

Explaining the Supreme Court's Shrinking Docket

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EXPLAINING THE SUPREME COURT'S SHRINKING DOCKET

RYAN J. OWENS* & DAVID A. SIMON**

ABSTRACT

In recent years, the United States Supreme Court has decided fewer cases than at any other time in its recent history. Scholars and practitioners alike have criticized the drop in the Court's plenary docket. Some even believe that the Court has reneged on its duty to clarify and unify the law. A host of studies examine potential reasons for the Court's change in docket size, but few rely on an empirical analysis of this change and no study examines the correlation between ideological homogeneity and docket size.

In a comprehensive study, the authors analyze ideological and contextual factors to determine the conditions that are most likely to influence the size of the plenary docket. Drawing on empirical data from every Supreme Court Term between 1940 and 2008, the authors find that both ideological and contextual factors have led to the Court's declining plenary docket. First, a Court composed of Justices who share largely the same world view is likely to hear forty-two more cases per Term than an ideologically fractured Court. Second, internal and external mechanisms, such as membership change and mandatory jurisdiction, are also important. Congress's decision to remove much of the Court's mandatory appellate jurisdiction is associated with the Court deciding roughly fifty-four fewer cases per

* Lyons Family Faculty Scholar & Assistant Professor of Political Science, University of Wisconsin-Madison. We would like to thank Justice David Stras of the Minnesota Supreme Court for his assistance with this Article. Justice Stras provided some of the data and analysis that were later incorporated into this Article with respect to the cert pool and Congress's elimination of most of the Supreme Court's mandatory appellate jurisdiction in 1988. Although he is not a co-author, we thank Justice Stras for his help during the formative, planning stages of this Article.

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Term. In short, the data suggest that ideology and context have led to a Supreme Court that decides fewer cases.

The Court's docket is not likely to increase significantly in the near future. Unless Congress expands the Court's mandatory appellate jurisdiction or the President makes a series of unconstrained nominations to the Court that increase its ideological homogeneity, the size of the Court's docket will remain relatively small compared to the past. Because the Court's case selection process is an important aspect of the development of the law, this Article provides the basis for further normative and empirical evaluations of the Court's plenary docket.

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INTRODUCTION

On April 9, 2010, Justice John Paul Stevens set off fireworks in Washington, D.C. when he informed the White House that he planned to retire during the Court's summer recess. Immediately, scholars and journalists predicted who might succeed him, as well as the political and legal ramifications of the selection. Attention quickly turned to a handful of individuals: Judge Diane P. Wood of the United States Court of Appeals for the Seventh Circuit, Judge Merrick B. Garland of the United States Court of Appeals for the D.C. Circuit, Judge Sidney R. Thomas of the United States Court of Appeals for the Ninth Circuit, Solicitor General Elena Kagan, Department of Homeland Security Secretary Janet Napolitano, and former Georgia Supreme Court Justice Leah Ward Sears.¹ Each of these potential nominees came to the table with a set of unique advantages and disadvantages, to be sure. Commentators, unsurprisingly, debated a series of questions: Would the President nominate from the left? Would he nominate a centrist candidate? Would Senate Republicans filibuster the nominee? Indeed, one news outlet expected to see a "bruising ... confirmation battle" after Senate Republicans signaled they would filibuster any nominee who was "clearly outside the mainstream."²

It is not hard to understand why attention was focused so closely on nominee ideology and Senate filibusters. After all, Presidents spend political capital on Supreme Court nominations primarily for ideological reasons.³ Senators, of course, largely have the same

1. Jake Tapper, *Leah Ward Sears, African-American Woman, on Obama's Short List for High Court*, ABC NEWS (Apr. 12, 2010), http://abcnews.go.com/GMA/Supreme_Court/president-obama-review-nominees-supreme-court/story?id=10347285.

2. *Senators Signal Bruising Confirmation Battle on Supreme Court Nominee*, CNN: POLITICS (Apr. 11, 2010), http://articles.cnn.com/2010-04-11/politics/supreme.court.senate_1-supreme-court-filibuster-activist-court?_s=PM:POLITICS.

3. See, e.g., LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 49-56 (2005); CHRISTINE L. NEMACHECK, *STRATEGIC SELECTION: PRESIDENTIAL NOMINATION OF SUPREME COURT JUSTICES FROM HERBERT HOOVER THROUGH GEORGE W. BUSH* 19-21 (2007); Garland W. Allison, *Delay in Senate Confirmation of Federal Judicial Nominees*, 80 JUDICATURE 8, 10-11 (1996); Sarah A. Binder & Forrest Maltzman, *The Limits of Senatorial Courtesy*, 29 LEGIS. STUD. Q. 5, 14-15 (2004); Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947-1998*, 46 AM. J. POL. SCI. 190, 191 (2002); Charles M. Cameron, Albert D. Cover & Jeffrey A. Segal, *Senate Voting on*

motivations, and sometimes even employ the filibuster for purely political or ideological reasons.⁴ Indeed, during the confirmation of Justice Samuel Alito, Republicans had to invoke cloture to overcome a Democrat filibuster. In short, coming as it did during an election year, on the heels of the highly controversial health care showdown, and during a time when the two major parties were more polarized than ever,⁵ the nomination seemed tailor made for a political battle.

Although the Stevens departure and elevation of Justice Kagan to the Court has come and gone, questions remain—questions that went ignored in the extensive discussion of the nomination. Would the new nominee to the Court spur it to hear more cases? What factors led the Court to hear historically low numbers of cases in recent Terms? And, are there ways to increase the number of cases the Court hears on an annual basis?

The answers to these questions are important for a host of reasons, not least of which is that the Supreme Court's impact on the law is a function of the type and number of cases it hears. When the Court fails to grant certiorari in cases that call for review, it leaves the law unclear.⁶ And, by that standard, legal ambiguity may be

Supreme Court Nominees: A Neoinstitutional Model, 84 AM. POL. SCI. REV. 528 (1990); Lee Epstein, René Lindstädt, Jeffrey A. Segal & Chad Westerland, *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POL. 296, 302-03 (2006); Glen S. Krutz, Richard Fleisher & Jon R. Bond, *From Abe Fortas to Zoë Baird: Why Some Presidential Nominations Fail in the Senate*, 92 AM. POL. SCI. REV. 871, 873-74 (1998); Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069, 1092 (1999); Jeffrey Segal, *Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics*, 49 J. POL. 998, 999-1000 (1987).

4. See generally SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE?: FILIBUSTERING IN THE UNITED STATES SENATE 13-18 (1997); Sarah A. Binder, Anthony J. Madonna & Steven S. Smith, *Going Nuclear, Senate Style*, 5 PERSP. ON POL. 729, 729 (2007); Timothy R. Johnson & Jason M. Roberts, *Pivotal Politics, Presidential Capital, and Supreme Court Nominations*, 32 CONGRESS & THE PRESIDENCY 31, 31-32 (2005); Anthony J. Madonna, *Winning Coalition Formation in the U.S. Senate: The Effects of Legislative Decision Rules and Agenda Change*, 55 AM. J. POL. SCI. 276, 276-77 (2011).

5. See NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 1-3 (2006).

6. See Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1366 (2006).

rampant. The Court decides fewer cases per Term now than at any other time in its modern history.⁷

We examine factors that explain the Court's diminished docket with the hope of determining whether the trend can be reversed. Although existing studies advocate compelling and reasonable theories to explain the Court's shrinking docket,⁸ such commentary overlooks one potentially important feature: ideological heterogeneity on the Supreme Court. Ideology, after all, drives much of Supreme Court decision making. It motivates whether the Justices grant review in cases,⁹ to whom the Chief Justice assigns opinions,¹⁰ whether the Justices bargain and negotiate over the content of opinions,¹¹ Justices' decisions to join final opinion coalitions,¹² and the Court's review of lower court decisions.¹³

Our theory is that ideology, along with internal and external factors, influences the number of cases the Supreme Court decides each Term. That is, we hypothesize that the Court will decide more cases per Term when it is composed of ideologically homogeneous Justices but fewer cases when the Court is ideologically heterogeneous. This explanation for the changing size of the Court's docket, as well as alternative hypotheses of docket change, will be tested empirically in this Article.

7. See *infra* Part I.B (describing the Court's shrinking docket).

8. See *infra* Part I.C (discussing explanations given for the Court's shrinking docket).

9. See, e.g., Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. POL. 1062, 1062-64 (2009); Gregory A. Caldeira, John R. Wright & Christopher J.W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549, 549-50, 553-55 (1999).

10. See FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 29-56 (2000).

11. See James F. Spriggs II, Forrest Maltzman & Paul J. Wahlbeck, *Bargaining on the U.S. Supreme Court: Justices' Responses to Majority Opinion Drafts*, 61 J. POL. 485, 485-86 (1999); Paul J. Wahlbeck, James F. Spriggs II & Forrest Maltzman, *Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court*, 42 AM. J. POL. SCI. 294, 294-95 (1998).

12. See generally MALTZMAN, SPRIGGS & WAHLBECK, *supra* note 10, at 125-48.

13. See Ryan C. Black & Ryan J. Owens, *Consider the Source (and the Message): Supreme Court Justices and Strategic Audits of Lower Court Decisions*, 64 POL. RES. Q. (forthcoming 2012) (manuscript at 1), available at <http://prq.sagepub.com/content/early/2011/01/04/1065912910395324>; Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 101-03 (2000).

So, what can we expect from the Supreme Court in the near future? If our data have anything to say on the matter, the answer is *a small docket in line with today's size*.

Part I introduces the discussion over the Court's docket size. We examine how the Court sets its agenda as well as the descriptive data on the Court's trend over modern times to hear fewer cases. We then summarize existing theories of docket change. Part II highlights the normative concerns over the Court's depleted docket, suggesting that its failure to hear cases unnecessarily leads to confused law, a Court that may be out of touch with pressing legal issues, certain parties wielding disproportionate influence over legal outcomes, and a diminution of the Court's institutional legitimacy. Part III introduces our theory for how ideology matters in the selection of cases and why ideological disagreement on the Court leads to a smaller docket. Part IV discusses our explanatory model. Part V presents the results of the multivariate model. This Article concludes by summarizing our findings and their larger significance. It argues, in part, that unless the political landscape becomes less polarized and results in a less ideologically diverse group of Justices—which is not likely to happen anytime soon—we can expect the Court to continue to decide relatively few cases each year. In short, without a fundamental restructuring of the *political* landscape, the *legal* landscape for the Court, at least in terms of its docket size, is not likely to change significantly.

I. THE COURT'S DEPLETED DOCKET

Today's Supreme Court decides markedly fewer cases than its predecessors. Since the 2005 Term, the Court has decided an average of 80 cases per Term, far fewer than the roughly 200 cases it heard earlier in the twentieth century. Justice Douglas captured this dynamic presciently when he remarked nearly forty years ago: "I think the Court [today] is overstaffed and underworked.... We were much, much busier 25 or 30 years ago than we are today. I really think that today the job does not add up to more than about

four days a week.”¹⁴ In short, we are witnessing the “great disappearing merits docket.”¹⁵

What led to this change and how can we correct it? Attempts to answer these questions have generated many theories. We, of course, have our own. We will get to them in time. First, however, we discuss how the Court establishes its docket. Only by understanding how the Court sets its agenda can we then understand the theories that account for the change in its docket size. As such, this Part begins by explaining how the Court sets its agenda. We then provide descriptive data that highlight just how historically remarkable the Court’s depleted docket is. Afterwards, we summarize existing explanations for this decline.

A. How the Court Chooses to Review Cases

By far, the vast majority of cases the Court hears and decides each Term, at least these days, are cases it elects to hear via the certiorari process. The Court’s process for selecting cases begins when a party in a lower court loses its case and petitions the Supreme Court to review the offending decision. The petitioner who loses his lower court decision will file a petition for certiorari with the clerk of the Supreme Court. Once the petition, or jurisdictional statement in the case of an appeal, is filed, the petition is randomly assigned to one of the law clerks in the cert pool.¹⁶

The cert pool originated in 1972 to reduce the amount of cert petition work done in each Justice’s individual chambers.¹⁷ Justice Powell—and others—observed that forcing each Justice’s clerks to review all cert petitions was inefficient and a poor use of their time—time which could be better spent drafting opinions and bench memos. Accordingly, he and a number of his colleagues pooled

14. ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 119 (2006) (quoting letter from William O. Douglas to Warren E. Burger (July 13, 1972)).

15. Starr, *supra* note 6, at 1366.

16. See WARD & WEIDEN, *supra* note 14, at 125.

17. Prior to its creation, each chamber independently reviewed every petition for cert. *Id.* at 117-18.

together their clerks to make the number of petitions more manageable.¹⁸

The cert pool clerk randomly assigned to the case reads the petition and all relevant materials included with it—such as a response or amicus briefs—and writes a preliminary memo that summarizes the proceedings and legal claims.¹⁹ The clerk concludes with a recommendation for how the Court should treat the petition.²⁰ The pool memo is then distributed to the chambers of the participating Justices.²¹ Relying on the memo and other information, the Chief Justice circulates a list of the petitions he thinks deserve consideration by the Court at its next conference. This master list is called the “discuss list.”²² The Court summarily—without a vote—denies petitions that do not make the discuss list.

At conference, the Justice who placed the case on the list—typically the Chief—leads off discussion of the petition. That Justice then casts an agenda vote—that is, to grant, deny, hold, or call for the views of the Solicitor General. In order of seniority, the remaining Justices do the same. If four or more Justices vote to grant review, the case proceeds to the merits stage.²³ This informal Court rule, which requires at least four Justices to put a case on the

18. *Id.* at 118. When the Court initially created the pool, five Justices joined it: Chief Justice Burger and Justices White, Powell, Rehnquist, and Blackmun. *Id.* at 119. Justices Douglas, Stewart, Brennan, and Marshall elected not to participate. *Id.* From that point on, until Justice Alito opted out of the pool in September 2008, every Justice but Justice Stevens joined the pool when they joined the Court. *Id.* at 125. Justices Sotomayor and Kagan have joined the pool. See Tony Mauro, *Kagan and Sotomayor Dive into the Cert Pool*, NAT'L L.J. (July 27, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202508559050>.

19. WARD & WEIDEN, *supra* note 14, at 125.

20. *Id.*

21. *Id.*

22. *Id.* at 126. Associate Justices may add petitions to the discuss list that they think merit the Court's attention, but no one may remove a petition from the list that a colleague added. It is worth pointing out that prior to 1935, the Court discussed all petitions for review and voted on them. *Id.* at 111. In 1935, Chief Justice Hughes created the “dead list,” also called the “special list.” *Id.* at 113. If the Chief believed a case was patently frivolous, the Chief would put the case on the dead list and, assuming no Justice wanted it taken off and discussed, the case would be denied summarily. *Id.* As the number of petitions filed increased, the Court switched gears and created the discuss list. *Id.* at 115. Cases that failed to make the discuss list were automatically denied review without a vote. It is interesting to note the Court's default position with each method. Under the dead-list approach, all petitions are presumed meritorious. Under the discuss-list approach, all petitions are presumed not to be worthy of cert unless otherwise directed. See *id.* at 112-16.

23. *Id.* at 126.

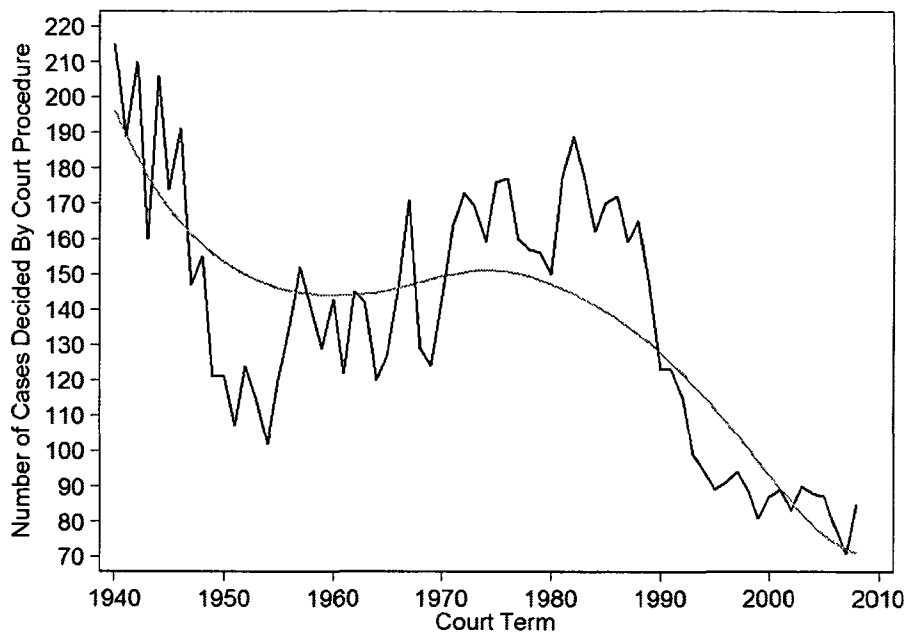
merits docket, is called the “Rule of Four.”²⁴ There are no formal requirements that direct Justices to grant certiorari review. The decision is entirely discretionary to the Court. Supreme Court Rule 10 states simply that the Court is likely to hear cases that involve conflicts among the lower courts, or cases that involve important legal issues.²⁵ All this is to say, then, that the agenda-setting process the Court employs is rife with discretion, allowing Justices to hear more, or fewer, cases as they wish.

