The Supreme Court's Third Shift: Policy, Precedent, and Public Opinion Via the Shadow Docket

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THE SUPREME COURT’S THIRD SHIFT

POLICY, PRECEDENT, AND PUBLIC OPINION VIA THE SHADOW DOCKET

by

Taraleigh Davis

A Dissertation Submitted in
Partial Fulfillment of the
Requirements for the Degree of

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ABSTRACT

THE SUPREME COURT’S THIRD SHIFT: POLICY, PRECEDENT, AND PUBLIC OPINION VIA THE SHADOW DOCKET

by

Taraleigh Davis

The University of Wisconsin-Milwaukee, 2023
Under the Supervision of Professor Sara C. Benesh

The Supreme Court is attracting more attention to its emergency docket – cases decided with neither briefing nor oral argument. These cases, while seemingly focused on immediate, individual problems, could potentially create policy in a way not necessarily intended or approved by Congress. Because the Court is particularly reliant on institutional support for effective policymaking and because we know that people support the Court, at least in part, due to its legalistic nature and its specific procedures, some are concerned that making decisions using this alternative, less public process as well as relying on these hastily decided cases as precedent may harm the Court’s legitimacy. Some argue it makes the Court appear more “political,” which we know to be harmful to legitimacy. Drawing on an original database of the emergency docket, as well as a pre-registered survey experiment, this project will seek to answer these questions: 1) What does the entirety of the Court’s workload comprise? 2) To what extent is the Supreme Court using its emergency docket to make policy? 3) To what extent are these orders used as precedent in other cases? 4) To what extent do decisions made outside the usual procedural process affect public opinion of the Court? I hope to clarify the picture we have of Supreme Court decision making by including data from the existing Supreme Court Database and provide evidence to evaluate the impression that the Court has turned more frequently to make even more consequential decisions “in the shadows.”
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Chapter 1 - Introduction

On September 1, 2021, just before midnight, the Supreme Court decided to leave in place a unique Texas law that banned most abortions in the state. The Court had only taken three days to deal with the case. There were no oral arguments, and the one-paragraph-long majority opinion was unsigned. However, Justice Elena Kagan had much to say in dissent:

“Today’s ruling illustrates just how far the Court’s “shadow-docket” decisions may depart from the usual principles of appellate process. That ruling, as everyone must agree, is of great consequence. Yet the majority has acted without any guidance from the Court of Appeals—which is right now considering the same issues. It has reviewed only the most cursory party submissions, and then only hastily. And it barely bothers to explain its conclusion—that a challenge to an obviously unconstitutional abortion regulation backed by a wholly unprecedented enforcement scheme is unlikely to prevail. In all these ways, the majority’s decision is emblematic of too much of this Court’s shadow docket decision making—which every day becomes more unreasoned, inconsistent, and impossible to defend.” Whole Women’s Health v. Jackson, No. 21A24, 2021 WL 3910722, at *5 (U.S. Sept. 1, 2021) (Kagan, J., dissenting; emphasis added)

Justice Kagan is not the only one noticing the Court’s actions. The Supreme Court’s emergency docket - orders issued with neither briefing nor oral argument - is drawing more and more attention. Because the Court is particularly reliant on institutional support for effective policymaking, some are concerned that making decisions using this alternative, less-public process may harm the Court’s legitimacy. Some argue it makes the Court appear more “political,” which we know to be harmful to legitimacy (Gibson and Nelson,

\footnote{1Throughout this dissertation, the terms “shadow docket” and “emergency docket” are used interchangeably.}
Judge McFadden of the District Court for the District of Columbia argues that "we are in 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" (McFadden and Kapoor, 2021). Erskine (2021) and Vladeck (2022) express concern for the consequences in the use of the emergency docket both in terms of legitimacy and the judicial hierarchy/compliance. While, so far, criticism is largely grounded in anecdotes, the areas of law that have been substantively and practically shaped by the Court’s motions decisions are not insubstantial.

The media is interested in the shadow docket. Some news reports focus on the technical aspects of the court’s decision-making process and the legal issues at play, while others focus on the political implications of the court’s decisions and the impact on specific groups or issues. The media also reports on the lack of transparency surrounding the shadow docket and the implications for the court’s legitimacy and accountability (Barnes, 2022; Grzincic, 2022). Regardless of its focus, the media coverage of the shadow docket can play an important role in shaping public perceptions of the Supreme Court and its decision-making processes (Baird and Gangl, 2006; Ramirez, 2008). We see that the public is increasingly aware of, interested in, and critical of the shadow docket as well. Public interest measured via Google searches shows that searches for the term “shadow docket” have significantly increased since 2020.² Public awareness and elite criticism combine to counsel consideration of how the emergency docket process could impact the legitimacy of the Court.

This project aims to deepen our understanding of the entirety of the Supreme Court’s workload. I aim to offer insight into the Court’s “third shift,” (e.g., the work outside the merits docket) by collecting and coding a comprehensive dataset of the Supreme Court’s workload.

²https://trends.google.com/trends/explore?date=all%20z%26geo%3DUS&q=shadow%20docket
emergency docket. Regardless of whether this work is in the “shadows,” it is still impactful, and scholars of judicial politics should be systematically studying this output of the Court.

What is the Shadow Docket?

The Supreme Court’s work is divided into two main categories. The first category includes its merits docket. Each year, the Court selects around 70 cases for full discussion, including extensive briefing, oral argument, and a set of written, signed opinions. Merit cases are heard during the Court’s October Term (OT), which begins on the first Monday of October and ends on the first Monday of October of the following year. The Court schedules arguments in these cases in advance on Mondays and Wednesdays throughout the term until April. All full opinions are released by the end of June. The Court’s decisions are announced on set dates and times in open Court.\(^3\)

The second category of work in which the Supreme Court engages includes the orders docket. This includes literally thousands of activities posted in the Supreme Court Journal. Each term, the Court or individual justices acting as Circuit Justice release orders regarding certiorari, procedural matters, and decisions over injunctions and stays, which pause legal proceedings temporarily. Most of the work of the Court in this venue is uncontroversial, including denials of certiorari, denials of emergency relief in cases that are not true emergencies, orders designating time for oral argument, or orders granting parties additional time to file their briefs (Vladeck, 2021).

On average, there are 85 applications seeking emergency relief submitted to justices

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\(^3\)This was, at least, the process before March 2020. From May 4, 2020, through the end of OT 2020, the Court only heard oral arguments over the phone and released its opinions via its website. Even after returning to in-person oral argument on October 4, 2021, the Court continued to post opinions online rather than issuing them from the bench on scheduled announcement days, usually at 10 a.m. EST. At the beginning of OT 2022, the justices returned to announcing opinions from the bench. https://www.supremecourt.gov/oral_arguments/calendarsandlists.aspx
that receive decisions per term. Some of the emergency docket cases have the potential to be quite consequential. In September 2022, for example, a case on the emergency docket allowed the execution of an Alabama inmate to move forward. This order vacated, without explanation, a District Court of the Middle District of Alabama’s order enjoining the execution of Alan Miller “by any method other than nitrogen hypoxia” (Hamm v. Miller No. 21A373 (2021)). One shadow docket case that was consequential and provided far-reaching implications is Roman Catholic Diocese of Brooklyn v. Cuomo, No. 20A87 (2020). This case centered on the constitutionality of New York’s COVID-19 restrictions on religious gatherings, which were imposed by Governor Andrew Cuomo to limit the spread of the virus. The Roman Catholic Diocese of Brooklyn and Agudath Israel of America, an Orthodox Jewish organization, challenged the restrictions, claiming they violated their First Amendment right to the free exercise of religion. They argued that the restrictions imposed on religious gatherings were more severe than those imposed on comparable secular activities. After considering the request for six days, the Court granted the request for an injunction against the enforcement of the restrictions. This decision had far-reaching implications, as it set a precedent for how courts should assess pandemic-related restrictions on religious gatherings. The Roman Catholic Diocese of Brooklyn v. Cuomo case demonstrated the significant impact that shadow docket decisions could have on legal precedents and broader societal issues, even when they are not full opinions resulting from oral arguments and extensive briefing.

As noted earlier, emergency orders typically come after only one round of briefing and are handed down with little semblance of legal analysis. The orders do not indicate how individual justices voted in the case. Sometimes votes can be inferred by a noted dissent, but sometimes we cannot even verify that there were justices who disagreed. In Hamm v. Miller, Justice Sotomayor, Justice Kagan, Justice Barrett, and Justice Jackson noted that they would have denied the application. We can infer that the vote was 5-4 only because

Data collected by the author.
of their public dissent. Emergency docket cases are handed down at all times of the day, and the Court does not wait for scheduled opinion release days to issue them, “granting relief to an applicant through an emergency order or a summary decision, rather than hearing the case with a full briefing and oral argument”(Fox, 2021).

Scholars criticize the seeming substantive use of the emergency docket exactly because these orders lack transparency, have unpredictable and rushed timing, and offer little guidance as to why or how decisions were made (Baude, 2015; Vladeck, 2021). Coined the “Shadow Docket” by Professor Baude (2015), these cases have become controversial even among the justices due to this sense of secrecy. We saw this in Justice Kagan’s dissent in Whole Woman’s Health. In Merrill v. Milligan, another emergency docket order from 2022, she calls out the shadow docket again: “Today’s decision is one more in a disconcertingly long line of cases in which this Court uses its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument.” (Merrill v. Milligan 595 U.S. ____ (2022), 20). In his concurring opinion, Justice Kavanaugh attacks Justice Kagan’s shadow docket rhetoric. “The principal dissent’s catchy but worn-out rhetoric about the “shadow docket” is similarly off target.” (Merrill v. Milligan 595 U.S. ____ (2022), 2). In this case, he argues that the stay issued will allow the Court to decide on the merits in an orderly fashion outside the emergency docket.

The federal government has taken note of the use of the shadow docket calling a hearing of the Presidential Commission on the Supreme Court of the United States in June of 2021. Steve Vladeck, a professor of law at the University of Texas, offered historical examples of shadow docket cases that have gained attention, including the case allowing for the execution of the Rosenbergs (Rosenberg v. United States, 346 U.S. 313), Justice Douglas’ halting of Nixon’s bombing of Cambodia (Holtzman v. Schlesinger, 414 U.S. 1316), and a stay of the Florida recount in the case that would eventually decide the 2000 Presidential election (Bush v. Gore, 531 U.S. 1046 (2000) (mem.) (Vladeck, 2021). Other more recent
examples of high-visibility emergency docket cases include an order stopping Wisconsin from implementing a strict voter identification law (Frank v. Walker, 574 U.S. 2014) and an order allowing a similar law to be implemented in Texas (Veasey v. Perry, 574 U.S. 2014). A Supreme Court order also stopped lower courts from expanding early voting in Ohio (Husted v. NAACP, 573 U.S. 2013) and voter registration in North Carolina (North Carolina v. League of Women Voters of North Carolina, 574 U.S. 2014). In 2021, the Court blocked California’s in-home gathering restrictions on religious liberty grounds (Tandon v. Newson, 593 U.S. 2021) but chose not to intervene in the Texas abortion case (Whole Woman’s Health v. Jackson, 594 U.S. 2021). The Court’s decisions in these cases raise questions that may suggest a role for ideology in the Court’s decisions: To wit, why is a short-term deprivation of religious liberty in the name of public health protected while a short-term deprivation of the right to bodily autonomy is not?

According to Article 3 of the U.S. Constitution, Congress has the power to manage the Court’s workload with regulations on its jurisdiction. However, Congress hasn’t weighed in on the issue of jurisdiction since 1988, where it provided greater discretion to the Supreme Court on what cases it can review.\(^5\) Not only does the Court currently have the power to be extremely selective in which cases it decides to hear or not hear, but it also has power over how the Court issues orders. While the Court has always used orders to administer its workload, the legal community and scholars have perceived an increase in significant, high-profile, emergency docket rulings over the past four years (Baum, 2020; Vladeck, 2022). The rulings appear to be unusually divisive, have led to uncommon forms of procedural relief from the Court, and have arguably caused significant uncertainty in the lower courts. Empirically, as mentioned earlier, there has been an increase in total grants of emergency relief overall since the year 2000. Grants for emergency relief have increased by 100% since 2016.\(^6\) Anecdotally, it seems that more grants


\(^6\) Data gathered by the author.
have statewide or nationwide consequences. In particular, some of these orders seem to have precedential effects, even with their lack of reasoning.\footnote{For example, \textit{(South Bay v. Newsom}, 592 U.S. 2021) currently has 329 citing decisions according to Nexis Uni.} All of this attention points to a need to fully appreciate what the Court does when it employs its emergency docket. I first consider its power to engage and then attempt to look closely at its procedure.

**Statutory Authority**

From where does the Court’s power to consider motions and applications for extraordinary relief come? I consider two relevant statutes (the All Writs Act (28 U.S.C § 1651) and the section of the Judiciary Act dealing with time for appeal or certiorari (28 U.S.C § 2101(f)), along with several Supreme Court rules and opinions and the Federal Rules of Civil Procedure to get a handle on the extent of the Court’s and the justices’ power over halting the implementation of lower court decisions and state and federal statutes (or lifting stays and injunctions put into effect by lower courts).

First, “regular” injunctions are governed by Rule 65 of the Federal Rules of Civil Procedure (FRCP) as interpreted by the Supreme Court most recently in \textit{Winter v. Natural Resources Defense Council} (555 U.S. 7 (2008)). In that case, the Court made clear that four factors should be considered when considering a preliminary injunction. They include the likelihood of success on the merits (not just its possibility), the likelihood of irreparable harm in the absence of the injunction (again, more than just its possibility), the balance of the benefits of the injunction for the plaintiffs and the harms to the defendants of the injunction, and, finally, whether the injunction is in the public interest. While all of these aspects are open to interpretation, an injunction should not be issued unless the balancing amongst the interests outlined in \textit{Winter} favors this relief.

The FRCP themselves grow out of one of the first acts of the newly-formed Congress, the Judiciary Act of 1789. Both parts of the Judiciary Act, the All Writs Act (§1651), and
the time for cert provision (§2101(f)) provide us with additional insight into what the Court and the justices are empowered to do. Their language is short and vague and far less limited than the FRCP, so the Supreme Court can likely justify any number of interventions on their bases.

The broadest power prescription for stays and injunctions is the All Writs Act (AWA):

- (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

- (b) An alternative writ or rule may be issued by a justice or judge of a court which has jurisdiction.

The only stipulations on the Court’s (or any federal court’s) power in the AWA is that the court have jurisdiction and that the writ be “necessary or appropriate,” a broad prescription to be sure. The AWA codifies the federal courts’ common-law authority.

The Court has spent some time considering the circumstances under which the writs it is empowered to issue by the AWA are, in fact, necessary or appropriate, but it has not always employed the four conditions discussed above, reserved for traditional writs. Instead, the use of the AWA is governed by its connection to retaining the Court’s jurisdiction and integrity. In a series of cases including Pennsylvania Bureau of Corrections v. US Marshals Service (474 U.S. 34 (1985)), the Court interpreted the AWA to require four conditions before it could exercise its authority under §1651:

- (1) There must exist no other statutory remedy;

- (2) The case must present its own, independent basis for jurisdiction;

---

8The Michigan Law Review advises that “All Writs” include mandamus, prohibition, certiorari, injunction, subpoena, ne exeat, and habeas.
• (3) The action must be necessary or appropriate to retain Supreme Court jurisdiction; and

• (4) The use of the AWA must be consistent with principles of law.

These four conditions, drawn mostly from the spare text, govern this equitable power, the origins of which are the English courts in equity Portnoi (2008). Such jurisdiction seeks to fill gaps in legislation to guard against the deprivation of individual rights (Portnoi (2008); Eskridge (2001)).

The Judiciary Act also includes rules about the timing of appeals and certiorari, one section of which is relevant to us here:

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make an application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

How does the Emergency Docket Operate?

