The Importance of Importance in Certiorari*

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Abstract

We analyze all paid certiorari petitions in the 1939 Term of the U.S. Supreme Court, and demonstrate that a case's importance and novelty—as indicated by measures we introduce here—each affect the probability that a petition is granted, net of covariates that have been previously demonstrated to be influential. Then, we present two empirical exercises that explore how the Court understands case importance. Finally, we consider the conceptual relationship between importance and salience, and related measurement challenges.

*We thank Audra J. Smith for excellent research assistance, Jeff Budziak for helpful discussion, especially about salience, and Ryan Black for responding to a question about data. Some discussion and results here overlap with an earlier working paper, "Agenda Control in the Hughes Court, OT 1939," on which Justin Wedeking provided thorough comments. Because we may ultimately be able to acquire some Reed cert memos that are for now missing, some of the analyses in Section 4—but not elsewhere—may be subject to (slight) change.

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This paper makes three contributions to the literature on U.S. Supreme Court agenda setting. First, we introduce original measures of case (issue) novelty and importance, and demonstrate—using data on all paid certiorari (cert) petitions filed in October Term (OT) 1939—that both factors affect the Court's decision to grant cert. (As Perry (1991, 220–221) points out, clerks and justices understand cases to be almost always fungible; what is relevant is the issue or legal question that the case raises. For consistency, we will usually use the term "case" rather than "issue," but in most of the relevant contexts the terms are interchangeable.) Case novelty and importance have been often discussed in legal analyses and judicial opinions, but have (in the case of importance) rarely or (in the case of novelty) never figured in previous systematic studies of Court agenda-setting.[1] As we elaborate below, our measures are notable as particularly direct indicators of importance and novelty as the Court understands those terms.

Second, we muster data on *what* the Court means by "case importance." We do this by examining William O. Douglas' and Stanley F. Reed's cert memoranda to formulate a typology of reasons that clerks give for deeming a case important. We also stratify cases into sets that are matched exactly on other covariates, to discern differences between important and non-important cases that are otherwise alike. Our results here generally comport with the evidence from interviews that Perry (1991, 253–260) relates, but there are a few interesting differences as well.

Third, we consider the relationship of case importance to the concept of salience, and compare our measure of case importance to that from Black and Owens (2009), which uses the

[1]Black and Owens (2009) uses the presence of an article in *United States Law Week* about the lower court decision as a proxy for "legal importance," finding that it has a small effect on certiorari in a sample of 358 discussed cases, 1986–1993. We discuss the relative merits of our measure and that measure below. And the presence of amicus briefs on cert, now standard a covariate, can reasonably thought of as proxy for at least one sort of case importance. Blake, Hacker and Hopwood (2015) includes whether the "clerk alleges [a] unique legal question in pool memo" as a predictor of cert vote; given the lack of elaboration, this variable is difficult to understand, but since it ends up perfectly predicting the Court's vote to *deny* in a sample of 2,000 cases, 1987–1993, it cannot, given our results, be related to the concept that we consider.

presence of an article in *United States Law Week* (*Law Week*) about the lower court decision as a proxy for "legal importance." We present a brief review of the literature that suggests that salience of Court cases, as a concept, has been the subject of theorizing and measurement that is disparate and inconsistent, if not incoherent. As such, we recommend that narrower concepts, such as—e.g., in our application—*case importance to justices* be substituted for the amorphous term *salience*.

1 Background

The Judges' Bill of 1925, as we now know, fundamentally changed the nature and operation of the United States Supreme Court, giving it sweeping discretion over its agenda, which in turn lead it to focus more on controversial social, economic, and political issues. Yet we know next to nothing about the how the Court used this newfound power over agenda setting in the critical, immediate years after 1925.[2] Most of our knowledge of agenda-control in the Supreme Court is based on the Burger Court and beyond (Caldeira and Wright 1988; but see Provine (1980), on the Vinson and early Warren Courts). It is not clear whether we can generalize from those results, since they are based on terms of relatively recent vintage. Caldeira and Wright's (1990) data come the Court's October Term (OT) 1982; others' (e.g., Black and Owens 2009) data from the early Rehnquist Court. Thus, these studies cover a relatively narrow swath of time, and correspondingly, a particular level of workload and stage in the Court's nearly-century-long institutional development. Indeed, the contrast between the Court of the 1920s and 1930s and the current Court is striking: a single law clerk vs. three or four, a heterogeneous bar vs. the "Supreme Court Bar," justices who wrote their own opinions vs. justices as editors, among other differences.

We probe the generalizability of prior results by analyzing agenda setting for the population

[2]In other work, we use data from OT 1939 and from later terms to compare how Chief Justices Hughes, Warren, and Burger constructed the Discuss List (Caldeira and Lempert 2020) and to examine justice-level heterogeneity in certiorari voting (Caldeira and Lempert n.d.).

of paid cert petitions in OT 1939. This allows us to evaluate the Court's "decision to decide" at a relatively early stage of institutional development—a decade and a half after the Judges' Bill of 1925. We find, in general, that both legal or "jurisprudential" and political or "policy" considerations shaped the Court's agenda in OT 1939, similarly in broad strokes to those identified in much later terms. Our results indicate that the influences on the cert vote that operate for 1982 and later terms are also relevant in 1939. But in addition, we demonstrate the influence of case importance and novelty at the agenda setting stage. These two variables, whose relevance is suggested both by the Court Rules and cross-national scholarship, have not yet been directly (or as directly) considered in political science research about the U.S. Supreme Court.

1.1 OT 1939

By the outset of October of 1939, the salad days of the "Nine Old Men" had passed. Remaining in place were James McReynolds and Pierce Butler, on the right; Chief Justice Hughes and Roberts occupied the middle on most issues. To the holdover liberal Harlan Fiske Stone, FDR had added Hugo Black, Stanley Reed, Felix Frankfurter, and William Douglas, replacing, respectively, Willis Van Devanter, George Sutherland, Benjamin Cardozo, and Louis Brandeis. In mid-November, 1939, Butler died (he had been ill since the beginning of the 1939 Term) and Attorney General Frank Murphy took his place in late January 1940.

Part of the term, then, the Court had only eight justices voting on writs of certiorari and appeal. We can array the justices more precisely, with Martin-Quinn (2002) ideal points. For the previous term, OT 1938, Black (-3.2), Frankfurter (-1.39), Reed (-1.14), Stone (-.70), Brandeis (-.609), Hughes (-.19), Roberts (.343), Butler (2.34), and McReynolds (3.53) were the justices sitting at the start of the term. The ideological center of gravity was much more moderate than it later become. In OT 1939, the term on which our analysis focuses, we have: Black (-3.30), Douglas (-3.0), Murphy (-1.61), Frankfurter (-1.27), Reed (-1.03), Stone (-.62), Hughes (.34), Roberts (1.0), and McReynolds (3.5). Obviously, in OT 1939, with the

addition of both Douglas and mid-course Murphy, the Court moved appreciably to the left, the median shifting from Brandeis to Reed. Thus, in principle and on ideological grounds alone, the liberal coalition could on most issues exercise control over the Court's agenda.

