

IMPORTANT QUESTIONS OF FEDERAL LAW: AN EMPIRICAL SURVEY OF POSSIBLE EXPLANATIONS FOR THE SUPREME COURT'S DECLINING DOCKET

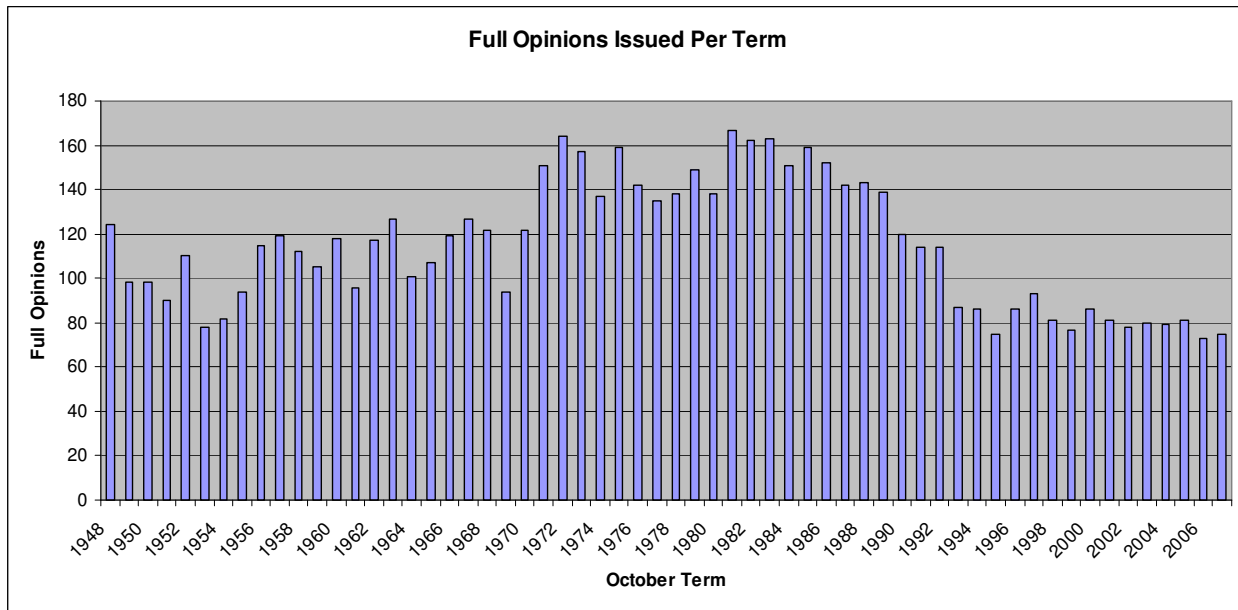
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Speaking before the United States Senate during his confirmation hearings, soon-to-be Chief Justice John Roberts remarked:

I don't want to prejudge questions or even be presumptuous to look down the road, but it seems to me that there's the capability there to hear more cases today, not fewer. And I'm sure there are reasons for the reduction in the caseload that I'm not familiar with that I might become familiar with, but they handled twice as many cases 20 years ago than they do today, and I think the capability to address more issues is there in the Court.³

Despite Chief Justice Roberts's professed faith in the Court's wherewithal "to address more issues," the so-called "incredibly shrinking"⁴ plenary docket that began under Chief Justice Rehnquist has continued apace under Chief Justice Roberts's tenure. The number of cases decided by signed opinion in October Term 2007 (67) was the lowest since October Term 1953 (65). Despite an up-tick in the Court's caseload during the most recent Term, to 75, the Court is still deciding fewer than half the number of cases it decided as recently as the mid-1980s.

Figure 1. The Slow Rise and Steep Fall of the Docket



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³ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 337 (2005) (statement of John G. Roberts, Jr.), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/AR2005091401451.html>.

⁴ "Incredibly shrinking" has been the favored description of the Court's docket size since the 1990s.

After thirty years of docket downsizing, the Court's granting of certiorari (cert) has become more powerful than ever in setting the nation's legal agenda. This analysis examines the magnitude of and possible reasons for the Court's shrinking docket.

