

# OUT OF THE SHADOWS: WHAT SOCIAL SCIENCE TELLS US ABOUT THE SHADOW DOCKET

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## TABLE OF CONTENTS

INTRODUCTION .....	673
I. THE SHADOW DOCKET: BACKGROUND & RECENT USAGE .....	675
A. <i>Historical Analysis</i> .....	675
B. <i>The Court’s Job Duties</i> .....	677
1. <i>Merits Docket</i> .....	677
2. <i>Shadow Docket</i> .....	678
C. <i>Procedure</i> .....	680
II. SOCIAL SCIENCE & THE SHADOW DOCKET .....	682
A. <i>Baum’s Research</i> .....	683
1. <i>Baum’s Original Findings</i> .....	683
2. <i>Update and Extension of Baum’s Research</i> .....	686
B. <i>Davis’ Research</i> .....	705
C. <i>Smart’s Research</i> .....	709
III. INSTITUTIONAL LEGITIMACY & THE SHADOW DOCKET .....	712
CONCLUSION .....	724

## INTRODUCTION

On September 21, 2021, the United States Supreme Court denied emergency relief to individuals and groups who opposed the recent Texas abortion ban. Justice Elena Kagan dissented from the Court’s decision to let the abortion regulations take effect. In her dissent, Justice Kagan indicated that the conservative majority’s decision was “emblematic of too much of this Court’s shadow-docket [decision-making]—which every day becomes more unreasoned, incon-

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sistent, and impossible to defend.”<sup>1</sup> Justice Kagan’s concerns have been echoed in other cases, including another dissent regarding the shadow docket that was joined by Chief Justice John Roberts.<sup>2</sup> And, recent arguments between Justices Kagan and Brett Kavanaugh have highlighted that the Court itself appears split and conflicted over the shadow docket’s use.<sup>3</sup> Indeed, Justice Kagan has gone so far as to warn that recent shadow docket efforts by the Court’s conservative majority do “a disservice to [the Court’s] own appellate processes, which serve both to constrain and to legitimate the Court’s authority.”<sup>4</sup> In other words, for those like Justice Kagan, recent shadow docket machinations suggest the Court is partisan, fractured, disputatious, and disregarding of procedural fairness. It turns out, Justice Kagan has reason to be worried.

This Article will evaluate the social scientific literature on the shadow docket. While the Supreme Court’s shadow docket endeavors have only recently gained significant attention, preliminary social scientific research has been produced that can help address fundamental questions about the Supreme Court’s behavior in this domain. Part I of this Article will provide a brief synopsis of the shadow docket, its recent usage, and its historical background. We will detail the difficulties of data gathering along with measurement issues of which scholars and practitioners should be aware when evaluating the shadow docket. Part II will proceed from this starting point to address what social science has determined about the Supreme Court’s shadow docket behavior. We will detail social scientific findings from emerging studies about the shadow docket and will update and extend an existing dataset on shadow docket activity. Importantly, the developing social science research suggests that the Supreme Court’s shadow docket exploits are indeed highly ideological in nature, and, that public views about the Supreme Court can be negatively affected by certain types of behavior vis-a-vis the shadow docket. We will then proceed in Part III to evaluate the implications for the emerging shadow docket scholarship. Specifically, we will tie the recent discussion of shadow docket behavior to larger social scientific theoretical frames, including institutional legitimacy theory. These connections suggest a potential problem for the Supreme Court as an institution. In particular, findings suggest the potentiality for a perfect storm of conditions which could seriously undermine the institutional strength of the Court. We will conclude with final thoughts on these ramifications.

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<sup>1</sup> *Whole Women’s Health v. Jackson*, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting).

<sup>2</sup> *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1348 (2022) (Kagan, J., dissenting).

<sup>3</sup> *See Merrill v. Milligan*, 142 S. Ct. 879, 879–82 (2022) (Kavanaugh, J., concurring); *id.* at 883 (Kagan, J., dissenting).

<sup>4</sup> *Id.* at 889 (Kagan, J., dissenting).

## I. THE SHADOW DOCKET: BACKGROUND &amp; RECENT USAGE

The Supreme Court today issues fewer signed opinions in merits cases than ever before.<sup>5</sup> The number of petitions for certiorari the Court receives, however, is quite high and has remained so in a historical sense.<sup>6</sup> Relatedly, recent commentary suggests the non-merits activity of the Court is bustling as well. This so-called shadow docket includes all the activities that are not a part of the Court's regular merits docket. Although the term is only a few years old and owes its existence to Professor William Baude, the docket itself has been here for as long as the Supreme Court.<sup>7</sup> Recent attention to shadow docket activity expresses concern about this feature of the Court's operation.<sup>8</sup> What are the consequences of having a Court working in the shadows? And should we be worried? Before we address these questions, we provide a general background on the contours of the shadow docket.

A. *Historical Analysis*

What authority does the Court have to engage in its shadow docket activities? Article III of the United States Constitution vests the judicial power of the United States in "one Supreme Court" and establishes that the Supreme Court has original jurisdiction to hear some cases in the first instance.<sup>9</sup> Section 2 of Article III also outlines that the Supreme Court shall have appellate jurisdiction, while Congress has the power to regulate what falls under this jurisdic-

<sup>5</sup> Compare LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 75–76 (3d ed. 2003), and Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1369 (2006), with *The Supreme Court 2020 Term—The Statistics*, 135 HARV. L. REV. 491, 491 (2021).

<sup>6</sup> In 1926, the total number of cases the Court had on its docket was 1,183; of those, 223 received signed opinions. Starr, *supra* note 5, at 1369. In contrast, in 2004, the Court had 8,593 cases on its docket and only 85 signed opinions. *Id.*; see also Barry P. McDonald, *SCOTUS's Shadiest Shadow Docket*, 56 WAKE FOREST L. REV. 1021, 1039–40 (2021).

<sup>7</sup> William Baude, Foreword, *The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1, 19–21 (2015); *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 2 (2021) (statement of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law) [hereinafter Vladeck Testimony], <https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf> [https://perma.cc/9ESH-Z5GM].

<sup>8</sup> James Romoser, *Symposium: Shining a Light on the Shadow Docket*, SCOTUSBLOG (Oct. 22, 2020, 12:15 PM), <https://www.scotusblog.com/2020/10/symposium-shining-a-light-on-the-shadow-docket/> [https://perma.cc/W7YT-DG5Q]; Vladeck Testimony, *supra* note 7, at 20–22.

<sup>9</sup> U.S. CONST. art. III, § 1. Original jurisdiction is the right of a court to hear a case for the first time. Cases that fall under the original jurisdiction of the Supreme Court include cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State is a party. *Id.* § 2.

tional parameter.<sup>10</sup> Appellate jurisdiction gives the Court authority to hear and potentially reverse or modify a lower court's decision. Importantly, for our focus, appellate jurisdiction is where the Court hears the vast majority of its cases in both the merits and non-merits dockets.<sup>11</sup>

During the debate on constitutional ratification, Alexander Hamilton described the judiciary in relatively passive terms.<sup>12</sup> Unlike the executive branch, which holds the “sword,” and the legislative branch, which holds the “purse,” the judiciary would possess merely force of “judgment.”<sup>13</sup> The judiciary would be the “weakest” of the federal branches—the least dangerous branch.<sup>14</sup>

Having established the judiciary in Article III, the Constitution's framers left the question of how the federal judiciary would operate to the legislative branch.<sup>15</sup> The legislature filled this gap with the Judiciary Act of 1789, the first bill presented to the first Congress.<sup>16</sup> The Act established the structure and jurisdiction of the federal courts system, among other things.<sup>17</sup>

After passage of the Judiciary Act of 1789 and throughout the nineteenth century, Congress gave the Supreme Court jurisdiction over various types of appeals from federal and state courts. And, unlike today's discretionary certiorari process, the Court at that time was required to hear and decide appeals through mandatory jurisdiction.<sup>18</sup> By 1890, however, because the Court had a backlog of over 1,800 appeals, Congress created intermediate federal circuit courts to handle appeals; and by 1988, it had also relieved the Supreme Court of most of its mandatory review responsibilities.<sup>19</sup> But to ensure that the Court still had the authority to hear appeals in cases that were deemed important or where there was a circuit split, Congress provided that the Court could issue a writ of certiorari.<sup>20</sup> Notably, Congress did not give the Court any guidance on how and when it should deny or grant certiorari; the Court, to this day, is largely unchecked when deciding which appeals to hear. Although Congress has the

<sup>10</sup> *Id.* The Constitution states that, “the Supreme Court shall have appellate jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make.” *Id.* This is known as the “Exceptions Clause.”

<sup>11</sup> For example, in the 2020 to 2021 Term, the Court only had two original cases on its merits docket: *Texas v. New Mexico* and *Florida v. Georgia*. *Granted & Noted List—October Term 2020 Cases for Argument*, U.S. SUP. CT. (July 29, 2021), <https://www.supremecourt.gov/grantednotedlist/20grantednotedlist> [<https://perma.cc/9QCJ-36QA>].

<sup>12</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> U.S. CONST. art. III, § 2.

<sup>16</sup> Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 49 (1923).

<sup>17</sup> Judiciary Act of 1789, ch. 20, 1 Stat. 73.

<sup>18</sup> Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1231 (1979).

<sup>19</sup> *Id.* at 1232; Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity “Crisis”: Charting a Path for Federal Judicial Reform*, 108 CALIF. L. REV. 789, 863–64 (2020).

<sup>20</sup> Linzer, *supra* note 18, at 1233, 1235–36.

power to manage the Court's workload, they have not weighed in on the issue of jurisdiction since 1988.<sup>21</sup>

Against this historical backdrop, we next address the Court's duties in managing its dockets. From there, we turn to the specific procedures utilized on the shadow docket.

### B. *The Court's Job Duties*

The Supreme Court's term begins on the first Monday in October and lasts until the first Monday in October of the next year.<sup>22</sup> Although the Justices technically work all year round, opinions for the merits cases that they hear each term are typically released by the end of June and oral arguments end even earlier in April.<sup>23</sup> The Court's schedule is public, so much of what happens during the Court's business hours may be obtained from the Court's website.<sup>24</sup>

As mentioned earlier, the Court has two dockets—the merits and shadow docket. Until recently, the merits docket received the most attention from the public. These cases receive the most focus because they make it to the front pages of newspapers and are the topic of much scholarly discussion.<sup>25</sup> Furthermore, various organizations host “Supreme Court Preview” talks at the beginning of every term, and “Supreme Court Review” talks at the end of every term, discussing the cases the Court decided in the previous term.<sup>26</sup> Recently, however, the shadow docket has begun receiving attention; this Symposium is a perfect example of the shadow docket's newfound attention.

#### 1. *Merits Docket*

The Court's merits docket includes those cases that go through full briefing, oral argument, and a signed opinion of the Court, often with concurrences

<sup>21</sup> Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (An act “[t]o improve the administration of justice by providing greater discretion to the Supreme Court in selecting the cases it will review, and for other purposes.”); see Menell & Vacca, *supra* note 19, at 836–43.

<sup>22</sup> *The Supreme Court at Work*, U.S. SUP. CT., <https://www.supremecourt.gov/about/courtatwork.aspx> [<https://perma.cc/QA6H-MGFZ>].

<sup>23</sup> *Calendars and Lists*, U.S. SUP. CT., [https://www.supremecourt.gov/oral\\_arguments/calendarsandlists.aspx](https://www.supremecourt.gov/oral_arguments/calendarsandlists.aspx) [<https://perma.cc/B7LC-N8WL>].

<sup>24</sup> *Id.* It is worth noting that these calendars outline when the Court is in session and which cases will be heard; when the Court is in conference; and when the Court will be releasing opinions relating to the cases from the merits docket. Such information is not as easily obtainable when it comes to the Court's shadow docket activities.

<sup>25</sup> Baude, *supra* note 7, at 5–6.

<sup>26</sup> Vladeck Testimony, *supra* note 7, at 2. For example, the American Bar Association hosts a “Supreme Court Preview” webinar, and the National Constitution Center makes annual “Supreme Court Review” videos. *ABA Supreme Court PREVIEW*, ABA, [https://www.americanbar.org/groups/public\\_education/publications/preview\\_home/](https://www.americanbar.org/groups/public_education/publications/preview_home/) [<https://perma.cc/9TXH-VVW2>]; National Constitution Center, *2022 Annual Supreme Court Review*, YOUTUBE (July 14, 2022), <https://youtu.be/e0EPXnshy64> [<https://perma.cc/6JYV-HDER>].

and dissents. These opinions are released at 10:00 AM local time on pre-announced decision days.<sup>27</sup> Today, the Court receives approximately seven to eight thousand petitions for certiorari each term and grants to hear between sixty to eighty cases per term, though, as mentioned earlier, that number has decreased over time.<sup>28</sup> These cases are at the center of attention, featuring oral arguments (which have been scheduled well ahead of time and are available for public listening), full briefing (including amici), and result in announcement of opinions in public ceremony.<sup>29</sup>

## 2. *Shadow Docket*

All the activity that does not otherwise fall under the merits docket falls under their non-merits docket—the shadow docket. This docket includes, among other things, thousands of activities, review of petitions for certiorari, injunctions, stays, and procedural requests.<sup>30</sup> Orders to these requests are usually issued by the Court or by the individual justice to whom the application was initially presented.<sup>31</sup> These orders are typically made after no more than one round of briefing (usually without an opinion or any guidance on how the lower courts should proceed in lieu of the order); no indication of how the justices voted; and can be handed down at any time, day or night.<sup>32</sup> Note that this procedure is different, and less transparent, than what we are accustomed to on the merits docket. The lack of transparency may explain contemporary ignorance of these activities.

The shadow docket might have been relatively unknown because of a perceived unimportance of these types of cases. But this is not an accurate assessment. The cases on the shadow docket have import for policy, sometimes in a truly national sense. For instance, *Bush v. Gore* started as a stay application.<sup>33</sup> When the Florida Supreme Court ordered a statewide recount of undervotes, Bush filed an emergency application to the Supreme Court, which the Court

<sup>27</sup> Vladeck Testimony, *supra* note 7, at 2.

<sup>28</sup> See *The Supreme Court at Work*, U.S. SUP. CT., <https://www.supremecourt.gov/about/courtwork.aspx> [<https://perma.cc/T8VM-K7MN>]; Starr, *supra* note 5, at 1368; McDonald, *supra* note 6, at 1040.

<sup>29</sup> See Vladeck Testimony, *supra* note 7, at 2. During the COVID-19 pandemic, the Justices appeared for oral argument remotely and, instead of announcing their signed opinions for the merits cases in person at the court, they simply posted them on the Court's website. *Press Releases*, U.S. SUP. CT., <https://www.supremecourt.gov/publicinfo/press/pressreleases.aspx> [<https://perma.cc/XT3C-R3GK>]. Although the Justices have resumed in-person oral argument and conferences, they continue to post their signed opinions online rather than conducting in-person announcements. *Opinions of the Court—2021*, U.S. SUP. CT., <https://www.supremecourt.gov/opinions/slipopinion/21> [<https://perma.cc/D9Y2-5F68>].

<sup>30</sup> Vladeck Testimony, *supra* note 7, at 2.

<sup>31</sup> Applications are typically presented to the Circuit Justice. *Id.*; *Circuit Map*, U.S. SUP. CT., [https://www.supremecourt.gov/about/Circuit\\_Map.pdf](https://www.supremecourt.gov/about/Circuit_Map.pdf) [<https://perma.cc/M7PP-CJX9>].

<sup>32</sup> Vladeck Testimony, *supra* note 7, at 2. The applications for stays that this Article will focus on include only those applications that included a dissent.

<sup>33</sup> *Bush v. Gore*, 531 U.S. 1046, 1046 (2000) (mem.).

granted, staying the proceedings.<sup>34</sup> And even then, scholars and the public paid the most attention to the actual substance of the case and very little to the procedure that the Court utilized when granting the stay.<sup>35</sup> Moreover, because the Court so rarely utilized the shadow docket to change the status quo, Supreme Court litigants rarely relied upon it.<sup>36</sup> As such, whether they realize it or not, by utilizing the shadow docket to make policy changes, the Court signals to its most common litigants its sentiments about an issue well before a full merits-based resolution. The data indicate that the signal has been received. Notably, the Solicitor General's office has indicated increased willingness to litigate in the shadows.<sup>37</sup> Between 2001 and 2017, the Bush and Obama Administrations filed a combined total of eight applications for emergency relief.<sup>38</sup> Contrast that with Trump's Administration (one term), which filed forty-one applications.<sup>39</sup> Of those forty-one, the Court granted twenty-eight in full or in part.<sup>40</sup> In fact, these applications became such a big part of the Solicitor General's caseload that the office had to add a fifth deputy in July 2020.<sup>41</sup> Of the eight applications during the Bush and Obama Administrations, the Court granted four and denied four, with only one noted dissent.<sup>42</sup> If scholars wish to understand the full dimension of the Court's operations, we can no longer ignore the shadow docket.

The task of analyzing the shadow docket is difficult for researchers. Because of the secretive nature of the Court, and specifically the work it does in the shadows, it is complicated for scholars to catalogue and analyze the shadow docket's activities. It is also unclear what role these decisions play for lower courts, particularly as precedent.<sup>43</sup> The most typical types of cases associated

<sup>34</sup> *Id.* at 1046–47 (granting stay and petition for certiorari).

<sup>35</sup> Vladeck Testimony, *supra* note 7, at 3. To elaborate, *Bush* is not known for the Court's grant of Bush's application for stay but rather for the aftermath of the ruling the Court released following oral argument in the case.

<sup>36</sup> *Id.*

<sup>37</sup> See *id.* at 5–6; Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 132–34 (2019).

<sup>38</sup> Vladeck, *supra* note 37, at 133 (describing the difference in numbers of applications filed by the Bush, Obama, and Trump Administrations).