During OT 1939, the Court dealt with a mix of cases similar to the those in previous terms, despite changes wrought by its decision in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938) and the adoption of the Federal Rules of Civil Procedures (1938) (see Hart 1940). Thus, for example, cases in the category of common law (contracts, property, marriage), many of them in diversity of citizenship, made up a substantial chunk of work (n = 121). *Causes célèbre* such as the Scottsboro trial and sundry laws involving Jehovah's Witnesses made headlines, but *Criminal Law* (n = 60) and civil rights and liberties was a tiny part of the Court's caseload. In practice, the Great Depression, the landmark statutes of the New Deal, and "federal specialties" generated the bulk and most important segment of the Court's workload. Thus, for example, *Admiralty* (n=20), *Bankruptcy* (n=87), *Federal Business Regulation* (n=38), *Federal Tax* (n=143), *Government Claims* (n=31), *Jones Act and FELA* (n=19), *Labor* (n=35), and *Patents, Copyrights and Trademarks* (n=53). Questions surrounding the police powers of states, one of the major bones of contention in the early Hughes Court, included *State Business Regulation* (n=19), *State Labor* (n=11), and *State Tax* (n=27). The remainder consisted of *Procedure* (n=19), *Due Process* (n=15), and a *Residual* category (n=48)—in this category, areas such as antitrust, civil rights, first amendment civil liberties, federal public lands, and immigration are subsumed.

1.2 Prior Work

The Court's formal criteria for granting of certiorari during OT 1939 were set out in Rule 38 (see e.g., Hart 1940, 14), currently Rule 10, and are familiar. For cases from the federal circuits, the criteria for granting certiorari are where "(1) a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; (2) or has decided an important question of local law in a way probably in conflict with the weight

of authority; (3) or has decided an important question of federal law which has not been, but should be, settled by this court; (4) or has decided a federal question in a way probably in conflict with applicable decisions of this court; or (5) has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." Of course, scholars have long recognized that the formal rules do not constitute a complete explanation of certiorari; the Court denies petitions that appear to meet the rule's criteria and grants others, absent those criteria; clearly, other, informal forces are influential. Nonetheless, these formal criteria guide petitioners, as suggested by the leading volume on Supreme Court practice (Stern and Gressman 1950; Shapiro, Geller, Bishop, Hartnett and Himmelfarb 2019).

Much scholarship has examined the final stage of the Supreme Court's agenda-setting process—i.e., the decision to grant certiorari; the makeup of the Discuss List has been the focus of much less attention. The first systematic study of the Discuss List is Caldeira and Wright (1990), which examines all non-*in forma pauperis* (IFP) cert petitions filed in OT 1982, dividing the set of potential influences on agenda-setting into two categories: "high-information" (United States as petitioner, actual conflict among lower courts or with Supreme Court precedent, briefs amicus curiae, ideological direction) and "low-information" (alleged conflicts, dissent in court below, reversal in a court below, and issue area). Caldeira and Wright (1990) finds generally that forces in the low-information category influence only the makeup of the Discuss List, whereas high-information factors influence both the Discuss List and the Court's cert decision. Black and Boyd (2013) analyzes the makeup of the Discuss List, considering a sample of discussed cases from 1986, 1987, 1991 and 1992 terms, supplemented with a sample of non-discussed cases from the 1992 term; the results are generally in accord with Caldeira and Wright (1990). Caldeira and Lempert (2020), using data from OTs 1939, 1968, and 1982, shows that Chief Justices Hughes, Warren, and Burger differed in the relative weights they placed on case-level factors as they constructed the Discuss List.

Work on Court agenda-setting *in general* is much more substantial. Due to a lack of

data, however, multivariate, large-N analyses have been limited to OT 1947 and later terms, with a particular focus and the most thorough analysis on the Burger Court years (for the earliest work, see Tanenhaus, Schick, Muraskin and Rosen (1963)).[3] For example, Ulmer presents data strongly suggesting that the presence of inter-circuit conflict (1984) and lower court conflict with Supreme Court precedent (1983) increases the probability of cert; and a multivariate analysis by Caldeira and Wright (1988) of all petitions filed in OT 1982 confirms the importance of conflict in agenda-setting. Scholars have presented evidence that, across terms and issue areas, the Court is more likely to grant cases that it intends to reverse and/or disagrees with on ideological grounds (e.g., Black and Owens 2009; Black and Owens 2012; Brenner and Krol 1989; Caldeira and Wright 1988; Lindquist, Haire and Songer 2007; Palmer 1982; Songer 1979) and in the presence of a dissent in the lower court or a reversal between levels of courts. Caldeira and Wright (1988) shows that when organized interests participate by filing amicus briefs (whether for or against cert), the probability that cert is granted increases. According to McGuire and Caldeira (1993), petitions submitted by specialized, high quality lawyers have greater likelihood of being granted. Black and Boyd (2012) demonstrates that higher status parties have more success at the cert stage, and that this relationship is conditional on filing of amicus briefs in support and, at the justice level, the justice's ideological location.

2 Data and Coding

Our data come from several sources. For information on the relatively objective, descriptive features of cases, we relied on petitions for certiorari and briefs in opposition in *Supreme Court Briefs and Records* (Gale), lower court opinions from Westlaw, and *United States Law Week*.

[3]Tanenhaus et al. (1963) examines a sample of non-IFP cert petitions from OT 1947–1958. The authors demonstrate that three "cues"—the U.S. as petitioner, dissent in the court below, and civil liberties as issue area— increase the probability that cert is granted. (They also consider a fourth "cue"—economic issue area—but do not find that it increases the likelihood of a grant.)

For data on subjective indicators, we read and coded the cert memoranda in the papers of William O. Douglas (Library of Congress), primarily, and, in the absence of them, those in the papers of Stanley F. Reed (University of Kentucky).[4]

The dependent variable is *Cert Granted*.[5] The precise definition of this variable follows Caldeira and Wright (1988; 1990). Information on the results of petitions comes mostly from *United States Law Week* and secondarily from Douglas' docket books. This determination involves many potential outcomes but the final outcome for our purposes is essentially whether the Court took up the matter in a plenary fashion (=1), or if it denied full treatment, either through a denial of cert or a summary decision (=0).

2.1 Independent Variables

Actual Conflict. We relied on Douglas' cert memos to determine the presence of an actual conflict, and, in the cases in which it is missing, we relied on those in Reed's papers.[6] We considered a conflict "actual" if the law clerk used the term "conflict," or a synonym, to de-

[4]Associate justices had one clerk each at the time. Because of the timing of the between-term transition (e.g., Fassett 2015, 153), some of the early OT 1939 memos were written by a justice's OT 1938 clerk. (We do not know which ones, because the memos were unsigned.) Douglas' clerk in OT 1938 was David Ginsburg, a Harvard Law graduate who had been his assistant for several years at the SEC (Barrett 2010). Ginsburg was followed by Stanley Soderland, who was selected by the dean of University of Washington Law School to clerk for Douglas (Douglas 1980, 170). (Note that Bruce Allen Murphy's chapter in Peppers and Ward (2012) lists incorrect dates of service for the two clerks.) Reed's clerk for OT 1938 was John Sapienza, a Harvard Law graduate who came to the Court after a year clerking for Judge Augustus Hand of the Second Circuit. Sapienza was followed by Philip T. Graham, who came straight from Harvard Law, where he had been President of the *Law Review* (Fassett 2015, 153).

[5]We code as "granted" cases in which the Court grants cert and hears oral argument, including "limited grants." Coded as "denied" include denials, summary grants or reversals, and DIGs (dismissed as improvidently granted). We omit writs of appeal in this paper.

[6]Examining Reed's memos also allows us to consider whether the clerk's determination of whether a conflict exists was influenced by ideology. Since Reed was on average more conservative than Douglas, even in OT 1939, comparing the discussion of conflicts in the two sources allows us to rule out the possibility that ideology played a major role in determinations of the existence of a conflict.

scribe the relationship between two or more cases, occurring in different circuits, state supreme courts, or between the lower court and the Supreme Court (i.e., the conflicts enumerated in Rule 38 (Revised Rules, 306 U.S. 671 (1939), at 719). Following Caldeira and Wright (1990), we code this variable 1 if the law clerk indicated the existence of a "conflict" over the interpretation of the U.S. Constitution or federal law between or among federal circuit courts, state supreme courts, conflict between a state supreme court and a federal circuit court, or conflict with U.S. Supreme Court precedent.

