

# Does Deference Depend on Distinction? Issue Salience and Judicial Decision Making in Administrative Law Cases

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# 1 Introduction

Even at the level of the U.S. Supreme Court where the justices possess near complete control over what cases they will hear, there is clear variation in the level of importance among the cases. For example, Perry (1991) provides evidence from interviews with justices and their clerks illustrating the prevalence of this view among the justices themselves with respect to tax and patent cases. In other settings such as the U.S. Courts of Appeals — where this degree of docket control is absent — the variation in the importance of cases is likely to be even greater. Therefore, understanding the relationship between this variation in the salience of issues before these courts and judicial decision making is of the utmost importance.

Existing research shows that salience impacts the decision to author separate opinions (Hettinger, Lindquist, and Martinek 2003; 2004), gender differences (Songer, Davis, and Haire 1994), and other aspects of judicial behavior on the U.S. Courts of Appeals. However, lacking from this existing work is a thorough conceptual definition of salience. Salience is a very broad term meaning a variety of things to different people at different times. At a basic level it is clearly synonymous with importance, but it is more than that. Importance can take many forms and can itself vary across time and individuals. Therefore, one of the primary goals of this chapter is to provide a detailed discussion of the essential components for a conceptual definition of salience.

With such a conceptual definition of salience defined, I present an alternative measure of salience to those commonly utilized in the judicial politics literature that builds directly from my conceptual definition. In focusing on the salience of issues rather than individual cases, I utilize public opinion data to operationalize salience as an issue deemed to be among the most important facing the nation at a given point in time by the mass public. This measurement approach allows for a focus on important issues, while accounting for

variation in the importance of issues over time.

Finally, I apply this measure to test the predictions of my theoretical model as outlined in Chapters 2 and 3. As noted there, judicial review of administrative agency decision making differs substantially from review of lower court decisions, and the impact of these decisions have far reaching policy implications for the everyday lives of ordinary Americans. Yet, the substantive issues involved in these cases vary greatly in terms of importance in the greater political environment. Therefore, an examination of the impact of salience on judicial decision making in administrative law cases can provide valuable knowledge in this important area.

## **2 What is Salience?**

The judicial politics literature is rife with discussions of issue salience, yet little of this work attempts to define the term at a conceptual level. Rather, scholars focus their attention on generating measures of salience that are valid and unbiased (see e.g. Epstein and Segal 2000). Operationalizing an undefined concept is problematic. Even if a measure receives consensus acceptance from the scholarly community, it fails the basic test of face validity if the concept it measures is undefined. By definition a measuring instrument cannot validly measure what it is intended to measure if we do not understand the concept that it represents with some degree of exactitude (Carmines and Zeller 1979). This is especially prevalent with respect to the concept salience, which as Wlezien observes “means different things to different people and nothing in particular at all to others” (2005, 557).

At its most basic level, salience refers to importance. This definition is consistent with the classic usage of the concept in the political science literature. Yet, importance itself is a concept so large as to be rather vacuous, thus defining salience simply as a set of important issues, fails to add conceptual clarity. Importance cannot exist independent of context,

therefore at a conceptual level a workable definition of salience must maintain a theoretical connection to the phenomenon under study. Specifically, any definition of salience — and by extension any measurement instrument used to operationalize that definition — must address importance with the context of the theoretical question under study with respect to the type of salience, the temporal focus, and the subject perspective. By type, I refer to the widely acknowledged dichotomy between legal and political salience (Brenner 1998; Cook 1993; Maltzman, Spriggs, and Wahlbeck 2000). Temporal focus distinguishes whether the theoretical interest is on importance at the time of the decision (contemporaneous) or at a later point (retrospective) (Epstein and Segal 2000). Finally, subject perspective builds on recent work by Black, Bryan, and Johnson (n.d.) in asking *to whom* the issue is important.

Since my theoretical interest focuses on the impact of salience on judicial decision making in individual cases, I take as a starting point the conceptual definition provided by Unah and Ange-Marie:

We define cases with high salience as those that ‘stand out’ ... 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 ... case salience may operate at both political and legal dimensions ... 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? (2006, 297-298)

While the Unah and Ange-Marie definition directly addresses each of the contextual concerns I raise above, the definition requires some further refinement. Moreover, I argue that this definition — like most of the judicial politics literature on salience — raises two additional concerns. Namely, an exclusive focus on the U.S. Supreme Court, and a focus on the salience of cases rather than of issues.

## 2.1 Legal and Political Salience

In addressing the distinction between legal and political salience, Cook (1993) draws heavily upon Richardson and Vines' (1970) discussion of two distinct subcultures that condition judicial decision making. Under the first of these — the legal subculture — judges will base their decisions on purely legal factors ignoring their own political preferences. According to Grossman and Sarat (1971), “bench and bar groups” are among the most important actors in reinforcing and maintaining these values among judges. Conversely, under the democratic subculture judges are expected to be responsive to broad societal interests in the same manner as democratically elected officials. Despite the political insulation of judges in general, and federal judges in particular, this subculture of democratic responsiveness still exists in the judicial system. Moreover, according to Richardson and Vines (1970) the conflict between the demands of these two subcultures creates pressures on judges in their decision making.

Consistent with this, most scholars today recognize that both law and politics influence judicial decision making on the U.S. Supreme Court (Richards and Kritzer 2002; Songer and Lindquist 1996), the U.S. Courts of Appeals (Randazzo, Waterman, and Fine 2006), U.S. District Courts (Rowland and Carp 1980), and state supreme courts (Brace and Hall 1997; Randazzo, Waterman, and Fix 2010). In general, these influences are sometimes viewed as conflicting and other times as more complex and interdependent (Randazzo, Waterman, and Fine 2006; Randazzo, Waterman, and Fix 2010). In the specific context of legal versus political salience, it seems that the magnitude of each should depend on the type of decision making. Certain issues will make a case salient owing to the “political overtones” involved (Maltzman, Spriggs, and Wahlbeck 2000, 37). Under the assumption that judges are concerned with their ability to influence policy in line with their ideological preferences, political salience is more relevant than legal salience in the vast majority of cases. However,

in a subset of cases, the impact of legal salience outweighs political salience. For example, this might occur when judges are determining how to deal with past precedents or other issues related to the development of the law (Fowler et al. 2007; Maltzman, Spriggs, and Wahlbeck 2000).

