# A Separation-of-Powers Approach to the Supreme Court's Shrinking Caseload

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**ABSTRACT**

Since the end of the 1980s the Supreme Court has cut its caseload nearly in half. While this decrease has not gone unnoticed, researchers have largely focused their explanations on institutional factors, such as changes in personnel, creation of the certiorari pool, or an increase in the amount of discretion justices have to set their agenda. Most existing work fails to consider how the preferences of members of Congress and the president also contribute to this staggering decrease. I provide the first systematic examination of how extrainstitutional influences affect the size of the Court's caseload. I examine the 1951–2016 terms of the Court to reveal that a constraining political environment significantly reduces the number of cases the justices agree to hear each term. These results suggest that the justices consider the preferences of actors in the other branches of government much earlier than their decisions on the merits.

Do Supreme Court justices alter their decision making to account for the preferences of the legislative and executive branches? Will justices, to avoid potential reprisal from the elected branches of government, vote for less optimal outcomes at the agenda or merits stage? Questions like these are critical to understanding the separation of powers in the

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United States. Yet, one aspect of the Court's relationship with the other branches of government that has not received the same attention is the Court's caseload, which is also commonly called its docket. Journalists, scholars, and members of the legal community have continually recognized the significant decrease in the size of the Court's caseload since the 1980s (e.g., Owens and Simon 2012; Harvey 2013; Moffett et al. 2016), but the explanations offered by research focus largely on internal changes on the Court such as personnel turnover, adjustments to the Court's jurisdiction, and the creation of the certiorari pool, with little acknowledgment of the other branches. I contend that in addition to institutional changes on the Court, it is crucial to also account for extrainstitutional dynamics created by the United States' separation-of-powers (SOP) system.

In this article, I assess whether the constitutionally created SOP system, designed to uphold judicial independence and fair and impartial checks and balances, actually allows Congress and the president to influence the size of the Supreme Court's caseload. In doing so, I provide the first assessment of the size of the Supreme Court's agenda and its decision to grant review over time, and how or whether fluctuations in docket size are influenced by the amount of interinstitutional constraint exhibited by various pivotal actors in the other branches of government. I analyze over a half a century's worth of Supreme Court agenda-setting behavior and find a consistent SOP influence on the size of the Court's docket regardless of the model of constraint that is used. During times of extrainstitutional ideological constraint, the results suggest that Supreme Court justices avoid as many as 12 cases. In an era in which the Court hears only 70 or so cases per term, even a single case has the potential to create profound legal, political, or social policy change, and so this result is especially noteworthy. Beyond their substantive importance, these results also inform the normative debate among legal professionals, commentators, and politicians.

## STRATEGIC BEHAVIOR AND THE SOP

The number of litigants petitioning the Court for review has steadily increased from 4,000 in the 1970s to upwards of 9,000 in recent terms. Yet, at the same time, the number of cases the Court actually decided has fluctuated over the same period, with a consistent downward trend from 200 cases in the mid-1980s to an average of 80 cases per term since the late 1990s. The justices claim that the majority of these cases simply do not merit their review (Barnes 2007), which may be true for some of these cases, but research suggests that the Court's docket still consists of plenty of certworthy cases (see Edelman, Klein, and Lindquist 2008; Beim and Rader 2019). I argue that their docket management is the result of strategic behavior.

Epstein and Knight (2000, 626) explain that justices behave strategically to achieve their preferred policy outcomes yet understand that their choices and outcomes depend on other actors and the institutional setting, which structure these choices, and thus alter their decisions accordingly. At the agenda stage, justices consider their colleagues' potential votes in order to determine whether the potential merits outcome is more optimal

than the legal status quo (Black and Owens 2009). Justices' strategic behavior also extends beyond their colleagues' preferences on the bench to the preferences of members of the legislative and executive branches that exert power over the Court when justices are faced with an unfavorable or threatening political environment, which causes justices to rationally alter their behavior (Harvey and Friedman 2006, 2009; Segal, Westerland, and Lindquist 2011; Harvey 2013).

Congress can exert power over the Court by introducing Court-curbing legislation to punish the Court for certain decisions, which has been shown to be an effective constraint (Clark 2009; Mark and Zilis 2018b, 2019), and some research suggests it is even more effective than direct policy retaliation against the Court's decisions (Mark and Zilis 2018a). What is more is that Court-curbing legislation is a sweeping response and does not discriminate based on the type of decision (i.e., constitutional or statutory). That being said, research also demonstrates that the Court considers Congress's preferences for both statutory and constitutional decisions because of the Court-curbing threats previously mentioned, override legislation, and constitutional amendments (Eskridge 1991; Meernik and Ignagni 1997; Epstein, Knight, and Martin 2001; Harvey and Friedman 2006; Bailey and Maltzman 2011; Segal et al. 2011; Hall 2014).

