Agenda Control in the Hughes Court, October Term 1939*

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Abstract

The Judges' Bill of 1925 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 social, economic, and political controversies. 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. Indeed, most of our knowledge of agenda-control in the Supreme Court is based on the Burger and early Rehnquist Courts. Here we consider agenda-control from October Term 1939, the earliest term for which the requisite data exist. We consider both stages of agenda-setting: the discuss list and the conference vote. We find, in general, that both legal and political considerations shaped the Court's agenda in OT 1939, similarly in broad strokes to those identified in much later terms. But in addition, we demonstrate the influence of issue substantiality and novelty at both stages of agenda setting. These two variables, whose importance is suggested both by the Court Rules and cross-national scholarship, have not been directly considered in prior work on the U.S. Supreme Court.

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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. 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 v. three or four, a heterogeneous bar v. the "Supreme Court Bar," justices who wrote their own opinions v. justices as editors, among other differences.

Here we try to provide some historical perspective and muster data on agenda-control from October Term 1939, which is the earliest term with the requisite data from justices' papers on the internal workings, votes on certiorari and appeal, indications of which cases the Court discussed in Conference, and law clerks' preliminary memoranda on the suitability of cases for plenary consideration. We consider both stages of agenda-setting: the first stage, at which the chief justice, in chambers, culls a set of certiorari petitions to be denied without a discussion and a formal vote; and the second, in which the remaining cases are discussed and voted on in Conference (see Caldeira and Wright 1990, Black and Boyd 2013). Roughly speaking, studies have found that so-called high-information cues influence both stages of the process, but low-information cues tend to influence only the initial stage (i.e., the selection of cases to be discussed).

We probe the generalizability of prior results by analyzing the two stages of agenda setting

for the population of paid certiorari 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. Like many of the incidentals of decision-making, the procedure for selecting the cases to be discussed differed in October Term 1939 from the process used in the terms existing studies consider. In OT 1939, Hughes, it seems on his own, composed and circulated a list of cases that would not be discussed, the default then the remaining cases to be discussed and voted upon. This practice carried over until the 1950s (the exact date of change is not known), when the chief justice would instead present a list of cases to be discussed, the default then denial without discussion. We are therefore in a position to assess whether this combination of institutional rules and critical personnel changes made a difference in the agenda before the Court.

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. Like Caldeira and Lempert (forthcoming), we find that in many ways, the influences relevant to the construction of the "Special List" (the set of cases denied without discussion) in OT 1939 are similar to those shaping the construction of the "Discuss List" (the set of cases discussed and voted on in Conference) in OT 1982 (Caldeira and Wright 1990) and subsequent years. Our results also indicate that the influences on the second stage of agenda-setting—i.e., the cert vote on the discussed cases—that operate for 1982 and later terms are also relevant in 1939. But in addition, we demonstrate the influence of issue substantiality and novelty at both stages of agenda setting. These two variables, whose importance is suggested both by the Court Rules and cross-national scholarship, have not been directly considered in prior work on the U.S. Supreme Court.

1 Background

For a few years after the Judges' Bill of 1925, all petitions to the Court received at least perfunctory discussion at Conference. By the 1930s, however, Chief Justice Hughes established

a procedure for “special listing” cases that would be denied without discussion. The exact date of the change is unknown, but references to cases being systematically denied without discussion appear as early as 1931 (Caldeira and Wright 1990, 810, 809–815; Provine 1980, 26–30). Presumably, the impetus for the change was the large proportion of unmeritorious petitions arriving at the Court—as Chief Justice Hughes noted in 1937, “...it is safe to say that about 60 percent of the applications for certiorari are wholly without merit and ought never to have been made (Stern and Gressman 1950, 97).”[1] The Chief would make up and circulate this Special List of cases, and any of the associate justices could remove a case from the list—a privilege, in Hughes's years, rarely exercised.