B. A Descriptive View of the Court’s Depleted Docket

Indeed, Justices have wished to hear fewer cases. As Figure 1 shows, the contemporary Court decides fewer cases than any Supreme Court in modern times. Figure 1 shows the number of cases decided per Term, from the 1940 Term through the 2008 Term. It shows, unmistakably, that the Court’s docket is shrinking. During the 1940s, the Court decided roughly 177 cases per Term. During the 1950s, that number dropped to approximately 124 per Term. In the 1960s, the number rose to about 137 per Term, and by the middle of the 1980s, the Court heard slightly more cases. Starting in the late 1980s and moving forward into the 1990s, however, that number dropped precipitously. By the 2000 Term, the Court heard only 87 cases.

24. As David O’Brien and others have shown, the Court will grant review to a petition upon at least three grant votes plus one or more “Join-3” votes. *See, e.g.,* David M. O’Brien, *The Rehnquist Court’s Shrinking Plenary Docket*, 81 JUDICATURE 58, 60-63 (1997). A Join-3 vote is like a conditional grant vote; if at least three other Justices vote to grant review to the case, the Join-3 vote is the equivalent of a grant vote. If fewer than three other Justices vote to grant review, the Join-3 is treated as a denial. *Id.* This informal Court procedure is known as the “Rule of Three.”

25. SUP. CT. R. 10. Although there are strong norms compelling Justices to grant review to cases with these legal factors present, Justices need not always follow them. Indeed, legal conflict, although important, is not dispositive. H.W. Perry, for example, highlights a number of Justices who believe that conflict among the circuits is sometimes tolerable and can lead to a hashing out of views, making later Supreme Court review more efficient. H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 246-52 (1991).

Figure 1: Number of Cases Decided by the Court, 1940-2008 Terms²⁶

A closer inspection of the data reveals that, in addition to this remarkable *overall* docket decrease, the Court has decided fewer cases in many of the specific *issue areas* it decides. Consider Figure 2, which lays out the number of cases heard per Term by issue area.²⁷ Examine the most obvious reduction: the number of economics cases decided per Term. During the 1946 Term, the Court

26. Figure 1 includes formally decided full opinion cases, unsigned orally argued cases, and judgments of the Court. The data for 1953-2008 were collected from the 2010 Release 02 dataset of the United States Supreme Court Database. See UNITED STATES SUPREME COURT DATABASE, <http://scdb.wustl.edu> (last visited Feb. 26, 2012). For 1946-1952, the data were collected from the Vinson-Warren Court Database. See VINSON-WARREN COURT DATABASE, <http://www.cas.sc.edu/poli/juri/sct.htm> (last visited Feb 26, 2012). The data for 1940-1945 were collected from Tables 2 through 8 in the *Supreme Court Compendium*, and include the number of cases per Term disposed of by signed opinion and per curiam opinion after oral argument. See LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH, & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM* (3d ed. 2003). The smoothed line depicted in Figure 1 is a loess smoother used to show general trends.

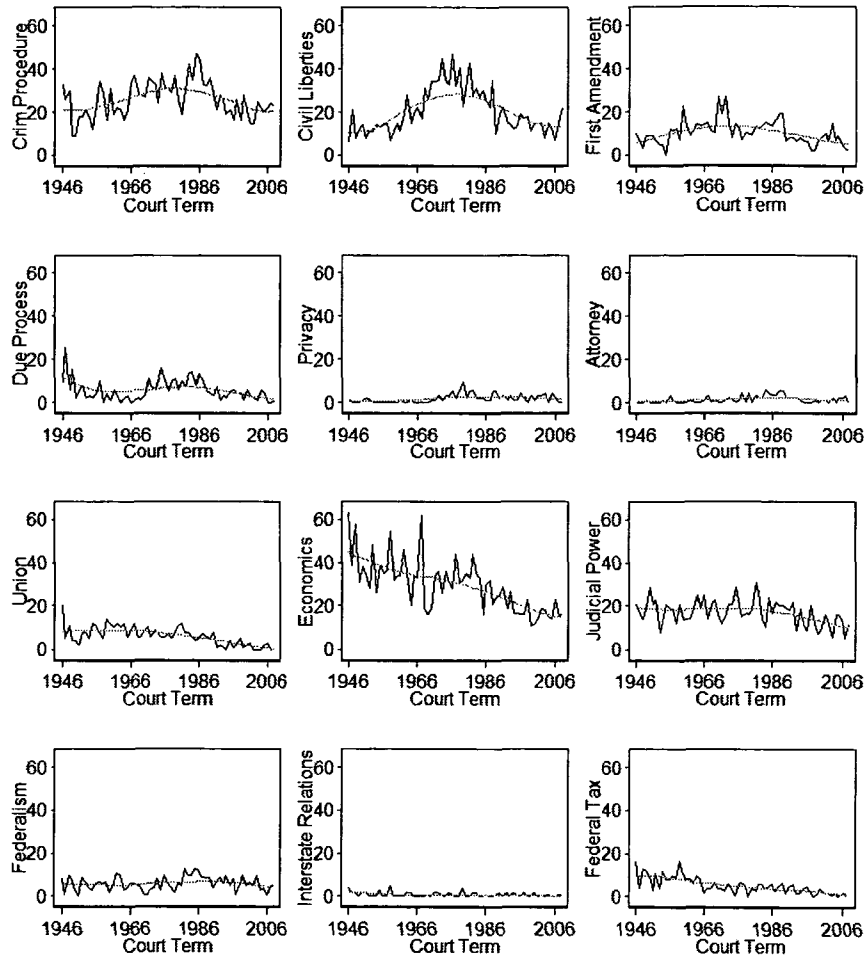
27. We derived these issue areas from the Supreme Court Database. See UNITED STATES SUPREME COURT DATABASE, *supra* note 26.

decided 63 economics cases. During the 2008 Term, however, it decided 17, a 73 percent reduction. Indeed, in the 1999 Term, the Court heard only 11 economics cases. In terms of the Court's overall docket, this shift is seismic.

Of course, economics cases are not the only type of cases the Court now shuns. Tax cases and union cases also fell short of the Court's attention over time. In 1946, the Court decided 16 tax cases. In the 2008 Term, it decided none. A similar pattern emerges when one looks at union cases. In 1946, the Court decided 20 cases dealing with labor unions. By the 2008 Term, however, that number dropped to a meager one case. The drop in these cases is consistently negative and nearly linear.

Other issues, although observing a slight uptick in the 1960s and 1970s, also failed to hold the Court's attention during the 1980s and 1990s. Take, for example, the Court's criminal procedure, civil liberties, and First Amendment cases. During the 1940s, the Court decided roughly 20 criminal procedure cases per Term. Like the Court's overall docket, the number of criminal procedure decisions during the 1960s and 1970s increased slightly, but then dropped thereafter. In the late 1940s, the Court averaged 10 decisions per Term in civil liberties disputes. During the Warren and Burger Courts, this number increased to an average of roughly 30 cases per Term. Yet, like the criminal procedure cases and the Court's overall docket, the number of civil liberties decisions during the Rehnquist and early Roberts Courts decreased such that the current Court hears roughly 10 to 15 civil liberties claims per year. First Amendment decisions reflect a similar trend.

Figure 2: Number of Court Decisions by Issue Area, 1946-2008 Terms²⁸



Although the raw number of all decided cases decreased, some issue areas fell out of the Court's favor more than others. Figure 3

28. Figure 2 displays the number of cases decided by the Court per Term and per issue from 1946 to 2008. See *supra* note 26 for an explanation of how the data were collected. The category entitled "Miscellaneous" was omitted from Figure 2.

shows that, as a percentage of the Court's overall docket, economics cases clearly dropped off while criminal procedure and civil liberties cases took on a larger role. During the early years of our sample, roughly 35 percent of the Court's docket consisted of economics cases. Over time, that percentage decreased to roughly 20 percent. In the 1981 Term, just under 10 percent of the Court's docket consisted of economics cases. Despite a slight uptick in recent years, the percentage of cases dealing with economics is a shadow of what it once was. Gone are the days when the Court rendered frequent decisions regarding business and regulation. And, unless recent economic and health care legislation passed by Congress makes an extensive and consistent mark on the Court's docket, we can safely say that today's Court, at least for the time being, is more interested in other issues.

Instead, the Court has shifted its focus to criminal procedure and civil liberties cases. In 1966, when the Court decided *Miranda v. Arizona*,²⁹ criminal procedure cases represented 17 percent of the Court's docket. When the Court affirmed *Miranda* in *Dickerson v. United States*,³⁰ criminal procedure cases represented 35 percent of the Court's docket. The Court's attention also has turned to civil liberties disputes. When the Court decided that Herman Sweatt must be admitted to the School of Law of the University of Texas in *Sweatt v. Painter*,³¹ just under 10 percent of the Court's docket consisted of civil liberties cases. Fifty-three years later, when the Court decided *Grutter v. Bollinger*,³² 19 percent of its cases involved civil liberties. By the 2008 Term, that number reached 26 percent.

Clearly, the current Court is one that appears least interested in business and economic cases and feels most at home setting law on criminal and civil liberties matters. We cannot be sure just what to make of this. But what is certain is that the Court's attention to some issues has wavered more than others and, overall, the modern Court has changed dramatically the number and types of cases it hears.

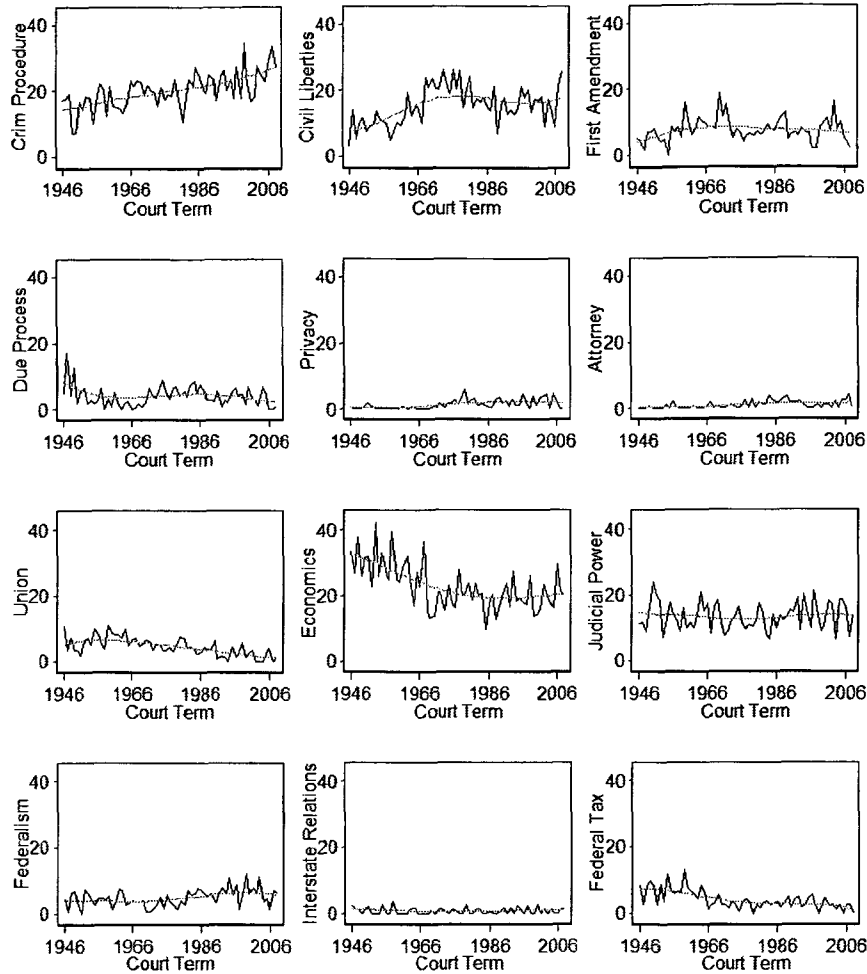
29. 384 U.S. 436 (1966).

30. 530 U.S. 428 (2000).

31. 339 U.S. 629, 636 (1950).

32. 539 U.S. 306 (2003).

Figure 3: Percent of Cases on the Docket by Issue Area, 1946-2008 Terms³³



33. Figure 3 displays the percentage of cases decided by Court per Term and per issue from 1946 to 2008. See *supra* note 26 for an explanation of how the data were collected.

But *why* has the Court decided fewer cases? What features led the Court to muzzle the number of decisions it produced? On this score there are a host of explanations. We summarize them below.

C. Existing Explanations for the Court's Depleted Docket

The question of why the Court hears fewer and fewer cases has produced no shortage of explanations. Generally, these explanations fall into one of three categories: (1) internal mechanisms and Court composition, (2) external mechanisms, and (3) the judicial hierarchy.

1. Internal Mechanisms and Court Composition

To begin with, features internal to the Court may influence how many cases the Court hears. By internal factors, we mean those over which Justices largely have direct control. Like many institutions, the Supreme Court observes a set of rules that govern its practices and procedures, and which might influence the Court's docket size.³⁴ At the same time, *who* sits on the Court can influence the agenda it sets. These two factors—internal procedural mechanisms and Court composition—may influence the size of its plenary docket.

The Court's informal rules and norms may have led to its depleted docket. Its informal rules govern such things as the norm against issue creation,³⁵ the norm of seniority,³⁶ and, most importantly for purposes of this paper, the conditions under which the Court is most likely to grant a writ of certiorari to a petition for

34. See generally RULES OF THE SUPREME COURT OF THE UNITED STATES (2010), available at <http://www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf>. It should be noted that, although these rules are categorized as "internal mechanisms," they regulate "external mechanisms." Rule 10, for example, is an internal mechanism because it states the conditions under which the Court is likely to grant review. SUP. CT. R. 10. But whether those conditions are present—whether, for example, a circuit split occurs—is an external mechanism over which the Court cannot exercise control.

35. See Lee Epstein, Jeffrey A. Segal & Timothy Johnson, *The Claim of Issue Creation on the U.S. Supreme Court*, 90 AM. POL. SCI. REV. 845, 845 (1996). Others have shown more generally that law clerks can influence Supreme Court behavior. See, e.g., Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making 29* (June 14, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=925705>.

36. MALTZMAN, SPRIGGS & WAHLBECK, *supra* note 10, at 5.

review.³⁷ In that vein, some scholars have argued that two informal mechanisms—the cert pool and the “Rule of Three”—either by themselves or in combination with Court membership, have influenced the Court’s docket size.

The cert pool, as stated above, was generated as a time-saving mechanism for the Justices’ chambers as they filter out the “cert-worthy” petitions from the frivolous ones.³⁸ As many argue, though, there are tremendous pressures on law clerks in the cert pool to recommend that the Court deny review to a petition; clerks fear mistakenly recommending the Court grant review on cases that could make themselves, the Justice for whom they clerk, or the Court look foolish.³⁹ Scholars, former clerks, and even Justices themselves wonder whether the cert pool creates an incentive for law clerks to recommend denials and, thus, may have led to the depleted merits docket. Kenneth Starr, for example, contends that the cert pool has led to a depleted docket.⁴⁰ He suggests that to avoid personal and institutional embarrassment, clerks in the pool try to find as many reasons as possible to deny a petition.⁴¹

Others believe the evidence may support Starr’s contention, as the decrease in the plenary docket ostensibly has coincided with the rise of the cert pool.⁴² Justice Stevens, for one, agrees with Starr’s hypothesis: “You stick your neck out as a clerk when you recommend to grant a case. The risk-averse thing to do is to recommend not to take a case. I think it accounts for the lessening of the docket.”⁴³

Former clerks also allude to this dynamic. Laura Ingraham, once a clerk for Justice Thomas, stated: “You’re in perpetual fear of making a mistake.”⁴⁴ Other clerks attribute their reluctance to a culture of restraint. One remarked that his practice was to “find

37. See SUP. CT. R. 10(a)-(c) (explaining the types of situations in which the Court is likely to grant cert, and noting that the Court “rarely grant[s] [cert] when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law”).

38. See *supra* notes 17-18 and accompanying text.

39. See, e.g., WARD & WEIDEN, *supra* note 14, at 144.

40. Starr has argued that the cert pool has negatively impacted the Court’s review process by giving too much discretion to young, inexperienced lawyers. Starr, *supra* note 6, at 1366.

41. *Id.* at 1376.

42. E.g., WARD & WEIDEN, *supra* note 14, at 143.

43. *Id.* at 144.

44. *Id.* at 129.

every possible reason to deny cert. petitions.”⁴⁵ Part of this was institutional: “[T]here is ... the rule that anything that is avoidable should be avoided.”⁴⁶ One clerk described this rule as an “enormous pressure not to take a case” and “an institutionalized inertia not to grant cert.”⁴⁷ Because the Court treats most cases as fungible, that is, having the same value, clerks believe that “it really [does not] matter if the Court ma[kes] a mistake in not taking a case.” To them, “[i]t is better to let [the case] have a little extra time, because if we [do not] grant cert, the [issue] will come up again.”⁴⁸

Moving away from anecdotal accounts, other scholars, such as David Stras, use empirics to argue that the cert pool may have contributed to the docket’s decline. In his study of the cert pool, Stras examined cert pool memoranda and compared them to the Court’s certiorari decisions.⁴⁹ He found that when the cert pool recommended the Court grant cert, the Court did so between 70 and 75 percent of the time.⁵⁰ He also found a strong positive correlation between the number of grant recommendations and the number of plenary decisions.⁵¹ In other words, when the cert pool recommends the Court grant cert, the Court’s decision to grant is strongly influenced by that recommendation. This is important in explaining the plenary docket’s decline because the cert pool “is considerably more stingy in making grant recommendations than is the Court in its decisions to grant plenary review.”⁵²

Given the correlation between the cert pool and the Court’s decision to grant cert, fewer recommendations from the cert pool may help explain the docket’s decline. Although Stras cautions that the “extent of that relationship is unclear,”⁵³ he has examined and rejected several other factors that may explain the decline including:

45. PERRY, *supra* note 25, at 218.

46. *Id.*

47. *Id.*

48. *Id.* at 221.

