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Measuring Issue Salience

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The concept of issue salience has figured prominently in many studies of American political life. Long lines of research have taught us that both citizens and political elites may respond differently to issues that are salient to them than to those that are not. Yet analysts making such claims about elite actors face a fundamental problem that their counterparts in mass behavior do not: they cannot survey, say, members of the Supreme Court to ascertain those cases that are especially salient to the justices. Rather, scholars must rely on surrogates for issue salience—surrogates that are fraught with problems and that have led to disparate research results.

Accordingly, we offer an alternative approach to measure issue salience for elite actors: the coverage the media affords to a given issue. We argue that this approach has substantial benefits over those employed in the past. Most notably, it provides a reproducible, valid, and transportable method of assessing whether the particular actors under investigation view an issue as salient or not. In making the case for our measure we focus on Supreme Court justices but we are sanguine about its applicability to other political actors

The concept of issue salience has figured prominently in many studies of American political life. We know, for example, that citizens base their evaluations of the President at least in part on how the President responds to issues of concern to them. As Edwards and his colleagues (1995, 121, 122) put it:

> The salience of issues to the public directly affects their impact on the public's evaluation of the president. If foreign policy is especially salient and he ostensibly handles foreign affairs well, his ratings will benefit. If economic policy is more salient, however, even high ratings on foreign policy will not prevent him failing in the polls if the economy sours. . . . Since salience mediates the impact of issues on presidential approval, we need to add it to our models of public evaluation.

Studies of political elites too have recognized the importance of issue salience. Much of the seminal research on Congress claims that legislators behave differently on issues of national or local salience than on those that are not (Mayhew 1974; Fenno 1978). Even studies on the Supreme Court posit that case salience may affect the choices justices make. A long line of literature claims that Chief Justices overassign important disputes to themselves (e.g., Ulmer 1970; Rohde 1972; Slotnick 1978, 1979; Spaeth 1984; Segal and Spaeth 1993), though this view has come under recent challenge (Maltzman and Wahlbeck 1996a). Others assert that the justices work harder to produce unanimous opinions in salient cases (see, e.g., Kluger 1976), and still others argue that more intra-Court bargaining occurs over the resolution of landmark disputes (Murphy 1964; Epstein and Knight 1998; but see Wahlbeck, Spriggs, and Maltzman 1998).

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Yet researchers making such claims about elite actors face a fundamental problem that their counterparts in mass behavior do not: They cannot survey, say, members of the Supreme Court to ascertain those cases that are especially salient to the justices. Rather, scholars must rely on surrogates for issue salience—surrogates that are fraught with problems and that have led to disparate research results. While Slotnick's (1978) measure of salience (cases excerpted in multiple constitutional law books) led him to conclude that Chiefs tend to assign important cases to themselves, Maltzman and Wahlbeck's (1996a) indicator (cases with substantial amicus curiae participation) produced an insignificant coefficient in a model attempting to explain Rehnquist's assignments; while the Epstein and Knight (1998) operationalization of case salience (*Congressional Quarterly's* 1990 list) revealed the existence of greater intra-Court bargaining over landmark disputes, the Wahlbeck, Spriggs, and Maltzman (1998) measure (*The Supreme Court Compendium's* 1994 list) suggested that such was not the case. Thus the question emerges: Are these and other competing results simply artifacts of the particular (and, as we believe, often problematic) measure invoked?

To address this and other puzzles embedded in the literature, we offer an alternative approach to measure issue salience for elite actors: the coverage the media affords to a given issue. We argue that this approach has substantial benefits over those employed in the past. Most notably, it provides a reproducible, valid, and transportable method of assessing whether the particular actors under investigation view an issue as salient or not.

In making the case for our measure we focus on the U.S. Supreme Court. Our reasons for this empirical reference point are two. First, owing in no small part to the demands of their research enterprises, judicial specialists have been especially attentive to the question of how to operationalize salience; in fact, the measurement of case salience has figured prominently in *over 40 percent* of the seventeen articles on the Supreme Court, published in three leading disciplinary journals since 1995.[1] Equally marked is that many of the authors of these articles expressed concern, even dissatisfaction, over the particular measure they invoked—with this statement illustrative: "The identification of [salient] cases raises various difficulties, not all of which can be satisfactorily resolved. Lacking a ready solution, we restricted the set of possible decisions for consideration using *Congressional Quarterly's* list of 'major decisions' . . ." (Flemming, Bohte, and Wood 1997, 1231). Hence, the indicator we propose—not to mention the results it yields—may be of particular interest to these scholars. Second, the judicial politics literature, perhaps more than any other, is replete with contradictory findings. Our measure may offer a way to separate the wheat from the chaff.

This noted, we also believe that scholars of other political institutions could apply our measure to the targets of their inquiries; indeed, one of the indicator's important virtues is that it is easily transportable to many fields in political science. We make this point with some force toward the end of the article. But, first, we review existing operationalizations of salience, describe their problems, and show how they may be contributing to competing research results. Next, we present the rationale behind our measure, assess whether it overcomes the problems evinced by others, and cross-validate it. Third, we use our measure to explore some of the disparate findings in the literature. Finally, we turn to other fields and speculate on how scholars of Congress and the Executive might adopt our basic measurement strategy.

Previous Assessments of Salience

At the onset, it is important to distinguish between two kinds of issue salience: retrospective and contemporaneous (see Mayhew 1991). By retrospective salience, we mean that analysts now view a particular issue (case) as salient, regardless of whether the actors (justices) thought it was salient at the time they were resolving it. By contemporaneous salience, we mean that the actors (justices) thought the issue (case) was salient at the time they were resolving it, regardless of whether analysts now view it as salient.[2]

[1] The journals are the *American Journal of Political Science,* the *American Political Science Review,* and the *Journal of Politics.*

[2] Of course, as we noted at the onset, researchers also may be interested in contemporaneous salience as it pertains to the mass public or even to particular groups, such as lawyers. But, by invoking this definition of contemporaneous salience, we and other scholars (see, e.g., Mayhew 1991) express our interest in understanding salience as it pertains to political elites (i.e., the actors making the decisions). This is a nontrivial point of distinction because, again as we suggested earlier, scholars studying members of the general public or of particular groups can administer surveys to identify issues that are salient to the target populations, but researchers (typically) cannot do the same for elite political actors. Hence, to measure contemporaneous salience in the sense that we use it (i.e., whether the actors thought an issue was salient at the time they were addressing it), investigators must rely on surrogates, which often involve judgments made by experts years, even decades, after the actors made their decisions. The key points to us, and the ones we underscore below, are that the vast majority of work on the Supreme Court (as well as on Congress) (1) seeks to tap precisely this kind of salience (i.e., whether the justices thought a case was particularly salient at the time they were deciding it) but (2) invokes measures of that concept that are often time delayed.

Surely there is a handful of studies for which retrospective salience is crucial. Along these lines we would point to Brenner and Spaeth's (1995) work on *stare decisis*. Among the questions they addressed was whether the Court is more likely to overturn "landmark" precedents. To measure the concept of "landmark," they relied on the list of cases reported in *Congressional Quarterly's Guide to the U.S. Supreme Court* (1990) (hereinafter called the "*CQ*" measure)—that is, a list created by an authority on the Supreme Court (Elder Witt) based on her evaluation of what is now considered a landmark case. This was a reasonable measure for the Brenner/Spaeth study because the investigators too were interested in the Court's retrospective view of particular cases: they wanted to know whether a justice, sitting in say 1990, viewed a precedent established in say 1966 as important or not. As long as the justice's evaluation roughly matched Witt's, the measure is appropriate.

Yet, it is worth emphasizing, the great bulk of work on the Court is far more concerned with contemporaneous salience. Ulmer's (1970) research on opinion assignment is illustrative. In seeking to ascertain whether Chief Justice Warren overassigned salient cases to himself, Ulmer was not interested in whether scholars in the 1970s would label a particular case "salient," that is, whether a case withstood the test of time; rather he required a measure of contemporaneous salience, that is, one which would enable him to ascertain whether Warren thought a particular case was important *at the time Warren was assigning it.* We could say the same about various strains of research assessing vote fluidity (e.g., whether justices are more likely to shift their votes in salient cases), the freshman effect (e.g., whether new justices write opinions in the most salient cases), bargaining (e.g., whether there is more internal bargaining over salient cases), and unanimity (e.g., whether justices are more likely to produce unanimous decisions in salient cases).

Virtually all scholars working in these and other areas acknowledge the critical conceptual distinction between contemporaneous and retrospective salience. As Flemming, Bohte, and Wood (1997, 1231) note: "Hindsight, of course, easily reveals the latent importance of an opinion. The historical importance of decisions, however, must not be confused with . . . contemporary appraisals of which opinions were significant and which were not" (see also Cook 1993). Yet, in their empirical work, researchers have tended to ignore this difference. Table 1, in which we outline the various measures of case salience, makes this point clear.[3]

Note that the three measures most often invoked by today's scholars (1, 2, and 3) are all retrospective in that they are based on expert evaluations of salience often made well after the date of the decision. Surely it is possible that a 1966 case classified as important by *CQ* or *The Supreme Court Compendium* in the 1990s was not equally as important to the justices deciding that case. And, just as surely, a case viewed as particularly salient to the Court in 1966 may not, for whatever reason(s), have made it on to the Witt (1990) or Epstein et al. (1994) list.

