

2023

Procedural Justice and the Shadow Docket

Taraleigh Davis

Sara C. Benesh

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/elj>



Part of the [Supreme Court of the United States Commons](#)

Recommended Citation

Taraleigh Davis & Sara C. Benesh, *Procedural Justice and the Shadow Docket*, 73 Emory L. J. 443 (2023).
Available at: <https://scholarlycommons.law.emory.edu/elj/vol73/iss2/4>

This Article is brought to you for free and open access by the Emory Law Journal at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory Law Journal by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

PROCEDURAL JUSTICE AND THE SHADOW DOCKET

*Taraleigh Davis**

*Sara C. Benesh***

ABSTRACT

This Article critically examines the role of procedural justice in shaping public perceptions of the U.S. Supreme Court's legitimacy, particularly in light of recent Court actions, including the leak of a major opinion and the increasing, potentially politicized, use of its shadow docket. Drawing from the procedural justice model—which posits that legitimacy is primarily founded on the decision-making processes and principled judgments of the Court—this Article investigates whether the decline in confidence experienced by the Court can be attributed, at least in part, to its shadow docket.

*Utilizing an experimental survey conducted over three critical time points—coinciding with the leak of the *Dobbs v. Jackson Women's Health Organization* decision, its subsequent announcement, and a period of procedural calm—this Article measures the public's reaction to various procedural scenarios, including the usage of the emergency docket. Results indicate that while the use of the emergency docket doesn't substantially erode the Court's diffuse support, it does impact how much respondents approve of how well the Court is doing its job, significantly so when filtered through policy agreement. This Article further finds that the Court's *Dobbs* decision strongly influenced perceptions, particularly among those aware of the leak or the opinion, with disagreement causing more pronounced and consistent negative effects than the partial positive effects from agreement.*

These findings underscore the impact of the Court's own behaviors on its perceived authority, suggesting that the justices' actions, particularly their adherence to fair and transparent procedures, can bolster the Court's legitimacy. As such, this Article highlights the urgent need for the Supreme Court to embrace resolving legal questions via due process in order to reaffirm its critical role in our democracy and regain public trust.

* Dr. Taraleigh Davis Assistant Professor of Public Law & American Politics Bradley University
tdavis4@bradley.edu

** Dr. Sarah Benesh Associate Professor and Chair of Political Science, University Wisconsin-Milwaukee

TABLE OF CONTENTS

INTRODUCTION	444
I. OUR STUDY	448
A. <i>Procedural Justice and Its Skeptics</i>	449
B. <i>Expectations About the Shadow Docket</i>	454
C. <i>The Leak and Dobbs v. Jackson Women’s Health</i> Organization	455
II. DATA AND ANALYSIS	456
A. <i>Research Design</i>	456
B. <i>Bivariate Results</i>	461
C. <i>Multivariate Results</i>	463
III. DISCUSSION	467
CONCLUSION	468

INTRODUCTION

“For a Court that has long tied its own legitimacy to its ability to provide principled justifications for its decisions, the rise of the shadow docket has quickly become the dominant symptom of a full-blown institutional crisis”¹

Partisan use of the shadow docket “raises serious questions about the public’s perception of the Supreme Court and the transparency of its decision-making.”² The “increasing media attention surrounding the matter reflects greater public awareness of, and likely heightened concern over, the shifting use of the shadow docket by the Supreme Court.”³

“[W]hen the justices increasingly render decisions affecting more and more Americans in a manner that precipitously resolves constitutional or statutory questions with little to no reasoning given, they feed the perception that their rulings are predicated on political ideology rather than judicial principles.”⁴

¹ STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* xiv (2023).

² 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/>.

³ *Id.*

⁴ Harry Isaiah Black & Alicia Bannon, *The Supreme Court ‘Shadow Docket’*, BRENNAN CTR. FOR JUST. (July 19, 2022), <https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket>.

The United States Supreme Court is getting a lot of attention these days for a set of potentially problematic reasons, focused in large part on its procedures: first, an (almost) unprecedented leak⁵; next, a wildly controversial decision overturning a fifty-year-old cultural landmark⁶; then, a set of questions about conflicts of interest born of the generosity of “dear friends”⁷; and now, the publication of a book on the “shadow docket” that suggests the Court’s process is being used as a way to implement a far-right agenda, without the usual accoutrements of deliberate decision-making processes.⁸ All eyes are on the Court today in a way that is perhaps unmatched since the heyday of the Warren Court.⁹ And much of the discussion surrounding the Court is focused on the extent to which it is deciding cases fairly (i.e., without undue influence of special interests; using the procedures of careful deliberation; independently from public perceptions; in its characteristic secrecy; and based on precedent and legal interpretation).¹⁰

We know from extensive historical scholarship that procedures have the potential to affect public perceptions of institutions. Professor Tom R. Tyler and his colleagues argue that at least part of the historically high levels of support for, trust in, and attachment to the Court is driven by people’s perceptions of the fairness of the Court’s procedures.¹¹ Subsequent studies agree, focusing on the

⁵ Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 5, 2022, 8:32 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>.

⁶ See *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2240 (2022). See generally *Roe v. Wade*, 410 U.S. 113 (1973).

⁷ Liza Batkin, *Clarence Thomas’s Friend of the Court*, NEW YORKER (Apr. 21, 2023), <https://www.newyorker.com/news/our-columnists/clarence-thomass-friend-of-the-court>.

⁸ See VLADECK, *supra* note 1, at xiii.

⁹ See A. E. Dick Howard, *The Changing Face of the Supreme Court*, 101 VA. L. REV. 231, 233 (2015).

¹⁰ See James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 L. & SOC’Y REV. 469, 471 (1989); *Promote Fair Courts*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/strengthen-our-courts/promote-fair-courts> (last visited Oct. 6, 2023).

¹¹ Tom R. Tyler, *The Role of Perceived Injustice in Defendants’ Evaluations of their Courtroom Experience*, 18 L. & SOC’Y REV. 51, 51–52 (1984); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 7 (2006); Tom R. Tyler & Kenneth Rasinski, *Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 L. & SOC’Y REV. 621, 621 (1991); Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 710 (1994); see also Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, *supra* note 10; James L. Gibson, *Institutional Legitimacy, Procedural Justice, and Compliance with Supreme Court Decisions: A Question of Causality*, 25 L. & SOC’Y REV. 631, 631 (1991); Jeffery J. Mondak, *Institutional Legitimacy and Procedural Justice: Reexamining the Question of Causality*, 27 L. & SOC’Y REV. 599, 600 (1993).

deleterious effects perceptions of politicization have on public support for the Supreme Court.¹²

And the Court depends on its legitimacy for its power; indeed, the Court has very little implementation authority beyond it.¹³ The Court, then, must concern itself with how it is perceived among the public.¹⁴ While the Court is generally and historically our most-liked institution,¹⁵ support for the Court is at a historic low.¹⁶ Reasons for the Court's historical esteem include the secrecy of its deliberation,¹⁷ its symbolism and our socialization which create a reservoir of goodwill,¹⁸ its lack of politicization,¹⁹ its penchant to not stray far from public opinion,²⁰ and its perception of difference from other political institutions.²¹ Much of the historical literature argues that the wells of legitimacy are deep and stable.²² Perhaps the Court's recent procedural actions are to blame for its loss of legitimacy.

Of course, if people do not know how the Court operates, its process is surely unlikely to matter to perceptions of the Court. Historically, scholars lamented the general public's lack of knowledge about the Court and the capacity of the

¹² E.g., James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 L. & SOC'Y REV. 195, 200 (2011).

¹³ Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 635 (1992).

¹⁴ *Id.*

¹⁵ See JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS 31 (James H. Kuklinski & Robert S. Wyer, Jr. eds., 1995); Tony Mauro, *Lifting the Veil: Justice Blackmun's Papers and the Public Perception of the Supreme Court*, 70 MO. L. REV. 1037, 1038 (2005); Tyler & Mitchell, *supra* note 11 at 722; Robert H. Durr et al., *Ideological Divergence and Public Support for the Supreme Court*, 44 AM. J. POL. SCI. 768, 769 (2000); JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS 3–4 (2009) (arguing how public perception of the Supreme Court's legitimacy rests upon the theory of positivity bias, fueled from the public's historical loyalty and support for the Supreme Court); see also James L. Gibson & Michael J. Nelson, *Reconsidering Positivity Theory: What Roles do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?*, 14 J. EMPIRICAL LEGAL STUD. 592, 595 (2017).