49. David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 977 (2007). Specifically, Stras examined every pool memo from October Terms 1984, 1985, 1991, and 1992. *Id.*

50. *Id.* at 979-80.

51. *Id.* at 987. Specifically, Stras found “[t]he Pearson correlation coefficient between those two variables ... [to be] .998 at a statistical significance level greater than .01.” *Id.*

52. *Id.* at 972.

53. *Id.* at 995.

a decline in the number of cert-worthy opinions, a decline in the quality of cert petitions, and changes in personnel on the court.⁵⁴ In other words, Stras's study supports the idea that the cert pool's recommendations influence the Court's ultimate decision to grant or deny cert.⁵⁵

Other scholars writing before Stras's study are less enthusiastic about the cert pool's ability to explain the decline. Margaret and Richard Cordray argue that "the cert pool has not had much systematic influence on the votes cast by individual Justices to grant or deny plenary review."⁵⁶ They claim this is the case for two reasons.⁵⁷ First, the Justices' differing levels of attention to cert petitions "does not correlate with their participation in the pool."⁵⁸ In other words, one Justice may examine petitions more closely than another Justice, but participation in the pool does not explain this behavior. Second, variation exists in the Justices' voting patterns *within* the cert pool.⁵⁹ Justices who participate in the cert pool vote to grant or deny cert at different rates. The Cordrays argue, therefore, that the cert pool does not influence the size of the plenary docket.

54. *Id.* at 987-90. Despite the strong relationship, the data leave room for independent judgment of the Justices. Nevertheless, the data still support the hypothesis that some meaningful relationship exists between the recommendations of the cert pool and the final decisions of the Justices. *Id.* at 994-95 ("To be sure, a 30% disagreement rate in that category does demonstrate that the Justices exercise some independent judgment in making their decisions about whether to grant certiorari. However, the approximately 99% agreement in all cases and the nearly 70% agreement in granted cases also reveal that the recommendations of the cert pool are indeed related to the final decisions of the Justices on petitions for certiorari." (citations omitted)).

55. *Id.* at 996-97. He also found that the level of agreement on decisions to deny cert between the Justices and the cert pool has increased over time; specifically, rates of agreement increased when more Justices joined the cert pool. *Id.* at 992. The data suggested that the rate of agreement has remained constant with respect to "hard" cases that the Court grants. *Id.* at 994.

56. Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 791 (2001).

57. *Id.*

58. *Id.*

59. *Id.* at 791-92. This explanation, however, is not entirely convincing. If it influences the Justices, the cert pool may result in differing grant rates for those inside and outside the pool. Nevertheless, it probably would not result in uniform voting patterns among the Justices. Where the data are available, it would instead cause the Justices' rates to decline relative to their pre-cert pool rates.

David O'Brien, too, suggests that no concrete evidence shows the cert pool influenced the plenary docket.⁶⁰ By drawing attention to more cases, he argues that the cert pool could have influenced the docket's size in either direction. On the one hand, greater attention to detail could have highlighted circuit splits, "which after further scrutiny are deemed 'tolerable' or in need of 'percolation.'"⁶¹ But just that kind of "highlighting" also could have caused some Justices to grant cert to settle such circuit divisions.⁶² He also notes "there is no evidence that justices not in the cert pool give more attention to petitions than those in the pool."⁶³ Put simply, O'Brien does not think there is concrete evidence showing the cert pool influences the Court's docket.⁶⁴

How, then, do the Cordrays and O'Brien explain the decline? In their view, the primary factor influencing the decline is the Court's composition.⁶⁵ They are not alone in this view. Preliminary support for this hypothesis comes from Arthur Hellman and others. Hellman contends that the Court's membership, and the Justices' views of the Court's role in deciding cases, explain the decrease in the plenary docket.⁶⁶ Justices who joined the Court in the late 1980s and 1990s, he argues, held a different view of the Court than their predecessors.⁶⁷ Specifically, they believed that "a relatively small number of nationally binding precedents is sufficient to provide doctrinal guidance for the resolution of recurring issues."⁶⁸ Thus, he argues that the view held by the new Justices influenced the decline in the Court's docket.⁶⁹

60. O'Brien, *supra* note 24, at 64; David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779, 801-02 (1997) [hereinafter O'Brien, *Shrinking Plenary Docket*].

61. O'Brien, *supra* note 24, at 64; *see also* O'Brien, *Shrinking Plenary Docket*, *supra* note 60, at 802.

62. O'Brien, *supra* note 24, at 63; O'Brien, *Shrinking Plenary Docket*, *supra* note 60, at 802.

63. O'Brien, *supra* note 24, at 63.

64. *See* O'Brien, *Shrinking Plenary Docket*, *supra* note 60, at 802-03.

65. Cordray & Cordray, *supra* note 56, at 41; O'Brien, *supra* note 24, at 58.

66. Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 429-30.

67. *Id.* at 430.

68. *Id.* at 430-31.

69. *See id.* at 431-32.

Like Hellman, O'Brien and the Cordrays look to Court membership to explain the decline.⁷⁰ The nature of their explanations, however, differs in subtle ways. O'Brien's argument, for instance, is more attuned than the Cordrays to the interaction between membership and internal mechanisms.⁷¹ Specifically, O'Brien examines how Court composition and the Rule of Three work in tandem to influence the plenary docket.⁷² The Court's Rule of Four holds that when four Justices agree to grant cert, the Court grants plenary review to the case and sets it on the merits docket for oral argument.⁷³ The Rule of Three, however, allows a Justice to cast a Join-3 vote that will be counted as a vote to grant cert if at least three other Justices vote to grant.⁷⁴ If fewer than three other Justices vote to grant cert, the Join-3 vote is counted as one to deny.⁷⁵ O'Brien contends that the Rule of Three, when combined with Court membership, can help explain the decline. When the Court lowered the bar and allowed a Join-3 vote, plus three grant votes, to trigger review, it created an initial spike in plenary review:⁷⁶ with a lower threshold for review, the Court could grant cert more easily and more frequently.⁷⁷ This lowered bar, perhaps combined with the desire of Chief Justice Burger to fill the newly expanded oral

70. See sources cited *supra* note 65.

71. See O'Brien, *supra* note 24, at 63.

72. *Id.* As noted above, O'Brien is skeptical about the cert pool's impact on the declining docket, though he does not rule it out entirely. See *supra* note 64 and accompanying text. He notes that shortly after its adoption, for example, the cert pool may have increased the number of grants because younger Justices deferred to older Justices not participating in the cert pool. See O'Brien, *supra* note 24, at 63. Later, though, with more Justices participating in it, the cert pool's collectivity diminished the salience of circuit splits or other important issues needing attention. See *id.* at 63-64. As we explained above, O'Brien could not make a definitive conclusion about how the cert pool worked to influence the docket. Thus, without further evidence, the data forced him to conclude that the cert pool, when combined with court membership, influenced the docket's decline. See *id.* at 64.

73. See *supra* note 24 and accompanying text.

74. O'Brien, *supra* note 24, at 60; Ryan C. Black & Ryan J. Owens, Join-3 Votes and Supreme Court Agenda Setting 2 n.4 (June 8, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1568389>.

75. O'Brien, *supra* note 24, at 60.

76. O'Brien, *Shrinking Plenary Docket*, *supra* note 60, at 798 ("Join-3 votes clearly lowered the threshold for granting cases and contributed to the inflation of the plenary docket."). The plenary docket initially increased when Warren Burger took office. See, e.g., Arthur D. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1709, 1734 (1978).

77. See O'Brien, *supra* note 24, at 60.

argument calendar, may have resulted in the jump in cases heard by the Court.⁷⁸

The spike gave way to a drop in the 1980s, which O'Brien argues resulted in part from the Court's changing composition. Justice Antonin Scalia and Justice Anthony Kennedy, for example, joined the Court after Chief Justice Burger and Justice Powell retired. This was significant because Justices Scalia and Kennedy would end up casting fewer Join-3 votes than their predecessors.⁷⁹ O'Brien notes that the docket continued to decline as Justices with a penchant for Join-3 votes—Justices Brennan, Marshall, White, and Blackmun—retired, making the docket look as though it shrank precipitously.⁸⁰ In this way, the Rule of Three interacted with the changes in Court membership to push down the size of the plenary docket.

Although discounting the Rule of Three,⁸¹ the Cordrays also argue that the Court's membership has influenced the decline of the plenary docket.⁸² Their study examined grant rates of Justices from the Burger Court and their later replacements.⁸³ Like O'Brien, the

78. *Id.* at 61.

79. *Id.* at 62-63.

80. *Id.*

81. The Cordrays do note that the Rule of Three may have led "Justices with less definite views on particular cases to opt for [the Rule of Three] ... rather than voting to deny," or, alternatively, "toward voting to grant" review. Cordray & Cordray, *supra* note 56, at 780. Nevertheless, they conclude that "there is no necessary correlation between frequent use of the Join-3 vote and a high overall grant rate." *Id.* Their data show that Join-3 votes were not a reliable indicator of Justices' willingness to grant review. *Id.* at 780-81.

82. *Id.* at 776. The Cordrays also examined a variety of other potential factors to explain the decline. These include Congress's elimination of the Court's mandatory jurisdiction, fewer filings in certain subject areas, and the federal government seeking review less frequently. *Id.* at 751-71. The decline in government review requests was the only factor that the Cordrays found persuasive. *Id.* They also explored how greater homogeneity among the lower courts may have influenced the docket. *Id.* at 771-76. They argued that the data suggest realignment of lower courts "toward more 'pro-government' results—i.e., 'statist realignment'—[which] has led the Solicitor General to seek review less often in civil cases, with a corresponding decline in such cases granted." *Id.* at 773. The Cordrays are quick to note that a pro-government alignment of the lower courts will influence grant rates only if that stance accords with the Supreme Court's ideological position. *Id.* at 774-75. It is for this reason that they study and point to Court membership as the primary explanation for the docket's decline.

83. *Id.* at 781-82. Specifically, the Cordrays looked at data on actual votes cast. *Id.* at 781. They used data on every Justice from the Burger Court era. *Id.* at 781-82. For the Rehnquist Court, they counted "conference votes from Justice Marshall's docket books, which cover the ensuing years until his retirement after the 1990 Term." *Id.* at 782.

Cordrays point to the appointments of Justices Kennedy and Scalia, who “settled into abnegating roles in the discretionary review process, voting to grant review less often than any other Justice.”⁸⁴ The elevation of Justices Scalia and Kennedy had a tremendous effect on the Court’s docket, “almost erasing the complement of votes cast by an average Justice for plenary review in a given Term.”⁸⁵ Although Justice Rehnquist was an exception to this hypothesis—he changed his voting patterns on his own⁸⁶—the influence of the new Justices was substantial. The Cordrays argue that nearly all of the later appointments—Justice Souter (replacing Justice Brennan), Justice Ginsburg (replacing Justice White), and Justice Breyer (replacing Justice Blackmun)—influenced the size of the docket.⁸⁷ Based on the Justices’ grant rates, they argue that “the Court’s personnel changes over this decade were a substantial independent cause of the remarkable decline in its docket.”⁸⁸

David Stras, although positing the influence of the cert pool,⁸⁹ also found that the Court’s membership influenced its docket size.⁹⁰ Stras studied the rates at which Justices voted to grant certiorari.⁹¹ Like the Cordrays and O’Brien, Stras found that during the docket’s decline, newly appointed Justices voted to grant certiorari less frequently than the Justices whom they replaced.⁹²

84. *Id.* at 785.

85. *Id.*

86. *Id.* (noting that, during the replacements of Justices Burger and Powell, Justice Rehnquist’s total votes for plenary review went “from keeping pace with Justice White in an aggressively pro-review first tier on the Court ... to ... eventually relinquish[ing] ... second place to Justice Blackmun,” and arguing that this abrupt shift “seems to be directly linked to Justice Rehnquist’s perception of his new and distinct role as the Chief Justice”).

87. *Id.* at 786-89.

88. *Id.* at 790. The Cordrays also argue that the federal government’s rate of victory influenced the Court’s docket; with more government victories in lower courts, the necessity for review by a pro-government Court diminished. *Id.* at 775 & n.201, 794.

89. David R. Stras, *The Supreme Court’s Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151 (2010).

90. *Id.* at 152.

91. *Id.* at 155-57.

92. *Id.* at 157-58. Stras offers specific examples:

First, Justice Souter, who voted to grant plenary review an average of 83 times per Term from 1990 to 1993, replaced Justice Brennan, who voted to grant plenary review an average of 129.25 times per Term from 1986 to 1989. Second, Justice Thomas, who voted to grant plenary review an average of only 71.7 times per Term from 1991 to 1993, replaced Justice Marshall, who voted to grant

Why might that be? One obvious answer is that the new Justices held different views about when the Court should hear a case on the merits. Another answer is that changes in membership affected the voting patterns of *existing* Justices.⁹³ Likely it was both. In emphasizing the Court's turnover as a factor in the declining docket, Stras pays close attention to Justice White,⁹⁴ who had a well-known view that the Supreme Court should resolve as many circuit splits as possible.⁹⁵ In keeping with the dynamic effect of the Justices' voting patterns on one another, Justice John Paul Stevens claims that Justice White was not only outspoken but persuasive; a "significant number of ... [drafts of Justice White's] dissent[s] from denial of certiorari remained unpublished[] because [they] actually persuaded one or more of Justice White's colleagues to change a vote from a 'deny' to a 'grant.'"⁹⁶

Stras notes that "the substitution of Justice Ginsburg for Justice White likely had a transformative effect on the size of the plenary docket."⁹⁷ Part of this, it seems, was unavoidable, given how

plenary review an average of 124.6 times per Term from 1986 to 1991. Finally and most significantly, the substitution of Justice Ginsburg for Justice White likely had a transformative effect on the size of the plenary docket. Justice White voted to grant plenary review a prodigious 215.6 times per Term, on average, between 1986 and 1992, or 67% more often than Justice Brennan, who voted to grant plenary review the second most often of any member of the court during the period. Meanwhile, consistent with her scholarly writings urging the Court to exercise self-control in managing the size of its plenary docket, Justice Ginsburg voted to grant plenary review during the October 1993 Term only 63 times, or 29.2% as often as her predecessor.

Id. (footnotes omitted).

93. O'Brien notes that dissenting from a denial of cert is a strategic behavior. O'Brien, *Shrinking Plenary Docket*, *supra* note 60, at 794. That is, dissents from denial are designed to be tools of persuasion—attempts to prod Justices to reconsider their votes to deny. *Id.*

94. Stras, *supra* note 89, at 157-58. He also paid close attention to Justice Souter (replacing Justice Brennan) and Justice Thomas (replacing Justice Marshall). *Id.* at 157. Combined with Justice Ginsburg's replacement of Justice White, Stras found that by 1993, these "three membership changes alone had accounted for an average reduction in favor of plenary review." *Id.* at 158.

95. *Id.* at 155.

96. John Paul Stevens, "Cheers!" *A Tribute to Justice Byron R. White*, 1994 BYU L. REV. 209, 217.

97. Stras, *supra* note 89, at 157. Kevin Scott also has found that Justice White's view of the Court's role influenced the size of the plenary docket. Kevin M. Scott, *Shaping the Supreme Court's Federal Certiorari Docket*, 27 JUST. SYS. J. 191, 203 (2006) ("[T]he positive effect on the Court's workload of the shared tenure of Justices White and Blackmun is quite substantial, increasing the size of the Court's docket by 19.43 cases each Term; their shared

faithfully Justice White practiced his philosophy. “Justice White voted to grant plenary review a prodigious 215.6 times per Term, on average, between 1986 and 1992, or 67% more often than Justice Brennan, who voted to grant plenary review the second most often of any member of the Court during the period.”⁹⁸ The other part was a result of Justice White’s replacement, “Justice Ginsburg[, who] voted to grant plenary review during the October 1993 Term only 63 times, or 29.2% as often as her predecessor.”⁹⁹ Based on this data, Stras argues that Court membership—Justice White’s in particular—contributed to the declining docket.¹⁰⁰

Membership change is, of course, an intuitively pleasing hypothesis, as some Justices simply have different normative conceptions of the certiorari process and, more specifically, the Court’s role in legal development. Because the certiorari process is the gateway to a final decision, it is reasonable to assume that Justices with one perspective of the Court’s role in legal development will view the docket in a different light than Justices with another, perhaps competing, perspective. In short, Court membership—and the views of Justices—matters, and might explain the depleted docket.

2. *External Mechanisms*

Mechanisms external to the Court also influence how it sets its agenda and, thus, its docket size. By external mechanisms, we mean those factors that the Court itself cannot control—namely, its jurisdiction. Although the Justices ultimately control the cert process, external factors—the Constitution, federal statutes, and, ultimately, Congress—control its jurisdictional limits.

On several occasions, Congress has altered the Supreme Court’s jurisdiction, which, in turn, has affected the Court’s docket. The Judiciary Act of 1891 was Congress’s first attempt to ease the burden of the Court’s workload. That Act created the United States Courts of Appeals and carved out a small discretionary docket for

impact was even greater than previously imagined.”).