Other Drawbacks of Existing Measures

To put it succinctly, the first three measures in Table 1 suffer from a problem of validity: while the authors wish to tap contemporaneous salience, the indicators assess retrospective salience. At least on this score, the same cannot be said of the others; in fact, one might say that measures 4, 5, 6, and 7 are explicit attempts to overcome this problem, to tap contemporaneous salience. But, as scholars have noted (see Cook 1993 and Brenner and Spaeth 1995 for comprehensive reviews), they too suffer from serious drawbacks.[4]

Table 1 sets out the key concerns, some of which are specific to the given measure. But there are four that are common to many on the list. The first centers on *content bias*, which occurs when the salience measure is weighted

[3] Table 1 also shores up a point we made earlier—the degree to which "salience" has figured into the judicial politics literature and continues to do so. While the table presents only a sample of studies, it is clear that analysts, writing over a three-decade period, have developed important hypotheses around the concept of case salience.

[4] In addition to measures 4, 5, 6, and 7 displayed in Table 1, there are at least three others that could be used to assess contemporaneous salience: (1) the length of the majority opinion, and cases highlighted in (2) *U.S. Law Week* (*U.S.L.W.*) and (3) the *Harvard Law Review.* To our knowledge, however, scholars have not invoked these perhaps because they suffer from some nontrivial problems. Of the many drawbacks with opinion length, one strikes us as particularly serious: the existence of orally-argued per curiams. These sorts of opinions tend to be shorter in length than signed majority opinions but may be no less important. *Furman v. Georgia* (1972) is one example but there are others. The problem with *U.S.L.W.* is that it is inconsistent in the way that it reports "salient" cases. During the 1960s and early 1970s, it ran a feature called "Highlights of the Term." Following that feature it would review important cases in particular areas of the law. Had *U.S.L.W.* continued with this practice it may have provided a usable measure, though one producing about twenty to thirty cases per term. But it did not. Starting with the 1976 term, it only carried articles on individual areas of the law, not a Highlights story. The *Harvard Law Review* is not much better. Beginning in the 1950s, *Harvard* published a table of cases to accompany its annual review of the term. But these tables are problematic because they contain a note to the following effect: "Certain cases of sufficient interest to merit comment in this Note have been omitted because of analyses of the lower court decisions featured in earlier volumes of the *Review.*" Only from the 1977 term on did *Harvard* begin to include the names of "important" cases in the annual review's table of contents.

TABLE 1 Measures of Salience Employed in Studies of the U.S. Supreme Court

Measure of Case Salience	Examples of the Types of Studies Invoking It	Drawbacks
Measure 1. Cases Reprinted in Constitutional Law Books	*Opinion Assignment:* Rohde 1972; Slotnick 1978, 1979; Danelski 1989 *Vote Fluidity:* Brenner 1989	• Validity: Taps retrospective salience, when most studies require a measure of contemporaneous salience. • Content Bias: Excludes substantial parts of the Court's docket, including statutory and administrative cases. • Recency Bias: Covers more recent cases than earlier ones. • Transportability: Emanates from sources so centered on the Court that it cannot be adopted to study other political institutions.
Measure 2. Cases on *Congressional Quarterly's* List (Witt 1990)	*Bargaining:* Epstein and Knight 1998 *Decision Making:* Segal and Spaeth 1996; Martin 1998 *Political Influence:* Flemming et al. 1997 *Vote Fluidity:* Epstein and Knight 1995	• Validity: See measure 1. • Content Bias: Focuses on civil liberties and constitutional cases. • Recency Bias: See measure 1. • Transportability: See measure 1. • Other: Changes in the case list occur from one edition to the next (compare Witt 1990 and Biskupic and Witt 1997).
Measure 3. Cases on *The Supreme Court Compendium's* List (Epstein et al. 1994)	*Bargaining:* Wahlbeck et al. 1998 *Decision Making:* Martin 1998 *Vote Fluidity:* Maltzman and Wahlbeck 1996b	• Validity: See measure 1. • Transportability: See measure 1. • Other: Abandons its 1994 case list in the 1996 edition (compare Epstein et al. 1994, Table 2-10 and Epstein et al. 1996, Table 2-10).
Measure 4. Cases Generating Substantial Supreme Court Citations within Five Years of their Decision Date	*Opinion Assignment:* Ulmer 1970	• Time Dependency: Fails to take into account that the number of salient cases within a five-year period depends on the total number of cases decided. Also assumes Court overcites salient cases but citation numbers are related to the number of times the Court deals with a particular issue. • Transportability: See measure 1. • Other: Assumes citation practices do not vary across justices or time, when this does not hold.
Measure 5. Cases Generating Eight or More Law Review Articles within Two Years of Their Decision Date	*Opinion Assignment:* Haines 1977	• Time Dependency: Fails to take into account the proliferation of law reviews over time. • Transportability: See measure 1. • Other: Assumes that law reviews seek to cover major cases when, in fact, many have specialized interests.
Measure 6. Cases Headlined on the Advance Sheets of the *Lawyers' Edition*	*Freshman Effect:* Melone 1990 *Opinion Assignment:* Spaeth 1984; Davis 1990; Segal and Spaeth 1993	• Transportability: See measure 1. • Other: Generates too many salient cases—as many as 70 percent for a given term.
Measure 7. Cases Generating Substantial Amicus Curiae Participation	*Opinion Assignment:* Maltzman and Wahlbeck 1996a	• Content Bias: Overselects civil liberties cases because of more group participation in this area. • Time Dependency: Ignores the problem of the lack of *en masse* interest group participation in the pre-1960 period.

Note: We adopt many of the drawbacks from Cook (1993) and Brenner and Spaeth (1995).

TABLE 2 Cases on *Congressional Quarterly*'s (1997) List, Classified by Issue and Authority for the Decision—1946–1995 Terms

2a. Issue

Issue	Cases on *CQ*'s List		Cases Not on *CQ*'s List		Total N	
	N	% of Total Cases On *CQ*'s List	N	% of Total Cases Not On *CQ*'s List	N	% of Total Cases
Civil Liberties	266	91.4%	2829	48.6%	3095	50.6
Economics	11	3.8	1890	32.5	1901	31.1
Judicial Power	4	1.4	775	13.3	779	12.7
Federalism	5	1.7	315	5.4	320	5.2
Miscellaneous	5	1.7	14	.2	19	.3
Total	291	100.0	5823	100.0	6114	100.0

2b. Authority for Decision

Authority	Cases on *CQ*'s List		Cases Not on *CQ*'s List		Total N	
	N	% of Total Cases On *CQ*'s List	N	% of Total Cases Not On *CQ*'s List	N	% of Total Cases
Constitutional	237	81.4	1877	32.2	2114	34.6
Not Constitutional	54	18.6	3946	67.8	4000	65.4
Total	291	100.0	5823	100.0	6114	100.0

Note: Issues are recoded as follows from the "value" variable in Spaeth's *U.S. Supreme Court Judicial Data Base*: Civil Liberties = values 1–6; Economics = values 7–8 and 12 ; Judicial Power= value 9; Federalism = values 10-11; Miscellaneous = value 13. Authorities are recoded as follows from the "authdec1" variable in Spaeth's Data Base: Constitutional = values 1,2; Not Constitutional = all other values.

Data Sources: Data on Issue and Authority are from Spaeth's *U.S. Supreme Court Judicial Data Base,* with orally argued case citation as the unit of analysis; data on the *CQ* List are from Biskupic and Witt 1997.