Beginning in the 1950s, the formal procedure has reversed, and a Discuss List is instead circulated by the Chief Justice (Stevens 1983). Cases not on the Discuss List are denied without discussion; and, as on the Hughes Court, any justice can add a case to the Discuss List. Perhaps more significant than the change in terminology are the shrinking proportion of all cases discussed and the increased contentiousness of the process. Even though Perry (1991, 85) quotes Chief Justice Burger's clerk to the effect that Burger took “great pride” in making up a Discuss List that was not modified by other justices, empirically the number of additions to the Discuss List was nearly an order of magnitude more frequent than changes to Hughes' Special List (e.g., Caldeira and Wright 1990; Caldeira and Lempert, forthcoming). Of course, the number of petitions has steadily increased over time, making the Chief Justice's screening task more difficult. And, Hughes has been acknowledged as an extraordinarily effective Chief Justice; he “gave the most thorough consideration imaginable” to petitions arriving at the Court, consulting and annotating the briefs and records directly (McElwain 1949, 13–14). In contrast, for example, the makeup of Burger's Discuss List often puzzled observers; one clerk reports that Burger “misses a few at time...and some that the Chief puts on, frankly I have

[1] Hughes continues: “There are probably about 20 percent or so in addition which have a fair degree of plausibility, but which fail to survive a critical examination. The remainder, falling short, I believe, of 20 percent, show substantial grounds and are granted. I think that [it] is the view of the members of the Court that if any error is made in dealing with these applications it is on the side of liberality (Stern and Gressman 1950, 97).”

no idea why they are on, and sometimes he doesn't know (Perry 1991, 86)."

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. The theoretical basis for this result is that, when making up the Discuss List, errors (i.e., mistakenly considering a case) are less costly than at the cert stage, and therefore, the Court can be more generous at the earlier stage, by taking into account both low- and high-quality "cues."[2] 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).

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

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[2]See also Provine (1980) and Perry (1991). Provine (1980, 78–83) presents descriptive statistics suggesting that the cases where the U.S. is the petitioner, cases where there was a reversal in a lower court, and civil liberties cases are each less likely to be special listed. Interviews with justices and clerks in Perry (1991, 85–89) suggest that both ideological and legal factors may shape the makeup of the Discuss List.

[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.)

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.

3 October Term, 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. For the previous term, October Term 1938, we can array the justices more precisely, with Martin-Quinn (2002) ideal points: 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 October Term 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 October 1939 Term, 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.

4 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* (Hein), lower court opinions from Westlaw, and *United States Law Week*. 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).

4.1 Dependent Variables

We consider two dependent variables. The first is whether a case was *Discussed* (=1) or, instead, placed on the Special List (=0).[4] The Special List was the set of cases Chief Justice Hughes designated for automatic rejection at Conference unless one of the justices asked it to be removed and discussed. This comes from information in Douglas' docket books and cert memos and Hughes' Special Lists circulated prior to Conference.

The second 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's 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).

4.2 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 describe 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),

[4]The Special List, known in Douglas' memoranda as the "BL," or "black list," is also sometimes referred to as the "dead list."

[5]We code as "granted" cases in which the Court grants certiorari 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.

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 very 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 Supplementary 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-government decision as liberal.[8] Our rationale for this departure is that, in the midst of

[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 Supplemental Information for details.

[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);

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 Below which is coded 1 if, on the primary issue for the docket, the decision below is conservative. Similarly, the variable Neutral Below is coded 1 if, on the primary issue, the decision below is neither liberal nor conservative.[9]

We also consider two variables which have been often discussed in legal analyses and judicial opinions, but have not figured in previous studies of Court agenda-setting: whether the case presents a substantial or novel question. The relevance of these variables is indicated by the language of the Supreme Court Rules. Referring to both substance 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).

Justices themselves have noted the central role of issue 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,

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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).

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).

Given such considerations, it is surprising that issue 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. They 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] Our analysis is the first to consider these variables in the U.S. context.[11] We define our variables as follows:

Substantial Issue. We looked for the clerk's judgment that the petition raised an important or otherwise substantial issue. If the clerk made such an indication (i.e., used "important" or a synonym), we code 1, 0 otherwise. This indicator should not be confused with designation as a "substantial federal question," a term often used in connection with writs of appeal.

