5-2013

Freedom of Expression...with Attitude

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Undergraduate honors thesis under the direction of

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Submitted to the LSU Honors College in partial fulfillment of
the Upper Division Honors Program

May 2013

Louisiana State University & Agricultural and Mechanical College

Baton Rouge, Louisiana

The United States Supreme Court is not just composed of justices, but of individuals who have political ideologies and preferences. The attitudinal model of decision-making claims that these policy preferences affect the justices' votes and written opinions in cases. Juxtaposed with the legal model, the attitudinal model discounts the importance of precedent and the intent of the framers in decision-making to favor labeling justices, votes, and decisions as liberal or conservative. The attitudinal model asserts that a liberal justice will produce more liberal decisions, and a conservative justice will produce more conservative decisions. This thesis will explore the attitudinal model of Supreme Court decision-making as it relates to specific First Amendment freedom of expression cases.

Supreme Court justices are policymakers. Segal and Spaeth define a policymaker as someone who "authoritatively allocates resources."[1] These resources can be anything from money to civil rights and liberties. Therefore, as policymakers, Supreme Court justices have the power to allocate rights to groups of people by how they decide a case. Consequently, justices make law with their decisions. Supreme Court Justice Benjamin Cardozo once expounded that "the law…is not found, but made" by judges.[2] Laws affect the everyday life of citizens in the United States, which means that it is important to understand how judges come to the decisions that translate in public policy and laws.

The Supreme Court can have a great effect on determining what is law in the United States. Supreme Court Justice Oliver Wendell Holmes, Jr. defined law as "the prophecies of what courts will do in fact, and nothing more pretentious."[3] Both Cardozo and Holmes have unsurprisingly centralized the definition of law around the courts, showing how essential they

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[1] Segal, Jeffrey A. and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, (Cambridge: Cambridge UP, 2002), 6.
[2] Cardozo, Benjamin N., *The Nature of the Judicial Process*, (New Haven: Yale UP, 1921), 115.
[3] Holmes, Jr., Oliver Wendell, *The Path of the Law*, 1897

believe all courts, but especially the Supreme Court, to be in the policymaking process. However, law is ever-changing because the public changes, society changes, and the composition of the Supreme Court changes. Holmes stated, "We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self-evident, no matter how ready we may be to accept it."[4] Consequently, the law can change with each decision made by the Supreme Court. Therefore, it is important to be able to predict the law, which can be done by looking for patterns in and at methods of Supreme Court decision-making.

Since Supreme Court justices are considered policymakers, they must have policy goals. Rohde and Spaeth argue that the "primary goals of Supreme Court justices in the decision-making process are *policy goals*."[5] They 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 to those policy preferences."[6] In the attitudinal model, a justice enacts his or her political attitudes and preferences while judging the facts of the case to reach these policy goals. A justice's policy goals should reflect his or her beliefs, attitudes, and values. Therefore, the policies that result from Supreme Court decisions should be reflective of the composition of the Court, concerning the political attitudes of its members.

The legal model is the antithesis of the attitudinal model, though both attempt to explain the behavior of justices regarding Supreme Court decision-making. The legal model holds that "the decisions of the Court are substantially influenced by the facts of the case in light of the

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[4] *Lochner v. NY*, 198 U.S. 45 (1905)
[5] Rhodes, David W. and Harold J. Spaeth, *Supreme Court Decision Making*, (San Francisco: W.H. Freeman and Company, 1976), 72.
[6] *Ibid*, 72.

plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent."[7] A supporter of the legal model would not agree with Cardozo's maxim that "the law…is not found, but made" by judges.[8] In contrast, they would argue that a judge finds the law by being guided by statutes, the Constitution, framer intent, and precedent. However, Segal and Spaeth argue that the "legal model and its components serve only to rationalize the Court's decisions and to cloak the reality of the Court's decision-making process."[9] The legal model can be juxtaposed with the attitudinal model to better understand the conflicting views of how Supreme Court justices decide cases.

The attitudinal model requires a basic understanding of what is meant in reference to justices' beliefs, attitudes, and values. Segal and Spaeth's attitudinal model "holds that justices make decisions by considering the facts of the case in light of their ideological attitudes and values."[10] Therefore, it is important to understand the definitions of attitude and value. Rhode and Spaeth define attitude as a:

> "relatively enduring, organization of interrelated beliefs that describe, evaluate, and advocate action with respect to an object or situation, with each belief having cognitive, affective, and behavioral components. Each one of these beliefs is a predisposition that, when suitably activated, results in some preferential response for the attitude object or situation, or toward the maintenance or preservation of the attitude itself. Since an attitude object must always be encountered with some situation about which we also have an attitude, a minimum condition for social behavior is the activation of at least two interacting attitudes, one concerning the attitude object and the other concerning the situation."[11]

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[7] Segal, Jeffrey A. and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, (Cambridge: Cambridge UP, 2002), 48.
[8] Cardozo, Benjamin N., *The Nature of the Judicial Process*, (New Haven: Yale UP, 1921), 115.
[9] Segal, Jeffrey A. and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, (Cambridge: Cambridge UP, 2002), 53.
[10] *Ibid*, 110.
[11] Rhodes, David W. and Harold J. Spaeth, *Supreme Court Decision Making*, (San Francisco: W.H. Freeman and Company, 1976), 75.

The definition of value is simply "an interrelated set of attitudes."[12] Since an attitude is "relatively enduring," the votes of Supreme Court justices must be "relatively stable and consistent" if attitudes are to be considered the "proximate cause" of the justices' votes.[13] Therefore, a liberal voting pattern should be seen for liberal justices, and a conservative voting pattern should be seen for conservative justices. As a result, the beliefs, attitudes, and values of Supreme Court justices should predictably affect their decisions.

The attitudinal model of Supreme Court decision-making insists that justices decide cases based on the facts in light of their ideological beliefs and policy preferences. The critics of this model insist that in reality judges remain neutral and unaffected, relying on only the facts of the case and relevant legal doctrine. However, Supreme Court Justice Cardozo combated these theories with his assertion that "there is in each of us a stream of tendency…which gives coherence to thought and action. Judges cannot escape that current more than other mortals."[14] As a Supreme Court justice, Cardozo spoke for many judges when he stated, "We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own."[15] Cardozo argues that judges are no different from everyone else in that their views and ideologies affect the decisions they make; there cannot be a separation of a person and his or her beliefs just because that person has become a judge. Cardozo's thesis of judge-made law and attitudinal decision-making supports the attitudinal model of Supreme Court decision-making.