<sup>39</sup> Vladeck Testimony, *supra* note 7, at 7.

<sup>40</sup> *Id.*

<sup>41</sup> Steve Vladeck, *Symposium: The Solicitor General, the Shadow Docket, and the Kennedy Effect*, SCOTUSblog (Oct. 22, 2020, 2:00 PM), <https://www.scotusblog.com/2020/10/symposium-the-solicitor-general-the-shadow-docket-and-the-kennedy-effect/> [<https://perma.cc/N4JR-KCS4>].

<sup>42</sup> Vladeck Testimony, *supra* note 7, at 3–4.

<sup>43</sup> Vladeck Testimony, *supra* note 7, at 10. It is also worth noting that, despite these difficulties, scholars have done a great job of studying individual topics from the shadow docket. For example, Vladeck focused on the work of the solicitor general's office (see Vladeck, *supra* note 41); Dr. Baum focused specifically on stay applications where there was a dissent noted (see Lawrence Baum, *Decision Making in the Shadows: A Look at Supreme Court Decisions on Stays*, 30 L. & CTS. NEWSL., at 1, 1, 2, <http://lawcourts.org/wordpress/wp-content/>

with the shadow docket involve requests for emergency relief (relief from a lower-court decision pending further litigation), stays of a lower-court decision, vacations or grants of stays imposed by the lower court, and grants of emergency writs of injunction pending appeal.<sup>44</sup> With an understanding of the confines of the shadow docket, and the scope of potential research lines into its activities, we turn now to discuss the specific legal procedures governing the shadow docket.

### C. Procedure

As previously noted, the Constitution established the types of cases over which the Supreme Court would hold jurisdiction, but left open the question of how to handle applications of the shadow docket variety.<sup>45</sup> Where, then, does the Court look when it must resolve a submitted application? Due to the fact that the Court essentially acts unrestrained in the shadows, it is not clear from where they receive their guidance. However, there are multiple sources that they *appear* to utilize in rendering decisions in these cases.

Some of these sources from which the Court appears to draw direction include the All Writs Act, several Supreme Court Rules, opinions from prior decisions (even in-chambers decisions), and the Federal Rules of Civil Procedure (“FRCP”).<sup>46</sup> Injunctions are governed by Rule 65 of the FRCP and were interpreted by the Court in *Winter v. Natural Resources Defense Council*.<sup>47</sup> The Court in *Winter* held that there are four factors to consider when reviewing an application for a preliminary injunction: (1) likelihood of success on the merits; (2) likelihood of irreparable harm to either the plaintiff or defendant if the injunction is granted or denied; (3) balance of equities and hardships; and (4) whether the injunction is in the public interest.<sup>48</sup>

The All Writs Act provides a separate avenue for generating shadow docket activity. Regarding stays and injunctions, the All Writs Act states that: (a) “[t]he Supreme Court and all courts established by Act of Congress may issue

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uploads/2021/04/7\_Fall\_2020.pdf [https://perma.cc/K7HL-4VCG]); and many scholars for decades have studied the effects of certiorari petitions (see, e.g., Starr, *supra* note 5; McDonald, *supra* note 6; Linzer, *supra* note 18).

<sup>44</sup> Vladeck Testimony, *supra* note 7, at 4–5.

<sup>45</sup> See discussion *supra* Section I.A.

<sup>46</sup> 28 U.S.C. § 1651; FED. R. CIV. P. 65(a)(2); *Rules and Guidance*, U.S. SUP. CT., [https://www.supremecourt.gov/filingandrules/rules\\_guidance.aspx](https://www.supremecourt.gov/filingandrules/rules_guidance.aspx) [https://perma.cc/8ZPA-ZLE2].

<sup>47</sup> FED. R. CIV. P. 65 (“The court may issue a preliminary injunction only on notice to the adverse party.”); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

<sup>48</sup> *Winter*, 555 U.S. at 20. In *Winter*, the Court set a high burden of proof for plaintiffs seeking an injunction. The Court clarified that a plaintiff has to show that an irreparable injury is “likely,” which is a higher standard than mere “possibility.” *Id.* at 22. The Court disagreed with the Ninth Circuit, which held that once a plaintiff shows likelihood of success on the merits, they need only show a “possibility of irreparable harm.” *Id.* The Supreme Court said the risk of danger must be something more definite. *Id.*



all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law”; and (b) “[a]n alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.”<sup>49</sup> As is clear, the language is quite broad and pliable, with phrases such as “necessary or appropriate” leaving much leeway for the Justices and the Court as a whole.

The Court has also issued explanatory guidelines to reporters who cover the Court.<sup>50</sup> These guidelines are interesting as they are the Court’s public pronouncement to inquiring minds about how they handle applications. These guidelines indicate there are four general criteria that the applicant normally must satisfy in order for the Court to grant a stay.<sup>51</sup> They are the following: (1) “a ‘reasonable probability’ that four Justices will grant certiorari, or agree to review the merits of the case;” (2) “there is a ‘fair prospect’ that a majority of the Court will conclude upon review that the decision below on the merits was erroneous;” (3) “irreparable harm will result from the denial of the stay;” and (4) a balance of equities which explores “the relative harms to the applicant and respondent, as well as the interests of the public at large.”<sup>52</sup>

The Justices are also not required to be physically present in court to receive the application.<sup>53</sup> If the assigned circuit Justice cannot be reached, the application is referred to the next junior Justice.<sup>54</sup> There is no requirement that the circuit Justice refer the application to the full Court for consideration.<sup>55</sup> Notably, the public may not be aware that the application has been referred to the full Court until the Court acts and the referral is noted in the Court’s orders.<sup>56</sup>

Upon receipt of an application, justices have a few options. First, they can deny without comment or explanation.<sup>57</sup> If the application is denied, the petitioner can renew the application to any other justice and may continue to do so until a majority of the Court has denied the application.<sup>58</sup> A justice can also ask the respondent to file an opposition brief before reaching a decision.<sup>59</sup> Justices can also grant the application. Once they do so, the order is indicated on the

<sup>49</sup> 28 U.S.C. § 1651; see Stephen I. Vladeck, *Military Courts and the All Writs Act*, 17 GREEN BAG 2D 191, 191 & n.1 (2014).

<sup>50</sup> See generally U.S. SUP. CT., A REPORTER’S GUIDE TO APPLICATIONS PENDING BEFORE THE SUPREME COURT OF THE UNITED STATES (2022), <https://www.supremecourt.gov/publicinfo/reportersguide.pdf> [<https://perma.cc/2CMD-CKL2>].

<sup>51</sup> *Id.* at 2.

<sup>52</sup> *Id.* at 2–3.

<sup>53</sup> *Id.* at 3.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 4.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

Court's website.<sup>60</sup> There are multiple places on the Court's website where one can find these orders: (1) opinions relating to orders—which is only utilized if there are drafted opinions, concurrences, or dissents; (2) dockets search—which requires one to know the party names associated with the case or the docket number; (3) the journal—which is updated regularly and finalized at the start of the new term; and (4) orders of the Court—which identifies the orders issued by the Court for all types of applications.<sup>61</sup> We note that the Court's electronic docket permits some search capabilities, but the efficacy of the search process for non-party terms, such as subject-matter or phrase searches, is unclear. When the order grants an application, it will typically state how long the order will be in place.<sup>62</sup> Even in the event of a denial, the Court's disposition can have dramatic policy consequences.<sup>63</sup>

Having sketched the shadow docket's contours and its related procedures, we turn now to discuss substantive research into this area of the Court's activities. In Part II, we discuss established and emerging research on the shadow docket, as well as update and extend analyses of an existing dataset.

## II. SOCIAL SCIENCE & THE SHADOW DOCKET

While shadow docket research in general has begun to pool, very little of it has been of an empirical or scientific nature.<sup>64</sup> We agree with others that it is important for legal scholars to fill their growing research reservoir with investigations employing social scientific approaches.<sup>65</sup> To that end, we discuss here preliminary social scientific research on the shadow docket. Specifically, we detail and discuss three research lines (with an update and extension to one of them).

<sup>60</sup> *Id.* As mentioned earlier, it is not easy to navigate orders lists on the Court's website and so, sometimes, unless there is a lot of public attention on an application, the public may never hear about some of the applications that the Court grants or denies.

<sup>61</sup> *Opinions Relating to Orders—2021*, U.S. SUP. CT., <https://www.supremecourt.gov/opinions/relatingtoorders/21> [<https://perma.cc/9J3Q-E2WS>]; *Docket Search*, U.S. SUP. CT., <https://www.supremecourt.gov/docket/docket.aspx> [<https://perma.cc/LA3E-PD6Y>]; *Journal*, U.S. SUP. CT., <https://www.supremecourt.gov/orders/journal.aspx> [<https://perma.cc/L3V3-7YUQ>]; *Orders of the Court—Term Year 2021*, U.S. SUP. CT., <https://www.supremecourt.gov/orders/ordersofthecourt/21> [<https://perma.cc/H846-HE8V>].

<sup>62</sup> U.S. SUP. CT., *supra* note 50, at 4.

<sup>63</sup> See, e.g., *Whole Woman's Health v. Jackson*, 141 S. Ct. 522 (2021) (denying emergency relief and leaving in place the Fifth Circuit's stay of district court proceedings, thereby permitting Texas' Heartbeat Act to go into effect).

<sup>64</sup> For examples of these, see Adam Feldman, *Clear Polarization in Second Level Supreme Court Decision Making*, EMPIRICAL SCOTUS (July 23, 2020), <https://empiricalscotus.com/2020/07/23/clear-polarization/> [<https://perma.cc/2BZP-79UB>]; Vladeck, *supra* note 37.

<sup>65</sup> RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 164 (1999) (arguing that legal academia should embrace “fuller participation in the enterprise of social science”); see Dennis Patterson, *The Limits of Empiricism: What Facts Tell Us*, 98 MICH. L. REV. 2738, 2738 (2000) (“The conventional legal academic wisdom about empiricism is that empirical information is by-and-large a good thing . . .”).

### A. *Baum's Research*

The first line of research we discuss is that conducted by Dr. Larry Baum on the Supreme Court's behavior in applications for stay cases. We proceed in two steps. In the first, we detail Baum's original research and findings. In the second, we update and extend Baum's original dataset.

#### 1. *Baum's Original Findings*

In the Fall 2020 newsletter of the Law & Courts Section of the American Political Science Association ("APSA"), Dr. Baum presented an exploratory study of applications for stay cases and justice behavior.<sup>66</sup> He acknowledged that political scientists had extensively studied one element of the Court's shadow docket—decisions on certiorari.<sup>67</sup> However, Baum indicated social science should also evaluate applications for stays and vacatur of stays, given that "some of these decisions have a significant impact on policy or politics."<sup>68</sup> Baum further suggested that "examining how justices respond to these applications can provide a useful perspective on the role of ideological and partisan considerations in decision making by the Court."<sup>69</sup>

To investigate the phenomenon of interest, Baum evaluated stay cases in the 2013 to 2019 Terms, limited specifically to those in which one or more Justices announced dissents from the Court's ruling.<sup>70</sup> In other words, the stay cases in Baum's dataset are those in which there is registered disagreement (i.e., at least one dissent).

As previously noted, the process for compiling a dataset for the shadow docket can be difficult, given the lack of a centralized system of decision reporting. Unlike merits decisions, decisions on stays can be found in multiple areas of the Court's operations. To facilitate data gathering, Baum employed a particular methodology, which we include here in full:

Decisions on stays in which any justice dissented are reported in the Court's Journal, available at its website. The great majority of these decisions are listed in the table of contents of the Journal, under Applications. I found others with a search of the Journal for "would" and "dissent." With a few exceptions, opinions that justices write in stay cases that are more than a sentence or two long (including some that concur with the Court's action) are reported in Opinions Related to Orders at the Court's website. The Court's action in all stay cases can be ascertained by searching docket numbers with an A (for instance, 19A238). This is a slow process because there are more than a thousand Application cases each term, of which the overwhelming majority (at least in the sets of cases I sam-

<sup>66</sup> See generally Baum, *supra* note 43. Additionally, Baum's original dataset is on file with the authors.

<sup>67</sup> *Id.* at 2.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 3. For the 2019 Term, Baum's data collection ended with July 2020, thereby omitting Court responses for the last two months of that Term. *Id.* at 3 n.2.

pled) are applications for extension of the deadline to file certiorari petitions. When the Court addressed related cases, I counted them separately if they were reported in separate orders. Similarly, if the same case resulted in multiple orders at different times, each was counted separately. One case was counted twice, because there were dissents from a mixed decision in both directions.<sup>71</sup>

Having employed this methodology, Baum's dataset resulted in 117 cases over the course of seven Terms.<sup>72</sup> Based on his research, Baum concluded that "as many as one-quarter or one-third of decisions of the full court on stays are accompanied by announced dissenting votes."<sup>73</sup> Baum's sample is not sufficiently representative of all stay cases before the Court to adequately draw conclusions about the justices' behavior in cases where they reached a unanimous decision. However, it does inform us about their behavior when they disagree with one another, and do so publicly.<sup>74</sup> Additionally, within the gathered cases, Baum codes for the type of dissent authored, the topic of the case, whether each justice on the Court at the time dissented or not, the ideological direction of the dissent (i.e., which ideological "side" disagreed with the result), and the total number of dissents associated with the decision.<sup>75</sup>

In terms of the case types, the greatest number of these applications involved stays of execution. Execution cases ( $N=57$ ) represented 48.7% of the cases.<sup>76</sup> Voting and election cases came in second with 14.5% of the cases ( $N=17$ ).<sup>77</sup> Immigration cases ( $N=15$ ) came in third with 12.8% of the cases.<sup>78</sup> Environmental protection cases ( $N=6$ ) constituted 5.1% of the cases and were the fourth highest category.<sup>79</sup> No other individual case type per Baum's coding scheme constituted greater than 5% of the total cases.<sup>80</sup>

<sup>71</sup> *Id.* at 3 n.2.

<sup>72</sup> *Id.* at 3.

<sup>73</sup> *Id.* at 4.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 4–5. Types of dissent include (a) whether there was no opinion in the Journal; (b) whether there was a very brief opinion in the Journal, (c) whether there was a longer opinion in the Journal, and (d) whether there was a full opinion. *Id.* at 4. We note Baum labels full opinions as "Substantial" opinions in his original table; we adopt the phrase "full opinion," as these opinions are those reported in "opinions" on the Supreme Court's website. Topical categories in Baum's original dataset include: (1) execution; (2) other criminal justice; (3) abortion; (4) contraception; (5) immigration; (6) voting and election; (7) same-sex marriage; (8) sexual orientation/transgender; (9) environmental protection; (10) census; (11) firearms; (12) pregnancy; (13) FOIA (Freedom of Information Act); and (14) arbitration.

<sup>76</sup> *Id.* at 4. Percentage calculations were derived from Baum's original dataset by the authors. We again thank Dr. Baum for sharing his data.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> In his article, Baum collapses sexual orientation/transgender and same sex-marriage into a single category of "Sexual orientation" for reporting purposes. *See id.* This bumps the newly combined category up to 7.7% of total cases. *Id.* He does the same with contraception and abortion labeling them "Reproductive rights," which results in this new category representing 5.1% of the total cases. *See id.* at tbl. 1.

The typical type of dissent associated with the Baum dataset is that of a four-vote dissent, occurring in 40.2% of the cases.<sup>81</sup> Two-vote dissents were second, standing at 24.8% of the cases, followed by three-vote dissents (17.9%) and single-vote dissents (17.1%).<sup>82</sup> When it comes to the type of dissent authored, the majority of the dissents included no opinion (60.7%).<sup>83</sup> The second highest category of opinion type is that of a full opinion (34.2%).<sup>84</sup> As these two numbers reveal, public pronouncement of dissents in these shadow docket cases tend to be an all-or-nothing approach: either the dissenters make a full explanation for their dissent, or, simply register their disapproval and devote little to no time explaining why.

Baum's findings with regard to the ideological behavior of the shadow docket are particularly compelling. In short, justice behavior in stay cases with dissents is completely aligned with the Justices' ideological moorings. All of the liberal Justices dissented more than their conservative counterparts.<sup>85</sup> This finding is intuitive given that the Court has been controlled by a conservative coalition during the entirety of the Terms covered in the dataset.

Baum also found that ideological extremity in the conservative coalition suggests a propensity to dissent.<sup>86</sup> For instance, Justice Thomas (considered by many the most conservative Justice) dissented at a rate nearly eleven times that of Justice Kennedy (widely considered a moderate, swing-vote during these terms).<sup>87</sup> Increased propensity to dissent relative to more moderate members of the conservative coalition occurs for Justices Scalia, Gorsuch, and Alito; again, consistent with the idea that the more ideologically extreme Justices will be more likely to dissent given their relative distance to others even within their ideological bloc.<sup>88</sup>

What is particularly interesting about these findings is the pure, ideological behavior of the Justices. In Baum's entire dataset, *there is not a single occasion where a liberal Justice and a conservative Justice agreed to dissent: not once*.<sup>89</sup> In other words, the Justices simply do not ever "cross-sides" and join those

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 5 tbl. 2. Justice dissent rates: Sotomayor (67.5%), Ginsburg (53.8%), Breyer (47.9%), and Kagan (41.9%), Thomas (25.6%), Gorsuch (23.0%), Scalia (19.6%), Alito (17.1%), Kavanaugh (8.6%), (Chief) Roberts (3.4%), and Kennedy (2.4%). *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*; Michael O'Donnell, *Deconstructing Clarence Thomas*, THE ATLANTIC (Sept. 2019), <https://www.theatlantic.com/magazine/archive/2019/09/deconstructing-clarence-thomas/594775/> [ <https://perma.cc/YXT5-GWEM>]; Colin Dwyer, *A Brief History of Kennedy's Swing Vote—And the Landmark Cases It Swayed*, NPR (June 27, 2018, 7:50 PM), <https://www.npr.org/2018/06/27/623943443/a-brief-history-of-anthony-kennedys-swing-vote-and-the-landmark-cases-it-swayed> [ <https://perma.cc/PD9N-4KNV>].