Alleged Conflict. In light of Rule 38's admonitions, petitioners typically allege some kind of conflict as a matter of course. We have a coded the existence of an "alleged conflict," as in Rule 38, where the clerk has noted the allegation of conflict of one of the types described in the definition of Actual Conflict. In relying on cert memos, we capture allegations of conflict that are not wholly baseless, since clerks seemed to disregard the most frivolous allegations of conflict (e.g., those without a citation of cases). Mere assertions of conflict, confusion, or disagreement do not suffice, absent an argument, references to particular cases, and the like.

Intermediate Reversal. We code this variable 1 if the court immediately below (nearly always either a federal court of appeal or state supreme court) reversed the lower court (usually a trial court, less often an agency).

Dissent. This variable is coded 1 if, in the court immediately below the Supreme Court, one or more judges dissented.

United States Petitioner. This variable is coded 1 if the "United States," a federal agency, or its representative (in his official capacity) is one of the petitioners. In practice, the Solicitor General or someone from his office must sign the brief. We do not include federal entities with independent litigating authority, of which there were a fair number prior to the 1980s. *United States Respondent* is coded 1 if such a party is the respondent.

Amicus Briefs. This variable is equal to the number of briefs amicus curiae filed on certiorari, including both briefs favoring and opposing. Surprisingly, amicus briefs on certiorari appeared in a non-trivial number of cases during OT 1939. Our theoretical justification for

combining both types of briefs derives from Caldeira and Wright (1988), which showed that amicus briefs, whether for or against certiorari, increase the probability of a grant. And the practical justification is that amicus briefs in opposition were filed in only two cases during OT 1939 (and in both, the Court granted certiorari).

Issue and Direction. We categorize each docket into one or more issues, noting which issue is primary, and which is secondary and tertiary (if any). Following Spaeth (2001), in ambiguous situations, we err on the side of coding the substantive issue, rather than the procedural, as primary. The issues are based on Spaeth (2001), supplemented by Songer (1998). We have also refined and subdivided certain issues, most importantly those related to bankruptcy and civil suits involving the government. The list of issues is available in the Supporting Information.

For the analyses presented here, we consider sixteen broad issue categories, formed by aggregating the issues into larger categories and coded 0 or 1: Admiralty, Bankruptcy, Common Law, Criminal, Due Process, Federal Business Regulation, Federal Tax, Government Claims, Jones Act and FELA, Labor, Patents Copyrights and Trademarks, Procedure, State Business Regulation, State Labor, State Tax, and a Residual category.

We also categorize the lower court decision, for each issue area within each docket, as liberal, conservative, or neutral.[7] For example, a lower court decision that upholds a state regulation against a Commerce Clause challenge would be coded as liberal on the issue area Economic Non-Legacy (issue: "state regulation of business"), but conservative on the issue area Federalism (issue: "national supremacy—miscellaneous"). See, for example, 39-131, *Galveston Truck Line* v. *Texas* 123 S.W. 2d 797 (1938).

With one exception, the rules for determining ideological direction follow Spaeth (2001). The single exception is torts and claims involving government, in which we code a pro-

[7]Issue areas, based on Spaeth's VALUE variable, are closely related, but not identical, to the issue categories we include as fixed effects. See the list of issue codes in the Supporting Information for details.

government decision as liberal.[8] Our rationale for this departure is that, in the midst of the New Deal era, such claims pitted conservative claimants against governments, usually the United States and that in the New Deal era, support for federal power was a tenet of liberalism (see also Baum 2017, 179–180). Thus, we have the dummy variable *Conservative Decision Below*, which is coded 1 if, on the primary issue for the docket, the decision below is conservative. Similarly, the variable *Nonideological Decision Below* is coded 1 if, on the primary issue, the decision below is neither liberal nor conservative.[9]

We also consider two variables that have been often discussed in legal analyses and judicial opinions, but have not figured in previous studies of Court agenda-setting: whether the case is important or novel (i.e., involves such an issue, presents such a question). The relevance of these variables is indicated by the language of the Supreme Court Rules. Referring to both importance and novelty, Rule 38(5) states that the Court looks favorably on cases wherein a "state court has decided a federal question of substance not theretofore determined by this court," or a circuit court has "has decided an important question of federal law which has not been, but should be, settled by this court." And there are several other indications in the Rule that the Court will give more serious consideration to cases raising issues that are "important," or "of substance." Practice manuals agree: the canonical *Supreme Court Practice* stresses that the importance of the issues is central to the cert decision, and also refers several times to the novelty of an issue as a relevant factor (see, e.g., Stern and Gressman 1950, 108–113).

[8]We briefly describe the scheme for determining ideological direction in corporate bankruptcy cases, since it is not self-explanatory. The coding instruction is to start at the top of the following list and continue until reaching an element that is applicable to the case. A lower court decision is liberal if it is: 1) Pro (federal) government / (federal) regulatory oversight of bankruptcy/reorganization; 2) Anti-manager/insider (i.e., pro-small investor); 3) Anti-compensation or expenses; 4) Pro-absolute priority rule; 5) Pro-bankruptcy judge's decision; 6) Pro-trustee's decision; 7) Pro-equal treatment of creditors/shareholders; 8) Pro-dissenting creditor; 9) Anti-delay. For the rationale behind these rules, see Hopkirk (1964) and Skeel (1998).

[9]A typical example is an Economic Legacy/Common Law case in which the disputants are two individuals or two corporations, such that there is no economic underdog. For example, 39-659, *Florida Blue Ridge Corp.* v. *Tennessee Electric Power Corp.* 106 F.2d 913 (1939).

Justices themselves have noted the central role of case importance and novelty. For example, Chief Justice Vinson (1949, 552) stated that the Court's function is "to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts." Ward and Weiden (2006, 110) extensively quotes a clerk for Justice Reed to indicate the central role that a case's importance (or lack thereof) played in the cert memos for Reed. Justice Jackson's training manual for clerks instructed them to evaluate whether cases involved "serious and important" issues (Peppers 2006, 127). Notably, this provides backing for the claim that clerks are acting as agents for their justices when assessing if a case important or novel, and that therefore our measure of case importance, based on clerk determinations, plausibly reflects the perspective of the justices.

Given such considerations, it is surprising that case importance and novelty have not been directly measured in studies of the Court's agenda-setting. Flemming and Krutz's (2002, 232–237) study of agenda-setting at the Canadian Supreme Court, which has appellate jurisdiction defined quite similarly to that of the U.S. Supreme Court, is the most closely relevant study. The authors find that issue novelty and public importance—coded by law students based on the petitioners' briefs—affect that court's decision to hear a case.[10] And, as mentioned above, Black and Owens (2009) uses the presence of an article in *Law Week* about the lower court decision as a proxy for "legal importance." We define our variables as follows:

Important. We looked for the clerk's judgment that the petition involved an important case—i.e., that it raised an important or otherwise substantial issue or question. If the clerk made such an indication (i.e., used "important" or a synonym), we code 1, 0 otherwise. In our regressions, we use the assessment from Douglas' memos where available, and from Reed's memos if the Douglas' memo was missing. A version of the variable that uses Reed's memos

[10]Flemming and Krutz (2002, 238–239) captures issue novelty by a single variable; their version of issue importance has several sub-components, including whether a case presented an issue of importance to federal, provincial, or broad socio-economic interests, and whether it was fact specific, parochial, or of limited generality.

where available and the Douglas memos otherwise does not change the results, although the Proportional Reduction in Error (PRE) is slightly greater for the version of the variable used in the regressions that we present here.

