DOES DOCKET SIZE MATTER?
REVISITING EMPIRICAL ACCOUNTS
OF THE SUPREME COURT'S INCREDIBLY
SHRINKING DOCKET

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Drawing on data from every Supreme Court Term between 1940 and 2017, this Article revisits, updates, and expands prior empirical work by Ryan Owens and David Simon (2012) finding that ideological, contextual, and institutional factors contributed to the Court's declining docket. This Article advances Owens and Simon's work in three ways: broadening the scope of the study by including nine additional Court Terms (through 2017), adding alternative ideological and nonideological variables into the model, and considering alternative model specifications. What emerges from this update and expansion, however, is less clarity and more granularity and complexity. While Owens and Simon emphasized the salience of ideological distance across Justices as well as ideological distance separating the Supreme Court from the lower federal appellate courts, results from our study, by contrast, suggest that when it comes to ideological differences, intra-Court rather than intercourt ideological distance emerged, on balance, as critical. Other variables also emerged as persistently important, notably Congress's decision in 1988 to remove much of the Court's mandatory appellate jurisdiction and variation in the total number of certiorari petitions filed. Finally, these core findings appear robust across alternative model specifications. While most commentators react to a diminishing Court docket by emphasizing possible adverse consequences, rather than commit to any normative position, our Article instead considers both the possible institutional costs and benefits incident to a declining Court docket, with an emphasis on structural horizontal separation of powers implications.

INTRODUCTION

This Article explores factors that inform a persistent decline in the Supreme Court's docket size. A secondary goal—and one more methodologically moored—relates to the comparatively new and growing "replication" literature in the empirical legal studies genre. To these ends, this Article sets out to both replicate Owens and Simon's 2012 empirical study of the Court's docket and then update and expand their study by broadening its scope from 2008 through 2017, exploring new variables, and considering alternative model specifications. By doing so, one can better assess the resiliency of their earlier findings and see if the findings persist after examining a larger number of Court Terms, variables, and empirical approaches. This Article's particular substantive contribution, in turn, derives from the results of our updated and expanded study and a discussion of how these results refine Owens and Simon's 2012 findings. More specifically, Owens and Simon's 2012 paper emphasizes that, among other factors, ideological differences among Supreme Court Justices ("intra-Court" differences) as well as ideological differences between the Court and federal appellate courts ("intercourt" differences) informed changes to the Court's docket size.[1] Results from our updated and expanded data set, by contrast, on balance imply something slightly different and suggest that, when it comes to ideological differences, what matters is intra-Court rather than intercourt ideological distance. Notably, our core results are robust to alternative model specifications.

Part I introduces the scholarly discussion of the Court's docket size as well as time trends. We examine how the Court sets its agenda as well as the descriptive data on the Court's trend over modern times to hear and decide fewer appeals. We then summarize the leading theories that seek to account for variation in the Court's docket size over time. Part II summarizes the existing empirical literature, identifies contested normative concerns flowing from over the Court's diminishing docket, and explains why replication studies matter, particularly at this moment in time for empirical social sciences. Part III describes our data as well as our research design and empirical strategy. Part IV presents the results of our various multivariate models and considers their possible implications. We argue, in part, that unless the political landscape becomes less polarized and delivers a less ideologically divergent group of Justices—which is admittedly unlikely to happen anytime soon—we should not expect the Court to suddenly reverse course and decide a materially larger number of appeals each Term. Without a fundamental restructuring of the current *political* landscape, the *legal* landscape for the Court, at least in terms of its docket size, is unlikely to change significantly in the short term. Finally, we conclude by considering whether a smaller Court docket, and perhaps regardless of the reasons for it, may not necessarily yield only negative consequences.

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1 Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1267 (2012).

I.   THE COURT'S SHRINKING DOCKET

Today's Supreme Court decides markedly fewer appeals than its predecessors. Since the 2005 Term, for example, the Court has decided, on average, fewer than 78 appeals per Term, far fewer than the roughly 200 appeals it decided during a few Terms in the mid-twentieth century.[2] Presciently commenting on the Court's docket depletion, Justice Douglas remarked more than four decades 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."[3] In short, we are witnessing the "great disappearing merits docket."[4]

Figure 1 shows the number of merits appeals decided per Term, from 1940 through 2017, and makes unmistakably clear that the Court's merits docket has, on net, shrunk over time. During the 1940s, the Court decided roughly 177 appeals 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 appeals. The 1980s, as a decade, is the most recent high-water mark in terms of the Court's workload, with 167 appeals per Term. Starting in the late 1980s and moving forward to the present, however, that number began to drop precipitously. By the 2000 Term, the Court decided only 87 appeals. During the last Term included in this study, 2017, the Court decided 68 appeals, which represents the fewest number of merits decisions at any point since the mid-twentieth century.
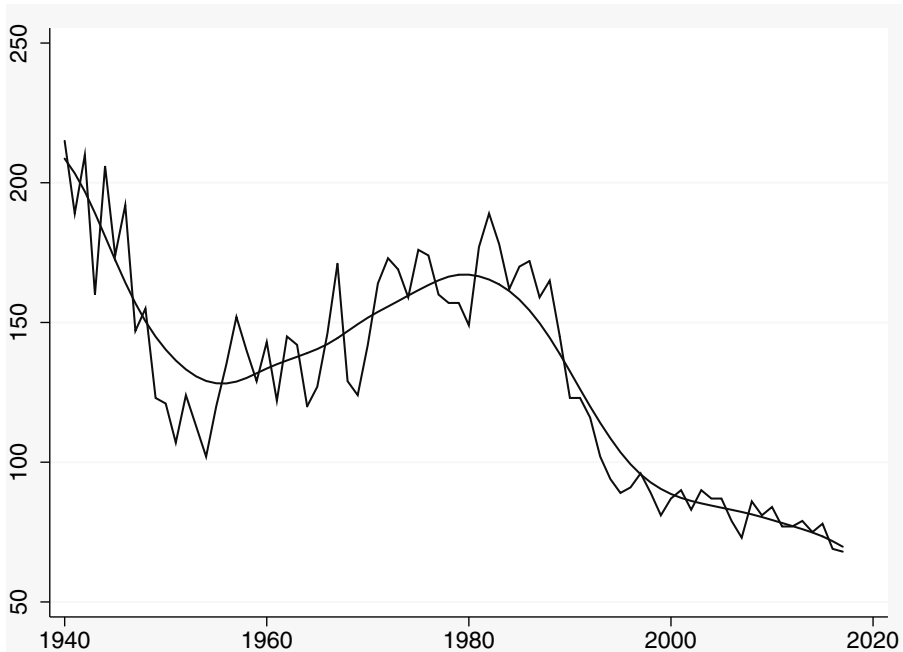
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2   *See infra* Figure 1.

3   ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 119 (2006).

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

FIGURE 1: NUMBER OF APPEALS DECIDED BY THE COURT,
1940–2017 TERMS[5]

Sources: U.S. Supreme Court Database (2018) and Owens and Simon (2012) (updated).

If greater historical context is necessary to help frame this study's time period (1940–2017), Figure 2, with its even broader historical sweep, provides an even wider lens. While illustrating the various ebbs and flows of the Court's docket since the late eighteenth century, one takeaway is that the number of appeals decided during the Court's most recent Term (68 in 2017) rivals the Court Terms leading up to the Civil War.[6] And, of course, the Court—and Justices—during the pre–Civil War era certainly did not benefit from the full complement of clerks who assist the current Justices, to say nothing of technological advances germane to workload efficiency increases (e.g., computer word processing, electronic legal databases) that simply did not exist during the mid-nineteenth century.

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5   Figure 1 includes formally decided full opinion appeals, unsigned orally argued appeals, and judgments of the Court. The data were collected from the 2017 Release 01 data set of the United States Supreme Court Database. *See Previous Versions of the Database,* SUP. CT. DATABASE, http://scdb.wustl.edu/data.php?s=2 (last visited Feb. 11, 2020). The smoothed line depicted in Figure 1 is a LOWESS smoother used to show general trends.