The president also plays a role in congressional attempts to override Supreme Court decisions because he must sign any bill into law in order for the override to take effect. He also wields power over the Court directly via the Office of Solicitor General (OSG). Since the justices show a high amount of deference to the OSG, increased involvement in a case can affect both the agenda and merits stages (McGuire 1998; Johnson 2003; Bailey, Kamoie, and Maltzman 2005; Thompson and Wachtell 2009; Black and Owens 2011, 2012). As the chief bureaucrat, the president can also instruct his cabinet members and other agency officials to ignore Court decisions, and because the justices have no method of enforcement, they are at the president's and bureaucracy's will (Carrubba and Zorn 2010).

Furthermore, it is clear that both Congress and the executive branch are mindful of the Supreme Court's docket because they care about policy outcomes. They demonstrate this through their actions. Members of Congress regularly file amicus briefs, and the president as represented by the OSG is one of the most trusted friends of the Court. Furthermore, Bailey (2007) demonstrates the abundance of overlapping issues that the president and members of Congress make statements and take positions on that relate to the Court's policy outputs.

Despite the theoretical support for the SOP relationship between the Court and the other branches, results are inconclusive at the agenda-setting stage. Harvey and Friedman (2009) examine the Court's propensity to review laws enacted by Congress and find that a hostile political environment can force the justices to significantly deviate from the median justice's preferred outcome. When the Court invalidates laws, other research reveals the justices granted review because they knew the law lacked support in Congress, which implies the Court is unlikely to strike down a statute that enjoys wide support among

current lawmakers owing to fear of reprisal for their actions (Hall and Ura 2015). Other work by Harvey (2013) suggests that the Rehnquist Court was responsive to the House median alone. And Moffett et al. (2016) theorize that the Court's docket is influenced by other branches, but uncertainty caused by internal changes on the Court is also significant in determining the size of the Court's caseload. However, Owens's (2010) case-level examination only finds that case characteristics like a lower court striking a law as unconstitutional, circuit court conflict, and federal government support for a petition are significant in predicting the justices' decisions to grant review. When considering the potential merits outcome, the ideological positions of the president and pivotal actors in Congress are insignificant in the justices' decision calculus.

My research design differs from previous studies on SOP agenda influence because I examine the number of cases granted review each term as opposed to individual statutes, cases, or the total number of cases decided. This is significant for two reasons. First, it is important to consider this relationship in the aggregate as opposed to the individual case level. There is idiosyncrasy involved in the review process for each case at the individual level that can add noise to the analysis, thus resulting in mixed conclusions as in past research (Harvey and Friedman 2009; Owens 2010). In fact, Segal et al. (2011) find that a hostile political environment makes justices less likely to strike legislation generally as opposed to altering their behavior on an individual case-by-case level, which suggests that taking a step back and viewing overall trends at the docket level can help shed some light on how SOP dynamics operate at the agenda stage of judicial decision making.

I am not the first to make this important contribution (Harvey 2013; Moffett et al. 2016), but I am the first to actually examine the number of cases granted review each term instead of a post hoc measure of the number of cases decided (Moffett et al. 2016) or the number of cases orally argued (Harvey 2013), which can (and does) differ from the number granted. Additionally, my approach provides a more complete and accurate testing of SOP theories. I am the first to examine multiple models of SOP constraint and how and whether each of these pivotal actors across the other branches of government influence the Court's decision making at the agenda stage each term (Harvey 2013; Moffett et al. 2016). In doing so, I improve on the previous literature on this topic by using a continuous measure of constraint as opposed to a dichotomous indicator that assumes all levels of constraint are the same (Moffett et al. 2016).

## SPATIAL THEORY OF SUPREME COURT CONSTRAINT

To connect the SOP and agenda-setting literature with the research on the Court's caseload, I must identify how and when the legislative and executive branches can exert influence over the justices' decisions to grant review. To model this relationship, I start with assumptions that are standard in the SOP literature: all actors have single-peaked preferences, which are plotted on a unidimensional policy space or a left-right ideological continuum (Harvey and Friedman 2009; Owens 2010). These represent their

preferred policy outcomes. And, within this policy space, all actors are aware of one another's ideal points (Harvey and Friedman 2006; Owens 2010).