Supreme Court justices are free to decide cases using whatever manner they choose. Rhode and Spaeth assert that Supreme Court justices have "free play of personal policy

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[12] Rhodes, David W. and Harold J. Spaeth, *Supreme Court Decision Making*, (San Francisco: W.H. Freeman and Company, 1976), 77.
[13] Segal, Jeffrey A. and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, (Cambridge: Cambridge UP, 2002), 324.
[14] Cardozo, Benjamin N., *The Nature of the Judicial Process*, (New Haven: Yale UP, 1921), 12.
[15] *Ibid*, 13.

preferences" as motivating factors in their decisions, which means that there are no consequences for using their personal policy preferences to decide cases. Supreme Court justices are not accountable to the electorate and have tenure for life.[16] Therefore, they do not have to worry about their decisions seeming unappealing to the voting public. Also, Supreme Court justices do not have ambition for higher office, which means that they do not make decisions "on the basis of how they will affect the probability" of attaining an office.[17] Finally, the Supreme Court holds the position as the court of last resort, which means that it cannot be overruled or held accountable by any other court.[18] Supreme Court justices can make decisions whose unpopularity holds no real consequences for them. Consequently, justices can easily decide a case using whichever method they choose, including a method that advances their own personal policy preferences.

The attitudinal model classifies justices, votes, and decisions as liberal or conservative. In general, liberal decisions are "pro-person accused or convicted of crime, pro-civil liberties or civil rights claimant, proindigent, pro-Indian, and antigovernment in due process and privacy, except for takings clause cases."[19] Concerning the First Amendment, a liberal vote or decision protects or expands the right to freedom of expression. A conservative vote or decision does not protect and/or does restrict the right to freedom of expression. Theoretically, a conservative justice is more likely to cast a conservative vote in a case, while a liberal justice is more likely to cast a liberal vote in a case. A Court that is composed of a majority of liberal justices will produce more liberal decisions, unlike a Court that is composed of a majority of conservative

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[16] Rhodes, David W. and Harold J. Spaeth, *Supreme Court Decision Making*, (San Francisco: W.H. Freeman and Company, 1976), 74.
[17] *Ibid*, 72-73.
[18] *Ibid*, 74.
[19] Segal, Jeffrey A. and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, (Cambridge: Cambridge UP, 2002), 323.

justices, which will produce more conservative decisions. However, these decisions must be made in light of the facts of the case. As a result, no justice or court produces only decisions that are consistent with their attitudes, beliefs, and values.

The Supreme Court's rulings concerning the freedom of expression of the First Amendment are vital to the composition of a democratic society. The First Amendment's provision for freedom of expression is the "core of our structure of individual rights."[20] Freedom of expression "remains the foundation of our efforts to obtain the proper balance between individual liberty and collective responsibility" and "still provides the framework within which our society tries to achieve necessary, nonviolent, social change."[21] The First Amendment freedom of expression doctrine has shifted throughout the different Courts, from the Warren Court through the Rehnquist Court.

This thesis will look at certain First Amendment freedom of expression decisions of the Warren Court, Burger Court, and Rehnquist Court, along with the individual decisions of Chief Justice Warren, Chief Justice Burger, and Chief Justice Rehnquist. These justices were chosen because of their leading roles in the Court and because their long tenure allowed them to decide numerous freedom of expression cases. Research typically classifies Courts by their chief justice because people associate with the leadership over periods of time. Furthermore, since chief justices typically serve for longer periods of time, they provide a larger pool of cases in which to evaluate their attitudes.

The Warren Court presided from 1953 to 1969. It is known for its extreme liberalism and its expansion of civil rights and liberties. In general, the Warren Court "protected expression to

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[20] Emerson, Thomas I., "First Amendment Doctrine and the Burger Court," *Yale Law School Legal Scholarship Repository*, (New Haven: Yale UP, 1980), 422.
[21] *Ibid*, 422.

an unprecedented degree" because of its "strongly favorable attitude toward the First Amendment."[22] The Court's chief justice, Earl Warren, was ideologically liberal, and therefore, cast mostly liberal votes. Chief Justice Warren "was his Court: *the* judicial activist Court: he viewed law as an instrument to obtain 'the right' result," which happened to be the liberal result a vast majority of the time.[23] Under Warren, there was a significant shift toward preferred freedoms.[24] Warren himself stated that "I am one who believes firmly that the Court must be vigilant against neglect of the requirement of our Bill of Rights and the personal rights that document was intended to guarantee for all time."[25] This philosophy of Warren's was the main drive behind his liberal decisions protecting civil rights and liberties, and specifically in this study, the freedom of expression. Warren felt that ethical imperatives, mainly the protection of rights, "deserved as much consideration as explicit constitutional language, and perhaps more."[26] Consequently, he identified the "language in the Bill of Rights with protection of the natural rights of man against the arbitrary actions of government."[27] Warren's pursuit of the protection of rights logically led to his liberal decisions, which did just that. According to Epstein, Warren "supported the liberal position" in 78.5% of all civil liberties cases in which he was involved.[28]

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[22] Emerson, Thomas I., "First Amendment Doctrine and the Burger Court," *Yale Law School Legal Scholarship Repository*, (New Haven: Yale UP, 1980), 440.
[23] Abraham Henry J., *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II*, (Lanham: Rowman & Littlefield, 2008), 203.
[23] Mason, Alpheus Thomas, *The Supreme Court: From Taft to Burger*, (Baton Rouge: LSU UP, 1979), 268.
[24] *Ibid*, 268.
[25] Warren, Earl, "The Bill of Rights and the Military," (New York: NYU Law Review, XXXVII, 1962), 201-202.
[26] White, G. Edward, "Earl Warren as Jurist," *Virginia Law Review* 67.3, (Charlottesville: Virginia Law Review, 1981), 462.
[27] *Ibid*, 470.
[28] Epstein, Lee, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions and Developments*, (Washington, D.C.: *Congressional Quarterly*, 1994), 424.

The Warren Court undoubtedly earned its reputation of extreme liberalism with its expansion of the Bill of Rights and unprecedented protection of the freedoms it ensures.

The liberal Warren Court was predictably responsible for numerous liberal decisions in the area of freedom of expression. Chief Justice Warren "held steady" the "direction of the Court," drawing them toward and across liberal lines.[29] Warren's Court generally followed his liberal lead in freedom of expression cases, with the one exception of the internal security cases, in which governmental interest proved too strong a factor for personal rights to overcome.[30] In keeping with its liberal reputation, the Warren Court rarely "narrowed the rights and immunities granted by the Constitution," rather it "insisted upon a strict interpretation of them."[31] In deciding between liberty and restraint, the Warren Court had a liberal "tendency" to "strike the balance in the favor of liberty," protecting the freedoms the liberal justices believed to be inherent in the Constitution.[32]

The Burger Court was a more conservative Court that persisted from 1969 to 1986. Chief Justice Warren Burger was ideologically conservative, which was reflected in his votes. In fact, Burger was an "on-the-record critic of Earl Warren's jurisprudence."[33] Before Burger even became a Supreme Court Justice, he had "established the sort of conservative judicial record" that "held high promise for a halt in the liberal jurisprudence of the Warren Court and, perhaps,

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[29] Katcher, Leo, *Earl Warren: A Political Biography*, (New York: McGraw-Hill, 1967), 475.
[30] *Ibid*, 475.
[31] *Ibid*, 476.
[32] Mason, Alpheus Thomas, *The Supreme Court: From Taft to Burger*, (Baton Rouge: LSU UP, 1979), 294.
[33] Abraham Henry J., *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II*, (Lanham: Rowman & Littlefield, 2008), 236.

even a reversal of aspects thereof."[34] Burger did his best to pull his associate justices away from their "predictable liberal-left majoritarian position under his predecessor's leadership;" a task that was often made difficult by the justices left over from the Warren Court.[35] Burger is considered a conservative justice in civil liberties decisions, voting conservatively in 70.4% of cases.[36] Burger's conservatism and the effect that it had on his Court can be seen in the conservative freedom of expression decisions that it produced.