6   While Figure 2 extends only through the 2013 Term, data in Figure 1 include information through the 2017 Term.

FIGURE 2: NUMBER OF APPEALS DECIDED BY THE COURT,
1793–2013 TERMS[7]

Total Decisions Per Term
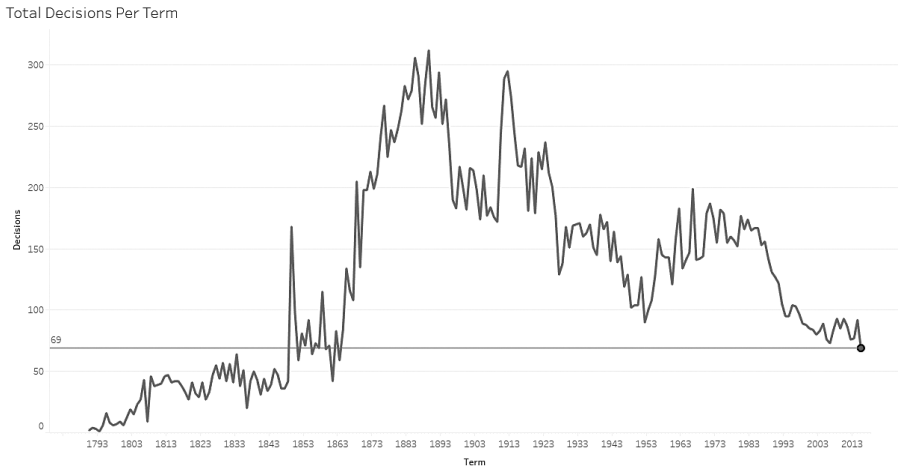
Source: Empirical SCOTUS (2018).

II.   LITERATURE REVIEW

The possibility that the Court's docket size does, in fact, matter helps animate scholars who have undertaken the task of empirically exploring possible explanations for the steady decline of late. While comparatively more scholarly attention focuses on normative or theoretical aspects flowing from the Court's docket size—and changes to it over time—consistent with (and evidence of) a larger trend in legal scholarship, some of the more influential work in this area adopts an empirical analytical frame.

Owens and Simon's (2012) paper represents the leading—and most comprehensive—empirical exploration of the Court's docket size and serves as the starting point for our Article.[8] Drawing from the same data set used in this Article, Owens and Simon's paper focuses on both ideological and contextual factors in an effort to empirically account for the downward trend in annual Supreme Court decisions.[9]

In terms of ideological distance, Owens and Simon limited their study to single measures for the intra-Court and intercourt dimensions, respectively.[10] As both ideology distance factors achieved statistical significance, not surpris-

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7   Figure 2 is a reproduction of a figure from the Empirical SCOTUS website. *See Decisions Per Term (Types)*, EMPIRICAL SCOTUS, https://empiricalscotus.files.wordpress.com/2018/01/dectypes.png (last visited Feb. 13, 2020).

8   Owens & Simon, *supra* note 1. For other examples of helpful empirical work that explores variation in the Court's docket size over time, see, for example, Kenneth W. Moffett et al., *Strategic Behavior and Variation in the Supreme Court's Caseload over Time*, 37 JUST. SYS. J. 20, 20 (2016).

9   Owens & Simon, *supra* note 1, at 1263.

10   *Id.* at 1276.

ingly much of their discussion dwelled on ideological aspects.[11] Complementing their ideological explanation for variation in the Court's docket, various contextual factors—notably, passage of the Supreme Court Case Selections Act of 1988 as well as the presence of Justice White—similarly proved influential in their account of the Court's decreasing appetite for deciding appeals.[12]

The discussion of their core findings emphasizes the political and ideological influences on the Court.[13] As well, Owens and Simon's normative focus dwells on various "problems" that flow from the Court deciding fewer appeals. In particular, Owens and Simon suggest that a reduced Court docket invites, among other challenges, increases in the number of "important issues" that the Court will simply not resolve, inflation of the relative importance and influence of "repeat players" before the Court,[14] and a decrease in the Court's overall legitimacy.[15]

A. Prevailing Theories on Influences to the Court's Docket

Perhaps Owens and Simon's most important contribution involves their empirical approach to a research question that has been dominated by largely descriptive accounts in the past.[16] By bringing data to an array of leading theoretical accounts of the Court's docket size, discussed briefly below, Owens and Simon's paper not only subjects these theoretical accounts to real-world data and hypothesis testing but also contributes to a scholarly foundation that benefits future scholars by helping identify new questions and lines of research to pursue.[17]

1. Internal Factors and Court Composition

The Court's own internal mechanisms, including, but not limited to, Court rules governing grants to writs of certiorari, along with the Court's membership, form an obvious cluster of factors that inform the Court's docket. That is, the Court's membership as well as the rules the Justices impose upon themselves assuredly influence *which* appeals are selected for Court review and, in so doing, resolve the question about *how many* appeals

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11   *See* Owens & Simon, *supra* note 1, at 1276 tbl.2.

12   *Id.* at 1275.

13   *See id.* at 1283 ("[T]he Court will continue to decide relatively few cases per Term unless the political landscape changes."). To be fair, the authors also write that they do not believe that "ideology alone accounts for the Court's docket shifts." *Id.* at 1284.

14   *See id.* at 1258. These repeat players include various members of the Supreme Court bar and the U.S. Solicitor General's Office.

15   *See id.* at 1284.

16   *See, e.g.*, Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 776–90 (2001) (exploring the influence of changes to the Court's membership); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 417–19 (focusing on the reduced number of cases in which the United States sought plenary review).

17   Owens & Simon, *supra* note 1, at 1270.

are selected each Term. It is difficult to overstate the importance of case selection and, as well, the potential impact of the Court's internal "rule of four." The particular strategic import of the Court's "rule of four" is well understood by the Justices themselves as well as others. As Professors Kurland and Hutchinson observed, "[t]he rule of four is a device by which a minority of the Court can impose on the majority a question that the majority does not think it appropriate to address."[18]

One additional internal mechanism, activated during the 1972 Term (principally during calendar year 1973),[19] involved the cert pool, which, as Owens and Simon describe, was justified as a "time-saving mechanism for the Justices' chambers" as they sorted through petitions.[20] This characterization of the cert pool as an administrative "time saver" comports with data on annual volume of certiorari petitions. In 1940, the total number of certiorari petitions the Court had to review was 977; by the 1972 Term, when the cert pool practice was implemented, the number of certiorari petitions had increased by almost 400% (3794).[21] While few scholars disagree that the cert pool has introduced some degree of administrative efficiency, what scholars do contest, however, is the degree to which (if at all) the emergence of the cert pool itself influences the total number of appeals the Court decides to resolve each Term.[22]

2.   External Factors

In addition to internal Court-controlled factors, such as the cert pool, other factors residing wholly outside of the Court's control can also influence how many appeals the Court decides to resolve. One obvious external factor

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18   Philip B. Kurland & Dennis J. Hutchinson, *The Business of the Supreme Court, O.T. 1982*, 50 U. CHI. L. REV. 628, 645 (1983). Perhaps notably, former Justice Stevens observed that approximately twenty-five percent of appeals that proceeded to the Court's discuss list were granted certiorari with only four votes. *See* John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 16–17 (1983). Of course, as Professors Revesz and Karlan point out, because a majority of Justices can vote to dismiss a case as improvidently granted after oral argument, a "grant of certiorari is not irrevocable." Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1082 (1988).

19   Barbara Palmer, *The "Bermuda Triangle?" The Cert Pool and Its Influence over the Supreme Court's Agenda*, 18 CONST. COMMENT. 105, 107 & n.8 (2001).

20   Owens & Simon, *supra* note 1, at 1235.

21   Indeed, one year later the number increased further to 4187. *Supreme Court Caseloads, 1880–2015*, FED. JUD. CTR., https://www.fjc.gov/history/exhibits/graphs-and-maps/supreme-court-caseloads-1880-2015 (last visited Feb. 29, 2020).

22   *Compare* David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151, 160 (2010) (indicating that one possible explanation for the decrease in plenary review is the increase in the number of Justices using the cert pool), *and* David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 972 (2007) (book review) (arguing that the cert pool's emergence may have contributed to the Court's docket decline), *with* Cordray & Cordray, *supra* note 16, at 791 (arguing that the cert pool has not had much systematic influence on the number of appeals the Court agrees to decide).

includes adjustments by Congress to the Court's jurisdiction. The clearest example of this during the time period of our study involves the Supreme Court Case Selections Act of 1988.[23] This legislation resulted in the removal of virtually all of the Court's remaining mandatory jurisdiction. Diminishing the Court's mandatory jurisdiction, in turn, afforded the Justices almost total freedom in selecting the appeals that they wanted to hear and decide.[24]

Of course, reductions in the Court's mandatory jurisdiction do not necessarily lead to reductions in the Court's docket. After all, while the Act had the net effect of eliminating a stream of appeals that mandatory jurisdiction required the Court take up, it does not inexorably follow that a net reduction in mandatory jurisdiction appeals means fewer appeals for the Court to hear. Indeed, nothing in the Act prevents the Court from replacing the volume of appeals that the Court no longer must hear with granting additional discretionary appeals that it wants to decide.