98. Stras, *supra* note 89, at 157.

99. *Id.* at 158.

100. *Id.* at 157-58.

the Supreme Court.¹⁰¹ When it later enacted the Judiciary Act of 1925, Congress once again limited the Court's mandatory jurisdiction and expanded its discretionary docket.¹⁰² And, most recently in 1988, Congress passed legislation that removed virtually all of the Court's mandatory jurisdiction, leaving Justices free to select the cases they wished to hear.¹⁰³ Some have argued that this 1988 Act led quickly to the Court's depleted docket.¹⁰⁴

Indeed, there is at least anecdotal evidence to believe that the Justices themselves viewed the 1988 Act as a tool to decrease their workload. For example, in the years leading up to passage of the Act, Chief Justice Burger drew attention to the Court's increased workload.¹⁰⁵ When Congress debated the 1988 Act, Justices wrote a letter to Senator Robert Kastenmeier¹⁰⁶ complaining that their mandatory jurisdiction consumed too much of their time.¹⁰⁷ Their solution was to remove the mandatory jurisdiction under which the Court chafed.¹⁰⁸

Naturally, scholars eager to test this hypothesis examined the Court's docket size before and since the Act's passage. Yet the results thus far have not supported the hypothesis that the removal of mandatory jurisdiction led to the diminished docket. Arthur Hellman's study, for example, suggests that the Act was not a

101. Judiciary Act of 1891, ch. 517, 26 Stat. 826. For a brief summary of the 1891 Act, see *History of the Federal Judiciary: Landmark Judicial Legislation*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/landmark_12.html (last visited Feb. 26, 2012).

102. Judiciary Act of 1925, ch. 229, 43 Stat. 936, 937.

103. Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662 (codified at 28 U.S.C. §§ 1254, 1257-58, 2104 (1994)).

104. See, e.g., Hellman, *supra* note 66, at 409.

105. Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 685-86 (1984) (citing Warren Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442 (1983)).

106. Senator Kastenmeier, along with eighteen other cosponsors, introduced the Act in bill form in the House. *Id.* at 685 n.4.

107. *Id.* at 687 & n.18. That was not the first time the Court claimed it was overburdened. Similar motives drove Congress to enact the aforementioned 1925 Act. Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 390 & n.5 (2004) (quoting Chief Justice William Taft in a 1924 letter to Senator Copeland in which Taft lobbied for greater discretionary jurisdiction).

108. Hellman, *supra* note 66, at 409 (quoting Justice Anthony M. Kennedy); *id.* at 410 (quoting Justice Antonin Scalia, who predicted a decline in the Court's Commerce Clause cases after the 1988 Act).

causal factor.¹⁰⁹ Hellman notes that the 1988 Act repealed mandatory jurisdiction in civil cases but did not affect criminal jurisdiction.¹¹⁰ Thus, Hellman expected a “more pronounced [reduction] on the civil side than in criminal prosecutions.”¹¹¹ His data did not support such an inference, however. There was a universal reduction of civil *and* criminal cases during the time period he studied.¹¹² As a result, Hellman argues the 1988 Act did not substantially affect the Court’s plenary docket.¹¹³

The Cordrays, too, dismiss the 1988 Act’s role in reducing the Court’s plenary docket.¹¹⁴ They examined and compared two sets of cases: the number of appeals given plenary review in the four Terms *before* the 1988 Act and the number of cases granted cert that would have formerly had a right of appeal in the four Terms *after* the 1988 Act.¹¹⁵ The Cordrays found that “[t]he reduction in these cases as compared to the remainder of the Court’s discretionary docket was ... quite modest, amounting to only one or two cases per Term.”¹¹⁶ They conclude, therefore, that the 1988 Act did not influence the size of the Court’s docket.¹¹⁷

3. *Principal-Agent Theory*

A third general explanation for the Court’s shrinking docket turns on principal-agent theory, focusing primarily on the ideological distance between the Supreme Court and lower courts. Some, for example, have argued that this ideological distance is precisely the reason the Supreme Court granted cert less often during the

109. *Id.* at 409-10.

110. *See id.* at 410.

111. *Id.*

112. *Id.*

113. *Id.* at 412.

114. Cordray & Cordray, *supra* note 56, at 758.

115. *Id.* at 755.

116. *Id.* at 757. Other external mechanisms have also received scholarly treatment, such as the number of cases filed in specific areas and the growth of the Supreme Court bar. *See id.* at 758-63; Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1510-21 (2008) (postulating that the Supreme Court bar could have influenced the docket by using its expertise to persuade clerks that cases are not worthy of cert and by raising the standard of argument by which cert decisions were made).

117. Cordray & Cordray, *supra* note 56, at 758.

Reagan-Bush years than in the preceding years.¹¹⁸ In the Reagan-Bush era, conservative jurists dominated the Supreme Court and lower federal courts.¹¹⁹ Lower tribunals largely shared Justices' ideological beliefs and, thus, could be trusted to vote just as the Supreme Court would have voted had it heard the case.¹²⁰ This ideological alignment meant the Supreme Court had less need to audit the lower courts.¹²¹ In this vein, Justice Souter once hypothesized that the Court's decreased caseload was a function of "a diminished level of philosophical division within the federal courts from which so much of the conflicting opinions tend to arise."¹²²

This outlook recognizes that the Supreme Court sits atop a judicial hierarchy, which means that the behavior of those tribunals beneath it might influence how extensively it must supervise them. To examine this relationship, scholars have employed principal-agent theory. Although criticized by some,¹²³ principal-agent theory is a useful theoretical tool to explain the conditions under which the Supreme Court reviews lower court decisions.

Principal-agent theory argues that an actor, the principal, will enter into a relationship with another, the agent, in the pursuit of a goal.¹²⁴ "The primary reason for [creating a principal-agent relationship] is that the agent has an advantage in terms of expertise or information."¹²⁵ Thus, to pursue his goals more effectively, the principal engages the services of the agent. Yet, the principal must solve two problems. First, the principal lacks information as to whether the agent will perform as sought—the adverse selection problem.¹²⁶ Second, once hired, the agent may in fact engage in

118. See, e.g., *id.* at 771.

119. *Id.*

120. *Id.*

121. *Id.*

122. Shannon Duffy, *Inside the Highest Court: Souter Describes Justices' Relationship, Caseload Trend*, PA. L. WKLY., Apr. 17, 1995, at 28.

123. See, e.g., Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535, 552-61 (2011) (criticizing the blanket application of simple principal-agent theory to the relationship between the Supreme Court and appellate courts).

124. See Gary J. Miller & Andrew B. Whitford, *Trust and Incentives in Principal-Agent Negotiations: The Insurance/Incentive Trade-Off*, 14 J. THEORETICAL POL. 231, 233-39 (2002); Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 756 (1984).

125. Gary J. Miller, *Solutions to Principal-Agent Models in Firms*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 349, 349 (Claude Ménard & Mary M. Shirley eds., 2005).

126. See Moe, *supra* note 124, at 756-57.

behavior the principal dislikes—the shirking problem.¹²⁷ Indeed, the agent may act orthogonally to the stated goals of the principal. To mitigate against these problems, principals must, among other acts, set up oversight mechanisms to gauge the quality of the agent's work.¹²⁸

Scholars have described the relationship between the Supreme Court and lower federal courts in principal-agent terms.¹²⁹ Applying this theory, the Supreme Court acts as the principal and the lower courts act as the Supreme Court's agents. As the philosophical division between the lower federal courts and the Supreme Court grows, the more often the Court must grant plenary review to audit those lower courts.¹³⁰ Thus, as the lower courts and Supreme Court

127. See Susan B. Haire, Stefanie A. Lindquist & Donald R. Songer, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC'Y REV. 143, 146 (2003).

128. For interesting examples of principal-agent analysis applied to Congress's relationship with the executive bureaucracy, see Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165-69 (1984); Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal-Agent Perspective (with Applications to the SEC)*, 44 PUB. CHOICE 147, 151-58 (1984); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 768-70 (1983). But see Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance'*, 12 LEGIS. STUD. Q. 475, 477-90 (1987).

129. See, e.g., Cameron, Segal & Songer, *supra* note 13, at 101, 101-03, 114-15; Tracey E. George & Albert H. Yoon, *The Federal Court System: A Principal-Agent Perspective*, 47 ST. LOUIS U. L.J. 819, 825-31 (2003); Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 175, 188 (2001); Haire, Lindquist & Songer, *supra* note 127, at 146-50; Stefanie A. Lindquist, Susan B. Haire & Donald R. Songer, *Supreme Court Auditing of the US Courts of Appeals: An Organizational Perspective*, 17 J. PUB. ADMIN. RES. & THEORY 607, 610-11, 619-22 (2007); see also Scott, *supra* note 97, at 192-94, 201-02 (finding a weak and insubstantial relationship between the ideological distance separating the Supreme Court and courts of appeals, and finding no evidence that lower court heterogeneity increases the Supreme Court's workload); Tajuana Massie, *Precedent or Ideology? Exploring the Influence of the U.S. Supreme Court on Decision-Making by the U.S. Courts of Appeals 29* (Sept. 2-5, 2004) (unpublished paper presented at the annual meeting of the Am. Pol. Sci. Ass'n), available at http://www.allacademic.com/meta/p60457_index.html; Kevin M. Scott, *An Exploration of the Motivations of Court of Appeals Justices 2* (Apr. 3-6, 2003) (unpublished paper presented at the annual meeting of the Midwest Political Sci. Ass'n), available at <http://www.kevinmccott.com/ScottAPSA2003.pdf>.

130. This is distinct from the concept of pure lower-court homogeneity—sometimes called “philosophical realignment”—which asserts that the Court's docket fell because of fewer disagreements among lower courts. See, e.g., Cordray & Cordray, *supra* note 56, at 771; Scott, *supra* note 97, at 193-94 (noting the difference between ideological distance and lower-court

become more ideologically congruent, the Supreme Court's need to audit lower courts decreases.

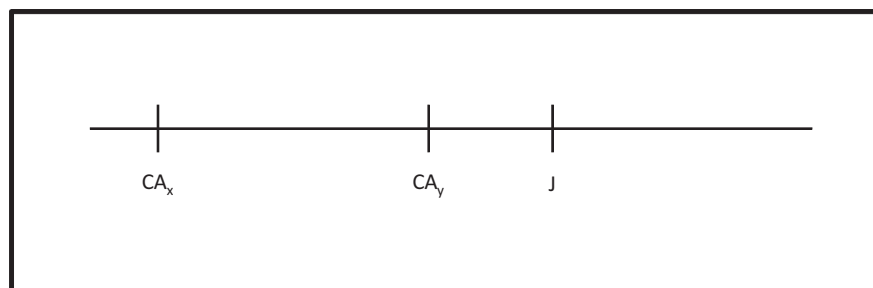
Figure 4 represents the principal-agent argument using a spatial model. The model represents the ideal point of the median Justice on the Supreme Court (J) as well as the preferences of the pivotal members of two hypothetical circuits (CA_x and CA_y).¹³¹ The vertical ticks on the line reflect the policies each pivotal actor prefers to all others in the policy space. As the distance between the Supreme Court and a circuit grows, the Supreme Court becomes more likely to disagree with the lower court and, concurrently, more likely to review that court's decisions. Thus, because the Supreme Court and CA_x disagree ideologically, the Supreme Court will be forced to audit the lower court more frequently to ensure that it complies with Court policy. Conversely, the Supreme Court will be forced to review CA_y less frequently, as that court shares the same general views as the Supreme Court.¹³²

heterogeneity). Philosophical realignment and principal-agent theory may be related. A Supreme Court that frequently audits the behavior of lower courts—or that gives broad and stern rulings—can stimulate greater philosophical realignment.

131. An actor's ideal point is the point in policy space that she prefers to all others. In the model here, we assume that all actors have continuous, single-peaked, symmetric preferences on a unidimensional policy scale. We also assume that they prefer policy that is closest to their ideal points. All actors know each others' preferences. Because the actors' preferences are categorized fully by the model, they will choose equilibrium voting strategies. See generally Ryan J. Owens, *The Separation of Powers and Supreme Court Agenda Setting*, 54 AM. J. POL. SCI. 412, 412-17 (2010).

132. Figure 4 represents the ideological distance between the Supreme Court (J) and two hypothetical courts of appeals (CA_x and CA_y).

Figure 4: Spatial Representation of Ideological Distance Between Circuit Courts of Appeals and Supreme Court¹³³



Existing empirical scholarship uses principal-agent theory to explain the Supreme Court's decision to review lower court decisions. For example, Charles Cameron, Jeffrey Segal, and Donald Songer examined how the Court uses signals and indices to determine which cases to review and, more specifically, whether the Court will follow a lower court's decision to admit evidence in a criminal case.¹³⁴ When a lower court renders a decision that accords with Supreme Court ideology in a case, Cameron and his colleagues found that the Supreme Court need not rely on indices to determine whether to review because the signal—here, admitting the evidence—mirrors the Court's own goals.¹³⁵ Conversely, when the lower court makes a decision that the Supreme Court dislikes—that is, it sends a signal of which the Court is skeptical—Justices will rely on other indices to verify the lower court's signal.¹³⁶ In sum, when the reviewing court has reason to question the lower court, it will become more likely to audit that court.

Similarly, Ryan Black and Ryan Owens argue that when determining which cases to review, Supreme Court Justices rely on both the identity of lower court judges and the ideological disposition of the lower court decision.¹³⁷ The authors examined a random sample

133. This figure represents the ideological distance between the Supreme Court (J) and two hypothetical circuit courts of appeals (CA_x and CA_y).

134. Cameron, Segal & Songer, *supra* note 13, at 103-08 (explaining theoretical model and hypotheses).

135. *Id.* at 112-13.

136. *Id.*

137. See Black & Owens, *supra* note 13 (manuscript at 1).

of 358 agenda-setting petitions decided across the first eight Terms of the Rehnquist Court (from 1986 to 1993), using private archival data culled from the papers of former Justice Harry A. Blackmun.¹³⁸ Their results show that Supreme Court Justices are most likely to audit ideologically incongruent lower court decisions rendered by ideological foes, and are least likely to audit ideologically congruent decisions rendered by lower court allies.¹³⁹ At the same time, and perhaps more importantly, Justices are more likely to review ideologically incongruent lower court decisions made by ideological foes than those rendered by lower court allies.¹⁴⁰ Overall, then, they find that lower court ideological congruence with the Supreme Court influenced whether the Court granted review.¹⁴¹

Other studies likewise employ principal-agent theory to explain why the Supreme Court reviews cases.¹⁴² Susan Haire, Stefanie Lindquist, and Donald Songer describe a three-tiered principal-agent system. One tier is composed of the Supreme Court and federal courts of appeals.¹⁴³ The second tier is composed of the circuit courts and federal district courts.¹⁴⁴ The third tier is composed of the Supreme Court and the district courts.¹⁴⁵ The authors investigated these relationships, as well as the Supreme Court's role in mediat-

138. *Id.* Blackmun's docket sheets are housed by Lee Epstein, Jeffrey A. Segal, and Harold J. Spaeth. See DIGITAL ARCHIVE OF THE PAPERS OF HARRY A. BLACKMUN, <http://epstein.law.northwestern.edu/blackmun.php?p=0> (last visited Feb. 26, 2012).

139. See Black & Owens, *supra* note 13 (manuscript at 8) (finding these results generally and when comparing liberal and conservative Justices facing a potential review of liberal or conservative panels).

140. *Id.* To be sure, not all scholars believe the principal-agent analysis explains docket shifts. The Cordrays, for example, see judicial realignment as explaining only government litigation. Cordray & Cordray, *supra* note 56, at 771-76 (arguing that judicial realignment should be doubted because there are still numerous circuit splits, and because the philosophical alignment of the courts did not shift when a Democratic president took office and made new judicial appointments).

141. Black & Owens, *supra* note 13 (manuscript at 8).

142. See, e.g., Haire, Lindquist & Songer, *supra* note 127, at 144-50; see also Hellman, *supra* note 76, at 1757-58 (explaining that, among other factors, lower court judges can influence the number of cases for which the Supreme Court grants cert, thereby implying a principal-agent relationship between them); Scott, *supra* note 129 (manuscript at 18-20) (testing both Justice ideology and ideological distance between the Supreme Court and appellate courts, finding that Justices' ideologies are the strongest predictors of granting cert, and asserting that further research into alternative explanations is necessary).

143. Haire, Lindquist & Songer, *supra* note 127, at 146-47.

144. *Id.* at 147.

145. *Id.* at 147-48.

ing the relationship between the district and circuit courts.¹⁴⁶ Their results confirm that the federal system functions in an integrated fashion. As Supreme Court scrutiny of a circuit court increases, that circuit court is more likely to audit lower district courts.¹⁴⁷ At the same time, circuit courts attempt to serve both their own policy preferences¹⁴⁸ and those of the Supreme Court.¹⁴⁹

Despite the empirical scholarship showing that ideological considerations motivate Justices' decisions to grant or deny review of cases,¹⁵⁰ it is unclear whether ideological homogeneity between the Supreme Court and lower federal courts led to a decrease in the Court's docket. Scholars still must test whether Justice Souter's hypothesis is correct.