Under the leadership of its chief justice, the Burger Court "displayed far less sensitivity to First Amendment values" than the Warren Court.[37] The Burger Court has "refused to press First Amendment doctrine forward but rather has tended to withdraw, frequently by taking advantage of openings in Warren Court decisions."[38] Overall, under the Burger Court, civil rights and liberties were not "accorded the priorities enjoyed under Warren."[39] For example, when free speech conflicted with "traditional proprietary rights asserted by individuals, corporations, or even government," the Burger Court viewed it as "simply one factor to be weighted in the balance, with no recognition that speech should be first among equals in the pantheon of liberty," displaying a conservative attitude toward the First Amendment's freedom

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[34] Abraham, Henry J., *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II*, (Lanham: Rowman & Littlefield, 2008), 236.
[35] *Ibid*, 203.
[36] Epstein, Lee, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions and Developments*, (Washington, D.C.: *Congressional Quarterly*, 1994), 424.
[37] Emerson, Thomas I., "First Amendment Doctrine and the Burger Court," *Yale Law School Legal Scholarship Repository*, (New Haven: Yale UP, 1980), 440.
[38] *Ibid*, 440.
[39] Mason, Alpheus Thomas, *The Supreme Court: From Taft to Burger*, (Baton Rouge: LSU UP, 1979), 289.

of expression.[40] Consequently, the Burger Court's conservatism was expressed in its freedom of expression doctrine.

The Rehnquist Court presided from 1986 to 2005 and is known as a conservative Court. Chief Justice William Rehnquist was first an associate justice beginning in 1972 before being promoted to chief justice of the Court in 1986. However, this study will only look at Rehnquist's votes and opinions during his time as chief justice. Rehnquist is known as one of the most conservative justices, whose votes were persistently conservative.[41] More specifically, he was considered a conservative regarding civil liberties cases, in which he voted conservatively in 79.6% cases.[42] Rehnquist's voting record was "overwhelmingly conservative, with the justice regularly voting to restrict civil rights and liberties, to retain the death penalty, and to side with business in antitrust cases and against unions in labor litigation."[43] In fact, Rehnquist has proved "willing to rethink doctrines in terms of a personal constitutional ideology," disregarding precedent and traditional legal decision-making methods.[44] Chief Justice Rehnquist's conservatism regarding civil rights and liberties can be seen in his freedom of expression doctrine.

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[40] Dorsen, Norman and Joel Gora, "The Burger Court and the Freedom of Speech," Ed. Vincent Blasi, *The Burger Court: The Counter-Revolution that Wasn't*, (New Haven: Yale UP, 1983), 44.
[41] Segal, Jeffrey A. and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, (Cambridge: Cambridge UP, 2002), 321.
[42] Epstein, Lee, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions and Developments*, (Washington, D.C.: *Congressional Quarterly*, 1994), 424.
[43] Yarbrough, Tinsley E., *The Rehnquist Court and the Constitution*, (Oxford: Oxford UP, 2000), 6.
[44] Lewis, Anthony, *The Burger Court: The Counter-Revolution that Wasn't*, Ed. Vincent Blasi, (New Haven: Yale UP, 1983), ix.

The Rehnquist Court "moved in a dramatically conservative direction, with membership change being the key factor explaining these shifts in the Court's decisional pattern."[45] The membership change that took place "ensured even more complete conservative domination of the Court."[46] However, the Rehnquist Court was not as "conservative as liberals had feared and conservatives had anticipated."[47] Generally, the Rehnquist Court "developed a distinctively conservative jurisprudence for the new century."[48] Yet, the Rehnquist Court still earned its reputation for conservatism in the area of freedom of expression.

This thesis will consider the attitudinal model discussed above in regards to the specific Supreme Court cases involving the First Amendment's freedom of expression discussed below. Each case has been labeled as a conservative or liberal decision. The votes of Chief Justice Warren, Chief Justice Burger, and Chief Justice Rehnquist, are also labeled as liberal or conservative. While this is a limited study using an empirical qualitative approach, not a systematic quantitative approach, the results should nonetheless provide a substantive test of the attitudinal thesis. Table 1 below lists all of the cases considered, the Supreme Court's decision as liberal or conservative, the justices' votes as liberal or conservative, and any opinions written by the chief justices.

Overall, the chief justices have decided a vast number of freedom of expression cases, First Amendment cases, and civil liberties cases. Warren participated in 771 civil liberties cases, voting liberally in 78.5% of them, and in 159 First Amendment cases, voting liberally in 79.9%

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[45] Hensley, Thomas R., and Christopher E. Smith, "Membership Change and Voting Change: An Analysis of the Rehnquist Court's 1986-1991 Terms," *Political Research Quarterly* 48.4, (Utah: Sage, 1995), 839.
[46] *Ibid*, 839.
[47] *Ibid*, 855.
[48] Keck, Thomas M., *The Most Activist Supreme Court in History The Road to Modern Judicial Conservatism*," (Chicago: U of Chicago P, 2004), 252.

of them.[49] Burger participated in 1,430 civil liberties cases, voting conservatively in 70.4% of them, and in 213 First Amendment cases, voting conservatively in 68.1% of them.[50] Rehnquist, in his entire term on the Supreme Court, participated in 1,665 civil liberties cases, voting conservatively in 79.6% of them, and in 241 First Amendment cases, voting conservatively in 81.3% of them.[51] Though freedom of expression cases make up only a portion of First Amendment cases, these statistics give a better idea of the scope of the topic and the number of cases I was looking at when deciding which cases I would consider in my study.

To select the sample of cases for this study, I searched freedom of expression cases in Lexis Nexis, JSTOR, and Google Scholar, and chose those that emphasized certain aspects of freedom of expression, such as indecency, obscenity, expression in schools, protesting, and symbolic expression. I want the thesis to be focused, especially in these areas, and therefore, chose ten cases per justice. The cases selected are highly salient cases because such cases typically get significant attention, attract the focus of scholars, and have more impact on policy, and therefore, facilitate analyzing the variation among the courts and chief justices. The cases generally have had a substantial impact on public policy and have tailored the definition of freedom of expression into what it means today. The cases were not chosen based on whether they were liberal or conservative decisions, but rather their legal importance. Each case has contributed greatly to First Amendment freedom of expression precedent and literature.

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[49] Epstein, Lee, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions and Developments*, (Washington, D.C.: *Congressional Quarterly*, 1994), 427.
[50] *Ibid*, 428.
[51] *Ibid*, 429.