In order to ably execute these writs, the Court has enacted a number of rules, many related to the procedure of applications and motions for such writs and some more substantively directed to the circumstances under which these motions might be granted. Rule 23 requires the relief to be first sought in the court below and reiterates the AWA’s focus on
cases eligible for certiorari. Rule 22 allows for applications to individual justices but notes that they may refer them to the Court. And Rule 20 includes language found in all three Rules and supported by legal scholars considering the judicial power: That these writs are to be employed only in exceptional circumstances (e.g., Bell 1969).\footnote{It is not entirely clear under which one of these potential sources of authority the Court operates in its non-merits docket. Indeed, the Court often invokes the four criteria for regular writs of injunction in its responses to applications for stays that may actually draw upon its AWA powers. Regardless, at least one legal scholar concludes that “choosing the correct writ to obtain the desired relief is no longer necessary in federal courts. Different writs may be sought alternatively or cumulatively; the choice is now unimportant” (Bell 1969, 859).}

The Supreme Court has issued guidelines that must be satisfied for the Court to grant a stay in an emergency application based on case law. They include:

- there is a “reasonable probability” that four justices will grant certiorari, or agree to review the merits of the case;
- there is a “fair prospect” that a majority of the Court will conclude upon review that the decision below on the merits was erroneous;
- irreparable harm will result from the denial of the stay;
- finally, in a close case, the Circuit Justice may find it appropriate to balance the equities, by exploring the relative harms to the applicant and respondent, as well as the interests of the public at large.\footnote{These guidelines are found in A Reporter’s Guide To Supreme Court Procedure For Applications available on the Supreme Court’s website. However, there is no reference to what case law this criterion is based on.}

The \textit{Reporter’s Guide} also gives us some insight into the process of emergency applications. The justice does not need to be physically present in the court building to receive the application. The application is referred to the next junior justice if the assigned Circuit Justice cannot be reached. There is no requirement that the Circuit Justice must refer the application to the full Court for consideration. In fact, the public may not be aware that the application has been referred to the full Court until the Court acts and the referral is noted in the Court’s order. When the application is referred to the full Court, the jus-
tices can discuss it via phone or through their law clerks but do not meet in an official capacity (Office, 2022). However, it was discovered during data collection that according to the Supreme Court docket, oftentimes emergency applications are distributed for conference.¹¹

According to the Guide, no rule or law requires the Circuit Justice to act within a certain time frame. There are five possible outcomes listed in the Guide for the disposition of an emergency application:

- A Justice may deny without comment or explanation ¹²
- If a Justice acts alone to deny an application, a petitioner may renew the application to any other Justice of his or her choice, and theoretically can continue until a majority of the Court has denied the application. In practice, renewed applications usually are referred to the full Court to avoid such a prolonged procedure.¹³
- A Justice may call for a response from the opposition before reaching a final decision. Such responses are usually due by a date and time certain. The Justice may grant an interim stay pending receipt of a response.
- A Justice may grant. If an application is granted by an individual Justice, or if the full Court acts upon one, its disposition is indicated by a written order or sometimes, an opinion.

An order granting an application will indicate how long the order will remain in effect—usually until the Court acts on the petition for writ of certiorari. In fairly standard language, the order will often go on to state that if the petition is denied,

¹¹Emergency applications being considered at conference will be discussed in greater detail in Chapter Two.
¹²According to the Guide, when a Justice denies an application, “there is usually nothing in writing” (Office, 2022, 15).
¹³We see multiple emergency applications refiled recently. Lucas Wall v. TSA No. 21A198 was originally submitted to the Chief Justice in November of 2021. It was denied by the Chief without being referred to the full Court and refiled with Justice Gorsuch in December 2021. Once it was referred to the full Court, it was denied.
the stay will automatically terminate, but if the Court grants full review, the stay will remain in effect until the Court hands down a decision on the merits, and the mandate or judgment is issued.

- If a Circuit Justice, acting alone, grants an application, the other side may file a motion to the full Court to vacate that Justice’s stay. As a practical matter, these are rarely, if ever, granted.

Figure 1: Initial Emergency Application Procedures

Consider a hypothetical election case to demonstrate the process of an emergency application before the Supreme Court. Imagine a lower court issues a preliminary ruling in Wisconsin a few weeks before an election that ballots must be postmarked 10 days before the election to be counted. This leaves little to no time for the losing side, Americans for Voting Rights (AFVR), to file and pursue an appeal. In this case, the AFVR files an emergency request that asks the Supreme Court to put the lower court’s ruling on hold while the AFVR’s normal appeal is pending. This procedure is known as asking for a stay. While a stay is meant to be temporary, as mentioned earlier, an emergency docket order from the Court sometimes resolves the issue when a request is submitted concerning an upcoming election. This is also true for stays of execution.

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14This example is modeled after a SCOTUS Blog article that explains emergency applications for stays. (Howe, 2020)
The emergency application would contain a brief that succinctly summarizes the facts and history of the case and argues why the lower court’s ruling should be placed on hold. This application would first go to Justice Barrett - the Circuit Justice for the Seventh Circuit, where Wisconsin is located. She could grant or deny the stay on her own, but she decides to refer it to the full Court, as displayed on the right-hand side of Figure 1. At this point in the process, the justices will consider whether the guidelines are satisfied to issue the stay. Will the justices grant cert in the future? Once they review the case, is there a “fair prospect” that they will overrule the lower court? Would irreparable harm result if they deny the stay? At 2:20 a.m., 5 days after the hypothetical application was filed, the following is posted in the docket of the case without announcement:


In this example, which is highly representative of the emergency orders, there is no explanation for the denial, nor is there any legal reasoning provided. We also do not know the votes on the case because it is possible that another justice (the Chief perhaps?) dissented without doing so publicly.
Figure 2 outlines the additional processes and possible outcomes following the submission of an emergency application to the Court. Upon submission, a justice has several procedures he or she may implement. First, the justice may issue a temporary stay and request a response, which can lead to the distribution of the application and referral to the Court. The Court can then either grant or deny the application. Alternatively, the Court may distribute the application to conference from either the temporary stay and response request or the request for response alone. In both instances, the application can be referred to the Court, which can grant or deny the application. Lastly, the justice may directly refer the application to the Court after submission, leading to either granting or denying the application.

**Examples of Motions and Applications for Stays and Writs**

Emergency Applications in four areas of law and policy have gotten extensive popular and scholarly attention making the emergency docket appear to be new: Election Law,
Capital Punishment, COVID-related Cases, and Immigration. In all four case areas, there is significant disagreement among the justices as to the propriety of granting applications and motions for stays of lower court decisions enjoining the application of state and federal laws. In other words, there is controversy over staying the stays. Some of them, depending on the timing, are effectively the final say on the matter for a whole bunch of affected people (Romoser, 2020), and there is reason to believe that they also generate reliance interests and signals from the Court as to how it might rule in future cases, thus affecting the lower courts’ decisions (McFadden and Kapoor, 2020).

In the election cases, not only are there cases involving middle-of-the-night decisions unaccompanied by opinions, but there are doctrines deriving from these midnight orders that now appear to govern decisions by all courts on election-related constitutional challenges. Take, for example, the rule from Purcell v. Gonzalez (549 U.S. 1, 2006) that judges be highly skeptical of any change to election procedures close to an election (Stephanopoulos, 2020; Codrington, 2021). According to this principle, courts should generally avoid making last-minute changes to election laws, procedures, or rules close to an election because it could cause confusion and potentially disenfranchise voters.

Codrington (2021) argues that the rule should not be seen as a bar in all cases to a change due simply to timing, but notes that the lack of detail in the rule, deriving as it does from a very short order, lends itself to abuse. The Court’s application of the Purcell principle in cases was not always consistent, leading to some criticism. Stephanopoulos agrees and, in evaluating the many COVID-related election law challenges from 2020, concludes that substantive interests seem to drive decisions over whether or not to allow an election regulation to go into effect, independently of how soon there is to be an election (2021). The inconsistency in applying the Purcell principle in the 2020 election law cases stems from the different ways the Supreme Court treated election law changes in various states.
In *Merrill v. People First of Alabama* (Application No. 19A1063, decided on July 2, 2020), the Court invoked the Purcell principle to stay a lower court’s order that would have eased restrictions on curbside voting and absentee ballots in Alabama due to COVID-19. The Court maintained that the lower court’s order would create last-minute changes and disrupt the election process. This case had a vote of 5-4 with Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan noting they would deny the application.\(^{15}\)

In *Republican Party of Pennsylvania v. Boockvar* (Application No. 20A54, decided on October 19, 2020), the Court permitted an extension of the deadline for receiving mail-in ballots in Pennsylvania. The Purcell principle did not serve as a decisive factor in the Court’s decision. The Court, deadlocked at 4-4, upheld the lower court’s ruling to extend the deadline. The order revealed that Chief Justice Roberts aligned with the liberal justices, as it specifically noted that Justices Thomas, Alito, Gorsuch, and Kavanaugh would have granted the application. This implies that Chief Justice Roberts, together with the liberal justices, contributed to the 4-4 deadlock, ultimately resulting in the affirmation of the lower court’s decision.

In *Democratic National Committee v. Wisconsin State Legislature* (Application No. 20A66, decided on October 26, 2020), the Court blocked an extension of the deadline for receiving mail-in ballots in Wisconsin, citing the Purcell principle. The Court emphasized the need to avoid last-minute changes to election rules to prevent confusion and potential disenfranchisement of voters.

The inconsistency lies in the Court’s selective application of the Purcell principle. In the Wisconsin and Alabama cases, the Court relied on the principle to avoid last-minute changes to election rules. However, in the Pennsylvania case, the Court did not invoke the principle and allowed the deadline extension for mail-in ballots. This inconsistency has

\(^{15}\)The Court’s composition changed on September 18, 2020 with the passing of Justice Ruth Bader Ginsburg. Justice Amy Coney Barrett’s first votes as a justice wouldn’t be until November 26, 2020, in *Roman Catholic Diocese of Brooklyn v. Cuomo*
led to criticism. Some legal scholars and commentators argue that the Court’s application of the Purcell principle was selective and results-driven, rather than based on a consistent legal standard. Foley adds his concern that these election cases are uncommonly partisan, using *Bush v. Gore*’s preliminary rulings as his prime example (Foley, 2020).

Related to the election cases (and sometimes contained within them, as noted above) are cases involving COVID-related restrictions. These cases, given the public health emergency in which they were raised, had huge and immediate impacts, and were divided along ideological lines, with only the dissenters explaining their votes (Wermeil, 2020). Wermeil considers cases involving religious freedom, prisoner safety, business closures, the U.S. Census, and medical abortions in his article, arguing that this important set of cases may never even make it to the Court merits docket for full consideration, fully decided instead in an ad hoc way (Wermeil, 2020). In *Roman Catholic Diocese of Brooklyn v. Cuomo* (Application No. 20A87, decided on November 25, 2020), the Supreme Court granted an injunction against New York’s COVID-related restrictions on attendance at religious services. The Court ruled that the restrictions violated the First Amendment’s Free Exercise Clause, with the conservative majority arguing that the regulations unfairly targeted religious institutions. In *Valentine v. Collier* (Application No. 19A1034, decided on April 22, 2020), the Supreme Court vacated a lower court’s order that required a Texas prison to implement COVID-19 safety measures to protect elderly and vulnerable inmates. The conservative majority granted the stay without a detailed explanation, while the liberal dissenters argued that the prison’s conditions violated the Eighth Amendment’s prohibition of cruel and unusual punishment.

In *South Bay United Pentecostal Church v. Newsom* (Application No. 19A1044, decided on May 29, 2020), the Court denied a request to enjoin California’s COVID-19 restrictions on the operation of businesses, including churches. The conservative dissenters argued that the restrictions unfairly targeted religious institutions, while the liberal majority al-
lowed the restrictions to stand without providing an explanation. In *Trump v. New York* (Application No. 20-366, decided on December 18, 2020), the Court allowed the Trump administration to exclude undocumented immigrants from the 2020 Census count used for apportioning congressional seats. The Court’s conservative majority reasoned that the challengers lacked standing, while the liberal dissenters argued that the exclusion was unconstitutional. In *FDA v. American College of Obstetricians and Gynecologists* (Application No. 20A34, decided on January 12, 2021), the Court reinstated the Food and Drug Administration’s in-person requirements for obtaining medication abortion drugs during the COVID-19 pandemic. The conservative majority granted the stay without providing a detailed explanation, while the liberal dissenters contended that the requirement posed unnecessary risks to women’s health.

Immigration cases were prevalent targets for emergency requests during the Trump Administration, which was far more likely to request such stays than previous administrations (Vladeck, 2019). In the DACA cases, Vladeck (2019) argues that the Court recognized as actionable the government’s claim that discovery placed too much of a burden on the federal government when a lower court decision enjoined its lifting of the DACA. Funding of the border wall was also on the Court’s emergency docket as the government argued it suffered irreparable harm from halting its efforts to construct these barriers to keep illegal drugs out of the U.S. (Vladeck, 2019). The Court also considered emergency applications in the travel ban and asylum-seeking cases, together influencing the U.S. immigration system in extremely important, immediate, and impactful (to the potential immigrants) ways (Wadhia, 2020).

16 Indeed, Vladeck (2021) argues that it appears to be the case that the Court has largely adopted a position that harm to the government results from an injunction of a duly-enacted law. Chief Justice Roberts appears to be adopting the position taken by Rehnquist in an in-chambers opinion in *New Motor Vehicle Board v. Orrin W. Fox* (434 U.S. 1345 (1977)), that “any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury” (at 1351). (See (Shapiro et al., 2019) for a discussion as well.) Indeed, in 2012, Chief Justice Roberts issued an in-chambers decision favorably citing the above language from the *New Motor Vehicle Board* opinion. This is another example of the potential precedential value of a case decided on the Court’s emergency docket, here of in-chambers opinions making consequential policy.
Emergency treatment of capital punishment cases has long been controversial as the Court issues midnight decisions staying or allowing scheduled executions. Baude (2019) discusses the potential for hidden rules in death penalty cases for the Volokh Conspiracy, arguing that something as simple as the timing of filings is seemingly being treated differently both than it used to be and from one another, without any discussion of why. “It seems clear to me” he says, “that the Court is attempting to signal a significant shift in how it handles death-penalty litigation, but it is struggling over how to carry it out” and considering such a shift under circumstances where the justices do not meet in conference, are under tight time pressure, and do not benefit from full briefing and argument is proving impossible (Baude, 2019). Ndulue (2020) focuses on vacating stays of execution, suggesting the government should have an extraordinary burden of proof to do this and that the Court doesn’t appear to require it.

In the summer of 2020, the Supreme Court made several decisions on the shadow docket that allowed for the resumption of federal executions after a 17-year hiatus. These decisions vacated lower court stays of execution and permitted the federal government to proceed with the executions of multiple death row inmates, such as Daniel Lewis Lee, Wesley Ira Purkey, and Dustin Lee Honken, among others.

One such case involved Daniel Lewis Lee, a convicted murderer and white supremacist, who was scheduled to be executed on July 13, 2020. Lee’s execution had initially been postponed by a lower court due to concerns related to the lethal injection protocol. However, the Supreme Court vacated the stay in a 5-4 decision, allowing the execution to proceed. Lee was executed on July 14, 2020.

In another case, Wesley Ira Purkey, convicted of murder and kidnapping, was scheduled for execution on July 15, 2020. Purkey’s attorneys argued that their client suffered from dementia and was therefore unable to comprehend the reason for his execution. A lower court granted a stay of execution, but the Supreme Court ultimately vacated the
stay in a 5-4 decision. Purkey was executed on July 16, 2020.

A third case involved Dustin Lee Honken, convicted of multiple murders, who was scheduled for execution on July 17, 2020. Similar to the previous cases, a lower court had issued a stay of execution over concerns related to the lethal injection protocol. Once again, the Supreme Court vacated the stay in a 5-4 decision, and Honken was executed on July 17, 2020.

The Court vacated stays of execution issued by lower courts, which had raised concerns related to the lethal injection protocol and the mental capacity of defendants. The 5-4 decisions in these cases indicate that there was significant disagreement among the justices, further fueling concerns about the adequacy of the Court’s review process in these instances. The application of the shadow docket in cases involving the death penalty raises concerns about whether the extraordinary burden of proof required by the gravity of the punishment is being met, given the potential for insufficient consideration and transparency in the Court’s decision-making process.

But all of these are specific stories of recent cases or areas of caselaw that reporters or law professors deem alarming. In places, they suggest changes in the Court’s criteria for granting extraordinary relief (Baude, 2015; Vladeck, 2019) as well as in the legal rules and standards the Court employs (Codrington, 2021). They point to, in places, increased ideological behavior in cases receiving less public scrutiny (Baum, 2020). They are said to present a new “mechanism to gain an advantage in politics or policy” (Baum, 2020, 9). But what role do they play in the entirety of the Court’s workload? One of the motivating questions of this research is whether these cases that are getting attention are the exceptions or the rule. How prevalent are these orders – first – and what do the orders comprise and to what effect – second – can only be truly understood if we catalog all of them.
Conclusion

In this dissertation, I will investigate the U.S. Supreme Court’s use of its emergency docket, focusing on the potential implications for policy, precedent, and public opinion. By cataloging all cases and considering the full breadth of the Court’s behavior, I aim to ascertain whether rulings discussed above in the areas of elections, immigration, capital punishment, and the pandemic are exceptions or illustrations of the change being wrought by the Court’s use of its emergency docket.