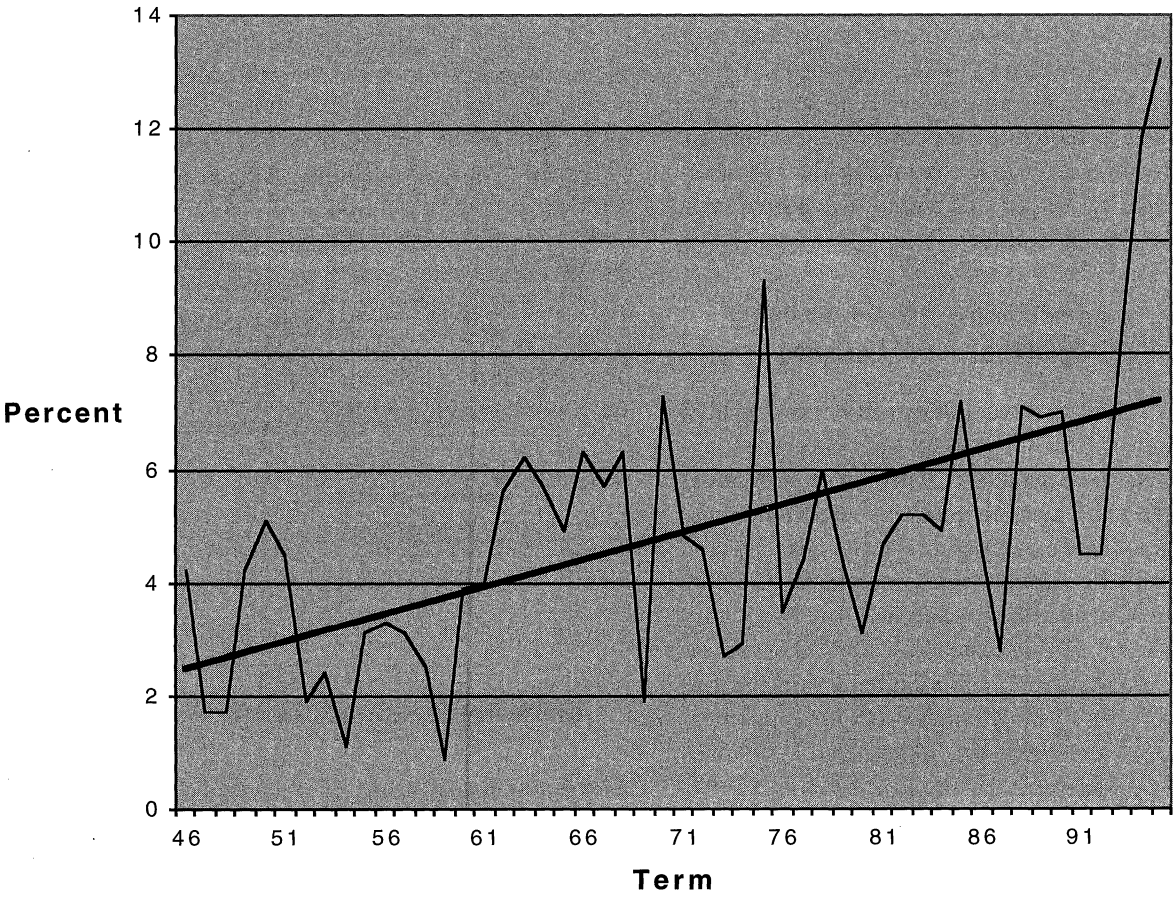
toward particular kinds of issues. Since this problem obviously plagues the first measure listed in the table—the use of constitutional law books to identify important cases—many scholars have turned to the *CQ* indicator. As Segal and Spaeth (1996, 978) explain, "We operationalize 'major cases' as those listed in *Congressional Quarterly's Guide*. . . . Common alternatives, such as appearance in constitutional law books, almost completely ignore statutory cases." In extolling the virtues of the *CQ* measure, Cook (1993), Brenner and Spaeth (1995, 26), and Epstein and Knight (1998) offer much the same rationale.

Yet, as Tables 2a and 2b show, the *CQ* measure is not immune to charges of content bias. Of the 291 1946–1995 term cases it classifies as salient, 91.4 percent involved issues of civil liberties, while only 50.6 percent of the total 6,114 disputes centered on such claims.[5] The bias also extends to the authority for the decision. Spaeth's U.S. Supreme Court Judicial Data Base categorizes 34.6 percent of orally argued cases decided during the 1946–1995 terms as constitutional; yet 81.4 percent of those on the *CQ* list are of the constitutional variety. Certainly, it may be the case that constitutional civil liberties suits are the most salient to the justices but we are hard pressed to believe that these are virtually the only ones that matter to them. Other scholars, of course, share our sentiment. As the quote above from Segal and Spaeth (1996, 978) reveals, the lack of coverage of statutory decisions is the primary reason why many spurned the constitutional law book approach (measure 1) and adopted the *CQ* list. Unfortunately, the *CQ* measure improves only marginally on the one it was designated to replace.

A second problem involves *recency biases.* While content bias centers on whether a particular measure is too heavily weighted toward specific kinds of issues, recency biases occur when the indicator becomes more loaded over time. Again, the *CQ* measure provides a case in point: As Figure 1 shows, the compositors of the list in-

[5] Here and throughout this article we assess the various salience measures against data from the 1946–1995 terms. Our reason for so doing is straightforward: the existence of a reliable and widely-used data base—Spaeth's U.S. Supreme Court Judicial Data Base—which covers these terms. For this analysis and the ones to follow, the unit of analysis is orally argued case citation (i.e., analu=' ' and dec_type=1, 6, or 7), unless otherwise noted. All data used in this article are available at http://www.artsci.wustl.edu/~polisci/epstein/.

FIGURE 1 Cases on Congressional Quarterly's (1997) List as a Percentage of the Total Number of Cases Decided, 1946–1995 Terms



Note: The regression is: $\hat{Y} = 2.35 + .10$ (time). "Time" has a standard error of .02.
Data Sources: Data on the total number of cases are from Spaeth's *U.S. Supreme Court Judicial Data Base,* with orally argued case citation as the unit of analysis; data on the *CQ* List are from Biskupic and Witt 1997.

cluded more and more cases with each passing term. The same charge, it is worth noting, has been leveled at several other indicators on our list, including measure 1 (decisions excerpted in constitutional law volumes). Even Slotnick (1978, 220), a user of this approach, has acknowledged that casebooks contain many more recent decisions than earlier ones (see also Brenner and Spaeth 1995, 24).

A third concern centers on various forms of *time dependency.* This problem plagues, among others, Maltzman and Wahlbeck's (1996a, 433) research on opinion assignments, which uses the following measure of salience:

> We considered any case that had more than 1.65 standard deviation about the average number of [amicus curiae] briefs for the 398 cases heard during the [1987–1989] terms to be important. Since the average case had 2.4 amicus briefs filed at this stage and the standard deviation across all 398 cases was 3.7 briefs, any case that had nine or more briefs filed is considered important.

On the surface, this seems like a wholly suitable indicator: it taps contemporaneous salience,[6] and it is reproducible. But it is hampered by the fact that amicus curiae participation *en masse* is a relatively recent phenomenon. Consider 1940, when interests filed twenty-six briefs in twenty-one of the 163 cases, for a mean of .16 amicus curiae submissions per case and a standard deviation of .46. Using Maltzman and Wahlbeck's criteria, we would classify as "salient" all cases in which one or more amicus curiae briefs were filed; in other words, all twenty-one cases would appear on a list of salient cases!

[6] Both scholars (e.g., Caldeira and Wright 1988; Perry 1991) and justices (e.g., Stevens 1990) have suggested that amicus curiae participation may signal case importance.

A final concern involves the lack of transportability of existing measures. Simply put, because scholars derived them from sources so centered on the Court, analysts working in other fields of political science cannot adapt them to the targets of their inquiries. A possible exception here is the amicus curiae measure to the extent that students of legislative politics could count the number of groups testifying about a particular bill to assess its salience. Yet, as we just noted, the amicus approach has its own share of ills.

The Importance of Finding a Valid, Reliable, and Unbiased Measure of Salience

We could go on and discuss other problems associated with existing measures. But perhaps the best evidence of the widespread dissatisfaction with these indicators comes from the researchers themselves—especially those who have jumped from one measure to the next. Spaeth, the developer of the *Lawyers' Edition* method (measure 6), severely criticized that approach in his book with Brenner (1995, 25), opting instead for the *CQ* list (measure 2). In 1996a Maltzman and Wahlbeck used the amicus curiae indicator to study opinion assignments (measure 7); in 1998, they (Wahlbeck, Spriggs, and Maltzman) abandoned that approach for the Epstein et al. (1994) measure (measure 3). But, in the second edition of *The Supreme Court Compendium* Epstein et al. (1996) actually discarded their own 1994 list in favor of *CQ*'s latest version (1997), which itself differed from the 1990 *CQ* list (i.e., the new authors, Biskupic and Witt, omitted some older cases).

And, yet, if this quest for a better measure were simply that— a quest without real substantive import for research—the measurement debate would border on the trivial. This, however, is not the case. As we noted above, studies invoking different measures of salience have generated disparate results about the phenomenon under analysis. Nowhere is this more evident than in research contemplating opinion assignment. Virtually all the studies of the 1970s and 1980s reached the conclusion that Chief Justices overassign salient cases to themselves, with most of these works invoking one of two measures of salience (measures 1 or 6). In their study of Rehnquist's assignment selections, Maltzman and Wahlbeck relied on a different indicator—the amicus approach—with their conclusion wholly distinct from previous efforts: "Rehnquist does not consistently assign himself salient cases" (1996a, 435).

Does this statement reflect a difference between the way Rehnquist and other Chiefs approached their jobs? Or is it merely an artifact of the statistical procedures and, most relevant to us, the operative definitions of salience? Until we have a valid, reliable, and unbiased measure of salience, we cannot know for sure.