II. WHY CARE ABOUT A DIMINISHED DOCKET?

So far, we have explained how the Court sets its agenda.¹⁵¹ We presented evidence to show that the Court hears fewer cases these days than any other time in modern history.¹⁵² We also delineated a variety of scholarly explanations for that dynamic¹⁵³—explanations that we will examine empirically. For now, however, we seek to highlight why it all matters. Should we care that the Supreme Court grants certiorari less frequently than ever before? Should policymakers and legal actors cast a skeptical glance towards the Court's minimal docket? Should the Court's depleted docket receive serious attention? Quite clearly, yes.

We argue that policymakers and the legal community should care about the Court's docket size for at least four reasons.¹⁵⁴ First, a

146. *Id.* at 147-50, 154-55.

147. *Id.* at 161.

148. The authors found that district court judges who were ideologically close to the circuit court were less likely to be reversed. *Id.* at 159.

149. Additionally, the circuit courts were more likely to affirm when the district court's policy was consistent with the Supreme Court, and the level of attention the Supreme Court gave a circuit also affected the interactions between the district and circuit courts. *Id.* at 161.

150. See Black & Owens, *supra* note 13 (manuscript at 6).

151. See *supra* Part I.A.

152. See *supra* Part I.B.

153. See *supra* Part I.C.

154. To be sure, some argue that we should not care because a smaller docket is unproblematic or will simply resolve itself. See, e.g., J. Harvie Wilkinson III, *If It Ain't Broke ...*, 119 YALE L.J. ONLINE 67 (2010), <http://yalelawjournal.org/2010/01/07/wilkinson.html>. Others, such

Court that hears few cases leaves important legal questions on the table. This can increase uncertainty among the lower court judges who must apply the law and parties who must operate within its confines. Second, a smaller docket can lead to a Supreme Court out of touch with the major legal issues of the day. Third, a small docket may put the Court in a position to be “captured” by certain interests or actors. And, finally, a small docket might cause public opinion to turn against the Court, leading to a loss of legitimacy for the institution whose strongest reservoir of power is legitimacy.

A. A Depleted Docket Risks Leaving Important Cases Undecided

Justice White viewed the Supreme Court as the unifier of law. He believed that the Court should resolve as many circuit splits as possible and unify the law.¹⁵⁵ If we subscribe to Justice White’s philosophy—that important cases, especially those that evince conflict among the lower courts, must be reviewed by the Court—the declining docket poses a clear and significant problem. According to this perspective, a depleted docket is normatively bad because it likely means that the Court is resolving fewer circuit splits. Justice White was not alone. Chief Justice Rehnquist, whose tendency to grant cert admittedly fell during his tenure,¹⁵⁶ also believed that the law needed clarification and unification. He thought that cases

as Sanford Levinson, have suggested that we cannot answer the question in a straightforward manner; the question is contingent on our conception of the Court’s role. Sanford Levinson, *Assessing the Supreme Court’s Current Caseload: A Question of Law or Politics?*, 119 YALE L.J. ONLINE 99 (2010), available at <http://yalelawjournal.org/2010/02/01/levinson.html>. In that vein, Hellman postulated four functions of the Supreme Court: “The Court delineates the limits of governmental authority as against claims of individual liberty; it marks the boundaries between state and national power; it interprets and clarifies the vast body of federal statutory and common law; and it supervises the operation of the federal courts.” Hellman, *supra* note 76, at 1716. Professor Paul Freund and others, when contemplating whether the size of the Supreme Court’s docket warranted a national court of appeals, described three roles of the Supreme Court: “to define and vindicate the rights guaranteed by the Constitution, to assure the uniformity of federal law, and to maintain the constitutional distribution of powers in our federal union.” FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, 57 F.R.D. 573, 578 (1972). It is helpful to bear in mind these conceptions of the Court when examining the importance of the Supreme Court’s declining docket.

155. See *supra* notes 94-95 and accompanying text.

156. See *supra* note 86 and accompanying text.

should be resolved, not stewed until tender: “[T]o ... suggest that it is actually desirable to allow important questions of federal law to ‘percolate’ in the lower courts for a few years before the Supreme Court takes them on seems to me a very strange suggestion; at best it is making a virtue of necessity.”¹⁵⁷ Chief Justice Rehnquist was concerned with the need to decide *national law*.¹⁵⁸ He did not endorse the idea of percolation: “We are not engaged in a scientific experiment or in an effort to square the circle.”¹⁵⁹ The Court’s role was not, as he saw it, to allow uncertainty in hopes of achieving the “best” outcome. It was instead, among other things, a unifier of national law—and that was the reason he advocated some twenty-five years ago for the creation of something like a national court of appeals.¹⁶⁰ To him, it was preposterous that *one* federal statute could produce *two* rules “simply because” two circuit courts disagreed on its meaning.¹⁶¹ In supporting a national court of appeals, Chief Justice Rehnquist wished to avoid forcing the Court to choose between its “active role in constitutional adjudication and its active role in statutory adjudication.”¹⁶² He believed that the Court should decide more cases, but recognized that, logistically, it could not. A smaller docket meant uncertainty in the law, and, without certainty, the law does not serve one of its main purposes: to demarcate the boundaries within which people can act legally and without retribution.¹⁶³

To be sure, concern over the Court’s docket size may depend on how one perceives the Court’s role. Justice Brennan, for example, thought that part of the Court’s role was “to define the rights

157. William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11 (1986). For a response, see Arthur Hellman, *Preserving the Essential Role of the Supreme Court: A Comment on Justice Rehnquist’s Proposal*, 14 FLA. ST. U. L. REV. 15 (1986).

158. See Rehnquist, *supra* note 157, at 12 (“In short, we need ... more national decision-making capacity than the Supreme Court as presently constituted can furnish.”).

159. *Id.* at 11.

160. See *id.* at 12.

161. *Id.* (“Congress should not be held to have laid down one rule in North Carolina and another rule in North Dakota simply because the Court of Appeals for the Fourth Circuit and the Court of Appeals for the Eighth Circuit disagree with one another on the meaning of a federal statute.”).

162. *Id.* at 14.

163. See generally Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (explaining the predictive role of the law).

guaranteed by the Constitution.”¹⁶⁴ He believed the Court’s ability to do this increased as the number of cases it decided increased. When the Court hears and decides more cases, he argued, it clarifies—and probably expands—the meaning of important constitutional principles. As such, rights are enhanced, as is the power of the Court.

Even if one believes, alternatively, that the Court should take a more passive role, a small docket nevertheless might diminish the Court’s importance. A small docket could afford the Court less opportunity to put its stamp of approval on actions taken by the elected branches. What is more, hearing few cases could put the Court’s importance on the line. The Court arguably gains institutional importance by hearing and deciding cases. And as the number of cases on which it renders judgments declines, the Court’s importance in policymaking could drift toward irrelevance. Finally, as the Court’s caseload declines, the potential effect of each decision increases. On its own, this is not necessarily a problem. Yet if the Court miscalculates in these cases, the effects of the error could be greater than an erroneous decision among numerous other correct decisions. In short, the smaller the denominator, the larger the marginal effects of wrongly decided cases.

Whatever the appropriate role for the Court, fewer cases could minimize the Court’s effectiveness and leave important legal issues on the table.

B. A Depleted Docket May Leave the Court Out of Touch

Not only does a depleted docket leave important issues unresolved, it also can lead to an out-of-touch Court. Indeed, some argue that this is exactly what has happened. Frederick Schauer, for example, argues that the Court simply does not have enough—or sufficiently accurate—information about the cases it chooses to hear, leaving it with less certainty over the effect of those decisions.¹⁶⁵ The fewer cases the Court decides, the more pronounced

164. Cordray & Cordray, *supra* note 107, at 394 (quoting William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 482 (1973)).

165. See Frederick Schauer, *Is It Important to Be Important?: Evaluating the Supreme Court’s Case-Selection Process*, 119 YALE L.J. ONLINE 77, 78-79 (2009), <http://yalelawjournal>.

these selection effects become—and the greater risk of error in *not* deciding a case.¹⁶⁶ To place Schauer's argument within this Article: the smaller the docket, the more likely that the Court will fail to decide an important case and, when it does decide a case, it could decide the wrong issue.

Arthur Hellman raises a related concern. His concern is not necessarily about insufficient legal guidance to lower courts but, rather, about the idiosyncratic nature of the Court's decisions.¹⁶⁷ Lower courts decide a variety of cases and apply the same rules in a variety of contexts. The Supreme Court, by contrast, decides fewer issues, operates less frequently, and applies fewer rules in fewer factual contexts. Hellman thinks this is cause for concern. Deciding only "isolated cases at long intervals" leads to Justices who make decisions under conditions of uncertainty.¹⁶⁸ At the same time, Hellman argues, the potential for the Court to skew the law or strain its relationships with lower courts increases as its merits docket drops. The fewer opinions it issues, the more likely that the effects of idiosyncratic or skewed decisions will be felt by judges, lawyers, and laypeople.¹⁶⁹

Less work for the Supreme Court is not commensurate with fewer decision errors. Indeed, without the proper information, the Court may make a critical mistake by *not* hearing a case. And the fact remains that, for a variety of reasons, the Court lacks perfect or even accurate information about the variety of cases it reviews for

org/2009/12/09/schauer.html ("[The Court] has decided no cases determining the authority of a President to commit troops to combat outside of the United States, whether in Afghanistan, Iraq, Kosovo, or anywhere else. And although, of course, the Supreme Court's structural and procedural decisions will have an indirect impact on the substance of policy, the Court has not directly decided cases involving health care policy, federal bailouts of banks and automobile manufacturers, climate change, the minimum wage, and the optimal rate of immigration. And nothing the Court has decided for years is even in the neighborhood of addressing questions involving mortgage defaults, executive compensation, interest rates, Israel and Palestine, the nuclear capabilities of Iran and North Korea, gasoline prices, and the creation of new jobs.").

166. As Schauer puts it: "[T]here can be errors of inaction as well as of action, and ... it is an error to engage in a process of institutional design without taking into account the likelihood and harm of errors of mistaken inaction along with those of mistaken action." *Id.* at 85.

167. Hellman, *supra* note 66, at 435.

168. *Id.*

169. *Id.* at 436.

cert.¹⁷⁰ Additionally, this lack of information can result in idiosyncratic decisions, which can skew the law and rupture relationships with lower courts. When the Court hears fewer cases, it exacerbates these problems.

C. A Depleted Docket Might Lead to the Excessive Influence of Certain Parties or Interests

In addition to unsettled law and a hampered Court, a small docket may lead to the excessive influence of certain parties or interests. Scholars often complain that organized interests exert too much control in politics and upon the Court.¹⁷¹ Copyright law scholars, for example, lament how Disney single-handedly induced Congress to extend copyright protection by twenty years.¹⁷² In administrative law, special interest groups often “capture” agencies in areas ranging from gun regulation¹⁷³ to aviation rules¹⁷⁴ to copyright policy.¹⁷⁵

170. See *supra* note 165 and accompanying text.

171. For an overview of the influence of organized interests on the Court, see PAUL M. COLLINS, *FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING* 17 (2008); Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782, 802 (1990); Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1111 (1988) [hereinafter Caldeira & Wright, *Organized Interests*]; Thomas G. Hansford, *Information Provision, Organizational Constraints, and the Decision to Submit an Amicus Curiae Brief in a U.S. Supreme Court Case*, 57 POL. RES. Q. 219, 226 (2004); Kevin T. McGuire & Gregory A. Caldeira, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court*, 87 AM. POL. SCI. REV. 717, 724 (1993); Ryan J. Owens & Lee Epstein, *Amici Curiae During the Rehnquist Years*, 89 JUDICATURE 127, 128 (2005).

172. See, e.g., LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 217-18 (2006).

173. See, e.g., Timothy Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1253 (2000).

174. See, e.g., Mark C. Niles, *On the Hijacking of Agencies (and Airplanes): The Federal Aviation Administration, “Agency Capture,” and Airline Security*, 10 AM. U. J. GENDER SOC. POL’Y & L. 381, 384 (2002).

175. See JESSICA LITMAN, *DIGITAL COPYRIGHT* 27 (2001); see also David A. Simon, *Teaching Without Infringement: A New Model for Educational Fair Use*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 453, 528 (2010).

Recently, Richard Lazarus highlighted the potential capture of the Supreme Court. He argued that the Supreme Court bar—a highly specialized and powerful group of attorneys—substantially influences the Court’s decision to grant or deny cert.¹⁷⁶ To show this, Lazarus studied cert petition grant rates from 1980 to 2008. Specifically, he examined the rate at which the Court granted cert when “expert Supreme Court advocate[s]”¹⁷⁷ sought review.¹⁷⁸ He found that, over the years, expert practitioners continually gained influence over the Court’s docket.¹⁷⁹ In 1980, for example, the Court granted cert in 5.8 percent of cases brought by expert practitioners.¹⁸⁰ By 2007 and 2008, that rate had increased to 53.8 percent and 55.5 percent, respectively.¹⁸¹

This capture, Lazarus fears, skews the Court’s docket toward issues that are not “truly the most important for the nation.”¹⁸² Instead, the cases that the Court hears reflect the preferences of a small cadre of lawyers and their clients.¹⁸³ The Justices and their clerks cannot pay close attention to the thousands of cert petitions filed each year.¹⁸⁴ What constitutes an information deficit for the Justices, then, becomes a “tactical advantage” for the Supreme Court bar.¹⁸⁵ They have the reputation, forum, and experience to

176. Richard J. Lazarus, *Docket Capture at the High Court*, 119 YALE L.J. ONLINE 89, 90 (2009), <http://yalelawjournal.org/2010/01/24/lazarus.html>; Lazarus, *supra* note 116, at 1509-10 (explaining the rise of the Supreme Court bar and also suggesting several ways in which it could have contributed to the docket’s decline); *see also* Hellman, *supra* note 76, at 1757-58 (noting that interest groups have become more involved in litigating cases that raise policy issues rather than litigating cases for an individual client, and noting that civil rights cases in the early 1970s were brought by way of defense, but by 1978 most were brought by individuals affirmatively claiming that the government violated their rights).

177. He defines “expert Supreme Court advocate” as “an attorney [who] either has to have presented at least five oral arguments before the Court or be affiliated with a practice whose current members have argued at least ten cases.” Lazarus, *supra* note 176, at 90.

178. Lazarus notes that he excluded from consideration those cases in which the Solicitor General was a petitioner. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* Levinson’s aforementioned claim—that our worry is contingent—applies here. *See supra* note 154. Lazarus thinks that the Court’s job is to decide only the really important issues. Someone like Justice White would disagree.

183. Lazarus, *supra* note 176, at 91-92.

184. *Id.* at 93.

185. *Id.* at 94.

argue persuasively that *their* cases are the ones the Court should hear.

Lazarus is not alone; additional empirical evidence drives home the point that elite attorneys can influence Justices. Consider the work of Kevin McGuire, who examined the success of Washington, D.C. attorneys.¹⁸⁶ McGuire found that Washington, D.C.-based attorneys are much more likely than non-Washington attorneys to succeed before the Court.¹⁸⁷ In a similar work, McGuire found that attorneys who are more experienced than their opposing counsel are more likely to win their cases.¹⁸⁸ Although there are a host of factors that lead to their victories—such as the incentive to provide more credible information and the ability to key in on the Justices' individual proclivities—the unmistakable fact is that elite attorneys observe more victories before the Court and, thus, are in a position to exert heightened influence over Justices.¹⁸⁹ When the Court's docket is small, the proportion of influence these attorneys exert over federal law grows dramatically.

Of course, no attorney can compare to attorneys in the Office of the Solicitor General (OSG) in terms of influencing the Court. A smaller Court docket surely, then, promises to increase the influence of the executive branch. Consider recent work by Ryan Black and Ryan Owens.¹⁹⁰ The authors examined every case coming from a federal court of appeals in which the OSG filed an amicus curiae brief at the agenda stage between the 1970 and 1993 Terms.¹⁹¹ They analyzed each Justice's general ideological views as well as his or her theoretically expected agenda vote in the case.¹⁹² They then examined whether each Justice cast a vote consistent with the

186. See generally Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505 (1998); Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187 (1995) [hereinafter McGuire, *Repeat Players*]; Kevin T. McGuire, *Lawyers and the U.S. Supreme Court: The Washington Community and Legal Elites*, 37 AM. J. POL. SCI. 365 (1993) [hereinafter McGuire, *The Washington Community*].

187. McGuire, *The Washington Community*, *supra* note 186, at 386-87.

188. McGuire, *Repeat Players*, *supra* note 186, at 193-94.

189. See *id.* at 187-88.

190. See Ryan C. Black & Ryan J. Owens, *Solicitor General Influence and Agenda Setting on the United States Supreme Court*, 64 POL. RES. Q. 765 (2011).

191. *Id.* at 769.

192. *Id.*

recommended action of the OSG.¹⁹³ The findings are remarkable. Even those Justices most likely to disagree with the OSG—both in a general ideological sense and in the particulars of the case before them—still followed the OSG's recommendation more than 35 percent of the time.¹⁹⁴ Put in more personal terms, the results demonstrated that Justice Thurgood Marshall, a staunch liberal, followed a recommendation made by President Reagan's Solicitor General Rex Lee thirty-five times out of one hundred, even when Marshall totally disagreed with the OSG recommendation in the case. That Justices followed OSG recommendations to such a degree even when they had so little agreement with the OSG provided, the authors believed, strong evidence of OSG influence.¹⁹⁵

Additional work on the OSG suggests that the executive branch might disproportionately benefit from a smaller docket. In a forthcoming book by Black and Owens,¹⁹⁶ the authors use cutting-edge matching methods to find evidence of OSG influence. The authors compare the success of OSG attorneys with the success of attorneys who formerly worked in the OSG, and with the success of attorneys who never worked in the OSG.¹⁹⁷ They matched observations such that OSG attorneys and non-OSG attorneys were as identical as possible in terms of experience, resources, amicus assistance, and other factors.¹⁹⁸ The goal was to ensure that the two different groups of attorneys were identical, save for the fact that in one set of cases, the OSG argued before the Court, whereas in the other set of cases a non-OSG attorney argued before the Court.