To collect the necessary data, I will rely on the *Supreme Court Journal*, Supreme Court Docket, and Nexis Uni, enabling me to explore whether things are genuinely changing or are merely our perception. This data will also facilitate an analysis of the policy impact of the Court’s docket, the extent to which the emergency docket is used as precedent, and its potential effects on public opinion of the Court. The dissertation will proceed as follows:

Chapter Two - Cataloging the Workload of the Court: This chapter will discuss data collection and present findings of emergency applications over time from OT 2000 - OT 2021. Additionally, I will formulate expectations and test hypotheses to determine how the justices’ handling of applications impacts emergency application outcomes.

Chapter Three - Policy: In this chapter, I will comprehensively examine the issue areas before the Supreme Court and analyze the areas where emergency applications have been filed. I will categorize the emergency applications according to procedures and outcomes based on their respective issue areas and probe any discernible ideological leanings in the decision-making process. Lastly, I will compare the emergency applications dataset from 2014-2021 with the merits docket.

Chapter Four - Precedent: This chapter will discuss the various ways that emergency applications from OT 2000 - OT 2021 have been used as precedent, including in Supreme Court opinions, lower court decisions, administrative agencies, statutes, and legal briefs.
Chapter Five - Experiment: In this chapter, I will examine the role of procedural regularity in public perceptions of the U.S. Supreme Court. I argue that substantive legitimacy can stem from procedural regularity. Using a unique experimental design, I derive multiple hypotheses from a procedural regularity and fairness model. The analysis will test the impact of decisions made via the emergency docket on diffuse and specific support of the Court from a multi-wave survey of 3793 nationally representative respondents. The experimental analysis indicates that procedural regularity significantly impacts public support for the Court, yielding important contributions and suggesting that at least some of the Court’s legitimacy is in its own hands.
Chapter 2 - Cataloging the Workload

Currently, no comprehensive dataset contains the work of the Court outside the merits docket. Law professors such as Steve Vladeck have begun to systematically focus on orders granting or denying emergency relief. (See Appendix B, which displays Professor Vladeck’s data from OT 2021. He catalogs emergency applications that request a stay and/or an injunction. He also notes public dissents.) Vladeck seems most concerned with how the emergency docket is expanding while the merits docket is shrinking. He has begun to call for Congress to have an increased role in shaping the Court’s docket. He also argues that this is not meant as an attack on the Court but a movement toward Congress being more involved in the Court’s docket.17 My dataset seems to gather the same cases; however, Vladeck has only looked at the most recent terms (full data for OT 2021 was available on Twitter), and his data only note the disposition of the Court and whether there was a public dissent.

Political science scholars such as Larry Baum have taken a different approach. His data includes applications for stays and injunctions that have gone to the full Court identified with a docket number containing an “A” in the Journal, such as 20A20. The “A” in the docket number signals the Court’s actions in all stay cases. Baum’s goal was to analyze whether justices were voting along party lines (Baum, 2020).18

In a working paper, Johnson and Strother (2022) parse out docket numbers from the Journal using “A” or “M” and only look for strings with “stay,” “enjoin,” or “injunc.” To create their dataset, they filter by whether or not a justice noted an agreement or disagreement. Their study focuses on 341 statements in 277 orders19 during the Roberts Court to analyze ideological decision-making on the shadow docket.

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17 https://twitter.com/steve_vladeck/status/1542699855381991424?s=20&t=Y0tlXatwJB53yuAuQgQXXA
18 Using this methodology Baum (2020) dataset contains only 111 cases from 2013-2019. My methodology, explained here, produces a set of 567 cases over that same time frame.
19 My dataset includes 1300 orders from the same time frame.
My dataset differs from what has been cataloged in a couple of ways. First, I catalog from the 2000 term through the 2021 term. This allows me to reach back in time and consider a much broader set of cases to provide insight into any perceived over-time change. Second, I catalog 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. Sometimes the docket number for emergency applications does not follow the 20A20 pattern that Baum, Johnson, and Strother use. An example of a case not included in either the Baum or Johnson & Strother dataset is docket number 20-922 (21A121) Lisa Marie Montgomery, Petitioner v. Jeffrey A. Rosen, Acting Attorney General, et al.. Baum’s dataset did not include this application because it did not follow the normal docket number pattern, and it is not included in the Johnson and Strother dataset because there are no statements of agreement and disagreement of justices. In addition, emergency orders request relief without the words “stay” or “injunction,” such as an emergency request for a certificate of appealability or an emergency application for interim relief, so Johnson and Strother will likely miss those as well.

Beyond the choices of which orders to consider, I argue that previous attempts to study orders also miss some of the most important aspects of those cases. I code my larger set of cases for a plethora of potentially interesting information, including the following: outcome (grant, deny); ideological direction; type of relief being requested; the process the justices and the Court take in considering the emergency application; whether orders are accompanied by written explanations (opinions, concurrences, or dissents); the identity of the litigants; treatment of the lower court decision; issue area; and timing. The resulting dataset will enable me to answer questions about over-time changes in types of orders, grant rates, and dissent rates; whether different issue areas are treated differently; how the issue area, dissent rate, and other aspects compare with the merits docket; and more.
Data Gathering

To answer these questions, I utilize the *Journal of the Supreme Court of the United States*, available online via the Court’s official website, to catalog the workload of the Supreme Court of the United States from OT 2000 – OT 2021. The *Journal* has been described as the minutes of the Supreme Court, and such a publication has been around for a very long time. The *Journal* includes all actions taken by the Court each term, including, of interest here, any orders it issues in pending cases (as well as many materials not of interest to us, including remarks by the Chief, bar admissions, attorney discipline, denials of rehearing, and various motions on time, filings, or divided argument). I consider the universe of emergency applications that are presented to an individual justice from the 2000 term through the 2021 term. I note the type of relief requested and how the justice handles the application by analyzing each docket via the Supreme Court’s website and the outcome of each emergency application. Because of data availability, I code issue area, the lower courts disposition, and whether the status quo is changed starting with only for the 2014 term through the 2021 term.

I started data collection during the Fall of 2021 and systematically combed each *Journal* to find all orders that were presented or addressed to a particular justice. I include applications for stays (including stays of execution and stays of the mandate), motions for stays or injunctive relief, and applications and motions to vacate stays or injunctions.\(^{20}\) Basically, any type of application that was presented or addressed to an individual justice is included in this dataset. I believe this almost completely covers the work the Court does outside of full hearings on the merits with oral argument and full opinion delivery and so presents us with the opportunity to catalog and understand the full range of the Court’s workload each term. The method of data collection includes emergency applications regardless of application number pattern and includes orders requesting relief that

\(^{20}\)Technically, motions are made to the Court while applications are made to individual justices. Until 1990, the Court made no real distinction between those two petitions.
do not contain just the words stay or injunction. The shadow docket, defined in the context of this project, is when the Court grants or denies relief to an applicant through an emergency order instead of hearing the case with a full briefing and oral argument.

During the first pass of data gathering, the following types of orders displayed in Table 1 appeared in the *Journal* as emergency applications and were included in the dataset:

<table>
<thead>
<tr>
<th>Types of Relief Requested in Emergency Applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>injunctive relief</td>
</tr>
<tr>
<td>stay the mandate</td>
</tr>
<tr>
<td>preliminary injunction</td>
</tr>
<tr>
<td>vacate stay of execution</td>
</tr>
<tr>
<td>stay of removal</td>
</tr>
<tr>
<td>stay or vacatur</td>
</tr>
<tr>
<td>issuance of judgment</td>
</tr>
<tr>
<td>writ of mandamus</td>
</tr>
<tr>
<td>writ of injunction</td>
</tr>
<tr>
<td>order requiring preservation of evidence</td>
</tr>
<tr>
<td>release</td>
</tr>
</tbody>
</table>
Table 2: Emergency Docket Data Gathering

<table>
<thead>
<tr>
<th>Application number</th>
<th>Docket number</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Journal section</td>
<td>Case name</td>
<td>Application for</td>
</tr>
<tr>
<td>Presented to</td>
<td>Referred to the Court</td>
<td>Pending disposition</td>
</tr>
<tr>
<td>Granted</td>
<td>Denied</td>
<td>In part</td>
</tr>
<tr>
<td>Cert before judgment</td>
<td>Who would have granted the stay?</td>
<td>Who dissented?</td>
</tr>
<tr>
<td>Who dissented from the grant of stay?</td>
<td>Who dissented from denial of application to vacate stay?</td>
<td>Who dissented from denial of application for injunctive relief?</td>
</tr>
<tr>
<td>Who dissented from denial of application to vacate injunction?</td>
<td>Who dissented from denial of motion to lift stay?</td>
<td>Who dissented from grant of application for injunctive relief?</td>
</tr>
<tr>
<td>Dissent for reasons set out in</td>
<td>Who would have granted the application?</td>
<td>Who would have denied the application?</td>
</tr>
<tr>
<td>Concurring</td>
<td>Concurring in denial of application to vacate stay</td>
<td>Concurring in the judgement</td>
</tr>
<tr>
<td>Concurring in the grant of application for stay</td>
<td>Concurring in the partial grant of application for injunctive relief</td>
<td></td>
</tr>
</tbody>
</table>

The data presented in Table 2 provides a comprehensive overview of the information collected from the Supreme Court Journal regarding emergency docket applications. This table outlines various aspects of each emergency application, including application and docket numbers (when available), dates, case names, types of relief sought, and the Justices involved in the decision-making process. Importantly, the table also captures which
justices concurred or dissented, shedding light on the various perspectives and disagreements that may arise during the adjudication of emergency applications. Figure 3 is a Journal entry from the 2020 term to demonstrate where the information from Table 2 is found.

Figure 3: Sample Emergency Order in Supreme Court Journal

Overall I gathered 1847 cases from terms OT 2000 - OT 2021. The shadow docket dataset opens a window of scholarly understanding into what goes on in the Court when an emergency application is filed. Figure 4 displays the number of emergency applications filed per term that are included in this dataset.
The U.S. Supreme Court is organized into geographical regions called circuits, with each justice assigned to one or more of these circuits. They are responsible for handling emergency applications that arise within their respective circuits. Figure 5 illustrates the percentage of applications presented to each justice during the time frame of this study. While the distribution of applications is primarily influenced by the Supreme Court’s rules of operation, it is also important to note that some applications come through refiling after a justice has initially denied an emergency application in chambers. This refiling process, along with other details regarding the handling of emergency applications, will be discussed later in this chapter.
Figure 5: Justices Receiving Emergency Applications OT 2000-2021
Table 3: Coding for the Emergency Docket

<table>
<thead>
<tr>
<th>Variable</th>
<th>Operalization</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issue area</td>
<td>Modeled after Supreme Court database by using the same values (criminal procedure, civil rights, first amendment, due process etc.)</td>
</tr>
<tr>
<td>Decision direction</td>
<td>Modeled after Supreme Court Database where liberal = 2, conservative = 1</td>
</tr>
<tr>
<td>Lower Court decision direction</td>
<td>Modeled after Supreme Court Database where liberal = 2, conservative = 1</td>
</tr>
<tr>
<td>Written opinion</td>
<td>Does the order contain a written opinion?</td>
</tr>
<tr>
<td>Conference</td>
<td>Was the order distributed for conference?</td>
</tr>
<tr>
<td>Refiled</td>
<td>Was the application refiled?</td>
</tr>
<tr>
<td>First justice</td>
<td>If refiled who was the original justice the application was submitted to?</td>
</tr>
<tr>
<td>Response Requested</td>
<td>Did the justice request a response after the application was filed?</td>
</tr>
<tr>
<td>Temporary Stay</td>
<td>Did the justice issue a temporary stay while the Court considered the application?</td>
</tr>
<tr>
<td>Addressed To</td>
<td>Was the application “addressed to” an individual justice as opposed to “presented to”</td>
</tr>
<tr>
<td>Status Quo</td>
<td>Does the order change the status quo?</td>
</tr>
</tbody>
</table>

**Coding Issue Area of Emergency Application**

Table 3 shows the variables coded after the initial data gathering. The Supreme Court Database codes Supreme Court cases in 14 issue areas encompassing a wide range of le-

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21Decision direction for cases are coded liberal when they are pro-defendant, pro-civil rights claimant, pro-immigrant, pro-individual, etc.
gal subjects and then codes the liberal and conservative directions in the decisions for the specific issue areas. The emergency application dataset from OT 2014 to OT 2021 contains the issue areas of criminal procedure, civil rights, First Amendment, due process, privacy, attorneys, economic activity, judicial power, and federalism. This data can provide valuable insights into the ideological underpinnings of Supreme Court decisions. I analyzed each emergency application and lower court decision and assigned an issue area modeled after the Supreme Court Database’s Methodology.

**Coding Decision Direction of Emergency Applications**

In the realm of criminal procedure, liberal decisions tend to prioritize the rights of the accused, advocating for procedural safeguards and emphasizing the importance of addressing systemic injustices within the criminal justice system. Conversely, conservative decisions often focus on maintaining law and order, upholding prosecutor discretion, and preserving the rights of victims.

In the civil rights issue area, liberal decisions generally emphasize the need to protect and expand the rights of historically marginalized groups, promoting inclusivity and striving for social justice. First Amendment issues reveal a complex interplay between liberal and conservative directions. While both may uphold the importance of free speech, liberal decisions often focus on preventing the suppression of minority voices, and conservative decisions may emphasize the protection of religious freedom and the limitation of government intervention in religious affairs.

Due process, a fundamental principle in the U.S. legal system, is enshrined in the Fifth and Fourteenth Amendments to the Constitution. It guarantees that the government must respect all the legal rights of individuals and not arbitrarily deprive them of life, liberty, or property without adhering to established legal procedures. The concept of due process

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22 A more detailed discussion of issue areas is contained in Chapter 3

23 Because of the lack of availability of the content of emergency applications online, the dataset for issue area and decision direction only included the OT 2014 - OT 2021 terms.
can be divided into two categories: procedural due process and substantive due process.

In the context of procedural due process, liberal decisions often emphasize the importance of fairness in legal proceedings, advocating for robust procedural safeguards to protect individual rights. These decisions may endorse measures such as adequate notice of legal proceedings, the right to counsel, and the right to confront and cross-examine witnesses. Liberal decisions also tend to prioritize protecting the rights of the accused and ensuring that the government does not abuse its power in the criminal justice system.

Conservative decisions related to procedural due process may focus on maintaining the efficiency and integrity of the legal system, ensuring that procedural safeguards do not excessively hinder law enforcement or unduly burden the courts. These decisions may be more inclined to uphold existing procedural norms and resist the expansion of procedural protections in favor of stability and predictability in the legal system.

Regarding substantive due process, liberal decisions often interpret this concept more expansively, recognizing the existence of certain fundamental rights that are not explicitly enumerated in the Constitution but are deemed essential to liberty. These decisions may extend constitutional protections to areas such as reproductive rights, marriage equality, and the right to make choices about one’s family and personal relationships. By doing so, liberal decisions seek to safeguard individual autonomy and prevent the government from infringing upon these deeply personal aspects of life.

In contrast, conservative decisions typically adopt a more narrow interpretation of substantive due process, adhering to originalist or textualist principles that emphasize the original intent or plain meaning of the Constitution’s text. Conservative decisions may be more reluctant to recognize unenumerated rights and are often skeptical of judicially-created rights that lack a clear basis in the Constitution’s text or the framers’ intent. This approach seeks to limit judicial discretion and prevent the courts from overstepping their role in interpreting the Constitution.
In the privacy issue area, liberal decisions generally prioritize the protection of personal autonomy and individual rights, often supporting the right to privacy in areas such as reproductive rights, family relationships, and personal information. On the other hand, Conservative decisions may emphasize traditional moral values, focus on the text of the Constitution, and argue that privacy rights are not explicitly enumerated, leading to a more constrained view of privacy protections.

In the area of attorneys, the liberal-conservative distinction typically manifests in terms of the role of attorneys in the justice system. Liberal decisions often advocate for stronger ethical standards and oversight of attorney conduct. Conservative decisions may resist expanding the government’s role in providing or regulating legal services. Regarding economic activity, liberal decisions tend to support government intervention and regulation in the market, aiming to protect consumer rights, ensure fair competition, and address social and economic inequalities. In contrast, conservative decisions frequently advocate for a limited government role in the economy, endorsing free-market principles, protecting private property rights, and resisting expansive regulations that they perceive as encroaching on individual liberties. In the judicial power issue area, liberal decisions often endorse a more active role for the judiciary in interpreting the Constitution and addressing societal issues, reflecting the belief that the courts are responsible for protecting individual rights and promoting social justice. Conservative decisions, on the other hand, generally advocate for judicial restraint.

I also followed the Supreme Court Database Methodology to code the decision direction of each emergency application between OT 2014- OT 2021. This was based on the decision’s outcome, not on whether emergency relief was granted. When coding decision direction based on the outcome of an emergency application decision, it is important to focus on the substantive implications of the decision rather than merely whether relief was granted. By doing so, you can better capture the true impact of the decision on the
underlying issue at stake.