Exactly where have the missing cases gone? This question has piqued the interest of a small, devoted following within academic circles, as well as among specialist practitioners. From their discussions, along with some of our own ideas, fifteen hypotheses for the declining docket have emerged:

- (1) the near-elimination of the Court's mandatory jurisdiction in 1988;
 - (2) the Office of the Solicitor General filing fewer cert petitions;
 - (3) the changing personnel on the Court;
 - (4) an escalating reticence within the cert pool to recommend a grant for anything but a deep, unambiguous circuit split;
 - (5) a more widespread use of "defensive" denials among Justices uncertain of cases' ultimate outcomes;
 - (6) a decrease in cert activity among (mostly liberal) advocacy groups wary of establishing unfavorable precedent;
 - (7) the changing nature of advocacy and judging at the Court, with more amicus filings, longer opinions, and more opinions per case;
 - (8) a relative lack of major federal legislation in recent years;
 - (9) a disinterest among the Justices for certain areas of law once well-represented on the docket;
 - (10) the influence of specialized Supreme Court practices and elite members of the Supreme Court bar;
 - (11) a desire among the Justices to limit their role and stay under the radar;
- and finally, a smaller number of circuit splits because of
- (12) better access to technology and, therefore, legal databases,
 - (13) better guidance from the Rehnquist Court's narrow reasoning,
 - (14) more ideological homogeneity among the courts of appeals, and
 - (15) the law generally becoming more settled and clear over time.

Of these fifteen, six hypotheses appear ripe for scrutiny, either because they present novel claims, because they are amenable to fresh empirical investigation, or because they

held up reasonably to past studies of their explanatory power.⁵ One of the most promising lines of prior inquiry centers on the Office of the Solicitor General (SG). In their 2001 study, Margaret Meriwether Cordray and Richard Cordray document how, between 1984 and 1999, the Solicitor General's Office filed fewer petitions, exerting a substantial effect on the Court's own docket declines.⁶ We begin by updating the statistics on cert filings by the Solicitor General's Office to determine whether the trend and correlation significance still hold.

Second, we investigate whether the Court's declining docket might represent a collective desire by the Justices to downsize their overall work flow. Here, our inquiry is whether a smaller docket has actually given rise to less work for the Court as a whole. We triangulate around our so-called "lazy hypothesis" through a variety of imperfect measures: total number of opinions authored (dissenting, concurring and majority opinions in merits cases; dissents from denial); average length of opinions; total number of pages authored per Justice per term; and average number and length of amicus briefs. In addition to uncovering potential changes to the Court's aggregate levels of productivity, this approach may reveal changes in how advocacy and dispositions have changed at the Court.

Third, we consider a claim that has found some purchase among Court followers, but has yet to undergo empirical scrutiny: the "self-censoring" hypothesis suggests that progressive lobbies have voluntarily reduced their tactical appellate efforts in response to a more entrenched conservative majority on the Court. Here we consider four prominent progressive groups—the American Civil Liberties Union (ACLU), the Service Employees International Union (SEIU), the National Association for the Advancement of Colored People (NAACP) and the National Resources Defense Council (NRDC)—in each case examining: (1) the number of cert petitions filed; (2) the staff levels in the appellate litigation departments of each; and (3) statements gleaned from direct interviews.

Fourth, we confront the so-called "Reagan-Bush-Bush" hypothesis, or the notion that an enhanced ideological alignment of the federal judiciary has resulted from the fact that judicial appointments have been in the hands of a conservative executive for twenty of the past twenty-eight years. Here we investigate the impact of this alignment on the number of circuit splits in the courts of appeals (i.e., horizontal homogeneity among circuits, separate from vertical homogeneity between circuits and the Supreme Court). We develop a combinatorial model of the decision-making of the courts of appeals using the party of the appointing president as a rough proxy for a judge's ideology.

Finally, we address two of the three "Roberts Conjectures," the explanations put forward by Chief Justice Roberts on the Court's declining number of affirmative cert grants.⁷ The Chief Justice suggested, first, that Congress has not passed 'significant' legislation of the sort that generated heavy case flow for the Court in prior decades. We

⁵ In the enumerated list on page 2, these hypotheses are numbered 2, 6, 7, 8, 12, and 14.

⁶ Margaret M. Cordray and Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH & LEE L. REV. 737 (2001).

⁷ See Marcia Coyle, *Despite Docket Drop, Justices Face Packed Homestretch*, NAT'L L.J., June 6, 2007, available at <http://www.law.com/jsp/article.jsp?id=1181034327576> (listing the hypotheses Chief Justice Roberts had publicly suggested to explain the Court's diminished caseload).

review recent dockets by case type, seeking to discern whether a drop in federal statutory cases has in fact transpired.⁸ In addition, we consider the life-cycle of major legislation, to determine whether Chief Justice Roberts might be falsely assuming a marked decline in the volume of cases a statute generates over time. The Chief Justice also cited the adoption of technologies such as Lexis and Westlaw, which have increased the availability of information about on-point decisions from other circuits among the courts of appeals (thereby presumably lessening tendencies for splits). Because his logic rests on courts taking into consideration the work of sister courts, we look to the changes in the average number of sister court opinions cited (using a random sampling of opinions for each circuit).

Hypothesis 1: Solicitor General Filing Fewer Cert Petitions.