The results are compelling. In terms of success before the Court, an OSG attorney is 12 percent more likely to win than an otherwise identical non-OSG attorney who formerly worked in the OSG, and 14 percent more likely to win than an otherwise identical non-OSG attorney who never worked in the OSG.¹⁹⁹ Moreover, the Court's

193. *Id.*

194. *Id.* at 766.

195. *Id.*

196. See generally RYAN C. BLACK & RYAN J. OWENS, *THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS* (Cambridge University Press) (forthcoming April 2012).

197. *Id.*

198. *Id.*

199. *Id.*

majority opinions are significantly more likely to borrow language from the OSG's briefs than from otherwise identical non-OSG attorney's briefs.²⁰⁰ Finally, the Court is much more likely to positively or negatively interpret precedent when the OSG makes such a recommendation versus an identical case in which it does not.²⁰¹ In short, the OSG wields considerable influence across the Court's decision-making process. Such influence, we believe, will be magnified exponentially with a depleted docket.

D. A Smaller Docket May Diminish the Court's Legitimacy

Finally, a depleted docket could lead the public to believe that the Court does not work sufficiently hard or is not sufficiently fair, and thereby diminish the Court's legitimacy. The number and type of cases the Court decides can shape the public's perception of the Court.²⁰² As Justice Brennan put it: "The choice of issues for decision largely determines the image that the American people have of their Supreme Court."²⁰³ When the Court fails to hear a case, it may change how Americans view the judiciary. In other words, what cases the Court decides to hear—and not hear—is important in terms of perception and, ultimately, legitimacy.

What is more, a smaller docket amplifies the effects of its decisions. This is important because unpopular decisions by the Court can "erode the institution's political capital."²⁰⁴ One may question—as James Gibson, Gregory Caldeira, and Lester Spence have questioned²⁰⁵—the risk of such erosion considering the Court

200. *Id.*

201. *Id.*

202. *Id.*

203. Brennan, *supra* note 164, at 483.

204. James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 357 (2003) (citing Anke Grosskopf & Jeffrey Mondak, *Do Attitudes Toward Specific Supreme Court Decisions Matter?: The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court*, 51 POL. RES. Q. 633, 634 (1998)).

205. *Id.* at 359. Specifically, they questioned the purity of their dependent variable and data. *Id.* at 357. They note that "[i]f the half-life of reactions to individual decisions is short ... then these reactions to an unpopular decision are of little consequence for institutions." *Id.* But if "the rate of decay is slow, then" the Court cannot issue too many within a short time frame. *Id.* They found that, even when people keep an institutional tally of decisions, the individual decisions themselves do not have much influence on loyalty toward the Court. *Id.*

enjoys “widespread approval” and strong legitimacy among the public.²⁰⁶ Although Gibson and his colleagues argue that individual rulings are unlikely to deplete the Court’s “reservoir of good will,”²⁰⁷ they acknowledge that “sustained policy disagreement can undermine legitimacy.”²⁰⁸ That is, if the Court continually issues decisions that conflict with Americans’ policy preferences, the Court’s legitimacy may falter. Thus, the number of cases the Court hears each Term could influence Americans’ currently strong commitment to the Supreme Court:²⁰⁹ as the number of cases decided shrinks, the Court’s diachronic margin for error diminishes. If one holds the number of “erroneous” decisions constant but allows the denominator—the size of the Court’s docket—to decrease, the relative effects of the erroneous decisions become more pronounced. Because the Court hears fewer cases, decisions that clash with public opinion can harm the Court’s legitimacy to a greater degree than when it hears a larger number of cases. In other words, to maintain legitimacy, the Court’s decisions must clash with the public view less often than when it hears a greater number of cases.

Of course, even if one holds constant the percentage of “erroneous” decisions per term, a smaller docket could *still* be more harmful to the Court’s legitimacy. This is because each decided case has greater influence; thus, the percentage needed to maintain legitimacy is now different from when it heard more cases. The Court might have to render fewer erroneous decisions with a smaller docket just to retain the same amount of legitimacy it enjoyed with a larger docket. To be sure, these are empirical questions that deserve to be tested. Theoretically, however, the arguments against a small docket make intuitive sense.

Legitimacy alone, however, may not tell the whole story. Tom Tyler and Kenneth Rasinski argue that the Supreme Court’s perceived legitimacy is linked to the perceived fairness of its internal

at 364.

206. *Id.* at 359.

207. *Id.* at 365.

208. *Id.*

209. As of 2003, the public seemed firmly committed to the Supreme Court. *Id.* at 358 (finding relatively high loyalty to the Supreme Court, in particular that “over four of five Americans assert that it would *not* be better to do away with the Court, even if there were fairly widespread displeasure with its decisions”).

decision-making procedures, or its procedural justice.²¹⁰ The authors examined various survey responses to questions about Supreme Court decisions.²¹¹ They tested the hypothesis that procedural justice indirectly influences behavior—namely, whether people will break the law.²¹² Although the authors found no significant relationship between procedural justice and acceptance of Court decisions, they did find that procedural justice has “a very strong influence” on perceived institutional legitimacy.²¹³ Based on these results, they contend that the Supreme Court’s legitimacy depends indirectly on “the belief that it makes decisions in fair ways, not on agreement with its decisions.”²¹⁴

Because decisions influence whether the public perceives the Court as legitimate, a smaller docket has the potential to catalyze the erosion of the Court’s legitimacy. That is important because people are more likely to follow a legitimate Court.²¹⁵ We suggest

210. Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC’Y REV. 621, 626 (1991); see also Vanessa A. Baird, *Building Institutional Legitimacy: The Role of Procedural Justice*, 54 POL. RES. Q. 333, 351 (2001) (finding that in Germany a legalistic model engendered the legitimacy of court decisions). *But see* James L. Gibson, *Institutional Legitimacy, Procedural Justice, and Compliance with Supreme Court Decisions: A Question of Causality*, 25 LAW & SOC’Y REV. 631 (1991) (replying to Tyler and Rasinski); James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC’Y REV. 469, 483-86 (1989) [hereinafter Gibson, *Understandings of Justice*] (finding that individuals’ perceptions of fairness within an institution have no effect on their willingness to accept the decision as final and binding); Jeffery J. Mondak, *Institutional Legitimacy and Procedural Justice: Reexamining the Question of Causality*, 27 LAW & SOC’Y REV. 599, 607 (1993) (finding no support for the idea that perceptions of procedural fairness affect perceptions of institutional legitimacy). Using a diagram, Mondak best summarizes the difference of opinion between Tyler and Rasinski on the one hand, and Gibson on the other. Mondak, *supra*, at 600 fig.1. The difference between them is the direction of the causal arrow: Gibson perceives legitimacy as influencing perceptions of procedural fairness, whereas Tyler and Rasinski perceive perceptions of procedural fairness as influencing legitimacy. *Id.*

211. Tyler & Rasinski, *supra* note 210, at 623-24.

212. *Id.* at 623.

213. *Id.* at 626.

214. *Id.* at 626-27.

215. Gibson, *Understandings of Justice*, *supra* note 210, at 489 (“Those who are supportive of the Court are significantly more likely to comply with its decisions even when they are disagreeable.”); see also Gibson, Caldeira & Spence, *supra* note 204, at 362 (noting that 77.7 percent of respondents with “hardly any confidence” still expressed willingness to “obey a Court decision even when they disagreed with it”).

that this consequence is another reason to be concerned about the declining docket.

III. THEORIZING CHANGE IN THE COURT'S DOCKET SIZE

Until now, we have focused our attention on descriptive and normative matters. We showed that over the last sixty-eight years the Court's plenary docket has decreased precipitously.²¹⁶ We then outlined the different theories offered by scholars to explain this decline.²¹⁷ Finally, we explored why the decline in the Court's plenary docket matters.²¹⁸ In the next Parts, we move from description to explanation. Building on existing work, we offer and empirically test our own theory for the change in the size of the Court's plenary docket—a theory rooted largely in literature on the ideological motivations of Supreme Court Justices and contextual features that channel their behavior.

We seek to discover why the Court's docket has changed over time. Our primary focus rests on the ideological composition of the Justices serving on the Court. Our main hypothesis is that as Justices become more polarized ideologically, they will decide fewer cases, and, conversely, as they become more homogeneous, they will decide more cases. We explain our rationale for this theory in Part III.A below. At the same time, we believe—in line with existing work²¹⁹—that other contextual factors may be critically important and simultaneously explain docket change over time. Chief among these contextual factors are the Supreme Court Case Selections Act of 1988, the creation of the cert pool, the Court's relationship with the circuit courts of appeals, and membership change on the Court.

A. Ideological Dispersion and Docket Size

In this Part, we explain our main theoretical assertion: ideological dispersion influences the Court's docket size. A host of recent studies provide strong evidence that Justices' decisions often turn

216. *See supra* Part I.B.

217. *See supra* Part I.C.

218. *See supra* Part II.

219. *See supra* Part I.C.

on ideological considerations. Even at the initial stage of the Court's decision-making process, ideology matters. Justices' agenda-setting decisions are derived, in part, from their desire to improve the status quo. Ryan Black and Ryan Owens found that Justices are 75 percent more likely to vote to grant review to petitions when they expect that the policy arising from the Court's merits decision will improve on the status quo.²²⁰ In a similar vein, Gregory Caldeira, John Wright, and Christopher Zorn found that Justices are more likely to grant review of cases as those Justices become increasingly similar ideologically to the mean of the Court.²²¹ And Jan Palmer discovered that Justices strategically set the Court's agenda by placing cases on the docket that they believe they will win, while keeping off the docket those cases they are likely to lose.²²² Other studies reach similar results.²²³ Ideological considerations influence Justices during oral arguments and the opinion-crafting process as well. For example, Timothy Johnson, Paul Wahlbeck, and James Spriggs show that ideology and an attorney's quality of oral argumentation conditionally influence whether a party wins before the Court.²²⁴ A Justice's decision to respond to a majority opinion draft also stems from ideological motivations.²²⁵ Justices who agree ideologically with opinion authors seek changes in their opinions only 15 percent of the time.²²⁶ Ideological opponents of that author, however, seek changes to that same opinion nearly 57 percent of the time.²²⁷

220. Black & Owens, *supra* note 9, at 1066.

221. Caldeira, Wright & Zorn, *supra* note 9, at 563-64.

222. Jan Palmer, *An Econometric Analysis of the U.S. Supreme Court's Certiorari Decisions*, 39 PUB. CHOICE 387, 396 (1982).

223. See, e.g., Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824, 35 (1995); Caldeira & Wright, *Organized Interests*, *supra* note 171, at 1109, 1122; Gregory A. Caldeira & John R. Wright, *The Discuss List: Agenda Building on the Supreme Court*, 24 LAW & SOC'Y REV. 807, 831 (1990); Kevin T. McGuire & Barbara Palmer, *Issues, Agendas, and Decision Making on the Supreme Court*, 90 AM. POL. SCI. REV. 853, 863 (1996).

224. See Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99, 111 (2006); see also TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 18-19 (2004); Timothy R. Johnson, *Information, Oral Arguments, and Supreme Court Decision Making*, 29 AM. POL. RES. 331, 346-47 (2001).

225. MALTZMAN, SPRIGGS & WAHLBECK, *supra* note 10, at 81-93.

226. *Id.* at 81-82.

227. *Id.* at 82.

In a similar vein, there is a 900 percent change in probability that a Justice will threaten an opinion author when she is an ideological foe.²²⁸ The decision to join a final majority coalition reflects similar ideological considerations.²²⁹

How might ideology influence the size of the Court's docket? Studies show that when groups contain individuals who think alike, they are more likely to effectuate their goals and to do so with dispatch. Groups containing members with diverse interests, on the other hand, face challenges in achieving desired outcomes and often observe fractured relations, lethargy, and stalemate.

In *Hearing the Other Side*, Diana Mutz examines whether exposure to diverse views increases civic participation or leads to depressed turnout.²³⁰ Mutz analyzes whether a fundamental tenet of deliberative democracy—an informed and diverse electorate that communicates with each other—actually leads to a more active citizenry.²³¹ She found that there is a tradeoff between participatory and deliberative democracy.²³² The more diverse views to which citizens are exposed, the less active they are in political life.²³³ Exposure to a range of political and ideological views leads citizens to shut down.²³⁴ On the other hand, exposure to information that reaffirms existing beliefs leads to increased levels of participation.²³⁵

Other works similarly highlight the power of shared perspective. Historian Lisa McGirr argues that similarity in world view, in part, led conservatives in Orange County, California, to push the Goldwater candidacy and redefine the conservative movement and

228. *Id.* at 87 (“[O]ur model predicts justices choose to make a suggestion or a threat in 1.7 percent and .8 percent of their first tactics when ideologically aligned with the author, and these numbers rise to 6.6 percent and 8.0 percent when they are ideologically opposed to the author.”).

229. For example, there is a 94 percent probability that a Justice will join a final coalition when she is ideologically close to the majority opinion writer, whereas the probability drops to 82 percent when the Justice is far away. *Id.* at 87-88.

230. See DIANA C. MUTZ, *HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY* (2006).

231. *Id.* at 1-17.

232. *Id.* at 110-16.

233. *Id.* (finding this result as to likelihood of voting, engaging in grassroots political activity, deciding within a certain time period who should be President, and intending to vote).

234. *Id.*

235. *Id.*

its role in modern politics.²³⁶ In his work on the Paris Commune Revolt of 1871, historian Roger Gould shows that only after workers lived among one another in the same neighborhood did they coalesce to form an uprising.²³⁷

Such findings apply to the elected branches as well. Take, for example, the passage of significant legislation. Sarah Binder shows that when Congress and the President hail from different parties, the federal government suffers from gridlock and passes fewer significant bills.²³⁸ Binder also demonstrates that as the parties themselves become more polarized, Congress passes less significant legislation.²³⁹ Other congressional scholars have likewise shown that when party unity is high, rank-and-file members give party leaders stronger powers to shepherd legislation.²⁴⁰

Court scholars observe similar features. For example, Nancy Staudt, Barry Friedman, and Lee Epstein studied the role of ideological homogeneity vis-à-vis consequential Court decisions. They examined whether, when Justices think alike, they are more likely to work together toward shared goals.²⁴¹ Staudt and her coauthors show that ideological homogeneity on the Court leads to more consequential decisions. The probability that a Court composed of Justices with orthogonal world views would render a landmark ruling was just 9 percent.²⁴² When, however, the Court became ideologically cohesive, the probability of rendering a significant ruling increased to 33 percent.²⁴³

We follow the theoretical tack taken by Staudt and her colleagues. We theorize that a cohesive Court will decide more cases than an ideologically fractured Court. Justices who share a world

236. See LISA MCGIRR, *SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT* 12-14 (2001).

237. See ROGER GOULD, *INSURGENT IDENTITIES: CLASS, COMMUNITY, AND PROTEST IN PARIS FROM 1848 TO THE COMMUNE* 27-29 (1995).

238. Sarah A. Binder, *The Dynamics of Legislative Gridlock, 1947-96*, 93 AM. POL. SCI. REV. 519, 521-27 (1999).

239. *Id.*

240. See, e.g., John H. Aldrich & David W. Rohde, *The Transition to Republican Rule in the House: Implications for Theories of Congressional Politics*, 112 POL. SCI. Q. 541, 545-47 (1998).

241. Nancy Staudt, Barry Friedman & Lee Epstein, *On the Role of Ideological Homogeneity in Generating Consequential Constitutional Decisions*, 10 U. PA. J. CONST. L. 361, 363-64 (2008).

242. *Id.* at 381.

243. *Id.*

view will decide numerous cases to further their preferences. On the other hand, Justices sitting on a Court composed of a wide range of ideological actors will be less sure of outcomes and will anticipate more dissents and internal strife. As a result, such a Court will decide fewer cases. Simply put, we hypothesize that as the Court becomes ideologically dispersed, it will decide fewer cases.

B. Contextual Factors and Docket Size

Although ideology plays a large role in judicial decision making, it is not the only factor that matters. Indeed, as we argued above, scholars have hypothesized that a host of internal, external, and hierarchical mechanisms may influence the choices Justices make.²⁴⁴ Chief among these alternative factors are whether the Term preceded the 1988 Act, whether the Court employed the cert pool, the Court's relationship with the circuit courts of appeals, and Court membership.

1. The Supreme Court Case Selections Act of 1988

We start with the Supreme Court Case Selection Act of 1988.²⁴⁵ As stated above, when Congress debated whether to pass the Act, all nine Justices on the Court authored a letter to Senator Kastenmeier stating that mandatory jurisdiction took up too much of their time.²⁴⁶ Congress heeded their calls; it eliminated essentially all of the Court's mandatory jurisdiction. After passing the 1988 Act, the Court's plenary docket began to decline.²⁴⁷ Some Justices attributed this decline to the Act's passage.²⁴⁸ With more discretion, the Court freed itself from the weight of its caseload.²⁴⁹ Some scholars tested this claim, but the studies do not appear to support the hypothesis.²⁵⁰ Nevertheless, the temporal coincidence of the docket's

244. *See supra* Part I.C.