TABLE 1: First Amendment Freedom of Expression Cases				
Case	**Court/Justice**	**Liberal**	**Conservative**	**Written Opinion**
Roth v. US 1957	Warren Court		*	
	Warren		*	Concurrence
Yates v. US 1957	Warren Court	*		
	Warren	*		
Edwards v. SC 1963	Warren Court	*		
	Warren	*		
Brown v. LA 1966	Warren Court	*		
	Warren	*		
Adderly v. FL	Warren Court		*	
	Warren	*		
Memoirs v. MA 1966	Warren Court	*		
	Warren	*		
US v. O'Brien 1967	Warren Court		*	
	Warren		*	
Brandenburg v. OH 1969	Warren Court	*		
	Warren	*		
Tinker v. Des Moines 1969	Warren Court	*		
	Warren	*		
Shuttlesworth v. Birmingham 1969	Warren Court	*		
	Warren	*		
Organization for a Better Austin v. Keefe 1971	Burger Court	*		
	Burger	*		Majority
Cohen v. CA 1971	Burger Court	*		
	Burger		*	
Papish v. University of Missouri Curators 1973	Burger Court	*		
	Burger		*	
Paris Adult Theatre I v. Slaton 1973	Burger Court		*	
	Burger		*	Majority
FCC v. Pacifica Foundation 1978	Burger Court		*	
	Burger		*	
Snepp v. US 1980	Burger Court		*	
	Burger		*	
Haig v. Agee 1981	Burger Court		*	
	Burger		*	Majority
NY v. Ferber 1982	Burger Court		*	
	Burger		*	
US v. Grace 1983	Burger Court	*		
	Burger	*		
Bethel v. Fraser 1986	Burger Court		*	
	Burger		*	Majority
Frisby v. Schultz 1988	Rehnquist Court		*	
	Rehnquist		*	
Hazelwood v. Kuhlmeier 1988	Rehnquist Court		*	
	Rehnquist		*	
TX v. Johnson 1989/ US v. Eichman 1990	Rehnquist Court	*		
	Rehnquist		*	Dissent

Sable Communications of CA v. FCC 1989	Rehnquist Court	*		
	Rehnquist	*		
Barnes v. Glen Theatre, Inc. 1991	Rehnquist Court		*	
	Rehnquist		*	Judgment
Wisconsin v. Mitchell 1993	Rehnquist Court		*	
	Rehnquist		*	Majority
National Endowment for Arts v. Finley 1998	Rehnquist Court		*	
	Rehnquist		*	
Erie v. Pap's AM 2000	Rehnquist Court		*	
	Rehnquist		*	
Watchtower Bible and Tract Society of NY v. Village of Stratton 2002	Rehnquist Court	*		
	Rehnquist		*	
VA v. Black 2003	Rehnquist Court		*	
	Rehnquist		*	

In *Roth v. United States* (1957), the Warren Court held that obscenity was not protected under the First Amendment's freedom of expression in a conservative decision. The Court ruled that expression that is "utterly without redeeming social importance" would not be protected under the First Amendment, showing that not all expression is protected.[52] The Supreme Court determined that something was obscene if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[53] Warren voted with the conservative majority, but wrote a special concurrence in which he limits the decision strictly to the facts of this case in order to protect "the arts and sciences and freedom of communication generally" in potential future cases.[54] Although Warren agreed with the conservative decision, his concurrence is overwhelmingly liberal in his warning against allowing obscenity laws to stifle "great art or literature, scientific treatises, or works exciting social controversy."[55] Warren also advised that the context of the material and a person's use of them are of utmost importance in ruling on obscenity issues. This liberal Court's

[52] *Roth v. United States*, 354 U.S. 476 (1957)
[53] *Ibid*
[54] *Ibid*
[55] *Ibid*

conservative vote can be explained by the facts of the case, as obscenity is generally viewed as morally repugnant and has long been viewed as beyond the boundaries of expression protected by the First Amendment by both the majority of the population and the majority of Supreme Court justices.

In *Yates v. United States* (1957), the Warren Court created a stricter definition of advocacy, making it more difficult to prosecute people for their speech under the Smith Act.[56] The petitioners were convicted under the Smith Act for "conspiring (1) to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) to organize…with the intent of causing" such an overthrow of the Government.[57] *Yates v. United States* is considered a liberal decision because the Supreme Court reversed the convictions and protected the speech of those convicted. Warren voted with the liberal majority. This decision is labeled as liberal because it extends the First Amendment's protection of speech to advocacy of abstract ideas.

In *Edwards v. South Carolina* (1963), the Warren Court found that the arrests and convictions of marchers peacefully protesting South Carolina's segregation laws and practices violated their First Amendment rights to freedom of expression. In this liberal decision, the majority, including Warren, protected the marchers' right to "exercise…these basic constitutional rights in their most pristine and classic form."[58] The Court asserted that speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[59] Just because speech is "provocative and challenging" and expresses unpopular views does not mean that it does not

[56] *Yates v. United States*, 354 U.S. 298 (1957)
[57] *Ibid*
[58] *Edwards v. South Carolina*, 372 US 229 (1963)
[59] *Ibid*

garner First Amendment protection.[60] The Court also liberally insisted that there is "no room under our Constitution for a more restrictive view," eschewing a more conservative approach to the freedom of expression.[61]

In *Brown v. Louisiana* (1966), the Warren Court held that speech is not confined to verbal expression.[62] Warren joined the liberal decision that protected Brown's and others' right to peacefully protest a segregated library by silently sitting in the library. The Court held that this peaceful protest was a form of expression, since they were trying to convey a message that was clearly understood. This liberal decision made it easier for peaceful protests to occur legally in the United States.

In *Adderly v. Florida* (1966), the Warren Court did not protect Adderly and her fellow students' right to protest against segregation in the driveway of a jail in an uncommonly conservative decision. The Court separated this case from *Edwards v. South Carolina* because unlike public state capitol grounds, jails are conventionally not public. The Court clearly stated that people cannot constitutionally "propagandize protests or views…whenever and however and wherever they please."[63] Warren, however, joined a dissent in which the minority asserted that jails are an "obvious center for protest."[64] The dissenters went further in claiming that protesters' "methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable, as these were."[65] The dissenters warned against

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[60] *Edwards v. South Carolina*, 372 US 229 (1963)
[61] *Ibid*
[62] *Brown v. Louisiana*, 383 U.S. 131 (1966)
[63] *Adderly v. Florida*, 385 U.S. 39 (1966)
[64] *Ibid*
[65] *Ibid*

letting the "power to control excesses of conduct be used to suppress the constitutional right itself," like what may happen in more conservative decisions.[66]

In *Memoirs v. Massachusetts* (1966), the Warren Court made the liberal decision that John Cleland's book *Memoirs of a Woman of Pleasure* was not obscene because it was not "utterly without redeeming social value."[67] The Court stressed that books could not be considered obscene even if they were "patently offensive" and appealed to the prurient nature.[68] Warren was part of the liberal majority. The liberal decision in *Memoirs* gave greater protection to literary art in the United States.