<sup>88</sup> Baum, *supra* note 43, at 5.

<sup>89</sup> *Id.* at 4.

with ideologically disparate views. Every single dissent (whether it be a single-vote dissent, a four-vote dissent, or otherwise) produces an ideologically “pure” outcome. When there is a dissent, it is *always* a single Justice or multiple Justices of the same ideological stripe.

Baum probes the ideological divisions a bit more by considering a Justice’s decision to join a dissent when that dissent is consistent with the Justice’s ideological bend.<sup>90</sup> For example, if there is a dissent in the liberal direction (meaning the liberal position has lost), how likely is it that members of that liberal bloc will be a part of that dissent? We might call this measurement “ideological consistency,” a reflection of just how liberal a liberal Justice is, and conversely, how conservative a conservative Justice is. Baum’s findings are in fact consistent with this notion. The ideological consistency rates are nearly ordered perfectly with the Justices’ ideologies.<sup>91</sup> For instance, Justice Sotomayor is in the liberal dissenting coalition 90.8% of the time when there is a liberal dissent.<sup>92</sup> Her more moderate colleague, Justice Kagan, joins her ideological colleagues in liberal dissents 56.3% of the time.<sup>93</sup> For conservatives, we see the same effect. When there is a conservative dissent in stay cases, Justices Thomas and Scalia join 100% of time; in Baum’s dataset these Justices *never* join their liberal colleagues and *never fail* to join the conservative dissent.<sup>94</sup> Contrast these Justices with Chief Justice Roberts and Justice Kennedy. Considered to be “moderates” (relative to the other conservative Justices), these Justices only joined the conservative dissent in 13.3% and 9.5% of the cases with a conservative direction, respectively.<sup>95</sup> Again, we see strong evidence of ideological patterns. The more ideologically extreme Justices can be counted on to join their bloc’s position; the more moderate members of the Court less so.

## 2. *Update and Extension of Baum’s Research*

Having outlined Baum’s research design and some of his findings, we turn to our update and extension of Baum’s original work. We replicate Baum’s data gathering efforts and update through the 2021 Term.<sup>96</sup> Our data update resulted in a total of 157 cases. Additionally, we extend beyond Baum’s original

<sup>90</sup> *Id.* at 5.

<sup>91</sup> *Id.* at 5 tbl. 2. Ideologically consistent dissent rates for Liberal Justices: Sotomayor (90.8%), Ginsburg (72.4%), Breyer (64.4%), and Kagan (56.3%); and for Conservative Justices: Thomas (100%), Scalia (100%), Gorsuch (87.5%), Alito (66.7%), Kavanaugh (33.3%), (Chief) Roberts (13.3%), and Kennedy (9.5%). *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> The total period covered in our update includes the 2013 to 2021 Terms. For the 2021 Term, we ended data collection on July 21, 2022, thus, similar to Baum, we miss the last bit of summer time covered in this Term. Our data gathering efforts replicated Baum’s. *See id.* at 3 n.2; *supra* text accompanying note 71.

analyses to probe more deeply into the Court's behavior in shadow docket stay cases.

We begin by replicating Baum's Table 1 from his original study.<sup>97</sup> Our Table 1 below presents the distribution of stay cases with dissents by various attributes.

TABLE 1

Term	<i>N</i>	Topic	<i>N</i>	#Dissenters	%	Opinion	%
2013	14	Execution	62	1	15.92	None	55.41
2014	24	Voting/elec.	27	2	22.93	Short	4.46
2015	14	Immigration	17	3	25.48	Full	40.13
2016	15	COVID	8	4	35.67		
2017	15	Abortion	7				
2018	21	Environment	7				
2019	18	Other	29				
2020	20						
2021	16						

The 2021 Term includes up to July 21, 2022. Opinions were treated as substantial if they were reported in "Opinions Relating to Orders" on the Court's website. Short opinions were very brief (e.g., two sentences).

We can see that the number of cases with dissents has oscillated over time but is fairly steady. Similar to Baum, the largest number of cases involve the topic of execution ( $N=62$ , 42.7%). Voting and election cases remain the second most frequent case type, although there has been a slight increase from Baum's original dataset. These cases constituted 14.5% of the total cases in Baum's original study; they now represent 17.2% of the total cases. Immigration remains the third highest case type; it was 12.8% in the original dataset, and is now 10.8%. The fourth most frequent case is where there has been real activity and that involves COVID-related cases. Obviously, this uptick is expected as COVID did not exist in the time period of Baum's previous study. This fact means the Court saw a surge of COVID-related stay applications with a related increase in such cases involving dissents. There was a similar, but smaller, increase in abortion-related cases (3.42% in Baum's original dataset, up to 4.5% in the update).<sup>98</sup>

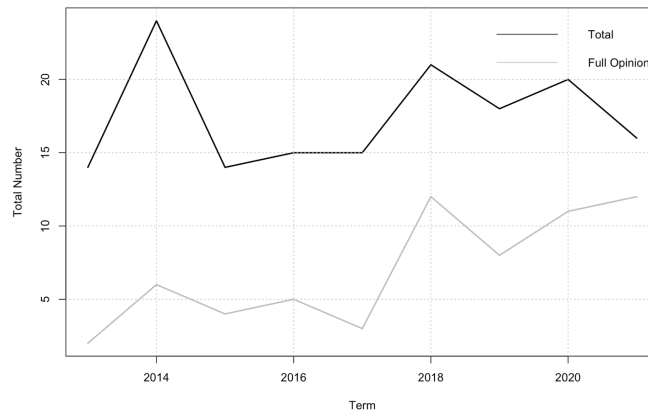
In terms of the number of dissenters, we find similar to Baum that the most frequent type of dissent involves a four-vote dissent (although it is slightly less than Baum found). Additionally, the greatest change in total number of dissenters is to the three-vote dissents (up from 17.9% in Baum's study to 25.48% in our study). On the whole, however, these numbers are fairly consistent.

<sup>97</sup> Baum, *supra* note 43, at 4 & tbl. 1.

<sup>98</sup> If we collapse, as Baum did in his article, abortion and contraception cases into a single "Reproductive rights" category, the results are: 7.7% in Baum's dataset and 5.7% in our updated dataset. *See id.*

Turning to the type of opinion authored in dissents, we see the most frequent type of dissent is one with no opinion; again, similar to Baum. However, there has been an increase in the percentage of stay cases with full opinion dissents. We evaluate this change next. Figure 1 below details the total number of shadow-docket stay cases in which there was a registered dissent and total number of full opinion dissents per term.

FIGURE 1

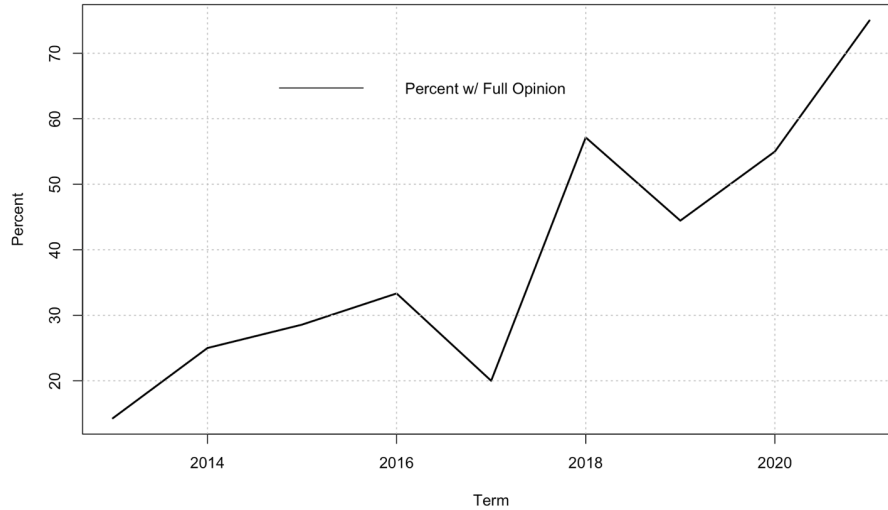


The data indicate the total number of stay cases with dissents has held relatively steady over time. There are peaks (a high of twenty-four in the 2014 term) and valleys (a low of fourteen in the 2013 and 2015 Terms), but on the whole, there is a fair amount of consistency in the number of such cases from term to term. The average number of such cases per Term is 17.4 (with a standard deviation of 3.5). The same, however, cannot be said for full opinion dissents. Clearly, there has been a rise in the number of these dissents.

The increase in the usage of full dissenting opinions in stay cases is displayed in Figure 2. There, we present full opinion dissents as a percentage of all cases with dissents by term.



FIGURE 2



The data reveal a clear trend in the usage of full dissenting opinions in stay cases with dissents. For instance, in the 2013 Term, only two dissents were with a full opinion. By the 2021 Term, there were twelve.<sup>99</sup> Dissenters appear to believe that it is rational and worth their time to publicly dissent and to do so in a formal opinion. This phenomenon begs the question: why? To answer this question, we need to consider the difference between aggregate data where the unit of observation is the entire term, compared to the individual cases where the unit of observation is the specific case. When considering the aggregate (by term) data, given the small number of terms in our dataset (nine), it is difficult to answer this question, and we encourage future research to investigate it more deeply with a greater number of observations. However, what one notices is the trend clearly increases from the 2017 to 2018 Term. This time period is when the Court shifted from closely divided to a reliable conservative majority with the failed nomination of Merrick Garland and elevations of Justices Gorsuch (replacing Justice Scalia) and Kavanaugh (replacing Justice Kennedy).<sup>100</sup> The Court has remained conservative with the replacement of Justice Ginsburg with Justice Barrett.<sup>101</sup> It could be that liberal Justices are sounding more alarm bells by publicly dissenting and in more robust ways (i.e., with a full opinion). However, while the total number of liberal-direction dissents has increased during

<sup>99</sup> We also note that at the time of writing this Article, the October Term 2021 (“OT” 21) is not even complete.

<sup>100</sup> *Supreme Court Nominations (1789-Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [<https://perma.cc/XPX7-7ZBM>].

<sup>101</sup> *Id.*

that time, it has also decreased in the most recent term.<sup>102</sup> And for all the terms, liberal dissents generate a full opinion in about 41% of such situations; conservatives trail, but only at a clip of approximately 33%.<sup>103</sup> In other words, with regards to the aggregate over-time data, ideology might have something to do with the recent trend of full-opinion outputs, but it cannot be the only cause. Both liberals and conservatives are employing the full-opinion strategy more than in the past. Future research, with greater numbers of observations, will assist in clarifying the causal mechanism for this phenomenon.

If we change our unit of observation from the entire term to the individual cases, we increase our total number of observations to permit more advanced modeling of the causes for issuing full opinions on a case-specific basis (rather than over-time). This strategy allows us to gain traction as to why particular cases generate full opinions. We estimated a logistic regression model where the dependent variable is dichotomous (i.e., whether the dissent resulted in a full opinion or not).<sup>104</sup> We also created and included dummy variables for each case type (including the frequently observed and salient topics<sup>105</sup>), whether the dissent was of a liberal direction,<sup>106</sup> the total number of dissents, the Court's total workload,<sup>107</sup> whether the federal government filed the application in question,<sup>108</sup> and the standard deviation of Martin-Quinn ideology scores<sup>109</sup> for the

<sup>102</sup> There were eleven such liberal dissents in OT 17; an uptick to fourteen in OT 18, fifteen in OT 19, and sixteen in OT 20. However, there was a sharp decline in OT 21 (only four), a term in which the conservative direction dissents increased to seven (the highest since the OT 18 term).

<sup>103</sup> For example, conservative dissents with full opinions were at the highest in our dataset for OT 21, in which there were five with full opinions (accounting for 71.4% of all conservative direction dissents (total=7)). In OT 18, by way of comparison, there were also seven total conservative direction dissents, but only three resulted in a full opinion.

<sup>104</sup> Full opinion=1, non-full opinion=0. Our regression model estimated the degree of the relationship between our dependent variable and independent variables. Given that our dependent variable is dichotomous (i.e., it takes a value of 0 or 1), we utilized logistic regression. Logistic regression is appropriate for estimations with dichotomous dependent variables as it utilizes the cumulative logistic distribution as a link function. PAUL M. KELLSTEDT & GUY D. WHITTEN, *THE FUNDAMENTALS OF POLITICAL SCIENCE RESEARCH* 252 (2d ed. 2013).

<sup>105</sup> In addition to Baum's original case types (see Baum, *supra* note 43, at 4.), we added new topical categories not included in Baum's dataset (however, we continued with the numerical category coding from Baum): (15) COVID; (16) separation of powers; (17) equal protection; and (18) free speech.

<sup>106</sup> Liberal dissent direction=1, non-liberal dissent direction=0.

<sup>107</sup> This is measured as the total merits decisions with signed opinions in orally argued cases. We referenced the database of cases collected and published by the Washington University School of Law. HAROLD J. SPAETH ET AL., *SUPREME COURT DATABASE CODE BOOK* (Sept. 30, 2021), [http://scdb.wustl.edu/\\_brickFiles/2021\\_01/SCDB\\_2021\\_01\\_codebook.pdf](http://scdb.wustl.edu/_brickFiles/2021_01/SCDB_2021_01_codebook.pdf) [<https://perma.cc/YQK9-VY7V>].

<sup>108</sup> Federal government filed=1, otherwise=0.

<sup>109</sup> The Martin-Quinn ideology scores are a dynamic metric developed by Andrew Martin and Kevin Quinn in 2002 to gauge the ideology of Supreme Court justices based upon their voting record. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation*

median justice on the Court in that term (which indicates the level of ideological heterogeneity of the Court<sup>110</sup>).

In terms of our hypotheses, we expected cases with topics which are more frequent and salient to increase the probability of a full opinion dissent; we expected a liberal dissent to increase the probability of a full opinion; and we expected increased heterogeneity would increase the decision to dissent (as prior scholars have found).<sup>111</sup> We had no prior expectations regarding the remaining variables. Given such, we tested for statistical significance with two-tailed tests of significance. We also clustered our standard errors by term to account for intra-term error correlation.<sup>112</sup> Results for the estimation are found in Table 2.<sup>113</sup>

TABLE 2

Variable	Coefficient	s.e.
Fed. Govt.	-.20	(.67)
Ideo. Var.	14.69**	(4.29)
Workload	.16**	(.06)
Liberal	1.67**	(.48)
# Dissents	-.13	(.20)
Abortion	4.25**	(1.03)
Contraception	2.99	(2.46)
Immigration	3.19**	(.99)
Voting/Elec.	2.39*	(1.00)
Same-sex	3.18**	(1.00)
Orient./Trans.	1.30	(2.28)
Census	3.46**	(1.01)
COVID	3.64**	(1.08)
Execution	1.82	(1.13)
Constant	-20.61**	(5.22)
Pseudo $R^2$	.18	
Log Likelihood	-75.79	
PRE	17.65%	

Note: Clustered standard errors (by term);  $N=141$ .

\*\*= $p < .01$ ; \*= $p < .05$

The results suggest several factors do contribute to the increased probability of a full dissenting opinion. In terms of the topical categories—abortion,

via *Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002).

<sup>110</sup> This approach to measurement of heterogeneity has been employed by prior scholars. See, e.g., Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 133 (2011).

<sup>111</sup> *Id.* at 134.

<sup>112</sup> For this model, our estimations were performed using the STATA statistical software package.

<sup>113</sup> The Terms covered are 2013 to 2020 (we do not include the 2021 term as, at the time of writing, we do not yet have Martin-Quinn scores for it; hence our  $N=141$ ).

immigration, voting and election, same-sex marriage, census, and COVID cases achieve statistical significance at conventional levels and indicate such cases increase the probability of a full opinion dissent being issued, relative to all other non-specified categories. Additionally, consistent with our expectations, a liberal direction dissent is more likely to produce a full opinion than a conservative dissent. Similarly, the ideological heterogeneity variable (“Ideo Var.”) is positive and statistically significant, demonstrating that when it is harder to place the median voter on the Court (i.e., greater ideological heterogeneity), there is a statistically significant increase in the likelihood of a full dissenting opinion. Finally, the workload variable is statistically significant and positive, indicating the greater the merits-based workload, the greater a probability of dissent with a full opinion. The model returns a modest proportional reduction in error (“PRE”) of 17.65%.<sup>114</sup>

We see in Table 2 that several of the case types increase the probability of a full opinion dissent. We can obtain purchase on these findings by calculating predicted probabilities of particular case types resulting in a full opinion. To do so, we held all non-topical variables at their mean or mode (depending on whether it is a continuous or dichotomous variable, respectively) and calculated a point estimate for the probability of a full dissenting opinion if the topic is present in a case. From there, we calculated the predicted probability of a full dissenting opinion if none of the topic categories in our model are present.<sup>115</sup> We then computed the difference between these two estimates to obtain the difference in probability between the specified case type and those not included in the model. We present these differences in Table 3.

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<sup>114</sup> PRE is how much better our model is than simply guessing the modal outcome for whether a full opinion was issued. Given that most cases do not issue a full opinion (i.e., =0 in our coding scheme), this statistic tells us if we gain any ground with our model rather than just guessing that no full opinion was issued for each case (“naïve model”). The calculation is quite simple and is a three-step process: (1) calculate how many incorrect guesses there are in the “naïve” model (M1), (2) calculate how many incorrect guesses there are with our model (M2), (3) utilize the formula:  $(M1-M2)/M2$ . See Jeffrey L. White, *Logistic Regression Model Effectiveness: Proportional Chance Criteria and Proportional Reduction in Error*, 2. J. CONTEMP. RSCH. EDUC. 4, 7 (2013). Calculation is performed with the STATA command “pre” (developed by Paul Millar).