Novel. This variable is coded 1 if the cert memo, in discussing the issue the petitioner raises, does not refer to any relevant Supreme Court precedent, or the memo explicitly notes that the question the petitioner raises is novel (unresolved, etc.). If, in our reading of the cert memo, the dispute is entirely fact-bound, so that there is no abstract legal question involved, then we did not classify the case as "novel," even if there was no reference to relevant Supreme Court precedent. Thus, this variable is probably more subjective than the rest. It is reassuring that with an alternative, more conservative specifications of this variable—whereby a case is only classified as novel if the clerk explicitly states as much—the results for all other variables are robust and that the model fit for the regressions we present in the main text are superior to the analogous models with the alternative definition of the variable.

3 Statistical Results

We present the results of our regression analyses in Table 1; we consider four specifications. Column 1 is a model without fixed effects; Column 2 adds fixed effects for Issue Category to the model in Column 1, and Column 3 adds fixed effects for Circuit; finally, Column 4 presents a specification with fixed effects for both Issue Category and Circuit.[11]

Fit for our models is good. For the fully-specified unconditional certiorari model, PRE = .45, with 650 of 737 correct (null: 580), compared to Caldeira and Wright (1990), PRE = .37. (Most of this difference is due to the inclusion of the fixed effects.) Observe that whereas the Akaike Information Criteria (AIC) give no clear reason to prefer one specification over another, the Bayesian Information Criteria (BIC) strongly favor the most parsimonious model.

[11]Cases coming from state courts are combined into a single category for the purposes of the "Circuit" fixed effects.

We find that the coefficients are generally consistent with our expectations. In every specification, the variable with the largest coefficient is Actual Conflict; a petition that presents an "actual" (or "square") conflict is clearly more likely to be granted than otherwise (in all specifications, $p < .001$ for Actual Conflict). Similarly consistent with expectations, petitions seeking review in cases in which there was a dissent or a reversal between lower courts are more likely to be granted (in all specifications, $p < .001$ for Intermediate Reversal, $p < .05$ for Dissent).

The results for U.S. Petitioner are more interesting; though the coefficient is significant ($p < .001$) in the baseline model, the magnitude of the coefficient decreases appreciably when fixed effects for Issue Category are added. Apparently, this is due to some collinearity: the bulk of cases the U.S. petitions in are concentrated in a relatively small number of issue categories. Since issue-related controls in studies of agenda-setting have typically been limited to a dummy variable for civil liberties (e.g., Black and Boyd 2013; Caldeira and Wright 1990) it is possible that the effect of U.S. as petitioner has been overestimated in earlier studies. Nonetheless, the results we present here are broadly consistent those in other studies, for more recent terms of the Court, ranging from 1968 to the early 1990s.

Turning next to the variables we introduce here, we find both important cases and those raising novel legal questions are more likely to be granted. Consistent with our theoretical expectations, if a cert memo classified a case as important or novel, the Court was significantly more likely to grant cert than in the absence of either (in all specifications, $p < .001$ and $p < .05$, respectively). Although we do not present the regression tables here, we note that both Important and Novel have effects at both stages of agenda setting: they predict both whether a case will be discussed and whether a *discussed* case will be heard by the Court. In all four specifications predicting whether a case is discussed (analogous to the four columns in Table 1) the p-values associated with the coefficients on Novel and Important are smaller than .05. The same is true for seven of eight relevant p-values in the models predicting the

cert vote among only cases that were discussed.[12]

It is conventional wisdom that the Supreme Court tends to grant certiorari in cases in which it wants to reverse the lower court's decision. The Hughes Court in OT 1939 proceeded as have subsequent courts, and the ideological direction of the lower court's decision is a significant predictor of the decision to grant. Unsurprisingly given the makeup of the Court, conservative lower court decisions ($p < .01$ in all specifications) were more likely to be heard than liberal decisions.

Although our tables do not include the coefficients for fixed effects, we briefly note that here, as in some but not all prior work, some issue areas receive more attention than do others. Most notably (in decreasing order of coefficient size) State Labor, Government Claims, Labor, Federal Business Regulation, Due Process, Federal Tax, and State Tax cases were all substantially more likely to be heard than the least-frequently heard subject area, Common Law ($p < .05$, coefficient > 1.7, for both specifications, for each of these variables). The landmark statutes of the New Deal and concurrent state legislation filled with federal courts with lawsuits in the areas of labor, regulation, and taxation, and dwarfed criminal law, civil rights and civil liberties cases, to which the Court turned in earnest only during the Second World War.

Even though amicus briefs figured in a much smaller proportion of cert petitions than on the post-Warren Court, the coefficient for Amicus Curiae is in the expected direction, substantial in magnitude, and statistically significant in each specification.

It is probably not surprising that controlling for the actual presence of conflict, an allegation of conflict is not enough to influence the Court to grant cert. Mere allegations, absent

[12]The eighth p-value, on Important from the most parsimonious model, is $\in (.05,\ .1)$; note that in these models, $N = 397$. More generally, most of the covariates that are statistically significant in Table 1 have effects at both stages of the agenda-setting process. At first glance, it may be surprising that whether a case presents an important or a novel question matters at least as much at initial agenda-setting stage than at the cert vote, but we suspect that it can be traced back to Chief Justice Hughes' long experience and sheer virtuosity at picking out compelling cases from petitions, even without the aid of his colleagues (see also Caldeira and Lempert 2020).

Covariate	(1)	(2)	(3)	(4)
Actual Conflict	2.753***	2.681***	2.949***	2.827***
	(0.40)	(0.42)	(0.43)	(0.45)
Alleged Conflict	0.367	0.476	0.426	0.548^{+}
	(0.28)	(0.30)	(0.29)	(0.31)
Intermediate Reversal	0.905***	0.966***	1.082***	1.143***
	(0.26)	(0.28)	(0.27)	(0.29)
Dissent Below	1.065***	0.925*	0.951**	0.895*
	(0.31)	(0.36)	(0.34)	(0.38)
Nonideological Decision Belown	0.450	1.398**	0.400	1.507**
	(0.40)	(0.48)	(0.42)	(0.51)
Conservative Decision Below	0.844**	1.339***	0.813**	1.306***
	(0.28)	(0.34)	(0.30)	(0.35)
U.S. Petitioner	1.631***	0.888^{+}	1.853***	1.075^{+}
	(0.43)	(0.53)	(0.45)	(0.57)
U.S. Respondent	0.049	−0.217	0.235	−0.164
	(0.30)	(0.43)	(0.33)	(0.50)
Important	1.127*	1.256*	1.295**	1.396**
	(0.44)	(0.49)	(0.46)	(0.51)
Novel	1.394***	1.367***	1.406***	1.346***
	(0.25)	(0.27)	(0.27)	(0.28)
Number of Amicus Briefs	1.238**	1.299*	1.020*	1.055*
	(0.47)	(0.50)	(0.48)	(0.51)
FEs: Issue?		X		X
FEs: Circuit?			X	X
AIC	513.418	507.685	516.837	513.326
BIC	568.649	631.955	627.299	692.827

Table 1. Did Supreme Court Grant Cert Petition? (1=Yes; 0=No). $N = 737$.
$^{+}$ $p < 0.1$ * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$. Fixed effects and constant omitted.

something more palpable in the clerk's eyes, did not carry any weight; even in this period, allegations of conflict were fairly routine, and were thus not sufficient reason to grant cert. Last, as observed in previous work, the United States as a respondent has no significant influence on the cert decision. Even though the United States has automatic credibility, like other respondents, it has no choice in whether to be a respondent and thus its claims that a petition is not cert-worthy simply do not carry as much weight as when it is a petitioner, a role in which it has the full range of choice in whether to file.