With grant rates historically hovering close to 70 percent for its cert petitions (compared to a grant rate below 5 percent among private litigants),⁹ the Solicitor General's Office is uniquely persuasive in helping the Court decide what constitutes "important questions of federal law." As such an outsized grantee, any decline in the number of cert petitions filed by the Solicitor General's Office might thus result in fewer grants by the Court. Such was the thinking behind Cordray and Cordray's 2001 study,¹⁰ which documented that between 1984 and 1999, the Solicitor General's Office had indeed filed fewer petitions, and that this exerted a substantial effect on the Court's own docket declines.¹¹ In addition, the Cordrays discovered that the number of cases in which the Solicitor General filed amicus briefs at the petition stage likewise declined from an average of 37 cases per Term from 1984-1991 to only 19 cases per Term from 1992-1999.¹²

According to the Cordrays' estimates, the Solicitor General's pullback in seeking plenary review accounted for a drop of approximately 15 cases per Term in the Court's plenary docket between 1984 and 1999. Moreover, the Cordrays source the loss of an additional 10 cases per Term with the Solicitor General's decreasing involvement as amicus at the certiorari stage, because the federal government is nearly as successful in supporting another party's application for review as it is in seeking review in its own right.¹³ These

⁸ Data collection efforts remain underway to review docket trends by case type.

⁹ See SUPREME COURT PRACTICE: FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES 164 & n.6 (Robert L. Stern ed. 2009) (identifying the discrepancy); see also REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 25 (1992) (according to Salokar, between 1959 and 1989, Solicitor General was successful in obtaining cert 69.78 percent of time, whereas private litigants were successful only 4.9 percent of time).

¹⁰ Cordray & Cordray, *supra* note 6.

¹¹ The Cordrays found that, between 1984-1987, for example, the Solicitor General sought review in 213 cases by filing either a petition for certiorari or a jurisdictional statement - an average of more than 53 cases per Term. Over the next four Terms, that number then slipped to 137 cases—an average of only about 34 per Term. These figures have continued to decline, falling to 31 cases per Term from 1995-1998, the last period observed in the Cordray's research.

¹² This figure does not distinguish between unsolicited amicus briefs and those briefs generated in response to specific requests by the Court (known as CVSG briefs).

¹³ Cordray & Cordray, *supra* note 6. We are currently re-examining the econometric methods the Cordrays use in estimating the loss of an additional ten cases as a result of the Solicitor General's amicus practices. If true,

figures indicate that the drop in filings by the Solicitor General, which occurred over essentially the same period as the decline in the plenary docket, is an independent factor that made a substantial contribution to the decline.

In updating the Cordrays' analysis (see Figure 2 below), it is evident that the steady downward trend in the number of cert petitions generated by the SG's Office has continued through 2008.

Figure 2. Average Cert Petitions Filed by the Office of the Solicitor General¹⁴

YEAR	SG PTS FILED PER TERM
1985-1988	avg 50
1989-1992	avg 34.5
1993-1996	avg 33
1997-2000 ¹⁵	avg 31
2001-2004 ¹⁶	avg 29
2005-2008 ¹⁷	avg 16

Ascribing impact on the Court's docket to these continued declines first requires ensuring that the SG's Office has retained its pride of place within the Court's cert process. Our data thus normalizes the number of petitions filed against the SG's grant rate for the observed period. While the SG's grant rate has declined absolutely from mid-1980s, it has declined less than that for private petitioners, such that the SG's Office has come to constitute a relatively larger percentage of the Court's docket. The SG's Office has become, if anything, an even more outsized patron of the Court (*in progress*).

There are numerous possible explanations for the SG's drop-off in cert activity, several of which the Cordrays posited convincingly in their earlier work.¹⁸ The main

that the SG wields such significance as an amicus presence in obtaining grants suggests yet another hypothesis: litigants are failing to enlist the SG's support as amicus as frequently as they once did.

¹⁴ This figure includes only cert petitions and jurisdictional statements filed annually by the Solicitor General's office.

¹⁵ The actual numbers were: 1997 Term – 21; 1998 Term – 32; 1999 Term – 24; 2000 Term – 46. Statistics obtained from the Office of the Solicitor General (website), September 15, 2009. Available online: <http://www.usdoj.gov/osg/briefs/brieftype.htm>.

¹⁶ The actual numbers were: 2001 Term – 28; 2002 Term – 27; 2003 Term – 36; 2004 Term – 26. Statistics obtained from the Office of the Solicitor General (website), *ibid*.

¹⁷ The actual numbers were: 2005 Term – 19; 2006 Term – 13; 2007 Term – 17; 2008 Term – 15, *supra* note 15.

