionally mandated proceedings in a given detainee's case (according to the *Ashwander* rules).

As Nolan (2014) notes, the Roberts Court has actually largely upheld *Ashwander*:

> "While cases like Citizens United and NFIB certainly garner the attention of constitutional scholars and even the public, and while arguments can be made about the necessity of the scope of both of those rulings, broad rulings on matters of constitutional law are a rarity at the Roberts Court. Indeed, the vast majority of opinions issued by the Supreme Court simply do not centrally involve a question of constitutional law…when the Supreme Court is squarely faced with a major constitutional question, the Roberts Court has frequently

> either avoided answering the question posed to it or resolved the constitutional question on narrow grounds, illustrating the continued viability of the *Ashwander* doctrine" (Nolan 2014, 11).

Indeed, "a stunning 65 percent of the cases were decided unanimously, compared with 49 percent being unanimous in the term before and 43 percent being unanimous two years ago" (Nolan 2014, 11).

DaimlerChrysler Corp. v. Cuno was set up as a piece of jurisprudence in which Roberts could lay down a conservative master stroke concerning the limits on federal power via the Commerce Clause. In short, Sykes gives an excellent rundown of the facts and legal background of the case. *DaimlerChrysler* presented a Commerce Clause challenge to certain Ohio state and municipal tax credits favoring in-state investment. The plaintiffs were Ohio taxpayers who asserted that their state and local tax burdens were increased by tax breaks provided to DaimlerChrysler for a newly expanded Jeep factory in Toledo. The district court rejected the challenge, finding no Commerce Clause violation. The Sixth Circuit affirmed as to the municipal tax credit, but held that the state tax credit violated the Commerce Clause (Sykes 2007).

Chief Justice Roberts, writing for a unanimous Court, did not reach the merits of the Commerce Clause claim because the plaintiff-taxpayers lacked Article III standing to challenge the tax credits. He began his opinion with the following principles:

> "What we have never done is apply the rationale of *Gibbs* to permit a federal court to exercise supplemental jurisdiction over a claim that does not itself satisfy those elements of the Article III inquiry, such as constitutional standing, that 'serv[e] to identify those disputes which are appropriately resolved through the judicial process'….We see no reason to read the language of *Gibbs* so broadly, particularly

> since our standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press" (*DaimlerChrysler*, 547 U.S., at 352).

Roberts continued, stating that the

> "Plaintiffs' theory of ancillary standing would contravene this principle. Plaintiffs failed to establish Article III injury with respect to their *state* taxes, and even if they did do so with respect to their *municipal* taxes, that injury does not entitle them to seek a remedy as to the state taxes. As the Court summed up the point in *Lewis*, 'standing is not dispensed in gross'…All the theories plaintiffs have offered to support their standing to challenge the franchise tax credit are unavailing. Because plaintiffs have no standing to challenge that credit, the lower courts erred by considering their claims against it on the merits. The judgment of the Sixth Circuit is therefore vacated in part, and the cases are remanded for dismissal of plaintiffs' challenge to the franchise tax credit" (*DaimlerChrysler*, 547 U.S., at 354).

The result can be seen as a punt, but it shows the deference that Roberts shows to precedent and his dedication to minimal steps from the Supreme Court.

The steps expected by Roberts are well seen in the evolution of *Bond v. U.S.*, in which the Court was charged with hearing an appeal of a guilty plea under a statute related to a chemical weapons treaty (*Id.*, 564 U.S. 211, 131 S.Ct. 2355 (2011)). Bond lived outside Philadelphia, Pennsylvania. After discovering that her close friend was pregnant by Bond's husband, Bond sought revenge, subjecting the woman to harassing telephone calls and letters, for which she was convicted on a minor state criminal charge. Nonetheless, Bond continued her assaults by placing caustic substances in places the woman might touch. Bond was finally indicted in the US District

Court for the Eastern District of Pennsylvania, which had been asked to use §229, a chemical weapons treaty that forbids the knowing possession or use of any chemical that "can cause death, temporary incapacitation or permanent harm to humans or animals" where not intended for a "peaceful purpose" (§§ 229(a); 229F(1); (7); (8)).