We now illustrate some effect sizes by demonstrating how the predicted probability of a grant changes as cases add some important indicators. Consider first a case that lacks Actual

Conflict, is not brought by the U.S. as Petitioner and is neither Novel nor Important.[13] Such a case is granted with a predicted probability of .10. But if the case is Important, the probability more than doubles, to .25. If the case is not only deemed Important, but the issue raised also Novel, the probability nearly doubles again, to .48. If, additionally, an Actual Conflict is involved, a grant becomes overwhelmingly likely, with a predicted probability of .90. And if the U.S. is also Petitioner, a grant is almost certain (Pr(grant)=.96).

Here, as in previous work, the ideological direction of the lower court's decision is consequential. If we hold all other covariates at their in-sample values, the increase in probability that a decision below is reviewed, if it is conservative rather than liberal, is .10.

As a final bit of context for comparing OT 1939 to the more-studied Burger Court, we consider how cert petitions of comparable "quality" were treated by the Court in OTs 1939 and 1982.

Define a low quality case as one with a dissent and an intermediate reversal below, as well as an alleged conflict, but no actual conflict, not brought by the U.S. Let a medium quality case be one that is that the same as a low quality case, but in which the U.S. is petitioner. And let a high quality case be one that adds an actual conflict to a medium quality case. Table 2 gives the probabilities that each type of case is granted, discussed, and granted given that is discussed for the 1939 and 1982 terms.[14]

[13]The values of the other variables are set at their in-sample observed values, as recommended by Hanmer and Kalkan (2013).

[14]These predictions are based on regressions that are included with the replication code. For over-time comparability's sake, the OT 1939 and OT 1982 models all have same covariates; in addition to those mentioned in the text (i.e., Alleged Conflict, Actual Conflict, Dissent Below, Intermediate Reversal, and U.S. Petitioner), these are binary variables indicating whether any amicus briefs were filed on cert, whether the case involved civil liberties, and whether the decision below was ideologically compatible with the Supreme Court or incompatible (i.e., =1 if decision below is liberal in 1939 and conservative in 1982 and =0 if the decision below is conservative in 1939 and liberal in 1982). The predicted probabilities in Table 2 are based on a non-civil liberties case without amicus briefs that is ideologically compatible with the Court considering the petition. We do not use the full suite of covariates from the OT 1939 models we presented earlier due to OT 1982 data availability limitations; for the same reason, we exclude all ideologically neutral (i.e., non-ideological) cases.

Case Quality	Pr(Grant)	Pr(Discuss)	Pr(Grant|Disc)
OT 1939			
Low	.34	.74	.49
Medium	.78	.99	.78
High	.98	1	.96
OT 1982			
Low	.02	.27	.08
Medium	.52	.86	.60
High	.98	.98	.98

Table 2. Probabilities of Cases Being Granted and Discussed as a Function of Case Quality, OT 1939 and 1982. See text for details.

The results here are straightforward. High quality cases are nearly certain to be discussed and heard in both OTs 1939 and 1982. Differences emerge for medium and low quality cases. Medium quality cases are nearly certain to be discussed in OT 1939, but have a .86 probability of being discussed in OT 1982. Such cases have about a 3 in 4 chance of being granted by the Hughes Court, but only about a 1 in 2 chance for the Burger Court. Most dramatic are the differences are among low quality cases (which, recall, still have a dissent below and an intermediate reversal): such cases have a 3 in 4 chance of being discussed and a still-respectable 1 in 3 chance of being granted in OT 1939; in contrast, petitions presenting low quality cases in OT 1982 are nearly futile, with about a 1 in 4 chance of being discussed and virtually zero probability (.02) of being granted.

4 The Meaning of Importance

Here, we present two empirical exercises as means of clarifying how the Court understands importance. First, we categorize the reasons given by clerks for classifying a case as important. Second, we analyze sets of cases that are matched on covariates but differ in whether they were classified as important, to isolate relevant differences between important and non-important cases.

4.1 Reasons Given by Clerks

First, we present the reasons given by clerks for categorizing a case as important. The advantage of this exercise is that it is a direct assessment of what makes a case important. There are, however, two disadvantages. One, we are selecting on the dependent variable; as such, we cannot say anything about the (perceived) attributes of cases that a clerk did not deem important. That is, we can only present here the reason a clerk saw a case as important; we cannot demonstrate that the cases classified as important are necessarily different than those deemed unimportant (our next exercise will tackle that task). Two, as we will see, in just over half of the cases, a clerk did not give an explicit reason for declaring a case important, even though some surely reason existed. In this sense, we undercount the number of cases that fall in each category of importance—and possibly, the number of categories themselves.

We classify the clerks' reasons into categories that are derived in part by drawing previous theoretical discussion of importance (e.g., Perry 1991, 253–265) and in part inductively. They are:

- The case has immediate effects on many people.
- The issue in the case is expected to arise more and more going forward, especially if cert is not granted.
- The case is important to the federal government's operation (including revenue raising).
- The case involves a lower court ignoring Court precedent by disregarding an administrative agency's fact-finding and/or overruling an administrative agency decision that was backed by substantial evidence.
- A large amount of money is immediately at stake in the case.
- There are many pending cases in the lower courts dealing with the same legal issue as this case.
- The case involves a broader area or "field" that is important.

- Other—some reason for importance is given, but it does not fit in any of the categories or share obvious commonalities with other reasons given.[15]

- The clerk does not elaborate on the reason a case is important.

Table 3 gives the number of reasons that fall into each category.[16]

Reason (Category)	Count
Immediate effects on many people	9
Expected to arise frequently in future	5
Important to federal government operation	12
Lower court overruling administrative agency	4
Large amount of money immediately at stake	1
Many similar pending cases in lower courts	2
Part of important field	4
Other	5
No elaboration	38

Table 3. Clerks' reasons for declaring a case important in cert memo. See text for details.

The two most frequently-given reasons given correspond to the "two common reasons" Perry (1991, 254) noted based on interviews of clerks and justices. Nine times, a clerk explained a case's importance by referring to the immediate effect the case would have on a large group of people, and twelve times effect on the federal government's operations was cited. In 39-705, *U.S.* v. *Dickerson* and 39-715, *U.S.* v. *Summerlin*, the clerk cited both reasons. *Dickerson* involved the question of whether Congress had suspended a certain army reenlistment

[15]Five such reasons were given. 1) Important to determine what effect a statute later held unconstitutional has on bankruptcy decrees (or what effects such laws should have more generally), 39-122, *Chicot Co. Drainage District* v. *Baxter State Bank*. 2) Important question of statutory construction that will determine the constitutionality of the Perishable Commodities Act, 39-459 *Rouw Co.* v. *Crivella*. 3) The question is very important theoretically because "as Holmes lamented" federal courts retaining jurisdiction if the jurisdictional amount is not met is an invasion of the states' reserved rights, 39-332, *Waterman v. New York Life*. 4) Because there is inherent importance in a case denying a litigant any opportunity for review, 39-71 *Roby-Somers Coal* v. *Routzahn*. 5) "Rather important question under the doctrine of [*Erie* v. *Tompkins*]," 39-815, *Fidelity Union Trust* v. *Field*.

[16]A case could have more than one reason given, though (excluding cases where no reason was given) the modal case had one reason given. If both clerks gave the same reason for a case, we counted that as one instance.

bonus that respondent claimed; the clerk wrote that "The government is probably right in its contention that [cert should be granted because] there are some 100,000 other applicants similarly situated, and it would be a needless burden on courts and litigants to force the development of a conflict on this question." *Summerlin* was about whether state statutes of limitations apply to the United States as a party in probate court; the clerk noted that "it is a question of considerable importance since 46 states have similar statutes and the government is constantly filing claims in probate." An example of a case claimed important solely because of its immediate effect on many people is 39-597, *Western Union* v. *Nestor*, about whether $500 liquidated damages apply for misdelivery of money orders under a standard Western Union contract. There, the clerk called the case "somewhat important" because some three million money orders were sent out under the contract. And an example of case called important only because of its importance to federal government operation is 39-674, *U.S.* v. *Appalachian Electric Power*, where the immediate question was whether a certain stretch of river was navigable, allowing the U.S. to build and operate a dam. The clerk wrote that "Even though it is primarily a factual issue it is very important since it involves the power of the government to control and regulate a large and important dam. [...] The question is an important one of policy [...]. Where facts are a mere disguise for the real policy which dictates the decision as in this case [...] navigability is merely the term used to describe a holding in favor of federal power [...]."