¹⁶ Domenico Montanaro, *There's a Toxic Brew of Mistrust Toward U.S. Institutions. It's Got Real Consequences*, NPR (May 3, 2023, 5:01 AM), <https://www.npr.org/2023/05/03/1173382045/americans-arent-thrilled-with-the-government-the-supreme-court-is-just-one-examp>; Calvin Woodward & Hannah Fingerhut, *Supreme Court Leak Shakes Trust in One More American Pillar*, AP NEWS (May 7, 2022, 9:53 AM), <https://apnews.com/article/abortion-us-supreme-court-religion-public-opinion-congress-b4df45938f55a5ae6e8aacbe5e36059f>.

¹⁷ HIBBING & THEISS-MORSE, *supra* note 15, at 148–49.

¹⁸ GIBSON & CALDEIRA, *supra* note 15, at 3.

¹⁹ See *id.* at 2.

²⁰ See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. OF PUB. L. 725 (1957), reprinted in 50 EMORY L.J. 563, 570 (2001).

²¹ HIBBING & THEISS-MORSE, *supra* note 15, at 89.

²² Cf. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, *supra* note 11, at 632.

media to make up for it with solid Court coverages.²³ But, as Professors James L. Gibson and Gregory A. Caldeira showed, the public may actually know more than we give it credit for,²⁴ especially when a case comes from a particular locality²⁵ or when the Court is particularly salient.²⁶ As Professor Stephen Vladeck noted, the Court is currently quite salient, and “procedural behavior [is] a main character in the story.”²⁷ The *New York Times*, the *Washington Post*, the *Chicago Tribune*, and the *Wall Street Journal* are all talking about the Court’s “shadow docket,” and searches for “shadow docket” on Google increased dramatically over the past couple of years.²⁸

If the Court relies on procedures for legitimacy, and if it is particularly salient now due to its actions, including the leak of a major opinion and increasing and potentially politicized use of its shadow docket, then Vladeck could be right “that it is the justices’ shadow docket behavior itself that is damaging the Court and contributing to public erosion in its perceived legitimacy”²⁹ and that the decline in confidence currently experienced by the Court is at least partially due to the shadow docket.³⁰ We seek to test that contention here. Through our experimental survey conducted over three time points that hold procedural significance (and drew increased attention to the Court), we test the effect of the Court’s increasingly commented-upon procedural behavior, both in the shadow docket and more generally. In Part I, we start by considering the extent to which procedures ought to matter and the extent to which the social science bears out a relationship between procedures and legitimacy. In Part II we then detail our survey design and discuss our findings. They are admittedly complicated, but we conclude, after careful review, that the use of the emergency docket, while not wildly damaging to the Court’s diffuse support, does influence the extent to which respondents approve of the Court. That influence, though, is filtered through policy agreement. We also find that the Court’s *Dobbs v. Jackson Women’s Health Organization* decision strongly influenced Court perceptions for those who heard of the leak or the opinion and that disagreement with the decision had a larger and more consistent negative impact than the partial positive impact agreement had on support.

²³ See Rorie L. Spill & Zoe M. Oxley, *Philosopher Kings or Political Actors? How the Media Portray the Supreme Court*, 87 JUDICATURE 22, 29 (2003).

²⁴ GIBSON & CALDEIRA, *supra* note 15, at 18.

²⁵ Valerie J. Hoekstra, *The Supreme Court and Local Public Opinion*, 94 AM. POL. SCI. REV. 89, 89 (2000).

²⁶ GIBSON & CALDEIRA, *supra* note 15, at 13.

²⁷ VLADECK, *supra* note 1, at 239.

²⁸ Taraleigh Davis, *The Supreme Court’s Third Shift: Policy, Precedent, and Public Opinion via the Shadow Docket 2* (May 2023) (Ph.D. dissertation, University of Wisconsin-Milwaukee) (on file with author).

²⁹ VLADECK, *supra* note 1, at 244.

³⁰ *Id.*

In Part III, we contemplate the implications of our results for the Court's perceived legitimacy. In our conclusion, we emphasize the crucial role that fair and transparent procedures play in maintaining the Court's legitimacy.

I. OUR STUDY

The Court's current salience, driven in part by its seemingly increased employ of its emergency docket³¹ to make consequential decisions, makes now a good time to look at the competing explanations offered by the political science literature on the drivers of legitimacy and the extent to which the trappings of judicial decision-making processes (or lack thereof) might drive such legitimacy.

To do so, we employ a survey experiment focused on the Court's decision-making procedures. Using two different vignettes (and a true control), we offer treated respondents differential details of the process used by the Court to decide one of two cases (one on immigration, one on the death penalty) resolved in one of two ways (one liberal, one conservative). In the first vignette, the Court employs its usual decision-making process where a lower court makes a decision, the losing litigant makes a request for certiorari, and the Court grants the writ and asks for lengthy briefs from the attorneys for each party. Such briefs are filed, including responses; oral argument is held with rigorous questioning by the justices of both sides' arguments; and, eventually, on a scheduled opinion-release date, a written, signed opinion is handed down accompanied by separate opinions of justices who disagree with the resolution and/or reasoning.

The second vignette describes a case decided via the Court's emergency docket process, exemplified by an emergency petition made to a single justice before or during lower court consideration of the case and referred to the Court, dealt with in the middle of the night after limited briefing and announced immediately, without oral argument, unaccompanied by reasoning or even an indication of how many or which justices agreed with the disposition. These vignettes, emblematic of how the Court is actually doing its work, are also perfect representations of the difference between a process cultivated to be procedurally fair and one used for expediency.³² Comparing responses from people who were shown either of these interventions to each other and to our true control, we can ascertain whether procedures matter to legitimacy in a

³¹ We use "emergency docket" and "shadow docket" interchangeably here, mindful that there is contention over naming.

³² VLADECK, *supra* note 1, at xiii, 12.

concrete and highly realistic way. Through this comparison, we can respond to some of the main criticisms of the Court's shadowy process—that it erodes confidence in the already-beleaguered institution.³³

In addition, we happened to capture some very interesting states of the world while our survey was in the field. Our first survey was sent out the day of the leak of the *Dobbs* decision³⁴ Our second hit the field just as the Court announced its decision in *Dobbs*.³⁵ And our final survey was fielded at the end of August 2022, when things cooled down Court-wise. The timing of our survey fielding allows us to additionally consider the influence of another salient procedural action by the Court—a leak and then a huge alteration of precedent³⁶—on perceptions of a Court hypothetically engaged with meaningful, but not terribly salient, cases decided either in their usual procedural way or via the emergency docket.

A. *Procedural Justice and Its Skeptics*

This section explores the procedural justice model, scrutinizing its claim that the legitimacy of institutions like the Supreme Court is largely rooted in their perceived procedural fairness.³⁷ We analyze critiques about the Court's increasing politicization and examine counterarguments prioritizing ideology and policy congruence. The procedural justice model suggests that legitimacy is primarily procedurally based.³⁸ The public pays heed to the decision-making processes the Court employs and the extent to which the justices make principled decisions, rather than focusing only the perceived fairness or desirability of the outcome.³⁹ Procedural justice explanations of legitimacy, then, focus on how the Court goes about what it does and not on what the Court actually does.⁴⁰ Given the extent to which the Court's power rests on its authority, fair procedures, and

³³ *Cf. id.* at 18.

³⁴ Gerstein & Ward, *supra* note 5.

³⁵ *See Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

³⁶ *See id.* at 2242; Gerstein & Ward, *supra* note 5.

³⁷ *See Tyler & Rasinski*, *supra* note 11, at 622.

³⁸ Tyler & Mitchell, *supra* note 11, 736–38.

³⁹ *See id.* at 736.