Let’s consider two hypothetical examples to illustrate this idea:

Example 1: Suppose there is an emergency application concerning a state’s newly enacted voting restrictions. Civil rights groups argue that these restrictions disproportionately impact minority voters, while the state government contends that the restrictions are necessary to prevent voter fraud. A lower court grants a temporary injunction, preventing the implementation of the restrictions until the case can be heard on the merits.

If the Supreme Court denies the emergency application to vacate the injunction, the voting restrictions will remain blocked until the case is heard. In this instance, the decision direction could be coded as “liberal” because the outcome supports the civil rights groups’ position, even though relief was not granted.

Example 2: Imagine an emergency application involving a state law that imposes strict regulations on abortion providers, effectively limiting access to abortion services. Pro-choice advocates argue that the law is unconstitutional, while the state government asserts its right to regulate medical practices. A lower court grants a temporary injunction, blocking the implementation of the law until the case can be heard on its merits.

If the Supreme Court denies the emergency application to vacate the injunction, the regulations will remain blocked until the case is heard. In this case, the decision direction could be coded as “liberal” because the outcome supports the pro-choice advocates’ position, even though relief was not granted.

By coding decision direction based on the outcome of the emergency application decision rather than merely whether relief was granted, you can better capture the true impact of the decision on the underlying legal issue and more accurately reflect the ideological direction of the decision. This approach provides a more nuanced understanding of the Court’s actions and their implications for the parties involved and the broader legal land-
scape.

**Inter-coder Reliability**

Because of the lack of availability of the content of emergency applications online, the dataset for issue area and decision direction only included the OT 2014 - OT 2021 terms. An intercoder reliability test was performed to assess the consistency and accuracy of the coding process on 587 cases. Adhering to the widely accepted guideline of selecting 10% of the total cases for intercoder reliability testing, a random sample of approximately 59 cases was chosen. The coding scheme was based on the established Supreme Court Database methodology, which provides a systematic approach for determining issue area and decision direction. The study’s coders underwent a rigorous training and calibration process to ensure a thorough understanding of the coding scheme and its application. The second coder had extensive experience with coding Supreme Court cases using the Supreme Court Database’s methodology. The intercoder reliability was assessed upon completion of the coding process, yielding an intercoder reliability rating of over 0.9. This high rating demonstrates a strong level of agreement among the coders and underscores the reliability of the coding process employed in this research. The robust intercoder reliability score achieved in this study provides confidence in the consistency and accuracy of the coding process and serves as a testament to the effective application of the Supreme Court Database methodology in categorizing and analyzing the cases at hand.

**Other Variables Coded from Emergency Applications**

The following variables from Table 3 were collected from the Supreme Court Docket for each emergency application from 2000-2021:

- written opinion
- refiled
- conference
- first justice
One of the critical variables examined was the presence of a written opinion in the order, which can provide insight into the Court’s reasoning and the legal issues at play. Additionally, the study assessed whether orders were distributed for conference, indicating a collaborative decision-making process among the Justices. In some instances, applications were refiled, necessitating an examination of the original Justice to whom the application was submitted. This information is valuable in understanding the dynamics and potential changes in the Court’s position over time. Another important variable collected was whether a response was requested by the Justice after the application was filed, which can suggest the need for further information or clarification before rendering a decision. The issuance of a temporary stay while the Court considered the application was also analyzed, as this variable sheds light on the urgency and potential consequences of the case at hand. Finally, it was noted whether the application was “addressed to” an individual justice as opposed to “presented to” an individual justice. To code for status quo, the determination is made by comparing the Supreme Court’s decision in an emergency application to the lower court’s decision. A deviation from the lower court’s decision is regarded as a modification of the status quo, regardless of whether it leans liberal or conservative.
Figure 6 is an example of a recent docket entry from the Supreme Court’s Website. This example shows where Chief Justice Roberts requested a response on October 1, 2020, as well as where the Court notes when an opinion is included in an emergency application order on October 5, 2020. Briefs and lower court opinions were available within the docket entries from the 2016 terms to the present. Before 2016 the docket was presented in a different format, as displayed in Figure 7.

24 The docket is shortened for display purposes
Figure 7: Supreme Court Docket Sample Pre-2016 Term

The docket entry in Figure 7 is a sample of an emergency application that was refiled. The emergency application was originally filed with Justice Sotomayor on July 27, 2015. The application was denied on July 28th and then refiled with Chief Justice Roberts on August 26th. The application was distributed for conference on September 9th and then denied by the Court on October 5th.

**Detailing the Shadow Docket**

Below I discuss emergency applications from terms OT 2000 - 2021 that were collected for this project. Emergency applications ask for many different types of relief. Stays of executions are by far the most requested type of relief. Sixty percent of the emergency applications submitted between OT 2000 - OT 2021 were requests for a stay of execution. (Figure 8). Beyond requests for stays and stays of execution, Figure 9 displays the almost 30 different types of relief requested between the 2000 and 2021 terms.
Other than stays of execution, the types of relief requested most often are for a certificate of appealability (COA) and requests to vacate a stay of execution. According to Rule 22, a certificate of appealability must be obtained before an individual can appeal a fed-
eral court’s decision in a habeas corpus case. The COA indicates that the petitioner has made a substantial showing of the denial of a constitutional right. If a lower court denies a petitioner’s request for a COA, the petitioner may file an emergency request with the Supreme Court asking it to grant a COA.

The high number of emergency requests for a Certificate of Appealability (COA) from 2000-2021 can be attributed to several factors. First, habeas corpus and post-conviction relief cases, which typically require a COA, often involve time-sensitive issues and significant consequences for the individuals involved. These cases frequently address challenges to the legality of detention, questions of constitutional rights, or other serious concerns, leading parties in these cases to seek emergency relief to expedite the appeals process. Second, the legal framework established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) mandates a COA in habeas corpus cases and other post-conviction relief proceedings while also imposing strict time limits and procedural requirements for appeals. Consequently, parties may increasingly request emergency COAs in order to comply with these deadlines and requirements.

An emergency application to vacate a stay of execution is asking the Court to lift a temporary halt to an execution that has been ordered by a lower court. A stay of execution is a court order that temporarily suspends the implementation of a death sentence, allowing the condemned individual to pursue legal challenges to their conviction or sentence. If a stay of execution has been granted by a lower court and the execution is imminent, the government may file an emergency request with the Supreme Court asking it to vacate or lift the stay of execution. The emergency request must explain why the stay of execution should be lifted and why the defendant’s execution should proceed. If the request is granted, the stay of execution is lifted, and the defendant may be executed. If the request is denied, the stay of execution remains in place.

Vacating stays of execution, being the next highest request after COA, can also be attributed to several factors. As with COAs, stays of execution are time-sensitive and carry significant consequences for the individuals involved. The urgency of these situations leads parties to frequently seek emergency relief to address these critical concerns. Additionally, the legal landscape surrounding capital punishment has evolved considerably in recent years, with increased scrutiny of methods of execution, the fairness of capital trials, and the constitutionality of the death penalty itself. This heightened attention to capital punishment has likely contributed to the growing number of emergency requests for vacating stays of execution.

**Justice Response**

Once emergency applications are submitted, it is crucial to examine the justices’ subsequent actions and their impact on the outcomes of these applications. This analysis explores the data by assessing the prevalence of various responses over time and modeling their effects on application outcomes. Justices have several options when responding to an emergency application:

Justices can deny an application in chambers without referring it to the full Court (this project is limited to decisions reported in the Journal and does not include in-chambers decisions). If this occurs, the petitioner can refile with a justice of their choice. The justice can refer the application directly to the Court without taking any of the above actions.\(^{26}\) This was the most common outcome, occurring in 66% of the cases in the dataset.

\(^{26}\)Requesting a response, issuing a temporary stay, distributing, or distributing for conference.
Figure 10 displays the percentage of emergency applications where no action was taken between the time the justice received the application or when it was referred to the Court for each term between 2000 and 2021. In the early years, between 2000 and 2002, the percentage of emergency applications with no action was very high, around 98-99%. A significant decrease in the percentage of no-action cases occurred in 2003, dropping to 33.7%. This could be because those actions were not noted in the docket prior to the 2003 term. Between 2004 and 2013, the percentage of no-action cases fluctuated between 48.4% and 78% without a consistent trend. In 2015, the percentage dropped to 50%, the lowest it had been since 2003. After this point, the percentage of no-action cases has generally trended downward, reaching its lowest level at 27.1% in 2021. Overall, the data shows that the percentage of emergency applications with no action has decreased over time, particularly in the last several years.

If a justice deems that an emergency application warrants further consideration, they can request a response from the parties and/or issue a temporary stay while the Court
reviews the application. The justice may then distribute the application (often done when the justices are on recess from the Court in D.C.) or distribute it for conference. Following the Court’s review, the justices can vote to either deny or grant the application and may include a dissent or written opinion. These various response options can be issued separately or in tandem. The subsequent sections will provide more detailed information on these processes.

Response Requested

The most notable steady increase of actions on emergency applications is when the justice requests a response from the parties. (see Figure 12 displaying the percentage of responses requested per term) According to the Guide, the request for a response is often referred to as a “call for a response” or a “CVSG” (Call for the Views of the Solicitor General) if the response is being sought from the U.S. Solicitor General’s office. The purpose of requesting a response is to allow the Justice to obtain more information about the case before making a decision on the emergency application. If the Justice decides to request a response, the party or parties receiving the request will be given a deadline by which they must file a written response to the application. The response will typically include arguments and evidence supporting their position on the case and responding to the arguments raised in the emergency application. Once the response is filed, the Justice may then consider the arguments made by both parties in deciding whether to grant or deny the emergency application. In some cases, the Justice may also refer the case to the full Supreme Court for consideration. See Figure 11, which displays the process for emergency applications when a response is requested by a justice.
An example of an emergency application where the justice requested a response is found in application No. (18A629) *Virginia House of Delegates, et al., Applicants v. Golden Bethune-Hill, et al.*:

“Dec 14 2018 Response to application (18A629) requested by The Chief Justice, due Thursday, December 20, 2018, by noon ET.”

In this instance, the Chief Justice gives the parties about a week to respond. According to the docket, both parties submitted their replies on December 20th (the due date), and a reply from the petitioner was filed on December 21st. The responses and replies, in this case, range from 17-40 pages. They begin with a very brief introduction to the facts of the case; then, they focus on specifically why the Court should or should not grant the stay, not the merits of the case. They all contain specific legal arguments with a table of authorities and cite multiple cases. The emergency application was then referred to Court by the Chief Justice on January 8th, and the application was denied by the Court on the same day.\(^\text{27}\)

Between the 2000 and 2003 terms, there was only one emergency application where the justice requested a response. In the 2021 term alone, responses were requested

\(^{27}\text{Docket entries can be found at: https://www.supremecourt.gov/docket/docket.aspx}\)
in 38 cases (54.3%).

Figure 12: Percentage of Responses Requested per Term

![Figure 12: Percentage of Responses Requested per Term](image)

Figure 13 shows how often each justice requests responses as they consider an emergency application. Justice Kagan has the highest rate of requests at 51%. Chief Justice Rehnquist had the lowest rate of requests. He did not request a response from any of the 72 emergency applications submitted to him.
Another action justices take is to distribute the emergency application to the conference. Petitions for writs of certiorari, along with corresponding briefs in opposition, amicus briefs, and reply briefs, are distributed (sent upstairs to chambers) to the justices. Typically, the conference is held on Fridays during the Court’s term and may involve the consideration of hundreds of petitions and applications. Applications for certiorari are not the only applications that are considered when the justices hold conference; justices also distribute emergency applications to conference. When a Justice refers an emergency application to conference, this could indicate that the justice believes the case merits consideration by the full Court in this setting rather than being decided by a single justice or denied outright without further consideration. This research brings to light a previously unexplored aspect of the Supreme Court’s handling of emergency applications, specifically the practice of distributing cases for conference. A thorough review of the existing
literature has not revealed any prior discussions or analyses of this particular conference activity, suggesting that this study provides a unique contribution to our understanding of the Court’s decision-making process.

At conference, the justices will review the materials submitted by the parties, including briefs and other supporting documents, and may discuss the case among themselves. They will then take a preliminary vote on whether to grant or deny the emergency relief requested. If a majority of the Justices agree to grant relief, the Court will issue an order to that effect. If a majority votes to deny relief, then the Court will deny the emergency application. The conference is a private meeting, and the discussions and deliberations that take place are not made public. The Court typically releases orders reflecting the outcome of the conference on the following Monday morning. The Court may also choose to grant or deny relief without referring the application to conference. The docket entry for an emergency application notes when an application is distributed for conference by the following type of entry:


According to Figure 14, between 2000-2002, only about 1% of emergency applications were distributed for conference, but towards the end of the decade, there are multiple terms where over 20% of emergency applications are distributed for conference. In the most recent term in the dataset, 2021, 8.6% of emergency applications were referred to conference.
This study also sheds light on another intriguing yet previously unexplored aspect of the Supreme Court’s handling of emergency applications—the distinction between "distributed for conference" and "distributed." Many emergency applications, especially over the summer, had a docket entry such as:

Jul 16 2020 DISTRIBUTED

Although the precise difference between these two categories is not yet fully understood in the literature, the data reveals some notable patterns that warrant further investigation. For instance, many emergency applications, particularly during the summer months, are marked as "distributed," which might suggest a different distribution process when the justices are not in session at the Court in D.C.

Overall, the data from 2000 to 2021 shows that emergency applications were distributed 9% of the time, with some variations between terms. According to Figure 15, in 2003, 2004, and 2005, the percentages of emergency applications that were "distributed" were significantly higher at 53.9%, 39.6%, and 35.2%, respectively. While the number de-
creased in 2006, it appears to be on the rise again in 2021. The reasons behind these fluctuations are not yet clear, but this novel finding highlights the need for further examination to better understand the implications and significance of the “distributed” category in the context of the Court’s decision-making process.\(^{28}\)

**Figure 15: Percentage of Applications Distributed per Term**

Temporary Stay

The justice receiving the emergency application has the option to grant a temporary stay while they are waiting for responses from the parties and/or considering the application. Oftentimes, this is called an “administrative stay” (Office, 2022). Temporary stays are usually in effect for only a short period of time, typically until the Court can decide whether to grant a longer-term stay or injunction. Temporary stays can be granted or denied without an explanation. An example of this action is found in application No. (18A375) *In Re Department of Commerce, et al., Applicants:*

\[\text{UPON CONSIDERATION of the application of counsel for the applicants, IT IS ORDERED that the orders of the United States District Court for the South-}\]

\(^{28}\)I have reached out to the Supreme Court Clerk to see if I can get clarification on the difference between “distributed” and “distributed for conference”
ern District of New York, dated July 3, 2018, August 17, 2018, and September 21, 2018, are stayed pending receipt of a response, due on or before October 11, 2018, by 4 p.m., and further order of Justice Ginsburg or of the Court.

After the responses were received, the application was referred to the Court and was granted in part. An administrative stay does not necessarily indicate which way the Court will rule, but it does hint at the possible outcome. When a temporary stay is issued, the Court grants the application 43% of the time. (When a temporary stay is not issued the grant rate is 10%). In Nathaniel Woods, Applicant v. Jefferson S. Dunn, Commissioner, Alabama Department of Corrections, et al. (19A976), Justice Thomas issued this temporary stay (without requesting a response from the parties):

UPON CONSIDERATION of the application of counsel for the applicant, IT IS ORDERED that execution of the sentence of death is hereby stayed pending further order of Justice Thomas or of the Court.