Novel Issue. 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

[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.

[11]Of course, the presence of amicus briefs on cert, now standard a covariate, can reasonably thought of as proxy for at least one sort of issue importance. And 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.

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 regression presented in the main text is superior to the model with the alternative definition of the variable.

5 Statistical Results

Following the basic approach of Caldeira and Wright (1990), we present three sets of regressions in Tables 1-3. Each set of regressions includes 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. In Table 1, we present the simple model of the decision to grant or deny certiorari, as defined above. Table 2 presents results for the models of the decision to discuss a case, coded discussed (=1) or special listed (=0).

Because none of the petitions submitted by the United States, and none of those on which briefs amicus curiae were filed, ended up on the Special List, we estimate Firth Logit models, which address this "separation" (Firth 1993; see also Heinze and Schemper 2002 and Zorn 2005).[12] Importantly, estimating standard logit models after excluding petitions filed by the U.S. and those with amicus briefs produced no relevant differences in our results or interpretations.

Finally, Table 3 models the Court's decision to grant or deny cert, given that a case is discussed. Thus, the observations on which we base the results in Column 3 include only those cases the Court discussed in Conference.

Another possibility is to model the two-stage agenda-setting process as a selection model. For want of a plausible exclusion restriction (i.e., a variable that predicts selection but not the

[12]All statistical analyses were performed in Stata 15.1. The user-written command firthlogit was used to estimate the Firth Logit (Coveney 2015).

decision to grant or deny), a Heckman probit is inappropriate, as e.g., Black and Boyd (2012) and Black and Boyd (2013) argue. Alternatively, following Black and Boyd (2013), we might model the Court's agenda-setting process with Sartori's (2003) selection model, which does not require an exclusion variable (i.e., the same set of variables can be the predictors in both the selection and outcome models). The identifying assumption of Sartori's model is that the errors are identical for each observation across the selection and outcome equations. But if we understand errors as subtle, hard-to-measure or perceive factors, probably not captured in cert memos, which affect the likelihood of granting or special-listing, the errors will likely be greater in magnitude during Conference discussion and thus have a greater impact on the post-discussion cert vote than on the pre-Conference makeup of discuss list. This condition of courses violates the Sartori model's assumption that errors are equal across stages. Moreover, there is a persuasive argument (see Black and Boyd (2012, 294)) that the assumptions of the Sartori model are violated here, since the Special List or Discuss List is in large part a unilateral decision (i.e., the Chief Justice's chambers formulates and circulates the list, subject normally only to a few additions), whereas the Court's vote on certiorari is a collective one. Without much doubt, Hughes was master of compiling the Special List; he is famous for his administrative command, over all aspects of the Court's business; and in the terms for which we have data, justices added only a few cases.[13] Contrast OT 1939 with any term under Chief Justice Burger, who, equally famously, had little control over the Discuss List or other institutional features. Both of these reasons militate against drawing conclusions from a Sartori model here.

More fundamentally, in our view, selection is only a problem for the models in Table 1 if cases that are special listed are not appropriately considered "denied" (or if one argued that a substantial number of cases special listed would be granted, if only they were discussed). In other words, we doubt that there is a problem of "partial observability" here, even in a

[13]In OT 1939, nine dockets were removed from Hughes' Special List, and none of these were ultimately granted.

technical sense.[14] And even if we are wrong, and selection bias affects the models in Table 1, the models in Table 2 are clearly valid; and the models in Table 3 can be reasonably used to make inferences about the population of discussed cases (e.g., Wooldridge 2002, 551). To be conservative, we nevertheless estimated a Sartori selection model and found no substantial differences between the results and those in our Tables 1 and 2, after adjusting for the scale of probit, relative to logit, coefficients. Due to the separation we discuss above, Sartori's model could not estimate reasonable standard errors for the United States as a petitioner and amicus briefs in the selection model.