Bond sought to argue the invalidity of the statute, relying on the Tenth Amendment, and, by extension, on the premise that Congress exceeded its powers by enacting the statute in contravention of basic federalism principles. However, rather than decide an easy "question," Roberts held to the idea of one step at a time and limited forays forward and assigned the opinion to Justice Kennedy for a unanimous decision on standing (with Breyer and Ginsburg in concurrence seeking a full call for invalidation). That decision read, in part:

> "The Court of Appeals held that because a State was not a party to the federal criminal proceeding, petitioner had no standing to challenge the statute as an infringement upon the powers reserved to the States. Having concluded that petitioner does have standing to challenge the federal statute on these grounds, this Court now reverses that determination. The merits of petitioner's challenge to the statute's validity are to be considered, in the first instance, by the Court of Appeals on remand and are not addressed in this opinion."

Only after the Third Circuit failed to get the message, upholding a conviction, did Roberts write for a unanimous court in *Bond v. U.S.*, 134 S.Ct. 2077 (2014). Having tried to provide insight on the matter in three years prior, Roberts this time took it upon himself to write for a unanimous (but still as we see fractured court), as follows:

> "The question presented by this case is whether the Implementation Act also reaches a purely local crime: an amateur attempt by a jilted wife to injure her husband's lover, which ended up causing only a minor thumb burn readily treated by rinsing with water. Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach. The Chemical Weapons Convention Implementation Act contains no such clear indication, and we accordingly conclude that it does not cover the unremarkable local offense at issue here" (*Id.*, at 2083).

Despite this declaration, Justice Roberts did not declare the act void (see *Bond v. United States*, 134 St. at 2087). This opinion held together a unanimous decision, as Justices Scalia, Alito and Thomas concurred in part, but noted:

> "Somewhere in Norristown, Pennsylvania, a husband's paramour suffered a minor thumb burn at the hands of a betrayed wife. The United States Congress—"every where extending the sphere of its activity, and drawing all power into its impetuous vortex"1—has made a federal case out of it. What are we to do?
>
> It is the responsibility of "the legislature, not the Court...to define a crime, and ordain its punishment." And it is "emphatically the province and duty of the judicial department to say what the law [including the Constitution] is." Today, the Court shirks its job and performs Congress's. As sweeping and unsettling as the Chemical Weapons Convention Implementation Act of 1998 may be, it is clear beyond doubt that it covers what Bond did; and we have no authority to amend it.

> So we are forced to decide—there is no way around it—whether the Act's application to what Bond did was constitutional" (*Id.*, at 2094).

Similarly, in the famous *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), Chief Justice Roberts's majority opinion displayed classic avoidance. Chief Justice Roberts explicitly stated that he was interpreting the challenged provision against its clear meaning—it was written as a mandate to buy health insurance, but he was reinterpreting it so that it was instead a tax for not buying health insurance. He wrote that "the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it," but "it is only because we have a duty to construe a statute to save it, if fairly possible, that [the mandate] can be interpreted as a tax." Chief Justice Roberts also claimed to be making a precedential holding that the mandate would not have been constitutionally valid under the Commerce Clause. He wrote that "[i]t is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question," and, further, that "[w]ithout deciding the Commerce Clause question, I would find no basis to adopt such a saving construction." This opinion will be discussed next, due to its importance and addition as a case where Roberts abandoned his own ideological preferences. The move to the tax question was not even raised by Plaintiffs or Defendants but instead *sua sponte* by the Court.

The Court has received the message. From Liptak's 2013 study, we see the number of laws overturned by percentage of cases since Chief Justice Warren (see Table 1).

Table 1

Percent of Cases Overturning Laws by Chief Justice Through 2014

Chief Justice	Percent Overturned during Total Terms
Roberts	3.8 %
Rehnquist	6.4 %
Warren	7.1 %
Burger	8.9 %

Furthermore, considering the lower number of cases on the docket, the minimalism of the Roberts Court is striking.

Next, *Ashwander* has been used by all but one Justice on the Court for *Citizens United* for the proposition that judicial restraint requires the avoidance of broad constitutional rulings.[14] Furthermore, all five members of the conservative bloc are among these authors. *Ashwander* inherently compels a minimalist step in decision making until and unless the other Courts and/or branches fail to deal with the message from the Supreme Court.