Once the application was referred to the full Court for consideration, the Court denied the emergency application, vacating Justice Thomas’ temporary stay. Justices do not always take this action when considering emergency applications. In Figure 16 we see that no temporary stays were issued in 2000, 2001, 2003, 2006, or 2012. The percentage of emergency applications receiving temporary stays peaked in 2016 at 14.5%. Interestingly, there were no temporary stays issued in the 2020 term.
Figure 17 illustrates the frequency and percentage with which individual justices issued temporary stays between 2000 and 2021. It is worth noting that justices did not often issue temporary stays during this period. Among the justices who served during these years, Justice Kennedy was the most likely to issue temporary stays, doing so in 10 cases, or 6.2% of emergency applications presented to him. Justice Thomas and Justice Alito issued temporary stays in 4.6% of cases, while Justice Roberts issued them in 5.6% of cases. Justice O’Connor issued temporary stays in 6.1% of cases, and Justice Ginsburg did so in 3.1% of cases. Justice Sotomayor issued temporary stays in 2.9% of cases. Justices Breyer, Gorsuch, Kagan, and Scalia, each issued temporary stays only once during their tenures between 2000 and 2021.
Litigant Responses to Justices

In August of 2022, Anthony Marciano filed a 213-page emergency application with Justice Sotomayor, who oversees the Second Circuit covering Connecticut, New York, and Vermont. He was seeking a stay of the Covid-19 vaccine mandate for all employees of New York City. Five days after Marciano’s submission, Justice Sotomayor denied the application without referring it to the Court. Recall that procedures of the Court allow a petitioner to refile the application when the Justice acts alone in denying the application. Indeed, once denied by the Circuit Justice, the petitioner can refile with any Justice of his or her choosing. In Marciano’s case, application (22A178) was refiled with Justice

\[\text{Anthony Marciano, Applicant v. Eric Adams, Mayor of the City of New York, et al. (22A178)}\]

\[\text{Something interesting happens to the language of the order in the journal when the order is refiled. The language in the order changes from: “Application for stay of execution of sentence of death presented to The Chief Justice and by him referred to the Court denied.” to “Application for stay addressed to Justice O’Connor and referred to the Court denied.” One possible explanation is when the order is originally submitted to the Court, it is filed with the Clerk’s Office and forwarded to the Justices presiding over the circuit court. The notation in the docket could mean the date that the Clerk’s Office presented the emergency application to the justice. When an emergency application is refiled, it is sent to a justice of the petitioners}\]
Thomas, the justice overseeing the Eleventh Circuit Court covering Alabama, Georgia, and Florida. Why would it make sense to submit this to a justice who oversees the southeast? Most likely, Marciano submitted to Justice Thomas because of his past comments on Covid-19 vaccines and mandates. A few months prior, Justice Thomas cited claims that COVID-19 vaccines were “developed using cell lines derived from aborted children” in a dissent from a denial of certiorari (Hooper, 2022). One might assume that Marciano was essentially justice shopping by refiling with a justice who might be more friendly to his plight.

The refiling of emergency applications is not a new phenomenon. Figure 18 displays the percentages of emergency applications that are filed per term. The first term we see refilings in the data is 2001. The percentage of cases in which a petition is refilled peaks in 2008 at 32.6% and has held around 17-20% since 2019. Are petitioners being strategic in where they refile? The docket notes the original justice and the justice with whom the application is refilled. According to the data, a petitioner refilled with a justice of the opposite ideology in 66% of refilled emergency applications.

Figure 18: Percentage of Applications Refiled per Term

Note: Percentages listed are calculated using the total number of applications submitted that term.

Figure 19 illustrates the initial justices who denied emergency applications in chambers before the applications were refiled and submitted to the full Court. The percentages are calculated by dividing the number of refiled applications by the total number of applications each justice received from OT 2000-2021. The *Journal* does not typically report when an individual justice denies an emergency application in chambers; however, in these cases, we can identify the original justice because the docket notes their initial denial when the application is refiled. Justice Souter had the highest percentage of emergency applications refiled (52.2%), while Chief Justice Rehnquist had the lowest rate (2.8%).

Identifying the original justice in refiled emergency applications is important for a variety of reasons. First and foremost, this information offers a unique and novel contribution to the literature, as it sheds light on an under-explored aspect of the Supreme Court’s decision-making process. Furthermore, examining the original justice’s identity allows researchers to identify patterns or trends in decision-making that may impact the outcomes of these refiled emergency applications, potentially revealing biases or preferences among the justices.

Figure 19: Initial Justices for Denied In-Chambers Emergency Applications that were Re-filed (OT 2000 - 2021)
Table 4: Initial Justice in Cases That Were Refiled

<table>
<thead>
<tr>
<th>Name</th>
<th>Initial Denials</th>
</tr>
</thead>
<tbody>
<tr>
<td>Justice Kennedy</td>
<td>50</td>
</tr>
<tr>
<td>Chief Justice Roberts</td>
<td>44</td>
</tr>
<tr>
<td>Justice Thomas</td>
<td>39</td>
</tr>
<tr>
<td>Justice Alito</td>
<td>32</td>
</tr>
<tr>
<td>Justice Ginsburg</td>
<td>28</td>
</tr>
<tr>
<td>Justice Kagan</td>
<td>26</td>
</tr>
<tr>
<td>Justice Scalia</td>
<td>25</td>
</tr>
<tr>
<td>Justice Stevens</td>
<td>23</td>
</tr>
<tr>
<td>Justice Sotomayor</td>
<td>17</td>
</tr>
<tr>
<td>Justice Souter</td>
<td>12</td>
</tr>
<tr>
<td>Justice Breyer</td>
<td>11</td>
</tr>
<tr>
<td>Justice Oconnor</td>
<td>10</td>
</tr>
<tr>
<td>Justice Gorsuch</td>
<td>3</td>
</tr>
<tr>
<td>Chief Justice Rehnquist</td>
<td>2</td>
</tr>
<tr>
<td>Justice Barrett</td>
<td>2</td>
</tr>
<tr>
<td>Justice Kavanaugh</td>
<td>2</td>
</tr>
</tbody>
</table>
Detailing the Shadow Docket: Outcomes

Applications Granted by Term

Figure 20 displays the percentage of emergency applications that were granted by the Court per term. The 2020 and 2021 terms are where we find the highest rates of grants at 31% and 31.4%, respectively. The terms with the lowest rate of applications granted are 2006 (only 1.1%) and 2012 (1.4%). I would argue that when pundits claim that the shadow docket is increasing, they really are noting that the Court is providing emergency relief more often, not that there are more requests for emergency relief.

Figure 20: Percentage of Applications Granted per Term

Dissents from Decisions on Applications

When the Court hands down a decision in an emergency application, the order notes whether the application was granted or denied and if there are any dissents. In the Journal dissents are notated as:

"Justice Sotomayor, dissenting from grant of stay" or
“Justice Kagan, with whom Justice Breyer and Justice Sotomayor join, dissenting”

Some terms did not have any public dissents with this language in response to emergency applications. However, during the 2020 term, almost a quarter of emergency applications contained public dissent, as displayed in Figure 21.

Figure 21: Percentage of Public Dissents per Term

![Percentage of Public Dissents per Term](image)

Note: Percentages listed are calculated using the total number of applications submitted that term.

Disagreements

Orders in emergency applications also note disagreement with a decision such as:

Justice Ginsburg would deny the application OR

Justice Alito would have granted the application

These instances were coded as a disagreement in the dataset, differentiating them from dissents. There were significantly more disagreements with this language than dissents. The highest rate of disagreement can be found in 2003 and 2010. (See Figure 22 for details). In the statistics section at the beginning of each term’s *Journal*, cases with the dissent language and the disagreement language are counted as dissents in the Court’s
records. These cases were combined to analyze how often there was public dissent in emergency order applications. (See Figure 23) We see a spike in dissents and disagreements combined during the 2020 term when the Court became a 6-3 conservative majority.

Figure 22: Percentage of Disagreements per Term
Dissents & Disagreements

Figure 23: Percentage of Dissents or Disagreements per Term

Table 5 presents a breakdown of the number of times justices dissented or expressed disagreement in emergency applications. The data is reported as a count rather than a percentage due to the limited information available about the justice to whom the emergency application is presented. Importantly, there is no record of which justices participated in the consideration of each emergency application.
Table 5: Number of Dissents and Concurrences

<table>
<thead>
<tr>
<th>Name</th>
<th>Dissents</th>
<th>Concurrences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Justice Ginsburg</td>
<td>136</td>
<td>2</td>
</tr>
<tr>
<td>Justice Breyer</td>
<td>121</td>
<td>1</td>
</tr>
<tr>
<td>Justice Stevens</td>
<td>106</td>
<td>1</td>
</tr>
<tr>
<td>Justice Sotomayor</td>
<td>100</td>
<td>2</td>
</tr>
<tr>
<td>Justice Kagan</td>
<td>64</td>
<td>0</td>
</tr>
<tr>
<td>Justice Thomas</td>
<td>52</td>
<td>5</td>
</tr>
<tr>
<td>Justice Alito</td>
<td>46</td>
<td>4</td>
</tr>
<tr>
<td>Justice Souter</td>
<td>37</td>
<td>0</td>
</tr>
<tr>
<td>Justice Gorsuch</td>
<td>33</td>
<td>6</td>
</tr>
<tr>
<td>Justice Scalia</td>
<td>19</td>
<td>1</td>
</tr>
<tr>
<td>Chief Justice Roberts</td>
<td>11</td>
<td>0</td>
</tr>
<tr>
<td>Justice Barrett</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td>Justice Kavanaugh</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>Chief Justice Rehnquist</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Justice Kennedy</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Justice Jackson</td>
<td>2</td>
<td>0</td>
</tr>
</tbody>
</table>

Reasons for Decisions

Sometimes, but not often, a justice will author an opinion in an emergency application. In fact, from OT 2002-2006, there were no separate opinions on emergency applications. Between 2000 and 2021, justices have issued written opinions in less than 4% of emergency application decisions. These opinions can be legal reasoning, concurrence, or dissent. The Journal does not always note a separate opinion was written, so I systematically checked the dockets for all of the cases (N=1847) and noted which dockets stated there was a separate opinion. This was notated in the emergency application docket by the phrase:

(Detached Opinion)

The docket does not differentiate between the types of opinions. Written opinions can be per curiam as in emergency application No. 20A151 *Ritesh Tandon, et al., Applicants v. Gavin Newsom, Governor of California, et al.*, 593 U.S. ____ (2021), concurrences as in emergency application No. 21A85 (21-588) *United States v. Texas et al.*, 595 U. S. ____ (2021), or
dissents as seen in emergency application No. 20A9 William P. Barr, Attorney General, et al., Applicants v. Wesley Ira Purkey. These examples of written opinions ranged from five to ten pages. The highest terms for written opinions are the most recent, with OT 2020 having the highest percentage of written opinions at 24.1% of applications. The docket does not differentiate between the types of opinions. Written opinions can be per curiam as in emergency application No. 20A151 Ritesh Tandon, et al., Applicants v. Gavin Newsom, Governor of California, et al., 593 U.S. ____ (2021), concurrences as in emergency application No. 21A85 (21-588) United States v. Texas et al., 595 U. S. ____ (2021), or dissents as seen in emergency application No. 20A9 William P. Barr, Attorney General, et al., Applicants v. Wesley Ira Purkey. These examples of written opinions ranged from five to ten pages. The highest terms for written opinions are the most recent, with OT 2020 having the highest percentage of cases accompanied by at least one written opinion at 24.1% as displayed in Figure 24.

Figure 24: Percentage of Written Opinions per Term
Conclusion

The examination thus far of the shadow docket has provided valuable insights into its evolving nature and the changing patterns of the U.S. Supreme Court’s handling of emergency applications. Despite encompassing a broad range of 31 different types of relief requested, the overall number of applications within the shadow docket has not increased over time. However, we have observed several notable shifts in the Court’s approach to these applications between 2000 and 2021.

One significant change has been the way justices initially respond to emergency applications. Over the years, justices have increasingly requested responses from the opposing parties more frequently, reflecting a growing emphasis on obtaining comprehensive information before making a decision. Furthermore, there has been a noticeable increase in the number of grants of emergency relief. This trend may indicate a higher level of urgency or importance being attached to certain cases or a change in the criteria used by the justices in deciding which applications merit relief. Additionally, our analysis has revealed an increase in dissents and disagreements among the justices in cases on the shadow docket. This could suggest a growing divergence of opinions on certain issues or a reflection of broader changes in the Court’s ideological composition. Finally, we have observed an uptick in the number of written opinions issued over time in emergency applications.

Analyzing the Shadow Docket

While there is an extensive body of literature on the factors influencing the Supreme Court’s decision to grant certiorari to a case, our understanding of what drives the Court to grant an emergency petition remains limited. Emergency petitions often involve pressing legal matters requiring immediate attention and resolution, making them distinct from regular cases that follow the certiorari process. In this section, I draw on the existing certiorari literature to advance hypotheses that may help explain the Court’s decisions in
The Supreme Court receives thousands of petitions for certiorari each year, but only a small percentage of them are granted (Black and Owens, 2009). There are several factors that may increase the likelihood of the Supreme Court granting cert in a case. One such factor is a circuit split, where there is a conflict among the federal circuit courts on an important legal issue (Kaheny, Haire, and Benesh, 2008). The Supreme Court may grant cert to resolve the conflict and provide a consistent interpretation of the law. Additionally, cases that raise significant constitutional issues, conflict with established Supreme Court precedent, or have significant implications for public policy or federal interests may be more likely to be granted cert (Perry, 1994; Lax, 2003).

The filing of amici briefs (briefs filed by non-parties who have an interest in the outcome of the case) or the involvement of the Solicitor General (the federal government’s chief lawyer who represents the government before the Supreme Court) can also be factors that increase the likelihood of the Supreme Court granting cert in a case (Caldeira and Wright, 1988; Lazarus, 2008). Amici briefs can provide additional perspectives and arguments to the Court, and if there is significant interest in a case from various parties, it may signal to the Court that the issue is important and should be reviewed (Kearney and Merrill, 2000). The involvement of the Solicitor General can also be significant, as the Solicitor General is often viewed as an expert in federal law and policy. If the federal government is a party in a case or files a brief, it can signal to the Court that the case raises important federal interests that should be reviewed by the Supreme Court (McGuire, 1998; Black and Owens, 2013). Ultimately, as with other factors, the involvement of amici or the Solicitor General is not a guarantee that cert will be granted in a case, but it can be a significant consideration that the Court takes into account when deciding whether to grant cert (Baum, 2021).

Emergency applications are requests for immediate action filed with the Supreme
Court when there is not enough time to follow the regular procedures for filing a petition for certiorari. According to Supreme Court rules and procedures discussed in chapter one, several factors may increase the likelihood of the Supreme Court granting an emergency application. First, when the emergency application is filed, the applicant must demonstrate that irreparable harm will result if immediate action is not taken. They must show in their brief that they will suffer significant harm that cannot be reversed if the Court does not act quickly. Second, the applicant must demonstrate a strong likelihood of success on the merits of the underlying case or that the Court is likely to grant cert in the case. Third, timing may also be a factor. If there is a significant time constraint, such as an impending election or scheduled execution, the Supreme Court may be more likely to grant the emergency request for relief. Finally, the Supreme Court may consider the balance of equities between the parties when deciding whether to grant an emergency application. Based on the data, the Court seems hesitant to grant emergency relief, and the Court has considerable discretion in deciding whether to grant an emergency application.

The data presented thus far contains procedures for how the Court handles emergency applications. Some actions the justices take in considering emergency applications may signal the presence of factors within the briefs that are difficult to measure that leads the Court to grant emergency relief. Actions gathered from the Journal and case docket for each emergency application include:

- Request Response
- Temporary Stay
- Conference
- Distributed
- Refiled

We might expect that when a justice requests a response from the parties, this signals that Court believes the application deserves a closer look at whether the party will suffer irreparable harm. We might also expect that the issuance of a temporary stay signals a
significant time constraint that would make emergency relief necessary. When an emergency application is distributed or distributed for conference, this also signals that the justices are taking a closer look at the application.

Do any of these actions impact how often emergency applications were granted between OT 2000 and OT 2021? I use a logit model to test the relationship between the actions taken on emergency applications and whether the emergency application was granted. Results are displayed in Figure 25. Overall, emergency applications were more likely to be granted when a justice requested a response or when a temporary stay was issued. The application was 8 times more likely to be granted if a response was requested. A temporary stay made it 2 times more likely that an emergency application would be granted. Emergency applications were less likely to be granted when the application was refiled.

Figure 25: Emergency Applications Granted
What characteristics in an emergency application would we expect to impact whether the Court issues a written opinion? Let’s first establish expectations regarding the influence of various characteristics on the likelihood of a written opinion being issued. I expect that if an emergency application is granted, the Court is more likely to issue a written opinion to justify its decision and provide legal guidance. If a response is requested, it indicates that the Court is seeking additional information from the parties involved, which might increase the likelihood of a written opinion being issued. The issuance of a temporary stay could suggest that the Court sees the matter as urgent or contentious, potentially increasing the likelihood of a written opinion. If a case is distributed for conference, it might signal that the justices are considering the case more thoroughly, which could increase the likelihood of a written opinion. Similar to the conference distribution, if a case has just been distributed, it might imply that the justices are closely examining the case, potentially leading to a written opinion. If a case has been refiled, it may imply that the Court has already reviewed it once and might be more inclined to issue a written opinion this time.

I use a logit model to test the relationship between the actions taken on emergency applications and whether the emergency application contained a written opinion. Results are displayed in Figure 26. The logit model suggests that when an emergency application is granted, the likelihood of the Court issuing a written opinion significantly increases. This aligns with our expectation that granting an emergency application would lead to a written opinion to justify the Court’s decision and provide legal guidance. Similarly, when a response is requested, the likelihood of a written opinion being issued also significantly increases. This supports our expectation that seeking additional information from the parties involved might result in a written opinion. In contrast, the issuance of a temporary stay, distribution for conference, mere distribution of the case, and refiling of the case does not significantly impact the likelihood of a written opinion being issued. This indicates that these factors might not play a crucial role in the Court’s decision to
issue a written opinion in emergency applications.