¹⁸ The Cordrays offer and scrutinize three possible reasons for the SG's own declines. First, they raise and ultimately reject the notion that the Justice Department may have changed its internal petitioning policies or criteria, and as a result may be seeking review in a smaller percentage of cases. Second, the Justice Department may be applying the same criteria, but the federal government may be involved in less litigation than in the past. Third, the Justice Department may be applying the same criteria to fewer cases simply because the federal government is winning more of its cases in the lower courts. While they ultimately reject the first of these based on available evidence, the Cordrays do find evidence that the number of civil cases involving the government, may be declining, even as the government's relative success in lower court civil cases may be increasing.

difference between the world of 2001 (when the Cordrays' initial study was published) and today is that, in 2001, the Court's downsizing was little more than a hunch among the Supreme Court bar. If it was perceived at all, it was largely written off as historical aberration, a simple fact of Chief Justice Rehnquist's style that would depart with him. During the Cordrays' initial 1984 – 1999 time horizon, the Court's docket declines were taking place concomitantly with declines in the number of SG filings. It was therefore safe to assume, as the Cordrays did, that the declines in the SG's cert filings constituted an independent factor in the Court's declining docket. Ten years and a new chief justice later, the Court's dwindling caseload is now well-documented, and, after nearly two decades, widely regarded as relatively permanent reality among Supreme Court litigators. We therefore have more reason in 2009 than did the Cordrays in 2001 to expect a feedback effect emanating from the Court's own shrinking docket—the SG, met with a more discerning Court, may itself be growing more selective in its filings.

Alumni of the SG's Office have indeed intimated that as the docket has declined, the Office's own standards for "certworthiness" have risen in tow. In the SG's case, this aversion to potential denials is more than ego—the government is a unique type of lawyer in that its compensation is not, like most lawyers, tied to a given case. The government therefore has an added incentive to not expend time and resources on cases ultimately rejected by the Court. To empirically evaluate such an "SG stinginess" hypothesis, it would be necessary to plot the number of cases in which the SG seeks plenary review against the total number in which it would be able to do so. While the SG's Office does not keep a precise record of these statistics, this metric is possible to triangulate since, by law, the US government cannot seek cert for any adverse lower court ruling, without seeking and obtaining approval from the SG (what is known as a "recommendation request").¹⁹

Regardless of the rationale behind the decreases in SG filings, it appears likely that the SG continues to comprise a significant source of the Court's declining docket. While this was once an independent driver of the Court's declines, mutual reinforcement may have set in, such that the SG is now at once reacting to, and fueling the Court's shrinking caseload.

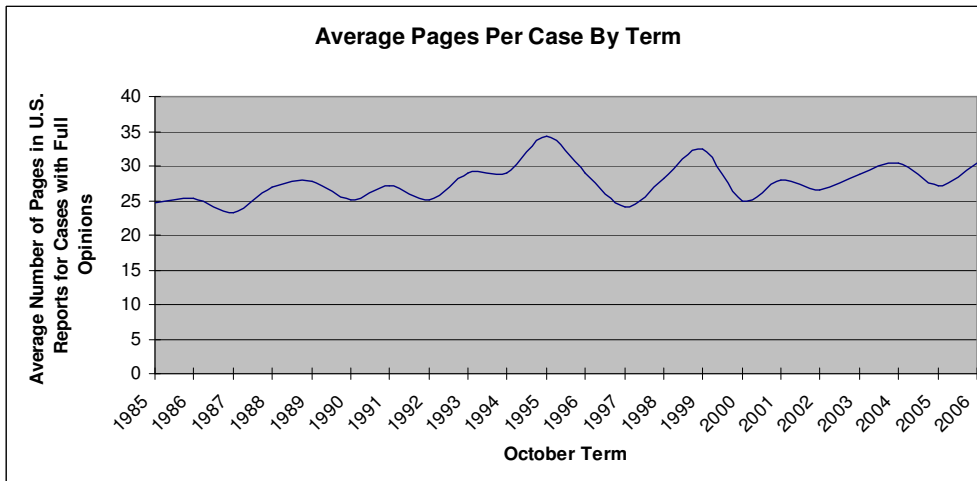
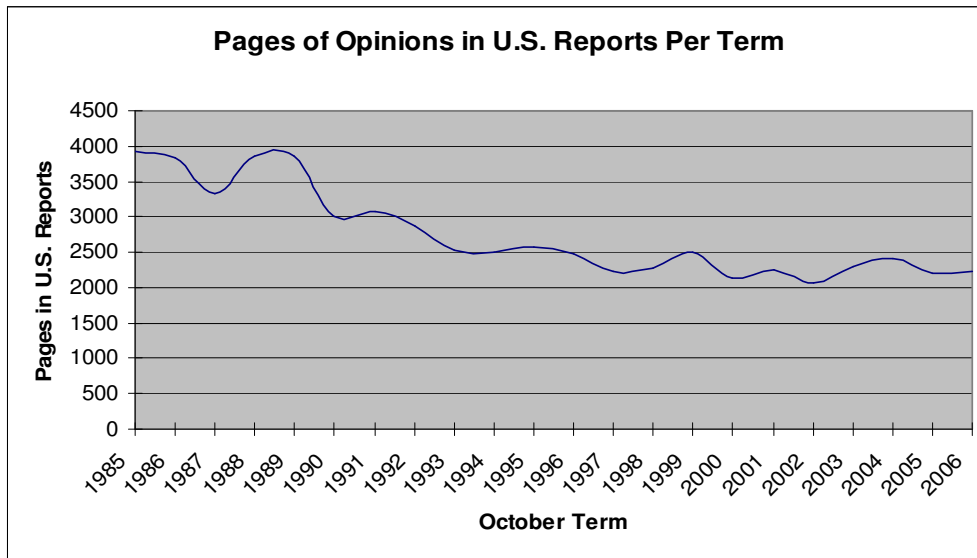
Hypothesis 2: A "Lazy" Court?