Ward and Pickerill noted the change in the Roberts Court toward such minimalism: "narrow, minimalist rulings are now the order of the day. In each case, Roberts voted for a narrow position and his view prevailed in three of the four decisions. In the case where it did not—*Windsor*—he drafted a dissent emphasizing that the Court's holding was limited" (Ward and Pickerill 2013). Bader (2010) further notes, "Chief Justice John Roberts has often been depicted

[14] See *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014)(Roberts, C.J.); *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011) (Kagan, J.); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 744 (2010) (Breyer, J., concurring); *Pearson v. Callahan*, 555 U.S. 223, 241 (2009) (Alito, J.); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (Thomas, J.); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (Kennedy, J.); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000) (Scalia, J.); *Jones v. United States*, 529 U.S. 848, 857 (2000) (Ginsburg, J.)(The Doctrine of Constitutional Avoidance: A Legal Overview 2014, note 99).

as an advocate of narrow rulings and a judicial philosophy of minimalism" (Bader 2010, 269). Randall T. Adams further notes that the decisions by the Roberts Court "might be fairly characterized as 'minimalist'" (Adams 2010).

This question was studied empirically by Ward and Pickerill, who used five categories: (1) Uphold Broadly, (2) Uphold Narrowly, (3) Strike Down As Applied (4) Strike Down On Face Narrowly, and (5) Strike Down On Face Broadly (Ward and Pickerill 2013). In doing so, they measured conventional judicial restraint, judicial minimalism, and passive virtues. The authors then provided a detailed examination of illustrative Supreme Court decisions for each category. The results from the Rehnquist and Roberts Courts from the 1994 term through the end of the 2011 term were presented. The numbers, as studied by Ward and Pickerill, bear the notion of minimalism out, concluding that the aggregate votes of the justices on the Roberts Court were minimalist 76.7% of the time, compared to 54.7% for the Rehnquist Court (Ward and Pickerill 2013).

Indeed, it appears that Roberts has used *Ashwander* as a means of giving the minority members attitudinal victories on non-Constitutional grounds. Two factors point to this likelihood. First is the Court's unwillingness—compared to its predecessors—to strike down laws (Whittington 2014). Second, a liberal shift in the "scoring of the court," which would explain these decisions as well, would be wildly inconsistent with the attitudinal model, including a leftward lurch by Justice Scalia. Judges are apt to agree on large general principles, as well as "baby steps," – meaning they do not reach far beyond prior decisions, as seen in the cases above, which often allow for a specific decision that does not require the fine print given to open Constitutional questions.

This prospect seems at odds with the conservative narrative on the subject. However, Whittington's analysis shows a Court that simply is not striking down laws and is instead not deciding these cases based on the Article III question. It has now been frequently observed that the Roberts Court has been remarkably reluctant to exercise the power of judicial review. The Court in recent years has struck down federal laws in fewer cases than has its predecessors (Ward and Pickerill 2013; Whittington 2014). More importantly, as Whittington notes, "the Court has struck down state laws in far fewer cases than has been routine for the past century. This Court could plausibly be described as the least activist Court in history, and this recent pattern should also cause us to reevaluate the claims of activism during the late Rehnquist Court" (Whittington 2014, 2220). This reluctance has also been confirmed by other scholars, who note that "in a high amount of cases, the Court decides cases very narrowly, not reaching very far ahead of where they need to be to decide the case" (Liptak Symposium). Lazarus notes that this tendency also affects opinion assignment: "for the closely divided cases in particular, the Chief appears to place a premium on opinion writers who can write more narrowly and therefore can be more trusted to maintain the majority established at conference" (Lazarus 2015). The Chief Justice's actions, along with the full use of the case and a reflection of the numbers of laws overturned, discussed above, seems to settle this argument.

CHAPTER 6

ROBERTS SACRIFICES HIS IDEOLOGY FOR HIS VISION OF THE COURT

Under intense political and media scrutiny, as well as challenges to the very legitimacy of the Court itself, the United States Supreme Court issued a landmark decision in *NFIB v. Sebelis,* 567 U.S. (2012), which upheld most of the provision of the Patient Protection and Affordable Care Act (ACA) and the Health Care and Reconciliation Act. The enormous political and market effects of this decision are still being debated. However, in what seemed like the least likely possible decision, Justice Roberts' actions have simultaneously worked to restore public opinion of the legitimacy of the Court while fundamentally altering the balance of Congressional and judicial power. The effects of the complex decision, including the shifting of the balance of power between Congress and the Courts, as well as the extraordinary actions of Justice Roberts with regard to his odd tax-based deference in this matter and its relation to the Court in crisis, cannot be explained by the attitudinal model. These actions do fit within the context of a circumstantial argument that Roberts has been pursuing a different set of goals rather than a mere ideological point and was willing to use the largest tool he had at his disposal to do so.