In *United States v. O'Brien* (1967), Warren and his Court held that O'Brien's burning of his draft card, which violated a federal law prohibiting the destruction or defacement of draft cards, at a courthouse was not protected by the First Amendment's freedom of expression. Warren, writing for the majority, declared that the Court could not "accept the view that an apparently limitless variety of conduct can be labeled as 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[69] This would extend too broad a protection of action, which led the Court to establish a standard to determine when a "sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[70] Warren stated that government regulation is "sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not

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[66] *Adderly v. Florida*, 385 U.S. 39 (1966)
[67] *Memoirs v. Massachusetts*, 383 U.S. 413 (1966)
[68] *Ibid*
[69] *United States v. O'Brien*, 391 U.S. 367 (1968)
[70] *Ibid*

greater than is essential to the furtherance of that interest."[71] Even though the Warren Court produced an uncharacteristically conservative decision, it still narrowly tailored a test that would protect First Amendment freedom of expression except in the specific circumstances set forth.

In *Brandenburg v. Ohio* (1969), the Warren Court issued a per curiam opinion stating that Ohio's Criminal Syndicalism statute violated Brandenburg's First Amendment right to freedom of expression. Warren was included in the liberal per curiam opinion of the Court. The Court established a test that determined that speech could be prohibited if it is "directed at inciting or producing imminent lawless action" and it is "likely to incite or produce such action."[72] In this case, the speech was determined to be "mere advocacy" and to be protected under the First Amendment after undergoing the established test.[73] This decision made it harder to prosecute advocacy as unprotected speech, expanding the First Amendment's protection of expression.

In *Tinker v. Des Moines Independent Community School District* (1969), the Warren Court ruled that wearing armbands to school to protest the Vietnam War was considered protected expression under the First Amendment because it was "closely akin to 'pure speech.'"[74] Warren voted with the liberal majority. The students' speech could not be suppressed because "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of speech."[75] While the Supreme Court often shows deference to school principals, the Court decided that the principal did not demonstrate that the wearing of armbands would interfere with the educational environment of the school. Significantly, the Court stated that students do not "shed their constitutional rights to freedom of speech or

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[71] *United States v. O'Brien*, 391 U.S. 367 (1968)
[72] *Brandenburg v. Ohio*, 395 U.S. 444 (1969)
[73] *Ibid*
[74] *Tinker v. Des Moines*, 393 U.S. 503 (1969)
[75] *Ibid*

expression at the schoolhouse gate."[76] This liberal decision protected political expression in public schools.

In *Shuttlesworth v. City of Birmingham* (1969), the liberal majority of the Warren Court, including the Chief Justice, protected the First Amendment rights of African Americans marching in protest of their allegedly denied civil rights despite having been refused a permit to allow the march. The Court ruled that the ordinance that allowed the city to deny the permit is unconstitutional, even after the "remarkable job of plastic surgery upon the face of the ordinance" by the Alabama Supreme Court.[77] The Court found that the ordinance was unconstitutionally administered to "deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought…immemorially associated with resort to public places."[78] The protection of Americans from such violation of their constitutional rights is assuredly a liberal decision.

Within these ten freedom of expression cases decided during the Warren Court era, a vast majority of liberal decisions were produced. As a whole, the Warren Court liberally decided 70% of the cases and conservatively decided 30% of the cases. The leader of the Court, Chief Justice Earl Warren voted even more liberally with 80% liberal votes and 20% conservative votes. However, the liberal reign of the Warren Court gave way to the more conservative Burger Court, in which Chief Justice Warren Burger and his Court shifted freedom of expression legal doctrine and precedent into a more conservative direction, as the cases below demonstrate.

In *Organization for a Better Austin v. Keefe* (1971), the Burger Court reversed a state court injunction against peaceful distribution of leaflets because it "imposes prior restraint on

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[76] *Tinker v. Des Moines,* 393 U.S. 503 (1969)
[77] *Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969)
[78] *Ibid*

speech and publication."[79] In the majority opinion, Burger set a liberal standard on prior restraint of expression, claiming that it will come before the Court with a "'heavy presumption' against its constitutional validity."[80] Furthermore, the respondent "carries a heavy burden of showing justification for the imposition of such a restraint."[81] The liberal nature of this decision is based on the protection against prior restraint and the heavy burden placed on those who must prove its constitutionality.

In *Cohen v. California* (1971), the Burger Court ruled that the "Fuck the Draft" message displayed on Cohen's jacket was indeed protected under the First Amendment even though it was obviously offensive. However, Burger voted with the conservative minority that argued that Cohen's "absurd and immature antic…was mainly conduct and little speech."[82] This liberal decision ruled that the First Amendment protects emotive and cognitive speech—the expression of emotion and the expression of ideas.[83] In this case, the liberal majority protected Cohen's offensive speech because it expressed his emotional and political opinions toward the draft.

In *Papish v. Board of Curators of University of Missouri et al* (1973), a college journalism student was expelled for distributing a newspaper "containing forms of indecent speech."[84] In a per curiam opinion, the Supreme Court reversed the expulsion because "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name of 'conventions of decency.'"[85] This liberal decision protects the expression of "indecent speech" in university newspapers because of the ideas it expresses

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[79] *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971)
[80] *Ibid*
[81] *Ibid*
[82] *Cohen v. California*, 403 U.S. 15 (1971)
[83] *Ibid*
[84] *Papish v. Board of Curators of the University of Missouri et al*, 410 U.S. 667 (1973)
[85] *Ibid*

and sets the precedent in such matters at the university level. However, in a conservative dissent, Burger asserted that the publication was "obscene and infantile" and to "preclude a state university from regulating the distribution of such obscene materials does not protect the values inherent in the First Amendment; rather it demeans those values."[86] Burger viewed universities as places in which students should learn to "express themselves in acceptable, civil terms" and with the "self-restraint necessary to the functioning of a civilized society."[87] Burger disagreed with the liberal per curiam opinion that protected the student's freedom of expression in this situation by combating it from a more conservative perspective.

In *Paris Adult Theatre I v. Slaton* (1973), the Supreme Court ruled on Georgia's injunction against two allegedly obscene movies playing at the theatre. The theatre displayed signs reading "Adults Only," "You Must Be 21 and Able to Prove It," and "If the Nude Body Offends You, Do Not Enter."[88] The majority justices, in a Burger-authored opinion, stated that they "categorically disapprove the theory…that obscene pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only."[89] Burger continued, "The States have a long recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation."[90] For example, like in *Roth*, the Court "implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and

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[86] *Papish v. Board of Curators of the University of Missouri et al*, 410 U.S. 667 (1973)
[87] *Ibid*
[88] *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973)
[89] *Ibid*
[90] *Ibid*

morality.'"[91] This opinion is a conservative opinion based on the majority's refusal to extend constitutional protection to obscenity despite its restriction to consenting adults.

In *FCC v. Pacifica Foundation* (1978), the Burger Court ruled that indecent material, not just obscene material, could be prohibited on television and the radio.[92] The conservative decision does not protect indecent materials on the television and radio because they are broadcast through public airwaves and extremely pervasive.[93] Burger was part of the majority that voted against extending First Amendment protection to indecent material on television and radio.