While nothing in the Supreme Court Case Selections Act, either on its face or in operation, necessarily compels a reduction in the Court's docket size, the net effect of the Act's implementation, as Court docket trend lines imply, corresponds with a reduction in the total number of appeals decided by the Court. As Figures 1 and 2 make clear, beginning approximately one year following the Act's implementation, the Court's docket size began to drop palpably and consistently for approximately one decade.[25]

3. Intercourt and Intra-Court Ideological Dispersion

The scholarly focus on ideological dispersion as a factor that influences the number of appeals the Court decides each Term divides into two broad dimensions: intercourt and intra-Court. Intercourt ideological dispersion, construed as the distance between the median Justice's Judicial Common Space (JCS) score and the median circuit court's JCS score, is frequently framed in principal-agent theory.[26] The theory's impulse and implications in this context are relatively straightforward. From its perch at the top of the judicial hierarchy and to the extent that the Court's role includes resolving splits between or among circuits as well as correcting erroneous circuit decisions, one could reasonably expect that the Court's need to "clean up" circuit

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23   Pub. L. No. 100-352, 102 Stat. 662 (codified in scattered sections of 28 U.S.C.).

24   For a discussion, see, for example, Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81 (1988); and Megan Reilly, Note, *Is the Supreme Court's Virtually Complete Discretion in Certiorari Decisions as Afforded by Congress in the Supreme Court Case Selections Act of 1988 Ethical, and What Potential Ethical Ramifications Stem from Such Control?*, 29 Geo. J. Legal Ethics 1299 (2016).

25   Prior empirical studies of slightly different research questions, however, did not detect a diminished Court docket attributable to the Supreme Court Case Selections Act. *See, e.g.*, Hellman, *supra* note 16, at 412.

26   Owens & Simon, *supra* note 1, at 1245–51; *see also* Tracey E. George & Albert H. Yoon, *The Federal Court System: A Principal-Agent Perspective*, 47 St. Louis U. L.J. 819, 825–31 (2003) (analyzing intercourt ideological dispersion's effect on docket size using the principal-agent theory).

decisions (or "splits") or "supervise" lower courts decreases as the ideological distance between the Court and circuits decreases.[27]

A second dimension explores intra-Court ideological dispersion, operationalized as the distance between the Court's most conservative and liberal Justices' Martin-Quinn scores. This particular influence, intra-Court ideological dispersion across the Justices, certainly warrants attention as it is the Justices themselves, through their individual votes on certiorari petitions, who directly control the Court's docket. What is implied by attention to intra-Court ideological cohesion is that as the Court's ideological cohesion decreases so, too, will the Court's appetite to decide appeals. That is, a decrease in the Court's ideological cohesion should correspond with a decrease in the number of appeals the Court agrees to decide.

B.   How to Understand a Diminishing Court Docket?

Despite increased scholarly attention to the Court's docket size and changes to it, does the total number of appeals decided by the Court each Term—let alone variation in this number over time and across Court Terms—matter? Or, assuming that the descriptive accounts of the Court's diminishing docket over time are accurate, as an interpretative matter what should one make of it?

Owens and Simon, similar to many scholars (particularly, but not limited to, legal scholars), paint a dim normative picture resulting from a diminished Court docket. Specifically, they identify four particular problems hastened by the Court's decreased appetite for deciding appeals.[28] One such problem is that as the Court decides fewer appeals it necessarily leaves more legal questions "undecided."[29] A second problem, perhaps conceptually related to the first, is that a reduced Court docket may contribute to the Court becoming more "out of touch," at least, perhaps, as it relates to legal development.[30] Third, to the extent that the Court decides fewer appeals, and particularly so in various discrete legal areas (e.g., copyright), Owens and Simon argue that those fewer appeals will increasingly be handled by the emergence of an elite Supreme Court bar that is dominated by a small handful of leading large law firms (and these law firms' significant corporate client bases).[31] Finally, a diminished Court docket could likewise subdue the Court's legitimacy as a constitutional institution over time, or at least, perhaps, public perceptions of the Court's legitimacy.[32]

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27   For one critique of the application of the principal-agent theory in the context of Court and court relations, see Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 Nw. U. L. Rev. 535, 552–71 (2011).

28   *See* Owens & Simon, *supra* note 1, at 1251–63.

29   *Id.* at 1252–54.

30   *Id.* at 1254–56.

31   *Id.* at 1256–60; *see, e.g.*, Kedar S. Bhatia, *Top Supreme Court Advocates of the Twenty-First Century*, 2 J.L. (1 J. Legal Metrics) 561, 570–72 tbl.A (2012) (listing lawyers who argued five or more appeals in the Supreme Court during OT 2000–12).

32   Owens & Simon, *supra* note 1, at 1260–63.

To be sure, while the somewhat grim picture painted by Owens and Simon (and others) certainly reflects the weight of scholarly opinion, dissenting voices also exist. Notably among those who offer alternative interpretations is U.S. Circuit Judge J. Harvie Wilkinson III, who argues that a decline in the Court's docket size does not raise concerns and, even if it did, any such concerns are self-correcting.[33] Moreover, Judge Wilkinson goes on to argue that many of the reforms seeking to address potential harms flowing from a decreasing Court docket, including calls for the Court to take on more appeals, will likely do more harm than good.[34]

C.   Why "Replication" Studies Matter

The need for greater attention to replication studies has increased over time; indeed, attention to this topic has exploded recently not only among academics but also in the popular media as well. Much of the current attention, likely sparked by a "crisis" in clinical psychology, has cast exceedingly harsh light on various scholarly fields and subfields.[35] The emergence of problems associated with the systematic inability to "replicate" numerous studies has resulted in, among other things, forced early retirements for senior academics[36] and increased public "scorn" directed at various scholarly fields and disciplines.[37] Moreover, noteworthy "failures to replicate" helped fuel the establishment of well-funded labs whose principal focus is to replicate published empirical social science.[38]

Prompted partly by the academy's renewed attention to and focus on replication, this Article seeks to contribute to a growing "replication" literature by replicating, as well as updating and expanding upon, the most recent, comprehensive, and leading empirical examination of the Court's diminishing docket, published by Professors Owens and Simon in 2012. Owens and Simon's paper sets out to explore the degree to which ideological differences

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33   J. Harvie Wilkinson III, *If It Ain't Broke . . .*, 119 Yale L.J. Online 67, 71–72 (2010) (arguing that a declining Court docket size does not raise problems and, if it did, any problems would be self-correcting).

34   *Id.* at 67.

35   *See, e.g.*, Open Sci. Collaboration, *Estimating the Reproducibility of Psychological Science*, 349 Science 943 (2015).

36   *See, e.g.*, Tom Bartlett, *As Cornell Finds Him Guilty of Academic Misconduct, Food Researcher Will Retire*, Chron. Higher Educ. (Sept. 20, 2018), https://www.chronicle.com/article/As-Cornell-Finds-Him-Guilty-of/244584; James Hamblin, *A Credibility Crisis in Food Science*, Atlantic (Sept. 24, 2018), https://www.theatlantic.com/health/archive/2018/09/what-is-food-science/571105/.

37   *See, e.g.*, Scott O. Lilienfeld, *Psychology's Replication Crisis and the Grant Culture: Righting the Ship*, 12 Persp. on Psychol. Sci. 660, 660 (2017); D. Stephen Lindsay, *Replication in Psychological Science*, 26 Psychol. Sci. 1827, 1827 (2015).

38   Open Sci. Collaboration, *supra* note 35, at 950; *Our Mission*, Ctr. for Open Sci., https://cos.io/about/mission/ (last visited Feb. 14, 2020). The Center for Open Science, located near the University of Virginia, includes various research projects spanning an array of scholarly fields, such as the "Reproducibility Project: Psychology." *Reproducibility Project: Psychology*, OSF, https://osf.io/ezcuj/ (last visited Feb. 14, 2020).

between the Supreme Court and lower federal appellate courts informed the Court's docket over time, while simultaneously accounting for the prior major theories.[39] In this spirit, we set out to independently replicate Owens and Simon's original findings, update their study with data from nine additional Court Terms, and expand their work through alternative variables as well as models.[40]

III.   DATA, RESEARCH DESIGN, AND METHODOLOGY

To test the various competing hypotheses relating to the Supreme Court's docket size, we draw on three distinct though related data sources. One important data source includes the Supreme Court Database, created by Professor Harold Spaeth and now actively updated and maintained under Professor Lee Epstein's supervision.[41] This data set supplies, among other information, the number of annual Court decisions generated each Term.[42] While the Spaeth-Epstein Supreme Court database is widely used,[43] especially among political scientists, and criticized,[44] the database's well-known main limitations are not particularly germane to the analyses in our study.