First, five members of the Court have starkly decreased the scope of the Commerce Clause. Congress has enjoyed vast deference to its legislative will under the auspices of *Wickard v. Filburn*, 317 U.S. 111 (1942). There, the Court held that government, via the Commerce Clause, had such vast powers of regulation that it could regulate an individual's private production of food for personal consumption. This decision has formed the foundation for vast grants of

Congressional power. Not surprisingly, this argument was at the core of the government's brief and was the expected basis for the decision.

However, in 1995, the decision of *U.S. v. Lopez*, 514 U.S. 549 (1995) challenged the decades of precedent flowing from *Wickard* and ruled that Congress, for the first time since the New Deal, had overstepped the authority of the Commerce Clause. This decision seemed to be an aberration, as the Court had returned to its prior foundation in *Gonzales v. Raich*, 545 U.S. 1 (2005) where the Court upheld the application of the Controlled Substances Act and stated that the power to criminalize the possession of home grown medicinal marijuana was nonetheless subject to Congressional legislation under the Commerce Clause.

Justice Roberts, with the four dissenters, but comprising a majority of the Court, appears to have indicated a conservative shift in judicial checks on Congressional power. Facing a legitimacy crisis regarding the political nature of the Court in the wake of *Bush v. Gore*, 5312 U.S. 98 (2000) and numerous 5-4 decisions in the next decade, Roberts ceded his ideological ground – although not without compromise. First, he noted the limits of the Commerce Clause, agreed upon by the liberal majority.

> "Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. Congress already possesses expansive power to regulate what people do. Upholding the Affordable Care Act under the Commerce Clause would give Congress the same license to regulate what people do not do. The Framers knew the difference between doing something and doing nothing. They gave Congress the power to regulate commerce, not to compel it. Ignoring that distinction would undermine the principle that the Federal Government is a

> government of limited and enumerated powers. The individual mandate thus cannot be sustained under Congress's power to 'regulate Commerce.'"

Here, Justice Roberts expressly stated the intention of the Court to limit the powers that Congress enjoyed under the Commerce Clause. He continued, "The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States."

However, in whether to save the Act, Roberts then abandoned his ideological preference, having saved a key issue for the Court and upheld the case for issues of institutional legacy and deference. Justice Roberts reached well back into history to support the position that even if legislation was not claimed to be a tax, it would not void taxes as valid under the authority Congress' taxing power, including charges for licenses and a surcharge on the shipment of nuclear waste. The Court held, "we held that the same exaction, although labeled a tax, was not in fact authorized by Congress's taxing power. *Drexel Furniture*, 259 U. S., at 38. That constitutional question was not controlled by Congress's choice of label." Rather, "the question is not whether that is the most natural interpretation of the mandate, but only whether it is a 'fairly possible' one." The Court further explained that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."

Having set out a foundation, Justice Roberts, for the majority, did fundamentally break with prior jurisprudence by reinstituting case law that eviscerates and inherently overrules the tax cases of the 1920s and 1930s. Unlike these cases, which focus on the motivation and purpose, this decision guts Dual Federalism's rationale by essentially declaring the motivation is irrelevant, as noted by Justice Day's opinion for *United States vs. Doremus*, 249 U.S. 86 (1919): "If the

legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it."

However, despite rejecting the intent and purpose of the case, Roberts used *Drexel* as the foundation of the review of the viability of the Act as an exercise of the tax power. Citing three factors in that case, Roberts set out a slightly new evaluation of the examination of the question of tax versus penalty:

> "in *Bailey v. Drexel Furniture*, we focused on three practical characteristics of the so-called tax on employing child laborers that convinced us the 'tax' was actually a penalty. First, the tax imposed an exceedingly heavy burden—10 percent of a company's net income—on those who employed children, no matter how small their infraction. Second, it imposed that exaction only on those who knowingly employed underage laborers. Such scienter requirements are typical of punitive statutes, because Congress often wishes to punish only those who intentionally break the law. Third, this 'tax' was enforced in part by the Department of Labor, an agency responsible for punishing violations of labor laws, not collecting revenue" (567 U.S. 519 (2012)).