In *Snepp v. United States* (1980), the Burger Court held that Snepp's First Amendment rights were not violated when he was denied royalties to a book he published about CIA activities in Vietnam. Snepp had signed an agreement with the CIA agreeing not to publish any information about the CIA's activities without its approval. Burger and the conservative majority ruled that Snepp had violated the "constructive trust" that existed between him and the government, hurt the CIA's "ability to perform its statutory duties," and compromised the safety of CIA agents.[94] The Court determined that "even in the absence of an express agreement—the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment."[95] The majority found that the government has a "compelling interest in protecting both the secrecy of information important to our national security and the appearance of

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[91] *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973)
[92] *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)
[93] *Ibid*
[94] *Snepp v. United States*, 444 U.S. 507 (1980)
[95] *Ibid*

confidentiality so essential to the effective operation of our foreign intelligence service."[96] Therefore, his speech was not protected under the First Amendment, a conservative ruling. In this case, the conservative majority felt that the government had a compelling interest that overrode First Amendment protection, creating a standard that would make it easier for the government to suppress First Amendment rights in the face of threats to national security.

In *Haig v. Agee* (1981), the Secretary of State, Haig, revoked Agee's passport because he was a former CIA agent who promised to "fight the United States CIA wherever it is operating."[97] The Passport Act of 1926 specifically gives the power of granting, issuing, and verifying passports to the Secretary of State, with respect to the relevant rules the President stipulates.[98] In a conservative ruling, the Burger Court dismissed Agee's claim that the revocation of his passport violated his First Amendment right to criticize the United States government because Agee's claims were "without merit," especially because the president "specifically interpreted [the 1926 Act] to authorize denial of a passport on grounds of national security or foreign policy."[99] Furthermore, the president and Secretary of State "left no doubt that likelihood of damage to national security or foreign policy of the United States was the single most important criterion in passport decisions."[100] In the majority opinion of the Court, Burger gave considerable weight to the history of the statute and past precedents, which guided the majority in their decision. Burger further asserted that "beliefs and speech are only part of Agee's 'campaign to fight the United States CIA" and that Agee's "conduct in foreign countries presents a serious danger to American officials abroad and a serious danger to the national

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[96] *Snepp v. United States*, 444 U.S. 507 (1980)
[97] *Haig v. Agee*, 453 U.S. 280 (1981)
[98] *Ibid*
[99] *Ibid*
[100] *Ibid*

security."[101] Therefore, Agee's actions are "clearly not protected by the Constitution" since the "mere fact that Agee is also engaged in criticism of the Government does not render his conduct beyond the reach of the law."[102] Once again, the conservative majority weighed the government's compelling interest, specifically in the area of national security, against First Amendment protection, and the First Amendment lost.

In *New York v. Ferber* (1982), Ferber was convicted of violating a statute prohibiting people from "knowingly promoting sexual performance by children under the age of sixteen" because he was selling videos of boys masturbating. The Supreme Court upheld Ferber's conviction with a majority including Burger, stating that "recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions. Thus it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."[103] In balancing the competing interests in the case, the Court agreed that the "balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment."[104] This is a clearly conservative decision in that it chooses to protect the competing, and decidingly compelling, interests in the case over the First Amendment protection.

In *United States v. Grace* (1983), Grace was threatened with arrest for violating a statute that prohibits the "display of any flag, banner, or device designed or adapted to bring into public notice any part, organization, or movement inside the Supreme Court or on its grounds," and

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[101] *Haig v. Agee*, 453 U.S. 280 (1981)
[102] *Ibid*
[103] *New York v. Ferber*, 458 U.S. 747 (1982)
[104] *Ibid*

consequently sued.[105] The Supreme Court, including Chief Justice Burger, ruled in favor of Grace, claiming that there is "no doubt that as a general matter peaceful picketing and leafleting are expressive activities involving 'speech' protected by the First Amendment."[106] Furthermore, expression protected by the First Amendment has been "historically associated" with "public places" in so much that "streets, sidewalks, and parks, are considered, without more, to be 'public forums.'"[107] In the case of free expression literally surrounding the Supreme Court, the Court held that the "sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated any differently."[108] In this liberal decision, the Supreme Court extended the protection of the First Amendment to protect those harassing the Supreme Court justices themselves.

In *Bethel School District No. 403 v. Fraser* (1986), the Burger Court did not protect Fraser's vulgar speech made in a nominative speech for student government during a school assembly. Burger, who authored the conservative majority's opinion, asserted that Fraser's sexually lewd speech was completely different than the political speech that the Court protected in *Tinker v. Des Moines.*[109] The Court held that the school did not violate the First Amendment by suspending Fraser because schools have the right to protect the "fundamental values of public school education" and to maintain an educational environment.[110] Burger stressed that the "undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries

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[105] *United States v. Grace*, 461 U.S. 171 (1984)
[106] *Ibid*
[107] *Ibid*
[108] *Ibid*
[109] *Bethel v. Fraser*, 478 U.S. 675 (1986)
[110] *Ibid*

of socially appropriate behavior."[111] Moreover, Burger made a distinction between the protection of offensive adult speech in cases like *Cohen v. California* and the protection of offensive speech of public school students as in this case.[112] In other words, the First Amendment rights of students in public schools are not "automatically coextensive with the rights of adults in other settings."[113] In this conservative decision, the Court constricted the First Amendment rights of students in public schools in keeping with previous precedent in which the Court has "acknowledged limitations on…where speech is sexually explicit and the audience may include children."[114] Most importantly to the future First Amendment freedom of expression cases in public schools, *Fraser* established that the "mode of analysis set forth in *Tinker* is not absolute" and diverged from its liberal precedent.[115]

After observing the liberal nature of the Warren Court within freedom of expression doctrine, the Burger Court was decidedly more conservative. The Burger Court voted conservatively in 60% of the cases and liberally in 40% of the cases. Like Warren, Chief Justice Burger voted attitudinally more extremely than his Court, voting conservatively in 80% of cases and liberally in 20% of cases. Chief Justice Rehnquist also guided his Court into a more conservative direction with his respective ideology. As illustrated in the cases to follow, Rehnquist undoubtedly left a conservative legacy in regards to freedom of expression.

In *Frisby v. Schultz* (1988), the Rehnquist Court, in a conservative decision, determined that a city could ban all picketing in front of a particular house on a residential street without violating the First Amendment's freedom of expression. The Court found that the ordinance

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[111] *Bethel v. Fraser*, 478 U.S. 675 (1986)
[112] *Ibid*
[113] *Ibid*
[114] *Ibid*
[115] *Ibid*

served a significant governmental interest that is "identified within the text of the ordinance itself: the protection of residential privacy."[116] Therefore, the conservative majority, including Rehnquist, ruled that the picketers banned by the ordinance "generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way."[117] In this case, the right to residential privacy outweighed the First Amendment right to freedom of expression in the Court's conservative decision.