⁴⁰ *See, e.g., Tyler & Rasinski*, *supra* note 11; Vanessa A. Baird & Amy Gangl, *Shattering the Myth of Legality: The Impact of the Media's Framing of Supreme Court Procedures on Perceptions of Fairness*, 27 POL. PSYCH. 597, 598 (2006); Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, *supra* note 10, at 471; E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 67 (Melvin J. Lerner ed., 1988); Denise Meyerson et al., *Introduction: Procedural Justice in Law, Psychology, and Philosophy*, in *PROCEDURAL JUSTICE AND RELATIONAL THEORY: EMPIRICAL, PHILOSOPHICAL, AND LEGAL PERSPECTIVES* 1 (Denise Meyerson et al. eds., 2021).

neutral decisions will lead to increased compliance.⁴¹ Legitimate institutions are empowered to make consequential decisions⁴² and, Professors Tom R. Tyler and Gregory Mitchell found a “consistent influence of procedural justice on judgements of legitimacy, empowerment, and even obligation.”⁴³ “[T]he legitimacy of the U.S. Supreme Court is based on the belief that it makes decisions in fair ways, not on agreement with its decisions.”⁴⁴

Problematic to this perspective, then, is rampant coverage of and discussion of the Court in political terms.⁴⁵ Many have noticed that “politics drive today’s news coverage of the Court”⁴⁶ and framing Court proceedings as fair or unfair could influence perceptions of the Court’s procedure.⁴⁷ While not all “believe” a non-political accounting of Supreme Court decision-making, there is evidence that some “fictive idea of principled legality”⁴⁸ or myth, or at least, ideal of principled decision-making, is an important source of Supreme Court legitimacy.⁴⁹ Indeed, Professors Vanessa A. Baird and Amy Gangl showed that were media coverage to focus only on political bargaining and compromise—political behaviors—when explaining Supreme Court decisions, the public would lose faith in the Court.⁵⁰ When coverage suggests, though, that legal factors dominate decision-making, the public views the Court more favorably.⁵¹ Trust is, according to Tyler, linked to motives.⁵² And, as Professor Benjamin Woodson found, perceptions of ideological motives activate policy preferences while perceptions of legal or principled processes bypass them.⁵³

⁴¹ See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 6 (Princeton Univ. Press 2006); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT’L J. PSYCH. 117, 119 (2000) [hereinafter *Outcome and Procedure*]; Tyler & Mitchell, *supra* note 11, at 723; Tyler & Rasinski, *supra* note 11, at 625–26; Mark D. Ramirez, *Procedural Perceptions and Support for the U.S. Supreme Court*, 29 POL. PSYCH. 675, 676–77, 692 (2008).

⁴² See Tyler & Mitchell, *supra* note 11, at 708; Bryanna Fox et al., *Are the Effects of Legitimacy and Its Components Invariant? Operationalization and the Generality of Sunshine and Tyler’s Empowerment Hypothesis*, 58 J. CRIME & DELINQ. 3, 7 (2020).

⁴³ Tyler & Mitchell, *supra* note 11, at 770.

⁴⁴ Tyler & Rasinski, *supra* note 11, at 626–27.

⁴⁵ See Ramirez, *supra* note 41, at 677, 692.

⁴⁶ E.g., Howard, *supra* note 9, at 283.

⁴⁷ Ramirez, *supra* note 41, at 678.

⁴⁸ Baird & Gangl, *supra* note 40, at 607 (citing Richard A. Brisbin, *Slaying the Dragon: Segal, Spaeth and the Function of Law in Supreme Court Decision Making*, 40 AM. J. POL. SCI. 1004, 1015 (1996)).

⁴⁹ See Ronald J. Fiscus, *Of Constitutions & Constitutional Interpretation*, 24 POLITY 313, 316 (1991).

⁵⁰ See Baird & Gangl, *supra* note 40, at 607.

⁵¹ See *id.*

⁵² See Tyler, *Outcome and Procedure*, *supra* note 41, at 122.

⁵³ See Benjamin Woodson, *The Dynamics of Legitimacy Change for the U.S. Supreme Court*, 39 JUST. SYS. J. 75, 75–76 (2018).

Recent scholarship in political science questions this relationship, though.⁵⁴ In their influential book, Professors Brandon L. Bartels and Christopher D. Johnston took on both the scholarly consensus over the enduring and deep-seated nature of support for the Court (especially that labeled “diffuse” by David Easton, or Caldeira and Gibson, or others) and its independence from policy evaluations, as well as the idea that the Court’s procedures play a role in public perceptions of the Court.⁵⁵ Instead, they argued, policy preferences drive it all, from support for the Court to perceptions that the procedures employed in Supreme Court decision-making are fair, and so there is little the Court can do to influence the public’s views of it.⁵⁶ This is in direct contrast with Tyler’s work, discussed above.

In their book, *Curbing the Court: Why the Public Constrains Judicial Independence*, Bartels and Johnston tested for procedural influences on attitudes toward narrow and broad Court curbing,⁵⁷ and found, in most relevant part, that respondents are not influenced by the processes they see the Court use.⁵⁸ Rather, they are “primarily motivated by policy, partisan, and ideological concerns.”⁵⁹ Indeed, Bartels and Johnston presented evidence that they interpret as showing that attachment to procedural justice concerns is nothing more than motivated reasoning: Those who agree with Court decisions view them as being fairly made and those who disagree with them, seeking to work against them, use procedures as an excuse.⁶⁰ In other words, in Bartels and Johnston’s story, policy preferences, and procedural fairness are endogenous and this is even more true for the politically-engaged.⁶¹

⁵⁴ See BRANDON L. BARTELS & CHRISTOPHER D. JOHNSTON, *CURBING THE COURT: WHY THE PUBLIC CONSTRAINS JUDICIAL INDEPENDENCE* 20–21 (2020).

⁵⁵ See *id.* at 20–21 (discussing DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 273 (1965); and Gregory A. Caldeira & James L. Gibson, *Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 636–37 (1992)).

⁵⁶ *Id.* at 267–68, 273.

⁵⁷ Bartels and Johnston made the case that Court-curbing rather than approval or legitimacy is what matters most to judicial independence, and so opinions over narrow and broad court-curbing comprise their dependent variables. See *id.* at 21–23. Narrow curbing is the extent to which respondents will accept decisions, comply with decisions, obey court rulings, and subscribe to the Court as the final decision maker. See *id.* at 22 (describing “narrowly targeted Court-curbing” as “less drastic, more circumscribed attacks, such as noncompliance or legislative overrides of individual decisions”). Broad curbing includes most of the measures of legitimacy employed by Gibson and progeny, including that we ought to do away with the Court if it continues to make decisions people disagree with, that Congress ought to curtail the Court’s ability to decide certain issues, that the Court has too much power, that the Court be made less independent, and that we ought to remove justices who make bad decisions. See *id.* at 72.

⁵⁸ See *id.* at 267–68.

⁵⁹ See *id.* at 273.

⁶⁰ See *id.* at 237–38.

⁶¹ *Id.*

Other scholars disagree with the procedural justice model for different reasons.⁶² Professors Dino P. Christenson and David M. Glick, who focused on reactions to the Court's decision in *NFIB v. Sebelius*⁶³ with a high-powered panel study, found that ideological agreement matters to changes in legitimacy surrounding a decision, but that the extent to which the Court decides using non-legalistic concerns also does.⁶⁴ Using commentary around Justice Roberts's "flip" in *Sebelius* as an experimental treatment, Christenson and Glick found that updated ideological distance affects legitimacy for the Court, as does exposure to the Court as political and beliefs that the Court makes its decisions in a legalistic way exacerbated the effect of ideological updating.⁶⁵ Hence, they confirmed that ideological agreement with Court decisions can matter to people's reaction to Court decisions, but that procedures matter also.⁶⁶

Professors James L. Gibson and Michael J. Nelson considered these same influences—ideology and legalistic decision-making processes—and found that process does indeed matter.⁶⁷ In their study, they considered three potential impacts on support for the Courts: subscription to legal realism, which suggests acknowledgement that the Court makes decisions based in part on their ideology; perceptions that the Court is politicized; and ideological disagreement with the Court.⁶⁸ They hypothesized that perceptions about how the Court makes decisions will condition the effects of politicization and ideological disagreement on legitimacy with those who subscribe to legal realism being affected by ideological disagreement and those who perceive the court to be politicized to be least supportive of the Court.⁶⁹ They found that ideological disagreement has only a small effect on legitimacy and only for legal realists, and that perceived politicization has a large and negative effect on legitimacy for all (though it is strongest for those who expect Court decision-making to be drive by legal influences).⁷⁰ Again, then, when people see the Court as a regular political institution with political processes, they are less supportive.⁷¹

⁶² See, e.g., Gibson & Nelson, *supra* note 15, at 612–13; Dino P. Christenson & David M. Glick, *Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy*, 59 AM. J. POL. SCI. 403, 415 (2015); Woodson, *supra* note 53, at 90–91.

⁶³ 567 U.S. 519, 588 (2012) (holding that the Affordable Care Act is constitutional in part and unconstitutional in part).

⁶⁴ Christenson & Glick, *supra* note 62, at 403–04, 415–16.

⁶⁵ *Id.* at 404, 415.

⁶⁶ *Id.* at 412–15.

⁶⁷ Gibson & Nelson, *supra* note 15, at 594.

⁶⁸ *Id.* at 595.

⁶⁹ *Id.* at 597–99.

⁷⁰ *Id.* at 612.