We could ask these same questions of the many other areas of research that have produced contradictory results. Even more important, though, is a consideration of the gaps in the literature—which takes us to our second point: for years, scholars have floated various hypotheses centering on salient and nonsalient cases that have not been rigorously assessed. Kluger's (1976) notion about landmark litigation provides a case in point: he argues that the justices, for various reasons, go to great lengths to produce unanimous opinions in salient disputes (see also Epstein and Knight 1998; Schwartz 1990). We can point to many cases in which this seems to hold but, to our knowledge, no systematic evidence exists to support it. Surely, as Flemming and his colleagues (1997, 1231) suggest, the lack of a valid, well-accepted, and "ready" measure of salience has contributed to this and other voids in our knowledge.

Creating a New Measure of Salience

To remedy this situation we offer the following measure of contemporaneous salience: whether the *New York Times* carried a front-page story about the case. We selected the *New York Times* because, of all U.S. newspapers aimed at a general readership, it is most national in orientation; that is, it is least likely to be biased toward regional events, especially on the front page (see, e.g., Mayhew 1991).[7]

On the surface, this measure improves on those offered in the past: since it attempts to tap salience at the time the justices were deciding the case—rather than years, even decades, after the Court resolved the dis-

[7] On the other hand, because the *Times* tends to be liberal in orientation, it may possess an ideological bias. We assess this possibility later in the article (see Table 4).

Another potential problem is that appearance on the front page may depend on what other newsworthy events took place on the same day as the Court's decision(s). We view this as less troublesome than the ideological bias because, even on the busiest of news days, important cases can find their way onto page 1. *Roe v. Wade* (1973) provides a case in point. On the same day that the Court handed down *Roe*, Lyndon Johnson died and President Richard Nixon announced a cease-fire accord to end the Vietnam War. And, yet, *Roe* still earned a place on the front page of the *Times*. Moreover, to the extent that this bias exists, it at least has the benefit of being random, unlike the systematic biases uncovered in earlier measures. Finally, we attempt to explore this potential problem by comparing our results with cases that registered as salient on other measures (see Table 5).

pute—it is a facially more valid indicator of contemporaneous salience. Of course, the measure assumes that salience means roughly the same thing to newspaper editors as it does to the justices but since *both editors and justices make this calculation at about the same time, within the same political context*, this assumption does not seem a particularly onerous one.[8] At the very least, the time lag is far shorter than it is for other measures, such as *CQ*, which are geared more toward whether a case has withstood the test of time and less toward whether it was salient at the time the Court was deciding it. [9] In other words, short of asking the justices themselves to identify cases that they deem salient—a task that is impossible to accomplish for deceased justices and impractical for current ones—the *NYT* approach provides the most proximate and viable surrogate of salience from the perspective of Court members.

Also worth noting is that the measure is reproducible.[10] To create it, we used two sources: the *Index to the New York Times* and LEXIS.[11] A salient case (1) led to a story on the front page of the *Times* on the day after the Court handed it down, (2) was the lead ("headlined") case in the story,[12] and (3) was orally argued and decided with an opinion (see note 5). This procedure yielded 914 cases, for an average of 14.9 per term— a figure that is greater than *CQ*'s (4.8) but, interestingly, is not appreciably different from the number of important laws per Congress reported by Mayhew (1991) (n = 12).[13]

Assessing the *NYT* Measure

Intuitions about validity constituted our *a priori* reason for developing the *New York Times* (*NYT*) measure. But intuitions aside, the questions remain: Do the results of our procedure withstand more rigorous scrutiny? Does our measure substantially improve on its predecessors? To address these, we perform two kinds of analyses. In the first, we revisit the key problems with previous indicators to determine whether they also afflict the *NYT* measure. In the second, we attempt to cross-validate the *NYT* indicator against others.

Biases

Recall that many existing indicators of salience have significant drawbacks, with one important set centering on

[8] We use the term "editors" because (at least at the *New York Times*) they are the ones who decide, at a meeting at the end of each workday, which stories should appear on page 1. In making their decisions, according to *U.S. News & World Report* (Miller 1998), the *NYT* editors consider the opinions of the various department heads (e.g., national, foreign, metro) but, ultimately the selections are theirs to make. Typically, "page 1" articles are "obvious" to them; when they are not, the editors invoke a standard they call "news judgment," which centers on such questions as "Will this story have consequences?" Linda Greenhouse, the *New York Times* reporter who covers the U.S. Supreme Court, in a phone conversation with Epstein, called the *U.S. News* story "very accurate" and aptly descriptive of the process that characterizes front-page decisions over her stories on the Court.

Is this process a haphazard one? Certainly in some respects it is, but no more so than that which characterizes decisions made by Witt or the authors of *The Supreme Court Compendium* in that neither has established coding rules. Hence, under these circumstances, the task for scholars is to assess whether the resulting measures are biased in any systematic way. This is what we attempted to do above for existing indicators and below for the *NYT* measure.

[9] According to the expanded version of Spaeth's (1997b) Data Base, the median interval between the assignment of the majority opinion and announcement of the decision is forty-nine days or about a month and a half. Obviously, this means that editors and justices are not making their decisions at *exactly* the same time but their decisions are closer together than they are for virtually any of the existing measures. In fact, the only indicator we can imagine that would be more contemporaneous—other than one derived from querying the justices—is a variation on our approach: a measure based on whether the *NYT* covered oral arguments in a case or published any predecision front-page story about it. The problem with this approach is that we run the risk of too many false positives and false negatives. False positives occur when a case that seems important turns out to be something of a dud. Such was true of the *Piscataway* (1997) affirmative action dispute, which was settled before the Court decided it. If we had used the predecision measure, we would have classified this case as salient, for the *Times* published a front-page story about *Piscataway* when it appeared that the Court would resolve it. The same, of course, is true of cases that the Court moots out, dismisses, or otherwise does not decide in a substantive fashion. False negatives would occur even more frequently: Because the *Times* publishes so few front-page articles about decisions before they come down, we would miss many cases that virtually all scholars would deem "salient." The list is impressive and long but a few recent examples are *City of Boerne v. Flores* (1997), *U.S. Term Limits Inc. v. Thornton* (1995), and *R.A.V. v. City of St Paul* (1992).

[10] For the list of cases, navigate to http://www.artsci.wustl.edu/~polisci/epstein/.

[11] For the reasons explained in note 5, this study covers the 1946–1995 terms of the Court. Between 1946 and 1971, the *New York Times* index listed decisions of the Court and on what page of the paper they appeared. (For some of those years, the index listed the case by name; for others, it provided only a description of the case. Based on the description, we were able to identify the case.) After 1971, it ceased listing particular cases. Hence we relied on LEXIS to obtain the cases for the remaining years. The search was simply "Supreme Court."

[12] This is an important point, for front-page articles sometimes focus on a particular case (the "headlined" or primary case) but discuss others. We exclude secondary cases.

[13] We should also note that the *NYT* measure is transportable to other fields. We take up this point in some detail at the end of the article.

TABLE 3. Cases Reported on the Front Page of the *New York Times*, Classified by Issue and Authority for the Decision—1946–1995 Terms

3a. Issue

Issue	Cases on *NYT* Front Page		Cases Not on *NYT* Front Page		Total N	
	N	% of Total Cases on *NYT* List	N	% of Total Cases Not on *NYT*'s List	N	% of Total Cases
Civil Liberties	685	74.9%	2410	46.3%	3095	50.6
Economics	152	16.6	1749	33.6	1901	31.1
Judicial Power	34	3.7	745	14.3	779	12.7
Federalism	36	3.9	284	5.5	320	5.2
Miscellaneous	7	.8	12	.2	19	.3
Total	914	100.0	5200	100.0	6114	100.0

3b. Authority for Decision

Authority	Cases on *NYT* Front Page		Cases Not on *NYT* Front Page		Total N	
	N	% of Total Cases on *NYT* List	N	% of Total Cases Not on *NYT*'s List	N	% of Total Cases
Constitutional	540	59.1	1574	30.3	2114	34.6
Not Constitutional	374	40.9	3626	69.7	4000	85.1
Total	914	100.0	5200	100.0	6114	100.0

Note: Issues are recoded as follows from the "value" variable in Spaeth's *U.S. Supreme Court Judicial Data Base*: Civil Liberties = values 1–6; Economics = values 7–8 and 12 ; Judicial Power = value 9; Federalism = values 10–11; Miscellaneous = value 13. Authorities are recoded as follows from the "authdec1" variable in Spaeth's database: Constitutional = values 1,2; Not Constitutional = all other values.