<sup>115</sup> Because we included some topical categories in the model and not others, those topical categories not included in our model are our “reference” category. Consequently, the change in probability is the equivalent of comparing the probability of a full dissent in a case of a specified topic (e.g., abortion) versus the probability of a full dissenting opinion in cases in our “reference” category (i.e., not one of the categories in our model). The values in Table 3 are the percent difference of a full opinion between specified types cases and the “reference” category cases (which include criminal justice, environment, firearms, pregnancy, FOIA, arbitration, separation of powers, equal protection, and free speech cases (see *supra* note 75 and accompanying text)). The probability of a full opinion in these “reference” category cases (with all non-topic variables set to mean/modes) is 7%. Hence, in our abortion example, we calculated the probability of a full dissenting opinion in abortion cases (84%) and subtracted 7% from it to obtain the difference in probability.

TABLE 3: INCREASE IN PROBABILITY OF FULL OPINION

Topic	Increase
Census	64%
COVID	67%
Abortion	77%
Immigration	58%
Same-Sex Marriage	57%

We see that many of the most salient and “hot-topic” categories generate sizeable increases in the probability of a full dissenting opinion in stay cases.<sup>116</sup> Abortion represents a full 77% increase in the probability of a dissenting opinion relative to our reference category cases. COVID cases also generate a large change with a 67% increase. In all, the results are consistent with the general notion that higher saliency topics will generate more fervent disagreement between the Justices, resulting in an increased output of full dissenting opinions.

Consistent with Baum’s prior study, we also explored the Justices’ ideological behavior in stay cases with dissents. We, like Baum, found a heavy ideological split in dissent blocs. Table 4 contains the directional splits in dissents.

TABLE 4

Dissent Direction	%	<i>N</i>
Liberal	70.06	110
Conservative	26.75	42
Cross-Ideological	3.18	5

As in Baum’s work, there is a heavy skew toward liberal dissents. Again, this result is unsurprising given the Court’s conservative nature during these terms. What is of note, however, is the appearance of cases with cross-ideological pairings. Recall that in Baum’s dataset (which ends with the 2019 Term), there was not a single dissent where a liberal Justice joined a conservative justice. In the data update, we now have five such cases.<sup>117</sup> This innovation is a recent phenomenon, however, as all of these cases occurred in the year 2022. Perhaps we will see more of these cross-ideological dissents moving

<sup>116</sup> All of the categories in Table 3 represent statistically significant increases at the 95% confidence level. We note that voting rights and elections cases do result in a predicted increase; however, confidence intervals around the point estimates between the reference category and the voting rights and elections cases overlap at the 95% confidence level. Therefore, we cannot say there is a statistically significant increase between these two categories.

<sup>117</sup> *Merrill v. Milligan*, 142 S. Ct. 879, 882 (2022) (mem.) (Roberts, C.J., dissenting with the liberals) (consolidating *Merrill v. Milligan* and *Merrill v. Caster*); *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1348 (2022) (mem.) (Kagan, J., dissenting, joined by Roberts, C.J.); *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (mem.) (Kagan, J., dissenting as to result but not joining the conservatives’ dissent); *United States v. Texas*, No. 22A17, 2022 WL 2841804, at \*1 (U.S. July 21, 2022) (mem.) (Barrett, J., joining the liberals; also the first time the Court has split along gender lines in a case).

forward. Nonetheless, the overarching theme of dissent directions is ideological, with close to 97% of the cases in the dataset reflecting ideological purity in the dissent direction.

We next replicate Baum's table of individual justice dissents by ideological grouping.<sup>118</sup> Results are found in Table 5.

TABLE 5

Justice	Liberals		Justice	Conservatives	
	% All Cases	% Lib. Dissent		% All Cases	% Cons. Dissent
Sotomayor	67.52	92.73	Thomas	26.75	97.62
Ginsburg	54.55	73.33	Gorsuch	25.00	85.71
Breyer	46.79	63.63	Alito	20.38	73.81
Kagan	45.22	60.00	Scalia	19.57	100.00
			Barrett	13.33	33.33
			Roberts	4.46	9.52
			Kavanaugh	4.00	14.29
			Kennedy	2.44	9.52

Justice Ketanji Brown Jackson is excluded, as there was only a single observation for her in our dataset.

We again see a similar story to Baum's findings. The more ideologically extreme Justices dissent more than the moderates. Indeed, Justice Sotomayor's rate of dissent is essentially unchanged (as is Justice Thomas's). Justices Kagan and Breyer are nearly the same (with a slight uptick for Justice Kagan and a slight decline of about 1% for Justice Breyer). The conservative Justices are largely the same, as Justice Gorsuch saw a small increase (2%) the same as Justice Alito (just over 3%). Chief Justice Roberts had a minor increase of about 1%. However, Justice Kavanaugh, who did not dissent with great frequency in such cases before, does so even less with the data update (a decline of about 5%). He is the only conservative Justice to decline. Justice Barrett was not a part of Baum's original study, but she clocks in at about a 13% dissent rate.

We also were interested in evaluating how the Justices might change over time in their decision to dissent in these stay cases. In Figure 3, we plotted each contemporary Justice's dissent rate over time.<sup>119</sup>

<sup>118</sup> Baum, *supra* note 43, at 5.

<sup>119</sup> We include Justice Breyer in Figure 3 as he served on the Court through the end of June 2022. *Resignation of Stephen Breyer from the U.S. Supreme Court*, BALLOTPEdia, [https://ballotpedia.org/Resignation\\_of\\_Stephen\\_Breyer\\_from\\_the\\_U.S.\\_Supreme\\_Court](https://ballotpedia.org/Resignation_of_Stephen_Breyer_from_the_U.S._Supreme_Court) [https://perma.cc/UZ6L-BA47]. Justice Jackson is omitted as there was only a single observation for her in our dataset.

FIGURE 3

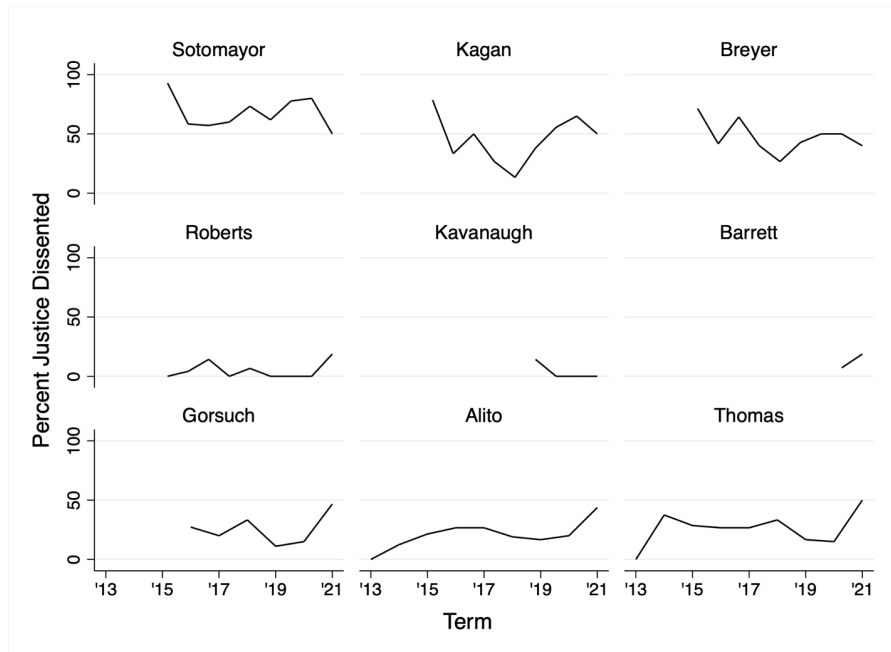


Figure 3 reveals a few interesting patterns. First, the liberals, over time, show dissent rates which tend to be higher than the conservatives. Justices Kagan and Breyer have nearly identical trend lines. Chief Justice Roberts and Justice Kavanaugh have some movement but hover relatively close to almost never dissenting. Justice Barrett only has two terms in the dataset, but her rates for those are more muted than the remaining conservatives.

For the remaining ideological conservatives, there is a recent trend upward in dissent rates. Moreover, all three of these Justices (Gorsuch, Alito, and Thomas) now dissent more than they did when the dataset begins (or when they first joined the Court), something that cannot be said for the liberal Justices. Indeed, Justice Alito has increased to about 44% and Justice Thomas to about 50% in their dissent rates for these cases. Justice Gorsuch, while relatively active in dissenting early in his tenure, also reveals an increase. In short, in the post-Gorsuch Court, the edges of the conservative bloc appear quite willing to dissent in these stay cases.

In addition to these measures, we also calculated justice agreement rates. Table 6 presents the percent of total agreement between all Justices in our dataset on the decision to dissent.

TABLE 6

	Gins- burg	Ka- gan	Brey- er	Rob- erts	Gorsuch	Kennedy	Kavanaugh	Scalia	Alito	Thomas	Barrett
Sotomayor	81.8	75.2	73.1	31.8	6.0	30.5	28.0	6.5	12.1	5.7	26.7
Ginsburg	-	85.1	72.7	42.1	20.0	45.1	33.3	23.9	28.1	19.8	-
Kagan		-	84.0	54.1	34.0	58.5	44.0	26.1	35.7	29.3	33.3
Breyer			-	52.6	33.3	50.0	50.0	19.6	32.7	26.1	44.8
Roberts				-	73.0	97.6	92.0	82.6	79.0	73.9	76.7
Gorsuch					-	76.9	78.4	-	94.0	95.0	75.9
Kennedy						-	-	80.4	85.4	76.8	-
Kavanaugh							-	-	80.0	76.0	86.7
Scalia								-	87.0	100.0	-
Alito									-	92.4	76.7
Thomas										-	76.7
Barrett											-

The five cross-ideological dissent cases are omitted.

Justice Ketanji Brown Jackson is excluded, as there was only a single observation for her in our dataset.



Table 6 is consistent with ideological expectations. For example, Justice Sotomayor agreed with Justice Ginsburg on the question to dissent 81.8% of the time. Contrarily, Justice Sotomayor practically never agrees with Justice Thomas on the question of whether to dissent. And when they did, it was only in 9 of 115 cases where the decision was *not* to dissent; they never agreed to dissent together. Contrast these results with Justice Scalia and Justice Thomas, where they always agreed on the decision to dissent (i.e., they always agreed either to dissent or not to dissent). The moderates on the Court behave similarly. For instance, Chief Justice Roberts agreed with Justices Kennedy and Kavanaugh nearly all the time (97.6% and 92.0%, respectively).

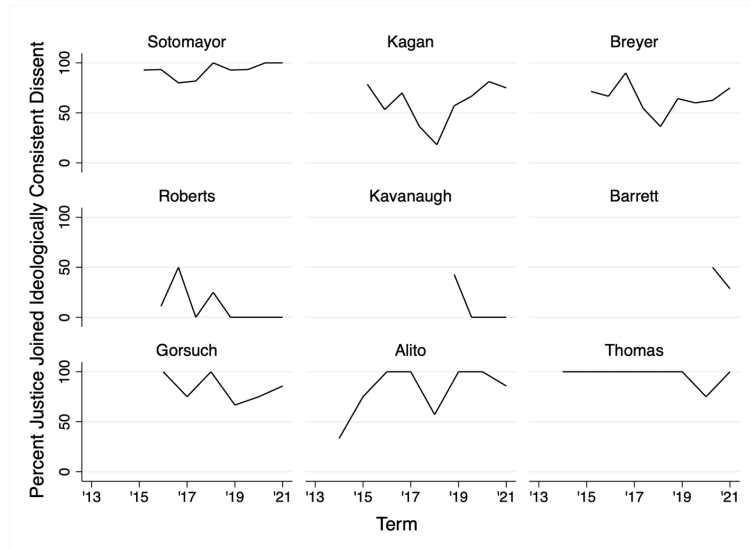
As Baum did, we evaluated a justice's ideological consistency.<sup>120</sup> Results are in Table 5. Like Baum, we found ideological consistency similar to the Justices' perceived ideologies on a left-right continuum. Indeed, many of the Justices are unchanged in a real sense from Baum's results. For instance, Justice Sotomayor is in the liberal dissenting coalition 92.73% of the time when there is a liberal dissent; this is nearly identical to before. Indeed, this conclusion can be drawn for most of the Justices. Justices Ginsburg, Breyer, Kagan, Thomas, and Gorsuch yield similar results, as does Chief Justice Roberts (with a slight decline).<sup>121</sup> The most notable exception to this measure is Justice Kavanaugh who has shifted fairly considerably to less ideologically consistent voting. In Baum's original study, Justice Kavanaugh chose to join his conservative colleagues in a dissent 33.3% of the time; after the data update, that number drops to 14.29% of the time, demonstrating his movement toward the median voter on the Court. We tease out these variations over time in Figure 4.

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<sup>120</sup> See *supra* text accompany notes 90–95.

<sup>121</sup> Indeed, after the data update, Justice Thomas dissented in stay cases with a conservative dissent direction 97.62% of the time. Justice Scalia is now the only Justice in the dataset who joined 100% of the time when there was a conservative dissent direction.

FIGURE 4



In Figure 4, we see the ideological consistency measure over time for the contemporary Justices.<sup>122</sup> And again, we see similar patterns. Justices Sotomayor and Thomas are a virtual lock to dissent when their ideological side produces a dissenting opinion. Justices Kagan and Breyer largely mirror each other, though, in more recent Terms, have generated slight differences between them. Justice Gorsuch is fairly consistent with high levels of ideological consistency. Justice Alito has grown more ideologically consistent over time with a notable dip in the 2018 Term, which then reverted back. Chief Justice Roberts and Justice Kavanaugh, however, have trends suggesting moderation. Again, this is what we would expect given both of their roles as the center of the Court's ideological spectrum. Indeed, in the last three terms neither has joined their conservative colleagues when there has been a conservative dissent.

One of the central questions about the shadow docket is whether the justices behave the same on this docket as they do on the merits docket. To an extent, the answer to this question is clearly yes. Ideological arrangements and pairings in stay cases where there is a registered dissent are quite similar to the Justices' conduct in votes on the merits.<sup>123</sup> But the finding that ideology matters is not novel (at least to most). If the shadow docket is truly operating "in the shadows," it suggests there could be differential behavior even on the ideological dimension. One method to evaluate this potential phenomenon is to compare the justices' ideological consistency between the types of cases in our dataset to

<sup>122</sup> We again include Justice Breyer in Figure 4 as he served on the Court through the end of June 2022. Justice Jackson is omitted as there was only a single observation for her in our dataset.

<sup>123</sup> See Baum, *supra* note 43, at 8.

the merits cases. For instance, if a justice consistently votes to join conservative dissents in the stay cases, but votes not to join conservative dissents in the merits cases, then we have evidence that the justice is acting more conservatively in the shadows. If, however, we find that a justice votes to join conservative dissents in the stay cases, while also voting to join conservative dissents on the merits to the same degree, then we can say they are acting in an ideologically pure manner and behaving no differently on the merits docket than in the shadows. To facilitate this inquiry, we operationalized a measure which is the difference between (a) the ideological consistency measure on stay cases and (b) an ideological consistency measure on merits-based dissents. To obtain the latter, we calculated the percentage of time in which a liberal Justice voted to join a liberal dissent and the percentage of time that a conservative Justice voted to join a conservative dissent. We obtained these values from the Supreme Court Database, which contains the decision direction information for each merits-based case (through the 2020 Term).<sup>124</sup> This variable can take on any value from -100% to +100%. For example, if a liberal Justice voted to join a liberal dissent in stay cases 100% of the time, but voted to join the liberal dissent in the merits cases 30% of the time, their differential would be 70% (indicating they skew towards greater ideological consistency in stay cases). If a liberal Justice voted to join a liberal dissent in stay cases only 20% of the time, but voted to join the liberal dissent in the merits cases 90% of the time, their differential would be -70% (indicating greater ideological consistency in the merits cases). In short, a positive (+) value will indicate greater ideological consistency in the stay cases; a negative (-) value will reflect greater ideological consistency in the merits cases.