245. Pub. L. No. 100-352, 102 Stat. 662 (codified at 28 U.S.C. §§ 1254, 1257-58, 2104 (1994)).

246. *See supra* note 106 and accompanying text.

247. *See* Hellman, *supra* note 66, at 403.

248. *See id.* at 409.

249. *Id.*

250. *See, e.g., id.* at 410-12.

decline with the passage of the 1988 Act is too much to ignore. As such, we hypothesize that passage of the 1988 Act led to a decrease in the Court's docket.

2. The Certiorari Pool

Many have argued that the cert pool led to a diminished docket, as clerks have become hesitant to recommend a grant vote and risk making the Court look foolish by accepting a case that is not truly cert-worthy.²⁵¹ That, at least, is the view of some Justices, law clerks, and scholars.²⁵² Interviews with both Justices and clerks confirm that a culture of restraint permeates the pool.²⁵³ Clerks are reluctant to recommend that Justices grant cert, and the Justices understand why: in an environment in which all cases are treated as fungible, recommending a denial of one more case is less risky than recommending a grant.²⁵⁴ If one recommends denial, it is harder to call it a "mistake," because the issue will confront the Court again. A grant recommendation forces the Court to confront the issue now.²⁵⁵ As a result, the unwritten rule is to avoid what you can. Accordingly, we hypothesize that after the adoption of the cert pool, the Court's docket decreased.

3. Ideological Agreement Between the Supreme Court and Lower Courts

A further hypothesis, as we discussed above, suggests that the Court heard fewer cases during the 1980s and 1990s because of its ideological agreement with lower federal courts.²⁵⁶ That is, scholars have argued that the Court heard fewer cases simply because it did not need to audit the lower courts to the same degree as in previous Terms.²⁵⁷ There is some anecdotal evidence to support this theory.

251. See *supra* notes 38-52 and accompanying text.

252. See WARD & WEIDEN, *supra* note 14, at 128-29, 143-44; Starr, *supra* note 6, at 1375-77.

253. See WARD & WEIDEN, *supra* note 14, at 128-29, 143-44; see also Starr, *supra* note 6, at 1375 n.66.

254. See WARD & WEIDEN, *supra* note 14, at 143-44.

255. See PERRY, *supra* note 25, at 220-21.

256. See *supra* Part I.C.3.

257. See, e.g., George & Yoon, *supra* note 129, at 825-31; Lindquist, Haire & Songer, *supra*

For example, of the 1385 cases the Supreme Court reviewed between the 1993 and 2008 Terms,²⁵⁸ during which Terms the Court was moderately conservative,²⁵⁹ roughly 21 percent came from the Ninth Circuit Court of Appeals,²⁶⁰ which is generally considered to be the most liberal circuit in the country.²⁶¹ The circuit scrutinized next most often was the Sixth Circuit, whose cases constituted a mere 7 percent of the Court's docket.²⁶² Indeed, decisions appealed from all state supreme courts *combined* totaled just 13 percent of the Court's docket during the same time period.²⁶³ In short, it appears that the Court had its sights set on reviewing the Ninth Circuit. Accordingly, we hypothesize that as the ideological distance between the Supreme Court and lower federal courts increased, the Court heard more cases, and conversely, when the two were ideologically in line, the Court heard fewer cases.

4. Membership Change

Finally, we showed above that a host of scholars argue that the Court's depleted docket is a function of membership change.²⁶⁴ Standing above all others in terms of docket activity, however, was Justice White. Justice White often dissented from the denial of cert because he thought the Court had an obligation to grant review to petitions showing the slightest of conflicts among the circuits.²⁶⁵ He possessed an "unswerving view that the Court ought not let circuit splits linger, that it should say what the federal law is sooner rather than later."²⁶⁶ Robert Stern and his colleagues show that Justice White dissented from the denial of cert sixty-seven times during the

note 129, at 610-11.

258. See UNITED STATES SUPREME COURT DATABASE, *supra* note 26.

259. The 2008 Martin-Quinn dataset shows that the Court as a whole was moderately conservative during this period. See *infra* Part IV.B for an explanation of Martin-Quinn scores as a measure of ideological persuasion.

260. See UNITED STATES SUPREME COURT DATABASE, *supra* note 26.

261. See George & Yoon, *supra* note 129, at 829.

262. See UNITED STATES SUPREME COURT DATABASE, *supra* note 26.

263. *Id.*

264. See *supra* Part I.C.1.

265. Ruth Bader Ginsburg, *Remembering Justice White*, 74 U. COLO. L. REV. 1283, 1285 (2003).

266. *Id.*

1989 Term and more than ninety times in the 1991 Term, largely based on his view that the Court had an obligation to resolve lower court conflicts over the proper interpretation of federal law.²⁶⁷ Given his well-known role in driving up the Court's agenda, we account for the presence of Justice White on the Court. Our expectation is that the presence of Justice White increased the Court's docket size.

IV. ASSESSING THE RELATIONSHIP BETWEEN IDEOLOGICAL DISPERSION AND DOCKET SIZE

Our goal is to test whether ideological cohesion, along with other features, influences the size of the Court's docket. To examine this argument, we rely on the United States Supreme Court Database and the Vinson-Warren Court Database created by Harold J. Spaeth.²⁶⁸ These databases contain information on the types and number of cases heard by the Court, as well as important background and contextual components to each of those cases. Once we collected our data, we were then in a position to determine our dependent variable, measure our key covariate, and examine the other features we believe may influence the Court's docket size.

A. The Dependent Variable: The Number of Decisions per Term

Our dependent variable, *Decisions*, is a count of the number of cases decided per Term. We analyzed all orally argued cases decided between the 1940 and 2008 Terms that resulted in a signed or per curiam opinion, or a judgment of the Court. The mean number of cases heard in a Term was 136.78. The minimum number of cases heard was 71 (2007 Term), while the maximum was 215 (1940 Term). Table 1 provides a breakdown of all Terms and the number of cases decided during each one.

267. See ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO & KENNETH S. GELLER, *SUPREME COURT PRACTICE* 236-37 (7th ed. 1993).

268. See UNITED STATES SUPREME COURT DATABASE, *supra* note 26; VINSON-WARREN COURT DATABASE, *supra* note 26. We also relied on the *Supreme Court Compendium* to collect portions of our data. See EPSTEIN, ET AL., *supra* note 26, at xiii-iv.

Table 1: Number of Cases Decided per Term, 1940-2008 Terms

Term	Cases	Term	Cases	Term	Cases	Term	Cases	Term	Cases	Term	Cases	Term	Cases
1940	215	1950	121	1960	143	1970	142	1980	150	1990	123	2000	87
1941	189	1951	107	1961	122	1971	164	1981	177	1991	123	2001	89
1942	210	1952	124	1962	145	1972	173	1982	189	1992	115	2002	83
1943	160	1953	114	1963	142	1973	169	1983	178	1993	99	2003	90
1944	206	1954	102	1964	120	1974	159	1984	162	1994	94	2004	88
1945	174	1955	120	1965	127	1975	176	1985	170	1995	89	2005	87
1946	191	1956	135	1966	146	1976	177	1986	172	1996	91	2006	79
1947	147	1957	152	1967	171	1977	160	1987	159	1997	94	2007	71
1948	155	1958	140	1968	129	1978	157	1988	165	1998	89	2008	85
1949	121	1959	129	1969	124	1979	156	1989	145	1999	81		

B. Ideological Factors

To determine the degree of ideological cohesion on the Court, we turned to an oft-used measurement strategy that examines Justices' revealed preferences: Martin-Quinn estimates.²⁶⁹ The Martin-Quinn estimation strategy employs a Bayesian modeling method that uses Justices' revealed behavior—that is, their votes—to estimate their latent preferences.²⁷⁰ “Using data derived from votes cast by the Justices and a Bayesian modeling strategy, [Martin and Quinn] have generated term-by-term ideal point estimates for all the Justices appointed since the 1937 term.”²⁷¹ These estimates allow scholars to quantify each Justice's preferences during each Court Term. Empirical legal scholars and political scientists alike have employed the Martin-Quinn scores frequently as proxies for Justices' preferences.²⁷²

269. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134, 135 (2002).

270. *Id.*

271. Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1503 (2007).

272. See, e.g., Berry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L. J. 123, 134-36 (2003); Keith Krehbiel, *Supreme Court Appointments as a Move-the-Median Game*, 51 AM. J. POL. SCI. 231, 236 (2007); Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of*

We examined the ideological cohesion of the Court each Term by determining the Martin-Quinn score of each Justice, sorting them from smallest to largest, and calculating the range among them.²⁷³ We calculated the absolute value of the distance between the most liberal Justice and the most conservative Justice in each Term.²⁷⁴ For example, during the 1950 Term, the most liberal member of the Court was Justice Hugo Black, with a Martin-Quinn score of -1.638. The most conservative member of the Court was Justice Sherman Minton, with a Martin-Quinn score of 1.323. The range between these two Justices was 2.961. The mean range of ideology on the Court during our sample was 6.642. The minimum was 2.801 and the maximum was 11.122. We expect the coefficient on *Range* to be negative and statistically significant, meaning that as the ideological heterogeneity of the Court increases, the number of cases it reviews will decrease.

C. Contextual Factors

As we stated above, ideological cohesion is likely to play a role in the Court's docket size, but not the only role.²⁷⁵ There are other factors which also may influence the Court's docket that have nothing to do with ideology. We argued that four alternative features may influence docket size.²⁷⁶

One alternative factor is whether the Court controlled its own docket. Our hypothesis was that the Court would hear fewer cases after passage of the Supreme Court Case Selections Act of 1988.²⁷⁷ As such, we include a dummy variable for whether the Term post-

Conflict Cases, 40 LAW & SOC'Y REV. 135, 147 (2006); Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1297 (2005); Paul J. Wahlbeck, *The Chief Justice and the Institutional Judiciary: Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1754 n.94 (2006); Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The "Rehnquist" Court(?)*, LAW & CTS., Spring 2005, at 18, 18, <http://www1.law.nyu.edu/lawcourts/pubs/newsletter/spring05.pdf>.

273. Raw scores were collected from the 2008 Martin-Quinn dataset. See *Measures, MARTIN-QUINN SCORES*, <http://mqscores.wustl.edu/measures.php> (last visited Feb. 26, 2012).

274. If we refit our model using the standard deviation of ideology among the Justices rather than the range, our results remain the same.

275. See *supra* Part III.B.

276. See *supra* Part III.B.

277. See *supra* Part III.B.1.

dated the Act. If the Term in question came after the Act, *Judiciary Act* equals 1. If the Term under study preceded the Act, the variable is coded as 0. Because Congress passed the Act in June of 1988,²⁷⁸ every Term after the 1987 Term is coded as 1 and every Term before 1988 is coded as 0. We expect the coefficient on *Judiciary Act* to be negative and statistically significant.

Scholars also claim that the cert pool led to the Court's decreased docket.²⁷⁹ To account for this possibility, we examine whether the Term came before the creation of the cert pool or after it. If the Term preceded the pool, *Cert Pool* equals 1. If the Term came after the pool's adoption, we coded *Cert Pool* as 0. Because the Court created the pool during the summer of 1972,²⁸⁰ we coded the 1972 Term and every one thereafter as a 1, and every Term before 1972 as 0.²⁸¹

As we discussed above, a third potential explanation for docket size is the ideological agreement between the Supreme Court and lower federal courts.²⁸² To examine this hypothesis, we required estimates of the ideological preferences of the Supreme Court—that is, the median Justice on the Court—and lower federal court judges. We retrieved them using the Judicial Common Space (JCS).²⁸³ The JCS is a scaling procedure that allows scholars to compare directly the ideal points of Supreme Court Justices, members of Congress, presidents, and, most importantly for purposes of this Article, lower federal court judges.²⁸⁴ The JCS relies on Keith Poole and Howard Rosenthal's Common Space data to estimate the ideal points of members of Congress and the President.²⁸⁵ It uses the Martin-Quinn

278. See Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662 (codified at 28 U.S.C. §§ 1254, 1257-58, 2104 (1994)).

279. See *supra* notes 38-55 and accompanying text.

280. See WARD & WEIDEN, *supra* note 14, at 117.

281. We also coded the number of Justices in the cert pool each Term. Our results did not change.

282. See *supra* Part III.B.3.

283. See Lee Epstein, Andrew Martin, Jeffery A. Segal & Chad Westerland, *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 306 (2007) (pioneering the Judicial Common Space measurement strategy). The author's data are available online. See Lee Epstein, *The Judicial Common Space*, UNIV. S. CAL., <http://epstein.usc.edu/research/JCS.html> (last visited Feb. 26, 2012).

284. Epstein, Martin, Segal & Westerland, *supra* note 283, at 306.

285. *Id.*; see also KEITH POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING 3 (1997).

scores to estimate Supreme Court Justices' preferences.²⁸⁶ To derive estimates of lower court judges, it relies on the notion of senatorial courtesy.²⁸⁷ That is, as Micheal Giles and his colleagues point out, when senatorial courtesy applies to a judge's appointment, that judge's ideal point can be coded as her home-state senators' first dimension Common Space scores.²⁸⁸ When senatorial courtesy does not apply to a judge's appointment, presidents are free to nominate judges who reflect their own policy preferences, which means that the ideal point of the judge can be coded as the President's first dimension Common Space score.²⁸⁹ The JCS uses this logic and estimates the ideal points of lower court judges based on the politicians who nominated them.²⁹⁰ The result is a score that can be compared directly across institutions and over time.²⁹¹ Empirical legal scholars have employed these scores across the board.²⁹²

We first determined the mean JCS score for each circuit court during each Supreme Court Term. We then calculated the average JCS score across all of the circuits in each Term, for a term-by-term mean JCS score of the circuits. Next, we obtained the JCS-determined score for the median Justice on the Supreme Court during each Term. After we identified the circuit average and the Court median per Term, we calculated *Distance From Average Circuit* as the absolute value of the distance between them. The distance between the Court and the average circuit ranged from a minimum

286. More specifically, it transforms the Martin-Quinn estimates into Poole and Rosenthal's Common Space scale. See Epstein, Martin, Segal & Westerland, *supra* note 283, at 306-07.

287. See *id.*

288. See Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 631 (2001).

289. See *id.* For example, a judge appointed to the D.C. Circuit Court of Appeals by a Republican president is coded as having the same ideal point estimate of that president. If that same judge had been nominated to a seat that observed two home-state Republican senators, the judge's ideal point would be coded as the average between the two home-state senators.

290. See Epstein, Martin, Segal & Westerland, *supra* note 283, at 306-07.

291. *Id.* at 306-09.

292. See, e.g., Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 395-96 (2010); Giles, Hettinger & Peppers, *supra* note 288, at 630-31; Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1350 n.102 (2009).

of 0.0006 during the 1999 Term to a maximum of 0.4567 in 1952. We expect to see a positive coefficient on *Distance From Average Circuit*, meaning that as the distance between the Court and the average circuit increases, the number of cases the Court hears will also increase.

Finally, we argued that membership changes likely influenced the size of the Court's docket.²⁹³ We discussed literature that suggests that Justice White was responsible for an increase in the number of cases decided.²⁹⁴ As such, we created a dummy variable for whether Justice White sat on the Court. If Justice White was on the Court during the Term in question—the 1962 to 1992 Terms²⁹⁵—*Justice White* equals 1. If he was not on the Court, *Justice White* equals 0.²⁹⁶

V. RESULTS

We theorized that five main factors are likely to influence the size of the Court's docket: the ideological dispersion among the Justices, passage of the Supreme Court Case Selections Act of 1988, the creation of the cert pool, the median Justice's ideological distance from the average circuit court of appeals, and the presence of Justice White.²⁹⁷ To test these claims, we employ multivariate analysis. Because our dependent variable is a count—the number of cases decided—we estimate a negative binomial regression model with robust standard errors clustered on Court Term.²⁹⁸

293. See *supra* Part III.B.4.

294. See *supra* Part III.B.4.

295. See Ginsburg, *supra* note 265, at 1283.

296. Given our unit of analysis and limited number of observations, we could not control for the entire panoply of membership change on the Court. Doing so would require a completely different data set and analytical perspective. Nevertheless, if there is one thing on which most scholars of the Court agree, it is that Justice White, above all other recent Justices, sought to grant review to cases with alacrity. See *supra* notes 265-67 and accompanying text.

297. See *supra* Part III.B.

298. When estimating models with dependant variables that count events, scholars typically employ either the Poisson or negative binomial regression models. See, e.g., Stefany Coxe, Stephen G. West & Leona S. Aiken, *The Analysis of Count Data: A Gentle Introduction to Poisson Regression and Its Alternatives*, 91 J. PERSONALITY ASSESSMENT 121, 121 (2009). Poisson is appropriate when the sample variance equals the sample mean. *Id.* at 122-23. If there is overdispersion, the results from the Poisson model will produce downwardly biased standard errors, resulting in an incorrect inference of statistical significance. J. SCOTT LONG

Table 2 presents our results. The model performs well. It observes a 61 percent reduction in error over guessing the mean value of *Decisions*. The χ^2 is statistically significant, which means that we may reject the null hypothesis that the independent variables jointly have no effect.

