IN THE SHADOWS OF LEGITIMACY:

HOW THE SHADOW DOCKET AFFECTS

SUPREME COURT LEGITIMACY

by

HALEY COOK

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Approved: *Alison Gash, PhD.*
Primary Thesis Advisor

In recent years, the Supreme Court has found itself with record low approval ratings, negative media coverage, and Congressional calls for Court reform. The Court's negative perception has been called a "legitimacy crisis" by the media. This raises the question, what does it mean for the Court to be legitimate or delegitimate? Further, what affects the Court's legitimacy as an institution, and why is legitimacy important? I seek to answer these questions by examining a controversial procedural mechanism of the Court: the shadow docket. First, I explore the historical context of the non-merits docket, and the characteristics that have given the modern shadow docket its name. Next, I review prominent theories of judicial legitimacy and investigate how the shadow docket affects the Court's legitimacy. Finally, I conclude that the shadow docket has likely played a role in the delegitimization of the Supreme Court, and it poses a greater threat to the Court's institutional legitimacy moving forward.

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Introduction

As of September 2023, only 41% of Americans approved of the U.S. Supreme Court's job performance.[1] This demonstrated little improvement from the all-time low of 40% in September 2021.[2] Historically, the public's approval of the Supreme Court has been largely immune to fluctuations in approval ratings that have plagued the other branches of the federal government. For generations, scholars have agreed that the Court is "held in high esteem by the public and that its legitimacy [is] enduring regardless of the extent to which the public [agrees] with" the Court's decisions.[3] However, public opinion of the Supreme Court has hovered in the low forties since 2021.[4]

The media has referred to this trend as the Court's "legitimacy crisis," arguing that low public support for the Court accompanied by critiques from scholars and calls for reform have put the institution's legitimacy into question.[5] Political scientists, legal scholars, journalists, and average citizens have speculated as to why the Court is losing the public's approval. Some argue that major political events over the past decade have created distrust within the American public toward the Court. Others hypothesize that Americans are rejecting the Court based on decisions that oppose their ideological beliefs. Additionally, rushed and politicized appointments[6] have

[1] Megan Brenan, *Views of Supreme Court Remain Near Record Lows*, GALLUP (Sept. 29, 2023), https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx.
[2] *Id.*
[3] Taraleigh Davis & Sarah C. Benesh, *Procedural Justice and the Shadow Docket*, 73 EMORY L. J. 443, 468 (2023).
[4] Brenan, *supra* note 1.
[5] Tonja Jacobi, *Introduction: The Fragile Legitimacy of the Supreme Court*, 73 EMORY L.J. 281, 281 (2023) (discussing the "legitimacy crisis").
[6] *See* Carl Hulse, *How Mitch McConnell Delivered Justice Amy Coney Barrett's Rapid Confirmation*, N.Y. TIMES (Oct. 27, 2020), https://www.nytimes.com/2020/10/27/us/mcconnell-barrett-confirmation.html.

deteriorated the Court's apolitical appearance, and ethical scandals within the Court and from the Justices have led to negative media coverage.[7]

Since the nation's founding, politics have been center stage in the national media. However, the Court's public approval has never seen fluctuations that correspond to political scandals.[8] The speculation that modern politics have led to low public approval of the Court does not explain why this historical immunity would have changed. The public has generally viewed the Court as apolitical and separate from other branches of government. This perception has allowed the Court to be seen as a fair institution and not politically involved.

Political science literature has long established that procedural fairness leads to public support for institutions, and that this support leads to institutional legitimacy. In order to analyze the Court's legitimacy crisis, I seek to understand the impact of the controversial shadow docket on the Court's legitimacy. The shadow docket has drawn media attention in recent years due to controversial and unpopular decisions. In this paper, I will investigate the characteristics of the modern shadow docket and how the Court's behavior on the shadow docket differs from the merits docket. I will then review two theories of institutional legitimacy and evaluate recently published empirical studies of the shadow docket. Finally, I will apply these theories of legitimacy to my analysis of the shadow docket in order to determine whether the shadow docket is affecting the legitimacy of the United States Supreme Court.

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[7] *See* Chas Danner, *A Quick Guide to Justice Clarence Thomas's Ethics Scandals*, N.Y. MAG.: INTELLIGENCER (Aug. 10, 2023), https://nymag.com/intelligencer/article/quick-guide-supreme-court-justice-clarence-thomas-ethics-scandals.html.

[8] *See* Jeffery M. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, GALLUP (Sept. 23, 2021) (Graph 2, *Trust and Confidence in the Judicial Branch of the Federal Government/U.S. Supreme Court, Full Trend*) https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx.

Merits Docket

On average, the Supreme Court decides between fifty and seventy cases annually on the merits docket. Cases on the merits docket undergo at least two full rounds of briefing followed by a lengthy oral argument, scheduled months ahead of time. Cases are typically decided in written opinions that explain the Court's decision and the precedents applied. Opinions are released on designated "decision days" starting at ten o'clock in the morning. Decisions are released in ascending order based on the seniority of the Justice authoring the opinion. Procedures that govern the merits docket are designed to provide fairness and transparency throughout the process, as well as enough time for thorough discussion and thoughtful decision-making.

To reach the merits stage, a case must be granted a writ of certiorari. When a party loses in a lower court they may file a petition for certiorari, a request for the Supreme Court to review the lower court decision. Once a cert petition is filed, the respondent has an opportunity to file a reply brief, and the petitioner may file a response to that. Based on these documents, the Justices may add cases to a "discuss list" to be voted on at the next conference. Cases that are not put on the discussion list are summarily denied. At conference, the Justices go through the discussion list and talk about each case. At the end of the discussion of each case, the Justices vote on whether certiorari should be granted. A case must receive four votes to receive a grant of certiorari and proceed to the merits stage.[9]

Historically, up to almost two hundred cases were heard by the Court on the merits docket each term. In the mid-1980s, the number of cases that were granted certiorari began to

[9] *See* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1226-28 (2012) (explaining the cert process).

drop substantially. By the 2000 term, only eighty-seven cases were argued on the merits docket.[10] More recently, the Court has heard arguments on between fifty and seventy cases per term – representing a reduction by over sixty percent since the 1940s. In the 2022 term, the court issued 58 opinions on the merits docket. Many scholars worry that the diminished docket leaves important legal issues unresolved, isolates the Court from the pubic, and could impact the Court's legitimacy.[11]

Multiple different explanations can be offered to account for the shrinking merits docket. One explanation looks to the "internal mechanisms [of the Court] and Court composition."[12] The Supreme Court operates under the Rules of the Supreme Court, as well as practices, procedures and norms that have been established over time. These rules and norms, combined with the composition of the Court may influence the size of the merits docket.[13] For example, some point to the Court's cert pool as a procedure that may be one reason for the decrease of the merits docket. The cert pool is a time-saving procedure where clerks are pooled together assigned to read an application and accompanying documents, summarize the controversy in a memorandum, and either recommend granting or denying certiorari.[14] The pool memorandum is then distributed to the Justices to consider whether or not to put a case on the discuss list.[15] Former clerks have revealed that the cert pool puts immense amounts of pressure on clerks, and that in order to avoid embarrassment of making a mistake, clerks will almost always recommend

[10] *Id.* at 1228 (detailing the number of cases decided historically on the Supreme Court's merits docket).
[11] *Id.* at 1251-1263.
[12] *Id.* at 1234-43.
[13] *Id.*
[14] Justice Alito and Justice Gorsuch do not participate in the cert pool. They do not receive the pool memorandum, and their law clerks independently review petitions for certiorari. Adam Liptak, *Gorsuch, in Sign of Independence, Is Out of Supreme Court's Clerical Pool*, N.Y. TIMES (May 1, 2017), https://www.nytimes.com/2017/05/01/us/politics/gorsuch-supreme-court-labor-pool-clerks.html.
[15] Owens & Simon, *supra* note 9, at 1226-27.

that certiorari is denied.[16] Because the cert pool results in few recommendations to grant cert, some hypothesize that this procedure "may help explain the docket's decline."[17]

In addition to the procedural aspect, the members of the Court themselves impact the number of cases that are heard on the merits docket. Because the Court has extremely limited original jurisdiction, the Justices have almost exclusive control over the cases that it hears. Justices Scalia and Kennedy joined the Court in the 1980s and they voted to grant certiorari less than any of the other Justices on the Court.[18] Since the 1980s, this trend has continued as Justices appointed after the 1980s "voted to grant certiorari less frequently than the Justices whom they replaced."[19] Over time, the Justices have become less willing to grant certiorari, therefore diminishing the merits docket. Given the fact that the Justices have almost exclusive agenda-setting powers, this suggests that they may only vote to grant certiorari in the cases that they *want* to decide, rather than to resolve circuit splits and constitutional questions. While these aspects of the Supreme Court certainly may be decreasing the merits docket, some have also speculated that the Court has shifted its focus to the shadow docket and now occupies itself with non-merits orders and applications, rather than merits docket cases.

[16] *Id.* at 1235-36.
[17] *Id.* at 1236.
[18] *Id.* at 1240-41.
[19] *Id.* at 1241.

The Shadow Docket

As the merits docket has shrunk, the Court's non-merits docket has become increasingly impactful. The non-merits docket is composed of everything that the Court decides on that is not on the merits docket. As opposed to the merits docket, the non-merits docket encompasses a plethora of procedural motions, orders, and applications. Some of the kinds of decisions that have historically taken place on the non-merits docket are denials of petitions for certiorari for cases that do not make it onto the "discuss list," denials of applications for emergency relief in non-emergent situations, grants for extensions on brief deadlines, divisions of oral arguments, and other generally non-controversial and non-substantive issues.

Supreme Court Justices are each assigned to at least one circuit court of appeals. Justices are assigned to their circuit or circuits by the Chief Justice.[20] In their role as Circuit Justice, the Justices receive receives applications from the circuit that they oversee and may provide "temporary relief where necessary or appropriate in aid of the Supreme Court's jurisdiction."[21] A Circuit Justice alone does not have the power to rule on the merits of a case and is limited to providing temporary relief only in extraordinary circumstances.[22] Under the Supreme Court's rules, a Circuit Justice may refer an application to the full Court for determination, however, this is not required if a determination is abundantly clear.[23] Additionally, if a Circuit Justice denies an application, the applicant may renew the application to any other Justice in hopes of being granted relief.[24]

[20] 28 U.S.C. § 42.
[21] § 2:439. *Powers of individual Justices*, 2A Fed. Proc., L. Ed. § 3:439.
[22] *Id.*; § 3:448. *Grant or denial of stay or injunction by circuit justice*, 2A Fed. Proc., L. Ed. § 3:448.
[23] S.Ct. Rule 22.
[24] *Id.*

Decisions to grant or deny relief on the non-merits docket typically receive limited briefing from the parties. The Court has always had a non-merits docket to decide on emergency relief applications and procedural motions. Historically, these decisions have always been relatively uncontroversial. Even the most controversial non-merits decisions, such as the execution of the Rosenbergs in 1953 and the initial stay of the vote recount in *Bush v. Gore* in 2000, were characterized by being based on the substance of the case and having limited legal ramifications.[25] The emergency docket was traditionally a procedural mechanism reserved for extraordinary circumstances and emergencies. Litigants did not generally rely on it because emergency relief was rare and other motions were inconsequential.