Before we discuss the results, we note that this measure is not perfect (or, is at least only one manner to tease out whether justices behave differently “in the shadows”). For one, it is limited to the sample of cases based on Baum’s method of data collection, which does not tell us about the justices’ behavior in stay cases in which *no* dissent was registered. Moreover, it is assuredly the case that the data generating processes between the merits docket and the shadow docket are distinct. For instance, all cases decided on the merits have already undergone case selection effects, such as the “Rule of 4” at the certiorari stage, whereas decisions on stays can be acted upon by a single circuit justice (and only those referred to the full Court will be found in Baum’s approach). Additionally, on the one hand, we might expect greater moderation on the merits docket due to the “Rule of 4,” given that a near majority has already decided to address the fundamental questions posed in these cases. On the other hand, if the measure produces justices who do hover near “0” (and thus are ideologically consistent between both dockets) while others skew in a different direction (e.g., more ideological in the stay cases), then we have evidence our measure does not uniformly skew toward greater ideological voting in stay cases and is

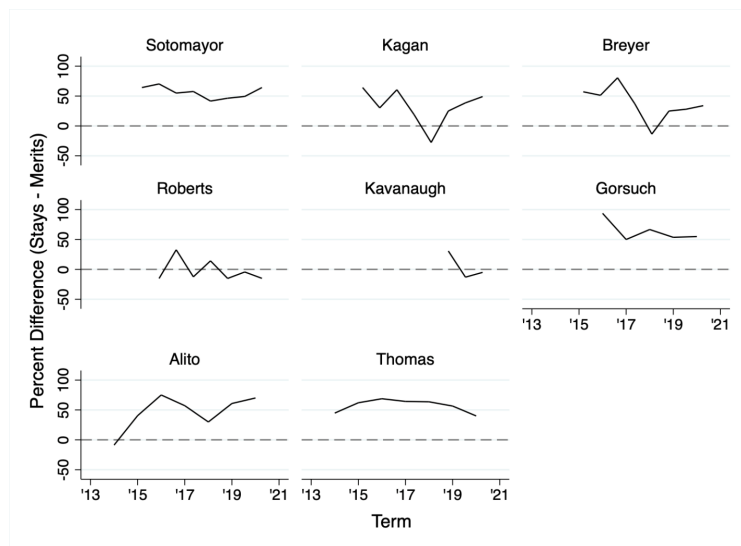
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<sup>124</sup> See SPAETH ET AL., *supra* note 107.

not subject to a consistent moderating effect by the merits docket. Furthermore, there are similarities between the decision to dissent in an ideologically consistent manner on both the merits docket and in stay cases. In both situations a justice must decide whether to join their ideological colleagues in a public pronouncement of opposition, with the same attendant concerns for resource and time expenditure. We proceed at this point with our measure, though aware that empirical indicants “are never able to fully exhaust nor completely duplicate the meaning of theoretical concepts.”<sup>125</sup>

In Figure 5 we plotted contemporary Justices’ ideological consistency differentials across Terms.<sup>126</sup>

FIGURE 5



The results have face validity as a measure. More ideologically extreme Justices appear to behave even more ideologically consistent “in the shadows” than they do on the merits docket. With the exception of a single Term for Justice Alito (2014), Justices Sotomayor, Gorsuch, Alito, and Thomas all act more ideologically consistent in these shadow docket cases. We do, however, also have more moderate Justices behaving consistently between merits cases and these stay cases. Justices Kagan and Breyer again mirror one another and do so

<sup>125</sup> RICHARD A. ZELLER & EDWARD G. CARMINES, MEASUREMENT IN THE SOCIAL SCIENCES: THE LINK BETWEEN THEORY AND DATA 3 (1980).

<sup>126</sup> We again use the Supreme Court Database for directional data. See SPAETH, *supra* note 107. Terms include 2013 to 2020. Calculations could not be obtained for conservative Justices (Roberts, Alito, Thomas) in the 2013 Term as there were no dissents of a conservative direction during that Term. Justice Barrett is omitted as she yields only a single Term; Justice Breyer is included whereas Justice Jackson is not. See *supra* note 119.

across various levels of our differential measure, including spending some time where they are more ideologically consistent in the merits cases than in the stay cases. And, our measure indicates that Chief Justice Roberts and Justice Kavanaugh are little different “in the shadows” compared to merits cases, again consistent with their position in the center of the ideological spectrum (and their propensity to be in the majority on either docket). On the whole, and with our prior caveats in mind, the preliminary evidence here does suggest more ideologically extreme Justices behave differently on the shadow docket than in merits cases.

Another area of inquiry concerning the shadow docket is its use by the federal government. Preliminary research suggests there has been increased use of the shadow docket by the government. Stephen Vladeck conducted a study of the Solicitor General’s behavior on the shadow docket, comparing Solicitors General across three presidential administrations (George W. Bush, Barack Obama, and Donald Trump).<sup>127</sup> Vladeck concludes that Trump (through former Solicitor General Noel Francisco) had been “far more aggressive in seeking to short-circuit the ordinary course of appellate litigation . . . than any of his immediate predecessors.”<sup>128</sup> As noted *supra*, there are criticisms of this approach by the federal government. Given the interest in this topic, we extended Baum’s dataset to a brief analysis of the federal government’s action within our universe of cases.<sup>129</sup> We begin by noting the general trends for stay applications by the federal government.

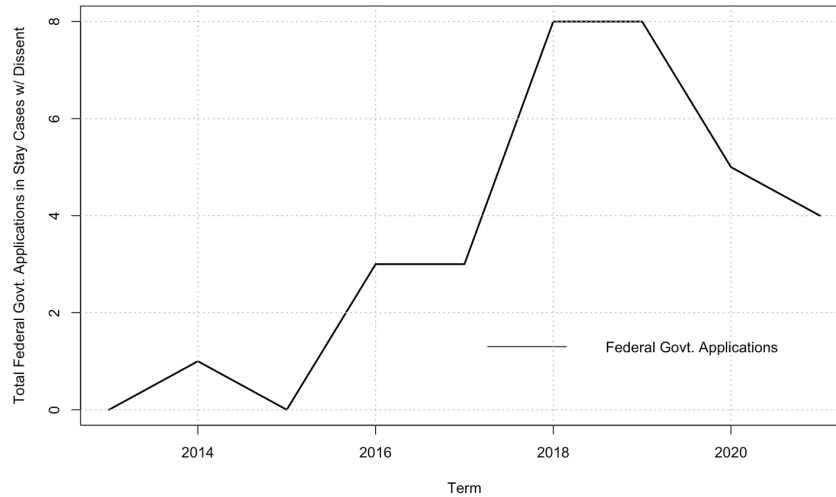
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<sup>127</sup> Vladeck, *supra* note 37, at Part II.

<sup>128</sup> *Id.* at 125.

<sup>129</sup> It is important to remind readers that our universe of cases will differ slightly from Vladeck’s. In particular, recall that Baum’s methodology collected cases in which there is a registered dissent. As a result, this data gathering process will miss applications for stays (or to vacate stays) that do not include a registered dissent. For example, in the 2018 Term, our dataset (updated with the Baum methodology) identifies eight cases. Vladeck finds for this Term ten. *Id.* at 163. The two cases beyond ours from Vladeck are *Trump v. United States District Court for Western District of Washington*, No. 18A276 (U.S. Sept. 17, 2018) [hereinafter No. 18A276] and *Trump v. Doe 2*, No. 18A626 (U.S. Jan. 22, 2019) [hereinafter No. 18A626] (mem.) (Roberts, C.J., in chambers). *Id.* In 18A276, the request was withdrawn; in 18A626, the application was denied by Chief Justice Roberts without referral to the full Court. *Id.*; *Search Results*, U.S. SUP. CT., <https://www.supremecourt.gov/search.aspx?filena me=/docket/docketfiles/html/public/18-677.html> [<https://perma.cc/V8X3-HBWW>]. As a result, such cases never registered a dissent and therefore are not included within our dataset. We note most of our cases do align with Vladeck’s (indicating that it is fairly typical for dissents to be registered in cases where the application is made by the federal government).

FIGURE 6



Similar to Vladeck, we see a sharp increase in the number of applications filed by the federal government during the Trump Administration.<sup>130</sup> During the five years under Democratic presidents, the federal government filed a total of five applications to the Court. In the four years under the Trump administration, twenty-seven such requests were filed. In other words, the Trump Administration filed over five-times as many applications with the Court as its Democratic counterparts (in cases with a dissent). The numbers are stark and consistent with Vladeck's findings.

We also evaluated in Table 7 the case topics for federal government applications, the number of dissenters in the case, and the type of opinion issued in the Court's decision.

<sup>130</sup> As a part of our data replication efforts, we (like Baum) coded for whether the federal government sought the stay or not. *See* Baum, *supra* note 43, at 6. We obtained applicant information from the Supreme Court's docket. *Docket Search*, U.S. SUP. CT., <https://www.supremecourt.gov/docket/docket.aspx> [<https://perma.cc/ZQH6-JMXH>].

TABLE 7

Topic	<i>N</i>	#Dissenters	%	Opinion	%
Immigration	14	1	6.25	None	50.00
Execution	6	2	15.62	Full	50.00
Abortion	3	3	31.25		
COVID	2	4	46.88		
Orient./trans.	2				
Voting/elec.	1				
Environment	1				
Crim. Just.	1				

By far the most frequent case topic is immigration, accounting for about 44% of the applications. While quite high relative to the other topics, it is not totally surprising that immigration leads the way. The Trump Administration's fixation on immigration is well-documented.<sup>131</sup> Still, immigration cases are more than double the next highest topical total. That position belongs to execution cases, a type of case which is the highest in our full dataset. This number might also be surprising given that the applications under present discussion are made by the *federal* government (and not state actors). However, that surprise fades when one considers that the Trump Administration executed thirteen inmates in the last six months of office: more than three-times as many as the federal government had executed in the prior six decades.<sup>132</sup>

As with the full set of cases, we break out the individual Justices' dissenting behavior in the cases with federal applications.<sup>133</sup>

<sup>131</sup> See, e.g., JULIE HIRSCHFELD DAVIS & MICHAEL D. SHEAR, BORDER WARS: INSIDE TRUMP'S ASSAULT ON IMMIGRATION (2019).

<sup>132</sup> Adam Liptak, 'Expedited Spree of Executions' Faced Little Supreme Court Scrutiny, N.Y. TIMES, <https://www.nytimes.com/2021/01/18/us/executions-death-penalty-supreme-court.html> [<https://perma.cc/NQ6M-3UDT>] (Nov. 15, 2021).

<sup>133</sup> In the thirty-two cases we have identified, twenty (62.50%) result in a liberal dissent and eleven (34.38%) result in a conservative dissent. We note that there is one case that contains cross-ideologies, *United States v. Texas*, No. 22A17, 2022 WL 2841804 (U.S. July 21, 2022) (Barrett, J., joining the liberals). As mentioned earlier, our data collection period ended on July 21, 2022.

TABLE 8

Justice	Liberals		Justice	Conservatives	
	% all cases	% lib. dissent		% all cases	% cons. dissent
Sotomayor	65.2	100.00	Barrett	37.50	100.00
Ginsburg	60.87	93.33	Thomas	34.38	100.00
Kagan	50.00	75.00	Gorsuch	32.26	90.91
Breyer	45.16	70.00	Alito	31.25	90.91
			Kavanaugh	8.00	25.00
			Roberts	0.00	0.00
			Kennedy	0.00	0.00

Justice Jackson is excluded as there was only a single observation for her in these cases. Justice Scalia is excluded as there was only a single observation for him in these cases.

Similar to the full dataset, there appears to be clear ideological behavior. Again, the Justices are ordered in dissent rates fairly consistent with their perceived ideological direction and degree. For instance, Justice Sotomayor dissents in almost two-thirds of the cases involving an application filed by the federal government. Given the time period involved in our study (one with a conservative-leaning Supreme Court), the results are consistent with expectations. Note also, though, that when a liberal dissent occurs, Justice Sotomayor *always* chooses to join that group. In fact, this ideological consistency sees an increase for every liberal Justice. Moving to the conservatives, we see a familiar story. The more extreme conservative Justices dissent at greater rates. Justice Thomas, like Justice Sotomayor, *always* chooses to join a conservative dissent when the federal government files the application. Interestingly, he is joined in that camp by Justice Barrett. This finding is surprising given she only dissents 13.33% of the time in all cases in the dataset, and only joins a conservative dissent 33.33% of the time in the full universe of cases. In other words, for Justice Barrett, there is a strong skew “in the shadows” toward what appears to be ideological behavior in cases where the federal government files an application. To a lesser extent, Justices Gorsuch and Alito follow suit, though the increases are more modest from the full universe of cases (though still fairly robust). Justice Kavanaugh does increase his dissent rate and ideological consistency “in the shadows,” however, the increases are relatively small and not as dramatic as his conservative colleagues. Which brings us to Chief Justice Roberts: he appears to move in a moderating direction, choosing never to dissent in such cases (meaning he is always in the winning coalition), and by implication, never joining a conservative dissent. While the sample size is small, it does appear that in cases involving federal government applications, the Justices retreat to their respective wings a bit more (and to the center for Chief Justice Roberts).

Finally, we evaluated the federal government’s success in applications. We coded a “win” as a grant of any request for relief (i.e., in whole or in part) given



that even a partial grant of a stay can alter the status quo.<sup>134</sup> Doing so yielded the following results.

TABLE 9: FED. GOVT. WIN RATES (%)

All	Trump	Dem.
75.0	81.5	40.0

The results suggest that the Solicitor General’s office is more often than not successful in achieving some alteration to the status quo through the shadow docket, achieving a “win” 75% of the time. Also interesting is the difference between the Democratic administrations’ successes (pooled together) versus the Trump Administration’s. As noted in Table 9, President Trump had more than double the success on the shadow docket than the Obama-Biden presidencies. Part of that explanation clearly centers on the composition of the Court, which skewed conservative in Trump’s administration. However, if applications for stays are truly reserved for “extraordinary cases,” it begs the question whether the Justices are faithfully applying this standard.<sup>135</sup>

To summarize, we have sought here to identify a particular source of data (Baum’s research) on an element of the Court’s shadow docket, and we have updated these data and extended the original analysis. We wish to again note that our work here concerns a slice of the shadow docket, but it is not the whole pie. Our dataset is limited to those stay cases with a registered dissent. However, we can make preliminary conclusions about the data. In terms of the individual Justices, it is largely—but not entirely—consistent with ideological behavior. As demonstrated, however, these behaviors are dynamic over time. Moreover, the Court as a whole appears to have embraced use of the shadow docket. While the total number of cases with dissents has remained fairly consistent over the Terms, the use of full opinions has grown. These results indicate the Justices have determined the shadow docket is a viable arena in which to do battle. While our results are certainly preliminary, we look forward to future researchers increasing the focus on this docket and engaging in novel research designs to further investigate the Court’s behavior “in the shadows.” To that end, we turn now to detail forthcoming research and preliminary findings by emerging social science scholars.

### B. *Davis’ Research*

The 2022 Midwest Political Science Association (“MPSA”) annual conference devoted an entire panel to emerging research on the Court’s shadow dock-

<sup>134</sup> Grant (whole/part)=1; otherwise=0.

<sup>135</sup> See *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)).

et.<sup>136</sup> We highlight two research lines which will be useful for future scholars in cataloguing and interpreting the Court's behavior "in the shadows." Full credit is given to these individuals in endeavoring to catalogue the Court's shadow docket activity. With their permission, we note some of their research designs and preliminary findings (noting, of course, that these are not fully complete research lines).

The first body of research relates to the difficult process of identifying and coding the Court's shadow docket activities. We have already alluded to some of these. Taraleigh Davis and her coauthors (collectively, "Davis") presented preliminary findings from their large project, which seeks to identify all of the Court's work (both merits and shadow docket).<sup>137</sup> As noted, the activities of the Court on the merits docket are quite open and available. However, it is the shadow docket where transparency lacks.<sup>138</sup> Davis, as a part of their dissertation project, attempts to rectify our lack of knowledge in this area of the Court's activities.

Davis begins the data collection process by analyzing the Supreme Court's Journal.<sup>139</sup> As noted, the Supreme Court's Journal acts as a running catalogue of the Court's actions, and includes within it orders, per curiam decisions, summary dispositions, remarks by the Chief Justice, bar admissions, etc.<sup>140</sup> Importantly, it also contains the Court's work on emergency filings and orders—those that are at the heart of the shadow docket and those which have generated the most recent conversation about concern for the Court's actions in this domain.<sup>141</sup> Davis gathers data on (1) applications of stays (including stays of execution and stays of the mandate); (2) motions for stays of injunctive relief; (3) applications and motions to vacate stays or injunctions; and (4) petitions for certiorari that were resolved by a grant, vacate, and remand order.<sup>142</sup> We note this data universe is much larger than that of Baum's (by design, of course) and allows for an evaluation of not only stay applications, but also decisions not resulting in a dissent.<sup>143</sup>

<sup>136</sup> Panel on the Shadow Docket, Midwest Pol. Sci. Ass'n, 79th Annual Conference (Apr. 9, 2022), [https://www.mpsanet.org/wp-content/uploads/2022/04/2022-MPSA-Annual-Conference-Program\\_FINAL\\_For-Website.pdf](https://www.mpsanet.org/wp-content/uploads/2022/04/2022-MPSA-Annual-Conference-Program_FINAL_For-Website.pdf) [<https://perma.cc/VYU8-FSGS>].

<sup>137</sup> Sara C. Benesh, Taraleigh Davis & Elizabeth Willis, Univ. Wisconsin-Milwaukee, Presentation at the Midwest Political Science Association 79th Annual Conference Panel on the Shadow Docket: Cataloging the U.S. Supreme Court's Entire Workload (Apr. 9, 2022) [hereinafter Davis], [https://convention2.allacademic.com/one/mpsa/mpsa22/index.php?cmd=Online+Program+View+Session&selected\\_session\\_id=1920466&PHPSESSID=lt3u71lh8dmbb41qtv7nkm4rqj](https://convention2.allacademic.com/one/mpsa/mpsa22/index.php?cmd=Online+Program+View+Session&selected_session_id=1920466&PHPSESSID=lt3u71lh8dmbb41qtv7nkm4rqj) [<https://perma.cc/M747-CYL8>] (data on file with authors).

<sup>138</sup> Baude, *supra* note 7, at 1 ("[M]any of the orders lack the transparency that we have come to appreciate in its merits cases.").

<sup>139</sup> Davis, *supra* note 137.

<sup>140</sup> *Journal*, *supra* note 61.

<sup>141</sup> *Id.*

<sup>142</sup> Davis, *supra* note 137.