Occasionally, a clerk ventured to classify a case as important, not because of immediate effects, or even because there were many similar pending cases, but because of his prediction that many similar cases would arise in the future, particularly if the issue were not resolved by the Court. For example, in 39-79, *Still* v. *Union Circulation*, a fairly involved conflict of laws case, the clerk argued that "with the *Tompkins* case on the books [the question] will become increasingly important."[17]

[17]Specifically, the question was whether a federal court in state X must follow state Y's substantive law if an accident occurred in Y and state X's law of conflict says Y's substantive law should be followed, or whether it can follow X's substantive law.

One reason given several times was probably a product of the times: a court overruling an administrative agency's decision, usually by disregarding its determination of facts.[18] (Of course, at this time, some lower courts were still opposed to certain New Deal reforms.) A typical example is 39-193 *NLRB* v. *Waterman Steamship Corp.*, concerning the discharge of union workers. Douglas' clerk called it important because it was "one of several flagrant reversals" by the 5th Circuit of the NLRB; Reed's clerk cited the court's disregard of the substantial evidence rule.

An interesting, but perhaps idiosyncratic reason—all four instances were by Reed's clerk—for classifying a case as important was that the case provided an opportunity to address an important *field*. These cases were seen as important chiefly for the opportunity that they gave the Court to influence developments in some broad area of law. Particularly illustrative is the language used by Reed's clerk in 39-696, *Clarke* v. *Gold Dust Corp.*, a case about the rights of dissenting stockholders after mergers: "This is quite an important field in which this Court by winking at Erie and Tompkins might do some pioneering in order to influence state courts."

Finally, two reasons appeared less often than might have been expected. The clerks cited a large amount of money immediately at stake in the case as a reason that a case is important only once, and many pending cases in the lower courts as a reason only twice.

What about cases where no reason for importance was given? On this point, our discussion is more speculative. But we discern two types of such cases: those where the reason for importance was likely self-evident and those where the memo included points that were relevant for explaining why the case was important, even as those points were not explicitly tied to a claim of importance.[19]

Cases where a clerk likely believed that the reason for importance would be self-evident to his justice included those that involved major federal statutes, especially those that were recently passed. Several such cases involved recent federal bankruptcy statutes: the 1933

[18]For some relevant historical discussion, see Tushnet (2022, 1025–1027).

[19]Recall, in Table 3, we only code reasons that were explicitly given as explanations for a case's importance in the memo.

and 1934 Amendments to the Bankruptcy Act (e.g., 39-180/218/219, *Thompson* v. *Terminal Shares / Murphy*), 1937's Municipal Bankruptcy Act (e.g., 39-402, *Haverstick* v. *Drainage District Number 7*) or 1938's Chandler Act, (e.g., 39-992 *RFC* v. *Prudence Securities Advisory Group*). Other such cases involved statutes like the National Banking Act (e.g., 39-246, *Dietrick* v. *Greaney*) or the NLRA (e.g., 39-996, *Heinz Co.* v. *NLRB*). It is tempting to include two cases well-known to this day—39-514, *Thornhill* v. *Alabama* and 39-690, *Minersville* v. *Gobitis*—as those where the reason for importance would be self-evident to the justices, but we must keep in mind that because these cases are, in retrospect, obviously important does not necessarily mean that this was so at the time of the cert vote.

Cases where the memo discussed case factors that might make a case important, while not tying the discussion to importance per se include, for example, 39-70, *AFL* v. *NLRB*. This case considered the question of what constitutes a bargaining unit under the NLRA; the clerk emphasized that when the NLRB declared the entire West Coast as the bargaining unit for longshoremen (and the CIO the bargaining agent) "it struck at the very roots of petitioner's union and destroyed its effectiveness in a large geographic area." Other examples are 39-98, *Corn Products Refining* v. *Loft Inc.*, involving a massive anti-trust suit against glucose manufacturers, and 39-604, *Standard Oil* v. *U.S.*, concerning a $6,000,000 judgment against the company in favor of the government.

In sum, then, our systematic examination of the reasons that clerks gave for assessing a case as important, covering cert memoranda for every paid case in a full term, gave results similar to those in Perry (1991): whether a case had effects on many people or on the operation of the federal government were the most commonly cited reasons. However, we also uncovered additional, though less commonly-given reasons. Ultimately, because this exercise involved selecting on the dependent variable, and because we only categorized case factors the clerks explicitly tied to importance (i.e., we did not "read between the lines" at all), it can only provide a partial answer to the question of what makes a case important. The next exercise addresses the shortcomings of this one.

4.2 Matched Sets

Here, we seek to understand what makes a case important, by comparing important and non-important cases in our sample, to discern relevant differences. Given the conceptual slipperiness of importance (e.g., Perry 1991, 253–254), it is worth abstracting away from other case factors when making such comparisons. Thus, we construct sets of cases that are matched (exactly) on our covariates Actual Conflict, Alleged Conflict, Intermediate Reversal, Dissent Below, U.S. Petitioner, U.S. Respondent, Novel Issue, and the ideological direction of the decision below, as well as the primary issue the case involved.[20] From these sets, we consider all those where there is (a) at least one case that at least one of the clerks called important and (b) at least one case that no clerk counted as important. This gives 14 matched sets consisting of 51 cases, of which 17 are classified as important. (Observe that not every important case appears in this analysis: those that do not match, on all covariates, *any* non-important case are omitted.) Within each set, we compared these two types of cases by reading the cert memoranda and the cert petitions, briefs in opposition, and reply briefs and noting all references to importance (or related terms), and more generally, case information relevant to the determination of importance.

Put briefly (and somewhat roughly), our findings are as follows. In eight of the sets, the important cases are distinguished from the non-important ones chiefly because of number of people impacted, either immediately or in the near future. In three of the sets, the important cases differ from the non-important cases chiefly because they affect the federal government or a federal statute. The differences for two sets are more complex (we discuss these below) and in one set it is not possible to discern a relevant difference between the important cases and non-important case.

Below, we list the cases comprising each matched set, indicating, in **bold**, which case(s) were deemed important by at least one clerk, and the primary issue the case involved. We

[20]For criminal cases, we match on the primary procedural issue the case involved, not the type of crime. We do not match on the number of amicus briefs, since that is, at least arguably, itself an indicator of importance.

also give a very short explanation of the relevant difference(s). For details, see the Supporting Information.

In the following eight sets, the sole or primary difference between the important and non-important cases was that more people would be immediately or shortly affected by the important cases:

- **39-151 Deputy v. Dupont**; 39-675 U.S. v. Stewart. Issue: Federal Income Tax. The clear difference here is that the statute in *Stewart* has been amended so as to moot the question going forward. The question involved in *DuPont* is still live.

- 39-317 Helvering v. Johnson; **39-479 Helvering v. Bruun**. Issue: Federal Income Tax. The major difference here is that the issue is live in *Bruun*, whereas in *Johnson*, the statute has been amended so that the problem will not reoccur in the future. The problem in *Bruun* also seems to be longer-running.