While many cases that come before a court will possess both or neither of these types of salience (Brenner and Arrington 2002; Unah and Ange-Marie 2006), there are a substantial number of cases important only on one of these dimensions. For example, while the political salience of a patent dispute over printing systems lacks political salience by any standard, the U.S. Supreme Court's decision in *Illinois Tool Works Inc. v. Independent Ink, Inc.*<sup>1</sup> formally altered an existing Court precedent, one of the most widely accepted indicators of legal salience (Maltzman, Spriggs, and Wahlbeck 2000). Similarly, some cases possess high degrees of political salience, but low legal salience. The U.S. Supreme Court case of *Ayotte v. Planned Parenthood*<sup>2</sup> is illustrative. Abortion consistently ranks as a political salient topic in the U.S., making it likely that any cases dealing with this issue will be highly salient politically. Yet, this case would not be classified as legally salient by commonly used measures. Because my theoretical interest does not lie with the treatment of precedent or the evolution of the law, but with judicial review of agency decision making, I follow Cook (1993), Epstein and Segal (2000), Unah and Ange-Marie (2006), and others by focusing conceptually on political rather than legal salience.<sup>3</sup>

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<sup>1</sup>547 U.S. 28 (2006).

<sup>2</sup>546 U.S. 320 (2006).

<sup>3</sup>Some scholars account for both legal and political salience in a single theoretical framework (see e.g. Maltzman, Spriggs, and Wahlbeck 2000). For my purposes, I feel it is most appropriate to focus solely on political salience for the reasons described above.

## 2.2 Contemporaneous and Retrospective Salience

Building on Mayhew (1991), Epstein and Segal (2000) distinguish salience based on temporal focus. The vital question here is whether theoretical interest focuses on the importance at the time a judge decides a case (contemporaneous), or at some future point in time (retrospective). As with the dichotomy between legal and political importance, both contemporaneous and retrospective salience are valuable for answering certain research questions. For example, research on the treatment of existing precedents by future courts would be interested in retrospective salience — the importance of a case at the time it was decided is of little value to a future judge determining its weight as precedent. Conversely, if our interest lies with the impact of salience on a judge at the time she decides a case, then how others view the case at some future point is irrelevant.

This distinction is of critical importance. If one desires to test a theoretical framework that asserts a role for contemporaneous salience as a factor in judicial decision making but tests the theory with a measure tapping retrospective salience, then the measure lacks validity and the results of any analysis may be biased. Unfortunately, while most of the work on salience and judicial politics deals with issues of contemporaneous salience from a theoretical perspective, many of the existing measures of salience actually gauge retrospective salience (Brenner 1998; Epstein and Segal 2000). In such a situation, validity requires the assumption that the level of importance of a given case or issue was the same for a judge deciding the case as it is to a scholar (potentially many) years later.

As this assumption seems quite strong, a better approach requires consistency between theory and measure with respect to temporal focus. The first step in maintaining such consistency necessitates a clear conceptual definition. Since my concern is with the impact of issue salience on judicial decision making at the time the decision is issued, I maintain Unah and Ange-Marie's (2006) focus on contemporaneous salience.

## 2.3 Salient to Whom?

The final contextual concern deals with the subject perspective of theoretical interest. In other words, it must answer the question of “salient to whom?” (Black, Bryan, and Johnson n.d.). Most commonly, scholarly interest focuses on salience from the perspective of judges, but other subjects could be of interest to scholars as well (Brenner and Arrington 2002; Epstein and Segal 2000).<sup>4</sup> While this appears intuitively simple, it often leads to a disconnect between concept and measure. Many studies utilizing existing measures of salience assert a theoretical interest in the relationship between political salience from the perspective of judges, but rely upon measures that capture the salience of individual cases to others (Black, Bryan, and Johnson n.d.). Largely, this is out of necessity as it is difficult to directly infer which cases are salient to judges themselves, but requires an assumption that the judges and these ‘others’ share the same idea of what is important. For example, studies using one commonly used measure of salience — appearance of a Supreme Court case on the annual list of important cases prepared by *Congressional Quarterly* (Savage 2004)<sup>5</sup> — rely on the generally unjustified assumption that the individuals who prepare the *CQ* list and the justices who decided the case share the same idea of what constitutes an important case.<sup>6</sup>

Like most other scholars, my theoretical focus on the impact of salience on judicial decision making requires that my conceptual definition of salience recognize the proper subject

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<sup>4</sup>Specifically, Brenner and Arrington (2002) mention the public, the media, scholars, and future justices as groups whose perspective might be of interest to scholars.

<sup>5</sup>Examples of studies relying on this approach include (Cook 1993; Epstein and Knight 1998; Segal and Spaeth 1996). For the most part, studies utilizing this measure justify the use of the measure as the best alternative available rather than on theoretical/conceptual grounds.

<sup>6</sup>Not all existing measures fail to provide support for an assumption of this nature. Epstein and Segal (2000) operationalize the political salience of U.S. Supreme Court cases as whether the case attained front page coverage in the *New York Times*, justifying the assumption that the editors of the *Times* and the justices share a common idea of importance on the grounds that “*both editor and justices make this calculation at about the same time, within the same political context*” (2000, 73, emphasis in original). While the *New York Times* measure is widely used, not all scholars accept that the measure accurately reflects salience from the perspective of the justices (Black, Bryan, and Johnson n.d.).

perspective. Thus, I maintain Unah and Ange-Marie’s (2006) focus on the importance of the case to the individual judge at the time of the judge’s decision. Given this recognition, the essential question thus becomes: How to we determine what is important to individual judges? Only two options appear acceptable. First, we could measure salience to a judge with some measure that directly taps some aspect of judicial behavior. Lacking direct access to the minds of judges, this type of measure — the “holy grail in this field” (Brenner 1998, 191) — remains elusive to scholars (Epstein and Segal 2000; Unah and Ange-Marie 2006, but see Black, Bryan, and Johnson n.d.).

Alternatively, we could utilize a measure that while independent of the actual views of judges with respect to case or issue importance reflects some objective measure of importance such as amicus participation (Caldeira and Wright 1988; Maltzman and Wahlbeck 1996), or a measure reflecting the subjective judgment of others regarding the importance of the case (Cook 1993; Epstein and Segal 2000). While each of these alternative approaches lack the ability to directly measure the perspective of judges, they provide potentially reliable alternatives as long as the assumptions connecting the measure to the perspective of the judge are reasonable.