<sup>143</sup> *Id.* Davis notes they hope to obtain data on applications submitted to individual Justices in their circuit justice role but not referred to the Court. The data collection on these, howev-

Davis's MPSA presentation discussed preliminary findings for the 2016 to 2020 Terms.<sup>144</sup> In that epoch, applications for stays and to vacate stays constituted a sizeable portion of the Court's shadow docket activities.<sup>145</sup> Therefore, Baum's analysis (and our update and extension) are fertile areas to look for "shadow docket" activity. However, Davis finds that applications involving the certiorari stage are by far the most common.<sup>146</sup> For instance, in the terms Davis investigates, there are about 125 applications for stays of execution.<sup>147</sup> Applications on certiorari sit at about 400.<sup>148</sup> These applications involve orders to grant, vacate, and remand ("GVR").<sup>149</sup> Understanding how the Court, as an institution, chooses to manage its docket (even if the GVRs result in no decision on the merits) informs us about the institution's choices in strategically directing its resources. In other words, to capture the Court's full workload, and the implications for its behavior, we need to extend past prior data efforts. In fact, Davis finds the Court's emergency docket (e.g., requests for stays) occur about as frequently as the Court's merits decisions.<sup>150</sup>

Another benefit of Davis's inquiry is the collection of data regarding which Justice received an application upon filing.<sup>151</sup> In expanding the data gathering processes, we will know not only which Justice received applications (which might tell us something about forum shopping) but also the overall success rate of those applications. For instance, Davis reports that for stay cases, the percentage of cases where a stay was granted varies quite a bit by term (and in fact, declines overall) from the 2016 Term to the 2020 Term.<sup>152</sup> Additionally, analysis of the Justices with whom those applications were filed reveals interesting patterns. The preliminary data indicate that for the Terms under investigation, the Justices who received the most applications were Justices Thomas and Alito (just under seventy each).<sup>153</sup> The third highest recipient is Chief Justice Roberts (just over forty).<sup>154</sup> Choosing a random year from the time period

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er, is quite difficult as these are not contained in the Supreme Court's Journal, making them tough to track down. It appears an exhaustive scan of the Court's docket is required; Davis intends on attempting to collate these applications as well.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> See generally Arthur D. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 HASTINGS CONST. L.Q. 5 (1983) (discussing GVRs).

<sup>150</sup> Davis, *supra* note 137.

<sup>151</sup> These are applications submitted to the full Court (whether with or without a dissent, thereby expanding beyond Baum's original methodology). *Id.* These do not include those applications submitted only to a Circuit Justice but which are not referred to the Court. *Id.*

<sup>152</sup> Davis reports the following percent granted by term: 2016 (60.0%), 2017 (31.2%), 2018 (37.0%), 2019 (42.4%), and 2020 (18.8%). *Id.*

<sup>153</sup> Justice Thomas received slightly more. *Id.*

<sup>154</sup> *Id.*

Davis investigates—2019—Justice Thomas was the circuit justice for the Eleventh Circuit, while Justice Alito was the circuit justice for the Third and Fifth Circuits, and Chief Justice Roberts was the circuit justice for the D.C., Fourth, and Federal Circuits.<sup>155</sup> If we look to the respective circuits' workload (cases commenced), we can ascertain if Justices receive many applications because of their respective circuit's workload or for some other reason.<sup>156</sup> We found that for the year 2019, the workloads for each of these Justices' circuits are as follows:<sup>157</sup>

TABLE 10

Justice	Circuit Workload
Thomas	5,507
Alito	10,593
Roberts	7,155

We see that in 2019, Justice Thomas's circuit commenced about half as many cases as Justice Alito's, yet the total number of applications for stay presented to Justice Thomas was more than Justice Alito's and Chief Justice Roberts's (indeed more than any other Justice's), despite the fact that Justice Alito and Chief Justice Roberts both had multiple circuits for which they were responsible (and whose circuit workloads are much greater).<sup>158</sup> As further comparison, Justice Kagan was allotted the Ninth Circuit. The Ninth Circuit is notorious for its size, both territorially and in its workload. For the same year, the Ninth Circuit's workload consisted of 10,191 cases commenced, the most of any circuit.<sup>159</sup> Yet, despite this circuit workload disparity, Justice Thomas received about twice as many applications for stays as Justice Kagan (with about half the amount of circuit workload).<sup>160</sup> Indeed, even with roughly the same circuit workload, Justice Alito received just under about double the number of applications for stay as Justice Kagan.<sup>161</sup> Even amongst the liberal Justices there is disparity. For instance, Justice Sotomayor was the circuit justice for the Sixth Circuit during this time, while Justice Ginsburg was the circuit justice for the Second Circuit. Despite the fact their circuit workloads were nearly identical,<sup>162</sup> Justice Sotomayor received over three times as many applications for stays as

<sup>155</sup> Allotment of Justs., 2018 WL 5090828, at \*1 (U.S. Oct. 19, 2018).

<sup>156</sup> *Statistical Tables for the Federal Judiciary—December 2019*, U.S. COURTS, <https://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-december-2019> [<https://perma.cc/YYV9-LP26>] (Dec. 31, 2019) (derived using tables B & B8).

<sup>157</sup> *Id.*

<sup>158</sup> See *supra* note 153 and accompanying text.

<sup>159</sup> *Statistical Tables for the Federal Judiciary—December 2019*, *supra* note 156 (derived using table B).

<sup>160</sup> Davis, *supra* note 137.

<sup>161</sup> *Id.*

<sup>162</sup> *Statistical Tables for the Federal Judiciary—December 2019*, *supra* note 156 (Sixth Circuit=4,366 cases commenced; Second Circuit=4,497 cases commenced).

Justice Ginsburg.<sup>163</sup> Do these disparities suggest strategic behavior by parties? The preliminary data cannot demonstrate this fact with certainty and further analysis is required. The point, however, is that such analysis can begin with a larger dataset of the Court's shadow docket behavior, something Davis intends to do.

Davis's efforts to obtain the Court's full workload are important. Understanding how the Court behaves both in and out of the shadows will allow researchers to formulate theoretical precepts for the operation of the Court as an institution, and, most importantly, test theoretically derived hypotheses. We look forward to Davis's finished product and encourage those reading this Article to follow these emerging scholars' work.

### C. Smart's Research

Another contribution to that MPSA panel was EmiLee Smart's work.<sup>164</sup> Like Davis, Smart is another emerging scholar interested in the impact of the Court's behavior on the shadow docket. In particular, Smart evaluates the question of whether the Court's actions "in the shadows" leads to a decline in the public's feelings toward the Supreme Court as an institution.<sup>165</sup>

Smart's theoretical concern is one that is front and center in the recent discussion about the shadow docket. Baude suggests that when the "spotlight is off" the Court's decisions "seem to deviate from its otherwise high standards of transparency and legal craft."<sup>166</sup> In other words, if the public consciousness is attuned to the disparate behavior of justices on the merits docket compared to the shadow docket, will that lead to a diminution in the Court's stature among the populace?

This question is not mere abstraction. Given that the Court wields no power over "the sword or purse," it must maintain its authority through legitimation processes.<sup>167</sup> Central to that notion is that the Court reaches its decisions in a virtuous manner, even with judicial discretion. As political scientists James L. Gibson and Michael J. Nelson have noted, "legitimacy seems to flow from the view that discretion is being exercised in a principled, rather than strategic, way."<sup>168</sup> Moreover, the Justices themselves appear to feel this way. In *Planned*

<sup>163</sup> Davis, *supra* note 137.

<sup>164</sup> EmiLee Smart, Univ. Kentucky, Paper Prepared for the Midwest Political Science Association 79th Annual Conference Panel on the Shadow Docket: A Shadow's Influence: How Citizens View the Supreme Court's Use of the Shadow Docket (Apr. 9, 2022), [https://convention2.allacademic.com/one/mpsa/mpsa22/index.php?cmd=Online+Program+View+Session&selected\\_session\\_id=1920466&PHPSESSID=qeh46dtcqs967buffm2iph12](https://convention2.allacademic.com/one/mpsa/mpsa22/index.php?cmd=Online+Program+View+Session&selected_session_id=1920466&PHPSESSID=qeh46dtcqs967buffm2iph12) [<https://perma.cc/WKD2-2TY9>] (on file with authors).

<sup>165</sup> *Id.*

<sup>166</sup> Baude, *supra* note 7, at 56.

<sup>167</sup> See *supra* text accompanying notes 12–14.

<sup>168</sup> James L. Gibson & Michael J. Nelson, *The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201, 211 (2014).

*Parenthood v. Casey*, the joint opinion of Justices O'Connor, Souter, and Kennedy noted that the "Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."<sup>169</sup> Is there concern, then, that the justices' shadow docket behavior undermines this notion of principled decisional activity? Some members of the current Court seem to think so. Dissenting from the Court's denial of injunctive relief (thereby permitting Texas's recent abortion law that deputizes private citizens to enforce state abortion policy), Justice Kagan stated that "the majority's decision is emblematic of too much of this Court's shadow-docket [decision-making]—which every day becomes more unreasoned, inconsistent, and impossible to defend."<sup>170</sup> She restated these concerns while dissenting from the Court's decision to permit a Republican-drawn voting plan in Alabama to stay in effect (which the lower federal district court concluded diluted African-Americans' votes).<sup>171</sup> There, Justice Kagan lamented, "Today's decision is one more in a disconcertingly long line of cases in which this Court uses its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument."<sup>172</sup> Justice Sotomayor has made a similar argument by noting that the Court tends to favor the federal government in applications for emergency relief (compared to such requests in cases involving executions) and indicated that she feared "this disparity in treatment erodes the fair and balanced [decision-making] process that this Court must strive to protect."<sup>173</sup> Are the Justices concerned with legitimacy and the shadow docket on to something? Smart attempts to answer this question.

In their research, Smart conducts an experiment which subjects respondents to a variety of conditions to tease out the impact of the Court's shadow docket activities. The experiment included a total of 1,065 respondents, administered through MTurk.<sup>174</sup> In Smart's study, respondents were given a scenario mirroring a news article that addressed the Court's procedures, including on the shadow docket.<sup>175</sup> Varying conditions were attached to the respondent's participation, including whether the news article read as a story about the Court's merits docket versus its shadow docket; whether the cases in the article dealt with procedures or substantive policy (in this study, abortion rights); whether the decision would be signed by the Justices (like a merits decision) or un-

<sup>169</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 866 (1992).

<sup>170</sup> *Whole Women's Health v. Jackson*, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting).

<sup>171</sup> *Merrill v. Milligan*, 142 S. Ct. 879, 883 (2022) (Kagan, J., dissenting).

<sup>172</sup> *Id.* at 889. Not every current Justice agrees with this assessment, however, as Justice Kavanaugh noted in this same case, "The principal dissent's catchy but worn-out rhetoric about the 'shadow docket' is similarly off target." *Id.* at 879 (Kavanaugh, J., concurring).

<sup>173</sup> *Wolf v. Cook County*, 140 S. Ct. 681, 684 (2020) (Sotomayor, J., dissenting).

<sup>174</sup> Smart, *supra* note 164. MTurk is a crowdsourcing platform that allows individuals to distribute research and data validation tasks to a virtual workforce. *Amazon Mechanical Turk*, MTURK, <https://www.mturk.com> [<https://perma.cc/928X-XXH9>].

<sup>175</sup> Smart, *supra* note 164.

signed and pithy (as many shadow docket resolutions are); whether there were oral arguments in the case; the pace with which decisions were made (i.e., quickly on the shadow docket, more deliberately on the merits docket); whether the Court received the usual submissions from the parties (e.g., written briefs, oral argument); and how prevalent the occurrence of such behavior was on the merits docket compared to the shadow docket.<sup>176</sup> Smart also included several control variables, including standard demographic variables (e.g., age, race, gender, education level) and ideological predispositions.<sup>177</sup>

To get at the central question of whether the Court's shadow docket behavior influences public perceptions of the Court, Smart utilizes several dependent variables, all aimed at testing a variety of hypotheses.<sup>178</sup> These dependent variables include: (1) a measure of support for the ruling at issue in the hypothetical scenario; (2) performance satisfaction (which functions as a Court approval measure); (3) a measure of procedural perceptions (i.e., do respondents feel differently based on the procedures utilized in the merits versus the shadow docket); (4) a measure of support for narrow court curbing (i.e., should the Court's authority be subverted in limited ways, such as a legislative override or jurisdiction stripping—this essentially evaluates the respondent's propensity to engage in non-compliance with a disfavored decision); and (5) a measure of broad curbing (e.g., should the Court be fundamentally changed by removing judges or making the Court less independent).<sup>179</sup>

Smart intends on publishing their research in the near future, but with their permission, we discuss the tentative preliminary findings. In short, the results are mixed. When it comes to performance satisfaction, procedural perceptions, and narrow court curbing, the shadow docket treatment in the experiment does not appear to produce statistically significant results.<sup>180</sup> In other words, the shadow docket does not appear to influence individuals' views on these dimensions. However, Smart finds that the shadow docket treatment effect does affect the respondents' views on the other dimensions. As Smart notes, the Court's use of the shadow docket does “influence support of the ultimate ruling, as well as support for broad Court curbing measures.”<sup>181</sup> Put differently, in this experimental research design, the Court's actions on the shadow docket can negatively affect the Court's public stature.

Smart's results are, of course, preliminary, and we await the final product of this research line. We feel it important, however, to point out (and even advertise a bit) this research for other scholars as it drives at a critical question

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> These dependent variables are constructed through factor analysis of a battery of questions for each distinct dependent variable category. See *id.* and the Appendix for these questions and related statistics on factor loadings.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

that has recently arisen concerning the Court's actions and behaviors. The concerns expressed by Justices (and others) appear to have some merit. We look forward to seeing Smart's finished product and hope the readers of this Article will as well. In Part III of this Article, we continue with an inquiry into the potentially precarious nature of the Court's institutional legitimacy in contemporary times.

### III. INSTITUTIONAL LEGITIMACY & THE SHADOW DOCKET

In Part III, we attempt to get at the question of whether the Court's institutional legitimacy is in decline using a different tact than Smart. Recall, Smart utilized an experimental design. Here, we attempt to evaluate the Court's institutional legitimacy over time with aggregate data. Before we address the specifics of our approach, it is worth delving more deeply into the literature on institutional legitimacy and the Supreme Court.

The social sciences have informed us that the Supreme Court retains a great deal of institutional legitimacy. Sometimes this is called a "reservoir of goodwill."<sup>182</sup> The research suggests that the Court's institutional legitimacy will not wane simply because the public is discontented with a single decision.<sup>183</sup> Social scientists have concluded that "it seems likely that a key source of the belief that judges engage in principled decision making is the association of courts with symbols of fairness and legality."<sup>184</sup> This notion, called "Positivity Bias," postulates that "anything that causes people to pay attention to courts—even controversies—winds up reinforcing institutional legitimacy through exposure to the legitimizing symbols associated with law and courts."<sup>185</sup> To know the Court is to love the Court. And, that bias extends even in the face of the public's consciousness regarding the ideological aspects of Justices' behavior. Principled decision-making is not merely mechanical. As Gibson and Nelson summarize, "the American people seem to accept that judicial decision making can be discretionary and grounded in ideology, while simultaneously principled and sincere."<sup>186</sup>

Under what conditions might we see a reduction in the Court's institutional legitimacy? To answer this question, we need to discuss the constituent elements of legitimacy. Institutional legitimacy theory argues there are two particular forms of legitimacy: (1) diffuse support and (2) specific support.<sup>187</sup> Diffuse

<sup>182</sup> Gibson & Nelson, *supra* note 168, at 205.

<sup>183</sup> See, e.g., James L. Gibson et al., *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535 (2003).

<sup>184</sup> Gibson & Nelson, *supra* note 168, at 211.

<sup>185</sup> JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE 3 (2009); see also Gibson et al., *supra* note 183.

<sup>186</sup> Gibson & Nelson, *supra* note 168, at 211.

<sup>187</sup> See generally DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE (1965); GIBSON & CALDEIRA, *supra* note 185, at 4.



support is “institutional loyalty.”<sup>188</sup> In other words, “it is support *not* contingent upon satisfaction with the immediate outputs of the institution.”<sup>189</sup> Specific support is “satisfaction with the immediate outputs of the institution.”<sup>190</sup> We might call this public approval. In short, “whereas diffuse support refers to general attitudes toward an institution, specific support turns primarily on the congruence between the Court’s policy outputs and the public’s favored policy outcomes.”<sup>191</sup> While public approval of the Court’s specific outputs can rise and fall dynamically, its institutional loyalty is more enduring.<sup>192</sup>

It is important to keep the above theoretical framework in mind when considering the impact of the shadow docket on the Court’s institutional legitimacy. A public opinion poll that indicates respondents approve of the Supreme Court less than they did in a prior time does not demonstrate an institutional crisis.<sup>193</sup> And the public’s disagreement with specific Supreme Court decisions does not itself equate to an erosion of institutional loyalty. So when might we see a decline in the Court’s institutional legitimacy? It is here that we believe current circumstances and the shadow docket might prove a drain on the reservoir. Based on institutional legitimacy theory, we believe a decline in the public’s loyalty to the Court is most likely when the following conditions are met: (1) consistent decline in specific support and (2) increase in the public’s perception that the Court is no different than other political branches.

With regard to the first condition, it has undoubtedly been met. Poll after poll has found that the public’s job performance evaluations for the Court are at historic lows. *Gallup* found in September of 2021 that approval was down to 40%.<sup>194</sup> This represents a continued decline over the course of several *Gallup* polls. A prior *Gallup* poll (from earlier in 2021) found approval to be 49%.<sup>195</sup> In 2020, that number was 58%.<sup>196</sup> The highest approval level in the last twenty years was 62% around 2000.<sup>197</sup> Additionally, in the wake of the Court overturning *Roe v. Wade*, the *Marquette Law School* poll discovered approval had sunk

<sup>188</sup> See James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 355 (2003).

<sup>189</sup> *Id.* at 356.

<sup>190</sup> *Id.*

<sup>191</sup> Gibson & Nelson, *supra* note 168, at 205.

<sup>192</sup> See James L. Gibson, *Performance Evaluations Are Not Legitimacy Judgments: A Caution About Interpreting Public Opinions Toward the United States Supreme Court*, 54 WASH. U. J.L. & POL’Y 71, 79–80 (2017) (finding that while there is a correlation between specific support and legitimacy, even “those who disapprove of the performance of the Supreme Court still express relatively high levels of institutional support”).