I use the Court median's ideal point as an estimate of the Court's sincere ideological preference in a given term for two reasons. First, the bench median is what has traditionally been used in the SOP agenda literature (Harvey and Friedman 2009; Owens 2010). Second, because I am looking at the overall number of cases in a term and not individual cases, I must choose an estimate that remains consistent across all cases the Court may choose to review.[1]

Theories in the congressional literature identify different actors in the legislative branch who determine policy outcomes. The specific location of congressional pivots is dictated by the theory that is chosen, and whether the Court is constrained is contingent on the location of these pivotal actors relative to the Court. For example, the chamber median model posits that legislation passed through Congress will reflect the preferences of the median legislator in each chamber. This model is derived from the median voter theorem of electoral behavior, such that the candidate who appeals to the median voter is the election winner. As such, policies in Congress that appeal to the chamber median achieve the same success (Romer and Rosenthal 1978). In what follows, I adopt the chamber median model to explain my measurement and identify the preferences of Congress. However, the results hold across all spatial theories of constraint.[2]

## COMMON SPACE OF CHAMBER MEDIAN PIVOTS

The key actors in the chamber median model are the chamber medians and the president. If the Court median falls outside of these actors' preferences, it is constrained. Take, for example, the 2009 term of the Court shown on the left side in figure 1. During the 2008 election, the Democrats gained control of both chambers of Congress and the presidency. This put a right-leaning Court at odds with the other branches. If the justices were to grant review and decide a case at the Court's ideal point, all of the other branches would prefer a more liberal policy and could challenge the Court's decision. In order to avoid backlash, the Court had to craft its opinion and any resulting policy at the closest pivot's ideal point, which during this term was the House median. Compare this to a few terms later when the Republicans regained control of the House during the 2012 term. The House median was more conservative than the Court median, as shown on the right side in figure 1. Here, the Court is unconstrained because if the president or Senate were to

1. Lauderdale and Clark (2012) suggest that it is important to consider issue area, but these issues are assigned after each case is decided, and there is good evidence to suggest issue codings suffer from confirmation bias (Harvey and Woodruff 2013).

2. This includes the veto-filibuster model, the committee gatekeeping model, and the party gatekeeping model. I chose the chamber median model because of its simplicity and because it is one of the best-fitting theories of constraint across the different time-series models. See the appendix (available online) for further discussion of these models and table A3 for full results.

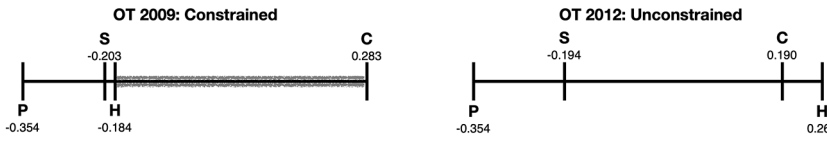


Figure 1. Estimates of common space locations from the 2009 and 2012 October terms (OT) of the US Supreme Court. The estimates come from Lewis et al. (2019) and Epstein et al. (2007). C = Court median, S = Senate median, H = House median, and P = president. The value below each pivot is its ideal point in common space. Smaller (more negative) values represent more liberal preferences; larger (positive) values represent conservative preferences.

challenge the Court's outputs by introducing override legislation or Court-curbing legislation, the House would challenge them and vice versa, which allowed the justices to grant review and decide cases at their ideal point without fear of retaliation from the other branches.

I test the theory of SOP constraint in my model by including the amount of ideological distance by which the Court was constrained each term. If the Court was unconstrained during a term, as they were during 2012, then the distance equals 0. When the Court is constrained, the variable equals the absolute distance between the Court and the closest pivotal actor. For example, in the 2009 term, under the chamber median model, the House median was the closest actor at 0.467 common space units away (see fig. 1; distance highlighted in gray).[3] Coding constraint in this manner is more precise than the method of measuring constraint with a simple dichotomous indicator and more accurately models the environment in which the Court is operating.