Roberts addressed the first factor in footnote 8 of his opinion after noting that the tax could never exceed the actual cost of purchasing insurance: "In 2016, for example, individuals making $35,000 a year are expected to owe the IRS about $60 for any month in which they do not have health insurance. Someone with an annual income of $100,000 a year would likely owe about $200" (ibid.). Next, he stated, "the individual mandate contains no scienter requirement" (ibid.) Finally, Roberts noted, "[t]hird, the payment is collected solely by the IRS through the normal means of taxation—except that the Service is not allowed to use those means most suggestive of

a punitive sanction, such as criminal prosecution. See §5000A(g)(2). The reasons the Court in Drexel Furniture held that what was called a 'tax' there was a penalty support the conclusion that what is called a "penalty" here may be viewed as a tax" (ibid.). Roberts' creativity, especially in light of his overall goals and flexibility left in his tax argument, are impressive. However, they do not seem to comport with a right-of-center Justice on the issue.

Roberts also exacted a second compromise. Kagan and Breyer agreed that the theoretical framework of a previously obscure dicta did provide real limitations on the government. The Spending Clause provides that "Congress shall have Power…to pay the Debts and provide for the common Defense and general Welfare of the United States" (Art. I, § 8, cl. 1). The Spending Clause permits Congress to "fix the terms on which it shall disburse federal money to the States," and "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions" (*Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Prior to this case, there were four recognized limitations on the spending clause. These included the following:

> 1) the exercise of the spending power must be in pursuit of the general welfare. *Helvering v. Davis*, 301 U.S. 619, 640, (1937).
>
> 2) the conditions on the receipt of federal funds must be reasonably related to the legislation's stated goal. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).
>
> 3) Congressional intent to condition funds on a particular action must be unambiguous and must enable the states to knowingly exercise their choice whether or not to participate. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).
>
> 4) Congress cannot act to "induce the States to engage in activities that would themselves be unconstitutional." *Dole*, at 210 (1987).

For the first time, the Court, with Breyer and Kagan, found that *Dole* and *Pennhurst* had been violated: "[t]hough Congress' power to legislate under the spending power is broad, it does not

include surprising participating States with post acceptance or 'retroactive' conditions. A State could hardly anticipate that Congress's reservation of the right to "alter" or "amend" the Medicaid program included the power to transform it so dramatically" (*Id.*, at 2598). The court elaborated:

> "The Medicaid expansion, however, accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children. See 42 U. S. C. §1396a(a)(10). Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage" (*Id.*, at 2605).

This opinion shows the lengths that Roberts will go to defer, when possible, to *elected officials.* In choosing between ideology and the institutional nature of the Court, Roberts goes beyond normal judicial function to achieve a well-reasoned account to defend the Court's reputation, take small steps and, indeed as he does as a minimalist, punt.

A legitimate question arises about why we did not see this approach in *Obergfrell v. Hodges* at all and a larger question of why this is not the approach in all major court legitimacy questions. First, public opinion shifts do not have the force of a law passed by Congress and signed by the President. Indeed, many argue the opposite, including Chief Justice Roberts. Second, we did see this, in *Windsor*, where Roberts limited the initial decision to already married couples: "By seeking

to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages" (*Id.*, at 133 S.Ct. at 2696). Finally, the Chief leads the Court, he does not control it.

CHAPTER 7

SALIENCE

Finally, salience needs to be addressed to resolve the question of whether the Roberts Court is merely taking easier, low-profile cases that do not impact judges. Defining salience itself is problematic, "as it cannot be directly observed and is not even a monolithic or well-defined concept. Cases vary in their political salience to the public, their legal salience to lawyers and judges, and in a hybrid way to politicians and political elites. Moreover, the extent to which these different conceptualizations of salience are correlated with one another is unclear" (Clark, Lax, and Rice 2015, 38). Due to this flexibility, there can be open disagreement as to how salience is or should be measured. Thus, I chose the following measures.

In an examination of case salience, what we learn is that the current Chief has been as strategic in assigning high-salience cases as he has been with those of lower salience. Reviewing the highest-profile matters, a Harvard study finds that "[a]pproximately 15 percent, or 85, of the 600 total cases assigned by the Chief from 2005-2014 fall into the study's high-profile 'salient' category, which are defined as decisions identified as the most important cases of the Term by the *New York Times* for each of the ten Terms" (Lazarus 2015). At the close of every term, the *New York Times* publishes a separate listing of those important rulings for its readers, typically numbering around ten cases in total but once as high as fifteen (see Liptak 2006-2014). While I am not certain that the *Times* is a wholly objective measure and understand the criticism of the use of a single newspaper to adequately reflect salience over a 50- to 70-year period, replicating the exhaustive study is beyond the scope of this thesis; while questions can be raised about this

approach, the method is at least credible. Not surprisingly, in these high-salience matters, numerical equality was not met, and Roberts favored writing the decision most often.