Second, it seems reasonable enough that the Court's declining docket might represent a collective desire by the Justices to downsize an unwieldy workload. Conventional wisdom holds that Supreme Court opinions have gotten longer and more fractured in recent Terms. If so, that trend could be the cause, or the result, of a declining docket that allows the Justices more time to devote to each case. Here, the guiding question, surprisingly not raised in previous studies, is whether a smaller docket is actually

¹⁹ We are currently collecting data on "the recommendations received"—or the total number of cases in which the SG could file for review; once collected we intend to plot these figures against the total number of cases in which the SG actually chose to file a cert petition.

associated with less work for the Court as a whole.²⁰ We approximate this so-called “lazy hypothesis” through a variety of imperfect measures: total number of opinions authored per case (dissenting, concurring and majority opinions in merits cases; dissents from denial); average length of opinions; total number of pages authored per Justice per term; and average number and length of amicus briefs. Some of these findings are summarized in the following Figures.²¹

Figures 3 and 4. Average Number of Pages Authored Per Term and Per Case



²⁰ While earlier studies have raised and ultimately rejected the notion that the Court’s docket declines could be attributed to the Congress’ 1988 move to abolish mandatory review and thereby allow the Court sole discretion over its docket, these studies consider the decline in numbers of petitions granted during this time, without examining whether the Court might have been interested in reducing its overall workflow, a function of caseload as well as *work expended per case*.

²¹ As an additional path of inquiry, we may pursue a claim advanced by Judge Richard Posner in his recent writings; in Judge Posner’s view, appellate opinion length has increased because clerks, who he suggests write comparatively longer opinions than federal circuit judges, are responsible for an ever greater percentage of writing.

The Justices' overall output per Term, counted by pages of opinions, has indeed declined, even as the number of pages written about an average case has unsteadily (and only slightly) increased. Of course, the Justices may be using the freed-up time on judicial activities other than opinion writing. A frequent complaint heard about the Justices' workload is the amicus briefs that stack up on either side of a case once it is granted. Indeed, on examining changes in amicus filings, we find that amicus activity at the merits stage has increased 32.6 percent when two contiguous six-year periods are compared (1997-2002 compared to 2003-2008).

What is ultimately unknowable, of course, is how much work the Justices' clerks have done behind the scenes over the years. While that and other unknowable factors may undercut the ultimate significance these trends hold, their existence nevertheless suggests a promising avenue for additional research.

Hypothesis 3: "Self Censoring" by Impact Appellate Litigators

Third, we consider a claim that has found some purchase among Court followers, but has yet to undergo empirical scrutiny: the "self-censoring" hypothesis suggests that progressive lobbies have voluntarily reduced their tactical appellate efforts in response to a more entrenched conservative majority on the Court. Here we consider four prominent progressive groups—the ACLU, SEIU, NRDC, and the NAACP²²—in each case examining the propensity to seek cert. Again, the most relevant metric is the ratio between the number of petitions filed versus the number of cases eligible for cert. To contextualize these figures, it is also useful to know whether these organizations have made any changes to staff levels or to appellate strategies in their litigation departments.

Because these organizations typically engage in impact litigation, targeting certain cases and jurisdictions so as to make "desirable law" from the vantage point of their constituencies, it is necessary to normalize the level of lower court activity among these groups. Of course, finding an interest group whose trial and lower court activity is not discretionary is relatively impossible. To control for this inherent self-selection and venue shopping among lower courts, and isolate just the impact that the current makeup of the Supreme Court might be exerting, we narrow our focus to the Ninth Circuit. Because the Ninth Circuit is widely reputed as one of the most liberal circuits in the country, it is reasonable to assume that progressive groups would be less deterred from litigating in the Ninth Circuit for ideological reasons.