A.   Dependent Variable: The Number of Court Decisions by Term

The term "Supreme Court decision" warrants a bit more specification, particularly as it serves as this study's dependent variable. To facilitate comparisons across past studies and time, we adopted Professors Owens and Simon's construction of the term. That is, we construe Court decisions to include only those that derived from a case that was orally argued and culminated in a signed or per curiam opinion or a judgment of the Court.[45] As Figure 1 illustrates, our dependent variable ranges from a low of 68 (2017 Term) to a high of 215 (1940 Term).

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39   Owens & Simon, *supra* note 1, at 1224, 1284–85.

40   We wish to specifically acknowledge Owens and Simon's collegiality and contributions to our study. Consistent with the scholarly enterprise in its purest form, both Professors Owens and Simon were gracious in sharing their original data set as well as responding to periodic questions throughout our study.

41   *See* SUP. CT. DATABASE, http://supremecourtdatabase.org (last visited Feb. 14, 2020). The full list of current contributors to this invaluable data set includes: Harold Spaeth, Lee Epstein, Ted Ruger, Sara Benesh, Jeffrey Segal, and Andrew Martin (version 2018, Release 2.0). *The Contributors*, SUP. CT. DATABASE, http://supremecourtdatabase .org/about.php?s=3 (last visited Jan. 14, 2020).

42   While the current (and most recent) United States Supreme Court Database includes data from the 1946 through the 2017 Terms, Professors Owens and Simon kindly shared docket information for the 1940 through 1945 Terms.

43   *See, e.g.*, Lee Epstein & Eric A. Posner, *Supreme Court Justices' Loyalty to the President*, 45 J. LEGAL STUD. 401, 408 (2016).

44   *See, e.g.*, Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477 (2008).

45   Owens & Simon, *supra* note 1, at 1270.

B.   Independent Variables: Ideological and Nonideological

The factors hypothesized to influence the number of Court decisions across Terms can be organized into two broad groups of independent variables: ideological and nonideological.

1.   Ideological Factors

The influence of ideological factors on the Court's docket size is construed in two related—though distinct—dimensions. One dimension involves ideological cohesion among the Justices on the Supreme Court. A second dimension focuses on ideological gaps between the Supreme Court and the various federal circuit courts, from which the Court draws a sizable portion of its docket.

a.   *Intra*-Court Ideological Distance

As ideological cohesion, in various directions and across various institutions, is of particular concern, we exploit the oft-used Martin-Quinn score estimates.[46] The Martin-Quinn scores reflect a Bayesian modeling method that exploits the Justices' votes to estimate their latent ideological preferences.[47] The scores are updated annually, and this study uses the 2017 Martin-Quinn scores.[48]

Following Owens and Simon's study, intra-Court ideological cohesion is operationalized by computing an ideological-range score for the Court each Term. The ideological-range score is the absolute value of the difference between the minimum and maximum Martin-Quinn scores for the Justices. More specifically, intra-Court ideological cohesion is understood as the gap between the Court's most liberal and conservative Justices for each Term.[49] Thus, we expect that a *decrease* in the Court's ideological-range score (that is, as intra-Court ideological cohesion increases), will correspond with an *increase* in the Court's docket size. Conversely, we expect a more ideologically heterogeneous Court to accept, review, and decide fewer appeals.

b.   *Intercourt* Ideological Distance

Along with the influence of ideological cohesion among the Supreme Court Justices, ideological cohesion between the Court and the federal circuits is also expected to inform variation in the Court's docket size. As

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46   For a general description see, for example, 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). To access the most recent (2018) Martin-Quinn Justice data files, see *Measures*, MARTIN-QUINN SCORES, http://mqscores.lsa.umich.edu/measures.php (last visited Feb. 16, 2020).

47   Martin & Quinn, *supra* note 46, at 135.

48   Owing to Martin-Quinn score updating, the Martin-Quinn score values we use in our study differ slightly from those used by Owens and Simon in their 2012 study.

49   *See* Owens & Simon, *supra* note 1, at 1272.

Owens and Simon hypothesized, as the degree of ideological separation between the Supreme Court and the federal circuit courts increases, we expect a corresponding increase in the Court's docket size. Conversely, we expect the Court to take on comparatively fewer appeals when it is ideologically closer to the federal circuits.[50]

To assess this hypothesis we exploit the annual Judicial Common Space (JCS) scores. JCS scores provide researchers with a common metric to comparatively assess ideal points for Justices as well as federal circuit judges. From these, one can explore intercourt ideological variation and, critical to this study, ideological distance. More specifically, for each Term we identified the median Justice's JCS score as well as the mean of the circuit courts' median JCS scores. We construe the intercourt ideological range for each Court Term as the absolute value of the difference between these two scores.

Insofar as this Article sets out to expand Owens and Simon's paper, we also consider in alternative specifications an alternative measure of intercourt ideological dispersion that focuses on circuit *outliers* rather than *midpoints*. Specifically, we crafted a new variable that derives from the absolute value of the distance between the median Justice's JCS score and the median JCS score from that circuit court located *furthest* from the Court's ideological "center." Our impulse here pivots on the notion that to the extent that the Court strives to achieve "error correction" (among the circuits), such an error correction impulse may be more efficaciously reflected by focusing on the ideological space between the Court's midpoint and the circuit court median that is most "distant" from the Court. One would expect, ex ante, that as the ideological gap between the Court's midpoint and the most ideologically distant circuit court increases, so too will the Court's docket size.

One small technical wrinkle, incident to our use of the dynamic Martin-Quinn and JCS scores, warrants brief explanation. Given that Martin-Quinn and JCS scores update periodically, this study updates Owens and Simon's 2012 study with the benefit of the most recent scores as well as expands it by including data through the 2017 Term. The dynamic nature of the Martin-Quinn and JCS scores' updating, however, precludes us from a literal replication of Owens and Simon's 2012 study.

2.   Nonideological Factors

When modeling Court outcomes, scholars across various fields understandably tend to focus on the role of "judicial ideology." And, to be sure, ideology has been found to exert important influences in many court studies.[51] That said, despite ideology's acknowledged role in Court outcomes,

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50   *Id.* at 1248.

51   *See, e.g.*, Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 260–63 (1995); James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J.

few judicial or court scholars believe that ideology is the *only* independent variable warranting attention.[52] As such, and consistent with Owens and Simon's prior work, our models include various nonideological variables that have either been previously found or hypothesized (or both) as salient to variation in the Court's docket size over time. These variables include the Supreme Court Case Selections Act of 1988, the emergence of the certiorari pool, and Justice White's somewhat notable penchant and appetite for the Court to hear and decide appeals, especially those involving circuit splits.[53]

Insofar as our Article seeks to expand Owens and Simon's 2012 work, we also consider an additional nonideological variable in supplemental analyses: the annual total number of the certiorari petitions filed by petitioners each Term (lagged by one Term).[54] We explore this variable because the Court's docket is drawn from the universe of certiorari petitions filed, and variation in the number of certiorari petitions may influence the number of appeals the Court decides to hear and decide. We lag the certiorari petitions filed variable to adjust for the practical reality that to the extent that certiorari petitions may influence the Court's docket size, any such influence will likely flow from the volume of certiorari petitions filed in the prior Term.

Of course, even if the motivation for considering certiorari petitions is persuasive, we remain mindful that some degree of censoring concerns arises. Left-side censoring, in theory anyway, could fall to zero. That is, despite its obvious unlikeliness, it remains theoretically possible that the Court could simply decline to decide *any* appeals in a given Term. To be sure, this has never happened, and, in reality, any left-side censoring is likely to land somewhere greater than zero. Indeed, across the seventy-eight years included in our study the Court has never decided fewer than 68 appeals (in 2017).