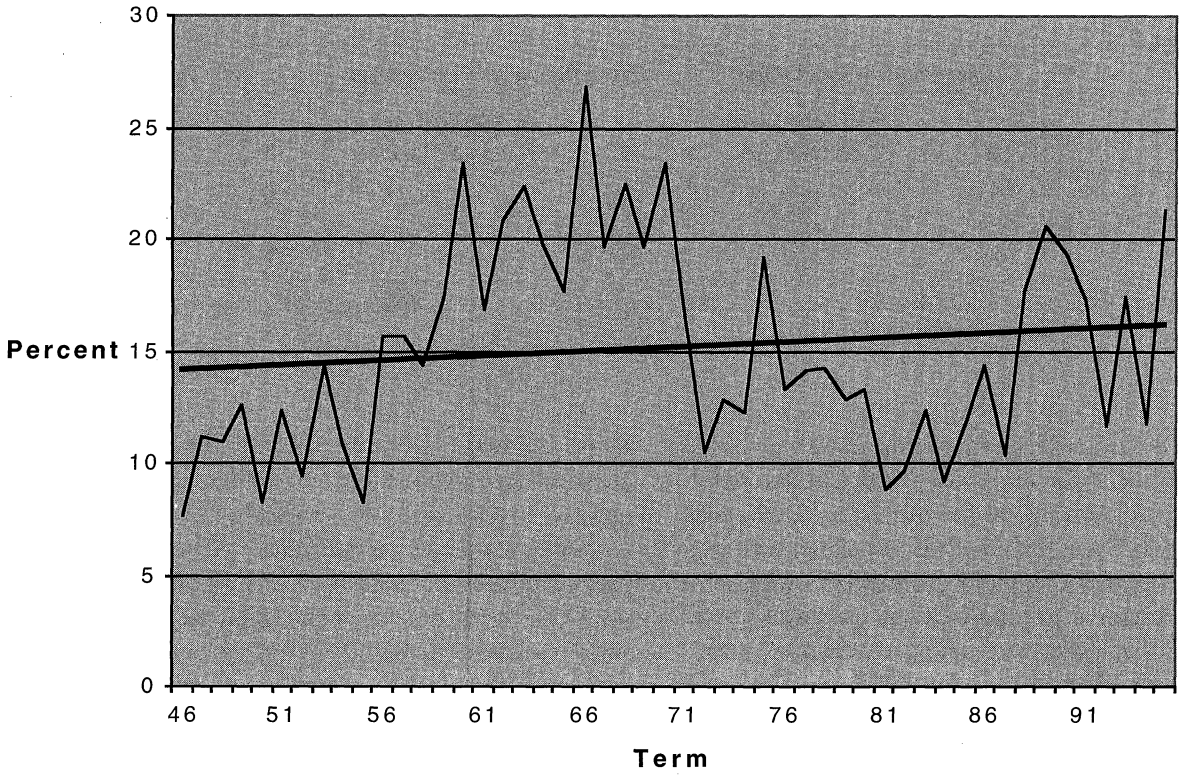
Data Source: Data on Issue and Authority are from Spaeth's *U.S. Supreme Court Judicial Data Base*, with orally argued case citation as the unit of analysis.

content and recency biases. While the *CQ* indicator suffered from both problems and many of the others listed in Table 1 from one or the other, the *NYT* measure does not evince the same biases or, at least, does not do so at the same levels. Consider, first, the sorts of cases covered on the front page of the *Times*. As Table 3 shows, neither civil liberties nor constitutional cases dominate at the rate that they do on *CQ*'s list; roughly 25 percent of the salient *NYT* cases fall into one of the other value categories and 41 percent are of the nonconstitutional variety. These percentages, it is worth noting, do not precisely mirror the actual figures but, as we suggested earlier, there is no reason to expect that they would; indeed, it may be that the justices view constitutional civil liberties cases as particularly salient. While some scholars claim as much (e.g., Schwartz 1983), an equally large, if not greater, number suggest that these are not the only sorts of cases that matter to the Court (e.g., Cook 1993); at the very least, this is the chief criticism of measure 1, the constitutional law approach. Accordingly, we are heartened by the improved balance the *NYT* measure obtains.

Also encouraging are the results of our longitudinal analysis. Recall that time was a significant predictor of cases on *CQ*'s list—with each passing term, the authors added more. What of the *NYT* indicator? As Figure 2 makes clear, no recency effect exists. Rather, we see more of a parabolic shape, with front-page coverage low in the 1940s and 1980s and high in the 1960s. This conforms to scholarly perceptions that the Warren Court—more than any other included in our analysis—was particularly inclined to resolve salient cases (e.g., Blasi 1983; Urofsky 1991). It also comports nicely with journalistic impressions of Court coverage. As Sherman (1988, 32) of the *National Law Journal* writes, "Landmark decisions in the 1960s and 1970s, including those involving school desegregation of public schools and the legalization of abortions . . . made clear to leaders of news organizations as well as to the public the potential impact of the judiciary on ordinary citizens."

And, yet, in the same story Sherman notes that the *New York Times*, in 1956, made a conscious effort to increase the quality of its coverage by sending Anthony

FIGURE 2 Cases on the Front Page of the *New York Times* as a Percentage of the Total Number of Cases Decided, 1946–1995 Terms



Note: The regression is $\hat{Y}$=14.08 + .04 (time). "Time" has a standard error=.05.
Data Source: Data on the total number of cases are from Spaeth's *U.S. Supreme Court Judicial Data Base,* with orally argued case citation as the unit of analysis.

Lewis to study at Harvard Law School. Is it thus possible that the results displayed in Figure 2 reflect a change in substantive coverage, rather than in the salience of Court cases? For three reasons, we suspect that the answer is no. First, if the change in coverage provides the primary explanation for the data patterns, then we would expect to see an increase in the number of front-page stories in the late 1950s. But, as Figure 2 suggests, this is not the case. Instead, the jump appears to occur in the early 1960s, with simple summary statistics confirming what our eyes tell us: the mean percent of cases on the front page of the *Times* in 1958 and 1959 was 15.9; for 1960 and 1961, that figure was nearly five cases greater (20.2). Second, if change in coverage rather than salience explains the results, then the *NYT* indicator should underreport cases decided prior to the late 1950s relative to the other measures. But, at least with regard to the *CQ* measure, this expectation does not hold. Of the 291 cases that appeared on the *CQ* list, the Court handed down 14.4 percent (n=42) between the 1946 and 1958 terms; on the *NYT* measure, 17.9 percent (n=164) of the 914 salient cases were decided during those terms. Finally, if the coverage the *New York Times* afforded to the Court was spotty during the pre-1950s years, thereby accounting for the relatively small number of cases reported in front-page articles during that period, then the number of other sorts of stories it ran on the Court should be equally small. Relevant data, however, suggest otherwise. In conjunction with another research project, we examined *New York Times* articles on Court-Congress-Executive interactions published between 1946 and 1993. The quality of these stories has seemingly improved over time, but their quantity has not markedly increased: in 1946 the *Times* carried thirty-one stories about the Court; in 1993 that number was only twenty-two.

In short, while we recognize that no measure is perfect and that ours suffers from problems inherent in all such efforts,[14] we are satisfied that the *NYT* approach

[14] There are at least two of these general limitations. First, neither our measure, nor any other existing one, differentiates among shades of salience; a case is either salient or it is not. We view this as a limitation because the category of nonsalient cases may include

TABLE 4 Cases on the Front Page of the *New York Times*, Classified by the Ideological Direction of the Decision—1946–1995 Terms

Ideology	Cases on *NYT* Front Page		Cases Not on *NYT* Front Page		Total N	
	N	% of Total Cases on *NYT* List	N	% of Total Cases Not on *NYT*'s List	N	% of Total Cases
Liberal	526	58.2	2631	51.2	3157	52.2
Conservative	378	41.8	2512	48.8	2890	47.8
Total	904	100.0	5143	100.0	6047	100.0

Data Source: Data on Ideology come from Spaeth's *U.S. Supreme Court Judicial Data Base*, with orally argued case citation as the unit of analysis. Cases coded as "0" (no ideological direction) are excluded.

improves on existing ones in many important ways. Even so, the *NYT* indicator is subject to a criticism that scholars have not often leveled at the others: an ideological bias. Because the *New York Times* is associated with left-of-center viewpoints, the question emerges of whether it is especially inclined to highlight stories about liberal Court decisions. Table 4 provides a straightforward-enough answer: The percentage of liberal decisions (58.2) covered on the front page of the *Times* roughly matches the overall figure of 52.2 percent.[15]

Cross-Validation

With this last type of bias ruled out, we turn to the second part of our assessment —one aimed at validating the *NYT* measure. Specifically, we are interested in sins of omission and commission: Is the *NYT* indicator failing to pick up cases that it *should* include? Is it including cases that it *should* not? Because these are, as our emphasis on the word "should" indicates, largely normative questions that inevitably require judgment calls, they are not easy to address; at the very least, it would be in error to invoke scattershot approaches—such as singling out particular cases that made the *NYT* list but did not make, say, *CQ*'s—because such are bound to put the *NYT* measure in a favorable light.[16] What we can do, though, is cross-validate the *NYT* measure against *CQ*'s. If cases that the *New York Times* missed (but *CQ* picked up) register on other indicators of salience, then this would give us cause to question the validity of our measure.