## **2.4 Additionally Concerns with Existing Definitions of Salience**

In addition to the lack of conceptual clarity with respect to the three contextual dimensions discussed above, many existing studies of the impact of salience on judicial behavior raise two additional concerns. First, most existing studies focus on salience at the case level. This presents a potential theoretical issue. Clearly, not all cases that appear before a court are of equal importance. Moreover, a single case may vary in importance to different judges. However, the salience of a given *issue* is likely to be more stable across cases and judges. Obviously, not all cases dealing with the same issue will be equally important, yet

all cases dealing with highly salient issues will be of greater import than those dealing with a relatively minor issue. Moreover, when a given issue possesses a high level of political salience at a given point in time, it is likely that all cases touching upon that issue will warrant additional attention.

A second concern with many of the existing studies of salience is the lack of applicability beyond the U.S. Supreme Court. Some existing work looks at the impact of salience on the U.S. Courts of Appeals (e.g. Hettinger, Lindquist, and Martinek 2004) and state supreme courts (e.g. Vining and Wilhelm 2009), yet most focus solely on the U.S. Supreme Court. The centrality of the U.S. Supreme Court in both the American legal system and in scholarship on judicial politics is widely recognized. Yet, as Songer, Sheehan, and Haire (2000) recognize the changing role of the U.S. Courts of Appeals brought on by an expansion in the discretionary jurisdiction of the Supreme Court and the evolution of new legal issues makes greater understanding of their policy-making role essential. Therefore, a definition (and measure) of salience applicable beyond the Supreme Court is important both for the study of other institutions, but to allow for meaningful comparisons about the impact of salience at different levels of the judicial hierarchy.

Keeping the above factors in mind, I adopt the following as my conceptual definition of salience: *A given case is defined as being salient if and only if it involves an issue that is important to a judge or panel of judges at the time the case is being decided due to its political overtones or potential to impact public policy in a significant way.* This definition addresses all of the contextual factors discussed above, clearly noting a focus on political rather than legal importance, a temporal focus on contemporaneous importance, and interest in importance from the prospective of the judge. Moreover, this definition avoids the additional concerns I voice with respect to existing definitions of salience by focus on the importance of the issue involved rather than the specific case and by remaining

general enough to be applicable to any court.

### 3 Measuring Salience

The key to avoiding measurement error lies in maintaining an explicit connection between a given measure and theory (King, Keohane, and Verba 1994). In determining a proper measuring instrument for salience, this requires a direct connection between the potential measure and the conceptual definition provided above. Specifically, it must 1.) account for the political importance of issues, 2.) be contemporaneous to the judge's decision, 3.) view importance from the perspective of the judge (or others who share with the judge a uniform view of which issues are important), 4.) focus on issues rather than individual cases, and 5.) be applicable for an analysis of decision making on the U.S. Courts of Appeals while possessing transportability to other courts.

Of the numerous measures of salience generated by judicial politics scholars, none meet all five necessary criteria. While many of these measures possess great utility for certain purposes — primarily for studies of the U.S. Supreme Court — for my purposes it is necessary to take a different approach. Specifically, I rely on data on public perceptions of the most important problem facing the country (Feeley, Jones, and Larsen 2001). While a public opinion measure of salience is uncommon in the judicial politics literature, such a measure possesses several desirable qualities. First, it is clearly focused on political importance. Derived from surveys of the American public conducted by the Gallup organization, the measure is designed to be a barometer of what issues the public views as particularly salient at a given time. Second, such a measure is contemporaneous to a judge's decision. Rather than providing an indication of salience after the fact, it provides a moving indicator what issues are important at a given point in time. Third, measuring salience through an indicator of the most important problem clearly places the focus on issues rather than

individual cases. Finally, such a measure possesses the flexibility to be applied to studies of multiple courts and even other political contexts.

The primary disadvantage to such a measure involves a question of perspective. Ideally, a measure of salience would directly measure the perspective of individual judges to ascertain which issues they consider most salient (Black, Bryan, and Johnson n.d.; Brenner 1998). However, lacking the ability to see into the minds of the hundreds of judges who have sat on the Courts of Appeals over the past few decades, a reasonable proxy is required. As Epstein and Segal (2000) note, this requires the assumption that judges share the perception of what is salient with the individual or group whose perspective is actually being measured. Assumptions of this nature — either explicit or implicit — dominate scholarship on the impact of salience on judicial decision making. For example, previous measures common in the literature evaluate salience from the perspective of newspaper editors (Epstein and Segal 2000; Vining and Wilhelm 2009), academics and other legal experts (Epstein and Knight 1998; Flemming, Bohte, and Wood 1997; Rohde 1972; Segal and Spaeth 1996; Slotnick 1979; Wahlbeck, Spriggs, and Maltzman 1998), and interest groups (Collins 2008; Maltzman and Wahlbeck 1996; Maltzman, Spriggs, and Wahlbeck 2000).<sup>7</sup>

A large body of research examines the relationship between public opinion and judicial (largely U.S. Supreme Court) behavior. This research focuses primarily on the congruence between public opinion towards a specific policy and Supreme Court decisions on that policy (Murphy and Tanenhaus 1968), trends in ideological directionality in public opinion

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<sup>7</sup>Black, Bryan, and Johnson (n.d.) propose a measure of salience for U.S. Supreme Court cases drawn more directly from the perspective of the justices, namely a measure based on questions asked during oral arguments. While this approach offers many benefits, it is problematic for two key reasons. First, its applicability beyond the Supreme Court is limited. Applying such a measurement technique to the Courts of Appeals would require a sizable investment in terms of time and resources to code even a sample of oral arguments. Moreover, this problem is further exacerbated by the fact that nearly half of the cases decided by the Courts of Appeals do not receive a formal hearing (Songer, Sheehan, and Haire 2000). Second, such a measure is, by definition, case specific rather than issue specific. While individual cases will vary in significance both overall and across specific judges, the greater variation is likely to exist between rather than within issues.

and Court decisions (Mishler and Sheehan 1993), overall public support for the Court as an institution (Caldeira and Gibson 1992), or the impact of Court decisions on public opinion towards an issue or position (Franklin and Kosaki 1989). While little work directly explores the link between the public’s evaluation of what issues are most important and a similar evaluation of issue importance by judges, Baird’s (2004) work on information signaling by the Supreme Court provides some evidence of shared perspectives. Could it be that potential litigants do not simply bring more cases before the Court in a given issue area due to signals that the issue is of particular salience, but that changing dynamics in the nation make the issue more salient to all members of the population: potential litigants, judges, and the mass public simultaneously?