Potential right-side censoring also exists. After all, the Court's business is conducted by no more than nine Justices, and practical limits attach to the amount of work (appeals decided) that nine Justices can be reasonably expected to complete each Term. While technological advances since 1940 as well as various increases in the number of clerks assigned to each Justice over time surely inform the Court's judicial capacity for deciding appeals, the uppermost bound during the course of this study was 215 decisions (in

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1675, 1713–20 (1999); Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals,* 58 Ohio St. L.J. 1635, 1678–86 (1998); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning,* 73 N.Y.U. L. Rev. 1377, 1465–70 (1998).

52   *See, e.g.,* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making,* 151 U. Pa. L. Rev. 1639, 1640, 1645 (2003); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures,* 99 Nw. U. L. Rev. 743, 747–59 (2005) (summarizing the academic, judicial, and public debates on the legal and ideological influences on judicial outcomes).

53   Owens & Simon, *supra* note 1, at 1235 (cert pool), 1242 (Justice White), 1267 (Supreme Court Case Selection Act).

54   Specific methodological complexities incident to including annual certiorari petitions are described more fully below. *See infra* Section IV.C.

1940). Despite the practical censoring concerns pointing in both directions, to the extent that size variations in the universe of petitions from which the Court draws its docket may inform the Court's docket size, it is a factor that warrants attention.

Heightening our sense that certiorari petitions warrant attention is how they and the Court's actual docket size covaried over the period of our study. Figure 3 illustrates the relation between the Court's docket size and the number of certiorari petitions filed over time. In the "dual-axis" figure, the axis on the left scales the number of certiorari petitions (represented with a broken line) each Term; the axis on the right scales the number of appeals decided by the Court (represented with a solid line).[55] While the pattern conveyed in Figure 3 implies a relation between these two variables, it is an unexpected relation. Specifically, what is implied by Figure 3, on balance, resembles something close to an inverse relation (again, potentially distorted a bit by the dual-axis scaling).

FIGURE 3: NUMBER OF APPEALS DECIDED BY THE COURT AND CERTIORARI
PETITIONS FILED, 1940–2017 TERMS
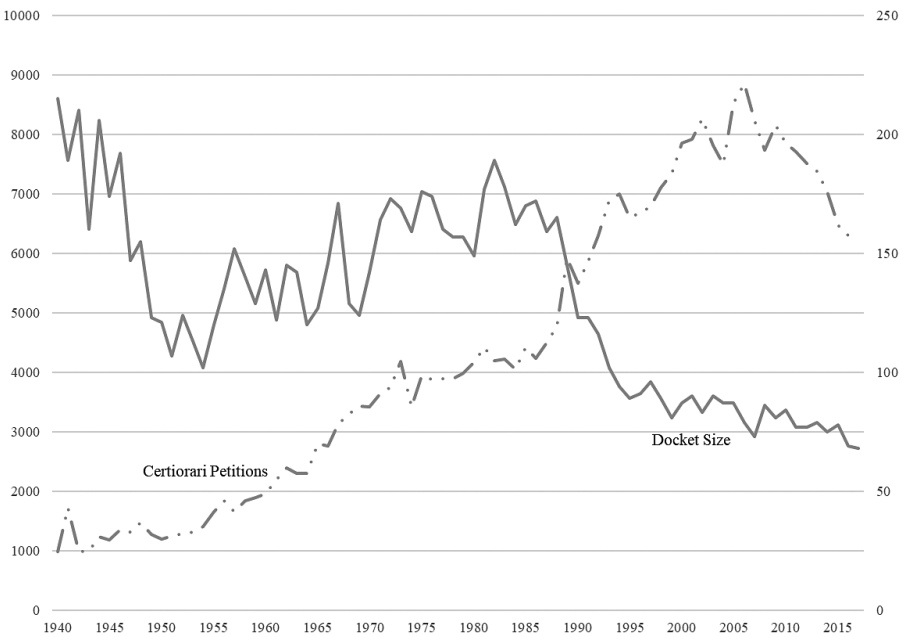
Sources: U.S. Supreme Court Database (2018), Owens and Simon (2012) (updated), and Federal Judicial Center (2018).

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55   Please note the different scales in the left and right axes. Also, the data relating to the number of appeals decided by the Court in Figure 3 are also presented in Figure 1.

IV.   RESULTS AND DISCUSSION

We present results from our efforts to replicate and update (in Table 1) as well as expand upon (in Table 2) Owens and Simon's prior work. While Owens and Simon explored the influence of five factors on the Court's docket size, we broadened the scope of the inquiry by exploring the influence of alternative and additional variables in our Article as well as multiple models.

A.   *Results: Replication and Updates*

As it relates to our initial and narrow replication task, Model 1 in Table 1 presents results from our effort that most closely traces Owens and Simon's empirical strategy in their 2012 paper. Specifically, this model specification uses Owens and Simon's original list of variables and is limited to their period of study (1940–2008).[56] Insofar as the dependent variable of interest—the total number of Supreme Court decisions by Term—is plausibly construed as a "count" variable, results from Model 1 (and Models 2 and 3) derive from a negative binomial regression model, clustered on Court Term. As results in Model 1 in Table 1 make clear, our findings largely track—and thus essentially successfully "replicate"—Owens and Simon's 2012 results.[57]

Beyond the narrow task of replicating Owens and Simon's published results, our Article also seeks to update Owens and Simon's work. We do so by extending the scope of the study to include updated data from additional Court Terms (1940–2015). To this end, Model 2's specification replicates that of Model 1 with one critical difference. Specifically, Model 2 expands the scope of the study to include data from additional Court Terms (1940–2015).

From an interpretative standpoint, results in Model 2 set the stage for similar results derived from alternative specifications. In particular, in Model 2 the additional Court Terms do little, and nothing of note, to all of the independent variables save for one—the intercourt ideological distance variable falls out of statistical significance.[58] Consequently, from the narrow perspective of ideological "distance," results in Model 2 imply that it is the ideological "distance" within the Court (and across the various Justices), along with other control variables (discussed below) that accounts for variation in the number of appeals the Court decides each term. Or, more specifically, and as hypothesized, in terms of ideological distance what is critical is that as the ideological heterogeneity of the Court *increases* (that is, as the "distance" separating the Court's most liberal and conservative Justices increases), the number of appeals the Court will decide *decreases.*

Beyond replicating and updating, however, we also expand on Owens and Simon's initial work partly by introducing an alternative measure of an

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56   Owens & Simon, *supra* note 1, at 1270–75.
57   *Id.* at 1276 tbl.2.
58   Notably, Moffett et al.'s study of the Court's docket from 1946 to 2005 similarly found no intercourt influence. *See* Moffett et al., *supra* note 8, at 34.

intercourt ideological distance. In the prior models (Models 1 and 2 in Table 1), intercourt ideological distance is construed in terms of the "distance" between the Court's median Justice and the median circuit JCS score. In Model 3, by contrast, we consider ideological "distance" between the Court's median Justice and the JCS in terms of the most divergent circuit. Whatever one may feel about how to best operationalize ideological distance between the Court and the federal circuits, however, in neither approach (Model 2 or 3) did the intercourt ideological distance variable achieve statistical significance.

The absence of statistical significance for the intercourt ideological distance variable, however operationalized, stands in stark contrast with the persistently significant influence exerted by intra-Court ideological distance. That is, to the extent that ideological distance mattered in terms of influencing the number of appeals decided by the Court each Term, it was distance among the Court's Justices that mattered rather than any ideological distance between the Court and the federal circuits.

B.   *Important Factors Other than Ideology*

As discussed above, as it relates to the influence of ideology—as variously operationalized—the findings presented in Table 1 (Models 2 and 3) diverge from Owens and Simon's 2012 findings mainly due to the persistent salience of intra-Court rather than intercourt ideological influences. While the absence of a systematic intercourt ideological difference in Models 2 and 3 represents an important departure from Owens and Simon's original findings, the influence of other nonideological factors largely persists across the various model specifications and, as such, warrants brief discussion.

1.   Supreme Court Case Selections Act of 1988

It is difficult to overstate the importance of the Supreme Court Case Selections Act's downward influence on the Court's docket size. Results from all three models in Table 1 illustrate the Supreme Court Case Selections Act's persistent and strong downward influence on the number of appeals the Court decided each Term. Prior to the Act's implementation the Court's average docket size between the 1940 and 1988 Terms was 153.5. After holding all else in our estimation constant, the effect of the Supreme Court Case Selections Act's passage on the Court's docket size was a reduction to 82.3 appeals per Term. That is, owing to the Supreme Court Case Selections Act's passage in 1988, the Court, on average, decided 71.2 fewer appeals per Term than before the Act's passage.[59]

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59   To model Owens and Simon's 2012 paper as closely as possible, the predicted values calculations derive from the negative binomial regression estimation reported in Model 2 (Table 1), which best reflects Owens and Simon's original estimation updated by our data from an additional nine Court Terms. The predicted values calculations were produced by Stata's "prvalue" command (v.14.1). The predicted values were calculated while holding all continuous values at their mean and the binomial variables at their modal values.