I also account for other possible influences on the size of the Court's caseload recognized by previous research. These include institutional factors like the Case Selections Act of 1988, the invention of the certiorari pool, and personnel changes. Additionally, I control for political factors like the ideological heterogeneity of the Court and the ideological makeup of the judicial branch, as well as other SOP explanations, such as the amount of new legislation to review. See the appendix for a full description of these variables.[4]

## DATA AND METHOD

My dependent variable is a count of the number of cases granted review in each term from 1951 to 2016.[5] I employ a negative binomial regression model because of the dispersion of the data.[6] Examining the number of cases granted review over time introduces additional

3. Bailey (2007) provides another possible measurement option.

4. I acknowledge that because the unit of analysis is at the term level as opposed to the traditional case level, there are some data limitations that prevent me from including the normal spectrum of controls that are typically included in agenda-setting research such as the status quo and certworthiness.

5. I obtained these data from the Federal Judicial Center.

6. Additional discussion of the modeling choices can be found in the appendix.

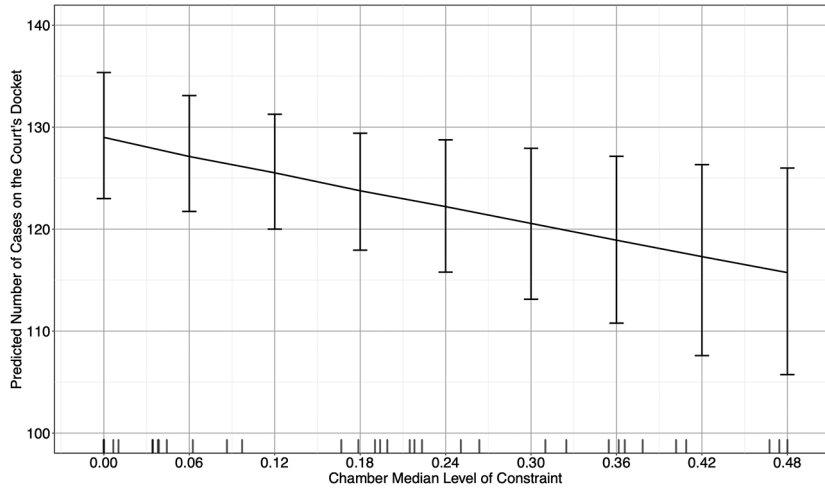


Figure 2. Predicted number of cases the Court should hear in a given term across the 95th percentile range of constraint under the chamber median model. *Cross bars*, 95% confidence intervals estimated using the observed value approach (Hanmer and Ozan Kalkan 2013). The rug plot along the *x*-axis displays the distribution of the data. The color of the tick marks represents the density of data at each level of constraint. Light gray marks represent one observation, and they darken as more data are concentrated at that level of constraint.

modeling concerns of serial correlation and stationarity. It is to be expected that there is institutional memory at the Court owing to lifetime tenure. As a result, the amount of cases the Court agrees to hear each term is related to the number of cases granted review in the previous term. To account for this relationship, I include a lagged dependent variable on the right-hand side of the model. Additionally, initial tests for stationarity on the dependent variable reveal that it possesses a unit root. Because of the nonstationarity of the dependent variable, I first differenced all of the independent variables that possess a unit root to avoid the pitfalls of regressing nonstationary variables on a nonstationary dependent variable (Box-Steffensmeier et al. 2014).[7] After accounting for the dynamics of the independent variables, the dependent variable is stationary.

## RESULTS

The SOP constraint variable exhibits a significant and negative effect on the number of cases the Court decides per term, regardless of which model is used (chamber median, party gatekeeping, etc.). The effect of the range of SOP constraint under the chamber median model on the number of cases the Court grants review is shown in figure 2 (see the appendix for a full table of results).

7. The results of these tests can be found in table A2.

Figure 2 displays the expected number of cases the Court will hear in a given term across different levels of constraint under the chamber median model. When the justices are free to act without fear of Congress's and the president's response to their rulings, the Court is expected to hear 134 cases, yet when the Court is acting in a highly constrained environment (i.e., constraint equals 0.46, or the 95th percentile), its workload decreases to 122 cases, a relative change of approximately 9%. This means the low odds of seeking justice or policy change at the Supreme Court are further diminished because of extra-institutional influence.

SOP influence on the Court's agenda is even more stark when examined over time, which is shown in figure 3. In the left panel of figure 3, the gray bars depict the predicted number of cases each term, given the observed values in the data. The black bars represent the additional cases the justices would have granted review to had their institution not been influenced by the other branches of government. Across the 65 terms, the Court was constrained for 29 of them, which ultimately resulted in the avoidance of 182 cases. That number is more than double the number of cases the Court has heard in any term dating back to the first few years of the 2000s and still more than what the Court averaged at its most productive period. In other words, my results suggest that fear of retribution via Court-curbing legislation or being overturned by Congress and the president leads to the avoidance of one to two terms' worth of cases left unheard by the Supreme Court.