Fit for our models is good. The fully-specified Special List model predicts 564 of 746 cases correctly, compared to the null model's 399, yielding a Proportional Reduction in Error (PRE) of .48, very good in comparison to Caldeira and Wright (1990), PRE=.31. For the fully-specified unconditional certiorari model, PRE = .45, with 650 of 737 correct (null: 580), compared to Caldeira and Wright (1990), PRE=.37. Finally, the fully-specified certiorari model for cases the Conference discussed is .46, 313 of 397 correct (null: 241), compared to Caldeira and Wright (1990), PRE= .53.

Turning first to Table 1, 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

[14] Partial observability refers to a unit having an unobserved outcome at the second stage because of its first stage outcome.

Covariate	(1)	(2)	(3)	(4)
Actual Conflict	2.752***	2.681***	2.944***	2.823***
	(0.40)	(0.42)	(0.43)	(0.45)
Alleged Conflict	0.366	0.475	0.425	0.546+
	(0.28)	(0.30)	(0.29)	(0.31)
Intermediate Reversal	0.904***	0.966***	1.082***	1.143***
	(0.25)	(0.28)	(0.27)	(0.29)
Dissent Below	1.063***	0.922*	0.948**	0.893*
	(0.31)	(0.36)	(0.34)	(0.38)
Nonideological Decision Below	0.447	1.393**	0.396	1.504**
	(0.40)	(0.48)	(0.42)	(0.51)
Conservative Decision Below	0.839**	1.332***	0.808**	1.297***
	(0.28)	(0.34)	(0.30)	(0.35)
U.S. Petitioner	1.632***	0.890+	1.854***	1.075+
	(0.43)	(0.53)	(0.45)	(0.57)
U.S. Respondent	0.048	−0.219	0.235	−0.167
	(0.30)	(0.43)	(0.33)	(0.50)
Substantial Issue	1.144**	1.279*	1.319**	1.428**
	(0.44)	(0.50)	(0.46)	(0.52)
Novel Issue	1.390***	1.364***	1.400***	1.342***
	(0.25)	(0.27)	(0.27)	(0.28)
No. of Amicus Briefs	1.235**	1.290*	1.013*	1.043*
	(0.47)	(0.50)	(0.48)	(0.51)
Constant	−3.425***	−5.210***	−4.858***	−7.058***
	(0.31)	(0.58)	(0.71)	(0.95)
FEs: Issue?		X		X
FEs: Circuit?			X	X
AIC	513.290	507.524	516.664	513.122
BIC	568.521	631.794	627.126	692.623

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

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.

Two other variables in Table 1 have not figured in previous studies—"novel" and "substantial" questions. Consistent with our theoretical expectations, if Douglas' law clerk considered a question in a petition "novel" or "substantial," the Court was significantly more likely to grant certiorari than in the absence of either (in all specifications, $p < .001$ and $p < .05$,

respectively).

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 World War II.

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 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 Substantial.[15] Such a case is granted with a predicted probability of .10. But if the case involves a Substantial issue, the probability more than doubles, to .26. If the issue raised is not only Substantial, but also Novel, the probability nearly doubles again, to .49. 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.

Turning to Tables 2 and 3, we ask: which variables have an effect at which stage of selection? Bearing in mind that comparing statistical significance across outcomes is complicated (inter alia) because of the differences in sample size, we nonetheless observe that most influences on the Special List also appear to affect the Court's decision on certiorari cert vote, and in similar ways. Apparently, as he composed the Special List, Chief Justice Hughes was able to evaluate even nonobvious, subjective signals in selecting the cases to be discussed. Determining whether a case presents a substantial or novel legal question, or whether an actual conflict exists is more fraught with uncertainty, and requires more intensive analysis, than diagnosing the ideological stakes or observing the presence of the United States, a dissent below, or an intermediate reversal. But the significance of the coefficients attending Novel, Actual Conflict (each $p < .001$ in all specifications) and Substantive ($p < .05$ in every specification) suggests that Hughes successfully evaluated these factors even in the initial cut of the Court's agenda. And Hughes was not moved by the mere allegation of conflict—an allegation alone was not