Conducting such a cross-validation involves two steps. In the first, we simply crosstabulated the *NYT* measure and *CQ*'s—the results of which Table 5 displays. Note that the *CQ* measure is, by and large, a subset of the *NYT* indicator. Of the 291 cases making it on to *CQ*'s list, about 85 percent (n = 246) also appeared on the front page of the *New York Times*.

Certainly these data suggest that the *NYT* measure is picking up most of the cases that, at least by the lights of *CQ*'s experts, are especially salient. But they do not address decisions on the off-diagonal, e.g., *Should* the *NYT* measure have picked up the forty-five cases listed in *CQ* that were not reported on the front page of the *Times*? To make this assessment, we turn to the second part of the cross-validation, which entails comparing the off-diagonal cases against other measures of salience.

We began this analysis by drawing a random sample of 100 cases and, again, crosstabulating the *NYT* measure

both relatively unimportant cases and some that are relatively salient, though not sufficiently so to register on any given measure. Overcoming this limitation is beyond the scope of our study, but we commend the challenge to others. Scholars taking it up may wish to consider a variation on the approach we use here by classifying cases as "highly salient" (those generating front-page *New York Times* articles), "mid-level salient" (those generating articles in the *Times*, regardless of where in the paper they appeared), and "nonsalient" (those failing to generate an article). Second, our measure, as well as all other existing indicators of salience, cannot speak to features of a case that may make it especially salient to a given justice. As Perry notes (1991, 260), "each justice has areas of particular interest"—and these areas may vary significantly from justice to justice. While no aggregate measure can tap this idiosyncratic aspect of salience, we certainly hope that scholars will attempt to develop indicators that can do so. Of course, this will be an immensely challenging task because, as we noted at the onset, researchers studying elite actors—unlike those investigating mass behavior—are typically unable to survey their subjects.

[15] For this analysis, we relied on Spaeth's (1997a) definitions of "liberal" and "conservative."

[16] This is so because more cases register as salient on the *NYT* measure than on *CQ*'s. While we believe that the number of cases on the *NYT* list is a more realistic portrayal of the pool of salient decisions—at the very least, the *NYT* figures are closer to those for important congressional laws than are *CQ*'s (see Mayhew 1991)—the difference presents a problem for a comparative analysis: It would be easier to identify cases that are on the *NYT* list that also "should" be on *CQ*'s list (but are not) than vice versa.

TABLE 5 **Crosstabulation of Cases on the Front Page of the *New York Times* and those on *Congressional Quarterly*'s (1997) List**

	New York Times		Total
	Not on *NYT* Front Page	On *NYT* Front Page	
Congressional Quarterly			
Not On *CQ*'s List	5155	668	5823
On *CQ*'s List	45	246	291
Total	5200	914	6114

Data Sources: Data on the total number of cases are from Spaeth's *U.S. Supreme Court Judicial Data Base*, with orally argued case citation as the unit of analysis; data on the *CQ* List are from Biskupic and Witt 1997.

against the *CQ* indicator.[17] The results nicely parallel those obtained for the universe of cases (see Table 5). Of the five (out of 100) decisions that appeared on *CQ*'s list, four (80 percent) were published on the front page of the *New York Times*; of the thirteen cases that made it on to the *NYT* list, four (31 percent) also appeared on *CQ*'s. But, again, our interest is less with the overlaps and more with the off-diagonal, that is, what should we make of the one case that the *NYT* measure failed to pick up and the nine that *CQ*'s missed? To address this question, we invoke four other, albeit not unproblematic, measures of issue salience: (1) whether the case was excerpted in one of three constitutional law books (Epstein and Walker 1998; Gunther and Sullivan 1997; O'Brien 1995);[18] (2) whether the case generated amicus curiae participation; (3) whether *Harvard Law Review* highlighted the case in its annual term review; and, (4) whether *The Supreme Court Compendium* listed the case in its table of landmark decisions (for problems with these indicators, see Table 1 and note 4). We then compared cases on the off diagonal against these sources—a procedure that yielded reasonably clear results: of the nine cases that appeared on the front page of the *New York Times* (but not on *CQ*'s list), all nine registered on at least one of the four other indicators of salience, with 55 percent (five of the nine) registering on two or more. The one case (*Vasquez v. Hillery* [1986]) that appeared in Congressional Quarterly (but not in the *New York Times*), did not fare as well, failing to hit three of our four other indicators. While it received a listing in the index of one of the constitutional law books (O'Brien 1995), it was not excerpted in any of the three, and it was not included on *Harvard's* or *The Compendium's* lists. *Vasquez* did attract one amicus curiae brief but this was not an especially impressive feat given that about 70 percent of the cases decided during the same term generated at least one third-party submission.

So, *should* the *Times* have published a story about Va*squez* on its front page? Obviously, this is a question over which reasonable people could disagree but, based on our analysis, the answer is no. The experts at *CQ* are among the only ones who viewed *Vasquez* as a salient case. Even so, it is the more general results of the cross-validation that interest us. Coupled with the findings of our analyses of bias, we believe that they provide rather convincing evidence in support of the integrity of the *NYT* measure.

Applying the *NYT* Measure to Substantive Research Problems

Earlier we made the point that the lack of a valid and well-accepted measure of salience stands as an impediment to research in two regards: it may be contributing (1) to competing findings on important judicial phenomena and (2) to serious voids in our knowledge about the Court. While this article is not the place to explore fully these issues, we do wish to provide a taste of how scholars might invoke the *NYT* measure to further their research programs.

Competing Findings: The Opinion Assignment Example

Do Chief Justices tend to assign salient cases to themselves? Maltzman and Wahlbeck (1996a) suggest that the answer is "no" for Rehnquist but other scholars argue that this is precisely the way Vinson and Warren behaved. Some even claim that over-self-assignment of salient cases has all the makings of a norm on the Supreme Court. As Danelski explains (1989, 496):

> The Chief Justice has maximal control over an opinion if he assigns it to himself, and undoubtedly Chief Justices have retained many important cases

[17] To level the playing field, we drew the sample from cases decided from the 1960 term on. This step was necessary because the *CQ* measure is heavily weighted toward recent cases. If we drew the sample from the universe of cases, the *CQ* measure inevitably would have missed many salient 1946–1959 term cases—or at least those that appeared on the *NYT* list (as well as on other measures). The sample is available at our data web site.

[18] We selected these because they are among the most recently published of the casebooks, thereby enabling us to include all the decisions in our sample in the cross-validation.

TABLE 6 Opinion Assignments Made by Chief Justices in Salient and Nonsalient Cases

	Chief Justice					
	Vinson		Warren		Rehnquist	
Assignments	***NYT***	***CQ***	***NYT***	***CQ***	***NYT***	***CQ***
Salient Cases						
% Self Assigned	29.8	42.9	20.0	26.2	27.3	36.4
% Assigned to Others	70.2	57.1	80.0	73.8	72.7	63.6
Total N of Assignments	57	21	270	65	77	22
Nonsalient Cases						
% Self Assigned	11.9	12.5	12.0	13.0	13.2	14.3
% Assigned to Others	88.1	87.5	88.0	87.0	86.8	85.7
Total N of Assignments	538	574	1082	1287	461	516

Note: NYT= cases registering as salient on the *NYT* measure; *CQ*= cases listed in Biskupic and Witt 1997

Data Sources: Vinson and Warren data come from Spaeth's Expanded Version of the Supreme Court Data Base. These data cover their full terms as Chief Justice, and are based on assignment sheets. Data on Rehnquist come from Rehnquist's assignment sheets, located in Thurgood Marshall's papers in the Library of Congress. The Rehnquist data cover the 1986-1990 terms—the only ones for which assignment sheets are available.

for that reason. The Chief Justice's retention of "big cases" is generally accepted by the Justices. In fact, the expectation is that he should write in those cases so as to lend the prestige of his office to the Court's pronouncement.

Whether Rehnquist's patterns diverged substantially from those of other Chiefs is not a question Maltzman and Wahlbeck (1996a) sought to resolve, or, for that matter, could have resolved, as their measure of salience differs from previous research. Moreover, since their indicator, as well as those invoked by their predecessors, suffers from serious drawbacks (see Table 1) we cannot say much—at least with any degree of certainty—about this aspect of the assignment process. This then is one area where the *NYT* measure may be helpful: because it taps contemporaneous salience and because it enables us to generate a list of cases for the entire contemporary period, it overcomes the obstacles of the past.

With this in mind, let us turn to Table 6. Here we display data on the opinion assignments made by Chief Justices Vinson, Warren, and Rehnquist in cases that registered as salient on the *NYT* and *CQ* measures, and those that did not.[19]

Note, first, that if Chief Justices evenly assigned cases, we would expect to see self-assignment percentages of *approximately* 11, or one-ninth of all assignments.[20] This seems to hold for nonsalient cases and to do so across both measures. In no instance did a Chief assign more than 14 percent of nonsalient cases to himself, with both Vinson and Warren hitting close to the 11 percent baseline.