It seems intuitive that judges — like the rest of the population — will be sensitive to the key political issues of the day. Therefore, it is likely that judges will pay increased attention to cases involving issues at the forefront of the national political dialog. As such, drawing on this connection between judges and the mass public for an indicator of issue salience offers a reasonable alternative given the near impossibility of directly measuring the perceptions of judges themselves.<sup>8</sup> Thus, even in terms of the one criterion on which this measure does not perfectly align with my conceptual definition of salience, it is at least as good — and potentially better — than many existing measures.

## 4 Research Design

With a conceptual definition of salience specified and an appropriate measure instrument located, I can now specify testable hypotheses drawing from the theoretical framework

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<sup>8</sup>One potential issue with this measure — and any measure that captures salience at the issue rather than case level — is that within any particular issue area the individual characteristics of some cases with make them more politically relevant than others that of a more mundane or routine nature. While this is probably true, it is also likely that when a given issue is particularly relevant in the political environment of the time, judges will given extra attention to even the most routine cases relating to that particular issue.

presented in Chapter 2 and the implications derived from the signaling game in Chapter 3. The first hypothesis relates to the impact of case salience on the likelihood that a court will strike down an agency decision or action. Due to the variation in the importance of the substantive issue in cases before the Courts of Appeals in general, and in administrative law cases in particular, the degree of deference to agencies by the courts should be impacted by the salience of the case. The first testable implication of the model in Chapter 3 reflects this in predicting that deference should be less likely in salient cases, all else equal. This leads to my first hypothesis:

**Salience Hypothesis:** As the salience of a case increases, the probability a court will strike down an agency decision increases, *ceteris paribus*.

The second hypothesis relates to the degree of policy convergence between the court and agency. The second implication of the model is that greater policy divergence (convergence) between the court and the agency it is reviewing increases (decreases) the likelihood that the court will strike down the agency's decision. However, as the model predicts that ideological factors should only come into play in salient case, my second hypothesis directly reflects this conditional relationship between salience and ideology:

**Ideology Hypothesis:** In salient cases, as the ideological distance between a court and an agency increases, the probability a court will strike down an agency decision increases, *ceteris paribus*. Conversely, in non-salient cases ideological congruence should have no impact on the probability a court will strike down an agency decision.

To evaluate whether issue salience impacts judicial review of administrative agency decisions, I examine a sample of administrative law cases in the U.S. Courts of Appeals decided between 1961 and 2002. Specifically, I rely on data from the Court of Appeals

Database, originally compiled by Donald R. Songer and updated by Ashlyn K. Kuersten and Susan B. Haire.<sup>9</sup> Limiting my analysis to all cases involving judicial review of an agency decision or action, yields 852 cases for my analysis.

Since my theoretical interest focuses on the impact of salience on the level of deference granted to agencies by a court, the dependent variable measures whether the court ruled in favor of the agency. This variable is coded “1” if the court held for the agency, “0” otherwise. In a handful of cases both parties were government agencies; these cases were eliminated from the data during the construction of the data set. Additionally, cases where there was no clear indication of the agency’s position on the primary substantive issue in the case were also eliminated from the data set.

The primary explanatory variable of interest is *Salient Issue*. As discussed above, I operationalize salience in reference to public opinion regarding the ‘most important problem’ facing the country. Data for this variable is taken from the Recoded MIP Data Set (Feeley, Jones, and Larsen 2001). This data set codes polls from Gallup’s Most Important Problem Survey according to the Policy Agendas Project’s content coding by major topic aggregated at the annual level.<sup>10</sup> Specifically, I code *Salient Issue* with a dichotomous indicator that is set equal to “1” for issue/years where at least five percent of all respondents classified a given issue area as the nation’s most important problem, and “0” otherwise.<sup>11</sup> In measuring salience in this manner, I rely on the assumption that judges are like any other member of the general population in that they will pay increased attention to issues that are highly

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<sup>9</sup>Both the original Court of Appeals Database and the update are archived at the University of South Carolina’s Judicial Research Initiative, which is located at: <http://www.cas.sc.edu/poli/juri/>.

<sup>10</sup>Data and codebook are available from the Policy Agendas Project at the University of Texas at Austin (<http://www.policyagendas.org/>).

<sup>11</sup>Because the Recoded MIP Data Set is an aggregation of multiple individual surveys, the percentage is actually a normalized percentage. See Feeley, Jones, and Larsen (2001) for details on the mathematical transformation.

relevant in the political environment at a given moment in time.<sup>12</sup> While this assumption is not directly tested — and is potentially untestable — it seems reasonable that judges would be aware of the dominant politically issue of the day. Moreover, understanding their ability to impact policy through their decisions, it seems reasonable to assume that judges would pay particularly close attention to cases involving these issues.<sup>13</sup> Figure 1 below provides a visual depiction of variation in importance across issues and time.<sup>14</sup>

[Figure 1 about here]

As my theoretical expectation with respect to issue salience focuses on its conditioning effect on ideological voting, it is necessary to include a measure of ideology. To operationalize a measure of the ideological distance between the two actors, I first require a measure of the ideology of each. In contrast to the U.S. Supreme Court where sophisticated measures of justice ideology exist (Martin and Quinn 2002; Segal and Cover 1989), for judges of the Courts of Appeals similar measures are lacking. Thus, for panel ideology, I rely on a modification of the measure of appeals court judge ideology developed by Giles, Hettinger, and

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<sup>12</sup>Two alternative measures of salience were also created and utilized in combination with the measure described above in alternative model specifications. The first was a measure of judicial expertise that was coded “1” if one or more of the judges on a panel had expertise in the issue involved in the case, and “0” otherwise. Expertise was defined as having prior profession experience in a position relevant to a given issue. For example, judges with previous experience as state prosecutors, service on the U.S. Sentencing Commission, or other relevant position were coded as experts in criminal issues, while judges who had served on the National Labor Relations Board, or in other relevant positions were coded as labor experts. Data on previous experience was taken from the Attributes of U.S. Appeals Court Judges Database compiled by compiled by Gary Zuk, Deborah J. Barrow, and Gerard S. Gryski and available from the JuRI project (<http://www.cas.sc.edu/poli/juri/attributes.htm>).