In surveying these organizations for any changes in the yield between eligible petitions emanating from adverse Ninth Circuit rulings, and those actually filed, the results do demonstrate a marked decline in the willingness of these organizations to file cert among the cases in which they are eligible to do so.

²² Data collection for the NAACP and ACLU remains underway.

Figure 5. Percentage of Cert Petitions Filed in Cert Eligible Cases²³

NRDC				
	Total Cases	Cert-Eligible Cases	Cert Filed	Percentage of Cases Petitioned
1985-1990	10	7	7	100.00%
1991-1995	7	3	2	66.67%
1996-2000	10	7	4	57.14%
2001-2004	13	5	3	60.00%
2005-2008	22	7	2	28.57%

SEIU				
	Total Cases	Cert-Eligible Cases	Cert Filed	Percentage of Cases Petitioned
1985-1990	4	1	1	100.00%
1991-1995	8	6	3	50.00%
1996-2000	7	2	1	50.00%
2001-2005	10	3	1	33.33%
2006-2008	6	4	2	50.00%

Likewise, the NAACP and the ACLU have also exhibited the same trends evidenced by the NRDC, albeit on an even smaller scale since these organizations filed far fewer Ninth Circuit cases and thus had a smaller sample size from which to cultivate potentially eligible and certworthy cases.

Several possible factors explain the declines in eligible cases for cert. Perhaps these organizations are winning a larger percentage of their cases at the lower court (whether due to “cherry picking” winnable cases, or to genuine to improvements in litigation quality). It is therefore helpful to contextualize these figures against possible internal changes to these organizations might have faced. Informal conversations with former ACLU and NRDC litigators reveal a high degree of care and strategy as to the cases each organization brings before the Court, and a genuine belief that the case will result in not just a good outcome for the immediate client, but good law for precedential effect.²⁴

Hypothesis 4: The “Reagan – Bush – Bush” Alignment of the Lower Courts

Fourth, we confront the so-called “Reagan-Bush-Bush” hypothesis, or the notion that an enhanced ideological alignment of the federal judiciary has resulted in fewer splits among the circuits.

The rationale behind this hypothesis is as follows:

1. Courts of appeals judges who are appointed by presidents of the same political party are more likely to agree.

²³ Statistics for NRDC and SEIU litigation remain provisional, pending cross-referencing against additional databases. Please do not cite.

²⁴ Overt changes in these organizations’ staff levels from roughly 2000 onward remains under investigation.

2. As appointees of a single party begin to outnumber appointees of the other party, it is increasingly likely that circuit panels will contain a majority of appointees of that party.
3. Circuit panels in which a majority of appointees are of the same party are less likely to split with one another.
4. Republican appointees currently make up nearly 60 percent of the body of circuit judges, which may be a high watermark resulting from Republican presidencies for twenty of the last twenty-eight years.
5. Thus, circuit splits are less common than they used to be.

To analyze this hypothesis, we construct a combinatorial model to chart the variation in circuit splits as the dominance of one party's appointees is varied. We find that the probability of a circuit split on an ideological issue *decreases supra-linearly* with increasing composition of Republican (or Democratic) appointees on the bench. That is, circuit splits would be expected to fall off even more rapidly than the percentage increase in Republican (or Democratic) appointees.

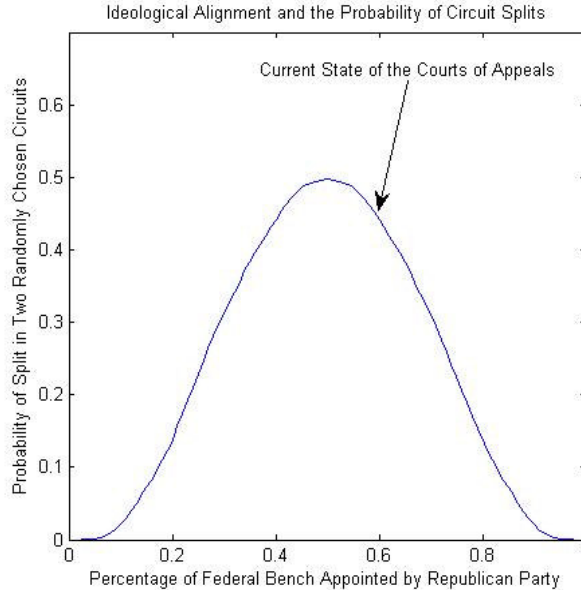
The model makes several assumptions. The first is that the composition of each circuit reflects the national percentage of appointees of one party. We know from the current makeup of the Fifth and Ninth Circuits, for example, that this assumption is not true in practice. Nevertheless, we make the assumption to simplify the analysis without losing its explanatory power.²⁵ Second, we narrow the scope of the analysis only to issues expected to divide Republican and Democratic appointees. It is hard to imagine issues that cut so cleanly through the judiciary, but the party of the appointing president is as close a proxy to ideological affiliation as we are likely to find.²⁶ Furthermore, the analysis remains equally germane in instances where Democratic and Republican appointees within a circuit swap expected ideologies (in equal numbers). Third, within each circuit, we assume the judges are selected randomly to sit on three-judge panels. Finally, we exclude the Federal Circuit from our analysis because of its specialized jurisdiction.