<sup>193</sup> It is, however, evidence of specific support discontent.

<sup>194</sup> Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, GALLUP (Sept. 23, 2021), <https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx> [<https://perma.cc/7TN6-MBV9>].

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

to 38%.<sup>198</sup> On the specific output of the *Dobbs* case, the results are clear: that ruling was out of step with the public at large. A *Marist* poll found that 56% of Americans were opposed to the *Dobbs* decision.<sup>199</sup> There is little doubt the Court is presently issuing policy outputs incongruent with the public's preferred policy outcomes. And, that specific performance discontent can begin to drain even institutional loyalty. As Gibson notes, "performance evaluations today, which are indeed grounded in ideological differences, may ultimately contaminate attitudes toward the institution itself."<sup>200</sup> In other words, "[n]o theory of legitimacy suggests that a badly performing institution can maintain its institutional support *ad infinitum*."<sup>201</sup>

How strong is the connection between specific support and diffuse support? This question is a point of contention in political science. Some contend that the link is quite strong. For instance, Professors Bartels and Johnston find ideological congruence between an individual and the Court to significantly affect perceptions of institutional legitimacy.<sup>202</sup> Indeed, these authors suggest that a single salient case can potentially diminish the Court's legitimacy.<sup>203</sup> Other scholars too have suggested the connection is quite strong.<sup>204</sup> There are more, however, who question the recent findings of strong connectivity. Professors Gibson and Nelson suggest that the conclusions by Bartels, Johnston, and others are incorrect, and that the Court's legitimacy is not "connected to the ideological and partisan cross-currents that so wrack contemporary American politics."<sup>205</sup> Gibson further contends that "legitimacy is for losers," meaning analyses of survey respondents should focus on those who disagree with the decisions (i.e., the losers in a given case).<sup>206</sup> In this sense, when a Court deci-

<sup>198</sup> Devan Cole, *60% of Americans Approved of the Supreme Court Last July. Now It's 38%, According to a New Poll*, CNN (July 20, 2022, 5:03 AM), <https://www.cnn.com/2022/07/20/politics/supreme-court-job-approval-marquette-poll/index.html> [<https://perma.cc/7RJR-SJPD>].

<sup>199</sup> Domenico Montanaro, *Poll: Majorities Oppose Supreme Court's Abortion Ruling and Worry About Other Rights*, NPR (June 27, 2022, 5:00 AM), <https://www.npr.org/2022/06/27/1107733632/poll-majorities-oppose-supreme-courts-abortion-ruling-and-worry-about-other-right> [<https://perma.cc/H2E3-K8UT>].

<sup>200</sup> Gibson, *supra* note 192, at 87–88.

<sup>201</sup> *Id.* at 88.

<sup>202</sup> See generally Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184 (2013). See BRANDON L. BARTELS & CHRISTOPHER D. JOHNSTON, *CURBING THE COURT: WHY THE PUBLIC CONSTRAINS JUDICIAL INDEPENDENCE* (2020).

<sup>203</sup> Bartels & Johnston, *supra* note 202, at 196.

<sup>204</sup> See generally Dino P. Christenson & David M. Glick, *Chief Justice Roberts' Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy*, 59 AM. J. POL. SCI. 403 (2015).

<sup>205</sup> James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?*, 59 AM. J. POL. SCI. 162, 173 (2015).

<sup>206</sup> James L. Gibson, *Legitimacy Is for Losers: The Interconnections of Institutional Legitimacy, Performance Evaluations, and the Symbols of Judicial Authority*, in *MOTIVATING*

sion does not align with the preferences of an individual, “legitimacy or institutional loyalty provides the rationale for accepting or acquiescing” to that unwanted decision.<sup>207</sup> Gibson reevaluates Bartels and Johnston’s data and finds support for his contention that their thesis does not hold when it comes to the “losers” in a case decision.<sup>208</sup> Gibson’s more recent work, however, does find there is a weak connection between one’s ideology and their assessment of institutional legitimacy.<sup>209</sup> The aggregate evidence, it appears to us, is consistent with what Gibson once suggested: “Where scholars differ seems to be on the degree of ‘stickiness’ in the relationship between change in performance satisfaction and institutional support.”<sup>210</sup> In other words, “[s]tickiness’ means that institutional support responds to changing satisfaction in considerably less than a one-to-one manner (and perhaps nonlinearly as well).”<sup>211</sup> But, a less than perfect relationship does not mean no relationship. And while “few want to do away with the US Supreme Court, considerable support exists for changing the institution’s balance between judicial independence and accountability.”<sup>212</sup> The “reservoir is far from bottomless.”<sup>213</sup>

Taking there to be *some* substantive connection between specific support and institutional legitimacy, we return to the second condition which could drive a decline in the public’s loyalty to the Court. Recall, the second condition required for a diminution of institutional loyalty is that of viewing the Court as operating no differently than other political institutions. The public’s perception that the Justices are no different than politicians in robes and that the Court engages in the same loathsome behaviors as, say, Congress, is a crack in the reservoir wall. In a study of Justice Alito’s confirmation, Gibson and Caldeira evaluated Positivity Bias Theory against the backdrop of what was (then) considered a contentious nomination.<sup>214</sup> Using a survey research design, the researchers determined that attentiveness to the nomination process did not erode institutional support.<sup>215</sup> However, exposure to politically motivated advertisements by warring interest groups *did* undermine institutional support for the Court.<sup>216</sup> In other words, while a gain to institutional loyalty occurs when individuals viewed the nomination processes itself, that gain was outpaced by a de-

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COOPERATION AND COMPLIANCE WITH AUTHORITY: THE ROLE OF INSTITUTIONAL TRUST 81, 83 (Brian H. Bornstein & Alan J. Tomkins eds., 2015).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 88–92; see James L. Gibson & Michael J. Nelson, *Change in Institutional Support for the US Supreme Court: Is the Court’s Legitimacy Imperiled by the Decisions It Makes?*, 80 PUB. OP. Q. 622 (2016).

<sup>209</sup> See Gibson, *supra* note 192, at 87.

<sup>210</sup> Gibson, *supra* note 206, at 87.

<sup>211</sup> *Id.*

<sup>212</sup> Gibson & Nelson, *supra* note 168, at 205.

<sup>213</sup> *Id.*

<sup>214</sup> See generally GIBSON & CALDEIRA, *supra* note 185.

<sup>215</sup> *Id.* at 113.

<sup>216</sup> *Id.*

cline in loyalty after seeing interest group attack ads. Gibson and Caldeira conclude, “Politicized nomination processes do in fact subtract from the legitimacy of the United States Supreme Court.”<sup>217</sup> Put more bluntly: “To the extent . . . low politics is associated with the Court, [its] esteem is threatened.”<sup>218</sup> Moreover, these diminutions are enduring.<sup>219</sup>

Have we reached the point where the Court is no longer distinct from the more political branches of government? Multiple Justices on the Court seem to think so. In the *Dobbs* decision, the joint dissent (quoting *Casey*’s invocation of Justice Stewart) argued that, “to reverse prior law ‘upon a ground no firmer than a change in [the Court’s] membership’—would invite the view that ‘this institution is little different from the two political branches of the Government.’”<sup>220</sup> The signal is quite clear from the dissent: the reason for the decision is because there are different people on the Court pursuing ideological goals in a strategic, as opposed to principled, manner. That the dissent makes this argument, while perhaps pronounced for the typical “civility” on the Court, does not mean the public views the Court in such a fashion.<sup>221</sup> However, there are additional public actions by the Justices which suggest that the Court is not simply engaged in policy (or even mild-ideological) debate. Rather, some of the actions are behaviors the public might assign to politicians.

Consider the fact that we have had multiple Justices ensnared in purely political disputes. During the 2016 presidential campaign, Justice Ginsburg notoriously called Donald Trump a “faker.”<sup>222</sup> She also suggested, “I can’t imagine what the country would be—with Donald Trump as our president.”<sup>223</sup> She ultimately apologized and indicated that judges should avoid commenting on candidates for public office; but, the story was out and into the public consciousness.<sup>224</sup> Justice Ginsburg is not the only one, however. Recently, after the *Dobbs* decision, Justice Alito mocked prominent politicians from around the

<sup>217</sup> *Id.* at 119.

<sup>218</sup> *Id.* at 120.

<sup>219</sup> *Id.* at 119 (stating that for respondents’ who indicated a decline in legitimacy, “it seems that the confirmation process made a lasting impression on their views of the Supreme Court”).

<sup>220</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2317, 2350 (2022) (Breyer, Sotomayor, Kagan, JJ., dissenting) (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 864 (1992)).

<sup>221</sup> Journalistic accounts have now taken notice of the personal attacks between Justices on the Court. See Joan Biskupic, *Supreme Court Enters a New Era of Personal Accusation and Finger-pointing*, CNN (May 21, 2021, 10:49 AM), <https://www.cnn.com/2021/05/21/politics/supreme-court-finger-pointing-kavanaugh-kagan-gorsuch/index.html> [<https://perma.cc/QZ45-AFNR>].

<sup>222</sup> Jessica Taylor, *Ginsburg Apologizes for “Ill-Advised” Trump Comments*, NPR (July 14, 2016, 10:44 AM), <https://www.npr.org/2016/07/14/486012897/ginsburg-apologies-for-ill-advised-trump-comments> [<https://perma.cc/89DJ-5JLD>].

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

world, including Boris Johnson, Emmanuel Macron, and Justin Trudeau.<sup>225</sup> He even threw in Prince Harry for good measure.<sup>226</sup> And though not necessarily by choice, Justice Thomas has found himself, through his wife Ginni Thomas, involved in the January 6 Committee’s investigation into the violence at the Capitol experienced after former President Trump’s electoral defeat.<sup>227</sup> These public actions are not connected in any way to the notion of “principled” decision-making. Instead, this is “bad press” of a political nature.

And then there is the leak.

It will take time to ascertain the long run impacts of the leak, but we think it is a reasonable assertion that the leak of the *Dobbs* draft opinion cannot fit within the parameters of prior concepts of “to know the Court is to love the Court,” at least within previous notions of what fills the reservoir. News reports ran with headlines such as, *Move to Scrap Roe Opens Justices to “Politicians in Robes” Label*, and *Supreme Court Leak Further Erodes Public Trust in Government*.<sup>228</sup> Moreover, the unusual nature of this leak has also been injected into the public consciousness. Not only have many news stories categorized the leak as such, but the public is now aware of a pending investigation (with potential criminal ramifications) for the leaker(s).<sup>229</sup> Leaking, investigating

<sup>225</sup> Chantal Da Silva, *Justice Alito Mocks Prince Harry, Boris Johnson for Opposing Roe Reversal*, NBC NEWS (July 29, 2022, 4:43 AM), <https://www.nbcnews.com/news/world/justice-alito-mocks-prince-harry-boris-johnson-roe-reversal-abortion-rcna40579> [https://perma.cc/6VMD-N3BA].

<sup>226</sup> *Id.*

<sup>227</sup> Allan Smith, *Jan. 6 Panel Will Weigh Subpoenaing Ginni Thomas if Needed, Cheney Says*, NBC NEWS (July 24, 2022, 10:03 AM), <https://www.nbcnews.com/politics/congress/jan-6-panel-will-weigh-subpoenaing-ginni-thomas-needed-cheney-says-rcna39735> [https://perma.cc/K7FV-TUBG].

<sup>228</sup> Kimberly Strawbridge Robinson, *Move to Scrap Roe Opens Justices to ‘Politicians in Robes’ Label*, BLOOMBERG L. (May 13, 2022, 9:10 AM), <https://news.bloomberglaw.com/us-law-week/move-to-scrap-roe-opens-justices-to-politicians-in-robos-label> [https://perma.cc/FH5V-HTCY]; Calvin Woodward & Hannah Fingerhut, *Supreme Court Leak Further Erodes Public Trust in Government*, PBS (May 8, 2022, 11:27 AM), <https://www.pbs.org/newshour/nation/supreme-court-leak-further-erodes-public-trust-in-government> [https://perma.cc/2L59-Q66H].

<sup>229</sup> *See, e.g.*, Jeannie Suk Gersen, *What an Unprecedented Supreme Court Leak Says About the Future of Abortion—and About Precedent Itself*, THE NEW YORKER (May 4, 2022), <https://www.newyorker.com/news/daily-comment/what-an-unprecedented-supreme-court-leak-says-about-the-future-of-abortion-and-about-precedent-itself> [https://perma.cc/A3FE-TLFZ]; Josh Gerstein, *How Rare is a Supreme Court Breach? Very Rare*, POLITICO (May 2, 2022, 8:36 PM), <https://www.politico.com/news/2022/05/02/supreme-court-draft-opinion-00029475> [https://perma.cc/C45Z-2S6S]; Jessica Gresko, *Court that Rarely Leaks Does so Now in Biggest Case in Years*, AP (May 3, 2022), <https://apnews.com/article/roe-wade-supreme-court-leaked-draft-opinion-c6a923f6e370672f4a5ccfd3be325786> [https://perma.cc/68W2-HXYE]; Nina Totenberg, *After the Leak, the Supreme Court Seethes with Resentment and Fear Behind the Scenes*, NPR (June 8, 2022, 7:11 AM), <https://www.npr.org/2022/06/08>

leaks, and prosecuting leaks, cannot be said to reflect the view that “discretion is being exercised in a principled, rather than a strategic, way.”<sup>230</sup>

We believe we might very well have entered such a state of declining legitimacy, and it may have been happening for some time. The characterization of the Court as political seems to us to be quite persistent in contemporary accounts. And, the Justices’ behaviors appear to be suggestive of such. Writing in 2017, Gibson noted that the Supreme Court is likely, due to the Trump Presidency, “to become more ideologically extreme in the near future, which can, it seems, erode the institution’s basic support. How long this might take, no social scientist can say. That there may be danger for the Court in the near future, however, seems reasonably likely.”<sup>231</sup> Now, in 2022, it is possible we are already over the rail and have left the precipice.

We make one final foray into this question of institutional legitimacy. For this we return to the question of ideological divergence. Recall that Bartels and Johnston find that ideological divergence can lead to a diminution in institutional legitimacy. Gibson and colleagues question this assertion and find that the relationship between this form of specific support is mild. However mild though, that relationship is important because a beleaguered Court might be less apt to fend off threats to its legitimacy if the relationship is at least somewhat “sticky.” Different from Bartels and Johnston, we utilized time series data to assess the connection between ideological divergence and support for the Supreme Court. We find motivation for this inquiry from scholars Kathryn Haglin and colleagues, who determined that specific support (i.e., public approval) is a function of ideological divergence.<sup>232</sup> Here, we extend that analysis to institutional support.

We begin with our measurement of institutional support. In the past, scholars have utilized survey batteries in singular time points to analyze institutional legitimacy. It is what Gibson and colleagues have done, as well as Bartels and Johnston.<sup>233</sup> These measures are theoretically developed, demonstrating reliability and validity. However, there are many years in which we do not have such studies, and thus over-time relationships cannot satisfactorily be considered, given the unavailable data. We followed a similar course as Haglin and colleagues (who faced a similar quandary), and utilized a different dependent

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/1103476028/after-the-leak-the-supreme-court-seethes-with-resentment-and-fear-behind-the-scene [https://perma.cc/2Z4C-GJDW] (describing the leak as “unprecedented”); Tierney Sneed, *Escalation of the Supreme Court’s Leak Probe Puts Clerks in a “No-Win” Situation*, CNN (June 1, 2022, 11:51 AM), <https://www.cnn.com/2022/06/01/politics/supreme-court-clerks-leak-investigation-phones-affidavit-abortion/index.html> [https://perma.cc/7LGQ-ZUUV].

<sup>230</sup> See *supra* note 168 and accompanying text.

<sup>231</sup> Gibson, *supra* note 192, at 88.

<sup>232</sup> Kathryn Haglin et al., *Ideology and Specific Support for the Supreme Court*, 74 POL. RSCH. Q. 955, 965 (2021).

<sup>233</sup> Gibson & Nelson, *supra* note 168, at 206; Bartels & Johnston, *supra* note 202, at 188.

variable, that of confidence in the Court as an institution.<sup>234</sup> *Gallup* has maintained a poll which asks how much confidence a respondent has in the Supreme Court.<sup>235</sup> Respondents can choose between “great deal,” “quite a lot,” “some,” and “very little.”<sup>236</sup>

We note that the use of this confidence measure has received pushback from some in the social sciences. Gibson and colleagues caution against using this measure in lieu of a battery of legitimacy questions.<sup>237</sup> They find that confidence does relate to loyalty, but it also has elements of association with specific support properties.<sup>238</sup> That said, under rigorous investigation, the measure “performed better than . . . expected,” and suggests that the confidence measure does pick up institutional loyalty.<sup>239</sup> Moreover, the measure appears not to be dependent on approval of “any particular policy decision by the institution.”<sup>240</sup> Gibson and colleagues suggest it is a viable measure when “no other indicators are available.”<sup>241</sup> Here, we are dealing with over-time assessments, and no other year-to-year measure exists. We have a theoretical reason as well to believe that the relationship between specific support and institutional loyalty is “sticky,” and therefore we proceed with this measure.

In Figure 7, we see the public’s confidence in the Court from 1973 to 2022.<sup>242</sup>

<sup>234</sup> Haglin et al., *supra* note 232, at 956, 962.

<sup>235</sup> See Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), <https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx> [<https://perma.cc/DAH5-43MP>] (discussing *Gallup*’s 50-year survey). The *Gallup Analytics* data for these polls are on file with the authors.

<sup>236</sup> *Id.* It also appears “none” is an option, but it was not offered every year (or there were no respondents who selected this choice). *Id.* Given this uncertainty around the prompt, we do not utilize this category in our analysis. If anything, doing so makes it harder for us to find the hypothesized effects.