Salient cases present a much different picture. Based on the data presented in Table 6, it is clear that Chiefs are prone to self-assign cases they deem important at the time they were making their selections. But considerable differences exist between the *CQ* and *NYT* measures. The former suggests that Chiefs choose themselves to write three or even four times the number of salient cases than the baseline percentage would lead us to expect. The *NYT* indicator, in contrast, projects more modest self-assignment patterns in salient cases—patterns that seem both sensible and in line with the scholarly literature on opinion assignment (i.e., even studies noting over-self-assignment in salient cases on the part of Chiefs do not produce figures nearly as high as those generated by the *CQ* indicator).[21]

[19] Inferring the identity of the opinion assigner from the Court's published reports leads to the misidentification of assignments in a nontrivial number of cases (see Palmer 1990). Accordingly, all our opinion assignment data come from the actual assignment sheets of the justices, rather than as estimates based on the final vote coalition. Data for Vinson and Warren come from Spaeth's (1997b) Expanded Version of the U.S. Supreme Court Data Base; data for Rehnquist (1986–1990 terms) come directly from the Court's assignment sheets, located in Thurgood Marshall's papers in the Library of Congress. This is the same source that Maltzman and Wahlbeck (1996a) used for their study of Rehnquist's assignment practices.

[20] We stress "approximately" because it is possible that the proportion of times the Chief Justice is in the majority divided by the average size of those majorities is a more precise baseline than 11 percent. Given that Chiefs vote so frequently with the majority, however, the figures produced from that procedure will not be altogether different from our 11 percent baseline. Moreover, because our findings on the self-assignment of salient cases are anything but subtle (see Table 6), the differences between the 11 percent baseline and the more "precise" one would border on the trivial.

[21] Why the *CQ* indicator produces such high percentages is a question on which we can only speculate. But is does seem plausible the *CQ* measure is biased in yet another way: toward cases in which Chiefs wrote the majority opinion.

Even so, it is worth emphasizing, the *NYT* measure does reveal that Chief Justices disproportionately assign salient cases to themselves. As we have noted throughout, this finding comports nicely with the balance of studies in this area (e.g., Ulmer 1970; Rohde 1972; Slotnick 1978, 1979; Spaeth 1984; Segal and Spaeth 1993) but not with research on Rehnquist (Maltzman and Wahlbeck 1996a). Of course, it is possible that once scholars build in controls for other variables affecting the assignment process this result could disappear. But the strength of our findings leads us to suspect that this is highly unlikely. In other words, at least based on the *NYT* indicator, we feel reasonably comfortable in concluding that Rehnquist followed the convention of self-assignment: Just as Taft (Danelski 1989), Hughes (Danelski 1989), Stone (Danelski 1989), Warren (Ulmer 1970; Slotnick 1978), and Burger (Spaeth 1984) were inclined to select themselves to write in the most salient disputes of the day, so too is our current Chief.

Gaps in Our Knowledge: The Unanimity Example

Does the Supreme Court tend to produce unanimous opinions in salient cases? This question has elicited a mixed response. On the one hand, the literature is replete with examples of justices, especially Chief Justices, going to great lengths to unite their colleagues behind a singular opinion (see, e.g., Kluger 1976; Epstein and Knight 1998). Such efforts may reflect a recognition by Chiefs that other political actors are less likely to attempt to override and more likely to follow unanimous decisions than those that result in divided votes (see, e.g., Eskridge 1991; Canon and Johnson 1998). On the other hand, not only is there a lacuna of systematic evidence to support this proposition, counterclaims exist as well. Beginning with Pritchett, scholars have argued that unanimous cases are simply the "easiest" ones for the justices to decide because the "facts and law are so clear that no opportunity is allowed for the autobiographies of the justices to lead them to opposing conclusions" (Pritchett 1941, 890). If this is so, then it is not a large leap to argue that unanimous cases may be the least salient of all, especially to the justices deciding them.

Using the *NYT* measure we offer an initial attempt to wade through these competing arguments, with Figure 3 providing the key results. During the period under analysis, over one-third of all cases (2,242 of 6,165) resulted in unanimous decisions but only 10.3 percent (230 of 2,242) registered as salient on the *NYT* indicator.[22] Note, too, the upward trend in *Times* coverage: as decisions evinced more and more vote division, they were more likely to register as salient. Certainly, then, these data suggest that Pritchett and his successors have the better case: decisions resolved by unanimous votes appear to be those that are less salient to the justices deciding them than those over which dissensus exists.

Does this basic finding hold across all four eras included in the analysis? Figure 4 suggests that it does, with a caveat; namely, the Warren Court was more prone to produce unanimous opinions in salient cases than the three others. While this is consistent with the expectations of some scholars (e.g., Schwartz 1983), it is important to keep in mind that even the Warren Court figure was less than we might have expected. During that era, the justices decided 36.5 percent of their cases by a unanimous vote but only 25.8 percent registered as salient.

Discussion

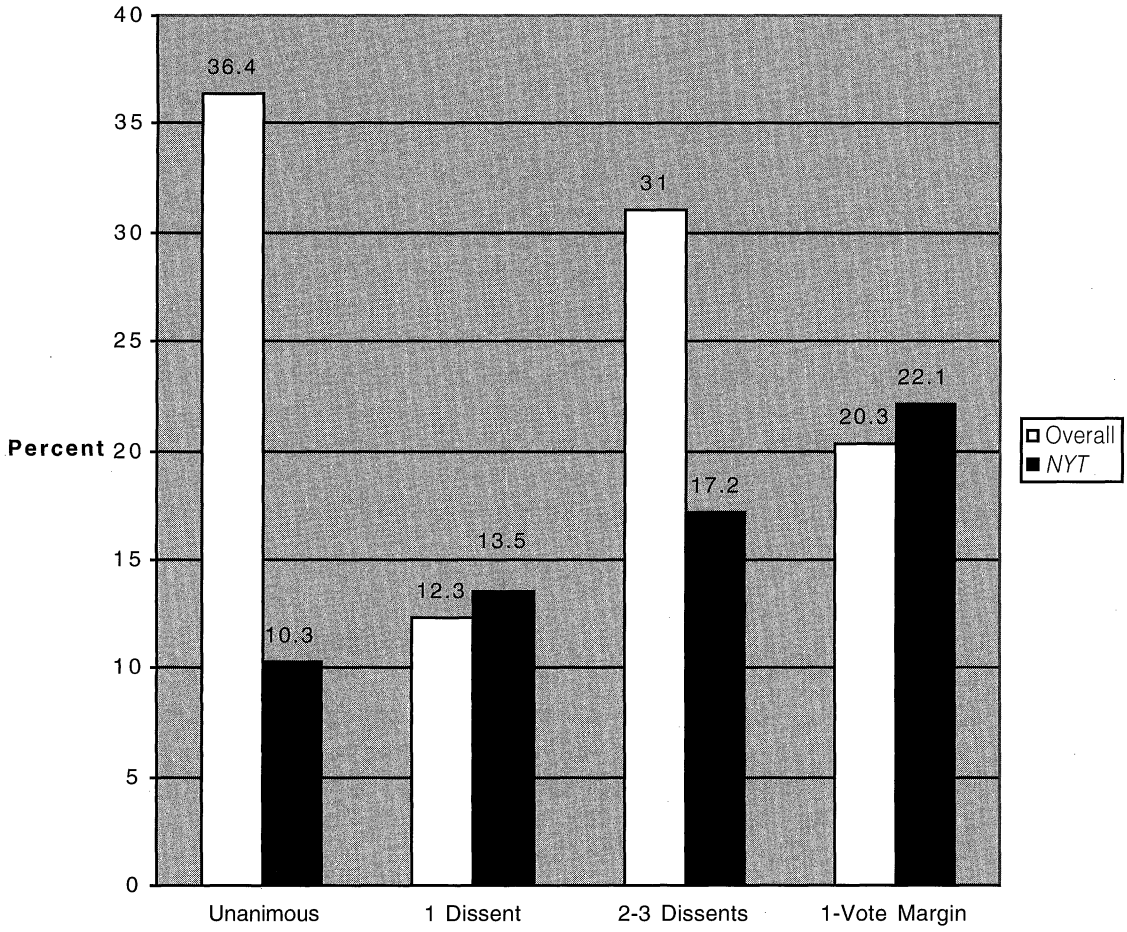
We could go on and apply our operationalization of contemporaneous salience to other key areas of research conducted by scholars of judicial politics—with fluidity and bargaining two that readily come to mind.[23] But more analyses of the sort conducted above would be equally as preliminary, for our purpose here was not to provide definitive answers to the questions we raise; instead, we merely wished to demonstrate the utility of the *NYT* measure for studies of the Supreme Court.