Our model employs a combinatorial analysis to calculate the probability that two randomly selected circuits will resolve an ideological dispute differently, given a certain makeup of Republican (or Democratic) appointees on those circuits (See Appendix 1). The calculations are summarized in the following Figure.

²⁵ We are also able to calculate the probability of circuit splits on ideological issues based on the current, varied compositions of the circuit courts of appeals.

²⁶ Of course, this is the predominant proxy used in political science analysis of judging and the courts.

Figure 6. Ideological Alignment and Probability of Circuit Splits



The most important feature of the model is the curve’s shape. In the middle range of proportions of Republican (or Democratic) appointees—the only values that are plausible in reality—the curve is concave down. The concavity demonstrates the supra-linear fall-off of circuit splits with increasing ideological alignment.

While the model gives us a theoretical intuition about the impact of appointments on circuit splits, we leave this hypothesis with the practical observation that the current makeup of the circuit courts of appeals is near 60 percent (88 of 149 sitting judges), as marked in the Figure.

Hypothesis 5: The Roberts Conjectures

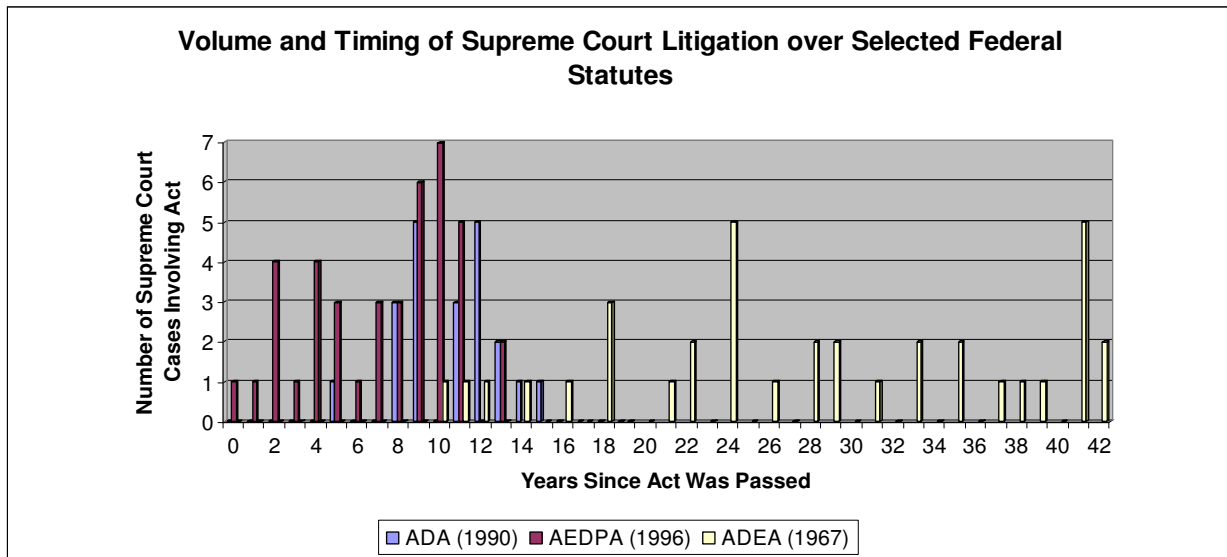
Finally, we address two of the three “Roberts Conjectures,” the explanations forwarded by Chief Justice Roberts on the Court’s declining number of affirmative cert grants. Chief Justice Roberts suggested, first, that Congress has not passed ‘significant’ legislation of the sort that has generated heavy case flow for the Court in the past. Chief Justice Roberts also theorized that the adoption of technologies such as Lexis and Westlaw have increased the availability of information about on-point cases from other circuits among the courts of appeals (thereby presumably lessening tendencies for splits).²⁷

²⁷ See Robert Barnes, *Roberts Supports Court’s Shrinking Docket*, WASH. POST, Feb. 2, 2007, A6. Speaking before a 2007 American Bar Association gathering in Alaska, Chief Justice Roberts said, “[t]he relative lack of major legislation in recent years, I think, can account to some extent to the corresponding decline in the court’s docket.” As cited in the article, “[h]e [Roberts] also said technology plays a role, because it is easier than ever for lawyers and judges to know the rulings of courts around the country.”