Another way to consider how extrainstitutional constraint affects the Court is shown in the middle and right panels of figure 3. The black bars show the predicted number of cases the Court is expected to hear each term, given the data. In the middle panel, however, the light gray bars that overlay the black bars represent the number of cases the Court would have heard under the average level of constraint each term. This amounts to 149 fewer cases heard and decided by the Court, which is more than a term's worth of cases. Compare this to the right panel, which shows the same information but with constraint set to the maximum level. Had this been the Court's reality, it would have heard an average of 12 fewer cases each term. Across 65 terms, this amounts to a staggering 779 fewer cases heard and decided by the Court. To put this in perspective, that is more cases than the sum of the Court's workload in its nine most recent terms.

## DISCUSSION AND CONCLUSION

This article began with the question of whether Supreme Court justices strategically alter their behavior based on the preferences of members of Congress and the president, and specifically whether their strategic response can shed light the Court's shrinking docket. Many have expressed concern for the noticeably diminished docket, including journalists, legal scholars, judges, and political scientists (Barnes 2007; Owens and Simon 2012; Harvey 2013; Moffett et al. 2016), all offering a number of explanations as to what has caused this decline. In this article, I provide strong evidence that a hostile political environment significantly reduces the size of the Court's caseload and has contributed to their shrinking docket over time.

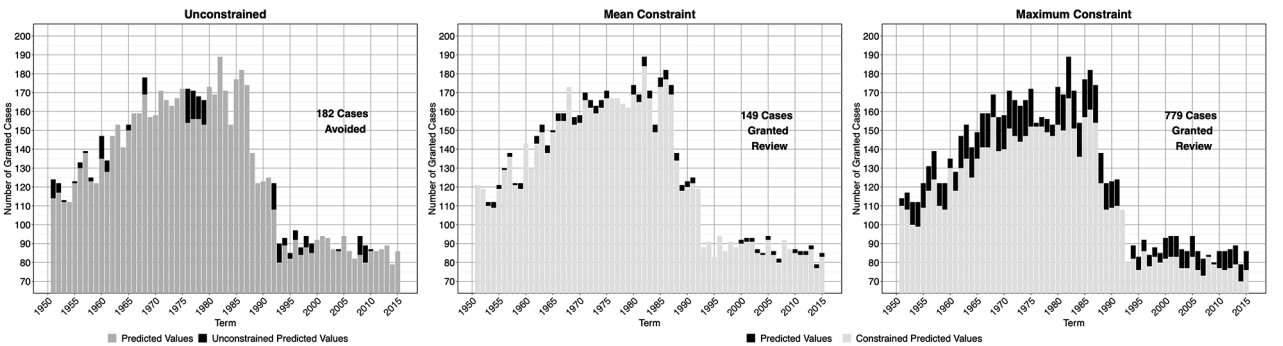


Figure 3. Values from the chamber median model. The gray bars in the left panel display the predicted values, given the data. The black bars stacked on top of the gray represent the additional number of cases to which the justices would have granted review if they were not constrained by the other branches. Conversely, the middle and right panels depict the number of cases the Court would have heard had they been constrained at the average level of constraint and maximum level of constraint, respectively. The black bars display the predicted values, given the data; the light gray bars represent the considerably fewer cases the justices would have heard in the same term, given they were under the average or highest level of constraint from the other branches of government.

These findings are significant because they suggest that the elected branches of government influence the workload of the Supreme Court, which affects access to justice for those seeking review from the highest court in the land. These findings add to the growing evidence that the constitutionally constructed barriers intended to isolate the Supreme Court from the other branches and ensure judicial independence are perhaps not as solid and impenetrable as the Framers intended. Of course, internal changes on the Court like the retirement of Justice White and the expansion of the Court's discretionary docket are also responsible for the significant drop in the Court's workload. These changes caused a structural shift in the number cases the Court hears each term, whereas SOP dynamics account for term-by-term fluctuations. When the Court is unconstrained, the justices operate under normal conditions—business as usual—whereas when they are constrained, they proceed with caution. That is to say, current trends seem to suggest that the Court will not return to a workload of 150–200 cases per term without another major intervention, but an unconstrained Court can, and does, make more important policy decisions each term and provides more opportunities to litigants to get their day in the highest court in the land.

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