Table 2: Negative Binomial Regression Model of the Number of Cases Decided by the Court, 1940-2008 Terms

Covariate	Coefficient	Robust Std. Error
Ideological Range	-0.035*	0.011
Judiciary Act	-0.467*	0.064
Cert Pool	0.060	0.058
Distance from Average Circuit	-0.748*	0.183
Justice White	0.173*	0.058
Constant	5.273*	0.091

N=68. * denotes $p < .05$ (two-tailed test). $\chi^2=291.99^*$

More importantly, we find support for our main hypothesis. The negative and statistically significant coefficient on *Ideological Range* suggests that our intuition was correct. The Court decides more cases when it is ideologically cohesive and fewer cases when it is ideologically fractured.²⁹⁹ Because the substantive significance of these results is difficult to determine from their coefficients alone, however, we present substantive effects in Figure 5.³⁰⁰

The y -axis on Figure 5 shows the predicted number of cases the Court will decide in a given Term. The x -axis provides three different values of ideological cohesion. The far left sector represents the predicted number of cases decided by the Court when the

& JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA 372 (2d ed. 2006). The negative binomial regression model, on the other hand, includes a parameter to compensate for overdispersion. *Id.* We observe evidence of overdispersion in our data, so we employ negative binomial regression. We should also note that our results remain the same if we employ asymptotic standard errors or nonclustered standard errors.

299. The variable remains statistically significant at the 95 percent level with a negative binomial regression model, an OLS regression model, a Bayesian OLS model, and a Bayesian negative binomial regression model.

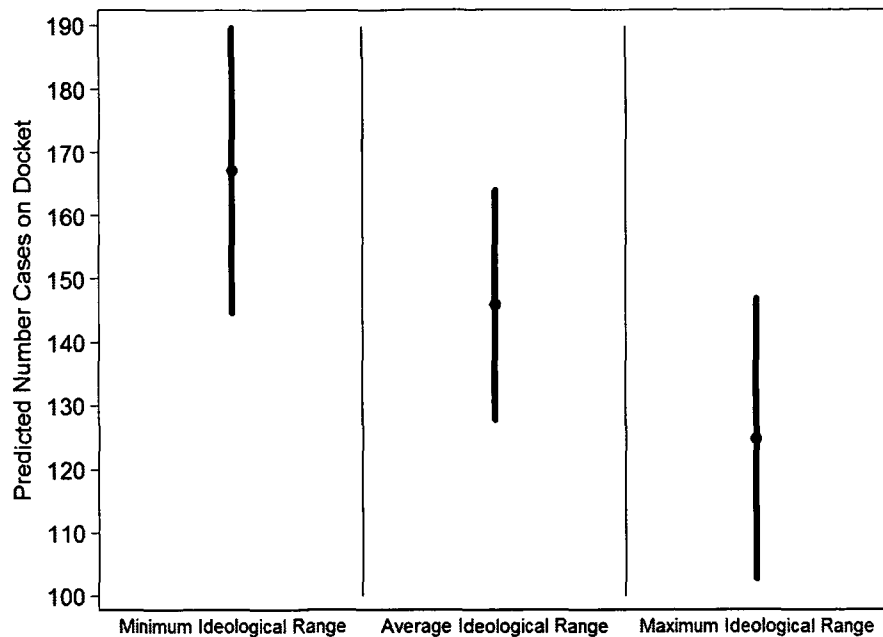
300. See Lee Epstein, Andrew D. Martin & Matthew Schneider, *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811, 1827-34 (2006).

ideological range among the Justices is lowest—that is, it examines a strongly unified Court. The middle sector reflects the predicted number of cases the Court would decide when the ideological range among the Justices is at its mean value. Finally, the sector on the far right reflects the predicted number of cases decided by the Court when the ideological range among the Justices is at its maximum value—that is, when the Court is highly fractured.

Figure 5 shows that as the Court becomes ideologically dispersed, it decides fewer cases. When Justices are ideologically *alike*, the Court will decide 145-190 cases.³⁰¹ When the ideological range of the Justices is held to its mean value, the Court can be expected to decide 128-164 cases. When, however, the Court becomes ideologically *spread*, it will decide only 102-147 cases.³⁰² Despite the overlap in confidence intervals, the predicted difference among all three columns is statistically significant at the 95 percent level.

301. Predicted values were calculated while holding other continuous variables to mean values and binary variables to modal values.

302. We should note that our results remain robust if we instead employ OLS regression or Bayesian negative binomial regression.

Figure 5: Predicted Number of Cases Heard by the Court³⁰³

Clearly, ideology appears to play a significant role on the Court's docket size. Moving from the most unified to the least unified Court leads to a 25 percent reduction in the number of cases decided in a Term. Yet, ideology is not the *only* feature that influences the size of the Court's docket. Table 2 shows that a host of other factors matter as well, chief among which is passage of the 1988 Act. When Congress passed the Act, it eliminated nearly all of the Court's mandatory jurisdiction and allowed the Justices to decide only those cases they elect to hear.³⁰⁴

As Figure 6 shows, the Justices took advantage of this congressional gift. Between the 1940 and 1988 Supreme Court Terms—that is, prior to the Act—the model predicts that the Court decided roughly

303. The vertical line segments denote 95 percent confidence intervals around the point estimate (the black dots). All other variables were held at their mean or modal values.

304. Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662 (codified at 28 U.S.C. §§ 1254, 1257-1258, 2104 (1994)).

146 cases per Term.³⁰⁵ Yet, holding all else constant, after passage of the Act the Court is predicted to decide only 91 cases per Term.³⁰⁶ The model predicts that the Court, on average, hears 54 fewer cases per Term after passage of the Act than before it. The 95 percent confidence interval on the predicted difference is 37-72 cases, which means that the Court decided anywhere between 37 and 72 fewer cases per Term after the 1988 Act. This difference is statistically significant and dramatic. What is more, we observe these results even after controlling for ideology, the cert pool, and other factors thought to be associated with docket size.

305. The 95 percent confidence interval on this prediction is 128-164 cases.

306. The 95 percent confidence interval on this prediction is 79-92 cases.

Figure 6: Predicted Number of Cases Decided by the Court Pre- and Post-1988 Act³⁰⁷

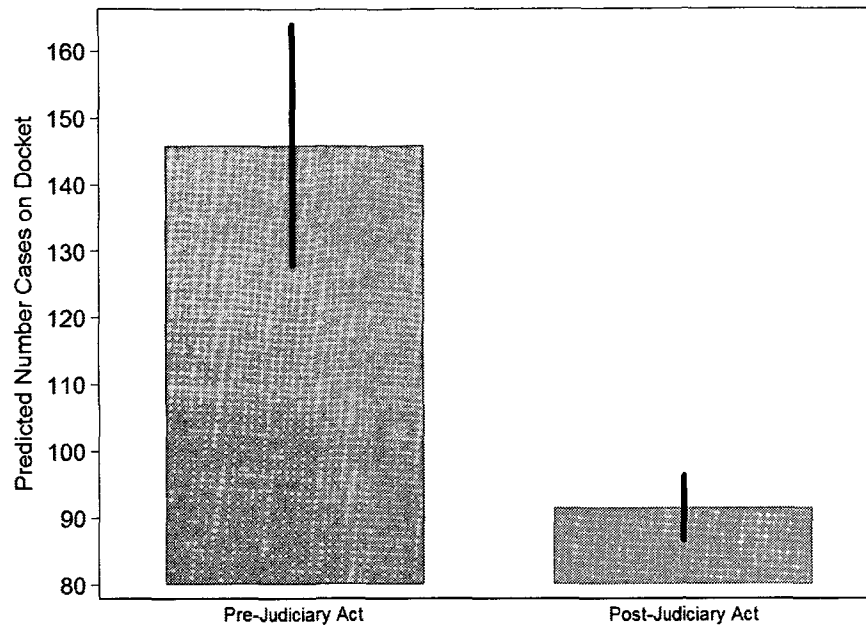


Table 2 also shows a positive and statistically significant coefficient on the variable for *Justice White*. We controlled for Justice White's presence because scholars have attributed a large portion of the Court's behavior to Justice White's desire to clear up conflict among the lower courts.³⁰⁸ Our findings support this hypothesis. Figure 6 shows the predicted number of cases the Court would hear and decide in the absence or presence of Justice White, holding all other variables at their mean or modal values. Again, the y-axis reflects the predicted number of cases the Court would decide in a Term. The x-axis reflects whether Justice White is or is not on the Court. When Justice White is not on the Court, the model predicts the Court will decide 146 cases.³⁰⁹ When Justice White serves on the

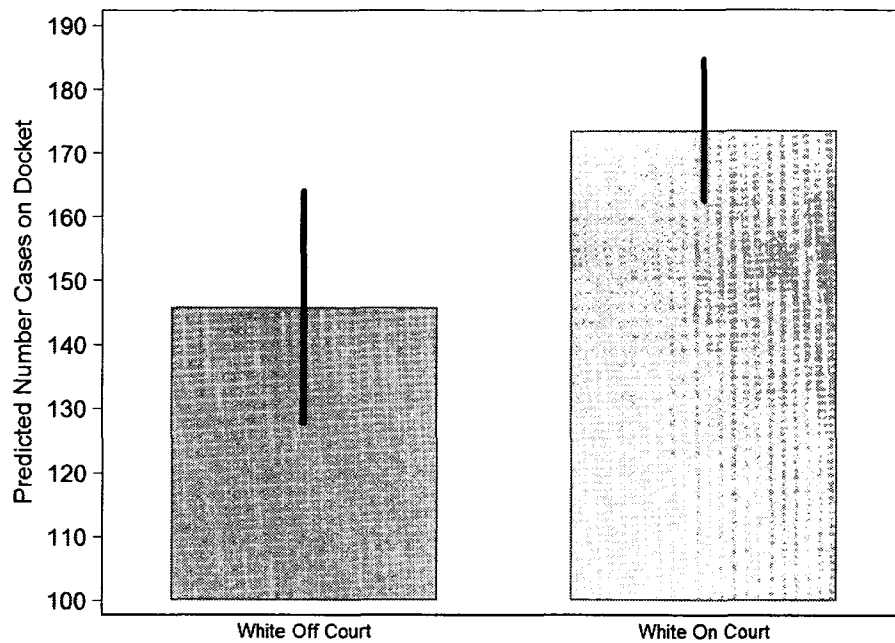
307. The bars represent the average predicted number of cases heard, whereas the smaller black lines show the 95 percent confidence levels around those predicted point estimates.

308. See *supra* notes 94-95, 155 and accompanying text.

309. The 95 percent confidence interval on this prediction is 128-164 cases.

Court, however, the model predicts the Court will decide 174 cases.³¹⁰ This difference of 28 cases is statistically and substantively significant.³¹¹

Figure 7: Predicted Number of Cases Decided by the Court with and Without Justice White on the Court³¹²



310. The 95 percent confidence interval on this prediction is 163-185 cases.

311. The 95 percent confidence interval on the 28 case difference in predictions is 11-45 cases. This means that the presence of Justice White alone led to anywhere between an 11- and 45-case addition to the Court's docket.

312. The bars represent the average predicted number of cases heard, whereas the smaller black lines show the 95 percent confidence levels around those predicted point estimates.

What about our other variables? We find no evidence to suggest that, when accounting for each of the factors commonly associated with docket size, the cert pool leads to a diminished docket. The coefficient on *Cert Pool* in Table 2 failed to achieve statistical significance, which precludes us from rejecting the null hypothesis that it had no effect on docket size. As a robustness check, we changed our measurement strategy and controlled for the *number* of Justices participating in the cert pool each Term. Our results remained unchanged. In short, although the cert pool clearly changed some things about the Court's internal processes, it does not appear to have systematically reduced the number of cases the Court decided per Term.

We stop to take a moment to discuss our findings with regard to the Court's relationship with the lower federal courts. The data suggest that when the distance between the Court median and the average circuit court increases, the Court decides fewer cases.³¹³ This finding defies our theory. Perhaps distance between the Supreme Court and the median circuit court is not the best measure for ideological alignment between the Supreme Court and lower federal courts. A better measure might interact the distance between the lower court and Supreme Court with amount of heterogeneity among the circuits. Unfortunately, given the limited number of observations, we cannot pursue such a strategy here.³¹⁴

We also checked the robustness of our findings by controlling for the number of landmark bills passed by the previous Congress. We believed that legislation might be relevant, especially in light of recent comments by Justice Breyer that the health care bill is likely to lead to a number of Supreme Court disputes.³¹⁵ To determine whether Congress recently passed significant legislation, we examined Stephen Stathis's book, *Landmark Legislation*, which is a

313. See *supra* Table 2.

314. The findings regarding the lower federal courts also could be due to the JCS scores being poor measures of lower court judge preferences. Recent empirical investigations reveal that JCS scores have important limitations. See, e.g., Ryan C. Black & Ryan J. Owens, Estimating the Policy Preferences of United States Courts of Appeals Judges Across Circuits and American Political Institutions 4-6 (July 10, 2009) (unpublished grant paper), available at <http://ssrn.com/abstract=1435164>.

315. See Tony Mauro, *Thomas, Breyer Discuss High Court Docket, Clerks, Cameras*, THE BLOG OF LEGAL TIMES (Apr. 15, 2010, 1:43 PM), <http://legaltimes.typepad.com/blt/2010/04/thomas-breyer-discuss-high-court-docket-clerks-cameras.html>.

compilation of the bills passed over time that are generally considered to be among the most important, policy-altering bills.³¹⁶ We coded the number of landmark bills enacted by Congress each term and refit our model with both a lagged variable, counting the number of landmark bills passed in the previous year, as well as the number of landmark bills passed in the current Term. The coefficient on each of these variables is positive but not near conventional levels of statistical significance.³¹⁷

SUMMARY AND CONCLUSION

What do these results tell us about the future of the Court and its docket? Plainly, they suggest that the Court will continue to decide relatively few cases per Term unless the political landscape changes. Until a President is able to make a series of unconstrained nominations that make the Court more homogenous—or appoints a series of Justices who, like Justice White, believe the Court has a duty to clear up legal conflict—the Court will continue to decide a small number of cases per Term. Of course, changing the law to expand mandatory jurisdiction would also have an impact.

Although unassuming, the small number of cases decided by the Court—along with our ideology findings—presents several problems. By deciding a small number of cases, the Court risks missing important issues in need of resolution. In deciding fewer cases, the Court also risks losing touch with the culture and decisions of the lower courts. When cases reach the Court, the Court confronts uncertainty, including uncertainty concerning the accuracy or clarity of information about the cases it chooses to hear. Because of this information deficit, the Court may decide the wrong cases or decide cases idiosyncratically. These possibilities increase with a smaller docket. Given that an ideologically dispersed Court will decide fewer cases, this risk grows when the Court appears least suited to deal with it. Because more ideological dispersion correlates with fewer

316. STEPHEN W. STATHIS, *LANDMARK LEGISLATION 1774-2002: MAJOR U.S. ACTS AND TREATIES* (2003).

317. We do not include these variables in the model because Stathis does not code past the Court's 2001 Term. *Id.* at iv. Given our small sample size, we believed it would be better simply to check the robustness of our results using these data, rather than putting them in the full model, as the data omit six Court Terms.

merits decisions, the Court is likely to perpetuate its idiosyncratic decisions, and a small docket amplifies this problem. These idiosyncrasies become more pronounced given the fractured nature of the Court.

Idiosyncrasies are not the only danger of a diminished docket; it also can lead to the influence of certain parties or interests. Fewer cases mean high-influence players—like the Supreme Court bar and the Office of the Solicitor General—can capture the Court’s docket more easily and influence a larger proportion of its decisions.

The last problem with a smaller docket is the potential for it to undermine the Court’s legitimacy. The visibility of individual decisions increases as the Court decides fewer cases. If the Court’s legitimacy depends on the public’s perceived fairness of its decision making, or the decisions themselves, a smaller docket leaves the Court with a smaller margin for error. Each individual decision has a large amount of weight and, therefore, a greater potential for undermining the Court’s legitimacy. Our findings on ideological dispersion demonstrate this effect. The public may view a splintered Court as less fair procedurally—as basing its decisions on political views rather than on the law. Because an ideologically dispersed Court is likely to decide fewer cases, it has a greater potential than an ideologically homogenous Court to undermine its own legitimacy.

* * * *

Ideology plays a role in the size of the Court’s docket. When Justices share a world view, they decide more cases. When they sit on an ideologically fractured Court, they decide fewer cases. These findings accord with existing empirical legal scholarship which highlights the importance of ideology and decision making on the Court.³¹⁸

Do we believe that ideology alone accounts for the Court’s docket shifts? Most certainly not. As our models suggest, the interaction of all these variables combine to influence docket size.³¹⁹ Indeed, post-estimation analyses of the data suggest that some Terms influenced

318. *See supra* notes 220-29.

319. *See supra* Table 2.

the model more than others. Still, the data suggest that ideological agreement among the Justices ought not to be overlooked by scholars seeking to examine the conditions under which the Court decides cases each Term.

In the end, then, it would appear that unless something dramatic in the political world changes, the legal world will continue to observe low levels of Supreme Court activity, along with the detrimental factors that come with a fractured Court, such as increased dissents, tolerated intercircuit conflict, and ambiguous law.

When the next Supreme Court vacancy and nomination arises, we are sure to witness another grueling examination of the nominee's ideology and background. To be sure, these issues are critical and deserve searching scrutiny. Yet, we hope that policymakers do not in the process continue to neglect the Court's broader obligation to clarify and unify law. We hope that when policymakers debate the merits and demerits of the nominee, they press that person on his or her views of the Court's docket. Recent nominees, such as Chief Justice Roberts, have paid lip service to the issue, but policymakers can force the issue and persuade the Court to address head on its obligation to provide clarity to the law. Failure by the Court to send clearer signals could have damaging long-term consequences for the Supreme Court as an institution.