Figure 26: Emergency Applications with Written Opinions

To analyze the likelihood of an order from an emergency application containing a dissent, we can start by establishing our expectations regarding the influence of various characteristics on the likelihood of dissent being included. If an emergency application is granted, we might expect a higher likelihood of dissent, as the justices who disagree with the decision may feel compelled to explain their opposing views. When a response is requested, it could indicate that the Court sees the matter as more complex or contentious. This may increase the likelihood of dissent, as the justices may have divergent opinions. If a temporary stay is issued, it might signal that the Court finds the matter urgent or contentious, potentially increasing the likelihood of dissent as the justices may have differing perspectives on the issue. If a case is distributed for conference, it might suggest that the justices are discussing the case more thoroughly. This could increase the likelihood of dissent, as the justices may be more likely to express their individual viewpoints. Similar to the conference distribution, if a case has just been distributed, it might imply that
the justices are closely examining the case. This could lead to dissent if the justices have differing opinions. If a case has been refiled, it may suggest that the Court has already reviewed it once and could be more inclined to issue a dissent this time, as the justices may have had more time to formulate their opinions.

The logit model suggests that when an emergency application is granted, the likelihood of the order containing a dissent significantly increases as displayed in Figure 27. This aligns with my expectation that granting an emergency application might lead to dissent, as the justices who disagree with the decision may feel compelled to explain their opposing views. Similarly, when a response is requested, the likelihood of the order containing a dissent also significantly increases. This supports the expectation that a more complex or contentious matter, as indicated by the request for a response, might result in divergent opinions among the justices and lead to dissent. The issuance of a temporary stay does not significantly impact the likelihood of an order containing a dissent, indicating that this factor might not play a crucial role in the presence of a dissent. The distribution of a case for conference also does not significantly impact the likelihood of an order containing a dissent suggesting that the justices’ discussion of the case in a conference might not necessarily result in differing opinions being expressed in the form of dissent. If a case has just been distributed, there is a slight increase in the likelihood of an order containing a dissent. Although not significant, this finding might imply that the closer examination of the case by the justices could potentially lead to dissent if there are differing opinions among them. Lastly, when a case has been refiled, the likelihood of an order containing a dissent significantly decreases. This result is contrary to our initial expectation and may suggest that the justices are more likely to reach a consensus in refiled cases, leading to fewer dissents.
Conclusion

In conclusion, this chapter has provided a comprehensive catalog and detailed analysis of the shadow docket, an essential aspect of the U.S. Supreme Court’s functioning that has historically received limited attention. The examination of a vast dataset comprising 1847 emergency applications between 2000 and 2021 has uncovered crucial information about the types of relief requested, the process undertaken by the justices and the Court in considering these applications, and the various outcomes, including grants, denials, and dissents.

The analysis has led to several noteworthy findings. The data revealed that emergency applications are sometimes considered at conferences and distributed, a previously unknown aspect of the Court’s operations. Additionally, I found that 326 cases in the dataset were refiled after being initially denied by the first justice in-chambers.
Through a regression analysis, I investigated the factors influencing the likelihood of an emergency application being granted, containing dissents, or featuring written opinions. I also show when a response is requested, the case is more likely to be granted, have a written opinion, and contain a dissent. Furthermore, cases with temporary stays are more likely to be granted, while those that are distributed are less likely to have written opinions. Interestingly, refiled cases are less likely to be granted.

In the next chapter, I investigate the Court’s policy attention and policy outcomes by examining the issue area and decision direction of emergency applications from 2014 to 2021. This thorough investigation of the shadow docket has expanded our understanding of the Court’s inner workings and laid the groundwork for further exploration of its implications on the American legal system.
Chapter 3 - Policy

Introduction

According to Dahl (1957), the Supreme Court is a legal and political institution with an important role as a national policymaker. As judges are not elected, their potential role as a political institution raises concerns about the counter-majoritarian difficulty, which poses a problem in allowing unelected judges to strike down legislation passed by elected representatives. Dahl contends that the Court rarely holds divergent political preferences from the president and will not often strike down federal legislation. Consequently, Dahl encourages us not to be overly concerned about the counter-majoritarian difficulty, arguing that the Court is simply an agent of the alliance of elected branches and, by itself, is “almost powerless to affect the course of national policy” (Dahl, 1957, p. 293).

However, Segal and Spaeth (2002) posit that the Supreme Court is politicized, with justices often deciding cases based on their personal policy preferences. They argue that the American political system does not effectively constrain the Court in its decisions on the merits. If justices are unconstrained when making decisions on the merits, where the Court abides by institutional rules of using written briefs, oral argument, and published written opinions crafted over months to issue decisions, one might question how much more unconstrained they are when deciding cases on the emergency docket. Thus, the breadth of discretion mixed with the Court’s policy preferences can be a recipe for unconstrained policy-making.

In this chapter, I consider the U.S. Supreme Court’s policy making – defined here as attention to issues and the resolution thereof in both decisions on the merits and in action the Court takes on petitions for emergency relief. By analyzing merits issue attention and policy outcome information in the first section, I provide a comprehensive overview of the Court’s policymaking across various issue areas as scholars and Court-watchers cur-
rently perceive it. I argue, though, that it is also essential to examine the Court’s issue attention and resolution on the emergency docket. By comparing the Court’s issue attention and policy outcomes in merits cases to those in emergency petitions, we can more fully understand the scope of the Court’s policy-making and, perhaps, shift our policy perceptions (Gibson, Caldeira, and Spence, 2003). The Court makes important policy choices and allocates valuable resources by selecting cases for full-dress review, deciding the scope of that review, and making decisions on the merits (Baum, 1997; Baum and Baum, 2009; Baum, 2017; Pacelle and Pyle, 2002). But it also does so when it intervenes in the decision-making process by issuing or vacating stays.

This chapter utilizes a dataset comprising merits docket cases and emergency applications from the Supreme Court, spanning from the 2014 term through the 2021 term. In the previous chapter, the emergency docket data encompasses a wider time frame, from 2000 to 2021. However, due to the nature of this analysis, which involves coding issue areas and decision directions of emergency applications, more detailed information was required. This information, which included case briefs and lower court decisions, was only readily available online from the 2014 term through the 2021 term. Even with the narrower time frame of 2014-2021 for both the merits and emergency docket cases, the data remains consistent and rich allowing for meaningful insights into the Court’s policy-making processes across the two dockets.

The case selection process of the U.S. Supreme Court is a crucial aspect of its policy-making role. As the Court receives thousands of petitions for certiorari each year but grants review to only a small percentage, its choices in selecting cases for review have significant implications for public policy development. When the Court decides to review a case, it indicates that the issue at hand is of high importance and warrants further examination. This prioritization can direct policy debates and legal developments on both national and local levels. As a result, the Court’s case selection process not only serves
as a powerful policy signal but also has the potential to shape policy outcomes in various areas.

The scope of review established by the Supreme Court and its decisions on the merits are other critical aspects of its policy-making influence. When the Court decides on the scope of review for a case, it determines which specific legal questions or issues will be addressed. A broad scope of review may encompass a wide range of legal issues, while a narrow scope may focus on a single question or issue. The choice of scope can substantially impact the policy implications of the Court’s decisions. When the Court reaches a decision on the merits, it establishes or clarifies legal rules and principles that can have lasting effects on various policy areas. These decisions often serve as binding precedents that lower courts and future Supreme Court justices must adhere to or work within. In this way, the Court’s decisions on the merits can significantly influence policy development and resource allocation over time.

The shadow docket, in part, consists of emergency applications and injunctions, which force the justices to make decisions on cases brought to them, sometimes under tight time constraints. This can result in less control over the issues the Court addresses and the resulting policy. Still, I argue that the Court signals its issue priorities through the granting of relief and issuing written opinions or dissents alongside its emergency orders. Decisions on the shadow docket may not necessarily resolve the underlying legal question nor provide a comprehensive analysis with guidance for future cases. Shadow docket decisions may also have more limited effects, as orders issued can be narrow in scope or temporary in nature, leading to more targeted policy outcomes.

An example of the unique ways in which the Court makes policy on the shadow docket is Barr v. East Bay Sanctuary Covenant No. 19A230 (2019). In this case, the Trump administration introduced a rule that barred migrants who had passed through another country before reaching the United States from seeking asylum unless they had first ap-
plied for and been denied asylum in that country. A lower court issued a nationwide injunction against the rule, arguing that it ran contrary to the asylum protections enacted by Congress, but the Supreme Court granted the government’s request for a stay of the injunction pending the disposition of the case in September 2019. This Supreme Court emergency action allowed the policy to go into effect while the legal challenges proceeded through the lower courts, hence stopping the nationwide injunction enacted by the Ninth Circuit.

This decision and the policy it made were rendered without the extensive briefing, oral argument, or comprehensive written opinion that is customary in merits docket cases. The Court’s reasoning and analysis were not transparent. But still, the stay had an immediate and significant impact on asylum-seekers and immigration policy, even though the underlying legal questions remained unresolved.

Litigants also play a role in policy-making at the U.S. Supreme Court. As parties to the cases that come before the Court, litigants help shape the Court’s agenda, frame legal issues, and influence the development of legal doctrine through their arguments and the evidence they present, often bringing cases with significant legal and policy implications. When they file petitions for certiorari, litigants highlight the legal questions and policy issues at stake, persuading the Court that the case is worth considering. Litigants who resemble or are part of interest groups often approach the courts as an alternative or complementary strategy to engaging with the elected branches of government. These litigants recognize that the judiciary, and particularly the U.S. Supreme Court, can have a significant impact on policy outcomes (Pacelle and Pyle, 2002; Pacelle, 2015).

Similarly, litigants who petition the court for emergency relief approach the Court for policy redress. As they navigate this complex landscape, it is important to recognize that new issues seldom emerge abruptly on the Court’s agenda. Instead, they represent potential policy-making opportunities or the opening of a policy window (Pacelle and Pyle,
2002; Kingdon, 2011). The policy window concept, developed by John Kingdon, refers to a critical moment when the alignment of a problem, a potential solution, and favorable political circumstances create an opportunity for significant policy change. Policy windows are often fleeting, and policy entrepreneurs must be prepared to seize the moment and push their proposals forward when a window opens. Sometimes, there is a time for a cert petition. But when there is not, the shadow docket, with its distinct features and procedures, offers a quick policy window with significant implications for policy-making that can happen off-cycle.

This tactic is particularly effective when a case involves an imminent deadline, ongoing harm, or a situation that could escalate if not addressed promptly. In such cases, the Supreme Court may be more inclined to consider the emergency application and potentially open the policy window. Furthermore, when lower courts have issued inconsistent or inconclusive rulings on the matter (as in the Mifepristone case in 2023), the Supreme Court may feel compelled to step in and provide guidance or resolution, thus engaging policy making earlier in the process. Parties or interest groups capitalizing on an emergent-friendly political environment or favorable public opinion may attempt to push their issue onto the Court’s emergency docket. By leveraging the politics stream,

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32 For example, Democratic National Committee v. Wisconsin State Legislature, Application No. 20A66 where the Supreme Court was asked to reinstate an extension of the deadline for receiving mail-in ballots in Wisconsin. The Court decided, on October 26, 2020, not to extend the deadline, emphasizing the importance of avoiding judicial intervention in the electoral process close to the election date.

33 In the case Trump v. International Refugee Assistance Project, Application No. 17A560, the Court partially granted the government’s request to stay lower court injunctions against the implementation of the travel ban, which affected nationals from several predominantly Muslim countries. The Court reasoned that the ban should be allowed to go into effect for individuals without a bona fide relationship with a person or entity in the United States, thus limiting the ongoing harm to those who did not meet this criterion.

34 In Wolf v. Cook County, Application No. 19A905, the Trump administration sought a stay of a nationwide injunction issued by a federal district court against the implementation of the “public charge” rule. The rule would have made it more difficult for immigrants to obtain legal status if they relied on certain public benefits, such as Medicaid or food stamps. The Supreme Court granted the government’s request for a stay on February 21, 2020, allowing the rule to go into effect while the litigation continued. The nationwide injunction could have created significant confusion and uncertainty regarding the implementation of immigration policies across the country.

35 Alliance for Hippocratic Medicine v. FDA

36 One possible example of this is Trump v. Sierra Club. In this case, the Trump administration sought an emergency stay to lift an injunction that blocked the use of military funds for the construction of a border
they can increase the likelihood of opening the policy window (Kingdon, 2011).

The submission of emergency applications can be seen as a strategic litigation activity aimed at vying for Supreme Court issue attention and trying to open the policy window. Interest groups and litigants may choose to focus on particular issue areas and use the shadow docket as a means to bring these issues to the Court’s attention in a faster and potentially more favorable manner.

Figure 28: Number of Emergency Applications Submitted by Issue Area OT 2014-2021

According to Figure 28, between the 2014 and 2021 terms, emergency applications filed with the Supreme Court were dominated by cases falling under the criminal procedure issue area, accounting for almost 60% of all applications. The next most common issue area was civil rights, which accounted for just over 16% of all applications. Interest groups may operate more aggressively when they perceive the Court as sympathetic to their cause and may seek to transplant favorable doctrine from one area of law to another. For example, the increase in emergency docket requests related to COVID-19 regulations

37 I will discuss each issue area more in-depth in the next section,
and federal execution cases may be driven by litigants who view the Court as more receptive to their arguments on the shadow docket.

The shadow docket can also serve as a platform for the Court to signal its interest in particular issues, potentially prompting further litigation or legislative action just as the cert process does (Braman, 2006). The Court can indirectly guide the legal and policy debate surrounding contentious issues by granting or denying emergency relief. Once a new issue gains traction on the Court’s agenda, it may lead to a surge of activity in related policy areas (Pacelle, 1991; Baird, 2004). Encouraged by their success, policy entrepreneurs often move quickly to capitalize on the momentum (Kingdon, 2011; Baumgartner and Jones, 2009).

While the Supreme Court’s decisions on the merits play a more prominent and lasting role in shaping public policy, its emergency application decisions can still have important implications for policy-making, albeit in a more circumscribed and immediate manner. Both types of decisions contribute to the Court’s overall policy-making role, highlighting the importance of considering both the merits and emergency dockets when examining the Court’s influence on public policy.

I expect that the distinct agenda-setting constraints on the shadow docket, as compared to the merits docket, lead to differing patterns of issue attention. While the Court enjoys significant discretion in selecting cases for review on the merits docket, focusing on issues deemed most important or legally significant, the emergency docket often compels justices to make decisions on cases they may not have chosen to hear. The constraints could also lead to more ideologically driven decisions, as the justices are required to make quicker rulings without the benefit of extensive briefing and oral arguments that characterize the merits docket. This expedited process may result in justices relying more heavily on their ideological predispositions.

Additionally, I expect that policy outcomes will be different due to the unique na-
ture of decisions made via the shadow docket. The expedited nature of the emergency docket and the emphasis on preliminary considerations may lead to less well-defined legal questions and rulings, contributing to a more reactive approach to policy-making. In contrast, the merits docket allows for comprehensive deliberation and thorough legal analysis, enabling the Court to scrutinize the implications of modifying established policies or overruling previous decisions. Different consideration methods by the Court yield different policy outcomes in terms of ideology and the extent to which the status quo is changed.

In order to fully evaluate the policy making of the Supreme Court from 2014-2021, I consider both the merits and the emergency dockets. I begin by discussing the number of merits cases heard by issue area, highlighting the Court’s issue attention during this period. I also examine the ideological direction of the Court’s merits cases by term and issue area within the same time frame. This analysis provides insight into the Court’s policy outcomes and their evolution over time. Next, I explore how often the Court changes the status quo by term and issue area for the same period. This assessment allows us to understand the Court’s attention to and, importantly, its impact on policy through its rulings on the merits.

Next, I turn to the emergency docket and apply a similar methodology to analyze the Court’s issue attention and policy outcomes over the same period. I discuss the frequency with which the Court changes the status quo in emergency applications by term and issue area, allowing for a comparative analysis between the merits and emergency dockets. Lastly, where applicable, I compare issue attention and policy outcome between the merits docket and the emergency docket from 2014-2021. By focusing on issue attention and policy outcomes both when the Court makes merits decisions and when it considers petitions for emergency relief, this chapter offers a comprehensive portrait of the U.S. Supreme Court policy-making from 2014 to 2021.
Issue Attention on the Merits Docket

The U.S. Supreme Court’s decision to address particular issues and policies in its merits docket is influenced by a combination of factors, including the legal significance of the case, societal impact, and the potential to resolve circuit splits or clarify constitutional questions (Perry, 1994). The Court often selects cases that present significant legal questions or involve interpreting important statutes, regulations, or constitutional provisions, as these cases can have far-reaching implications for the American legal system and may set precedents that guide future decisions (Baum, 2021).