An important function of the non-merits docket is accelerated consideration for applications for emergency relief. These applications are generally submitted to an individual Justice in their role as Circuit Justice. Applicants may request various forms of relief; however, the four most common requests are for the Court to (1) stay a lower court decision pending appeal; (2) vacate a stay ordered by a lower court; (3) grant an emergency injunction pending appeal; and (4) vacate a lower court emergency injunction.[26] The Circuit Justice may respond to the emergency request on their own, or they may refer the request to the full Court for consideration. Importantly, the case does not receive a full briefing process or argument. Because this form of relief is intended for emergencies, the request is usually decided quickly and without

[25] *Rosenberg v. United States*, 346 U.S. 273 (1953) (granting the application for stay of execution of defendants), vacated, 346 U.S. 273 (1953) (vacating the order for stay of execution); *Bush v. Gore*, 531 U.S. 1046 (2000) (granting certiorari and stay); *See* Stephen Vladeck, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023) (hereinafter Vladeck, THE SHADOW DOCKET).

[26] *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing before the S. Comm. On the Judiciary*, 117th Cong., 4-5 (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.

the procedural protections of the merits docket such as oral argument, *amicus* participation, and multiple rounds of briefing.

In the early 2010s, the Court's behavior on the non-merits docket changed. In response to this shift, Professor of Law William Baude coined the term "shadow docket" in 2015 to describe the non-merits docket as a "range of orders and summary decisions that defy [the Court's] normal procedural regularity."[27] While the term can refer to the non-merits docket as a whole, most frequently these orders come from emergency relief applications. The term first became common in legal and political academic literature, and by 2021 it was commonly used by mainstream media to describe the accelerated procedure for decisions.[28]

Cases on the shadow docket typically receive one round of briefing, or sometimes less, and no oral argument. The resulting order is often not accompanied by any reasoning and does not detail how the Justices voted, or even how many Justices voted on the particular issue. A specific Justice's vote is only revealed if that Justice publicly dissents from the decision, or enough justices publicly dissent that it becomes clear which Justices were in the majority. The most common request for emergency relief is for a stay of a lower court's order. Under normal conditions, these orders would only be in place throughout the appeals process as interim relief. There is not a procedural rule that governs when and how shadow docket orders are handed down. Accordingly, orders may be handed down at any time, oftentimes including the middle of the night.[29]

For some, the Court's behavior on the modern shadow docket has raised eyebrows. For others, it has set off alarm bells. Steven Vladeck, Charles Alan Wright Chair in Federal Courts at

[27] William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1 (2015).
[28] Mike Bedell, *Public Perception May Curb Supreme Court's Shadow Docket*, CHI. POL'Y REV. (Dec. 23, 2021), https://chicagopolicyreview.org/2021/12/23/public-perception-may-curb-supreme-courts-shadow-docket/.
[29] Vladeck Testimony, *supra* note 26, at 2.

the University of Texas School of Law and the leading expert on the shadow docket, raises eight specific issues with the shadow docket:

1. Shadow docket rulings lack reasoning, leaving the parties, lower courts, and other actors affected by a decision to speculate as to why the Court ruled the way that it did.

2. Orders are often anonymous, not showing which Justice voted which way unless a Justice decides to publicly dissent.

3. The timing of shadow docket rulings is unpredictable, with decisions frequently coming down at all hours of the night.

4. Shadow docket cases generally do not receive merits briefing, oral argument, or *amicus* participation, leaving the Court to decide the case with a limited record.

5. Shadow docket orders create problems with predictability, which lower courts rely on to make decisions that they believe the Supreme Court will uphold.

6. The Court has prematurely and unnecessarily resolved constitutional questions through emergency orders.

7. More cases are being decided on the shadow docket, and less cases are being heard on the merits docket, which has distorted the Court's workload

8. The rise of the shadow docket undermines that Court's legitimacy.[30]

Importantly, the shadow docket may also be referred to as the "emergency docket," "orders docket," or "lightning docket,"[31] and the term itself has garnered some criticism, including from Supreme Court Justices themselves.[32] One criticism is that the term "shadow docket" creates an illusion that the Court is using "sneaky and improper methods to get its [way]."[33] I have chosen to use the term "shadow docket" in this paper because it is the most

[30] *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Cts., Intellectual Pro., and the Internet of the House Comm. on the Judiciary*, 117th Cong., 4-5 (2021) (statement of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law).
[31] EmiLee Smart, *A Shadow's Influence? How the Shadow Docket Influences Public Opinion*, AM. POL. RSCH. (forthcoming 2024) (originally published 2023).
[32] *See generally* Katie Barlow, *Alito blasts media for portraying shadow docket in "sinister" terms*, SCOTUSBLOG (Sept. 30, 2021 at 6:59 PM), https://www.scotusblog.com/2021/09/alito-blasts-media-for-portraying-shadow-docket-in-sinister-terms/.
[33] *Id.* (quoting Justice Alito).

common term for the procedure both in academic literature and in the general media. While some argue that the use of the term shadow docket may contribute to negative views of the Court,[34] others respond that the "fighting over what to *call* the phenomenon is little more than a distraction" from the potential problem that is the shadow docket.[35] Discussing the topic by using the name most commonly understood by the public avoids confusion with other procedural processes.

The shadow docket has become integral to how the Supreme Court operates. Even a D.C. Circuit Judge has acknowledged that this is a "new era of litigation, in which securing emergency interim relief can sometimes be as important as, if not more important than, an eventual victory on the merits."[36] The Court's behavior on the modern shadow docket is characterized by three distinct changes from its traditional use. First, the shadow docket has increased in size over the past decade. Second, recent shadow docket orders have had broad legal and practical ramifications. Finally, decisions on the shadow docket are more likely to be decided along ideological lines than decisions made on the merits docket.

The Increasing Volume of the Shadow Docket

As the term "shadow docket" suggests, the non-merits docket is not as easy to track as the merits docket. Shadow docket orders may be found in multiple locations on the Supreme Court's website; they may appear as opinions of the court, opinions relating to orders, published orders of the Court, or as unpublished orders by individual Justices.[37] Additionally, interest in the shadow docket is new. The term itself has only been used since 2015, and because non-merit

[34] *See* Smart, *supra* note 31, at 3.
[35] Vladeck, THE SHADOW DOCKET, *supra* note 25, at 243.
[36] Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J. OF L. AND PUB. POL'Y 828, 828 (2021).
[37] Vladeck Testimony, *supra* note 26, at 3, n.6; OT stands for October Term, referring to the Supreme Court's term that begins in October of that year. For example, OT 2005 began in October 2005, and ended in October 2006.

orders have historically been uncontroversial, data on the shadow docket before the 2010s is scarce. Furthermore, recent studies of the shadow docket continue to struggle to quantify it due to the irregularity of the orders.

One way that the modern shadow docket has been quantified is by the number of emergency orders granted each term. Vladeck has compiled data on the number of orders issued granting emergency relief from OT 2005 through OT 2020.[38] Vladeck's data for OT 2021 and OT 2022 are added to that dataset and shown below in Figure 1.[39]

[38] *Id.* at 5.
[39] Vladeck's data for OT2021 and 2022 were not included in his Testimony for the Senate Judiciary Committee. *See* Vladeck Testimony, *supra* note 26.

Figure 1: Total Grants of Emergency Relief by Supreme Court Term (OT 2005-OT 2022)[40]

Term	Grant Stay	Vacate Stay	Grant Injunction	Vacate Injunction	Total
OT 2022[41]	6	2	0	0	**8**
OT 2021[42]	11	2	1	2	**16**
OT 2020	7	5	7	1	**20**
OT 2019	15	4	0	1	**19**
OT 2018	12	3	0	0	**15**
OT 2017	9	0	0	0	**9**
OT 2016	10	1	0	0	**11**
OT 2015	11	1	1	0	**13**
OT 2014	7	2	1	0	**10**
OT 2013	4	2	2	0	**8**
OT 2012	1	0	0	0	**1**
OT 2011	6	0	0	0	**6**
OT 2010	6	0	0	0	**6**
OT 2009	3	1	0	0	**4**
OT 2008	8	0	0	0	**8**
OT 2007	7	0	0	0	**7**
OT 2006	1	0	0	0	**1**
OT 2005	6	0	0	0	**6**

[40] Vladeck Testimony, *supra* note 26, at 5 (showing data for OT 2005-OT 2020).
[41] OT2022 data is available on X. Steve Vladeck (@steve_vladeck) X (Twitter) (Oct. 1, 2023, 5:56 AM), https://twitter.com/steve_vladeck/status/1708465946724069830.
[42] OT2022 data is available on X. Steve Vladeck (@steve_vladeck) X (Twitter) (Sept. 23, 2022, 8:09 AM) https://twitter.com/steve_vladeck/status/1573328689395539969.

The numbers illustrate the rise of the shadow docket by the form of relief granted. For example, from OT 2005 through OT 2012, the Court did not grant a single injunction, but starting in 2013 the Court was more willing to grant these requests. The trend was shattered in OT 2020, with the Court granting *seven* injunctions – more than the total number of injunctions granted during every other term in the dataset. Many of these injunctions were granted to prevent COVID restrictions from going into effect.[43] In OT 2020 the Court also granted the most emergency orders of relief of any term in the dataset. This is particularly noteworthy given the fact that less than a month before the 2020 term began, Justice Ruth Bader Ginsburg passed away and her seat was filled by Justice Amy Coney Barrett.[44] Justice Barrett's appointment established a conservative supermajority on the Court, with six conservative-leaning Justices and three liberal-leaning Justices.

The total requests granted each term is an important metric not only for understanding that the shadow docket has grown in volume, but also for understanding why applications for emergency relief have become a common strategic move from litigators. The Court's willingness to grant more relief applications, especially in cases that do not necessarily present an "emergency," may encourage parties who lose in lower courts to its use as a means to circumvent the full appeals process.[45] Given the different procedures and standards on the shadow docket, this undermines the appeals process and lower court determinations. Figure 2 shows the total orders granted by term from Figure 1, illustrating the dramatic increase in recent years.

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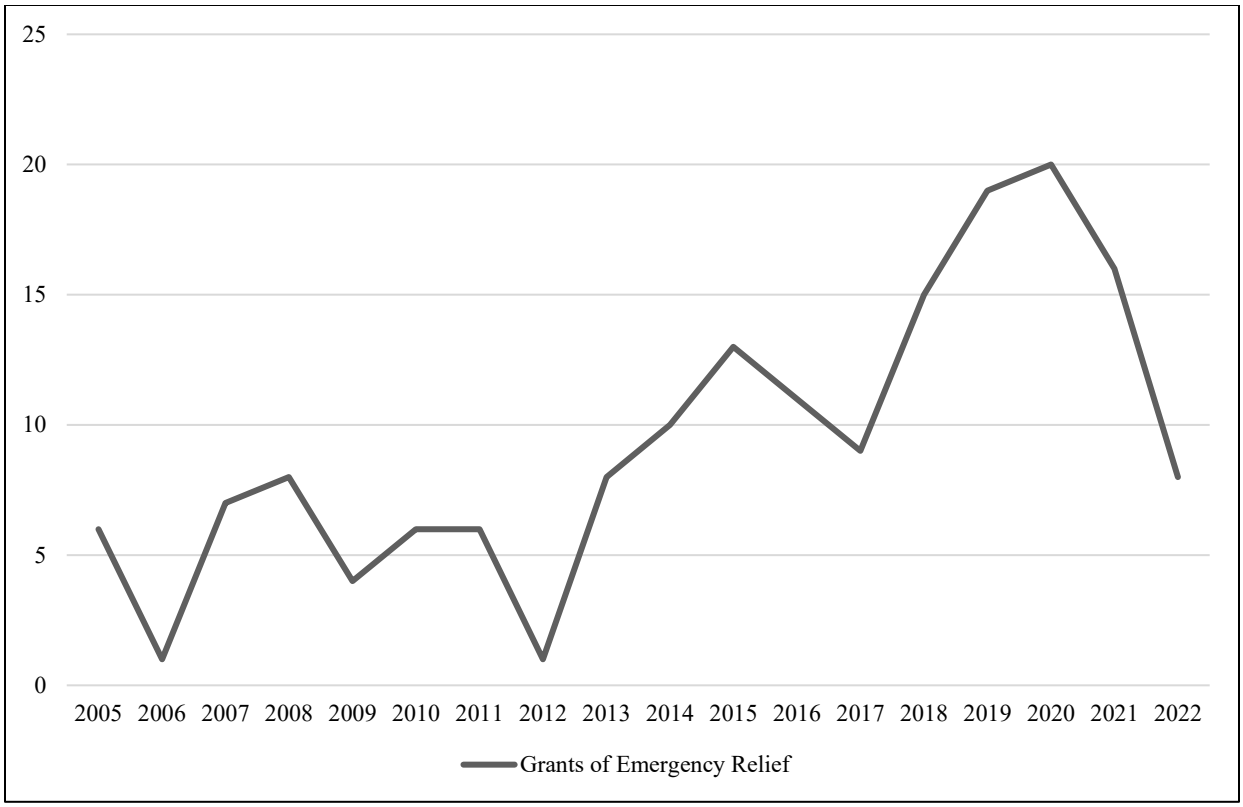
[43] *See* Vladeck, THE SHADOW DOCKET, *supra* note 25, at 195.
[44] Barbara Sprunt, *Amy Coney Barrett Confirmed To Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020, 8:07 PM), https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court.
[45] *See* Steve Vladeck, *Bonus 61: Injunctions Pending Appeal*, SUBSTACK: ONE FIRST (Jan. 11, 2024) https://stevevladeck.substack.com/p/bonus-61-injunctions-pending-appeal (it is "really hard to see the argument that the injunction was causing the kind of "irreparable harm" to Idaho that at least used to be a prerequisite for emergency relief.")