- **39-180, 218-219 Thompson v. Murphy (180) Thompson v. Terminal Shares (218-9)**; 39-302 Palmer v. Palmer; 39-321 Palmer v. Palmer; 39-502 Cassel v. Radio. Issue: Corporate Bankruptcy. *Palmer* is more fact-specific than Thompson. Argument for importance is perhaps a little more concrete in the *Thompson* petition compared to the *Cassel* petition. It is tempting to conclude that *Cassel* is significantly more fact specific than *Thompson*, but the Douglas memo for *Cassel* implies that the case could be used to extend the doctrine of *Los Angeles Lumber*.

- 39-142 McVay v. Swift; 39-280 Woods v. Rains; 39-496 Rios v. Baetjer; **39-580 Municipal Council v. Hospital de San Juan**; 39-659 Florida Blue Ridge v. Tenn Electrical; 39-896 McCampbell v. Warrich; 39-197 Federal Crude Oil v. Yount. Issue: Real Property. *Municipal Council* is distinct in two respects. First, the value of land at issue. Second, a reversal would have fairly immediate implications for the disposition of even more land, potentially transferring it from Church to state hands. The other cases involve land of much more modest or even trivial value and have no apparent legal

implications for other cases.

- **39-387 Vidal v. Garcia**; **39-640 McGregor v. Public Utilities**; 39-839 Trinity Universal v. Cunningham; 39-866 Texas Natural Gas v. El Campo; 39-187 Milinkovitch v. Superintendent of Insurance (In re National Surety). Issue: State Regulation of Business. *Vidal* is easier to explain, since the impact (though perhaps just on the island of Vieques) is clear and potentially extremely wide-ranging. *McGregor* is much harder to understand: Reed's clerk's view may be idiosyncratic or we may lack era-specific context to grasp the point.

- **39-786 Clawson & Bals v. Harrison, Collector**; 39-971 Grain Belt Supply v. Commr; 39-1012 Zinsmaster Baking v. Commr. Issue: Federal Excise Tax. The *Clawson* petition, unlike the others, gives concrete numbers about impact (amount of money at stake, people, cases involved, etc.); also, in *Clawson*, the U.S., as respondent, concedes importance.

- **39-79 Still v. Union Circulation**; 39-799 Sibbach v. Wilson. Issue: Liability, Non-governmental. It is arguable, if not clear, that more people would be affected by the conflict law question in *Still* (see footnote 17) than the question in *Sibbach* (whether a party can be held in contempt for refusing a medical exam).

- **39-614 Public Service Comm v. Wisconsin Telephone**; **39-681 Railroad Commission (Texas) v. Rowan & Nichols**; 39-837 City of York, Nebraska v. Iowa-Nebraska Light and Power. Issue: State Regulation of Business. Both petitions (and amici in Wisconsin case) give concrete information about the impact of the cases. This is not so for Nebraska. While it may be that the question of perpetual franchises impacts as many people as the two other cases, it is harder to tell for justices (and other readers). Moreover, it seems that a reversal in *City of York* would have little or no impact outside of Nebraska. An additional relevant difference is that the Wisconsin and Texas cases both involve administrative determinations disregarded by courts, which was of

particular concern to the Court of the time.[21]

In the following three sets, the sole or primary difference between the important and non-important cases was that the important case affected federal statutes or the federal government:

- **39-459 Rouw v. Crivella**; 39-912/3 Carl v. Ferrell/Norris. Issue: Liability, Non-governmental. Conclusion: In *Rouw*, a federal statute (the Perishable Commodities Act) is construed to call its constitutionality into doubt. It also seems clear that more people are affected by *Rouw* than by *Carl*. Moreover, the *Rouw* petition gives concrete numbers about impact; *Carl* is vague.

- **39-402 Haverstick v. Drainage District Number 7**; 39-1038 Touchton v. City of Fort Worth; 39-89 Getz v. Edninburg. Issue: Municipal Bankruptcy. Conclusion: In most respects, these cases are very similar. The obvious difference in *Haverstick* is that an RFC loan is involved—and thus, the federal government's money.

- **39-332 Waterman v. NY Life**; 39-609 Cohen v. Globe Indemnity; 39-910 Prentiss v. Mutual Benefit; 39-932 Pitcher v. Met Life; 39-663 Clum v. Guardian Life. Issue: Insurance Claims. Conclusion: The clear difference is that *Waterman* involves a question of federal court jurisdiction (whether the face or the surrender value of an insurance policy determines the jurisdictional amount).

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Finally, these sets involve miscellaneous or hard-to-discern differences between the important and non-important cases.

- 39-57 Rinn v. Asbestos Mfg. Co.; **39-696 Clarke v. Gold Dust**. Issue: Securities—Private Litigation. *Clarke* suggests that a field may be seen as important, and indeed that it may be possible for the Court to affect that field, even through a case that

[21]For additional historical context, see Tushnet (2022, 382–388).

is in the narrower sense not important. *Clarke* also appears to have wider potential application, or at least is less fact-specific. (*Asbestos* seems entirely fact-specific.)

- 39-754/756/757 Landay et al v. U.S. **39-755 Lane v. U.S.**; 39-679 Buckner and Gillespie v. U.S.; 39-792 Davis v. SEC. Issue: Self-Incrimination. In many ways, these cases are very similar. It is hard to see that more individuals will be affected by one rather than the other. Probably it is fair to say that the decision in 755 is most dubious (i.e., far reaching in government power, unsupported by precedent). The petitions do not much differ in the (lack of) emphasis on importance. Perhaps these cases also show a connection between novelty, perceived correctness of the decision, and importance, which is consistent with Reed memo's statement phrasing: "the question seems important enough and doubtful enough [. . .]."

- 39-265 FCC v. Pottsville Broadcasting; **39-316 Fly (McNich et al) v. Heitmeyer**; **39-499 FCC v. Sanders Bros**. Issue: Federal Utilities Regulation—Radio and Television. The difference among these cases is hard to discern.

Our systematic analysis of case sets matched on covariates is generally consistent with the summaries of the reasons that clerks explicitly gave to explain why a case is important—and, in turn, with the Perry's (1991) qualitative analysis. This is reassuring, as is the fact that differences between important and non-important cases could, usually, be readily discerned: even when not giving explicit reasons for importance, clerks were classifying cases based on relevant case factors. Moreover, we can see that importance is often *not* a function of other covariates for which we have controlled, including, notably, issue area.[22]

5 Importance and Salience: Theory and Measurement

Finally, we discuss the relationship of case importance to salience. After considering conceptual issues, we move on to problems of measurement.

[22]True, both of these points could also be inferred from our regression analyses.

It is hard to disagree with Clark, Lax and Rice (2015, 38), when it notes that salience, as conceptualized in studies of the Supreme Court, is not "a monolithic or well-defined concept." When referring to salience, scholars of courts have been inconsistent in defining what salience means in the abstract and in defining the actors whose perception of salience is relevant. For example, Epstein and Segal (2000), probably the most important article on salience at the Court, gives no definition of what the term *salience* actually means.[23] The closest it comes to a definition are several instances where "importance" is used as a synonym for salience (Epstein and Segal 2000, 66, 68, 71). In this respect, Epstein and Segal (2000) is not unique (e.g., Baird 2004; Bailey, Kamoie and Maltzman 2005).

Some articles *explicitly* define salience as a function of importance; Strother (2019, 133) writes, for example, that "Salience is a latent quality that [...] in general [...] speaks to the contemporaneous importance of a given case." But this is certainly not the only definition in the literature. Collins and Cooper (2012, 397), considering the literature in political science at large, notes that although "most scholars agree that a salient issue or event is one that actors care more about or one that they feel is more 'important,' others define salience as awareness of information about events or issues" (internal citations omitted). Clark, Lax and Rice (2015, 40) defines salience as "the weight the justice places on the utility she receives from her decision in the case." Unah and Hancock (2006, 295) conceptualizes salient cases "as those that 'stand out' in Supreme Court plenary agenda in the sense that they involve important issues of public policy and therefore are likely to receive a disproportionate amount of attention and involvement from justices throughout and from court-watchers, such as journalists."[24] Sometimes, salience is equated simply with certain issue areas (e.g., Blake, Hacker and Hopwood 2015, 984). Considering salience at the certiorari stage specifically,

[23]One could argue that it is a term of art in political science that needs no definition; however, the various inconsistent conceptualizations of the term in the literature belie this argument.