<sup>237</sup> Gibson et al., *supra* note 188, at 355; see also Tom W. Smith, *Can We Have Confidence in Confidence? Revisited*, in *THE MEASUREMENT OF SUBJECTIVE PHENOMENA* 119, 176 (Dennis F. Johnson ed., 1981).

<sup>238</sup> Gibson et al., *supra* note 188, at 364.

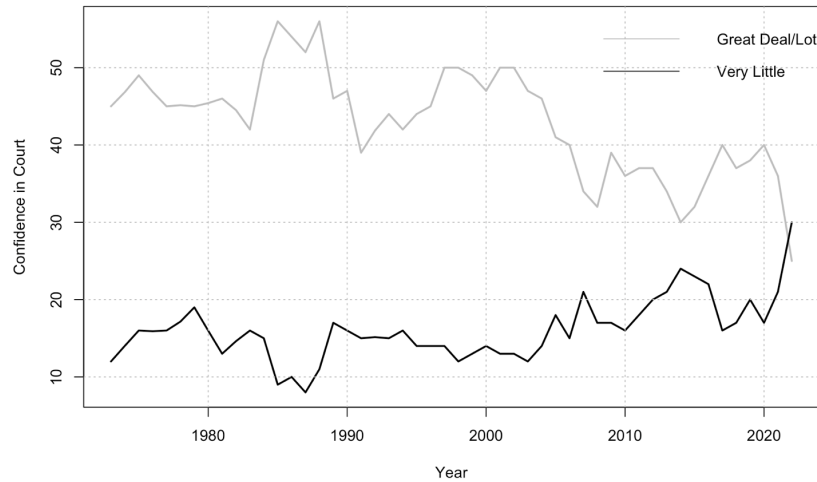
<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 361.

<sup>241</sup> *Id.* at 363.

<sup>242</sup> Data are from *Gallup*. See *supra* note 235. We have combined the “great deal” and “quite a lot” categories into a single series. We also note that for the years 1974, 1976, 1978, 1980, 1982, and 1992 there were no polls conducted on this question. *Id.* As we will see, these years are not included in our final estimations because our main independent variable of interest (ideological divergence), only extends between 2001 and 2021, so the missing years do not cloud our analysis in that regard. In order, however, to present a consistent series across all years for illustration purposes, we interpolated values for those missing years with a Kalman filter (a statistical control used to estimate variables of interest when they cannot be directly measured) utilizing the R statistical package “imputeTS.” See Steffen Moritz & Thomas Bartz-Beielstein, *imputeTS: Time Series Missing Value Imputation in R*, 9 R J. 207, 209 (2017). This algorithm will structurally model the series and use the Kalman filter to smooth through the missing observations to create imputed values. *Id.*

FIGURE 7



Some patterns are immediately noticeable. First, the series are dynamic; they do not stay at the same levels throughout all years. Additionally, it is clear that those having “very little” confidence in the Court have increased over time. In fact, contemporary times represent a definite upward trend (meaning a greater proportion of the populace who lack confidence in the Court as an institution). The graphical representation certainly suggests that in more recent times, the public has taken a turn against the Court.

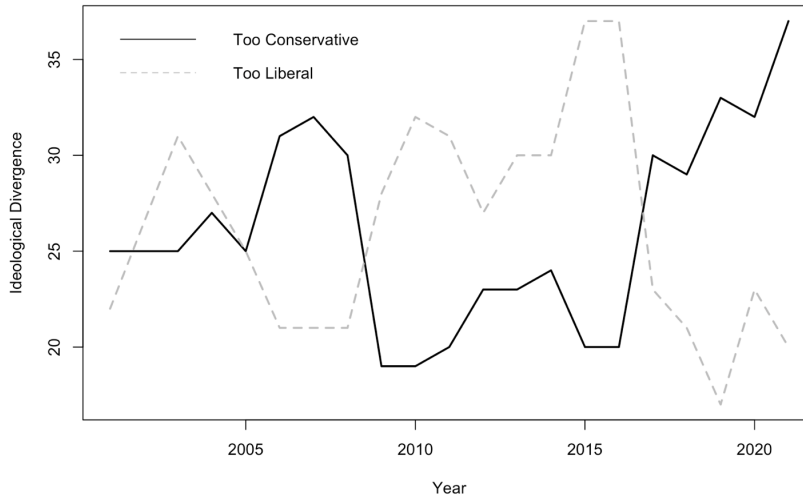
Our main independent variable of concern is ideological divergence. *Gallup* also has a poll which asked, “In general, do you think the current Supreme Court is too liberal, too conservative or just about right?”<sup>243</sup> Figure 8 displays these series.<sup>244</sup>

<sup>243</sup> *Supreme Court*, GALLUP, <https://news.gallup.com/poll/4732/supreme-court.aspx> [<https://perma.cc/W7YE-X7G7>].

<sup>244</sup> We note that this poll question was not asked in 2002. *Id.* As this is the only missing year for this series, we did not utilize more complex imputation procedures and simply averaged the 2002 values from the 2001 and 2003 data.



FIGURE 8



Again, we see noticeable trends. The two series tend to move opposite one another, especially in more recent years. The correlation coefficient between these series is  $-.85$  ( $p < .00$ ). However, there are moments in these series where they move together. On the whole, these series are dynamic and suggest that the public's evaluation of the ideological extremism of the Court is responsive to stimuli.

We now move to analyze whether ideological divergence decreases confidence in the Court. We hypothesized that as ideological divergence between the public and the Court increases, so does the percentage of respondents indicating they have “very little” confidence in the Court. To do so, we estimated two models. The first model used an aggregate measure of divergence, i.e., we added together the percentage of respondents who find the Court too liberal and too conservative. This measure gives us a sense of the general public sentiment of divergence. We then disaggregated these components and estimated a model where “too liberal” and “too conservative” were separate variables. We also included relevant control variables. Specifically, we included the public's (lack) of confidence in Congress.<sup>245</sup> Previous scholars have shown that evaluations of federal institutions run together (especially Congress and the Supreme Court).<sup>246</sup> We also included a dummy variable for whether there was divided government and whether the president was a Democrat. Finally, we included a dummy variable for two failed judicial nominations, those being Harriet Miers

<sup>245</sup> See *Congress and the Public*, GALLUP, <https://news.gallup.com/poll/1600/congress-public.aspx> [<https://perma.cc/CW7Y-FGDR>].

<sup>246</sup> See, e.g., Haglin et al., *supra* note 232, at 965; Sofi Sinozich, *The Polls—Trends: Public Opinion on the US Supreme Court, 1973-2015*, 81 PUB. OP. Q. 173, 179, 185 (2017); Robert H. Durr et al., *Ideological Divergence and Public Support for the Supreme Court*, 44 AM. J. POL. SCI. 768, 772 (2000).

and Merrick Garland.<sup>247</sup> Results of our estimations are contained in the table below.<sup>248</sup>

TABLE 11

Variable	Model 1	Model 2
Congress	.20** (.04)	.16** (.05)
Div. Gov't.	1.97* (.77)	2.20* (.78)
Garland	-1.36 (1.33)	-.68 (1.42)
Miers	5.15* (1.78)	5.47** (1.77)
Pres	1.21 (.92)	2.55† (1.43)
Divergence	.26† (.13)	
Too Cons.		.33* (.14)
Too Lib.		.20 (.14)
Constant	-5.13 (6.80)	-4.85 (6.70)
Adj. $R^2$	.77	.78
$N$	21	21

Note: Standard errors in parentheses.

\*\*= $p < .01$ ; \*= $p < .05$ ; †= $p < .10$

We see that ideological divergence does appear to have an impact on the public's confidence in the Court (at the  $p < .10$  level, two-tailed test). As divergence increases, so does the proportion of individuals who have little confidence in the Court. Additionally, as expected, the public's discontent with Congress does appear to bleed into its evaluations of the Court (but the effect of ideological divergence is greater). Divided government also has a fairly robust impact. Perhaps most surprising is the Miers failed nomination's impact. While the Garland nomination is not statistically significant, the Miers nomination produces a sizeable increase in the proportion of individuals who have a lack of confidence in the Court. We expected the result, though perhaps not the size of

<sup>247</sup> *Supreme Court Nominations (1789-Present)*, *supra* note 100. We wished to isolate the effects of the Miers and Garland failed nominations because they were individuals who did not pass through the nominating process and could raise with the public a sense that the Court was a political entity to be treated with the same regard as the other political branches.

<sup>248</sup> Because our dependent variable is continuous, and the relationship between our independent variables and dependent variable is linear, we employed ordinary least squares ("OLS"). DAMODAR N. GUJARATI & DAWN C. PORTER, *BASIC ECONOMETRICS* 62 (5th ed. 2009). Our estimations were performed using the STATA statistical software package.

the impact. Overall, the model appears to confirm what we suspected, namely, that ideological divergence does affect confidence in the Court as an institution. The model has a strong  $R^2$ , explaining 77% of the variance in the dependent variable.

In the second model, we disaggregated the ideological divergence variable into its constituent parts (i.e., too liberal and too conservative). The results are consistent with expectations with regard to those who feel the Court is too conservative. As the proportion of individuals who feel the Court is too conservative increases, the Court's public standing as an institution declines at a statistically significant clip. This is an expected result, particularly in light of the time period under study here where the Court lurched to the right. The proportion of those who say the Court is too liberal, however, does not seem to affect the Court's institutional stature, at least at conventional levels of statistical significance. We note that this variable performs in the expected direction (i.e., is positive), but it fails to achieve statistical significance ( $p < .17$ ). Again, our "Congress discontent" variable is statistically significant and positive (although it is about half the impact of the "too conservative" variable). The presidential dummy variable is statistically significant and positive (at  $p < .10$ ), meaning that, during Democratic administrations, the public's lack of confidence in the Court is expected to rise. Divided government also causes an increase in the level of discontent with the Court (the same as Model 1). And finally, the Miers nomination again returns a robust impact on the public's confidence in the Court (while the Garland nomination yields no statistical significance). The second model confirms what we hypothesized—namely, that ideological divergence (particularly of the view that the Court is too conservative) results in a decline in the public's confidence in the Court as an institution. Finally, Model 2 returns a similar  $R^2$  value as Model 1 in explaining 78% of the variance in the dependent variable.<sup>249</sup> In all, the models provide support for the idea that confidence in the Court as an institution is connected to the perceived ideological divergence between the public and the Court.

What can we say of these results as they relate to the current environment of the Court and the shadow docket? We believe the evidence mustered indicates that the Court has entered (or is entering) a moment where real damage to the public's institutional loyalty can occur. We do not suggest that the Court is about to face non-compliance and utter disregard from the public. The social-scientific literature suggests such a strong reaction is unlikely to occur with a quick jolt. If anything, the decline will be more tempered. However, while the

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<sup>249</sup> We also performed post-estimation diagnostics to evaluate the stability of the models. We tested for the presence of heteroskedasticity (a sign of inefficiency in linear regression models) using a variety of methods. *See id.* at 371. We found no evidence of heteroskedasticity in either model. Also, given that we have time series data, we tested for autocorrelation in the residuals (another sign of inefficient estimates due to correlation between time ordered observations) using a variety of methods. *Id.* at 413. We found no evidence of autocorrelation, indicating our models are stable.

Court is unique and can withstand public discontent in ways other institutions cannot, it is not “impervious” to such effects.<sup>250</sup> There are moments where this relationship appears more brittle than others, and we could very well be in that space. If so, the public would appear to be less receptive to machinations on the shadow docket, which makes the Court appear to be no different than other political branches. Further investigation is required before we can reach this conclusion with confidence. The burgeoning social science research on the shadow docket will greatly contribute to this inquiry.

#### CONCLUSION

The recent attention to the shadow docket is, we think, a good thing. In seeking to explain the nature of an institution it is necessary to understand in full that institution’s behaviors. As a matter of scientific inquiry, we never achieve perfect knowledge of an entity’s complete motivations and machinations. Finite resources and probabilistic conclusions about the state of the world are obvious constraints. But, that does not mean we relent in efforts to increase and improve our understanding and explanation of social phenomena. And with regard to the shadow docket particularly (and the Court generally), it is clear we have much to learn. This Symposium is one step in that forward progress.

We have attempted here to canvass the major research issues associated with obtaining greater insight into the Court’s behavior on the shadow docket. Researchers proceeding in this area must take care to understand the parameters and pitfalls in data collection, cataloguing, and analysis. The operationalization of inquiries must take account of these impediments in order to properly place confidence in associated analyses and findings. We have sought to contribute to this understanding by reviewing and extending past research, as well as highlighting emerging lines of research in this scholarly domain. We also connect these research endeavors to larger theoretical frames such as institutional legitimacy theory.

We conclude here with the potential ramifications for the Court’s shadow docket activity. On the whole, the preliminary findings suggest that the Court’s shadow docket work is highly ideological and has the potential to reduce the Court’s public stature. Moreover, our findings highlight the connection between ideological divergence and confidence in the Court as an institution. It is at this intersection where we feel the Court may be in a bad spot. Declining confidence in the Court as an institution, combined with the preliminary findings of emerging research, indicates the Court’s legitimacy can be undermined by the shadow docket. This result has, we think, two important consequences, one theoretical and one practical.

On the theoretical, legitimacy of institutions is crucial to good governance. As one scholar explained:

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<sup>250</sup> Gibson, *supra* note 206, at 87.

Being legitimate is important to the success of authorities, institutions, and institutional arrangements since it is difficult to exert influence over others based solely upon the possession and use of power. Being able to gain voluntary acquiescence from most people, most of the time, due to their sense of obligation increases effectiveness during periods of scarcity, crisis, and conflict.<sup>251</sup>

Gibson notes that, “[a]ccording to the democratic theory that undergirds American liberal democracy, institutions—especially courts—must be free to make decisions in opposition to the preferences of the majority.”<sup>252</sup> Moreover, in a legal system with judicial review, “it is specifically a function of courts . . . to overturn the actions of the majority when those actions infringe upon the fundamental rights of minorities.”<sup>253</sup>

But the Court does more than just protect the rights of minorities, it is an integral and active participant in a sustained democracy. As Robert A. Dahl contended, the Court is not merely an agent of the cohesive alliances which form to ensure democratic duration.<sup>254</sup> Rather, “[i]t is an essential part of the political leadership and possesses some bases of power of its own, the most important of which is the unique legitimacy attributed to its interpretations of the Constitution.”<sup>255</sup> The Court “operates to confer legitimacy, not simply on the particular and parochial politics of the dominant political alliance, but upon the basic patterns of behavior required for the operation of democracy.”<sup>256</sup> The Court helps define the parameters of the fractious discussions held by the political entities most directly connected to the polity (a connection which generates those actors’ legitimacy in the Lockean sense). Repeated interactions between the democratic participants do not happen in a vacuum. These “patterns of behavior in turn presuppose[] widespread agreement (particularly among the politically active and influential segments of the population) on the validity and propriety of the behavior.”<sup>257</sup>

Part of the calculus those parties make on the validity of such “rules of the game” stem from the authoritative adjudications of the Court. To extend Chief Justice Roberts’s metaphor that justices are like umpires who call balls and strikes, competing teams are willing to forgive occasional variance in the strike zone.<sup>258</sup> But sustained inconsistency, especially derived (or perceived to be derived) from matters unrelated to the ballgame, can call into question whether

<sup>251</sup> Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375, 375 (2006).

<sup>252</sup> Gibson, *supra* note 206, at 82.

<sup>253</sup> *Id.*

<sup>254</sup> Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293 (1957).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 295.

<sup>257</sup> *Id.*

<sup>258</sup> *Chief Justice Roberts Statement—Nomination Process*, U.S. CTS., <https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process> [<https://perma.cc/WQC2-U9QU>].

the game is even worth being played. When one team, or both teams, decide the umpire is illegitimate, they may both take their ball and go elsewhere. The Court, then, must be somewhat cognizant that its institutional interests may need to trump the personal (or ideological, strategic, etc.). Instances in the alternative, especially those “in the shadows” lacking transparency, will chip away at the previously accumulated “reservoir of good will.” Given the current lack of confidence in the Court as an institution, such activity will begin to drain the reservoir and the confidence intervals around the borders of fractious discussion will enlarge. If democratic sustainment is the goal (and we believe it should be), then the Court’s behavior on the shadow docket can (along with related conditions of democratic deficit) hinder this aspiration. Which turns us to the practical implications.

There are tangible consequences for the public’s decline in confidence in the Supreme Court. For instance, research has shown that when there is a decline in institutional stature, the allocation of resources and discretion afforded to the Court are at risk.<sup>259</sup> The Court’s capacity to engage in judicial review is also diminished.<sup>260</sup> And, the finality of its decisions is more easily softened by hostile congressional overrides.<sup>261</sup> In other words, the diminished status of the Court in the public’s eyes can lead to significant impediments to the Court’s parameter-enforcing role in our democratic system. These are not mere theoretical abstractions; they are concrete consequences. Future research on the shadow docket will help us understand how impactful the Court’s activity in this domain truly is.

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<sup>259</sup> Joseph Daniel Ura & Patrick C. Wohlfarth, “An Appeal to the People”: *Public Opinion and Congressional Support for the Supreme Court*, 72 J. POL. 939, 953 (2010).

<sup>260</sup> Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 981 (2009); Alison Higgins Merrill et al., *Confidence and Constraint: Public Opinion, Judicial Independence, and the Roberts Court*, 54 WASH. U. J.L. & POL’Y 209, 220 (2017).

<sup>261</sup> Michael J. Nelson & Alicia Uribe-McGuire, *Opportunity and Overrides: The Effect of Institutional Public Support on Congressional Overrides of Supreme Court Decisions*, 70 POL. RSCH. Q. 632, 637 (2017).