2. Justice White

Justice White enjoyed a well-earned reputation for his desire and com-
mitment to "clean up" splits and conflicts between and among various circuit
courts.[60] His desire exerted an upward influence on the number of appeals
the Court took and decided. When Justice White was on the Court, the
model predicts that it will decide, on average, 180.6 appeals per Term. When
Justice White was not on the Court, the predicted docket size decreases to
153.5. The docket size difference attributable to Justice White's presence on
the Court is a net increase of, on average, 27.1 appeals per Term.[61] As the
results in Table 1 illustrate, however, the statistical significance of Justice
White's influence—increasing the average number of Court decisions each
Term—does not persist across all specifications. While any "Justice White"
effect proved somewhat less forceful and persistent than that exerted by the
Supreme Court Case Selections Act of 1988, Justice White's influence on the
number of Court decisions nonetheless likely deserves attention.

TABLE 1: NEGATIVE BINOMIAL REGRESSION MODELS OF THE NUMBER OF
APPEALS DECIDED BY THE COURT, BY TERM (1940–2015)

	1	2	3
Ideology:			
Intra-Court ideological dist.	-0.03*	-0.03**	-0.02*
	(0.01)	(0.01)	(0.01)
Intercourt ideological dist.	-0.76**	-0.27	
	(0.17)	(0.23)	—
Intercourt ideological dist. —furthest Cir.	—	—	-0.13
			(0.20)
Nonideology Factors:			
Case Selections Act, 1988	-0.44**	-0.57**	-0.53**
	(0.06)	(0.12)	(0.12)
Cert pool review	0.08	0.09	0.07
	(0.06)	(0.06)	(0.06)
Justice White	0.14*	0.17*	0.15
	(0.06)	(0.08)	(0.10)
Total cert petitions filed (lag)	—	—	—
Constant	5.22**	5.20**	5.17**
	(0.08)	(0.13)	(0.18)
(*N*)	68	76	76

Source: Owens & Simon (2012) (updated).
Notes: Robust standard errors in parentheses. *$p<0.05$; **$p<0.01$. We estimated the models
using the "nbreg" command in Stata (v.16.1).

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60   Such an impulse is almost assuredly Sisyphean insofar as (former) Judge Starr esti-
mated that there are "'approximately 400' circuit splits each year." *See* Starr, *supra* note 4,
at 1372 (quoting Cordray & Cordray, *supra* note 16, at 772).
61   Owens and Simon reported similar findings regarding Justice White's influence on
the Court's docket size. *See* Owens & Simon, *supra* note 1, at 1281 fig.7.

C. *Model Expansion: Certiorari Petitions Filed*

Though not considered by Owens and Simon, we felt it possible that variation in the size of the universe of certiorari petitions filed in the Court each year (lagged by one year) may inform the number of appeals the Court takes and decides.[62] We also felt that the dependent variable is more usefully understood with respect to the total number of certiorari petitions filed in the Court each year. Accordingly, in alternative specifications we include an exposure variable. Our decision to expand Owens and Simon's study in these ways, however, necessitated important modifications to our empirical strategy.

The emergence of both the Case Selections Act in 1988 and the Court's cert pool practice responded to, in some degree, general and growing concerns over the steady increase in the number of certiorari petitions filed over time. Insofar as our new control variable of interest—the total number of certiorari petitions filed, lagged by one year—motivated not only the passage of the Case Selections Act in 1988 but also the emergence of the Court's cert pool practice, we concluded that multicollinearity concerns necessitated removing the Case Selections Act of 1988 and cert pool dummy variables from alternative models that included the certiorari petitions variable.

A second change to our empirical strategy involves the model itself. In Owens and Simon's original work, which, importantly, does *not* consider how variation in the number of certiorari petitions may inform the Court's docket size, their selection of a negative binomial regression model was appropriate, especially given the basic "count" character of the dependent variable (total number of appeals decided by the Court by Term) and given the negative binomial regression model's ability to adjust for overdispersion (that is, when the conditional variance exceeds the conditional mean). However, the threat posed by overdispersion may be inflated, the inclusion of an exposure variable (total number of certiorari petitions filed in the Court each Term) may supply helpful context to the dependent variable, and the number of certiorari petitions, lagged by one year, may serve as a useful control variable for the model.

To better explore how the total number of certiorari petitions filed (lagged by one year) may influence the Court's docket size, we consider two separate approaches. Models 1 and 2 in Table 2 present results from negative binomial regression models modified to include an exposure variable (total number of certiorari petitions filed each Term). Negative binomial regression may also be appropriate for rate data, where the rate is a count of events divided by some measure of that unit's *exposure* (a particular unit of observation). In particular, the rate is the docket size divided by certiorari petitions filed in any given Court Term. In negative binomial regression this is handled as an offset, where the exposure variable enters on the right-hand

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62   We lagged the certiorari petitions control variable by one year because we hypothesize that if certiorari petitions indeed inform the Court's docket size, it would be the number of certiorari petitions filed in the year prior.

side of the equation, but with a parameter estimate (for log(exposure)) constrained to 1. The exposure variable is important, as it sets the upper boundary for the dependent variable. That is, if one assumes that the Court is functionally limited to granting certiorari only to appeals that filed a petition for certiorari, then the number of certiorari petitions filed each year defines the dependent variable's upper limit. Another virtue of our alternative modeling approach is that it accounts for potential distortions introduced by time trends in our panel data.[63]

Results presented in Models 1 and 2 in Table 2 converge on at least two key points. First, and once again, to the extent that ideological distance matters at all (in Model 2), it is only intra-Court ideological distance that was salient. Second, consistent with what is implied at the descriptive level in Figure 3, certiorari petitions exerted an important effect on the models. In terms of the Bayesian information criterion (BIC),[64] as between the two negative binomial models we considered (Models 1 and 2), Model 2 is preferred (albeit slightly), thus highlighting our alternative measure of intercourt ideological distance.

Of course, including an exposure variable (as we do in Models 1 and 2) introduces further methodological wrinkles. Specifically, modifying the original negative binomial regression model to include an exposure variable (certiorari petitions) plausibly transforms the character of the dependent variable so that it is now better understood as the number of Court decisions *out of* the total number of certiorari petitions. If so, then this understanding of the dependent variable may be better approached as a binomial outcome rather than a traditional "count." And, if so, the negative binomial regression model's comparative advantages may no longer be especially apt.

To explore this methodological possibility—and to better assess the core results' robustness across different model specifications—we considered a binomial regression model, and results from two specifications are presented in Models 3 and 4. While results in Models 3 and 4, similar to those generated by different models (along with the results presented in Table 1), emphasize the persistent and particular salience of ideological dispersion across the Supreme Court Justices, it is worth noting that, for the first time since replicating Owens and Simon's 2012 results (Table 1, Model 1), intercourt ideological dispersion achieves statistical significance (Table 2, Model 4). Finally, in terms of BIC, as between the two binomial regression models (Models 3 and 4), Model 4 is preferred.

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63   For alternative approaches toward a possible risk posed by stationarity in the dependent variable, see, for example, Moffett et al., *supra* note 8, at 31 (describing an error-correction model as one "conservative" approach). As it relates to negative binomial models' implications for possible time-trend data, see generally A. COLIN CAMERON & PRAVIN K. TRIVEDI, REGRESSION ANALYSIS OF COUNT DATA 263–303 (2d ed. 2013).

64   *See generally* Adrian E. Raftery, *Bayesian Model Selection in Social Research*, 25 SOC. METHODOLOGY 111 (1995). Lower BIC values indicate a better fitting model. *See id.* at 133–34.