The second measure utilized amicus participation as an indicator of political salience (Maltzman and Wahlbeck 1996; Maltzman, Spriggs, and Wahlbeck 2000). The inclusion of either (or both) of these alternative measures did not alter the estimates for the impact of the other variables in the model. Also, neither of these alternative measures achieved statistical significance in any of the alternative models. Results of a series of Hausman specification tests confirmed the appropriateness of excluding these measures from the primary models.

<sup>13</sup>If my assumption is incorrect and judges pay less attention to the more mundane or routine cases even when they involve a particularly salient issue, then the measurement error will systematically bias against finding support for my salience hypothesis.

<sup>14</sup>Appendix A-1 provides information on my matching of issue codes between the MIP and Court of Appeals data sets.

Peppers (2001). This measure takes account of the ideology of the appointing president as measured by Poole (1998), as well as the Poole and Rosenthal (1997) common space score of the relevant Senator or Senators when senatorial courtesy was operative at the time of the judge's appointment (Giles, Hettinger, and Peppers 2001, 631). These ideology scores range from -1 (most liberal) to 1 (most conservative). While the use of the measure developed by Giles and colleagues is quite widespread, it weights the influence of senatorial courtesy too heavily to provide an accurate reflection of political reality. Therefore, I follow the procedure of Songer and Szmer (citation needed) and use the median of the GHP score and the Nominote score of the appointing president as a measure of appeals court ideology. As no direct measures of agency ideology are available, the ideology of the appointing president of the agency head will be used as a proxy. Because my theoretical model predicts that judges should consider agency ideology as an indicator of whether the agency is likely to shirk or faithfully implement the court's decision *in the future*, I measure the ideology of the agency at the time of the court decision, rather than at the time the initial agency decision was made or action taken. Thus, my measure of *Court-Agency Distance* is simply the absolute value of the distance between the two ideology measures, where larger values correspond to greater ideological divergence and smaller values correspond to ideological congruence.

To examine the hypothesized relationship between ideology and judicial deference conditional on issue salience, I next generate an interaction term between *Salient Issue* and *Court-Agency Distance*. If the hypothesized relationship exists, then there should be a negative relationship between the interaction term and the dependent variable, and the coefficient on the term *Court-Agency Distance* should be statistically insignificant. In other words, when the court is faced with a case involving a salient issue (i.e. *Salient Issue* = 1), greater ideological distance should decrease the likelihood of deference, but when the court

is dealing with a non-salient issues (i.e. *Salient Issue* = 0), then ideology should have no impact on the likelihood the court will defer to the agency.

While my theoretical interest focuses on the ideology of the agency due to its potential future actions and the resulting strategic considerations judges may undertake, it is nonetheless important to account for the ideological directionality of the initial agency decision or action that the court is reviewing. To account for this, I include an indicator of *Liberal Agency Decision*, coded “1” if the decision or action being review is in a liberal direction and “0” if it is in a conservative direction. Cases in which the initial agency action or decision lacks a clear ideological directionality are excluded. Because agency turnover is generally limited to changes in presidential administrations, in many cases the agency that issued the initial decision or action will be ideologically identical to the agency charged with implementing the court’s decision. Therefore, a failure to control for this variable could result in omitted variable bias.

I also include two control variables that the existing literature on judicial review of administrative agencies suggest are of theoretical importance: *DC Circuit* and *Post-Chevron*. *DC Circuit* is a dummy indicator of whether the case was heard by the DC Circuit or by one of the other circuit courts. In the area of administrative law generally, the DC Circuit holds a special position as appeals for many agencies go directly to this circuit regardless of where the action at issue occurred. As such, the DC Circuit gets the lion’s share of administrative law cases.<sup>15</sup> Due to its unusual position in administrative law, it is possible that the decision of the DC Circuit will be systematically different from those of the other circuits. Finally, *Post-Chevron* captures whether the case occurred after the Supreme Court issued its decision requiring federal court judges to grant greater deference to agency interpretation of federal statutes, and is coded “1” if was decided after 1984

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<sup>15</sup>This is true in my sample as well. Out of 852 total cases, 209 or 24.52% were heard by the DC Circuit. No other single circuit heard more than 10% of the cases in the sample.

(the year the U.S. Supreme Court issued its decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*)<sup>16</sup> and “0” otherwise.<sup>17</sup>

## 5 Empirical Results

Since the dependent variable for the analysis is dichotomous, I utilize logistic regression to estimate my empirical models. I first present the results of my basic model, looking at the impact of political salience and ideology on the likelihood of deference to an administrative agency. Figure 1 presents estimates of the logit coefficients and 95% confidence intervals for my basic model.

[Figure 2 about here]

As the figure illustrates, panels of the U.S. Courts of Appeals are significantly less likely to rule in favor of an administrative agency in salient cases. This effect is statistically significant controlling for the ideological distance between the panel and the agency, the ideological direction of the decision or action under review, whether the case was decided after the Supreme Court issued its *Chevron* decision, and whether the case was reviewed by the DC Circuit. Substantively, the effect represent an 15.98% decrease (from 36.39% to 20.41%) in the predicted probability the court rules in favor of the agency when reviewing a liberal agency decision or action, or a 20.08% decrease (from 59.61% to 39.53%) when review a conservative action or decision.<sup>18</sup>

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<sup>16</sup>476 U.S. 836 (1984)

<sup>17</sup>A table of descriptive statistics is provided in Appendix A-2.

<sup>18</sup>Predicted probabilities calculated in Stata 11.0 using CLARIFY (King, Tomz, and Wittenberg 2001; Tomz, Wittenberg, and King 2001). The reported probabilities are calculated holding *Ideological Distance* at its mean value, *Post-Chevron* at “0,” and *DC Circuit* at “1.” However, the results are not sensitive to the choice of these values. Changing any combination of these starting values results in estimates that differ from those reported by no more than  $\pm 4\%$ , well within the 95% confidence interval for the reported predicted values.

While the results presented in Figure 2, provide support for the expected relationship between issue salience and judicial deference to administrative agencies, the lack of significant effect for the ideology variable is a bit counterintuitive. Yet, it is possible that the effect of ideology may be conditional upon the presence of a salient issue in the case (Hypothesis 2). In other words, since judges realize there is little at stake in non-salient cases (90.28% of the cases in the data), ideology may play a more muted role. However, in the case dealing with political charged issues ideology may come into play. If this is the case, then the empirical model presented in Figure 2 would provide inaccurate predictions due to a failure to properly specify this conditional relationship. To overcome this issue, the model in Figure 2 is respecified by including the multiplicative term *Salient Issue\*Court-Agency Distance*. The results of this specification are shown in Figure 3.