⁷¹ See *id.*

Finally, Woodson offered support for procedures even with consideration of ideological disagreement.⁷² In his study, he differentiated among groups of respondents with various procedural perceptions of Court decision-making: those who viewed the Court as using ideologically based decision-making, those who view the Court as using principled or legalistic processes, and those who viewed the Court to be affected by public opinion in its decision-making.⁷³ He found that “a person’s perception of the Court’s decision-making process determines the form of the relationship between policy attitudes and legitimacy change.”⁷⁴ In other words, people evaluated the Court using the same criteria they perceive the Court to use.⁷⁵ This suggests that, to the degree that people perceive the Court as playing politics (as Gibson and Nelson, and Christenson and Glick found), they will use a political frame to evaluate the Court. Using the same panel study as Christenson and Glick, Woodson found that those expecting ideological decisions become more supportive of a Court making liked decisions and less supportive of a Court making disliked decisions.⁷⁶ Those who see the Court’s decision-making as principled always become more supportive of the Court after the Court’s decision.⁷⁷ And those who see public opinion affecting the Court exhibit no change in their perception of the Court after a particular decision.⁷⁸ Woodson’s conclusion, then, was that while, in the aggregate, legitimacy levels may appear to be unaffected by decisions, that obscures an interesting relationship between expectations people have about how the Court makes its decisions. Perceptions of decision-making processes, then, affect legitimacy.

While there is surely a debate that will continue to rage and become more and more specific and focused, it is clear that the possibility that perceptions about process influence people’s views of the Supreme Court is real. We focus on two potential procedural perceptions that could influence the Court’s legitimacy: that the Court is using unfair procedures on its shadow docket, and

⁷² See Woodson, *supra* note 53, at 76.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *See id.*

⁷⁶ *Id.* at 89.

⁷⁷ *Id.*

⁷⁸ *Id.*

that the Court is politicized as evidence by its leak⁷⁹ and its decision to overrule *Roe v. Wade*⁸⁰ in *Dobbs*.⁸¹

B. *Expectations About the Shadow Docket*

The Court's apparent increase in consequential use of its shadow docket is thought by many commentators to portend the demise of its most-liked-institution status. Bartels and Johnston would perhaps argue (and Justice Alito would surely agree)⁸² that those complaining about the Court's increasing penchant to decide consequential cases via its emergency docket are really just complaining about the policy outcomes of those decisions.⁸³ While others, including Vladeck, insist that the Court's conscious choice to make policy-consequential decisions via its emergency docket and therefore without the usual procedural fairness employed by the Supreme Court, matter to the legitimacy of the decision maker.⁸⁴ As the opening quote of Vladeck's book suggests, in fact, Vladeck saw this movement toward the shadow docket as inextricably linked with the oft-noted decrease in the Court's legitimacy.⁸⁵ While his account of the Court's decisions "in the shadows" was not an empirical one, he made the case that, perhaps due to various characteristics of the Trump presidency and the COVID pandemic combined with the Supreme Court's new conservative supermajority, the Court appears to have changed the ways in which it grants or vacates stays of lower court decisions in a way that consistently favors the interests of the Republican party over the Democratic party.⁸⁶ Indeed, it has done so in novel ways that have also demanded lower courts to consider such stays (most often unaccompanied by any reasons for them) to be precedential.⁸⁷ Given the procedural justice literature discussed above and Vladeck's rightful claim that "procedural regularity and principled justifications are a central part of what makes the Supreme Court a court, rather than just another font of partisan

⁷⁹ See *Read Justice Alito's Initial Draft Abortion Opinion Which Would Overturn Roe v. Wade*, POLITICO (May 5, 2022), <https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504>.

⁸⁰ 410 U.S. 113 (1973).

⁸¹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022) (overturning *Roe v. Wade*).

⁸² There is no recorded video or transcript from Justice Alito's speech, but Vladeck reports on it using an AI-generated transcript of the live streamed event. VLADECK, *supra* note 1, at xiii, 287.

⁸³ See BARTELS & JOHNSTON, *supra* note 54, at 253.

⁸⁴ E.g., VLADECK, *supra* note 1, at 274, 277.

⁸⁵ *Id.* at ix, 277.

⁸⁶ See *id.* at 129–96.

⁸⁷ *Id.* at 51, 247–48.

political power,” concern over the influence of the shadow docket on legitimacy seems reasonable.⁸⁸

C. *The Leak and Dobbs v. Jackson Women’s Health Organization*

A final piece of our analysis considers the extent to which awareness of the leak of the *Dobbs* draft and/or the decision in the *Dobbs* case similarly affects Supreme Court legitimacy. While we are mostly interested in our experimental context, we cannot ignore the timing of our surveys. And given the procedural justice literature above, it seems reasonable to expect that a huge breach of Supreme Court norms (the leak)⁸⁹ along with a major alteration of precedent (*Dobbs* overturning of *Roe v. Wade*)⁹⁰ may additionally impact views of the Court. While there is not a lot of social science evidence for the influence of precedent alteration on legitimacy, it is certainly of theoretical concern to the Court. Powell, in 1990, used a lecture to expound upon his view of the importance of *stare decisis* to the rule of law, to the exercise of “the *judicial power*” and, hence, to legitimacy.⁹¹ And in *Planned Parenthood v. Casey*, the joint opinion spent more than four pages discussing the importance of *stare decisis* to the continued legitimacy of the Court, highlighting the importance of principled decision-making in the process.⁹² Reviewing the *Casey* decision, Vanessa Laird argued that, in the joint opinion, Justice O’Connor, Justice Kennedy, and Justice Souter “stake[d] a claim to institutional survival” by making the case for the impact of *stare decisis* on legitimacy.⁹³ Indeed, they suggested that overruling *Roe* would do “profound and unnecessary damage to the Court’s legitimacy.”⁹⁴

Decisions themselves (even those that do or choose not to overrule precedents) also have the potential to influence public regard for the Court, though social scientists have reported mixed results from studies examining the consequences of a single decision on Court legitimacy. *Bush v. Gore*,⁹⁵ for

⁸⁸ *Id.* at 249.

⁸⁹ See Read Justice Alito’s Initial Draft Abortion Opinion Which Would Overturn *Roe v. Wade*, POLITICO (May 2, 2022), <https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504>.

⁹⁰ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022).

⁹¹ Lewis F. Powell Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 287 (1990) (emphasis in original).

⁹² 505 U.S. 833, 865–69 (1992); Tyler & Mitchell, *supra* note 11, at 708.

⁹³ Vanessa Laird, *Planned Parenthood v. Casey: The Role of Stare Decisis*, 57 MOD. L. REV. LTD. 461, 467 (1994).

⁹⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992).

⁹⁵ 531 U.S. 98 (2000).

example, did not appear to influence the Court's legitimacy,⁹⁶ while many of the decisions Professors James W. Stoutenborough and Donald P. Haider-Markel studied (including *Bowers v. Hardwick*,⁹⁷ *Roe v. Wade*,⁹⁸ and *Lawrence v. Texas*⁹⁹) did.¹⁰⁰ While the impact of *Dobbs* is a question we largely leave to another day, we did test for awareness of and agreement with a major decision and the leak thereof in our model of legitimacy of the Court during that contentious summer.

II. DATA AND ANALYSIS

Moving into the empirical heart of our study, we apply a rigorous methodological approach to interrogate how procedural variations might shape public perceptions of the Supreme Court during a time of great salience. Our approach entails the use of a unique experimental design, enabling us to systematically explore the nuanced interplay between procedural treatments, policy focus, and ideological direction.

A. Research Design

We employ a 2x2x2 between-groups experimental design featuring a total of eight press releases and a true control group. The experiment varies the procedural treatment (full merits v. emergency docket) of a case in a particular policy (immigration or death penalty) that is decided in a liberal or conservative direction.¹⁰¹

⁹⁶ Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of Supreme Court*, 85 JUDICATURE 32, 38 (2001).

⁹⁷ 478 U.S. 186 (1986).

⁹⁸ 410 U.S. 113 (1973).

⁹⁹ 539 U.S. 558 (2003).

¹⁰⁰ James W. Stoutenborough & Donald P. Haider-Markel, *Public Confidence in the U.S. Supreme Court: A New Look at the Impact of Court Decisions*, 45 SOC. SCI. J. 28, 32 (2008) (listing *Bowers*, *Roe*, and *Lawrence* as cases that appeared to influence the Court's legitimacy).