TABLE 2: NEGATIVE BINOMIAL REGRESSION AND BINOMIAL REGRESSION
MODELS OF THE NUMBER OF APPEALS DECIDED BY THE COURT,
BY TERM (1940–2015)

	1	2	3	4
Ideology:				
Intra-Court ideological dist.	-0.02	-0.03*	-0.03*	-0.03*
	(0.01)	(0.01)	(0.01)	(0.01)
Intercourt ideological dist.	0.14		0.23	
	(0.22)	—	(0.22)	—
Intercourt ideological dist.		0.28		0.34*
—furthest Cir.	—	(0.15)	—	(0.16)
Nonideology Factors:				
Case Selections Act, 1988	—	—	—	—
Cert pool review	—	—	—	—
Justice White	-0.02	0.03	-0.02	0.04
	(0.06)	(0.07)	(0.06)	(0.07)
Total cert petitions filed (lag)	-0.00**	-0.00**	-0.00**	-0.00**
	(0.00)	(0.00)	(0.00)	(0.00)
Constant	-1.74**	-1.91**	-1.66**	-1.83**
	(0.17)	(0.18)	(0.18)	(0.19)
BIC	727.31	725.37	150.10	138.68
(N)	75	75	75	75
Model:				
Negative Binomial Regression	✓	✓		
Binomial Regression			✓	✓

Source: Owens & Simon (2012) (updated).
Notes: Robust standard errors in parentheses. *$p < 0.05$; ** $p < 0.01$. We estimated Models
1 and 2 using the "nbreg" command; Models 3 and 4 using the "binreg" command in Stata
(v.16.1).

D. Discussion, Implications, and Limitations

The cumulative weight of these findings implies that a slight—though perceptible—shift in the source of ideological influences from what Owens and Simon described in 2012 is warranted. Specifically, while Owens and Simon's results emphasize ideological gaps across the Justices (intra-Court gaps) *and* ideological gaps separating the federal circuit courts and the Supreme Court (intercourt gaps), results in our study, on balance, suggest narrowing the interpretative focus to intra-Court ideological gaps across the Justices *rather than* intercourt gaps between the Supreme Court and federal circuit courts. Moreover, as a comparison between Tables 1 and 2 implies, these core ideological findings display some degree of persistence across multiple (but not all) specifications of the negative binomial regression and binomial regression models. That is, on balance our core results appear largely robust to model selection or specification.

What may explain the slightly divergent findings when it comes to ideological distance, especially in light of the many other findings that we share with Owens and Simon? We argue that it is not simply that our study benefits

from data from additional Court Terms, but, and more importantly, it is what may have specifically transpired during these additional years that deserves close inspection. While Owens and Simon's paper includes Court Terms 1940–2008, and our Article includes Terms 1940–2017, between 2009 and 2017 only President Obama nominated federal judges and Supreme Court Justices. Indeed, during his administration President Obama's 329 total confirmed Article III judicial nominations included two Supreme Court Justices (Justices Sotomayor and Kagan were confirmed by the Senate in 2009 and 2010, respectively) and 55 circuit judges.[65] Moreover, during his two terms Obama enjoyed a Democrat-controlled Senate (and a "unified" federal government for purposes of judicial nominations) for all but two of his eight years as president.

Thus, one critical change since Owens and Simon's 2012 study—and what helps distinguish their original data set from the updated data set used in our study (along with the annually revised Martin-Quinn and JCS scores)—involves contributions attributable to the addition of President Obama's 57 Court and circuit nominations. To the extent that the judges and Justices nominated by President Obama consistently reflect, more or less, President Obama's general judicial philosophy, it then follows that one should expect that President Obama's 57 judges and Justices contributed to a net reduction of ideological "space" between the Court and the circuits. To put the point more concretely, the addition of data from nine Court Terms that largely overlap with the Obama administration provides one plausible explanation for why Owens and Simon's finding of a statistically significant influence exerted by intercourt ideological space falls out of statistical significance in all but one of our models.

1. Do Intra- Versus Interideological Differences Matter, and, If So, What Might They Imply?

While Owens and Simon emphasize intra-Court *and* intercourt ideological distances, our findings emphasize the former and not the latter. Does this subtle change in the source of ideological distance raise any substantive issues of import?

To the extent that ideological distance matters when it comes to explaining variation in Court outcomes over time, greater precision regarding the *source* of such distance also matters. And this is perhaps especially true when it comes to variation in the Court's docket size over time. That the Court alone decides what appeals it will hear, our findings that intra-Court ideological distance's influence persists across the various models that we examined

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65   Stephen B. Presser, *Evaluating President Obama's Appointments of Judges from a Conservative Perspective: What Did the Election of Donald Trump Mean for Popularity Sovereignty?*, 60 How. L.J. 663, 664 (2017); *see also Justices 1789 to Present*, Sup. Ct. U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Feb. 19, 2020) (indicating that Justice Sotomayor and Justice Kagan were appointed by President Obama and confirmed in 2009 and 2010, respectively).

suggests that intra-Court factors will likely remain important to the Court's docket size going forward. After all, the Court's internal "rule of four" impacts cert-granting decisions and strategy,[66] and the Justices themselves collectively exercise exclusive control over the Court's discretionary appeals. Consequently, the persistence of ideological distance among the Justices as an important variable predicting the number of appeals the Court decides during any given Term suggests that changes to Court membership or the Justices' evolving ideological preferences will be critical to any systematic changes to the Court's docket size going forward.

Resolving splits among circuit courts certainly remains salient to the Court's role as the nation's highest court. Moreover, while individual Justices' commitment to cleaning up circuit disputes varies across Justices and over time, this preference was especially acute for Justice White.[67] However, the emergence of circuit splits is just as likely a product of ideological distance (and other variables) among circuits rather than between the circuits and the Court. As well, while it remains a possibility that an individual Justice (or Justices) systematically skew their cert-granting preferences and vote toward resolving circuit splits, the one (modern) Justice (White) who was especially committed to such certiorari petitions is no longer on the Court.

2. Regardless of the Source(s) of a Reduced Court Docket, Are the Consequences from Fewer Court Decisions Necessarily Bad?

When it comes to discussions of the stark empirical reality of a declining Supreme Court docket, the clear weight of scholarly commentary reacting to changes in the Court's docket size over time is palpably negative.[68] Owens and Simon, for example, identify four distinct negative consequences flowing from a declining Court docket, including increasing legal uncertainty among the lower federal courts and decreasing Court legitimacy.[69]

Despite such persistent dire warnings about the consequences flowing from the Court's decreased appetite for deciding appeals, however, perhaps not *all* of the implications are negative. That is, it remains at least possible that *some* positive (or at least some nonnegative) aspects may flow from the Court settling on a more modest role in American life (in terms of the raw number of Court decisions). Moreover, even if critiques of a reduced Court role are, on net, persuasive, any such critiques would be strengthened by at least acknowledging and considering possible benefits flowing from fewer Court decisions.

The modest perspective advanced in this Article, however, is not without precedent. In a 2010 essay Judge Wilkinson, for example, pushed back

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66   *See supra* note 18 and accompanying text.

67   *See supra* subsection IV.B.2.

68   *See, e.g.*, Owens & Simon, *supra* note 1, at 1251–63. *But see* Wilkinson, *supra* note 33 (arguing that a declining Court docket size does not raise problems, and, if it did, any problems would be self-correcting).

69   Owens & Simon, *supra* note 1, at 1251–63.

against conventional wisdom and argued that suggestions to increase the Court's docket size were "wrong"[70] and that even if the Court's decreasing docket size were a problem that warranted correction, it was a situation that could be relied upon to "resolve itself."[71]

    a.   One Logical Extension of Sunstein's "Judicial Minimalism" Doctrine

Professor Sunstein's provocative and widely influential theory on modern Supreme Court decisionmaking, developed and refined over a number of years, emphasized a growing conflict among Justices over the "sweep" of their decisions.[72] Broadly speaking, where judicial "minimalists," according to Sunstein, evidence a preference for narrow, case-by-case adjudication of disputes, judicial "maximalists," by contrast, prefer more expansive judicial opinions that articulate broad rules for the future. Moreover, disputes between the judicial minimalists and maximalists, frequently pivoting on debates about when the Court should "speak and when [it should] remain silent," Sunstein writes, dominate many Court struggles, and certainly begin with the Rehnquist Court.[73] While critics of Sunstein's "judicial minimalism" theory certainly exist, many of these critics are quick to concede the popularity and importance of Sunstein's thesis.[74]

Sunstein's judicial minimalism theory and its impulse to "leave things undecided" self-consciously hearkens back to Alexander Bickel's "passive virtues."[75] Indeed, particularly in the constitutional realm, as Sunstein implies, some form of judicial minimalism may be advantageous as it may help redirect the resolution of various issues to more democratic government institutions.[76] To the extent that judicial minimalism is desirable as a normative or descriptive (or both) matter, a more extreme version of this theory is, rather than agree to decide a case on the narrowest possible grounds, instead to simply agree not to hear a case in the first case.