Before turning to the interactive model, however, it is interesting to note that the directionality of the agency action or decision under review impact the likelihood the court will defer to the agency *independent of the ideological congruence between the two actors*. When the court is reviewing a liberal agency decision there is a reduced likelihood that the court will defer to the agency, all else equal. The substantive impact of this is illustrated by the predicted probabilities discussed above. The baseline probability of deference when reviewing a conservative decision is 59.61% in a non-salient case or 39.53% in a salient case, but the likelihood of deference decreases by 23.22% in non-salient or 19.12% in salient cases when the action or decision under review was liberal. Neither the control for the DC Circuit or for the impact of *Chevron* achieve statistical significance.

[Figure 3 about here]

Figure 3 reveals that, as hypothesized, the impact of ideology on the likelihood of judicial deference to administrative agency decision making is conditioned upon the political salience of the issue in the case. The negative coefficient on the interaction term, *Salient*

*Issue\*Court-Agency Distance* implies that when the court is confronted with a case involving a salient issue the likelihood the court will rule in the agency's favor decreases as the ideological distance between the court and agency increase. Conversely, when the case involves an issue that lacks political salience, we see that the impact of ideology on the likelihood of deference disappears based on the failure of the *Ideological Distance* term to achieve statistical significance at conventional levels ( $p = 0.619$ ).

[Figure 4 about here]

While this finding is interesting, the substantive impact of the interaction effect cannot be inferred from Figure 3 due to the inability to directly interpret logit coefficients. To provide some substantive meaning for these results, the conditional effect of ideology on the likelihood of judicial deference is presented graphically in Figure 4a below. As the figure illustrates, in cases involving a non-salient issue (indicated by the solid line) the probability of deference is largely unchanged regardless of the ideological distance between the court and agency. In contrast, when the case involves a politically charged issue (indicated by the dashed line) the probability of deference decreases from approximately 0.41 when the court and agency are perfectly aligned ideologically to about 0.07 when the two actors are completely divergent ideologically. Another interesting observation from Figure 4a relates to the comparison of the probability of deference for salient versus non-salient cases. Only at the lowest levels of ideological distance (when the court and agency are almost completely congruent) is the probability of deference higher in cases dealing salient issues than in those involving non-salient issues, and even here the difference is not large enough to be statistically significant.

One problem with Figure 4a is that it assumes this effect to be independent of the ideological direction of the action or decision under review. As Figure 3 reveals, the likelihood of deference is significantly lower when the court reviews a liberal agency decision.

To account for this influence, the results in Figure 4a are broken down for only those cases involving the review of a liberal decision (Figure 4b) or a conservative decision (Figure 4c). Figures 4b and 4c illustrate that the same generally pattern as Figure 4a: the probability of deference decreases in salient cases as the ideological distance between the court and agency increases. Yet, there are some important difference that are worth noting. When a court reviews a liberal decision, the probability of deference in salient cases is actually noticeably higher than for non-salient cases when the court and agency are closely aligned ideologically. As ideological distance increases, the likelihood of deference in non-salient cases remains static, while the likelihood of deference in salient cases drops by nearly 40%. In cases reviewing a conservative decision, the probability of deference in salient cases is nearly identical to those presented in Figures 4a and 4b. Conversely, in these cases the likelihood of deference in non-salient cases actually increase slightly as ideological distance increases. This result further emphasizes the finding that ideology does not influence the court's decision making in non-salient cases.

## 6 Conclusions

In this chapter, I provide a detailed discussion of the difficult in defining salience as a concept. Specifically, I give attention to the major contextual considerations that must be considered when defining the concept in a manner consistent with the theoretical question of interest. I then proceed to provide a conceptual definition of salience that accounts for all the factors I discuss in a manner consistent with my theoretical model contained in Chapters 2 and 3.

Building from this conceptual definition, I suggest an alternative measure of salience to those commonly utilized in the judicial politics literature. Opposed to measures that focus on the importance of individual cases, I utilize a public opinion based measure that captures

fluctuations over time in the overall political importance of a given issue. Recognizing that not all cases in a given issue area will share equal importance, it is likely that when an issue is a particularly 'hot-button' topic judges will pay special attention to all cases touching on that issue.

An application of this measure of salience to a sample of cases involving judicial review of administrative agencies provides early support for the primary predictions of the model presented in Chapter 3. These analyses show that the courts are less likely to defer to agencies in salient cases, all else equal. Moreover, the effect of ideology is also as predicted by my model. Conditional on issue salience, the courts are less likely to defer when they are ideologically divergent from the agency. However, in cases involving non-salient issues, deference is unaffected by ideology.