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

Covariate	(1)	(2)	(3)	(4)
Actual Conflict	2.575***	2.425***	2.617***	2.495***
	(0.68)	(0.69)	(0.68)	(0.70)
Alleged Conflict	0.260	0.231	0.189	0.153
	(0.20)	(0.21)	(0.21)	(0.21)
Intermediate Reversal	0.654**	0.625**	0.687***	0.663**
	(0.21)	(0.22)	(0.21)	(0.22)
Dissent Below	0.690*	0.688*	0.767*	0.778*
	(0.30)	(0.32)	(0.31)	(0.34)
Nonideological Decision Below	−0.203	0.423	−0.178	0.494
	(0.26)	(0.31)	(0.27)	(0.32)
Conservative Decision Below	0.414*	1.038***	0.404*	1.001***
	(0.19)	(0.26)	(0.20)	(0.26)
U.S. Petitioner	3.565***	3.301***	3.569***	3.118**
	(1.44)	(1.50)	(1.44)	(1.48)
U.S. Respondent	−0.253	−0.398	−0.173	−0.560
	(0.19)	(0.32)	(0.21)	(0.36)
Substantial Issue	2.004*	2.037*	2.104*	2.135*
	(0.88)	(0.91)	(0.89)	(0.94)
Novel Issue	1.264***	1.237***	1.272***	1.242***
	(0.22)	(0.23)	(0.23)	(0.24)
No. of Amicus Briefs	2.055**	1.514*	2.534**	2.723*
	(1.64)	(1.54)	(1.72)	(1.84)
Constant	−0.773***	−2.091***	−1.487***	−2.945***
	(0.17)	(0.61)	(0.44)	(0.78)
FEs: Issue?		X		X
FEs: Circuit?			X	X
AIC	799.630	753.260	782.685	734.199
BIC	855.007	877.858	893.439	914.173

Table 2. Was Cert Petition Discussed? (1=Yes; 0=No). $N = 746$. $^{+}$ $p < 0.1$ * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

enough to avoid the Special List. This finding reinforces previous qualitative (Danelski 1960, 2016; McElwain 1949) and quantitative (Caldeira and Lempert forthcoming) accounts of Chief Justice Hughes' administrative and intellectual prowess.

We may also consider whether the magnitude of covariate's impact is significantly different across the two stages. Of course, as Long and Mustillo (2019) notes, comparing coefficients across logit regressions is inappropriate because the amount of residual variation, which must be assumed in binary choice models, likely varies across regressions. Comparing predicted probabilities, however, does not rely on the assumption of equal residual variation (Long and Mustillo 2019). Thus, we compute the statistical significance of the second difference to

Covariate	(1)	(2)	(3)	(4)
Actual Conflict	2.115***	2.017***	2.286***	2.138***
	(0.40)	(0.42)	(0.44)	(0.46)
Alleged Conflict	0.365	0.472	0.385	0.477
	(0.30)	(0.33)	(0.32)	(0.35)
Intermediate Reversal	0.767**	0.859**	0.921**	1.028***
	(0.27)	(0.29)	(0.28)	(0.31)
Dissent Below	0.846*	0.847*	0.767*	0.861*
	(0.33)	(0.38)	(0.37)	(0.41)
Nonideological Decision Below	0.624	1.357**	0.786	1.505**
	(0.45)	(0.53)	(0.49)	(0.56)
Conservative Decision Below	0.815**	1.133**	0.800*	1.030**
	(0.31)	(0.36)	(0.33)	(0.38)
U.S. Petitioner	1.182**	0.575	1.461**	0.849
	(0.42)	(0.54)	(0.45)	(0.59)
U.S. Respondent	0.321	−0.001	0.578	0.115
	(0.33)	(0.48)	(0.37)	(0.55)
Substantial Issue	0.824+	0.980*	1.008*	1.120*
	(0.44)	(0.49)	(0.47)	(0.52)
Novel Issue	0.916***	0.901**	0.839**	0.856**
	(0.27)	(0.29)	(0.29)	(0.31)
No. of Amicus Briefs	0.798+	0.988*	0.553	0.688
	(0.46)	(0.50)	(0.48)	(0.51)
Constant	−2.493***	−4.055***	−3.754***	−5.660***
	(0.35)	(0.62)	(0.75)	(1.00)
FEs: Issue?		X		X
FEs: Circuit?			X	X
AIC	420.218	428.764	425.714	436.888
BIC	468.025	536.330	521.328	592.262