Hypothesis 5A: Chief Justice Roberts’s “Lazy Congress”

Taking up the first of Chief Justice Roberts’s theories, we review recent dockets by case type, seeking to discern whether a drop in statutory cases has in fact transpired. Because the Chief Justice’s claim assumes a drop-off in the amount of workflow a given “major” piece of legislation generates over time, we examine the lifecycle of several major pieces of legislation—namely the ADA, AEDPA, and ADEA—attempting to determine whether the workflow these statutes generate has in fact declined over time. The results here appear mixed. While there is an intense up-tick in the litigation of AEDPA and the ADA roughly 8-12 years after they were passed, litigation stemming from the ADEA did not begin in earnest until roughly 8 years after passage and has since continued somewhat steadily.

Figure 7. Litigation Lifecycles of Selected Federal Statutes



Hypothesis 5B: Chief Justice Roberts’s Lexis Solution

Second, we examine whether the adoption of technologies such as Lexis and Westlaw has in fact led to less dissension among the courts of appeals (thereby presumably lessening tendencies for splits). This is perhaps the most difficult question encountered yet. Given such diffuse inventory and imprecise metrics, no clear data sets stand out. Yet there is one short-cut: because Chief Justice Roberts’ logic rests on not only the greater availability of relevant information, but also on the degree to which lower court judges actually take into consideration the work of sister courts, one method of evaluating his claim is to measure the degree of awareness among lower courts in cases where they are creating or deepening a split. That is, we could modify our central question to ask: are circuits finding out that they would create a split in a way that they weren’t before computerized legal databases (largely Lexis’ “Shepard’s” and Westlaw’s “KeyCite” features)?

This, too, is easier hypothesized than tested. One method of surveying these trends is to examine circuit splits *ex post* for evidence of whether appellate courts were wittingly generating or deepening a split. Specifically, we aim to identify some random sampling of cases in which the Supreme Court granted cert and acknowledged a circuit split, then trace these cases back to the most recent lower court decision to determine if the given appellate court was aware its decision would be creating or deepening a split. As a rough measure of such ‘awareness’ by a circuit court as to relevant rulings by sister circuits, we document changes in the average number of sister court opinions cited (again, using a random sampling of lower opinions for each circuit). We also calculate the use of certain buzzwords that typically accompany a circuit court’s acknowledgement of split—*inter alia*, “split,” “circuit,” “sister circuit.”

This method comes with a host of risks: has court parlance in talking about circuit splits changed over time? Do circuits have an incentive to downplay the creation of a split that has changed with time? Moreover, by starting with cases the Supreme Court has granted as a means of finding circuit splits, we have to factor in the fact that Supreme Court shops have developed proprietary search formulas that will find explicit mentions of circuit splits in lower court opinions. Cases including those “explicit mentions” might thus be overrepresented on the Court’s docket in the last ten years.

The data for this hypothesis is still being collected, and the early evidence suggests is as yet inconclusive. If there does not appear to be any appreciable increase in the frequency with which those cases acknowledged to contain a split by the Supreme Court contain an acknowledged split by federal judges in their earlier circuit opinions—then it seems safe to reject Chief Justice Roberts’s technology hypothesis. If there does appear more knowledge and consideration of sister circuit decisions among the lower courts, then more investigation will be required to determine whether Chief Justice Roberts is indeed onto something in postulating a role for Lexis and Westlaw in the declining docket.

Appendix 1: Doing the Math

Hypothesis 4: The “Reagan – Bush – Bush” Alignment of the Lower Courts

Let N_i represent the number of judges allotted to the Court of Appeals for the i^{th} Circuit by 28 U.S.C. § 44. We set $i = 12$ for the D.C. Circuit.

Let p represent the proportion of Republican-appointed judges, assumed to be constant across circuits. Then the number of Republican-appointed judges on the i^{th} Circuit, R_i , is $\text{round}(N_i p)$, and the number of Democratic-appointed judges, D_i , is $N_i - R_i$.

Given two circuits, i and j , the probability that a randomly selected 3-judge panel from each court will rule differently on a matter that splits judges along party lines is:

$$P_{i,j}(p) = 1 - \left(\frac{R_i C_2 \cdot D_i C_1 + R_i C_3}{N_i C_3} \right) \left(\frac{R_j C_2 \cdot D_j C_1 + R_j C_3}{N_j C_3} \right) - \left(\frac{D_i C_2 \cdot R_i C_1 + D_i C_3}{N_i C_3} \right) \left(\frac{D_j C_2 \cdot R_j C_1 + D_j C_3}{N_j C_3} \right).$$

Finally, we average over all possible pairs of circuits to produce the probabilities, $\Pi(p)$ charted in the main explication of Hypothesis 4:

$$\Pi(p) = \frac{1}{66} \sum_{i=1}^{12} \sum_{j=i+1}^{12} P_{i,j}(p).$$