In *Hazelwood School District v. Kuhlmeier* (1988), the principal of a public high school censored the high school newspaper by ordering that two articles not be published. The Rehnquist Court ruled that the principal's actions did not violate the student's First Amendment rights. Rehnquist and the rest of the conservative majority recognized that educators could have editorial control over student speech if their goals and actions were "reasonably related to legitimate pedagogical concerns."[118] The Court differentiated this case from *Tinker v. Des Moines* because it does not pertain to First Amendment requirements of a "school to tolerate particular student speech," but rather pertains to concerns of "educators' authority over school-sponsored publications…and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[119] Therefore, the *Tinker* standard for "determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression."[120] The Court constructed a new standard that First Amendment protection does not necessarily extend to public school students when educators

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[116] *Frisby v. Schultz*, 487 U.S. 474 (1988)
[117] *Ibid*
[118] *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988)
[119] *Ibid*
[120] *Ibid*

exercise "editorial control…of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[121] In this conservative decision, the Court once again narrowed the First Amendment protection of public school students.

Texas v. Johnson (1989) and *United States v. Eichman* (1990) both deal with statues that forbid the desecration of the American flag. In both cases, the Rehnquist Court, in an uncharacteristically liberal decision, ruled that desecration of the flag is expressive conduct, and therefore, protected by the First Amendment. In the majority opinion of *Texas v. Johnson*, Justice Brennan stated that "if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[122] In his conservative dissent, Rehnquist focused on the importance of the history and meaning of the American flag, even quoting the national anthem, and cited past statutes and customs that protect the flag from desecration and misuse. He argued that the First Amendment "does not guarantee the right to employ every conceivable method of communication at all times and in all places."[123] Additionally, Rehnquist pointed out that the "public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace."[124] He rallied against the burning of the flag, which he equated not with symbolic speech but with an "inarticulate grunt or roar that…is most likely to be indulged in not to express any particular idea, but to antagonize others."[125] Consequently, Rehnquist voted that the desecration of the flag

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[121] *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988)
[122] *Texas v. Johnson*, 491 U.S. 397 (1989)
[123] *Ibid*
[124] *Ibid*
[125] *Ibid*

should not be protected under the First Amendment freedom of expression, especially because the statute "deprived Johnson of only one rather inarticulate symbolic form of protest," but significantly "left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy."[126] However, The Court echoed the majority's exact sentiments and votes a year later in *United States v. Eichman* because "punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering."[127] Rehnquist, voting with the conservative minority, joined Justice Stevens' dissent. This atypically liberal decision of the Rehnquist Court expanded the right to freedom of expression to include even the desecration of the flag, an unpopular and unpatriotic act.

In *Sable Communications of California v. FCC* (1989), Sable Communications, a dial-a-porn company, challenged the Communications Act of 1934 (amended in 1988) that prohibited obscene interstate communications for commercial purposes. In a conservative decision, the Supreme Court held that there is "no constitutional stricture against Congress' prohibiting the interstate transmission of obscene commercial telephone recordings."[128] However, sexual expression "which is indecent but not obscene is protected by the First Amendment."[129] Furthermore, the Supreme Court "recognized that there is a compelling interest in protecting the physical and psychological wellbeing of minors."[130] However, past demonstrating that the government has compelling ends, "the means must be carefully tailored to achieve those

[126] *Texas v. Johnson*, 491 U.S. 397 (1989)
[127] *United States v. Eichman*, 496 U.S. 310 (1990)
[128] *Sable Communications of California v. FCC*, 492 U.S. 115 (1989)
[129] *Ibid*
[130] *Ibid*

ends."[131] In this case, the Court felt that prohibiting adults from using dial-a-porn services, which falls under indecent communication, "far exceeds that which is necessary" to defend the government's compelling interest in protecting minors.[132] Overall, the Court's decision in this case is liberal because even though it recognizes a compelling governmental interest to protect minors, it calls for more narrowly tailored laws to do so instead of the overly broad Communications Act. Rehnquist voted with the liberal majority to extend First Amendment protection to indecent speech, but to reaffirm the lack of protection of obscene speech.

In *Barnes v. Glen Theatre, Inc.* (1991), adult entertainment theatres in Indiana wanted to feature completely nude dancers, without pasties and g-strings, which were required under Indiana's public indecency laws. In deciding this case, the Supreme Court applied the four-part "*O'Brien*" test. Though there was no majority opinion, Rehnquist penned the judgment of the Court in a plurality opinion. The Supreme Court decided that "public indecency statutes…reflect more disapproval of people appearing in the nude among strangers in public places."[133] Therefore, the statute "furthers a substantial governmental interest in protecting order and morality," an interest that is "unrelated to the suppression of free expression."[134] In this conservative plurality opinion, the Court holds that the "substantial governmental interest in protecting order and morality" that public indecency statutes uphold outweighs any connection nude dancing may have with freedom of expression.[135] Consequently, the Court did not grant First Amendment protection to nude dancing.

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[131] *Sable Communications of California v. FCC*, 492 U.S. 115 (1989)
[132] *Ibid*
[133] *Barnes v. Glen Theatre Inc.*, 501 U.S. 560 (1991)
[134] *Ibid*
[135] *Ibid*

In *Wisconsin v. Mitchell* (1993), a unanimous Rehnquist Court held that the increase of Mitchell's jail sentence for aggravated battery, which was based on his racist motives, did not violate his First Amendment right to freedom of expression. This is considered a conservative decision of Rehnquist and his Court because they refused to protect Mitchell's racist motives as expression, especially because the "result of his motives was physical assault, which is not by any stretch of the imagination expressive conduct protected by the First Amendment."[136] The Court also considered that sentencing judges have conventionally "considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant."[137] Conclusively, the First Amendment does not "prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive of intent" and such evidence is "traditionally" used in the sentencing of defendants.[138] Therefore, the Court ruled that Mitchell's racist motives may be used in the consideration of his sentencing. The Court believed racist motives can lead to more heinous crimes, and therefore, decided to leave them unprotected, at least within the sentencing of a crime.

In *National Endowment for Arts v. Finley* (1998), Finley and three others who were denied grants under the National Foundation of the Arts and Humanities Act of 1965, which was amended with § 954(d)(1) in 1990 to require those awarding grants to "take into consideration general standards of decency and respect for the diverse beliefs and values of the American public," sued.[139] The Supreme Court denied that the act violated the First Amendment's freedom of expression. In an 8-to-1 majority, including Rehnquist, the Court reaffirmed its 1990 decision in *Rust v. Sullivan* when it asserted that "Congress may 'selectively fund a program to encourage

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[136] *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)
[137] *Ibid*
[138] *Ibid*
[139] *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998)

certain activities it believes to be in the public interest.'"[140] Furthermore, the Court decided that the '"decency and respect' criteria do not silence speakers by expressly 'threaten[ing] censorship of ideas;"' consequently, it does not "perceive a realistic danger that § 954(d)(1) will compromise First Amendment values."[141] Furthermore, the "considerations that the provision introduces, by their nature, do not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face."[142] This is a conservative decision because it does not assert that the "decency and respect" requirement to receive the grant violates First Amendment freedom of expression.