Table 3. Did Supreme Court Grant Discussed Cert Petition? (1=Yes; 0=No). $N = 397$. $^{+}\ p < 0.1$ $^{*}\ p < 0.05$, $^{**}\ p < 0.01$, $^{***}\ p < 0.001$

assess whether the magnitude of a covariate's effect is significantly different across models (see Berry, DeMeritt and Esarey 2010). (Letting Z be the covariate of interest and X be fixed values of the other covariates, the second difference is $\Delta\Delta[\Pr(Y)] = [\Pr(\text{Discussed}|Z = 1, X) - \Pr(\text{Discussed}|Z = 0, X)] - [\Pr(\text{Cert Granted}|Z = 1, X) - \Pr(\text{Cert Granted}|Z = 0, X)]$.) We calculate these differences for the four specification-pairs, holding X at the observed in-sample values (Hanmer and Kalkan 2013). For several variables, the impact across stages is very similar: the second differences for Actual Conflict, Alleged Conflict, Intermediate Reversal, and Dissent are all near zero ($|\Delta\Delta[\Pr(Y)]| < .05, p > .50$, for each covariate in every specification). Ideology has similar effects across stages as well (for Conservative Below,

$|\Delta\Delta[\Pr(Y)]| \leq .06, p > .37$). In contrast, U.S. Petitioner has a substantially greater effect at the initial agenda-setting stage than at the cert vote ($\Delta\Delta[\Pr(Y)] > .20, p < .05$). There is some hint that the presence of a Substantial ($\Delta\Delta[\Pr(Y)] \in [.16, .19], p \in [.13, .22]$) or a Novel ($\Delta\Delta[\Pr(Y)] \in [.08, .11], p \in .[.08, .18]$) legal question has a greater effect at the Special List stage, but the evidence in favor of this proposition is weak. Finally, for Amicus Briefs, the second difference, though usually large in magnitude ($\Delta\Delta[\Pr(Y) > .20$, for three out of four specifications), is sensitive to model specification ($\Delta\Delta[\Pr(Y)] = .10, p = .66$, when calculated based on the models that include fixed effects for Issue Category only).

There are a number of differences between our results and those in Caldeira and Wright (1990). Intermediate Reversal and Dissent Below influence both stages of the agenda-setting process, not just the Special (/Discuss) List. In OT 1939, therefore, the implication is that these signals may have carried more information about the cert-worthiness of a case than they did in OT 1982. The reason for this is not clear, but we note that the relative frequency of petitions with Intermediate Reversals and Dissents was similar across terms, so that differences in relative frequency do not account for the differences. (Nor is omitted variable bias a culprit, since the OT 1939 model is more fully-specified than the model for OT 1982.)

Another difference is that Alleged Conflict has a similarly minimal (and nonsignificant) effect at each stage in OT 1939, but in OT 1982, Alleged Conflict had a statistically significant (though not very large) effect at the Discuss List stage. Here, a likely explanation for the difference is Hughes' outstanding legal acumen, which allowed him to distinguish mere allegations of conflict from verifiable conflicts, even without the aid of Conference discussion, apparently unlike Burger and the associate justices who composed the Discuss List in 1982.