The Supreme Court Database categorizes merits cases into issue areas, including criminal procedure, civil rights, the First Amendment, due process, privacy, attorneys, unions, economic activity, judicial power, federalism, interstate relations, federal taxation, miscellaneous, and private action (Harold J. Spaeth and Benesh., 2022). The Court’s attention to certain types of cases has fluctuated across different periods. (Harold J. Spaeth and Benesh., 2022).

In 1925, Congress granted the Supreme Court the power of writ of certiorari, which allowed the Court to choose which cases to hear, as opposed to being required to accept and decide every case brought before it (Pacelle, 1991). This change enabled the Court to focus on the issues it deemed most significant. According to Pacelle (1991), the Court’s docket is influenced by the prevailing social, economic, and political climate of the time. Before the Warren Court, the Court’s focus was primarily on economic issues. This was largely due to the fallout from the Great Depression and the subsequent New Deal legislation, which required the Court’s attention to address various regulatory and constitutional matters (Pacelle, 1991). Over time, however, the Court began to deny more economic cases, signaling that the issue was no longer as important to the Court, effectively closing the policy window for those matters. This shift in the Court’s focus set the stage for the Warren Court era (1953-1969), during which the Court turned its attention
towards civil rights, liberties, and social justice issues (Klarman, 2004). During the Rehnquist Court era (1986-2005), the Court focused more on issues such as federalism, criminal procedure, and economic regulation, reflecting a conservative shift in the Court’s composition (Epstein and Walker, 2019).

**Merits cases heard by Issue Area**

Figure 29: Number of Merits Cases by Issue Area OT 2014-2021

![Figure 29: Number of Merits Cases by Issue Area OT 2014-2021](image)

Figure 29 displays merits cases per issue area from the Supreme Court database between 2014 and 2021 (Harold J. Spaeth and Benesh., 2022). This data shows that the Supreme Court has predominantly focused on merits cases related to Economic Activity (23.2%), Criminal Procedure (22.4%), and Civil Rights (17.2%) in this time period. In contrast, issue areas such as Privacy, Attorneys, Interstate Relations, Federal Taxation, and Private Action represent a much smaller portion of the Court’s merits cases. The distribution of merits cases across issue areas may be indicative of the Court’s priorities, as well as the prevailing legal and societal concerns during the studied period.
Issue Area #1 - Criminal Procedure

Issue area #1, criminal procedure, is a broad category that includes cases involving the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and cases involving criminal statutes and procedural rules. Criminal procedure issues generally arise in cases where individuals have been accused of violating criminal laws, and the question before the court is whether the prosecution or law enforcement authorities followed proper procedures in obtaining evidence, making arrests, or conducting trials. Between the 2014 and 2021 terms, criminal procedure cases made up 22% of the Court’s merits docket.

The Fourth Amendment of the U.S. Constitution protects individuals from unreasonable searches and seizures. The Supreme Court has often been called upon to determine whether a particular search or seizure was reasonable and whether evidence obtained as a result of the search should be admissible in court. The Fifth Amendment protects individuals from being compelled to testify against themselves. The Supreme Court has dealt with issues related to self-incrimination, such as the admissibility of confessions obtained during police interrogations. The Sixth Amendment guarantees the right to counsel in criminal trials. The Supreme Court has examined issues related to this right, such as whether a defendant has a right to counsel during police questioning and whether a defendant has a right to effective assistance of counsel during trial.

Focusing on cases that are important and impactful is crucial for understanding the Court’s policy-making trends across various issue areas. United States v. Jones (2012) serves as a prime example of the Court’s significant impact on shaping policy and legal doctrine. This case dealt with the issue of law enforcement’s use of GPS tracking devices.

38 Measuring the salience of Supreme Court cases can be challenging due to various factors. The degree of public attention, media coverage, and long-term legal impact may not always align or be easily quantifiable. Additionally, the significance of a case may change over time as societal values evolve, making it difficult to establish a definitive ranking or assessment of salience. For the purposes of this chapter, I am highlighting cases that demonstrate an example of the legal issue area and its policy implications.
without a warrant and their implications for an individual’s Fourth Amendment rights against unreasonable searches and seizures. The Court unanimously held that attaching a GPS tracking device to a suspect’s vehicle without a valid warrant and monitoring the vehicle’s movements constitutes a “search” under the Fourth Amendment. The Court reasoned that this action violated the suspect’s reasonable expectation of privacy, as it involved physical intrusion onto the personal property for the purpose of obtaining information. This ruling has significant implications for law enforcement practices in the digital age. *come back and add case during data if I have time*

**Issue Area #2 - Civil Rights**

Issue Area #2 in the Supreme Court Database is Civil Rights which comprises almost 17% of the cases on the merits docket between 2014 - 2021. This issue area encompasses cases related to discrimination on the basis of race, gender, sexual orientation, disability, and other protected characteristics. It also includes cases related to voting rights, affirmative action, and other issues related to equal protection under the law. Civil rights refer to the rights of individuals to be free from discrimination based on their race, gender, religion, national origin, and other protected characteristics. The issue area of civil rights in Supreme Court cases involves interpreting and applying laws and constitutional provisions related to protecting individual and group rights. These rights include equality, freedom from discrimination, and due process of law. Civil rights cases often involve claims that a government action or law has violated an individual or group’s civil rights. The Supreme Court is tasked with determining whether the law or government action in question is consistent with constitutional protections for civil rights. Discrimination can take many forms, such as race, gender, sexual orientation, age, and disability. Civil rights cases involving discrimination often require the Supreme Court to consider how to balance competing interests, such as the government’s interest in promoting diversity against an individual’s right to equal treatment.
The Supreme Court has played a key role in shaping voting rights law in the United States. These cases often require the Court to consider the constitutionality of laws and policies that may impact the ability of certain groups to vote. The Voting Rights Act of 1965 is one of the most significant pieces of voting rights legislation in U.S. history. The Act prohibits discrimination in voting practices or procedures on the basis of race. In recent years, the Supreme Court has considered challenges to the constitutionality of certain provisions of the Act, particularly the requirement that certain states with a history of discriminatory voting practices receive federal approval before making any changes to their voting laws. In *Shelby County v. Holder* 570 U.S. 529 (2013), the Court looked at a key provision of the Voting Rights Act of 1965 that required certain states with a history of discriminatory voting practices to receive federal approval, or "preclearance," before making any changes to their voting laws. Shelby County, Alabama, challenged the constitutionality of this provision, arguing that it was no longer necessary. In a 5-4 decision, the Court struck down the formula used for the preclearance requirement, finding that it exceeded Congress’s authority to regulate state elections. The Supreme Court effectively weakened the federal oversight of electoral practices in states with a history of racial discrimination. As a result, this decision dismantled a significant enforcement mechanism, enabling states to implement changes to their voting laws without prior approval from the federal government. In the aftermath of the ruling, several states began enacting restrictive voting policies, such as voter ID laws.\(^\text{39}\)

**Issue Area #3 First Amendment**

Issue area #3 in the Supreme Court Database is the First Amendment. The First Amendment to the United States Constitution protects a range of rights, including freedom of speech, freedom of religion, freedom of the press, and the right to assemble and petition the government. The First Amendment is a source of litigation before the Supreme Court.

\(^\text{39}\)Texas SB14 and North Carolina H.B. 589 are just two examples
in almost 7% of the merits docket during this time frame.

*Mahanoy Area School District v. B.L.*, 594 U.S. ___ (2021) is a recent freedom of speech case involving a student disciplined by her school for posting a profanity-laced message on Snapchat while off-campus. The Court ultimately held that the school’s discipline violated the student’s First Amendment rights. Free speech and the free exercise clause were at issue in *Kennedy v. Bremerton School District* 597 US ___ (2022) as well. Under the Free Speech Clause, individuals generally have the right to express themselves on matters of public concern, subject to reasonable time, place, and manner restrictions. However, public school employees like Joseph Kennedy have limited free speech rights because their speech can be attributed to the school and may interfere with its mission to remain neutral on religious matters. In this case, the school district argued that Kennedy’s prayer on the football field was not protected by the Free Speech Clause because he was acting in his official capacity as a coach, and his conduct could be interpreted as an endorsement of religion by the school. The Supreme Court rejected this argument, holding that Kennedy’s prayer was not attributable to the school because it occurred after his official duties had ended and was not coercive or disruptive. Under the Free Exercise Clause, individuals have the right to freely exercise their religion, subject to reasonable restrictions to protect public safety, health, or other important interests. In this case, Kennedy argued that the school district’s discipline of him for engaging in prayer violated his right to freely exercise his religion. The Supreme Court agreed with Kennedy, holding that the school district’s discipline of him for engaging in private religious expression violated his Free Exercise rights. The Court emphasized that the school district’s interest in avoiding an appearance of endorsing religion did not outweigh Kennedy’s individual right to freely exercise his religion. The ruling is expected to significantly impact future interpretations of the First Amendment’s Free Exercise, Establishment, and Free Speech Clauses, with potential long-lasting policy implications.
Issue Area #4 Due Process

Issue area #4 is Due Process, which is the concept that the government must follow fair procedures when depriving individuals of life, liberty, or property. These cases make up approximately 4% of the Court’s 2014-2021 merits docket. One example of this issue area is *Town of Castle Rock v. Gonzales* 545 U.S. 748 (2005). In this case, the Court considered whether a woman had a right to sue a police department for failing to enforce a restraining order against her estranged husband, who later killed her children. The Court held that the woman did not have a constitutionally protected property interest in the enforcement of the restraining order and could not sue the police department for failing to do so.

Another salient case in the due process issue area is *Hamdi v. Rumsfeld* 542 U.S. 507 (2004). This case dealt with the due process rights of U.S. citizens detained as enemy combatants in the context of the “war on terror.” Yaser Esam Hamdi, a U.S. citizen, was captured by U.S. forces in Afghanistan and held in military detention without formal charges or access to legal counsel.

The central question in *Hamdi v. Rumsfeld* was whether the government could indefinitely detain a U.S. citizen as an enemy combatant without providing them the due process rights guaranteed under the Fifth and Fourteenth Amendments. The Court held that while the government had the authority to detain enemy combatants during hostilities, U.S. citizens held as enemy combatants must be afforded due process rights, including the right to contest their detention before a neutral decision-maker. *Hamdi v. Rumsfeld* had significant policy-making implications, as it clarified the due process rights of U.S. citizens detained as enemy combatants and influenced the government’s handling of such cases in the context of the “war on terror.”
**Issue Area #5 - Privacy**

Privacy is an important issue area that the Supreme Court addresses, but it makes up only 1% of the Court’s merits docket over this time period. Issue area #5 includes cases that raise questions about various aspects of privacy, including bodily integrity, personal autonomy, and the government’s surveillance powers. A highly salient case in the privacy issue area is *Lawrence v. Texas* 539 U.S. 558 (2003). In this case, the Supreme Court addressed the constitutionality of a Texas statute that criminalized consensual same-sex intimate conduct. The Court struck down the Texas statute, holding that the constitutional right to privacy protected the liberty of consenting adults to engage in private intimate conduct free from government intrusion. This decision effectively invalidated similar laws in other states that criminalized consensual same-sex conduct. The decision in *Lawrence v. Texas* had significant policy-making implications, as it reaffirmed and broadened the scope of the right to privacy and set the stage for subsequent legal battles and policy discussions on LGBTQ+ rights. The ruling laid the groundwork for future cases that further advanced LGBTQ+ rights, including *United States v. Windsor* (2013) and *Obergefell v. Hodges* (2015).

Another more recent example of a privacy case is *Carpenter v. United States* 585 US (2018), where the Court considered whether the government’s acquisition of cell phone location data without a warrant violated the Fourth Amendment’s protection against unreasonable searches and seizures. The Court held that individuals have a reasonable expectation of privacy in their cell phone location data and that the government’s acquisition of this data without a warrant is a violation of the Fourth Amendment.

**Issue Area #6 - Attorneys**

Issue area #6 in the Supreme Court database is focused on Attorneys. This issue area includes cases that raise questions about the legal profession, including the regulation of
attorneys, the rights and responsibilities of attorneys, and the provision of legal services to individuals. From 2014-2021 fewer than 1% of cases on the merits docket concerned attorneys.

An example salient attorneys case is Bates v. State Bar of Arizona 433 U.S. 350 (1977). This case dealt with the issue of attorney advertising and its regulation by state bar associations. Two Arizona attorneys were disciplined by the State Bar of Arizona for violating a state bar rule that prohibited attorneys from advertising their services. They argued that the rule violated their First Amendment right to free speech. The Supreme Court held that attorney advertising was a form of commercial speech protected under the First Amendment. The Court ruled that the state bar could only regulate attorney advertising to prevent false or misleading information and that a blanket prohibition on attorney advertising was unconstitutional. The Court emphasized that the public had an interest in receiving information about the availability and cost of legal services. Bates v. State Bar of Arizona had significant policy-making implications as it marked a shift in the regulation of attorney advertising. The decision contributed to the growth of attorney advertising and affected how state bars across the country regulate the legal profession in this regard.

**Issue Area #7 - Unions**

Issue Area #7 in the Supreme Court database is focused on Unions. This issue area includes cases involving labor unions, collective bargaining agreements, union organizing, and other issues related to labor and employment law and makes up almost 3% of the Court’s merits docket over this time frame. A straightforward example of a case that falls under the Unions issue area is NLRB v. Yeshiva University 444 U.S. 672 (1980). This case addresses the issue of whether faculty members at a private university are considered “employees” under the National Labor Relations Act (NLRA) and, thus, are eligible to unionize and engage in collective bargaining.
In this case, the National Labor Relations Board (NLRB) found that full-time faculty members at Yeshiva University were employees under the NLRA and were entitled to unionize. Yeshiva University appealed the NLRB’s decision, arguing that the faculty members were more like managerial employees who are excluded from the NLRA’s coverage. The U.S. Supreme Court held that the faculty members at Yeshiva University were not “employees” under the NLRA because they had significant control over the university’s decision-making process, including academic policies, faculty hiring, and promotions. The Court reasoned that the faculty members’ authority over these matters made them more akin to managerial employees, who are not entitled to collective bargaining rights under the NLRA.

**Issue Area #8 - Economic Activity**

Issue area #8, Economic Activity, refers to cases that involve economic regulations and policies, including antitrust law, securities regulation, and intellectual property law. The regulation of economic activity has significant impacts on the U.S. economy and consumers. From 2014-2021, Economic cases make up 23.2% of the Court’s merits docket. Antitrust law is an area of law that governs competition between businesses and prohibits certain practices that are deemed to be anti-competitive, such as price-fixing and monopolies. Securities regulation regulates the issuance and trading of securities, such as stocks and bonds, and is designed to protect investors from fraud and ensure that markets are fair and transparent. The bankruptcy area of law governs the process by which individuals and businesses can seek relief from overwhelming debt through the legal system. Taxation law covers the complex system of federal, state, and local taxes that individuals and businesses must pay and includes issues such as tax planning, compliance, and disputes with tax authorities. Other economic issues that may fall under issue area #8 include labor and employment law, intellectual property law, and international trade law.
South Dakota v. Wayfair, Inc. 585 US _ (2018) was a landmark case in the issue area of economic activity decided by the Supreme Court in 2018. The case concerned a South Dakota law that required out-of-state retailers to collect and remit sales taxes on purchases made by South Dakota residents, even if the retailers had no physical presence in the state. The central issue in the case was whether the Supreme Court’s prior decision in Quill Corp. v. North Dakota, which held that states could only require retailers to collect and remit sales taxes if they had a physical presence in the state, remained good law. The Court ultimately overruled Quill, holding that physical presence was no longer necessary for a state to impose its sales tax collection and remittance obligations on out-of-state retailers. In reaching its decision, the Court considered the significant changes in the economy and the rise of e-commerce since Quill was decided in 1992. The Court noted that the physical presence rule had become an artificial and outdated barrier to states seeking to collect sales taxes on purchases made by their residents, which had resulted in significant revenue losses for the states. The decision in South Dakota v. Wayfair has significant implications for the issue area of economic activity, as it allows states to expand their ability to collect sales taxes from out-of-state retailers that sell goods and services to their residents. This decision has led to many states enacting laws to require remote sellers to collect sales tax and has had a major impact on e-commerce businesses and the broader economy.