In *Erie v. Pap's A.M.* (2000), the city of Erie, Pennsylvania passed an ordinance prohibiting public nudity, affecting Pap's A.M.'s "Kandyland," which featured nude dancers. In a case similar to *Barnes v. Glen Theatre, Inc.*, the statute allowed the dancers to appear in pasties and a g-string but not completely nude. The Supreme Court upheld the ordinance because it was a "content-neutral regulation that satisfies the four-part test of *United States v. O'Brien*" and it "regulated conduct alone" by not "target[ing] nudity that contains an erotic message," but instead, "ban[ning] all public nudity, regardless of whether that nudity is accompanied by expressive activity."[143] Therefore, the state's "interest in preventing harmful secondary effects is not related to the suppression of expression."[144] The Court considered the requirement of wearing pasties and g-strings a "minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancers' erotic message."[145] In this conservative decision, the Court decided that the ordinance did not violate the freedom of

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[140] *Rust v. Sullivan*, 500 US 173 (1990)
[141] *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998)
[142] *Ibid*
[143] *Erie v. Pap's A.M.*, 529 U.S. 277 (2000)
[144] *Ibid*
[145] *Ibid*

expression of the First Amendment because the erotic message was still conveyed and the governmental interest protecting public decency and morality was still upheld.

In *Watchtower Bible and Tract Society of New York v. Village of Stratton* (2002), Stratton had an ordinance forbidding "canvassers" who were promoting a cause from going "in and upon" private residential property without a permit, causing Watchtower, a Jehovah's Witness group, to sue. The Supreme Court stated that the issue in the case was "the amount of speech covered by the ordinance and whether there is an appropriate balance between the affected speech and the governmental interests that the ordinance purports to service."[146] According to the Court, the "mere fact that the ordinance covers so much speech raises constitutional concerns" because a law "requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition."[147] The Court held that the ordinance "does not pass First Amendment scrutiny" also because it is not "tailored to the Village's stated interests."[148] Despite the majority's liberal decision protecting expression, Rehnquist wrote a lone conservative dissent. Rehnquist claimed that the majority opinion "renders local governments largely impotent to address the very real safety threat that canvassers pose," citing that historically the permit requirement for "door-to-door canvassers, which gives no discretion to the issuing authority," has been held constitutional until the "abrupt" change of the Court.[149] He continued that the Constitution does not "require that Stratton first endure its own crime wave before it takes measures to prevent crime," suggesting that public safety

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[146] *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002)
[147] *Ibid*
[148] *Ibid*
[149] *Ibid*

outweighs the freedom of expression that may be protected by allowing canvassers to go door-to-door without a permit.[150]

In *Virginia v. Black* (2003), the Rehnquist Court held that Virginia's cross-burning statute, which forbade the burning of the cross with intent to intimidate, was unconstitutional. However, this decision is considered to be a conservative decision because the Court only declared the statue unconstitutional because it assumed that any cross burning constituted intent to intimidate.[151] Also, the plurality ruled that banning cross burning with intent to intimidate is constitutional, as long as the intent to intimidate is real and not assumed.[152] This is a conservative decision because, ultimately, the Court did not extend First Amendment protection to include cross burning with a real intent to intimidate.

On the political spectrum from liberal to conservative, the Rehnquist Court proves to be extremely conservative in the area of freedom of expression. The Rehnquist Court voted liberally only 20% of the time while voting conservatively 80% of the time, making it the most extreme of the three Courts. Chief Justice Rehnquist also voted liberally in 20% of the cases and conservatively in 80% of the cases, making him equally as "attitudinal" as Warren and Burger. Overall, Rehnquist and his Court's votes provide significant support for the attitudinal model of decision-making.

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[150] *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002)
[151] *Virginia v. Black*, 538 U.S. 343 (2003)
[152] *Ibid*

TABLE 2: Votes by Court		
Court	**Liberal**	**Conservative**
Warren 1953-1969 (10 votes)	**70%**	30%
Burger 1969-1986 (10 votes)	40%	**60%**
Rehnquist 1986-2005 (10 votes)	20%	**80%**

Table 2 shows the votes from the cases from Table 1 and discussed above as votes by each Court. As the attitudinal model predicts, the Warren Court has a majority of liberal decisions, and the Burger and the Rehnquist Courts have a majority of conservative decisions. In Table 2, the favorable results are bolded. However, no Court has a perfect ideological percentage because of change in Court composition and differing facts in each case. Despite this, Table 2 demonstrates overwhelming support for the attitudinal model of Supreme Court decision-making in regards to the First Amendment's freedom of expression.

TABLE 3: Votes by Justice		
Justice	**Liberal**	**Conservative**
Chief Justice Warren (10 votes)	**80%**	20%
Chief Justice Burger (10 votes)	20%	**80%**
Chief Justice Rehnquist (10 votes)	20%	**80%**

Table 3 shows the votes of the Supreme Court justices considered in this study, labeled as liberal or conservative. As with Table 2, the favorable percentages are bolded. In accordance with the attitudinal model, Justice Warren voted liberally a large majority of the time, and

Justices Burger and Rehnquist voted conservatively in a significant majority of cases, which shows irrefutable support for the attitudinal model.

Overall, the data from this study supports the attitudinal model of Supreme Court decision-making, at least in the area of First Amendment freedom of expression cases. Though the number of cases is limited, the cases discussed are representative of the major freedom of expression jurisprudence of the different Court eras. The Warren, Burger, and Rehnquist Courts and their chief justices voted with their political attitude in a majority of the cases, illustrating the power that a political ideology can have on Supreme Court justices and their decisions, and therefore the public laws and policies that shape American life.

Freedom of expression in particular is one of the most important aspects of American life, and therefore, shows how great of an impact can be made with Supreme Court decisions, with only the attitudes of five Americans. As Chief Justice Roberts said, speech is "powerful" and "can stir people to action, move them to tears of both joy and sorrow, and…inflict great pain."[153] Consequently, the policies governing speech are that much more important to American life and the American ideal. Freedom of expression is the cornerstone of American freedom and is therefore representative of America itself. Freedom of expression defines America, but so do other factors that may not necessarily work with it, and may even work against it.

Since freedom of expression is so important to American society, the competing interests that the Supreme Court must balance against it are important. The main governmental interests that compete with freedom of expression are the need for social order and morality, maintenance of civilized society, protection of minors, public welfare and safety, national security, public

[153] *Snyder v. Phelps*, 562 U.S. _____ (2011)

educational values, fostering an educational environment in public schools, and protection of privacy and property. These are also values of American society, and therefore must be weighed against the value of freedom of expression. Depending on the liberal or conservative composition of the Court, freedom expression may be expanded or restricted due to these factors, which played a role in most of the decisions in this study. Accordingly, it is important to note the many factors that judges have to consider in their decision-making and how their attitudes affect how much weight they give to each factor.

In this study of the attitudinal model of Supreme Court decision-making and the freedom of expression of the First Amendment, the evidence greatly supports the attitudinal model. The justices showed consistency in voting with their ideological party, producing significant data to support the thesis. The study demonstrates a high correlation between justices' ideological attitudes and values and their votes. Consequently, justices' attitudes affect policymaking and laws in the United States, which have an impact on citizens' everyday lives. Basically, the ideological attitudes of five people—five justices—can determine the laws of the land.