A similar explanation accounts for our results on the role of Substantial and Novel legal questions at each stage (variables not included in Caldeira and Wright (1990), or—indeed—any other systematic study of Court agenda-setting). At first glance, it is surprising that whether a case presents an substantial 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.

Consistent with Caldeira and Wright (1990), we find that three of the "high-information" signals, United States as petitioner, amicus briefs, and ideological direction of the decision significantly influence both stages, in most specifications. These results stand very much to reason; it is, however, interesting to note again that the United States as Petitioner was never special listed. In OT 1982, for example, the United States was appreciably less successful at the Discuss List stage than in OT 1939, even though the Solicitor General's office faced an ideologically sympathetic Chief Justice Burger.

Finally, we may ask: how did the agenda-setting decisions of the Hughes Court compare to those of the Burger Court? Though a full-blown over-time comparison is beyond the scope of this article, we present some illustrative examples below. Specifically, 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 4 gives the probabilities that each type of case is granted, discussed, and granted given that is discussed for the 1939 and 1982 terms.[16]

The results here are straightforward. High quality cases are nearly certain to be discussed

[16] 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 4 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 4. Probabilities of Cases Being Granted and Discussed as a Function of Case Quality, OT 1939 and 1982. See text for details.

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.

6 Conclusion

Until now, nearly all of the systematic, multivariate empirical work on the Supreme Court's agenda-setting has focused on the contemporary Supreme Court, mostly the Burger and Rehnquist Courts and to a lesser extent on the Warren Court. Our study focuses on the earliest term for which the essential pieces of data are available, in the years immediately after the Judges Bill of 1925 when, we contend, the contours of the Supreme Court's decision-making process were in flux and were a far cry from the well-oiled machine of the last thirty or forty years, especially after the "Supreme Court bar" re-emerged from its century-long hibernation.

To summarize: we have investigated the construction of the Special List and of the final

certiorari vote for the population of paid petitions filed in OT 1939. This is therefore one of the few multivariate analyses of the forces at work in makeup of the Court's decision to discuss a case at Conference, and, as we have noted, by nearly a half-century, the earliest term for which such an analysis exists. Empirical analysis of this term and, more generally, early terms after the Judges Bill, are intrinsically interesting as reports of an important period of the Court's institutional development, and theoretically important, as a basis from which to test propositions developed from data in the relatively contemporary era.

In many ways, our results parallel those found for later terms of the Court. And this is true even though, during the Warren Court, the Court inverted the first stage of agenda-setting from identifying a Special List, or list to be denied, to creating a Discuss List, a set of ten to fifteen cases to consider at each Conference. Notably, as we should anticipate, the ideological direction of the lower court's decision, i.e., the "political stakes" at issue, plays an appreciable role in the agenda-setting decision, at both stages, and as do "legal" considerations such as conflict and disagreement between the lower courts, and the important institutional advantage reflected in the presence of the United States as the petitioner. But in addition, and what is entirely new, is that we find two legal factors, often discussed in the law reviews, "novelty" and "substantiality," influence the shape of the Court's agenda. Critically, the inclusion of these two covariates, which in previous analyses had the status of unmeasured confounders, do not change most substantive conclusions about the impact of other covariates. One perhaps unanticipated finding is that amicus filings on certiorari, even though much rarer in this period than today, had a discernible effect on agenda-setting.

Perhaps most interestingly, we find that Chief Justice Hughes, in selecting cases for discussion, was able to account for relatively subtle, subjective cues: he selected substantial and novel legal questions and actual inter-court conflicts but screened out petitions on mere allegations of conflict.

This appears to contrast with results found for Burger and Rehnquist's chief justiceships. Though Hughes' extraordinary legal acumen is a leading candidate explanation for the dis-

crepancy, there are other possibilities as well. Clearly, the work of the Court, at least in terms of the raw number of petitions, was much lighter during the Hughes and Stone Courts than during the Burger and Rehnquist Courts; and it may be that the set of petitions the Court faced were legally less complex. Future research might well investigate the relative merits of these possibilities, not to mention many other potentially fruitful questions.

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