¹⁰¹ The selection of immigration and death penalty as the focal policy issues for our press release treatments was a careful, strategic decision. These topics were chosen due to their divisiveness in contemporary political discourse, which allows for clear liberal and conservative decisions that correspond with individuals' ideological preferences. Additionally, by not selecting the topic of abortion—a highly salient issue—we prevented potential priming effects that could impact the responses to our post-treatment survey questions about the leak of the *Dobbs* opinion and awareness of the *Dobbs* decision.

We also considered participants' pre-treatment policy preferences in our design, employing questions about support for the death penalty and perspectives on immigration prior to administering treatment. This allowed us to account for existing policy attitudes that could potentially influence reactions to the experimental press releases and the subsequent assessment of the Court's legitimacy.

It is crucial to acknowledge that individuals' perceptions on the policy topics themselves could indeed influence their understanding of procedural justice and, in turn, judicial legitimacy. However, our study design

The survey was administered online¹⁰² and had a median completion time of 15 minutes. Participants were asked about their political attitudes and policy preferences and then randomly assigned to either a true control group or one of eight press releases. The vignettes' contents were hypotheticals, not based on real cases, and were presented as news stories to promote external validity.¹⁰³

In the four “regular procedure” press release treatments (two for each issue area, one liberal, one conservative), the report highlighted the usual procedure the Court followed on its merits docket. The four “shadow docket procedure” treatments (again, two issues, two ideological directions) highlighted emergency docket procedures.

For example, in the case of immigration with a liberal decision, respondents who received the “shadow docket procedure” treatment read:

The Supreme Court’s ruling came only 6 days after the lower court’s ruling and the U.S. government’s appeal to the Supreme Court. The order was unsigned and consisted of a single paragraph stating that the ban barring entry from the southern border was not legal given that Congress had not banned certain categories of persons from receiving asylum and had left to the Attorney General and the Secretary of Homeland Security the authority to make rules about eligibility.

This is in contrast to the “regular procedure” press release:

mitigates this potential influence through the use of random assignment to the different press releases. This ensures that any biases or pre-existing attitudes toward these policy issues are evenly distributed across all treatment groups, thereby preserving the integrity of our findings.

¹⁰² The study received IRB approval on December 4, 2021, and the survey was preregistered on aspredicted.org the same day. We contracted with LUCID Theorem to purchase the sample and used Qualtrics to employ the survey. The median completion time was 15 minutes. Several recently published studies have used Lucid in social science research and demonstrate that experimental findings tend to track well with national probability samples. See, e.g., Miles T. Armaly, *Loyalty Over Fairness: Acceptance of Unfair Supreme Court Procedures*, 74 POL. RSCH. Q. 1, 4 (2020); Alexander Coppock & Oliver A. McClellan, *Validating the Demographic, Political, Psychological, and Experimental Results Obtained from a New Source of Online Survey Respondents*, 6 RSCH. & POL. 1, 1 (2019). We collected data at three-time points: Wave 1 was administered on May 10, 2022, shortly after the leak of the *Dobbs v. Jackson Women’s Health*. opinion. Wave 2 was administered on June 24, 2022, when the Court released the *Dobbs* opinion in Wave 3 was administered on August 22, 2022, long after the announcement. In total, we surveyed 3,793 respondents via a quota-based nationally representative sample. No respondents were allowed to participate in more than one wave of the survey. We included attention checks at the end of the survey to ensure respondents read the material carefully. Only a small portion failed our attention checks (less than 10 percent), and we refrain from dropping them to avoid post-treatment bias. See Peter M. Aronow et al., *A Note on Dropping Experimental Subjects Who Fail a Manipulation Check*, 27 POL. ANALYSIS 572, 579 (2019).

¹⁰³ See Brian J. Gaines et al., *The Logic of the Survey Experiment Reexamined*, 15 POL. ANALYSIS 1, 7 (2007).

The Supreme Court justices decided to hear the case and invited both sides to file arguments to plead the merits of the case. During oral argument in October, the justices listened carefully to arguments from both sides and asked questions of each. The justices then met in conference and deliberated the pros and cons of each argument. The justices took over 6 months to craft the 6-3 majority opinion and announced the ruling from the bench in open session. In an 87-page written opinion, the justices explained their reasons for blocking the deportations, including that Congress had not banned certain categories of persons from receiving asylum and has left to the Attorney General and the Secretary of Homeland Security the authority to make rules about eligibility.

A battery of questions was administered post-treatment, including various measures designed to measure legitimacy, specifically through assessing both diffuse and specific support.

Diffuse support captures “attitudes toward the Court as an institution,” and specific support captures perhaps more transient attitudes toward the Court’s output.¹⁰⁴ Judicial scholars have used several batteries of questions to attempt to measure diffuse support for the Court and the choices over questions to employ are often debated.¹⁰⁵ It appears to be the case, though, that the underlying concepts are adequately measured even in somewhat different combinations.¹⁰⁶ We employ the legitimacy battery from Professors James L. Gibson, Gregory A. Caldeira, and Lester Kenyatta Spence to measure diffuse support.¹⁰⁷ This battery has been used in the literature for decades and performs similarly with and without the trust measure and with and without the mixed up in politics measure.¹⁰⁸ We use an additive index of the battery as the measure of diffuse support respondents have for the Court.¹⁰⁹

¹⁰⁴ Ramirez, *supra* note 41, at 683; James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 355 (2003).

¹⁰⁵ See, e.g., Gibson, *Measuring Attitudes Toward the United States Supreme Court*, *supra* note 104, at 358.

¹⁰⁶ See Christenson & Glick, *supra* note 62, at 415.

¹⁰⁷ Gibson et al., *supra* note 104, at 358. This battery includes questions about whether we should do away with the Court, whether Congress and the President should be able to reverse unliked decisions, whether the Court’s ability to hear certain controversial issues should be expanded, whether the Court can be trusted to do what is right when deciding cases, whether justices should be able to be removed from their position based on their decisions, whether the Court gets too mixed up in politics, and whether there ought to be a stronger means of controlling the actions of the Supreme Court. *Id.*

¹⁰⁸ See, e.g., Gibson et al., *supra* note 104, at 354; Gibson & Nelson, *supra* note 15, at 163; Joshua Boston et al., *Your Honor’s Misdeeds: The Consequences of Judicial Scandal on Specific and Diffuse Support*, 56 POL. SCI. & POL. 195, 198 (2023).

¹⁰⁹ The Cronbach’s alpha for the scale among our respondents was a strong 0.73, which is comparable to previous uses of the measure.

To measure specific support, respondents were asked: “Thinking of the Supreme Court as a whole, do you approve strongly, approve somewhat, disapprove somewhat, or disapprove strongly of the Supreme Court, no matter who the Justices are?” Similar measures have been employed for approval/specific support for decades as well.¹¹⁰

Because the literature is replete with criticisms of and differential decisions about whether to employ diffuse or specific in analyses of public support for the Supreme Court, we considered both separately modeling specific support and diffuse support under the theory that specific support is potentially easier to move than diffuse support¹¹¹ and suggesting that they both tap into a similar (or at the very least, related) concept over whether people see the Court as an institution that ought to be empowered to make decisions that matter.

Our main explanatory variable was, of course, the experimental treatment, and we focused our attention on those results. We also paid attention to the potential effect of the leak of the *Dobbs* opinion or the decision itself on support for the Court considering both whether the respondent heard about the leak or decision, and their likely ideological response to the leak or the decision given their pre-treatment abortion attitudes.¹¹²

In addition, to control for factors scholars have found impact public support for the Court the most, and to take into account the debate we reviewed over whether ideological agreement fully explains Court legitimacy, as well as to include one more way to measure the influence of procedures on Court evaluations, we estimated multivariate models for those who received a treatment.¹¹³ These included democratic values, found to generally help explain

¹¹⁰ Ramirez, *supra* note 41, at 683; Woodson, *supra* note 53, at 91.

¹¹¹ See, e.g., Gibson et al., *supra* note 104, at 356.

¹¹² We considered those who respond that they “strongly support” or “somewhat support” in response to the question “In general, do you support or oppose the government restricting abortion rights?” as those likely to be supportive of the Court’s decision in *Dobbs* (43%) and those who “somewhat oppose” or “strongly oppose,” to be likely opponents (57%). Given our interest in the influence of the environment surrounding the Court, we exclude respondents without an opinion on abortion from all analyses (20% of the total respondents across all three waves, or 890 of 4,532).