In addition to the *New York Times* construction, Whisenant (2016), using the Supreme Court database, provides two different measures, mean and median salience over time. She used a very traditional method of measuring salience, examining the *Washington Post* and the *New York Times* for articles mentioning the phrase "Supreme Court" and then using an automated reader program to analyze the articles "for mentions of specific cases" and to "[match] the articles to specific cases." I found her approach to be a traditional study of salience.

Table 2

Mean Salience of Cases by Chief Justice 1955 to 2014 Terms

Chief Justice	Court Mean Salience
Warren	0.021
Burger	0.023
Rehnquist	0[15]
Roberts	-0.004

[15] The author set Rehnquist at 0 for purposes of comparison in both tables.

Table 3

Median Salience of Cases by Chief Justice 1955 to 2014 Terms

Chief Justice	Court Median Salience
Warren	0.043
Burger	0.059
Rehnquist	0
Roberts	0.089

I list both approaches because these numbers provide very different views on all courts, but especially the Roberts Court. Neither negates the concerns listed above, but given my dissatisfaction with traditional definitions, they provide some reference. The high difference in the Roberts Court could be in light of the high number of unanimous or 8-1 error correcting cases that escape notice. Additionally, given the relatively small number of cases accepted by the Roberts Court, the median value appears to prevent outliers from skewing the numbers. Therefore, the median measure likely makes more sense and would indicate that the Roberts Court is taking on *more salient* cases.

After reviewing the cases in total, a brief review of the Justices' voting shows that the attitudinal model does still have predictive value. Roberts and Kennedy, the conservative swing votes, are highest with Roberts at 34%, followed by Justice Kennedy at 31%. This percentage is for nearly two-thirds of these cases and, given the ideological compatibility between Roberts and Kennedy, suggests that the ideological preference point is alive and well in the few highly charged cases the Court does take. (The remaining numbers do not add to 100 because Justices Alito,

Kagan and Sotomayor were added to the court to replace Stevens and Souter.) These numbers show the limits of equal opinion assignment. Work may be distributed evenly, but in higher-salience cases, the quality of cases does not remain the same, as discussed above with favored Justices (Lazarus 2015).

These cases remain the few and the outliers. A Court of such power to be taking fewer than ten cases per year and without reducing cases of greater salience (and, by one key measure, actually greatly increasing them) suggests that agreement is high amongst the judges on certain topics, even if in a narrow sense of Constitutional avoidance.

CHAPTER 8

CONCLUSION

The Chief Justice and his institutional leadership have created an observable and measurable shift in the number of decisions granted cert by the Court, the percentage of unanimous opinions decided by the court, and the nature of the decisions themselves as minimal and maximal. What should we make of these findings? First, justices are rational actors who weigh the costs and benefits of their votes. Second, when the matter is less ideologically important to a particular Justice or of lower salience, those costs and benefits can actually outweigh strict attitudinal concerns, especially where the Court limits how far it steps into the future. While we are missing key data that would flesh this equation out, it does not relieve us of our duty to raise these questions. Such an equation would supplement the circumstantial case made in this paper that Chief Justice Roberts has acted to pursue certain goals and used the tools at his disposal as Chief to encourage his colleagues to move slowly and focus on serious errors over a choice of ideology first and last.

Additionally, the court's decision-making behavior is only a small part of the data compared to what is not observable to political scientists and other legal academics. The certiorari process, for example, which includes cases that are not granted review, may be of greater relevance than the cases that are granted review. However, this massive amount of potential data is not measured or observed in any empirical analysis. This does not mean that the observations presented herein about the Roberts Court are incorrect; they are simply what we know until better information is available. It is possible that the concurrences hold some important information.

However, three facts are not disputed. The first is that politically charged cases are heavily influenced by policy preference, but in many cases, we are viewing a collegial court with broad agreement on many principles that moves slowly. The second, and related point, is that Justice Roberts has, at least in part, moved to attain his goals of an institutional Court rather than a larger policy-making body. This approach gives greater credence and clarity for lower courts, even at the expense of Roberts' own ideological preferences. Finally, Roberts has shown a propensity in his writing and use of his tools to function in a unique way, especially to protect the legacy and credibility of the Court as an institution.

And that is the legacy of the leadership of Justice Roberts.

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