Figure 2: Total Grants of Emergency Relief by Supreme Court Term (OT 2005-OT 2022)



Quantitative analysis of shadow docket orders demonstrates the Court's willingness to grant requests for emergency relief, but it leaves out the Court's denials of applications for emergency relief. When the Court denies emergency relief, it refuses to intervene and allows the lower court's order (or the lower court's denial of relief) to remain in effect. Some of the most controversial shadow docket decisions are denials of relief from the Court. For example, just before midnight on September 1, 2021, the Court issued an unsigned order denying emergency relief in *Whole Woman's Health v. Jackson*.[46] By denying relief, the Court allowed the most restrictive law on abortion post-*Roe v. Wade* to go into effect.

[46] Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021); *See infra* Shadow Docket Section II, subsection *Disrupting the Status Quo*.

Another way to analyze the shadow docket's expansion is by looking at the frequent litigants at the Supreme Court, such as the Office of the Solicitor General. Between 2000 and 2017, the Justice Department sought emergency relief eight times, roughly once every other year.[47] However, in four years the Trump Administration filed forty-one applications for emergency relief.[48] Five of these applications were not decided, but out of the thirty-six applications that resulted in an order, twenty-eight were granted.[49] During the Trump Administration, emergency relief applications became regular practice for the federal government, and the Court largely acquiesced to their requests, even when both the trial court and appeals court denied relief.[50] Justice Sotomayor expressed concern over this practice in a dissent, indicating her fear that the "disparity in treatment erodes the fair and balanced [decision-making] process that [the] Court strives to protect.[51]

In a doctoral dissertation, Dr. Taraleigh Davis sought to analyze the entirety of the non-merits docket from OT 2000 through OT 2021.[52] Davis found that the number of emergency applications submitted to the Court did not substantially increase between OT 2000 and OT 2021.[53] However, Davis' study found that the percentage of emergency applications granted per term increased significantly between OT 2000 and OT 2021. OT 2006 and OT 2012 had the lowest rates of orders granted in the data set, with 1.1% and 1.4% of applications being granted respectively. The highest rates of applications granted were during OT 2020, with 31% of applications granted, and during OT 2021, with 31.4% of applications granted. Her analysis

[47] Vladeck Testimony, *supra* note 26, at 7.
[48] *Id.*
[49] *Id.* (twenty-four orders were granted in full, and four orders were granted in part).
[50] *See* Wolf v. Cook Cnty., 140 S.Ct. 681, 684 (2020) (Sotomayor, J., dissenting).
[51] *Id.*
[52] Taraleigh Davis, *The Supreme Court's Third Shift: Policy, Precedent, and Public Opinion Via the Shadow Docket* U. Wis. Digit. Commons 24 (2023), https://dc.uwm.edu/etd/3132/.
[53] *Id.* at 29.

confirms that the Court grants significantly more emergency relief applications now than it previously did. Davis argues that "when pundits claim that the shadow docket is increasing, they are really noting that the Court is providing emergency relief more often." [54]

Regardless of what method is used to understand the size of the shadow docket, it has grown over the past decade. Legal scholars have noted that the Court's increased reliance on the emergency docket has correlated with the shrinking of the merits docket.[55] Some hypothesize that the Court is intentionally diverting work to the shadow docket, thus reducing the size of the merits docket, and others suggest that the expansion of the shadow docket simply leaves the Justices with less time to devote to the merits docket. While correlation does not establish causation and no final conclusions can be made about this, "it is possible that the increase in emergency rulings has contributed to fewer resources and less time for the merits docket cases."[56]

The Broadening Impacts of the Shadow Docket

Beyond the quantitative rise of the shadow docket, the Court's shadow docket orders are qualitatively different from that of the traditional non-merits docket. The only other time in history that the shadow docket has been as active as the modern shadow docket was in the 1980s. Two primary factors led to this increase in activity in the 1980s. First, in 1972 the Court effectively imposed a temporary nationwide ban of all capital punishment in *Furman v. Georgia*.[57] Then, in 1976, the Court approved Georgia's reformed capital punishment system,

[54] Davis, *supra* note 52, at 57.
[55] *Case Selection and Review at the Supreme Court: Written Testimony for The Presidential Commission on the Supreme Court of the U.S.*, 18 (2022) (Written testimony of Samuel L. Bray, Professor of Law, Notre Dame Law School).
[56] Sarah Voehl, *Illuminating the Shadow Docket: On the Increasing Impacts of This Evolving Judicial Procedure*, 23 NEV. L. J. 945, 955 (2022).
[57] Furman v. Georgia, 408 U.S. 238 (1972).

creating a new path forward for the death penalty in the United States.[58] Following this decision, the number of inmates on death row rose.[59] This led to an unprecedented number of emergency applications for stays of execution, including eighty-three applications in OT 1983.[60] Additionally, starting in 1980 the Court stopped formally adjourning for summer recess. This allowed emergency applications to be resolved by the full Court throughout the whole year.[61]

The emergency orders of the 1980s in death penalty cases had the effect of halting or allowing a specific execution to occur – a matter of life and death for the inmate and clearly an emergency worthy of an expedited decision from the Court. Additionally, these cases largely did not have "broad legal or practical ramifications," meaning that the Court's decision affected the inmate and the inmate alone.[62] Modern shadow docket orders have produced significant effects, both legally and practically. Recent orders on the shadow docket have made non-merits decisions increasingly impactful based on two specific developments. First, the Court is increasingly willing to disrupt the status quo in shadow docket orders with limited explanation, or none at all. Second, modern shadow docket orders affect large populations, not just the immediate parties to the litigation.

Disrupting the Status Quo

On September 1, 2021, the Supreme Court denied an application for injunctive relief that would have prevented a Texas law that made it illegal for a physician to perform an abortion if the fetus has a detectable heartbeat, from going into effect.[63] Moments before midnight, the Court's two-paragraph explanation of the denial was released. The majority in the 5-4 decision

[58] Gregg v. Georgia, 428 U.S. 153 (1976).
[59] Vladeck, THE SHADOW DOCKET, *supra* note 25, at 102.
[60] *Id.* at 105.
[61] *Id.* at 106.
[62] *Id.* at 16.
[63] Whole Woman's Health v. Jackson, 141 S.Ct. 2494 (2021); *See* Tex. Health and Safety Code § 171.204.

reasoned that the injunction should be denied due to the "complex and novel" procedural aspects of S.B. 8, and stated that the denial does not resolve any substantive claims presented by the applicants.[64] The parties were not given the opportunity to submit briefing on the merits to the Court, nor were they afforded the opportunity for oral argument.[65] Generally, a fetus' heartbeat becomes detectable around six gestational weeks, making it illegal for doctors to provide abortions after this point in a pregnancy.[66]

As of September 2021, binding Supreme Court precedent held that a state's abortion regulation may not have the purpose or effect of imposing a substantial burden on a woman's right to choose to have an abortion.[67] Additionally, "No federal appellate court [had] upheld such a comprehensive prohibition on abortions before viability" under the relevant precedent.[68] S.B. 8, the law at issue, banned essentially all abortions after approximately six gestational weeks, which is before many people know that they are pregnant. The Court's ruling in Whole Woman's Health v. Jackson allowed Texas's near-total abortion ban to go into effect, ignoring decades of precedent upholding a woman's right to access an abortion.[69]

In Whole Woman's Health v. Jackson, the Court could have granted injunctive relief or a stay of the district court proceedings in order to prevent S.B. 8 from going into effect before the constitutionality of the law had been decided by the appellate court. Instead, it ruled in a way that was inconsistent with well-established precedent. The two-paragraph ruling provided no

[64] *Jackson*, 141 S.Ct. at 2495 ("their application also presents complex and novel antecedent procedural questions on which they have not carried their burden").
[65] *Id.* at 2496 (Roberts, C.J., dissenting).
[66] *See* Maggie Astor, *Here's What the Texas Abortion Law Says*, N.Y. TIMES (Sept. 9, 2021), https://www.nytimes.com/article/abortion-law-texas.html.
[67] *See* June Medical Servs. LLC v. Russo, 140 S.Ct. 2103 (2020) (upholding *Hellerstedt* and *Casey*); Whole Woman's Health v. Hellerstedt, 579 U.S. 2292 (2016); Planned Parenthood of Se. Pa. V. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022).
[68] *Jackson*, 141 S.Ct. at 2498 (Sotomayor, J., dissenting).
[69] *Id.*

reasoning as to why the majority chose to ignore the blatant constitutional violation, but it served as a signal for how the Court might rule on future challenges to abortion rights. Justice Kagan's dissent expressed her frustrations with the conservative majority's use of the shadow docket, stating that the ruling "illustrates just how far the Court's 'shadow docket' decisions may depart from the usual principles of appellate process."[70]

Texas's likely unconstitutional S.B. 8 went into effect because the majority of the Court's justices denied the application for emergency relief. The majority was able to deny the application and ignore the obvious conflicts with well-established precedent without an extensive opinion or overruling *Planned Parenthood v. Casey* because of the nature of the modern shadow docket. The decision by the majority in this case was not an outlier; rather, it is "emblematic" of the kinds of decisions being made on the modern shadow docket, which Justice Kagan asserted "every day becomes more unreasoned, inconsistent, and impossible to defend."[71]

The Precedent Issue

While more and more shadow docket orders are being handed down, there is disagreement on the precedential value of these decisions. Precedent is the idea that lower courts' decisions should defer to higher courts' decisions on the same issue.[72] The Court has stated that orders on the non-merits docket do not establish precedent of the same value as an opinion of the Court from the merits docket that receives a full briefing and oral argument.[73] In a 2021 speech at the University of Notre Dame, Justice Alito reiterated that decisions for emergency relief do not create precedent on the underlying issues.[74]

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[70] *Id.* at 2500 (Kagan, J., dissenting)
[71] *Id.*
[72] McFadden & Kapoor, *supra* note 36, at 843.
[73] Lunding v. N.Y. Tax App. Trib., 522 U.S. 287, 307 (1998).
[74] Barlow, *supra* note 32.