¹¹³ We focused on those treated (either with the regular or shadow procedures treatment) for a couple of reasons. First, our control groups were very small compared with our treatment groups, and so finding a difference between the control and the treatments in a multivariate regression would be difficult even if there does, according to the bivariate analysis, appear to be some differences. More important, though, given the debate over the extent to which policy agreement eclipses the influence of procedures, we needed to include policy agreement into our models and can only do so for those who were treated. See Christenson & Glick, *supra* note 62, at 415; Gibson & Nelson, *supra* note 62, at 594; Woodson, *supra* note 53, at 76; BARTELS & JOHNSTON, *supra* note 54, at 224–25.

evaluations of institutions;¹¹⁴ perceptions of the fairness of decision-making processes, a more direct way to consider the possible influence of procedures on legitimacy;¹¹⁵ political knowledge, long known to influence perceptions and generally expected to differentiate respondents in public opinion research;¹¹⁶ policy congruence with the experimental treatment to disentangle the influence of a liked from an unliked decision in measuring the effect of the experiment;¹¹⁷ partisan identification given the increasing reliance on party cues for public opinion in our polarized nation;¹¹⁸ and subjective ideological distances from the Court, recognizing both that people may have differential perceptions of the liberalism or conservatism of the Court and that their congruence with the Court may affect their perceptions of its legitimacy.¹¹⁹

Respondents' immediate reactions when queried as to the fairness of the two procedures suggest a distinction: 77% of those who heard about the decision made in the "regular" way said the decision was made fairly, while 70% of those who heard about a "shadow docket" case said the decision was made fairly. Interestingly, though, both numbers are quite high. But our question was whether either treatment changed levels of legitimacy and approval as compared with the

¹¹⁴ See Gibson & Nelson, *supra* note 15, at 170; Gibson & Caldeira, *supra* note 15, at 438. The democratic values index was adopted from Gibson & Nelson, *supra* note 15, at 169, and includes questions about equality, accepting elections, and separation of powers.

¹¹⁵ See Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, *supra* note 10, at 483. In our study, the fairness index was created from a battery of pre-treatment questions that asked "How much do you agree/disagree with the following statements: The U.S. Supreme Court obtains all necessary information when deciding a case. The U.S. Supreme Court considers multiple views when deciding a case. The U.S. Supreme Court decides cases in a fair way."

¹¹⁶ See Gibson & Caldeira, *supra* note 15, at 438–39. We measure this as the number of correct answers to a set of factual questions, including the identity of the Speaker of the House and the Chief Justice of the United States, and the length of a full presidential term.

¹¹⁷ Gibson & Nelson, *supra* note 15, at 166–67; Michael A. Zilis, *Minority Groups and Judicial Legitimacy: Group Affect and the Incentives for Judicial Responsiveness*, 71 POL. RSCH. Q. 270, 278 (2018); MICHAEL A. ZILIS, *THE RIGHTS PARADOX: HOW GROUP ATTITUDES SHAPE US SUPREME COURT LEGITIMACY* 91 (2021); Woodson, *supra* note 53, at 89. We asked all respondents, pre-treatment, their policy positions on immigration and on the death penalty. We code policy agreement by coupling those responses with the randomly assigned vignette (either immigration or death penalty decided either liberally or conservatively).

¹¹⁸ See Woodson, *supra* note 53, at 89. In our study, we measured iteratively by asking those who indicate that they are independents whether they lean Democrat or Republican and asking those who identify whether they consider themselves strong or not very strong to create a seven-point scale: 1=Strongly Democratic, 2=Democratic, 3=Lean Democrat, 4=Independent, 5=Lean Republican, 6=Republican, 7=Strong Republican.

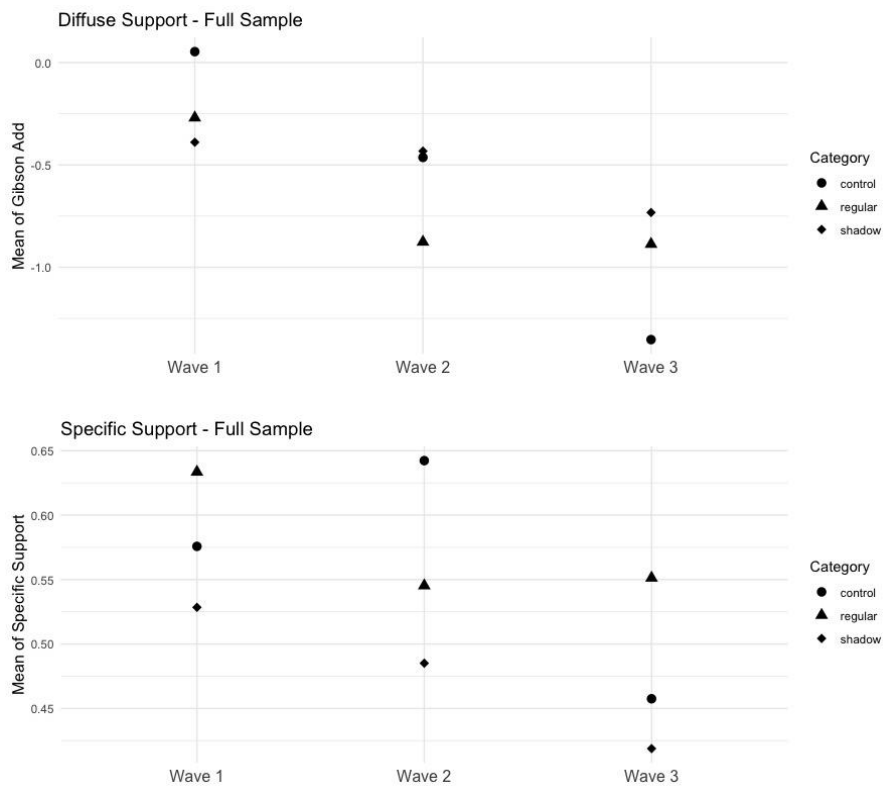
¹¹⁹ See BARTELS & JOHNSTON, *supra* note 54, at 51; Michael J. Nelson & James L. Gibson, *Measuring Subjective Ideological Disagreement with the US Supreme Court*, 1 J. L. & CTS. 75, 83 (2020). Pre-treatment, we asked respondents their perception of the liberalism of the Supreme Court and asked respondents to place themselves on an ideological scale. The absolute value of the difference is our measure for ideological distance from the Court.

control group who read nothing about the Supreme Court before being asked to evaluate the institution and its justices, and we turn to the results on that next.

B. Bivariate Results

We began by exploring the relationships between the treatments and legitimacy by examining mean legitimacy (both specific and diffuse) across waves and across treatment groups, as show in Figures 1 and 2.

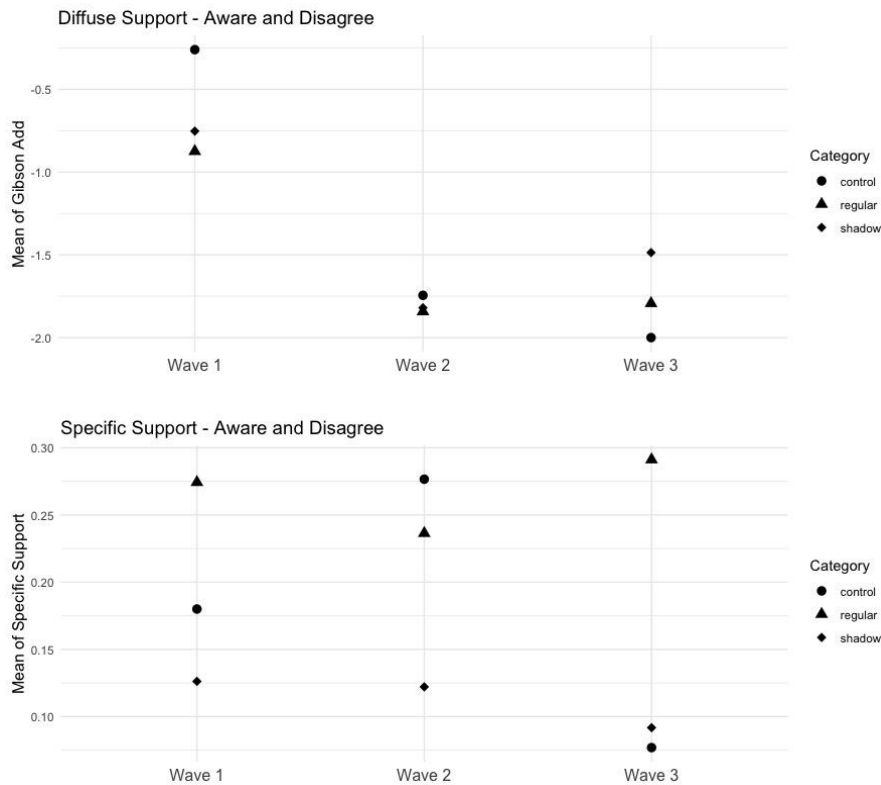
Figure 1: Diffuse (top) and Specific (bottom) Support by Treatment and Wave (All Respondents)



In Figure 1, we considered all respondents together, showing that there was variation across groups and waves (though most of the differences were not statistically distinguishable from one another and the range in variation was, as expected, fairly small). Immediately of note, for both specific support and diffuse support, and nearly regardless of whether respondents are in the control

group, the “regular process” treatment or the “shadow docket” treatment, support for the Court was highest in Wave 1 and lowest in Wave 3. This suggests that the environment in which the Court was being evaluated mattered in some way. Respondents in May and June and August differed from one another in how they viewed the Supreme Court.