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70   Wilkinson, *supra* note 33, at 67.

71   *Id.* at 71.

72   *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 355–56 (2006); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6–7 (1996); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 48–49.

73   SUNSTEIN, ONE CASE AT A TIME, *supra* note 72, at xi–xii.

74   *Compare* Jeffrey Rosen, *Foreword*, 97 MICH. L. REV. 1323, 1327 (1999), *and* Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 92 (1999), *with* Sheldon Gelman, *The Hedgehog, the Fox, and the Minimalist*, 89 GEO. L.J. 2297, 2339 (2001) (reviewing SUNSTEIN, ONE CASE AT A TIME, *supra* note 72).

75   *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111–13 (2d ed. 1986). *See generally* Sunstein, *Foreword: Leaving Things Undecided*, *supra* note 72.

76   Robert Anderson IV, *Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court*, 32 HARV. J.L. & PUB. POL'Y 1045, 1051 n.19 (2009).

b. Implications from Brandeis's "Laboratory of Democracy" Thesis

A related, though distinct, point from Sunstein's "judicial minimalism" theory as well as Bickel's "passive virtues" observation hearkens back to a dissent from Justice Brandeis. In *New State Ice Co. v. Liebmann*,[77] the Court struck down an effort by the New State Ice Company, duly licensed by the State of Oklahoma to engage in the ice business in that state, to preclude Liebmann from entering the ice business without first obtaining the necessary state license. In his dissent, Justice Brandeis was far more willing to afford states, such as Oklahoma, greater regulatory latitude when it came to business regulation.[78] In arguing that, in his opinion, Oklahoma's Ice Act (of 1925) sufficiently engaged with a "public" business, Justice Brandeis went on to note that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[79]

To be sure, Brandeis's memorable "laboratory of democracy" point was specifically directed to various state legislative activities rather than (state or federal) judicial activity. That said, might not a softer form of the argument persuade with respect to, for example, some conflicts between or among circuits involving a contested legal issue? Obviously, it is, of course, one of the Supreme Court's functions to "police" legal disputes across circuits. At the same time, few—if any—argue that the Court must immediately resolve all such conflicts. After all, the number of such conflicts—to say nothing of their possible severity or import—almost assuredly exceeds the number of appeals the Court can agree to resolve.[80] Thus, the argument that a reduced Court docket necessarily increases the number of unresolved circuit splits is necessarily one of degree and not kind, so long as one concurrently assumes that some level of discord among the circuits is inevitable as a practical matter.

Moreover, as Professor Frost notes, a not-inconsequential percentage of what "counts" as circuit splits are relatively "trivial" and externalize only minimal costs on litigants.[81] Thus, even if one argues that the Court should focus on circuit splits when selecting appeals to hear, the relative and absolute importance of circuit splits can vary, sometimes considerably in terms of the costs these splits impose on litigants and legal doctrine.

Finally, even in situations where circuit splits may impose nontrivial costs onto litigants or legal doctrine in terms of legal uncertainty, some of these splits may possess virtues of their own, including contributing "fruitfully to

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77 285 U.S. 262, 280 (1932).

78 *Id.* at 310–11 (Brandeis, J., dissenting). The key legal determination in the Oklahoma statute involved the state's finding that the business of ice production was a "public" business. *Id.* at 271–74 (majority opinion).

79 *Id.* at 311 (Brandeis, J., dissenting).

80 *See generally* Starr, *supra* note 4.

81 Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1569, 1597–1600 (2008).

the dialogic quality of federal law."[82] To the extent that any particular split arises between two circuits, depending on the nature of such a split, perhaps it might serve as a useful filtering mechanism for the Court to permit other circuits to weigh in and allow the contested point to legally mature and percolate. Indeed, perhaps subsequent circuit opinions taking sides on such a dispute might identify a useful analytic approach or reasoning that could both inform any subsequent Court resolution and, perhaps, even contribute to and improve a subsequent Court's resolution.

3. Model Selection

Our Article's final contribution involves methodology. Owens and Simon specified a negative binomial regression model in their 2012 paper.[83] Their model selection was unremarkable—even predictable—given the "count" character of the dependent variable. Indeed, such an approach strikes us as intuitively plausible enough that our initial replication and updating results, presented in Table 1, follow Owens and Simon's lead and adopt their methodological approach.

A negative binomial regression model is especially apt in situations where a threat of overdispersion exists. Admittedly, while assessments about whether the observed variance is higher than what theory may predict is largely a subjective decision, we note that the dependent variable's observed variance spans from a low of 68 to a high of 215. It is certainly possible, however, that the threat of overdispersion in this context may be inflated, especially given how, as Figure 3 suggests, variation in the dependent variable corresponds with variation in another independent variable, the universe of certiorari petitions filed (the universe from which the dependent variable derives). And if the threat posed by the possibility of overdispersion recedes, then models other than negative binomial regression become more plausible.

Even if some level of an overdispersion threat persists, however, and the negative binomial regression specification remains a viable alternative, at the very least we feel the introduction of an exposure variable is a plausible alternative specification that warrants consideration. Thus, one part of our methodological contribution—the inclusion of an exposure variable prompted by a desire to control for certiorari petitions filed—flows from our sense that the dependent variable, the raw number of appeals decided by the Court each Term, is more usefully understood once framed by the total number of certiorari appeals filed in the Court each Term.

The inclusion of an exposure variable also plausibly transforms the character of the dependent variable so that it is now perhaps better understood as the number of Court decisions *out of* the total number of certiorari petitions. If so, such an understanding of the dependent variable may be better approached as a binomial outcome rather than a traditional "count." And if

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82   Wilkinson, *supra* note 33, at 69.
83   Owens & Simon, *supra* note 1, at 1275.

the dependent variable may be characterized as something other than a pure "count" variable, models other than negative binomial regression, including a binomial regression model, emerge as a viable alternative. We explore such a possibility and compare results from these two models in Table 2. More important than our own methodological preferences, of course, is that the results presented in Tables 1 and 2 appear, in the main, largely impervious to model selection. That is, our main results generally persist regardless of model specification.

4. Limitations

While we remain comfortable with our results' overall robustness, we nonetheless remain mindful of limitations to our data and research design. While Figures 1 and 2 clearly evidence an overall decline in the Supreme Court's docket since the post–World War II era, the slope of the downward curve varies over the course of our study. Future research may want to look more closely at more granular, discrete time periods. Another potential aspect of interest for future research involves changes to the composition of the types of appeals included in the annual certiorari petition pools as well as possible changes in the types of appeals the Court agrees to hear and decide. Finally, it is also likely that the Court's certiorari grants from the federal circuit courts distribute unevenly across the federal circuits. Closer examination of these distributional shifts, if any, may uncover additional wrinkles that inform explanations for the Court's diminishing appetite for deciding appeals.

CONCLUSION

Various general trends, illustrated in Figures 1 and 2, on balance evidence a palpable diminution in the Court's appetite to decide appeals over the past few decades and, more generally, since approximately the World War I era. Despite a persistent drop in the number of Court appeals decided over time, by definition the velocity of this decline will eventually approach zero as the number of Court decisions by Term cannot, by definition, fall below zero. That is, a natural limit bounds this decline. Despite the natural limit on how few appeals the Court can decide during any Term, far less bounded, however, is the potential for future research that extends beyond the relatively narrow timeframe of our study. While clear docket size trend patterns emerged prior to 1940 (as suggested in Figure 2), neither our nor Owens and Simon's study ventures into these earlier data.

Whatever general clarity—and academic consensus—exist on the broad descriptive empirical point that the Court's docket size has diminished over time, somewhat less of a consensus exists on the various specific factors that plausibly account for this decline. And despite good-faith disagreements about the independent contribution of any particular factor, the weight of scholarly opinion characterizes the various consequences flowing from the persistent drop in the number of Court decisions per Term in negative

terms. Whether such a characterization is warranted, however, is not entirely clear. A reduction in Court decisionmaking reflects a severe form of judicial minimalism and plausibly contributes to "the dialogic quality of federal law." We take no strong normative position about the externalities that flow from a reduced Court docket. Our smaller point is simply that how best to characterize these externalities remains an issue upon which reasonable minds can—and do—differ.