On the contrary, the Court rebuked the Ninth Circuit for failing to apply another shadow docket order as precedent.[75] In *Tandon v. Newsom*, two pastors challenged a California COVID-19 restriction that limited in-home gatherings to no more than three households, arguing that it infringed on their First Amendment right to free exercise of religion.[76] The Ninth Circuit denied the pastors' injunctive relief because they found that the appellant pastors were not likely to succeed on the merits of their claim.[77] Following the Ninth Circuit's denial, the pastors applied for injunctive relief with the Supreme Court.

In a *per curiam* opinion, five justices granted the order for injunctive relief.[78] The order primarily relied on *Roman Catholic Diocese of Brooklyn v. Cuomo* as the authority, citing it five times within the four-page *per curiam* opinion. *Roman Catholic Diocese of Brooklyn*, however, was also a shadow docket case. In *Roman Catholic Diocese of Brooklyn*, the Court granted an emergency application for injunctive relief when COVID-19 restrictions in New York were challenged on the ground that they infringed on the right to free right to exercise religion.[79] In this order, the Court did not apply the traditional standard for emergency injunctions pending appeal, which requires that it is "indisputably clear" that the applicant is entitled to relief."[80] Instead, without any explanation, the Court applied a much lower standard and granted the injunction.[81]

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[75] Tandon v. Newsom, 592 U.S. 61 (2021) (granting injunctive relief) (citing Roman Catholic Diocese of Brooklyn v. Cuomo); *See* Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. 14 (2020) (granting injunctive relief on the basis that a COVID-19 restriction on attendance at religious services likely violates the First Amendment).
[76] Vladeck, THE SHADOW DOCKET, *supra* note 25, at 186.
[77] Tandon v. Newsom, 992 F.3rd 916, 920 (9th Cir. 2021).
[78] *Tandon*, 592 U.S. at 62 (The Chief Justice would deny the application. Justice Kagan, Justice Breyer, and Justice Sotomayor dissenting.)
[79] Vladeck, THE SHADOW DOCKET, *supra* note 25, at 175-77; *Roman Catholic Diocese of Brooklyn*, 592 U.S. at 15.
[80] Vladeck, THE SHADOW DOCKET, *supra* note 25, at 177; *See Lux v. Rodriguez*, 561 U.S. 1306 (2010) (Roberts, C.J., as Circuit Justice).
[81] Vladeck, THE SHADOW DOCKET, *supra* note 25, at 177.

Even though *Roman Catholic Diocese of Brooklyn* was a shadow docket order, which the Court has previously stated does not have precedential value, and it applied a standard not set forth by the relevant caselaw, the *per curiam* opinion rebuked the Ninth Circuit for failing to apply it.[82] In this four-page shadow docket opinion, the Court effectively broadcasted the beginning of a new era on the shadow docket. Resting its reasoning on another shadow docket order that applied a different standard for relief without any explanation, the Court announced to all that "even unsigned and unexplained emergency orders [are] to be treated as precedent" and applied by lower courts.[83]

Given the uncertainty of whether shadow docket rulings create precedent, lower courts have disagreed on how to apply these rulings to cases in front of them.[84] In response to these difficulties, D.C. Circuit Court Judge Trevor McFadden outlined a scheme to help judges and litigants understand the precedential value of shadow docket orders.[85] McFadden argues that shadow docket decisions can be divided into three distinct categories based on the precedential force that a decision has: decisions that have "little value for lower courts, those that are useful as persuasive authority, and those that are authoritative with respect to future cases considering the same legal questions."[86]

In the first category of shadow docket decisions are "denials of stay applications and decisions issued by a single justice without any opinion."[87] Decisions to deny a stay application

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[82] *Tandon*, 592 U.S. at 64.
[83] Vladeck, THE SHADOW DOCKET, *supra* note 25, at 188
[84] *See* Casa de Maryland, Inc. v. Trump, 971 F.3d 220 (4th Cir. 2020) (judges disagreeing on what weight to give shadow docket cases).
[85] McFadden & Kapoor, *supra* note 36. McFadden's analysis focuses on emergency stay applications, but he later concludes that the same analysis "applies to any order or decision from the Supreme Court's shadow docket that requires the Court to make a preliminary determination about the movant's likelihood of success on the merits." *Id.* at 886.
[86] *Id.* at 831.
[87] *Id.*

does not have any precedential or persuasive effect because it is "not a decision on the merits of the underlying legal issues."[88] McFadden argues that only the small fraction of applications which the Court grants should be cited as persuasive or authoritative guidance.[89] Decisions by a single justice not accompanied by an opinion do not have precedential value because without any reasoning it cannot be considered a decision on the merits of the underlying issue.

Orders granted by a single Justice that are accompanied by an opinion explaining their view of the merits of the case have value as persuasive authority, but do not create precedent. These decisions, McFadden argues, cannot have precedential effect because one Justice alone does not have the authority to "revise or modify the judgments of the lower courts" and therefore cannot be binding.[90] While they do not hold precedential value, they can be cited as persuasive authority because the Justice's reasoning may indicate how the Court would be likely to rule on the merits of the issue in the future. McFadden notes that concurrences, dissents, and statements respecting a shadow docket order will also fall in this category.[91]

Finally, McFadden argues that shadow docket decisions by the full Court "in which a majority of the Supreme Court has clearly indicated that the applicant is likely to succeed on the merits of the question(s) presented" create binding precedent for lower courts.[92] In determining whether an order has precedential effect, lower courts should look to whether it "makes it clear that the movant's position on a legal question is likely correct."[93] Next, lower courts should look to the reasoning in support of the decision in the Court's opinion, giving more weight to "a

[88] *Id.* at 849 (citing Ind. State Police Pension Tr. v. Chrysler LLC, 556 U.S. 960, 960 (2009) (per curiam); internal quotation marks omitted).
[89] *Id.* at 850.
[90] *Id.* at 850
[91] *Id.* at 831.
[92] *Id.* at 831-32.
[93] *Id.* at 857.

thorough and well-reasoned opinion" than an opinion that provides "little or no analysis."[94] McFadden argues that the level of reasoning provided by the Court affects the lower court's confidence in treating the opinion as precedent, but "ultimately, even a decision with little or no reasoning can be authoritative."[95]

McFadden's scheme is a helpful tool for understanding the impacts of shadow docket orders. However, McFadden's scheme only applies to the 4% of emergency applications that receive a written opinion.[96] Presuming that all lower courts apply similar analysis and reasoning as McFadden, the other 96% of shadow docket cases should provide little or no precedential value. However, Davis found that "24% of emergency applications from 2000-2021 have been cited by at least one federal court, and 5.4% have been cited at least once by the Supreme Court.[97] Davis's findings establish that shadow docket cases are frequently cited by lower courts and the Supreme Court itself.

Precedent is important for a number of reasons. First, it is a foundation to the judicial system as established by the Constitution.[98] Second, it provides consistency and predictability in the judicial process. The doctrine provides that "similar cases are treated similarly, fostering stability and fairness within the legal system."[99] Lower courts must be able to look to precedent to decide cases that they believe are not likely to be overturned by higher courts. The lack of clarity as to whether shadow docket orders create binding precedent for lower courts creates a problem for lower courts' predictability.

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[94] *Id.* at 864.
[95] *Id.*
[96] Davis, *supra* note 52, at 144.
[97] *Id.* at 147.
[98] *See* U.S. Const. art III, §, cl. 1 ("the judicial Power of the United States, shall be vested in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish.").
[99] Davis, *supra* note 52, at 142.

Effects on Large Classes of People

Historically, the immediate effects of decisions on the non-merits docket have been very narrow, generally just impacting the parties to the claim.[100] Recently, however, shadow docket decisions have had more expansive effects, reaching beyond the immediate parties to the litigation and affecting large populations. The reach of a shadow docket ruling is important because it is not a final determination on the merits of the claim. When large populations of people are affected by shadow docket orders and the Court provides no reasoning for its decision, the risk of injury becomes much greater.

For example, as discussed earlier, the Court's denial of emergency relief in *Whole Woman's Health v. Jackson* allowed Texas' near-total abortion ban to go into effect.[101] When S.B. 8 went into effect, all seven million women of reproductive age in Texas lost their right to decide to have an abortion after six gestational weeks.[102] Given the number of people affected by this ruling and the contradictory caselaw, it is no wonder that the decision led to public outcry across the country.[103] The sheer number of people immediately affected by the Court's failure to issue an injunction pending appeal in *Whole Woman's Health v. Jackson* starkly contrasts with the limited effects of traditional shadow docket decisions.

The broadening implications of the shadow docket have also been felt in the realm of immigration law. During his presidency, Trump implemented many controversial immigration policies that were challenged in the courts. One of those policies was a set of travel and

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[100] *See* Vladeck, THE SHADOW DOCKET, *supra* note 25, at 16 (explaining the limited result of shadow docket decisions on execution orders compared to recent shadow docket decisions.).
[101] Whole Woman's Health v. Jackson, 141 S.Ct. 2494 (2021).
[102] Elizabeth Nash, et al., *Impact of Texas' Abortion Ban: A 14-Fold Increase in Driving Distance to Get an Abortion*, GUTTMACHER INST. (Sept. 15, 2021), https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-14-fold-increase-driving-distance-get-abortion.
[103] Timothy Gardner & Richard Webner, *Texas law sparks hundreds of U.S. protests against abortion restrictions*, REUTERS (Oct. 4, 2021, 12:58 PM), https://www.reuters.com/world/us/abortion-rights-advocates-will-march-across-us-protest-restrictive-laws-2021-10-02/.

immigration restrictions that were imposed on several countries, mostly majority-Muslim countries.[104] Known as "the travel ban," the policy was enjoined by the federal district courts of Hawaii and Maryland.[105] On appeal, the Fourth and Ninth Circuits upheld the injunctions.[106]

The Solicitor General then sought certiorari and applied for stays of the injunctions.[107] The Court granted certiorari and granted the stay application in part,[108] allowing most of the provisions of the travel ban to go into effect. Specifically, the Court's order implemented a "compromise resolution" that "no party had sought."[109] After granting two more separate stays on the travel ban cases, the Court was to hear arguments on the merits.[110] Just days before the Court was to hear oral argument on the cases, the "Trump Administration announced significant changes to the policy" and the Court "removed the cases from the calendar" with instruction to dismiss.[111] The case was not decided on the merits by the Supreme Court until one year after the Court's initial stay had been granted.[112] By the time the case was heard, the travel ban policy had been "amended in response to court challenges," and the Court "upheld the ban in a 5-4 decision."[113]

The implications of the travel ban were felt across the country, and outside of its borders. For many immigrants already in the United States, there was a sense of uncertainty and fear

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[104] Voehl, *supra* note 56, at 966.
[105] State v. Trump, 245 F. Supp. 3d 1227, 1239 (D. Haw. 2017); Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 566 (D. Md. 2017).
[106] Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 606 (4th Cir. 2017) (en blanc) ("affirming in part and vacating in part the preliminary injunction awarded by the district court"); Hawaii v. Trump, 859 F.3d 741, 789 (9th Cir. 2017) (per curiam) (affirming in part and vacating in part the district court's preliminary injunction).
[107] Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 135 (2019) [hereinafter Vladeck, *Solicitor General*].
[108] Trump v. Int'l Refugee Assistance Project, 137 S.Ct. 2080, 2089 (2017).
[109] Vladeck, *Solicitor General*, *supra* note 107, at 136-37.
[110] *See Id.* at 137 (explaining the dispute over the scope of the Court's original stay and the subsequent stay granted by the Court).
[111] *Id.* at 137-83.
[112] *Trump v. Hawaii*, 138 S.Ct. 2392 (2018).
[113] *Id.* at 2423 (upholding the travel ban); Voehl, *supra* note 56, at 966 (detailing that the travel ban had been "amended in response to court challenges").

knowing that the Court was willing to issue a stay to allow the controversial travel ban to go into effect before the case was heard on the merits. The ban capped the total number of refugees that could be admitted into the country, denying the opportunity to thousands of refugees hopeful of starting new lives in the United States.[114] Additionally, the family members who were forced to be separated from their loved ones due to the travel ban felt the burden of the Court's orders. Other implications of the travel ban include doctor shortages in rural areas, "a drop in enrollment among foreign students, and the denial of visas to more than 41,000 people." [115]

Shadow docket orders on immigration law "affect the lives of people who may be at their most vulnerable."[116] These orders intimately affected the lives of Americans and those hoping to come to the United States. American immigration law is not only important to American policy, but it also is important to international policymaking, making these orders all the more impactful.[117] Shadow docket orders on immigration issues have the unique capability to reach beyond the country's borders and touch the lives of people around the world. The travel ban cases illustrate the shadow docket's expanding impact, and the Court's willingness to effect broad policies through emergency relief applications.