Figure 2: Diffuse (top) and Specific (bottom) for Aware of the Leak/Opinion & Disagree



In Figure 2, we took advantage of the environment surrounding the spring and summer of 2022 to get some purchase on whether the Court’s leak and eventual decision in *Dobbs* influenced legitimacy. Considering those likely most affected by the Court’s ruling in *Dobbs*—those who had both heard of the leak or the decision AND who likely disagreed with the Court’s decision—support is a little more wonky. Figure 2 shows diffuse and specific support across waves

and by treatment for those who heard of the leak/decision and disagreed with the ruling. Diffuse support took a dive right after the leak and then rebounded for all groups, but specific support was different depending on the treatment. Those in the shadow docket treatment group had the lowest levels of support, but that low level didn't change much by wave. Those in the control group became first more and then less supportive. And those in the regular group remained higher than the other two groups throughout. Overall, though, comparing Figure 1 with Figure 2, you can see that support for the Court was much lower for those who heard of the leak/decision and disagreed with it, as expected (if we expect that the Court's decisions can influence public perception of the institution).

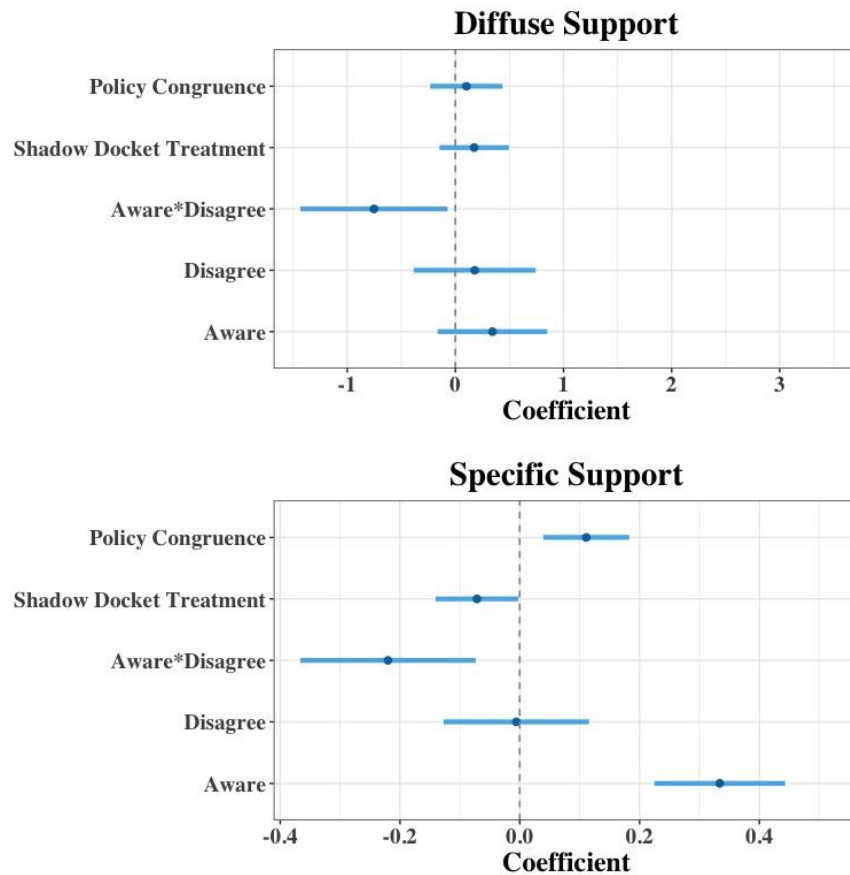
C. Multivariate Results

While our design (random assignment into conditions) allowed us to tell whether the treatment worked just by looking at the difference among the three groups (it did, but only partially), ours is a complicated story best told employing controls. Focusing on a multivariate model provides a bit more clarity given all the moving parts in our analysis (including two experimental treatments, policy agreement with those treatments, awareness of the *Dobbs* leak/decision, and opinions on *Dobbs*). Table 1 provides the results from the regression, and Figure 3 focuses our attention on those moving parts in greater detail.

Table 1: *Specific and Diffuse Support for the Court Summer 2022*

	Table 1:	
	<i>Dependent variable:</i>	
	Specific (1)	Diffuse (2)
Aware	0.334*** (0.056)	0.343 (0.259)
Disagree	-0.006 (0.062)	0.179 (0.288)
Shadow Docket Treatment	-0.071** (0.035)	0.174 (0.164)
Policy Congruence	0.111*** (0.037)	0.102 (0.170)
Wave 2	-0.005 (0.044)	-0.270 (0.205)
Wave 3	0.009 (0.042)	-0.330* (0.197)
Democratic Values	-0.051 (0.033)	2.166*** (0.152)
Fairness	0.490*** (0.017)	1.429*** (0.078)
Political Knowledge	0.130** (0.065)	2.898*** (0.303)
Ideological Distance	-0.077*** (0.017)	-0.152* (0.081)
PID	-0.021*** (0.008)	0.782*** (0.036)
Aware * Disagree	-0.220*** (0.075)	-0.753** (0.347)
Constant	0.280*** (0.077)	-6.912*** (0.356)
Observations	2,992	2,992
Adjusted R ²	0.332	0.285
<i>Note:</i>	*p<0.1; **p<0.05; ***p<0.01	

Figure 3: Experimental Variables on Diffuse (Top) and Specific (Bottom) Support



Considering the treatment, first, we found that those who received the shadow docket treatment did indeed approve of the Court at lower levels than those who received the regular procedures treatment (controlling for some important influences on approval). However, policy congruence mattered greatly as well, suggesting that respondents considered both the procedures and the policy. In terms of the effects of the independent variables on the dependent variable, the positive impact of policy congruence mostly canceled out the negative effect of the shadow docket treatment. For those who disagreed though (e.g., when policy congruence is 0), the shadow docket treatment harmed specific support. This finding can be read to support both sides of the argument

outlined above—yes, procedures mattered, as well as policy agreement (but this is only for specific support).

That this was the case even here, where the shadow docket treatment competed for influence with a blockbuster leak of a major, largely counter-majoritarian decision in a highly salient issue area overturning a fifty-year-old precedent, was remarkable and suggested that the influence of procedures on Supreme Court approval could be even greater in other contexts. In other words, and as previous scholars have concluded as well, context does matter.

We also included a battery of questions relating to respondents' perceptions of the fairness of the Court's procedures. In both models, the index influenced Court support, independent of the treatment or the other influences on approval and legitimacy; in fact, considering standardized coefficients, that variable is the single most influential variable in both models (not shown). This provided additional support for a procedural account on top of the experimental findings, which were likely more subtle. Even controlling for ideological disagreement, and even again when the Court had positioned itself to be quite salient due to a major leak and a significant and public alteration of precedent, the procedures the Court employed (e.g., the treatment in our experimental condition) and whether people perceived the Court to make decisions in a fair way (in that they consider multiple views carefully, amass all relevant information, and decide cases fairly) influenced the public's regard of the Court.

Of additional and consequential note, as shown in Table 1, both specific and diffuse support were indeed affected by the awareness of and disagreement with the *Dobbs* decision, but in different ways. For specific support, awareness was positively related to support when respondents agreed with *Dobbs* (the variable's direct effect) and negatively related to support when they disagreed (as shown by the interaction between awareness and disagreement). Support for the Court, again, was predicated, at least in part, on policy agreement. This is also shown through the significant effect of ideological distance (measured as the distance between a respondent's perception of the Court's ideology and their report of their own), which depressed Court approval. 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. Ideological distance overall depressed diffuse support as well.

The final statistically significant influences we uncovered on approval and legitimacy were expected via the literature. Those with more political knowledge were more supportive, and Democrats reported less approval of the

way the Court decided cases but afforded the Court more overall legitimacy. Finally, those who subscribe to democratic values in general afforded more legitimacy to the U.S. Supreme Court (though they are no more likely to indicate approval).