Naturally we hope that judicial specialists will pick up on these leads. But we are equally sanguine that scholars toiling in other areas of political science will find our measure of some value. For one of the unique characteristics of the *NYT* measure is that, unlike almost all of its predecessors, scholars can transport it to other fields of study. To see how, consider the plight of analysts of legislative politics. For many sorts of research enterprises, these scholars require a measure of contemporaneous and national salience, with Mayhew's (1991) important work on divided government providing an interesting example. To determine whether Congress is less likely to produce important legislation during periods of divided government, he required a measure that would, at least in part, tap whether a law was viewed as consequential at the time it was passed—or what he called "contemporary judgments about important enactments" (1991, 201). To construct such an indicator, he relied on annual "end-of-the-session" roundups appearing in the *New York Times*,[24] as well

[22]Figure 3 does not include data based on the *CQ* measure because the percentages it yields are quite small: 2.5 for unanimous cases; 5.0 for 1 dissent decisions; 5.4 for 2-3 dissent decisions; and 8.4 for one-vote margin decisions.

[23]We could also imagine studies seeking to explain the conditions that give rise to the production of salient cases—studies that would parallel Mayhew's (1991) research on Congress.

FIGURE 3 Vote Splits in U.S. Supreme Court Cases, 1946–1995 Terms



Note: Overall = percent of cases that fell within each category (*e.g.,* 2,242 [36.4 percent] of the 6,165 cases were decided by a unanimous vote); *NYT* = percent of cases within each category that registered as salient on the *NYT* index (*e.g.,* 230 [10.3 percent] of the 2,242 cases decided by a unanimous vote were salient).
Data Source: Spaeth's *U.S. Supreme Court Data Base,* with orally argued citation plus split vote as the unit of analysis.
Unanimous = cases decided by 5-0, 6-0, 7-0, 8-0, or 9-0 votes; 1 Dissent = cases decided by 4-1, 5-1, 6-1, 7-1, or 8-1 votes; 2 or 3 Dissents = cases decided by 5-2, 6-2, 6-3, or 7-2 votes; 1-Vote Margin = cases decided by 4-2, 4-3, 5-3, or 5-4 votes.

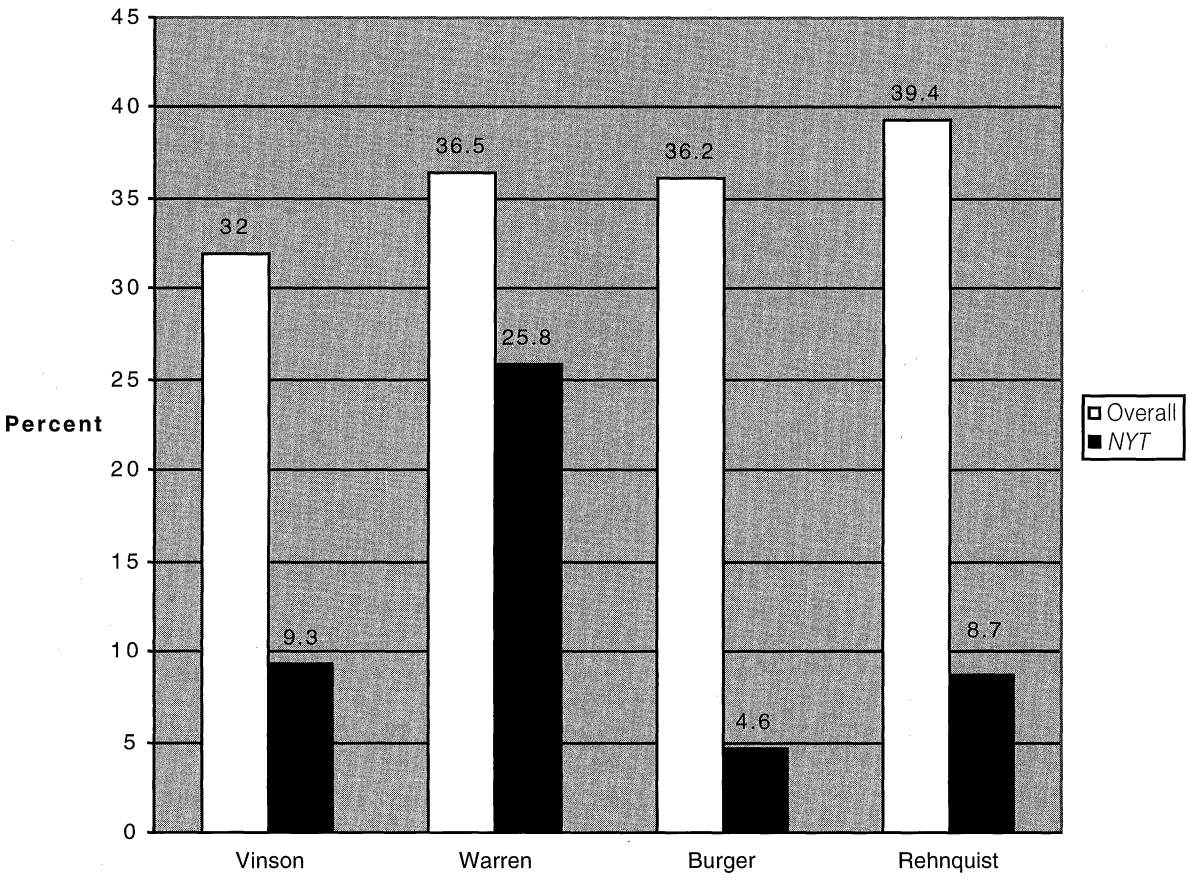
as on books and articles that "discussed the overall legislative records of particular Congresses . . ." (1991, 39); in other words, his sources varied considerably from one Congress to the next. To be sure, Mayhew meticulously identified each of these sources for all the legislative sessions included in his analysis—thereby ensuring that other researchers could reproduce his list—but the list itself cannot be extended in time (or, for that matter, backdated) in a reliable way: Apart from the *New York Times* roundup, scholars would not know whether they were invoking the same sources to which Mayhew would have turned. Seen in this way, our approach, while adopting the logic underlying Mayhew's, may improve on it: Congressional scholars could simply consult the *New York Times Index*/LEXIS to locate stories about particular pieces of legislation; if a law received front-page coverage one day after it was enacted, then it would meet Mayhew's (and our) definition of contemporaneous salience.[25]

[24]One might argue that this same approach could be applied to the Court, that is, using the term roundups in the *New York Times* to measure case salience. But there are two problems with it. First, the *Times* did not publish a term roundup for every year included in our study; and backdating is impossible due to the lack of roundups for many years prior to 1946. Second, the style of the roundups has varied considerably over time. In some years, the round-up was quite inclusive, covering virtually every case the Court decided; in others, it was far more selective.

[25]Interestingly, Mayhew (1991) adopts this sort of approach to study "important" congressional investigations: He deems an investigation "important" if it generated twenty or more *New York Times* articles.

Also worth noting is that further refinements in our approach would be necessary for scholars, perhaps the bulk of legislative

FIGURE 4 Unanimous Cases, 1946–1995 Terms



Note: Overall = percent of unanimous cases decided during the Court era (*e.g.,* 246 [32 percent] of the 769 cases decided during the Vinson Court era were by a unanimous vote); *NYT* = percent of unanimous cases that registered as salient on the *NYT* index during the particular Court era (*e.g.,* 23 [9.3 percent] of the 246 cases decided by a unanimous vote during the Vinson Court era were salient). *Data Source:* Spaeth's *U.S. Supreme Court Data Base,* with orally argued citation plus split vote as the unit of analysis. Unanimous = cases decided by 5-0, 6-0, 7-0, 8-0, or 9-0 votes.

A rather direct adoption of our measure also may be appropriate for students of executive politics. Do agencies, independent regulatory commissions, or advisory committees evince different behaviors in salient matters than in those of a more run-of-the-mill nature? To begin to solve this and related puzzles, analysts require a measure of contemporaneous salience—with an examination of stories published in a nationally-oriented newspaper, such as the *New York Times, seemingly* in order.

specialists, who argue that members of Congress are motivated more by the concerns of their constituents and less by the public writ large. Do members of Congress vote differently on issues of particular salience to voters in their district/state? To answer this and a host of related questions, we commend searches of front-page city/state newspapers—searches that could be conducted via LEXIS, indexes to the various periodicals, or, for more recent years, the World Wide Web.

We emphasize "seemingly" because, as scholars adopt and adapt our approach to the specific targets of their inquiry, we advise them to exercise caution. Surely, had the *NYT* measure failed on one or more of the tests through which we put it (e.g., the analyses designed to detect content and recency biases), we would have rejected it, deeming it equally as problematic as its predecessors at best and inappropriate at worst. Only after conducting rigorous analyses were we willing to reach any firm conclusions about whether the measure was a satisfactory one. We urge others to put their results through the same battery of tests or one equally suited to their particular indicator.

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