The Politicization of the Shadow Docket

In his book, Vladeck argues that the shadow docket has become "a place to achieve political victories, not legal ones."[118] Further, Vladeck illustrates how the shadow docket has been used to advance conservative policy goals.[119] When the Trump Administration began

[114] *See* Vladeck, *Solicitor General*, *supra* note 107 at 136-37 (explaining that the Court stayed the lower court's injunction, allowing the travel ban's refugee cap provision to go into effect).
[115] Voehl, *supra* note 56, at 967-68.
[116] *Id.* at 966.
[117] *Id.*
[118] Vladeck, THE SHADOW DOCKET, *supra* note 25, at 127.
[119] *See generally Id.*; Kristen E. Parnigoni, *Shades of Scrutiny: Standards for Emergency Relief in the Shadow Docket Era*, 63 B.C. L. REV. 2743, 2747-48 (2022).

frequently requesting emergency relief, political issues were suddenly center stage on the shadow docket. Of course, this was not entirely within the Court's control; however, the Court did (and still does) have the choice to deny the emergency applications that do not present true emergencies at all, and instead ask the Court to signal how they might rule on the substance of policies. As evidenced by the immigration cases, the Court has not been afraid to express their policy preferences on the shadow docket.[120]

In 2020, Dr. Lawrence Baum presented one of the first empirical studies of the shadow docket.[121] In this exploratory study, Baum analyzed the emergency stay cases on the shadow docket that had at least one dissent between OT 2013 and OT 2019.[122] Baum found that in "three-quarters of the cases, the dissents came from the Court's liberals," and that there was not a single case in which both liberal and conservative justices dissented.[123] In other words, on the shadow docket, Justices tend to stick to their ideological parties and not "cross sides" to dissent with Justices of a different ideology.[124] Additionally, the study found that the more ideologically extreme a Justice is, the more likely they are to join a dissent by a fellow liberal (or conservative) Justice.[125] The main takeaway from Baum's exploratory study is that on the shadow docket, the Justices seem to be ideologically divided. While this study is limited due to the small data set, it provided a first glimpse into the Court's ideological behavior on the shadow docket.

In 2023, Nicholas Conway and Yana Gagloeva expanded upon Baum's research and confirmed his findings.[126] In their study, Conway and Gagloeva looked at emergency stay orders

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[120] *Supra* pp. 28-30.
[121] Lawrence Baum, *Decision Making in the Shadows: A Look at Supreme Court Decisions on the Stays*, L. & CT. NEWSL., Fall 2022, at 1.
[122] *Id.* at 3.
[123] *Id.* at 4.
[124] Nicholas D. Conway & Yana Gagloeva, *Out of the Shadows: What Social Science Tells Us About the Shadow Docket*, 23 Nev. L. J. 673, 685 (2023) (reviewing Baum's research).
[125] Baum, *supra* note 121, at 5.
[126] Conway & Gagloeva, *supra* note 124 at 686-705.

with documented dissents from OT 2013 through OT 2021.[127] Their analysis revealed that liberal dissents are "more likely to produce a full opinion than a conservative dissent," and when an issue is more ideologically divisive (i.e. COVID or abortion), a full dissenting opinion is significantly more likely.[128] Conway and Gagloeva found that there were five cases in their dataset in which a dissent crossed ideological groupings, all in 2022.[129] Even with this, however, the Justices still seem to be deciding cases on the shadow docket along ideological lines, with 97% of the cases in the dataset "reflecting ideological purity in the dissent direction.[130] Additionally, the study confirmed Baum's previous conclusion that "ideologically extreme Justices dissent more" than moderate Justices.[131]

Further, Conway and Gagloeva sought to determine whether this ideological behavior on the shadow docket differs from the Justices' behavior on the merits docket. To determine this, they measured the "difference between (a) the ideological consistency measure on stay cases and (b) an ideological consistency measure on merits-based dissents."[132] While recognizing the limitations of the data set and the measure used, Conway and Gagloeva argue that "[more] ideologically extreme Justices appear to behave even more ideologically consistent" on the shadow docket than they do on the merits docket.[133] Specifically, their evaluation finds that "Justices Sotomayor, Gorsuch, Alito, and Thomas are more ideologically consistent" in shadow docket cases.[134] This suggests that there is reason to believe that the justices act differently "in the shadows" than they do on the merits docket by engaging in more ideologically motivated

[127] *Id.* at 686.
[128] *Id.* at 692.
[129] *Id.* at 693.
[130] *Id.* at 694.
[131] *Id.*
[132] *Id.* at 699.
[133] *Id.* at 700-701.
[134] *Id.* at 700.

decision-making. While these studies only analyze a small subset of shadow docket orders, they show a consistent trend of the Justices being divided along ideological lines in shadow docket orders.

Another study, conducted by Dr. Taraleigh Davis as a part of her PhD dissertation, found that there has been a "substantial increase in conservative decisions" on the shadow docket in recent terms.[135] Davis's entire study included every shadow docket order between OT 2000 and OT 2021, totaling 1,847 cases.[136] She contends that her methodology provides a more inclusive data set than previous empirical studies because it is designed to include the various types of cases that make up the shadow docket.[137] However, Davis's analysis of the ideological behavior on the shadow docket focuses on decisions from OT 2014 to OT 2021.[138] The study coded the ideological outcome of shadow docket cases as either liberal or conservative based on the substantive implications of the decision.[139]

During the 2014 and 2015 terms, the Court's decisions were more liberal than conservative, with 78% of decisions in 2014 and 67% during the 2015 term being liberal.[140] OT 2016 saw a significant shift, with 80% of the orders being granted in a conservative direction.[141] In every term that followed, through OT 2021, between 70% and 80% of shadow docket decisions were conservative.[142] Davis theorizes that this dramatic increase in conservative decisions "may be attributed to various factors, such as changes in the Court's composition,

[135] Davis, *supra* note 52, at 119-21.
[136] *Id.* at 28.
[137] For the study, Davis "[cataloged] any application that was presented or addressed to an individual Justice regardless of whether the docket number includes an 'A' or what the application was for." *Id.* at 24. For the types of relief requested in the emergency applications that Davis's study includes, *see Id.* at 26.
[138] *Id.* at 119-20
[139] Davis uses the Supreme Court Database coding scheme for determining the ideological leaning of a decision. *Id.* at 32-36.
[140] *Id.* at 120.
[141] *Id.*
[142] *Id.*

evolving legal and political landscapes, or the nature of cases presented for emergency applications during these terms."[143]

While that increase in conservative decisions on the shadow docket is interesting on its own, the Court's shadow docket behavior is further emphasized by analyzing the Court's decision direction on the merits docket. Between OT 2014 and OT 2021, the Court's merits decisions were relatively ideologically balanced, with the decisions leaning conservative between 44% of the time at its lowest,[144] and 64% of the time at the highest.[145] The data shows that the Court issues more conservative decisions on the shadow docket than it does on the merits docket.[146] Based on these findings, Davis argues that "policy outcomes on the emergency docket are significantly more conservative over time, particularly in civil rights and criminal procedure cases."[147]

This aspect of the shadow docket deserves further inquiry to fully understand the difference in behavior on the shadow docket compared to the merits docket, but these studies validate concerns about the policy implications of the shadow docket. Davis theorizes that this pattern is caused in part by changes in Court composition and the rushed decision-making that the emergency docket requires.[148] Whatever the specific reasons for the change might be, the trend could lead the public to see the Court as more political and less principled. These empirical studies seem to support Vladeck's argument that the shadow docket is being used to push policy agendas rather than resolve legal issues, and this has disproportionately benefitted those who align with a conservative ideology.

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[143] *Id.*
[144] Conservative decisions were issued 44% of the time during OT2019. *Id.* at 99.
[145] Conservative decisions were issued 64% of the time during OT2021. *Id.*
[146] *Id.* at 131-32.
[147] *Id.* at 138.
[148] *Id.* at 132.

The Court's use of the shadow docket has clearly changed in the past two decades. The shadow docket has gone from a generally mundane, little-known procedural mechanism to a significant portion of the Court's workload, affecting legal norms, large classes of people, and the Court's ideological trends. The Court's behavior on the shadow docket has caught the attention of many people, including average Americans who might not have a full understanding of the judicial system.[149] While research on the shadow docket is still developing given the recent timeframe of these changes, the research that is available suggests that the Court's behavior on the shadow docket could have institutional effects on the Court as well as the societal effects that are already being felt. This has led to questions and claims about how the modern shadow docket could affect the Court's institutional legitimacy.

[149] *See* Bedell, *supra* note 28 (the term "shadow docket" appeared in more than twenty mainstream publications in the six weeks following the Court's decision in *Whole Woman's Health v. Jackson*).

Legitimacy

Academics[150] and laypeople alike have recently "[questioned] the Court's legitimacy,"[151] some even calling it a "legitimacy crisis."[152] However, it is not always clear what it means to question the Supreme Court's legitimacy, nor is it clear exactly what a "legitimacy crisis" is and what it means. To understand these critiques of the Court, we must first examine two critical questions: (1) what *is* legitimacy, and (2) what makes a court legitimate or illegitimate? There is no shortage of academic literature theorizing political and judicial legitimacy, and it is a source of continued research. I will begin this chapter by introducing prominent theories of political and judicial legitimacy. Through these frameworks, I will then analyze the shadow docket's effect on the legitimacy of the Supreme Court as an institution.

Theories of Legitimacy

On a broad psychological level, legitimacy is the "property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper and just."[153] When an institution is legitimate "people to defer voluntarily to [its] decisions, rules, and social arrangements."[154] People comply with the rules and decisions of legitimate authorities because they are viewed as justified and deserving of respect for reasons beyond immediate self-

[150] *See* Vladeck, THE SHADOW DOCKET, *supra* note 25, at 21
[151] Steven Greenhouse, *The US supreme court is facing a crisis of legitimacy*, THE GUARDIAN (Oct. 5, 2023, 6:10 PM), https://www.theguardian.com/commentisfree/2023/oct/05/us-supreme-court-facing-crisis-of-legitimacy; Michael Tomasky.
[152] *See The Supreme Court's Legitimacy Crisis*, THE NEW YORK TIMES (Oct. 5, 2018), https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html.
[153] Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOLOGY 375, 375 (2006).
[154] *Id.* at 376

interest.[155] Legitimate authorities receive broad compliance because people "feel obliged to defer to the decisions made by leaders with legitimacy and the rules they create."[156]

Three-Dimensional Legitimacy

Law professor Richard Fallon set forth a framework of legitimacy that breaks down the Supreme Court's legitimacy into three different categories of legitimacy: sociological legitimacy, moral legitimacy, and legal legitimacy.[157] Fallon's framework allows legitimacy to be assessed individually for each dimension. For example, Fallon's framework provides the vocabulary to describe a popular and morally sound decision based in insufficient legal reasoning as morally and sociologically legitimate, but legally illegitimate. The distinction between the three faces of legitimacy provides distinction beyond the binary of legitimate or illegitimate and provides the vocabulary to describe the different ways in which the Court or its decisions may be legitimate.