[24]Later, the authors write: "Ideally, case salience is best conceptualized by answering the question: How important is the case to a justice at the time the justice was making the decision? (Unah and Hancock 2006, 296)"

Schoenherr and Black (2019, 46) equates a case's salience with its probability of review.

Nor is there agreement about *whose* perception of salience is conceptually relevant. Reviewing the literature, Black, Sorenson and Johnson (2013, Note 4) suggests that most studies are conceptually concerned with salience to justices. But other studies argue that what is relevant is salience to the public (Collins and Cooper 2012), to the other branches (Johnson 2003, 435), to organized interests (Collins 2008, 147), or to issue communities (Peters 2007)—and sometimes the relevant actor is not specified.

A distinction between political and legal salience is sometimes connected to the question of who the relevant actor is. Collins and Cooper (2012, 397) gives one explanation: "A case that is politically salient is one that is important to the public. A case that is legally salient, however, is important because it influences 'the development of the law' regardless of whether it is known to the public" (internal citation omitted). Note that it is not clear: which actor(s)—if any—care about the "development of the law?" Also worth mentioning is that some scholars conceptualize *political* salience by reference (only) to *justices'* perceptions (e.g., Spriggs, Maltzman and Wahlbeck 1999, 491).

Given these very different theoretical perspectives on salience, it is not surprising that a wide variety of measures have been proposed. (Strother (2019) contains a thorough, recent review and Black, Sorenson and Johnson (2013) includes a review that is particularly relevant to some of our arguments that follow.) A number of studies have built on Epstein and Segal (2000), constructing measures of salience based on media coverage of cases (e.g., Clark, Lax and Rice 2015; Collins and Cooper 2012). A notable alternative proposes to measure salience at the justice level as a function of the number of questions a justice asks about a case at oral arguments (Black, Sorenson and Johnson 2013). The number of amicus briefs filed has also been used to indicate salience (e.g., Collins 2008), as have the issue areas a case involves (e.g., Blake et al 2015; but see Teger and Kosinski 1980, 845) and whether the lower court decision overruled a precedent or declared a statute unconstitutional (e.g., Spriggs, Maltzman and Wahlbeck 1999, 497). At the agenda-setting stage, Schoenherr and Black (2019, 49) proposes

the presence of a *Law Week* summary of the lower court decision as a measure of the case's (petition's) salience.[25] Schoenherr and Black (2019, 46) also argues that a case's presence on the Discuss List can itself be taken as an indicator of its salience.

Considering all of this inconsistency in conceptualization and measurement, we argue that it is often more appropriate to discard the term *salience* in favor of one that is more concrete—for example, *importance*, or *demand for adjudication*. Scholars should also specify the actor(s) whose perception is relevant to the concept being measured: the justices, interest groups, the public, etc. This perspective is not novel, though it is rarely defended explicitly. Our argument is consistent with basic approaches of studies including Perry (1991, 253–265), Caldeira and Wright (1988), and Black and Owens (2009). True, the approach we defend might limit the breadth of theoretical claims that can be made; however, the connection between concept and measurement will be more credible. In our view, it is easy to balance these two considerations: a narrow, defensible claim is preferable to a broader claim backed by weaker evidence.

In closing, we consider the relative merits of two measures of case importance to justices: our measure and the presence of a *Law Week* summary (Black and Owens 2009). We focus on these two measures, because we are interested in a measure that can be used to assess case importance to justices (immediately) prior to the cert vote.[26]

We believe that our measure based on cert memos has two major advantages over *Law Week* summaries, as a measure of importance to justices. First, the connection to *justices'* perceptions is tighter. True, it is clerks, not justices, who make the claim of importance in the memos. But clerks act as agents for justices when writing memos—of course, this is not true of *Law Week* editors, who, when deciding which cases to summarize, are presumably attempting

[25]This measure is introduced in Black and Owens (2009, 1069–1070), where it is called a measure of *legal importance*—a term that, we argue below, should not be considered synonymous with *salience*.

[26]Coverage from national newspapers at this stage is surely too rare to make the use of traditional media-based measures (e.g., Epstein and Segal 2000). And, of course, the oral argument based measure in Black, Sorenson and Johnson (2013) is inapplicable. Other measures discussed above are too distant from the concept we are seeking to measure and/or endogenous.

to guess which cases will be of interest to their readership of attorneys. In defense of the *Law Week* measure, though, it should be noted that the connection between *Law Week*'s coverage, which is targeted at a specialized audience, and justices' perceptions of importance is surely tighter than the connection between popular press coverage and justices' perceptions.[27]

The second major advantage is that our measure has a consistent meaning over time. Whether a case is important will always be a relevant consideration in a cert memo (Perry 1991, 253), and "importance" has a relatively uncomplicated, constant meaning (even as, of course, the specific elements that make a case important will differ across eras). In contrast, as Epstein and Segal (2000, Footnote 4) notes, the format of relevant *Law Week* sections has changed over time (the authors note one particular change in 1976). And during the 1939 term, *Law Week* apparently summarized all, or nearly all, paid petitions to the Court, whereas about one-third of paid petitions that made the Discuss List were summarized 1986–1993 (Schoenherr and Black 2019, 49).

One more, smaller, advantage of our measure is that it allows researchers to get a sense of *why* a case was considered important. As we have discussed above, clerks sometimes will explicitly explain the reason for calling a case important. Thus, if a researcher is interested in cases that were deemed important for particular reasons (in contrast with important cases in general), examining cert memos provides a way to identify such cases.

We must acknowledge some relative drawbacks of our measure as well. The measure is time-consuming to construct, since it requires the careful reading of memos. For the same reason, reliability problems could arise if coders are not capable and motivated. And acquiring memos can be both difficult and expensive. The measure relies on the competence of clerks, who, though among the very elite in their cohort, are also relatively inexperienced. The agreement rates between Doulgas' clerk and Reed's clerk are disappointing, though as we

[27]Contra Epstein and Segal (2000, 73), we believe the assumption that "salience means roughly the same thing to newspaper editors as it does to the justices [because] both editors and justices make this calculation at about the same time, within the same political context" *is* fairly "onerous."

noted above, both clerks' claims of importance are successful predictors of the Court granting a petition.[28]

6 Conclusion

In this paper, we have introduced original measures of case novelty and importance, and demonstrated that both factors affect the Court's decision to grant cert, based on an analysis of all paid cert petitions in OT 1939. We have also presented systematic evidence about how the Court understands the concept of importance. Finally, we have discussed the relationship between justices' perceptions of case importance and the concept of salience, arguing that narrower but better-defined concepts like our own may often be preferable in analyses of Court decision-making, and compared our measure to a viable alternative from Black and Owens (2009).

Empirically, an obvious extension to this work is to code importance and novelty based on cert memoranda from later terms, and thereby evaluate how the variables' impact has changed over time. It would also be interesting to compare the effect sizes associated with our measure of importance and with the *Law Week* measure, in terms where both are facially valid. And theoretically, there is room to consider how other relevant constructs—besides "importance to justices"—that fall under the many versions of (what has been referred to as) salience may be specified and measured.

[28]Of course, in the vast majority of cases where we had memos from both justices' clerks, the clerks agreed that a case was not important. But ignoring those cases, the clerks were many times more likely to disagree about importance (i.e., one claims importance and one doesn't) rather than agree—although, as it turns out, systematic patterns of missingness in the Reed memos may make this problem appear worse than it is.

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