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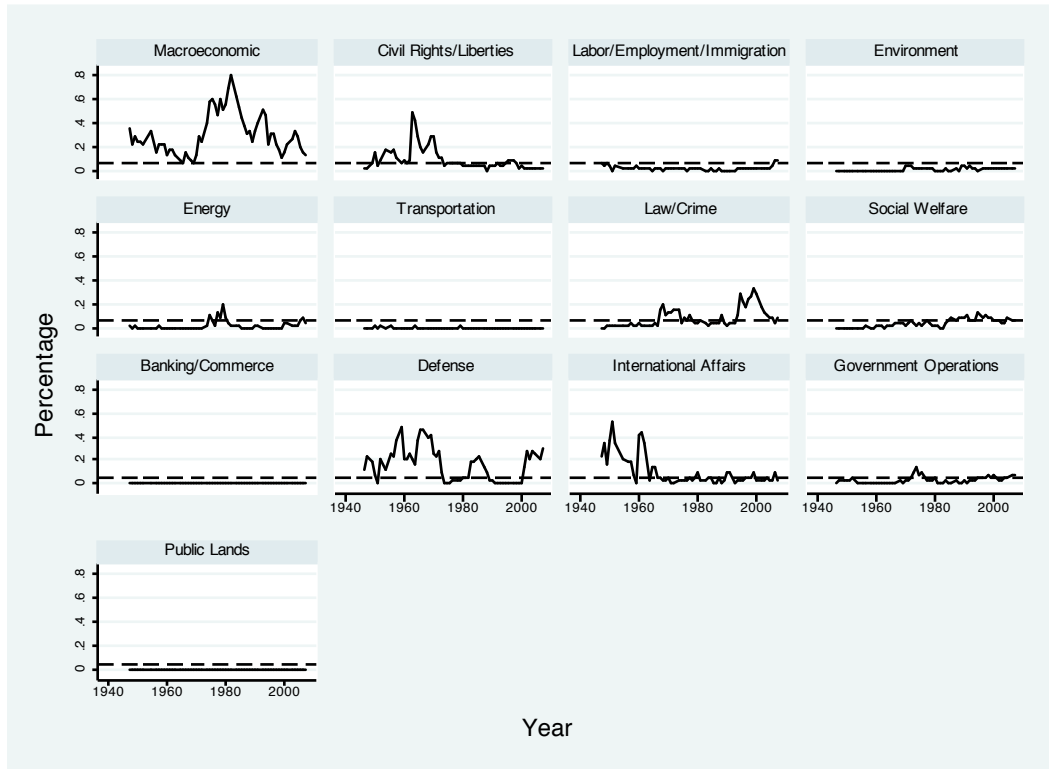
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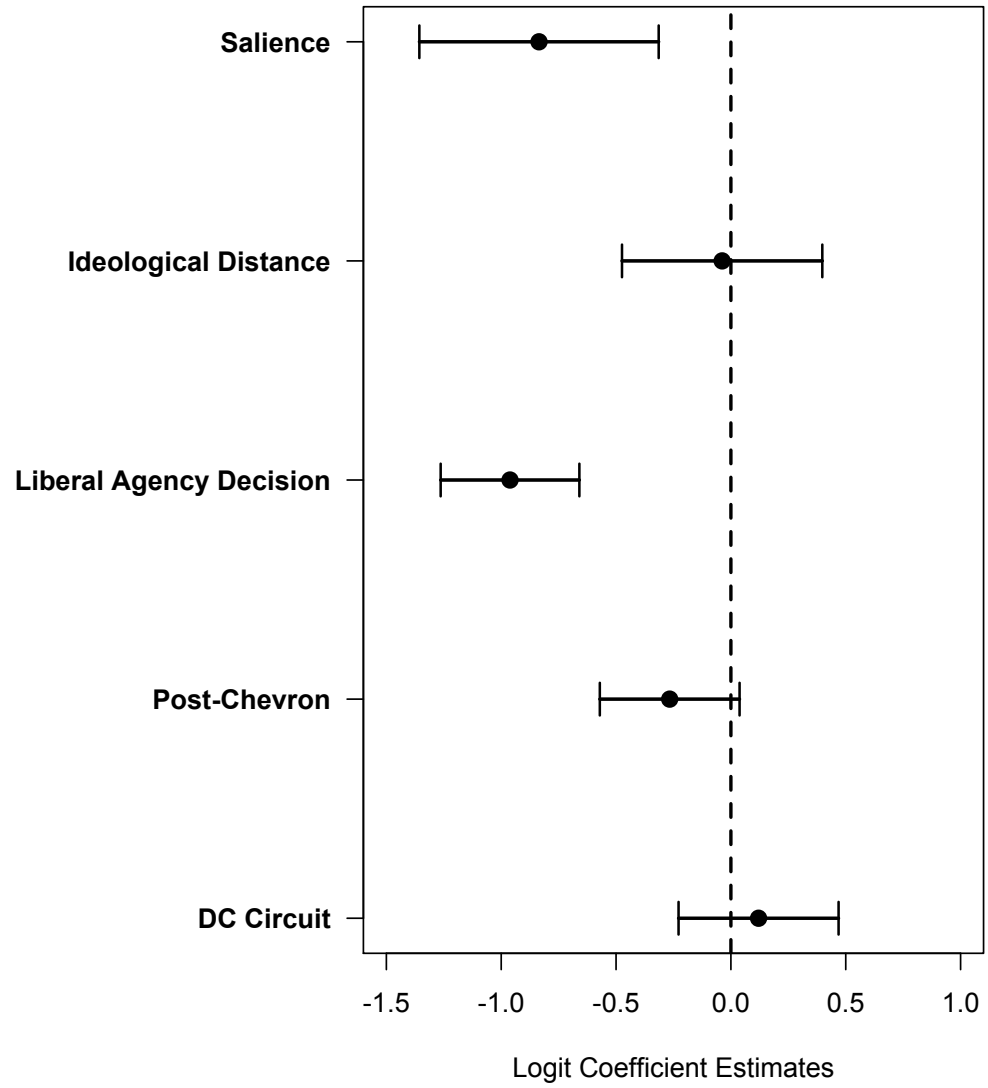
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Figure 1: Variation in Issue Salience Across Time