Sociological legitimacy involves the public opinion of and attitudes toward a government, resting "on what factually is the case about how people think or respond."[158] Similar to the psychological understanding of legitimacy, sociological legitimacy is high when people believe that a particular institution is worthy of respect and obedience "for reasons besides self-interest."[159] It is rooted in what people think about an institution or government, rather than what people *ought* to think about it.[160]

Moral legitimacy is a normative concept concerning whether people ought to respect or obey the Constitution and laws of the United States, or whether the government is morally

[155] *Id.* at 381; *See also* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 22-23 (2018).
[156] Tyler, *supra* note 153, at 393
[157] Fallon, *supra* note 155, at 21.
[158] *Id.*
[159] *Id.* at 23.
[160] *Id.*

justified.[161] Fallon describes two different forms of moral legitimacy. The first form is minimum moral legitimacy, according to which governments must have a minimum level of morality "in order to deserve support and respect and to justify their officials in exercising coercive force."[162] Ideal moral legitimacy finds that "a perfectly just constitutional regime would be legitimate even in the absence of consent."[163] Fallon establishes that the U.S. Constitution is minimally morally legitimate because "reasonable people should accept and acknowledge" it as legitimate.[164] Moral legitimacy provides government officials a moral justification for "coercively enforcing the law."[165]

Finally, legal legitimacy is primarily concerned with legally sound decision-making.[166] The primary question of legal legitimacy is whether a decision or rule was made in "accord with or [is] permissible under constitutional and legal norms."[167] Legal legitimacy looks to the internally recognized norms of the system within which a particular decision is made. Fallon argues that disagreement is inherent, but disagreements on interpretations or conclusions do not render decisions entirely illegitimate.[168] Instead, legal legitimacy rests on the reasonable exercise of legal judgment within a system's realm of acceptable legal judgment.[169] In some ways, legal legitimacy relies on both moral and sociological legitimacy because the norms that legal legitimacy relies on for comparison must be sociologically and morally legitimate.[170]

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[161] *Id.* at 23-34; *See also* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2244 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)).
[162] Fallon, *supra* note 155, at 34.
[163] *Id.* at 25.
[164] *Id.* at 28.
[165] *Id.* at 31.
[166] *Id.* at 35.
[167] *Id.*
[168] *Id.* at 39.
[169] *Id.* at 40.
[170] *Id.* at 83-92.

Fallon's analysis proceeds under the conclusion that the Constitution is both sociologically[171] and morally[172] legitimate.[173] Under this assumption, Fallon's framework can be applied to the Supreme Court and its decisions. Gillian Metzger has built on Fallon's work, finding that diffuse support[174] represents the Court's "sociological or institutional legitimacy."[175] Metzger also argues that the Court's sociological legitimacy varies among different groups of the public, making it more difficult to protect this dimension of legitimacy.[176] A decision by the Court is morally legitimate when based on reasonable moral judgements.[177]

There are a number of acceptable interpretive methods that the Justices can use in their decision-making.[178] The legal legitimacy of the Supreme Court does not concern what interpretive method is used; rather, it concerns whether the Justices consistently and reliably apply their preferred interpretive methods in good faith.[179] Consistency from each Justice is crucial for the Court's legitimacy because when the Justices consistently adhere "to reasonable positions, we can respect their decisions, even if we" ultimately disagree with the outcome.[180] Further, when the Justices change their minds or an individual justice applies a different interpretive method, this is acceptable "so long as they provide reasons for doing so that they genuinely believe and intend to adhere to in the future."[181] Fallon argues that a change in

[171] *Id.* at 83-87.
[172] *Id.* at 28-29.
[173] Grove, *supra* note 161, at 2244.
[174] *See infra* pp. 39; 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, 204-05 (2014).
[175] Gillian E. Metzger, *Considering Legitimacy*, 18 GEO. J. L. PUB. POL'Y 353, 366 (2020) (reviewing Richard H. Fallon, Jr., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)).
[176] *Id.* at 369.
[177] Grove, *supra* note 161, at 2247.
[178] *Id.*
[179] Fallon, *supra* note 155, at 130-32.
[180] *Id.* at 131.
[181] *Id.* at 12-13.

interpretive methodology requires an explanation that provides a "significant safeguard against abuse."[182]

Procedural Justice

One of the most well-known theories of legitimacy is procedural justice. Procedural justice concludes that when institutions "exercise their authority through procedures that people experience as being fair" they are viewed as more legitimate, and "their decisions and rules are more willingly accepted."[183] It finds that an institution's legitimacy is rooted in the perception and experience of fair procedures.[184] Tyler and Rasinski argue that procedural justice is a substantial factor of an institution's legitimacy, and legitimacy leads to acceptance of their decisions.[185] Additionally, legitimacy creates a reservoir of support that allows an institution to make unpopular decisions while maintaining acceptance because people believe that the institution makes fair and principled decisions through its procedures.[186]

Literature on procedural justice emphasizes the idea that people judge the procedural fairness of judicial systems based on "prior interactions with the justice system and judges in the decision-making process."[187] Although the vast majority of Americans have never had a personal interaction with the Supreme Court, the public is still aware of the procedures of the Court's merits docket.[188] "Interactions with information about the normal procedures of the merits docket counts as a prior interaction with the system" for the purpose of assessing the Supreme

[182] *Id.* at 146.
[183] Tyler, *supra* note 153, at 379.
[184] Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC'Y REV. 621, 622 (1991). For an overview of the research on procedural justice and legitimacy, see Tyler, *supra* note 153.
[185] Tyler & Rasinski, *supra* note 184, at 626-27.
[186] Tyler, *supra* note 153, at 381.
[187] Smart, *supra* note 31.
[188] *Id.*; *See also* James L. Gibson & Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 J. POLITICS 429 (2009).

Court's procedural fairness.[189] Therefore, people generally judge the procedural fairness of the Supreme Court based on their knowledge of the normal procedures of the merits docket.

Under a procedural justice framework, legitimacy is assessed through support for the Court. Support is further divided into two different categories: specific support and diffuse support. Specific support measures satisfaction with specific outputs of an institution. Diffuse support, on the other hand, measures general attitudes toward an institution and loyalty to that institution. While specific support may vary based on decisions or outputs from an institution, overall attitudes toward the institution tend to remain steady even when specific support falls.[190] People comply with the decisions of an institution even when they disagree with them. For this reason, diffuse support is the main measure of institutional legitimacy under a procedural justice framework.

Applying the procedural justice framework to the Supreme Court, we find that it is a legitimate institution if people believe that its procedures are fair and principled. Tyler and Rasinski found that procedural justice has a strong influence on the Court's legitimacy, and therefore on acceptance by the public.[191] When people believe that the Court uses a principled or legalistic decision-making process, the Court's legitimacy increases regardless of whether people agree or disagree with their decisions.[192] However, when people believe that the Court engages in ideological decision-making, they view the Court as less legitimate when they disagree with the Court's decisions.[193] Ideologically-based decision-making negatively impacts legitimacy

[189] Smart, *supra* note 31.
[190] Conway & Gagloeva, *supra* note 124, at 713.
[191] Smart, *supra* note 31, at 626.
[192] Benjamin Woodson, *The Dynamics of Legitimacy Change for the U.S. Supreme Court*, 39 JUST. SYS. J. 75, 89 (2018).
[193] *Id.*; *See also* Davis & Benesh, *supra* note 3, at 453.

because it is not a procedurally fair method, and perceptions of fairness in the decision-making process affect legitimacy.[194]

The federal judiciary is unique in comparison to the other branches of government because judges are not elected, so they are not accountable to public approval in that way. Because of this, the Court "depends on its legitimacy for its power."[195] Additionally, the Supreme Court must rely on the other branches of government, which are accountable to the electorate, for the implementation of its decisions. Given these circumstances, the Court should be especially concerned with the public perception of it as a procedurally just institution to remain legitimate and retain acceptance and compliance from the public. In fact, there is evidence that Justices may occasionally change their vote on particularly salient cases in an attempt to appease public opinion.[196] The Court's historically high approval ratings have generally demonstrated that people have perceived the Court as procedurally fair and worthy of respect.[197] However, the recent decline of the Court's public approval has led those who adhere to the procedural justice model to question what this means for the Court's future.

The Court on Legitimacy

The Court rarely addresses its standing with the public, controversies, or other external conversations about the Court. This restraint often reflects the public's view of the Court as removed from the political dialogue that surrounds other branches of government. In a rare occasion, the Court spoke directly to legitimacy in the plurality opinion by Justices O'Connor, Kennedy, and Souter in *Planned Parenthood v. Casey*.[198] The Justices write:

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[194] Woodson, *supra* note 180.
[195] Davis & Benesh, *supra* note 3, at 446.
[196] *See* Grove, *supra* note 149, at 2254-58.
[197] Davis & Benesh, *supra* note 3, at 445.
[198] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion).

> As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.[199]

The plurality acknowledges the Court's lack of independent enforcement mechanisms, and their reliance on legitimacy to achieve acceptance. For the Court in *Casey*, power is derived from legitimacy, and legitimacy is derived from two things: (1) the substance of the Court's decisions, and (2) the public's perception that the Court is deserving of the power to decide what the law means.

The Court's description of legitimacy resembles Fallon's three-dimensional framework of legitimacy, incorporating components of legal, moral, and sociological legitimacy. The opinion of the Court is especially important under this framework of legitimacy because it explains how the Court reached the decision, and it is the only part of the decision-making process that is intended to face the public. The second element of the Court's description of legitimacy is the "perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."[200] First, the Court references sociological legitimacy because it requires actual public support for the institution, which refers to diffuse support, which is the metric by which sociological legitimacy can be assessed. Second, the idea that the Court must be deemed to be "fit to determine" what the law means and "what it demands" invokes moral legitimacy.[201] This is a normative determination that is rooted in moral questions about who gets to decide what the law means. The *Casey*

[199] *Id.* at 865.
[200] *Id.*
[201] *Id.*

plurality's framework incorporates similar elements to Fallon's framework and clearly outlines where they believe that their legitimacy comes from and why it is important.

The opinion continues to outline the Court's specific responsibilities in order to retain legitimacy through principled decision-making and clear explanations. The Justices continue:

> The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.[202]

Here, the plurality emphasizes that it is the Court's job to make decisions rooted in principle and to provide explanations that support those decisions. The Court's opinions are the only place when it speaks directly to the public, so they must demonstrate that decisions are made based on accepted legal principles and reasoning. Additionally, the opinion recognizes that decisions based on social or political pressure may threaten the Court's standing as a principled institution, therefore delegitimizing the Court and risking noncompliance. This reflects the procedural justice argument that people view the Court as more legitimate when they believe that the Court uses principled decision-making, and less legitimate when they believe that the Court makes decisions along ideological lines.[203] The Justices argue that it is the Court's responsibility to not only make principled decisions, but also to explain decisions in ways that resonates with the public as fair and principled.

The plurality concludes that "a decision without principled justification would be no judicial act at all." They come to this conclusion by finding that the Court's legitimacy is dependent on the substance of its decisions and the public finding the Court to be respectable and worthy of acceptance. They further reason that the public will only accept decisions if they are

[202] *Id.* at 865-66.
[203] Woodson, *supra* note 192.

grounded in principle and do not give in to social and political pressures. This brings the Court to the ultimate conclusion 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."[204]

The plurality's perspective on legitimacy shows how Fallon's framework and the procedural justice framework are similar and may operate at the same time. Once could argue that the Court adheres to the procedural justice model in *Casey*, and at the same time it could also be argued that their statements support a three-dimensional model of legitimacy. However, I would argue that the Court's explanation of its own legitimacy beautifully blends the two perspectives and addresses the major concerns of both frameworks. Overall, it is clear that the plurality believes that the Court wields little power without public acceptance for its decisions, and acceptance flows from the Court's legitimacy.