III. DISCUSSION

Public commentary on the Court has almost reached a fever pitch. President Biden established a presidential commission on the Court to consider reforms in light of discussion in Congress over Court-curbing measures;¹²⁰ Vladeck is on the circuit talking about the damage the Court is doing via its shadow docket;¹²¹ Supreme Court journalist Joan Biskupic released a new book focused on *Dobbs* that claims the Court's right turn and ideological entrenchment have thrown it into turmoil and have adversely affected the rights of Americans;¹²² the legal academy is critical of the current Court on a variety of counts;¹²³ and podcast episodes on our dire prospects for the future are becoming legion.¹²⁴ But are these criticisms coming from elites and the basis for them (namely, politicization, and process) also affecting the esteem in which the public holds the Court? From our evidence, yes, a bit. And perhaps the increased perception

¹²⁰ *Presidential Commission on the Supreme Court of the United States*, WHITE HOUSE, <https://www.whitehouse.gov/pscotus/> (last visited Oct. 6, 2023).

¹²¹ E.g., VLADECK, *supra* note 1, at 12; Scott Shafer, *Stephen Vladeck Sounds Alarm on Supreme Court's Abuse of 'The Shadow Docket'*, KQED (May 22, 2023, 10:00 AM), <https://www.kqed.org/forum/2010101893191/stephen-vladeck-sounds-alarm-on-supreme-courts-abuse-of-the-shadow-docket>.

¹²² See generally JOAN BISKUPIC, *NINE BLACK ROBES: INSIDE THE SUPREME COURT'S DRIVE TO THE RIGHT AND ITS HISTORIC CONSEQUENCES* (2023).

¹²³ See, e.g., Richard L. Heppner Jr., *Let the Right Ones In: The Supreme Court's Changing Approach to Justiciability*, 61 DUQ. L. REV. 79, 79 (2023); Kari Hong, *The Supreme Court's Draft Abortion Decision Overturning Roe v. Wade: How Originalism's Rejection of Family Formation Rights Undermines the Court's Legitimacy and Destabilizes a Functioning Federal Government*, 83 MONT. L. REV. ONLINE 1, 1 (2022); Mark Joseph Stern, *The Supreme Court Is Blowing Up Law School, Too*, SLATE (Oct. 2, 2022, 7:00 PM), <https://slate.com/news-and-politics/2022/10/supreme-court-scotus-decisions-law-school-professors.html>. But see Benjamin M. Flowers, *The Bar's Role in Responding to Attacks on the Court*, 29 HARV. J.L. PUB. POL'Y PER CURIUM 1,1 (2023).

¹²⁴ See, e.g., *Strict Scrutiny*, CROOKED MEDIA, <https://crooked.com/podcast-series/strict-scrutiny/> (providing in depth analysis of cases and culture at the Supreme Court); *5-4, 5-4* POD, <https://www.fivefourpod.com/> (dissecting and analyzing Supreme Court cases); *Amicus*, SLATE, <https://slate.com/podcasts/amicus> (describing the law interpreted by the Supreme Court Justices); *More Perfect*, NPR, <https://www.npr.org/podcasts/481105292/more-perfect> (humanizing the lives and drama of the Supreme Court Justices); *Deep Dive*, INST. FOR JUST., <https://ij.org/podcasts/deep-dive/> (exploring legal concepts that bring about real world change); *SCOTUStalk*, SCOTUSBLOG, <https://www.scotusblog.com/category/scotustalk/> (discussing Supreme Court decisions from a nonpartisan perspective); Eric Segall, *Supreme Myths*, APPLE PODCAST, <https://podcasts.apple.com/us/podcast/supreme-myths/id1523903890> (discussing the Supreme Court and its cases).

of the influence of ideology on Supreme Court decision-making has finally come to a head.

When previous generations of scholars considered public perceptions of the Supreme Court, they were largely unanimous in their view that the Court was held in high esteem by the public and that its legitimacy was enduring regardless of the extent to which the public agreed with the Court's outputs.¹²⁵ Legal realism challenged the notion that the Court was driven only by legal influences¹²⁶ and the political science literature settled on the attitudinal model as the best description of Supreme Court decisions.¹²⁷ But still, people supported the Court above most other institutions, governmental or not.¹²⁸ Nominations and confirmations became increasingly contentious and centered on the likely decision-making of the nominees, especially in the area of abortion,¹²⁹ and the public became more aware that ideology mattered to Supreme Court decision-making.¹³⁰ None of this necessarily changed the general perception of the Court as an authoritative decision maker in our democratic system, maybe due to positivity bias.¹³¹ But perhaps it introduced, more starkly, the notion that policy preferences are a reasonable basis on which to evaluate the output of the Court as an institution. As Bartels and Johnston showed, that evaluation may have large consequences for the willingness of the public to countenance measures to curb the Court, making it less independent and subjecting it to more majoritarian control than we may have expected 20 years ago.¹³²

CONCLUSION

In conclusion, based on our analysis, we argue that procedures are even more important than ever. If the general understanding of the Court and its justices moves toward perceptions that they are, like other governmental institutions, political, then, given the Court's position in our government, there must be a concomitant belief that they are at least principled; that they at least listen to

¹²⁵ See Michael J. Nelson & Patrick D. Tucker, *The Stability and Durability of the US Supreme Court's Legitimacy*, 83 J. POL. 767, 767 (2021).

¹²⁶ Keith J. Bybee, *Legal Realism, Common Courtesy, and Hypocrisy*, 1 L. CULTURE HUMANS. 75, 86 (2005).

¹²⁷ See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 73. (1993).

¹²⁸ Sara C. Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697, 698 (2006).

¹²⁹ Miles T. Armaly & Elizabeth A. Lane, *Politized Battles: How Vacancies and Partisanship Influence Support for the Supreme Court*, 51 AM. POL. RSCH. 23, 24 (2023); Charles M. Cameron et al., *Voting for Justices: Change and Continuity in Confirmation Voting 1937–2010*, 75 J. POL. 283, 297 (2013).

¹³⁰ Gibson & Caldeira, *supra* note 12, at 195–96.

¹³¹ See Gibson & Nelson, *supra* note 15, at 593.

¹³² BARTELS & JOHNSTON, *supra* note 54, at 83.

both sides, are persuaded by strong legal arguments, and make decisions in a way that suggests reflection and fairness and not pure politics. As we show, a decision that comes down via the Court's emergency docket, while not wildly damaging to the Court's diffuse support, does influence the extent to which respondents approve of how well the Court is doing its job. That influence of procedures is filtered through policy agreement. In addition, we find that the Court's *Dobbs* decision strongly influenced Court perceptions for those who heard of the leak or the opinion. Though, disagreement with the decision had a larger and more consistent negative impact than the partial positive impact agreement had on support.

This is all to say that it seems to us, evaluations of policy congruence are part of the story when it comes to the public's reaction to the Supreme Court today. On the one hand, policy congruence may be neutral in its impact on the Court, provided disappointment with one decision for one slice of the public is canceled out by approval from another slice.¹³³ On the other, Tyler would suggest that a Court that relies too much on public approval without a fundamental attachment to its institutional authority will have difficulty overall, perhaps leading to a weaker institution that obtains variable degrees of compliance with its rulings.¹³⁴

Regardless of which of those views ends up prevailing, we still, in 2023, find that part of the degree to which the Court is authoritative relies upon its justices. Yes, there is evidence that the ways in which the other branches and the media talk about and treat the Court could influence public perceptions about the Court and its processes.¹³⁵ But, we also show that the Court's behavior itself also matters. In order to convince the public that it ought to continue to play an important role in our democracy, the U.S. Supreme Court must return to early principles—to the intent of the framers, if you will—and carefully apply fair procedures to resolve legal questions rather than being (at least perceived as) overtly interested in political wins. But has the Court actually ever been like that?

¹³³ Gibson & Nelson, *supra* note 15, at 614; Nelson & Tucker, *supra* note 125, at 770–71.

¹³⁴ Tyler, *Social Justice: Outcome and Procedure*, *supra* note 41, *passim*.

¹³⁵ Armaly & Lane, *supra* note 129, at 24–25; Jon C. Rogowski & Andrew R. Stone, *How Political Contestation Over Judicial Nominations Polarizes Americans' Attitudes Toward the Supreme Court*, 51 *BRIT. J. POL. SCI.* 1251, 1252 (2021); Michael J. Nelson & James L. Gibson, *How Does Hyperpoliticized Rhetoric Affect the US Supreme Court's Legitimacy?*, 81 *J. POL.* 1512, 1515 (2019).