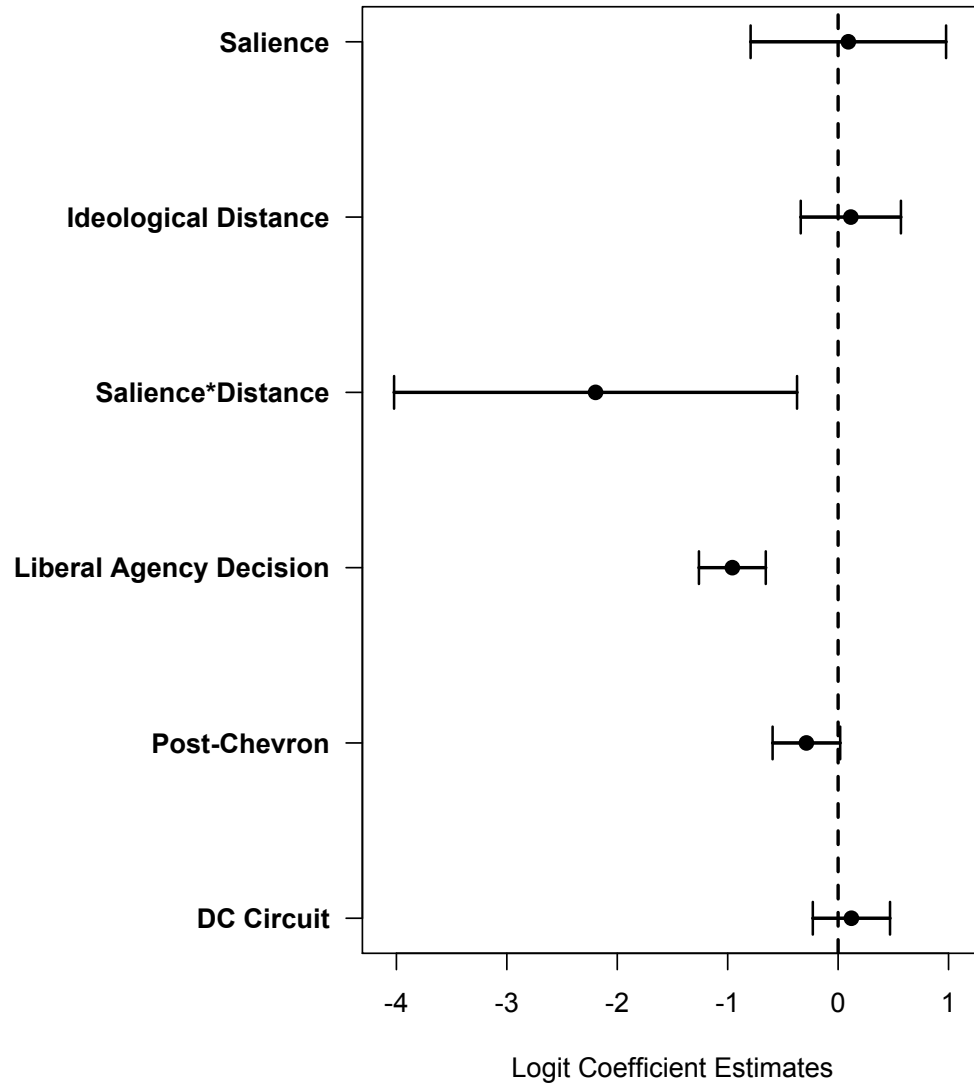
Note: The dashed horizontal line represents the 5% threshold used in determining whether an issue was coded as salient for a given year.

Figure 2: Impact of Issue Salience on Deference to Agencies



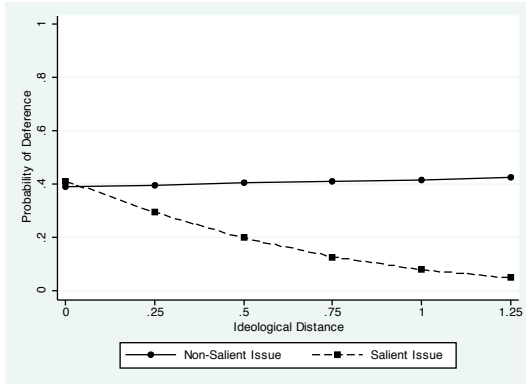
Note: The dots represent logit coefficient estimates. The errors bars represent a 95% confidence interval. Estimates for the constant term (not shown) are 0.299 [-0.044, 0.641].

Figure 3: Conditional Impact of ideology and Issue Salience

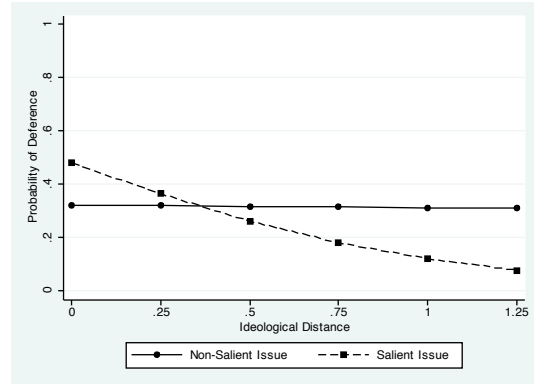


Note: The dots represent logit coefficient estimates. The errors bars represent a 95% confidence interval. Estimates for the constant term (not shown) are 0.226 [-0.121, -0.574].

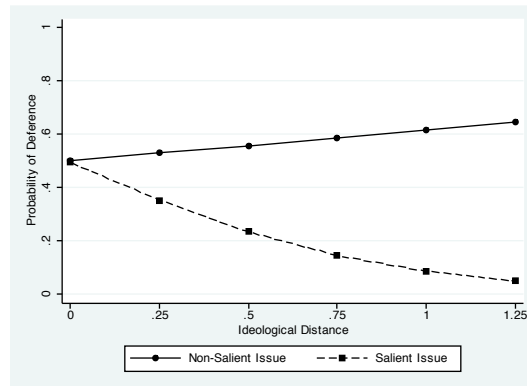
Figure 4: Impact of Ideology Conditional on Issue Salience



(a) All Cases



(b) Cases Reviewing Liberal Agency Decision



(c) Cases Reviewing Conservative Agency Decision

# Appendices

Table A-1: Issue Saliene Coding Conversion

COA Codes			MIP Codes			
GENISS	Description	CASETYP1	MAJORTOPIC	Description		
1	Criminal	ALL	12	Law/Crime		
2	Civil Rights	ALL	2	Civil Rights/Liberties		
3	1st Amendment	ALL	2	Civil Rights/Liberties		
4	Due Process	ALL	2	Civil Rights/Liberties		
5	Privacy	ALL	2	Civil Rights/Liberties		
6	Labor	ALL	5	Labor/Employment/ Immigration		
7	Economic	701-706	1	Macroeconomics		
		725	5	Labor/Employment/ Immigration		
		771	2	Civil Rights/Liberties		
		765-766	7	Environment		
		757-758	8	Energy		
		756, 761-764	10	Transportation		
		760, 773-774	12	Law/Crime		
		750-751, 755	13	Social Welfare		
		710-722, 726-731, 733-737, 739-748, 752-754, 759, 770, 772	15	Banking/Commerce		
		723-724, 732, 738	20	Government Operations		
		9	Miscellaneous	921	5	Labor/Employment/ Immigration
				903	12	Law/Crime
				922-923	16	Defense
920	19			International Affairs		
901-902, 904-906	20			Government Operations		
910-916	21			Public Lands		

Table A-2: Descriptive Statistics

Variable	Mean	Standard Deviation	Minimum	Maximum
Pro-Agency	0.398	0.490	0.000	1.000
Saliency	0.097	0.296	0.000	1.000
Ideological Distance	0.495	0.327	0.000	1.137
Saliency*Distance	0.045	0.168	0.000	1.042
Liberal Agency Decision	0.622	0.485	0.000	1.000
Post- <i>Chevron</i>	0.357	0.479	0.000	1.000
DC Circuit	0.246	0.431	0.000	1.000