Empirical Studies of Legitimacy

Little research has been conducted to evaluate the effect of the shadow docket on the Supreme Court's institutional legitimacy. One reason for this is that it was less than ten years ago, in 2015, that William Baude popularized the term and brought the issue to light.[205] Since the emergency docket was relatively uncontroversial and uneventful until the 2010s, little attention was paid to its use by litigators and the Court. The changes in the modern shadow docket outlined in the prior section are recent, and the shadow docket has only piqued the public's interest in the past few years. Mike Bedell found that in the six weeks that followed the Court's shadow docket decision in *Whole Woman's Health*, the term "shadow docket" appeared in at

[204] *Casey*, 505 U.S. at 866.
[205] Baude, *supra* note 27.

least twenty pieces from major mainstream publications, as opposed to fifteen pieces in the same newspapers in the eight months prior to the decision.[206] Additionally, Google searches for the term spiked for the first time in 2020.[207]

Given how recent the shift in shadow docket behavior was, and that widespread attention manifested only in the past four years, studies assessing the effect that the shadow docket may be having on the Court's legitimacy have not spanned long periods of time and have not been replicated multiple times. In order to ascertain more clear and consistent data to determine whether there is a causal relationship between the two, as well as the extent of that relationship, continued research must be conducted. However, two recently published studies provide data from which preliminary conclusions can be drawn and hypotheses can be made about the present and future impacts of the shadow docket on the Court's legitimacy as an institution. Both studies have approached the issue from a procedural justice framework, seeking to understand whether the shadow docket affects people's support for the Court.

Davis & Benesh's Research

In their study, Taraleigh Davis and Sara Benesh investigated "how procedural variations might shape public perceptions of the Supreme Court during a time of great salience."[208] Study participants read press releases[209] describing a decision made by the Court, varying by procedural treatment (full merits procedures or shadow docket procedures), policy issue (immigration or death penalty), and ideological direction of the decision (conservative or

[206] Bedell, *supra* note 28.
[207] *Google Trends*, GOOGLE (last accessed Feb. 2024), https://trends.google.com/trends/explore?date=2013-01-01%202024-02-22&geo=US&q=%22shadow%20docket%22&hl=en-US (searching "shadow docket" search trends from 2013 through February 2024).
[208] Davis & Benesh, *supra* note 3, at 456.
[209] To read examples of the vignettes used in the study, *see Id.* at 457-58.

liberal).[210] After participants read the press release, they were asked a "battery of questions" to measure legitimacy through diffuse and specific support.[211] The surveys were conducted three times over the course of four months.[212]

The timing of Davis and Benesh's surveys happened to coincide with the leak of the *Dobbs v. Jackson Women's Health Organization* opinion,[213] which was the final decision that overruled *Roe v. Wade*.[214] The timing of their surveys allowed them to preliminarily assess whether the leaked opinion affected the Court's legitimacy in addition to the shadow docket.[215] This is important to note before evaluating the results of the study because it is likely that the leak and overruling of a major precedent may impact public perception of the Court. Additionally, the Court was particularly salient during this period of time, meaning that people were more exposed to media coverage about the Court. While we will not know the extent of the impacts of the *Dobbs* leak and overruling of *Roe* for some time, it is important to contextualize the results of this study with the historic events that were taking place at the time.

The results of the study showed that 77% of the participants who read about the "regular" merits decision "said the decision was made fairly, while 70% of those who" received the shadow docket decision thought that the decision was made fairly.[216] Despite both numbers being "quite high," those who received the shadow docket case were less likely to determine that the decision was fair.[217] Further, "respondents' perceptions of the fairness of the Court's

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[210] *Id.* at 456.
[211] *Id.* at 458.
[212] *Id.* at 462.
[213] *See* Josh Gerstein & Alexander Ward, *Supreme Court has voted to overturn abortion rights, draft opinion shows*, Politico (May 2, 2022, 8:32 PM) https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.
[214] *Dobbs*, 142 S.Ct. at 2228.
[215] Davis & Benesh, *supra* note 3, at 455-56.
[216] *Id.* at 460.
[217] *Id.*

procedures" affected both specific and diffuse support.[218] Davis and Benesh note that "independent of the treatment or the other influences on approval and legitimacy… [fairness] is the single most influential variable" for both specific and diffuse support.[219] This indicates that the public's regard of the Court is influenced by whether people perceive the Court's procedures to be fair.[220]

Inquiries designed to assess specific support generally revealed that participants who read the shadow docket treatment "[approved] of the Court at lower levels than those who received the regular procedures treatment."[221] The findings therefore showed that shadow docket procedures affect specific support of the Court, as well as the perception that a decision is fair. However, "policy congruence mattered greatly" for specific support as well.[222] Participants "considered both the procedures and the policy" of the decision in their evaluation of the Court, and the positive effect of ideological congruence "mostly cancelled out the negative effect of the shadow docket treatment" when it came to specific support.[223] In other words, participants who self-identified as liberal or conservative and received an ideologically congruent case (decided in a liberal or conservative way) decided under shadow docket procedures did not demonstrate lower levels of support for the Court. However, participants who disagreed with the decision in their case (ideologically incongruent) demonstrated less support for the Court when they received the shadow docket treatment. This suggests that procedure may only matter to a certain extent when people disagree with a decision, and they are more willing to look past procedural faults when they agree with the Court's decision.

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[218] *Id.* at 466.
[219] *Id.*
[220] *Id.*
[221] *Id.* at 465.
[222] *Id.* at 465.
[223] *Id.*

While Davis and Benesh found that specific support generally decreased with shadow docket treatment, diffuse support was not affected at a statistically significant rate.[224] Although the procedures of the shadow docket did not appear to affect diffuse support for the Court, the study showed that policy congruence does impact diffuse support at a statistically significant rate. [225] They found that participants who knew of the *Dobbs* decision and agreed with it "did not statistically differ from those who did not hear about [it];" however, those who knew of the decision and disagreed with it showed lower levels of diffuse support, and therefore afforded the Court "much less legitimacy."[226] Although this finding does not specifically address the shadow docket, it suggests that ideological congruence plays a role in Court legitimacy

Davis and Benesh's work highlights three variables that may be negatively affecting the Court's general standing with the public: (1) perceptions of fairness, (2) ideological congruence or incongruence, and (3) shadow docket procedures. Perceptions of fairness and ideological congruence directly affected the Court's diffuse support. While Davis and Benesh found that shadow docket procedures did not directly affect diffuse support, the evidence showed that people were less likely to find a decision to be fair when it was made via the shadow docket.[227] This suggests that if shadow docket decisions are viewed as less fair, and perception of fairness is a significant indicator of specific and diffuse support, then shadow docket procedures may indirectly affect levels of diffuse support. This validity of this hypothesis needs to be tested further, but these findings provide support for the procedural justice framework of legitimacy.

[224] *Id.* at 469.
[225] *Id.* at 466.
[226] *Id.* ("For diffuse support, those who agreed with the decision in *Dobbs* did not statistically differ from those who did not hear about the leak/decision, but those who were aware of it and disagreed lent much less legitimacy to the U.S. Supreme Court.").
[227] *Id.* at 460.

Davis and Benesh argue that the results of their study show that the idea that the Court's legitimacy is immune to public disagreement with its decisions may no longer hold true. Instead, they suggest that perhaps "policy preferences are a reasonable basis on which to evaluate the output of the Court as an institution."[228] Additionally, they find that "procedures are even more important than ever" for the Court to not be viewed as any other political institution.[229] The public must believe that the Court's decisions are principled, meaning that they "listen to both sides, are persuaded by strong legal arguments, and make decisions in a way that suggests reflection and fairness and not pure politics."[230]

Smart's Research

A recent study conducted by EmiLee Smart sought to "examine how the use of the shadow docket influences public opinion."[231] Smart's study was designed similarly to Davis and Benesh's study, except the vignettes that participants read described the Court's decision on an abortion case with three manipulated variables: (1) shadow docket or merits docket procedures, (2) procedural issue or substantive issue, and (3) pro-choice or pro-life outcome.[232] To determine the effects of these variables, Smart examined "ruling support, narrow court curbing support, and broad court curbing support."[233] Ruling support evaluated the degree to which participants supported the decision that they read about. Narrow court curbing refers to "an individual's willingness and support of noncompliance, jurisdiction stripping, and legislative override" and measures specific support.[234] Broad court curbing evaluates participants' "willingness to

[228] *Id.* at 468.
[229] *Id.*
[230] *Id.* at 468-69.
[231] Smart, *supra* note 19, at 7.
[232] *Id.*
[233] *Id.*
[234] *Id.*

fundamentally change the structure or procedures of the Court as an institution such as getting rid of judges, restricting the issue areas the Court can address, or making the Court less independent."[235] Broad court curbing measures diffuse support.

Smart found that individuals who review the shadow docket vignettes "are less likely to support the ruling of the Court."[236] This finding indicates that shadow docket procedures influence public perception of the Court, even with little information about the shadow docket and its procedures. Issue type (substantive v. procedural) produced no significant effect on support for the ruling, which is likely due to participants not fully understanding the differing norms for procedural and substantive questions.[237] Smart found that all participants are less likely to support a ruling that is "in opposition to their personal views" of abortion, "but when the ruling is congruent with their personal views, they are more likely to support the ruling irrespective of the procedure used to make the decision."[238] Similar to Davis and Benesh's result, Smart found evidence showing that ideological congruence is a "significant predictor" of support for a decision.[239]

The data also showed that support for narrow court curbing (specific support) was not significantly affected by shadow docket procedures, meaning that people are not "willing to risk noncompliance" based on shadow docket treatment alone.[240] However, Smart found that shadow docket treatment "is a significant predictor of support for broad court curbing."[241] Support for broad court curbing was 1.7% higher for participants who received shadow docket vignettes than

[235] *Id.* at 8.
[236] *Id.*
[237] *Id.* at 9.
[238] *Id.*
[239] *Id.*
[240] *Id.* at 9-10.
[241] *Id.* at 10.

those that received merits docket vignettes.[242] Additionally, when the case involves a substantive decision made on the shadow docket, broad court curbing support increased by 2.7%.[243]

Support for broad court curbing indicates support for "fundamental changes to the judicial independence of the Supreme Court."[244] The conclusion that the shadow docket increases support for these kinds of reforms indicates dissatisfaction with the procedure. Additionally, support for broad court curbing measures the Court's diffuse support; when support for broad court curbing is high, diffuse support is low, and low levels of support for broad court curbing indicates high diffuse support. Therefore, Smart's data shows that the shadow docket decreases diffuse support and Court legitimacy. Further, this effect is magnified when the issue decided is substantive, rather than procedural.

Smart concludes that the shadow docket's deviation from procedural norms leads people to support a decision less, and it makes people "more likely to support altering the institution making the decisions."[245] While ideological congruence affected ruling support, it is especially significant that the shadow docket was found to increase people's willingness to fundamentally change the Court as an institution. As judicial advocates and members of Congress have been calling for Supreme Court reform, Smart's data provides timely insight that the Court's use of the shadow docket has played a role in these calls.[246]

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[242] *Id.*
[243] *Id.* at 11.
[244] *Id.*
[245] *Id.*
[246] Nate Raymond, *US judge, scholars urge Supreme Court term limits in bipartisan push*, REUTERS (Oct. 25, 2023, 3:01 AM), https://www.reuters.com/legal/government/us-judge-scholars-urge-supreme-court-term-limits-bipartisan-push-2023-10-25/.

Discussion

The Shadow Docket and Diffuse Support

Both Davis and Benesh's study and Smart's research help to determine the effects of the shadow docket on public perceptions of the Court and its legitimacy. Regarding the shadow docket's effect on diffuse support for the Court, Smart came to a different conclusion as Davis and Benesh. While Davis and Benesh concluded that the shadow docket does not significantly affect diffuse support of the Court, Smart found that shadow docket procedures increased people's support for broad court curbing, representing lower levels of diffuse support. Their different conclusions are likely the result of the different questions used to measure diffuse support in each study. Davis and Benesh specifically noted that the choice of questions to measure diffuse support is often debated by researchers, but they used a combination of questions that has been "used in the literature for decades."[247] By contrast, Smart used more unique "combinations of questions" that have been "set forth by previous literature" to determine support for narrow and broad court curbing, noting that the distinction between broad and narrow court curbing is a fairly recent development.[248]

In addition to the different questions, Smart's research omitted the fairness measure that Davis and Benesh found to be a significant indicator of both specific and diffuse support. That is, the results established that shadow docket procedures are less likely to produce a decision that is considered fair, and whether a decision is perceived as fair strongly indicates diffuse support. This suggests that the shadow docket may decrease diffuse support insofar as it is viewed as a less fair procedure for making decisions.[249] Smart did not explicitly measure levels of fairness;

[247] Davis & Benesh, *supra* note 3, at 458.
[248] Smart, *supra* note 31, at 7 n. 13.
[249] *See* Davis and Benesh's Research subsection, *supra* pp. 44-47.

therefore, it is possible that the fairness effect that Davis and Benesh found was conflated into Smart's diffuse support data. Davis and Benesh's results provide evidence to hypothesize that the shadow docket indirectly influences levels of diffuse support through its perception as fair.

Diffuse support measures the reservoir of goodwill that the Court relies on for the acceptance of and compliance with unpopular decisions. Under the procedural justice framework of legitimacy, diffuse support *is* legitimacy and Court must retain a certain level of diffuse support. Under Fallon's three-dimensional model of legitimacy, diffuse support measures sociological legitimacy. For a decision to be perfectly legitimate it must possess all three dimensions of legitimacy. However, because moral, legal, and sociological legitimacy each operates independently, it is possible for a decision to still be morally and legally legitimate while sociologically illegitimate. This would degrade the Court's legitimate. Therefore, diffuse support is also important under the three-dimensional framework although it does not equate directly to overall institutional legitimacy. This means that when the Court's diffuse support is high, the Court's legitimacy is high, adding to the reservoir of goodwill. However, when something leads to lower levels of diffuse support, for example perceptions of unfairness, it decreases the Court's institutional legitimacy and begins to drain the reservoir of goodwill.

Ideological Congruence

Both studies found that ideological congruence is a strong indicator of specific and diffuse support, demonstrating a strong connection between policy outcomes and legitimacy. Although Davis and Benesh found ideological congruence to be a stronger indicator of diffuse support than shadow docket treatment, the Court's recent shadow docket behavior is more distinctly ideological and therefore deviates from both procedural norms and the norm of principled decision-making. Ideological decision-making on the shadow docket

disproportionately produces conservative decisions, meaning that those who adhere to a liberal ideology frequently disagree with the decisions. Diffuse support from those who agree with these decisions is not likely to be affected by shadow docket procedures; however, it is likely to be depressed in groups who disagree with the decision.

The evidence shows that the Court engages in ideological decision-making more frequently on the shadow docket than the merits docket. Currently, liberals are likely to disagree with shadow docket decisions between 70% and 80% of the time.[250] This implicates what is referred to as "legitimacy for losers," which argues that "legitimacy or institutional loyalty provides the rationale for accepting or acquiescing" to an unwanted decision.[251] Legitimacy for losers would suggest that if the Court is deciding in favor of one group, here conservatives, 70% to 80% of the time, diffuse support among the "losing" group (in this instance, those who adhere to a liberal ideology) is likely to be depressed.

Disagreement arises regarding the degree to which diffuse support responds to changes in satisfaction, but evidence suggests that it is less than a one-to-one relationship.[252] Although the relationship is not perfect, that "does not mean [there is] no relationship."[253] The decrease in institutional support will not correspond directly to the number of adverse decisions, it is likely that to some degree a depression of legitimacy will result. In this context, because liberals have been on the "losing" side of shadow docket decisions 70% to 80% of the time for almost a decade, it is likely that this has impacted diffuse support. Therefore, I hypothesize that the

[250] Between OT2016 and OT2021, shadow docket decisions were conservative between 70% and 80% of the time. *See supra* pp. 31; Davis, *supra* note 52, at 120.
[251] Conway & Gagloeva, *supra* note 124, at 714 (quoting James L. Gibson, *Legitimacy Is for Losers: The Interconnections of Institutional Legitimacy, Performance Evaluations, and the Symbols of Judicial Authority, in* MOTIVATING COOPERATION AND COMPLIANCE WITH AUTHORITY: THE ROLE OF INSTITUTIONAL TRUST 81, 83 (Brian H. Bornstein & Alan J. Tompkins eds., 2015)).
[252] *Id.*
[253] *Id.*

negative effect of ideological incongruence on the shadow docket is more significant than that of the merits docket because merits decisions are more ideologically balanced.[254]

Three-Dimensional Legitimacy and the Shadow Docket

The three dimensions of legitimacy according to Fallon are sociological legitimacy, moral legitimacy, and legal legitimacy. Sociological legitimacy is measured by diffuse support; therefore, the research and analysis of diffuse support explained in the preceding sections apply similarly to sociological legitimacy. Moral legitimacy is a normative judgment involving questions like whether the Court *should* be able to decide certain kinds of cases on the shadow docket, or whether lower courts *should* agree to apply shadow docket orders as precedent regardless of what the Supreme Court says. I think there are good arguments for both sides of these questions, however, I will focus on the impacts of the shadow docket on legal legitimacy. However, legal legitimacy is likely affected by shadow docket procedures, and the Court's behavior on the shadow docket.

Legal legitimacy asks whether a decision or rule was made in "accord with or [is] permissible under constitutional and legal norms."[255] Fallon specifies that legal legitimacy relies on the consistent application of principled interpretive methods.[256] Multiple aspects of the modern shadow docket violate the conditions of legal legitimacy, and therefore may lead to less institutional legitimacy for the Court. First, shadow docket orders are often not accompanied by opinions, providing no explanation for the decisions. And second, the increase in ideological decision-making necessarily means that the Court is engaging in less principled decision-making.

[254] *See supra* pp. 32; Davis, *supra* note 52, at 99.
[255] *Id.*
[256] *See supra* at pp. 35-37.

For a decision to be legally legitimate under Fallon's framework, Justices must apply an accepted interpretive method consistently and in good faith. When Justices change their chosen interpretive method or overrule precedent, Fallon argues that they must explain their decision to do so and provide reasons for doing so.[257] Without a requirement for explanation, there is no way to hold the Justices accountable for decisions that are not made in good faith. However, only 4% of shadow docket decisions are accompanied by an opinion.[258] Under the conditions of the traditional non-merits docket, this would not be concerning to legal legitimacy because decisions generally did not result in widespread substantive changes and the creation of precedent.

Fallon's framework assumes that all decisions of the Court are accompanied by an opinion, and the question is whether the Justice explains their deviation from their typical interpretive method, or why they decided to overrule precedent. For Fallon, if a Justice comes to a decision that is incompatible with their traditional method of interpretation and fails to provide a good faith explanation for their deviation, the decision lacks legal legitimacy. However, on the shadow docket, opinions are almost entirely absent. When the Court does provide an opinion in these cases, they are frequently only two or three paragraphs, or a couple of pages long at most. The Justices do not explain their analysis, nor do they take time to examine precedent – they simply grant or deny the order.

As I previously outlined, decisions on the modern shadow docket are increasingly consequential in a number of ways. Decisions made on the shadow docket regularly disrupt the status quo and may affect large populations.[259] Legal legitimacy would demand an opinion and explanation for decisions that substantively alter the status quo and affect millions of people. Not

[257] *See supra* at pp. 35-37.
[258] Davis, *supra* note 52, at 144
[259] *See supra* pp. 18-28.

only do these decisions deviate from the norms of the American legal system, but some deviate from the precedent the Supreme Court itself has set. Without an explanation of these deviations, these decisions lack legal legitimacy and potentially display judicial abuse.[260]

The shadow docket provides the Justices with a mechanism to make decisions that not only omit an opinion, but also do not identify how the Court's votes fell unless there is a signed dissent. The shadow docket's opacity seems to be incompatible with the requirements of legal legitimacy. Further, the shadow docket's propensity to produce decisions that fall along ideological divisions suggests that the Court is engaging in ideological decision-making. Not only does ideological decision-making depress sociological legitimacy, but it is not an acceptable interpretive method in the American judicial system.

Given the conclusions of Davis and Benesh's and Smart's studies, it is likely that sociological legitimacy is negatively affected by the shadow docket. Additionally, shadow docket procedures do not provide safeguards against abuse, and its opacity runs counter to the concept of legal legitimacy. Decisions that consistently fall along ideological lines on the shadow docket suggest the possibility that the Court is engaging in purely ideological decision-making on the shadow docket, and without an opinion, the public is left to guess the Court's reasoning. The shadow docket has the ability to negatively impact both sociological legitimacy and legal legitimacy.

[260] *See* Fallon, *supra* note 155, at 12-13.

Conclusion

The shadow docket is integral to how the Supreme Court operates today. In the past fifteen years, the non-merits docket has gone from being an inconsequential procedural mechanism to regularly making decisions that affect the lives of many. From abortion rights to immigration law, the substantive impacts of the modern shadow docket are broad. Additionally, the Court has decided cases in ways that contradict settled precedent and apply different standards without explanation. Further, the shadow docket regularly produces decisions that are ideologically divided, almost always leaving the liberal justices in the dissent. The shadow docket's lack of transparency leaves the public in the dark about how these decisions are made and why.

Evidence shows that these procedures are viewed as less fair, and shadow docket decisions are afforded less support by the general public. Given the findings of Davis, Benesh and Smart, it is clear that the shadow docket has the ability to depress the Court's legitimacy. Further research needs to be done to determine the extent of the shadow docket's role in the current "legitimacy crisis;" however, we now know that people view shadow docket decisions as less fair, and this leads to lower levels of legitimacy. However, these effects were only seen when people were informed about the procedures of the shadow docket. The key element is that it only applied for those who *knew* of the shadow docket.

Although there has been heightened media coverage of the shadow docket, my experience talking with friends and family has proven that most people still do not know what the shadow docket is, or what decisions have been made on it. Without empirical data on this, I cannot draw any conclusions, but I would guess that only a fraction of Americans know of the shadow docket. If my hypothesis is correct, I would argue that the shadow docket's effect on the

Court's institutional legitimacy is likely extremely modest. However, with continued media coverage and discussion about the shadow docket, more and more people will learn about it. This could lead to much more significant reductions of the Supreme Court's legitimacy.

To avoid the future deterioration of the Court's legitimacy, reforms should be considered to address the aspects of the shadow docket that are most troubling. For example, requiring the Court to issue a short form signed opinion for every order on the shadow docket would address the opacity of the procedure and provide accountability for ideological decision-making. Additionally, reinstating oral argument for emergency relief applications could help reestablish fairness in the procedure. Now is the time to address these issues through reform in order to prevent further reductions in the legitimacy of the Court due to the shadow docket.

Finally, it is important to note that while diffuse support is the most easily quantified datapoint on Court legitimacy, other aspects of legitimacy that are less easily quantified deserve attention moving forward. Specifically, in order to assess exactly where the Court's legitimacy stands, further studies should be conducted concerning how likely people are to risk noncompliance with the Court's decisions. Looking beyond the attitudes of the general public, it is important to assess the willingness to be noncompliant from political and legal elites. If powerful political and legal elites are willing to defy the Court's decisions, it is likely that the Court's legitimacy has diminished to a level that provides an imbalance in the federal government and diminishes the checks and balances of the three branches.