Issue Area #9 - Judicial Power

The Judicial Power issue area refers to cases before the Supreme Court that involve the powers and limitations of the judiciary, including the scope of judicial review, separation of powers, and issues related to jurisdiction. Judicial power cases make up 12.5% of the cases on the Court’s merits docket from 2014-2021. We are familiar with Marbury v. Madison, the landmark case that established the principle of judicial review, giving the Supreme Court the power to strike down laws that are deemed unconstitutional. A more
recent example is *BP P.L.C. v. Mayor and City Council of Baltimore*, 593 U.S. ___ (2021), a case that dealt with the issue of whether state law claims against oil and gas companies for the effects of climate change should be heard in state or federal court. The case has implications for the judicial power issue area because it dealt with the question of whether federal courts have the authority to hear certain types of claims or whether those claims should be left to state courts. In this case, the Supreme Court ruled in favor of the oil and gas companies, holding that the companies could remove the case from state to federal court because the federal courts had jurisdiction over the matter. The Court found that the federal courts had jurisdiction over the claims because they involved federal common law issues related to the Clean Air Act and other federal environmental laws.

**Issue Area #10 - Federalism**

Issue Area #10, Federalism, generally refers to the division of powers and responsibilities between the federal government and the states. This issue arises in cases involving conflicts between state and federal law. Federalism cases make up almost 4% of the Court’s merits docket from 2014-2021.

A salient case that highlights the Supreme Court as a policy maker in the federalism issue area is *United States v. Lopez*, 514 U.S. 549 (1995). This case dealt with the limits of Congress’s power to regulate interstate commerce and the balance of power between the federal government and the states. Alfonso Lopez, a high school student, was convicted under the federal Gun-Free School Zones Act of 1990 for carrying a concealed handgun into a school. The Act made it a federal offense to possess a firearm in a school zone. Lopez challenged the constitutionality of the law, arguing that Congress had exceeded its authority under the Commerce Clause of the U.S. Constitution. The Court ruled that the Gun-Free School Zones Act exceeded Congress’s power under the Commerce Clause, as the possession of a firearm in a school zone was not an economic activity and did not have a substantial effect on interstate commerce. This decision marked a significant limitation
on Congress’s power to regulate non-economic activities under the Commerce Clause.

*Rutledge v. Pharmaceutical Care Management Association* 592 US _ (2020) is a more recent case that deals with the issue area of federalism. Specifically, it involves the power of states to regulate the practices of pharmacy benefit managers (PBMs), which are third-party administrators of prescription drug programs for health plans. In this case, Arkansas passed a law that regulated how much PBMs could reimburse pharmacies for generic drugs. A trade group representing PBMs, challenged the law in court, arguing that it was preempted by the Employee Retirement Income Security Act (ERISA), a federal law that regulates employee benefits plans. The Supreme Court ultimately ruled in favor of Arkansas, holding that the state’s law was not preempted by ERISA because it was directed at the prices of drugs, not the administration of employee benefit plans. The decision reaffirmed the principle of federalism, which recognizes the power of states to regulate certain areas of commerce within their borders. Overall, the case highlights the ongoing tension between state and federal power in the realm of healthcare policy and the Supreme Court’s role in balancing these interests.

**Issue Area #11 Interstate Relations**

Issue area #11 - Interstate Relations refer to cases that involve disputes between and among the states. Only 1.3% of the Court’s merits docket from 2014-2021 contains cases from this area. While the Federalism issue area primarily focuses on the division of powers between the federal government and state governments, interstate relations cases concern the relationships between states themselves. The Interstate Relations issue area includes cases dealing with conflicts between states, the rights and powers of states in relation to each other, and disputes over interpreting interstate agreements and compacts. This could include cases related to state boundary disputes, disputes over water rights between states, and disputes over the use of interstate resources. The case *Florida v. Georgia*, 592 U.S. ___ (2021), is a good example of how issue area #11, interstate relations, can be rel-
relevant in Supreme Court cases. In this case, the dispute between the two states was over the allocation of water from the Apalachicola-Chattahoochee-Flint River Basin. Florida claimed that Georgia’s excessive use of water from the river system was causing harm to the oyster fisheries in Florida’s Apalachicola Bay. Florida sought to impose a cap on Georgia’s water consumption to remedy the harm. The case was heard by the Supreme Court as an original action, which means that the Court acts as a trial court and hears the case directly rather than on appeal. The Court ultimately ruled in favor of Georgia, finding that Florida had failed to prove by clear and convincing evidence that Georgia’s water consumption was causing irreparable harm to Florida’s oyster industry.

**Issue Area #12 - Federal Taxation**

Issue area #12, federal taxation, refers to cases that involve disputes over federal tax laws, regulations, and policies. This issue area can include cases related to individual and corporate income taxes, estate and gift taxes, excise taxes, and other forms of federal taxation. Federal taxation cases make up less than 1% of the Court’s merits docket.

*Commissioner v. Glenshaw Glass Co.* 348 U.S. 426 (1955) highlights the Supreme Court as a policy maker. This case dealt with the definition of gross income for federal income tax purposes and the taxation of punitive damages received in lawsuit settlements. The Supreme Court held that the punitive damages were part of the companies’ gross income and subject to federal income tax. The Court determined that the Internal Revenue Code’s definition of gross income was expansive enough to encompass any increase in wealth, regardless of whether it originated from business activities or other sources. This decision clarified the definition of gross income and expanded the scope of taxable income under federal law.

*CIC Services, LLC v. Internal Revenue Service* 593 US _ (2021) was a more recent case decided by the Supreme Court that falls under this issue area. In this case, CIC Ser-
vices challenged an IRS rule that required certain taxpayers to disclose certain “reportable transactions” to the agency. CIC Services argued that the IRS did not follow the required notice-and-comment procedures when it issued the rule, and thus the rule was invalid. The Supreme Court agreed with CIC Services, ruling that the IRS rule was invalid because it was issued without the proper notice-and-comment procedures. The Court held that the rule was a legislative rule rather than an interpretive rule and, as such, was subject to the notice-and-comment requirements of the Administrative Procedure Act.

Issue Area # 13 - Miscellaneous

Issue Area #13 “Miscellaneous” is a catch-all category that the Supreme Court database uses for cases that do not fit into any of the other issue areas. They make up around 2% of the Court’s merits docket in our time span. Seila Law LLC v. Consumer Financial Protection Bureau 591 US - (2020) is a case that was decided by the Supreme Court in 2020, and it involves the constitutionality of the CFPB. The issue before the Court was whether the CFPB’s structure, which featured a single director who was removable only for cause, was consistent with the separation of powers principles embodied in the Constitution. The case made an important policy ruling but does not fit neatly into the databases issue categories.

Issue Area #14 - Private Action

Issue area #14 is focused on various areas of civil law, including real property, personal property, contracts, evidence, civil procedure, torts, wills and trusts, and commercial transactions. The real property area of law deals with lands and anything attached to it, such as buildings or natural resources. This issue area makes up only .6% of the Court’s merits docket between 2014-2021. Disputes arise over property ownership, use, or development. Personal property law deals with property that is not land or attached to it, like cars, furniture, and money. Contract law deals with agreements between two or more
parties. Disputes may arise over the terms of a contract, whether a contract was properly formed, or whether a party breached a contract. Evidence law deals with the rules for presenting information in court. This includes rules for what types of evidence are admissible, how evidence is presented, and how witnesses are questioned. Civil procedure deals with the process of resolving disputes in court and covers rules for filing a lawsuit, serving notice on the other party, conducting discovery, and presenting evidence in court. Torts deal with civil wrongs or injuries caused by one party to another and include personal injury, defamation, and intentional infliction of emotional distress. Commercial transactions include the sale of goods, financing arrangements, and other types of commercial agreements. Disputes may arise over the terms of a commercial agreement or whether a party has breached the agreement. There were only four merits cases coded private action between OT 2014 and OT 2021, making up less than 1% of the docket.

*Air and Liquid Systems Corp. v. Devries* (2019) is an example of a salient private action case in terms of Supreme Court policy-making. In this case, the Supreme Court addressed the issue of whether manufacturers of equipment that required asbestos parts, which were added post-sale by third parties, could be held liable under maritime law for injuries caused by asbestos exposure. The Court held that, in the context of maritime law, manufacturers have a duty to warn users about the dangers of asbestos when their product requires asbestos parts to function. The decision has continued to influence legal interpretations and policies concerning product liability and maritime law.

**Policy Outcomes on the Merits Docket**

As a significant policy-making institution, the Supreme Court’s decisions play a critical role in shaping the legal and policy landscape across the country. By evaluating the ideological direction of the Court’s decisions and changes in the legal status quo, we can better understand the Court’s influence on policy development.
I ideological Leanings of the Court’s Judgments

The decision direction, which reflects the ideological leaning of the Court’s judgments, provides valuable insights into the policy implications of the Court’s rulings. By assessing the decision direction by term and issue area, we can identify patterns and trends, such as shifts towards more liberal or conservative rulings on particular issues or overall trends over time. The Supreme Court Database codes the outcomes of merits cases as liberal or conservative, as discussed in detail in Chapter Two. Table 6 reviews the coding scheme for liberal and conservative decision direction based on issue area.
<table>
<thead>
<tr>
<th>Context of Issues</th>
<th>Liberal (2)</th>
<th>Conservative (1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal Procedure, Civil Rights, First Amendment, Due Process, Privacy, Attorneys</td>
<td>pro-person accused or convicted of crime, or denied a jury trial</td>
<td>reverse of above</td>
</tr>
<tr>
<td></td>
<td>pro-civil liberties or civil rights claimant, especially those exercising less protected civil rights (e.g., homosexuality) pro-child or juvenile</td>
<td></td>
</tr>
<tr>
<td></td>
<td>reverse of above</td>
<td></td>
</tr>
<tr>
<td>Unions and Economic Activity</td>
<td>pro-union except in union antitrust where liberal = pro-competition pro-government anti-business</td>
<td>reverse of above</td>
</tr>
<tr>
<td></td>
<td>reverse of above</td>
<td></td>
</tr>
<tr>
<td>Judicial Power</td>
<td>pro-exercise of judicial power pro-judicial “activism” pro-judicial review of administrative action</td>
<td>reverse of above</td>
</tr>
<tr>
<td>Federalism</td>
<td>pro-federal power pro-executive power in executive/congressional disputes anti-state</td>
<td>reverse of above</td>
</tr>
<tr>
<td>Federal Taxation</td>
<td>pro-United States</td>
<td>pro-taxpayer</td>
</tr>
<tr>
<td>Interstate Relations and Private Law Issues</td>
<td>unspecifiable (3) for all such cases.</td>
<td></td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>incorporation of foreign territories and executive authority vis-a-vis congress or the states or judicial authority vis-a-vis state or federal legislative authority = (2); legislative veto = (1).</td>
<td></td>
</tr>
</tbody>
</table>
The Supreme Court’s ideological leanings play a crucial role in shaping policy outcomes in the United States, as its decisions often have a significant and lasting impact on the development, interpretation, and enforcement of laws and regulations, affecting various aspects of society (Segal and Spaeth, 2002). Conservative and liberal judgments can lead to different policy outcomes, with conservative judgments often emphasizing the importance of limited government intervention, strict interpretation of the Constitution, and deference to states’ rights (Epstein and Walker, 2019). As a result, policy outcomes in areas such as economic regulation, social issues, and civil rights may reflect these values, potentially leading to policies that reduce governmental intervention, protect individual property rights, or maintain traditional social norms.

On the other hand, liberal judgments tend to favor more expansive interpretations of the Constitution, promoting the idea of a “living” document that evolves with societal changes (Breyer, 2005). These judgments may prioritize social justice, the protection of individual rights, and the need for government intervention to address societal inequalities. Policy outcomes resulting from liberal judgments might involve expanding access to social services, promoting equal protection under the law, and addressing systemic issues through government action.

One of the most notable examples of the Supreme Court’s liberalizing influence on public policy is the landmark case of Brown v. Board of Education 347 U.S. 483 (1954). In this case, the Court unanimously held that racial segregation in public schools was unconstitutional, marking a major turning point in the civil rights movement. The Brown decision overturned the “separate but equal” doctrine established by Plessy v. Ferguson (1896) and set the stage for further desegregation efforts, including the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

In contrast, the recent Dobbs v. Jackson Women’s Health Organization (2022) case exemplifies the Court’s conservative influence on public policy. In Dobbs, the Supreme Court
overturned the precedents set by *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992), significantly limiting the constitutional right to abortion. The *Dobbs* decision upheld a Mississippi law that banned abortions after 15 weeks of pregnancy, which marked a departure from the previous viability standard established in *Roe* and *Casey*. This ruling has had significant policy implications, as it has emboldened states to enact more restrictive abortion laws and sparked renewed debates surrounding reproductive rights.

Figure 30: Merits Cases by Term and Decision Direction

![Figure 30](image)

Figure 30 illustrates the fluctuations in the proportion of conservative decisions in merits cases from 2014 to 2021. The average rate of conservative decisions over this period is 52.25%, which suggests a relatively evenly-balanced policy making Court.

The subsequent increase in conservative decisions from 2019 to 2020 (44% to 60%) indicates a renewed influence of conservative ideology on policy outcomes, which could result in preserving or expanding conservative policies in certain issue areas. This shift can be partially attributed to changes in the Court’s membership, particularly the replace-
ment of Justice Ruth Bader Ginsburg, a liberal icon, with the conservative-leaning Justice Amy Coney Barrett in 2020.

Figure 31: Merits Cases by Issue Area and Decision Direction

Figure 31 highlights the ideological leanings of the Supreme Court in merits cases across various issue areas from 2014 to 2021. The data reveals that the Court tends to shape policy outcomes in a conservative direction in areas such as Privacy, Judicial Power, Economic Activity, and Federal Taxation while making more liberal policies in First Amendment, Due Process, Miscellaneous, and Private Action cases.

In the remaining issue areas, including Criminal Procedure, Civil Rights, Attorneys, Unions, and Federalism, the Court demonstrates a more balanced approach between conservative and liberal perspectives. This balanced distribution indicates that the Court’s decisions in these areas may contribute to policy outcomes that reflect a mix of conservative and liberal values, ensuring a more nuanced and diverse legal landscape.

The 2021 Term featured groundbreaking conservative decisions with significant policy impact across various issue areas. *New York State Rifle and Pistol Association v. Bruen* recognized a Second Amendment right to carry guns outside the home. A First Amend-
ment issue case, *Kennedy v. Bremerton*, expanded the role of religion in public life. In the Privacy issue area, where the Court decided 66% cases in a conservative direction, *Dobbs v. Jackson Women’s Health* eliminated the constitutional right to abortion, reinforcing the conservative direction previously noted. Lastly, in the Economic issue area, *West Virginia v. EPA* made it more challenging to address climate change.

**Status Quo Changes on the Merits Docket**

Analyzing changes in the legal status quo sheds light on the Court’s capacity to reshape policy and legal doctrine. When the Court’s decisions alter the existing state of affairs, it highlights the institution’s role in driving policy change and its impact on a range of issue areas. By examining these changes across different terms and issue areas, we can better understand the Court’s policy-making priorities and the broader implications of its decisions.

A change in the status quo refers to a situation where the Court’s decision alters the existing legal or policy landscape, often by overturning, modifying, or clarifying previous rulings or doctrines. Changes in the status quo can have substantial impacts on various issue areas, as they may redefine the interpretation and application of laws and regulations.

For example, the landmark case *Brown v. Board of Education* overturned the “separate but equal” doctrine established by *Plessy v. Ferguson*. This decision not only changed the status quo in education policy but also marked a turning point in the civil rights movement, significantly affecting racial segregation policies across the country. Another example is the case of *Obergefell v. Hodges*, where the Court ruled that same-sex couples have a constitutional right to marry. This decision altered the status quo by ensuring marriage equality nationwide and overruling state laws that previously banned same-sex marriage.
As mentioned earlier, *South Dakota v. Wayfair*, the Court overturned a long-standing precedent set by *Quill Corp. v. North Dakota*, which had held that a state could only require businesses to collect sales tax if the business had a physical presence in the state. The *Wayfair* decision changed the status quo by allowing states to require online retailers to collect sales tax, even if they did not have a physical presence in the state, thus having significant implications for e-commerce and state tax revenue policies.

To measure changes in status quo, I considered disruption of the current legal landscape, focusing on the Court’s treatment of the lower court it is reviewing. Specifically, if the lower court’s disposition was liberal and the Supreme Court’s direction was conservative, this indicated a change in the status quo and vice versa. The data used for this analysis was obtained from the Supreme Court Database, which provides comprehensive information on the Court’s decisions, allowing for a thorough examination of changes in the status quo resulting from the Court’s rulings during the specified time period.

In the dataset, oftentimes, there is a change in the legal status quo without overturning precedent. For example, *Jesinoski v. Countrywide Home Loans, Inc.* 574 U.S. 259 (2015) is a case that addressed the issue of how a borrower should exercise their right to rescind a mortgage loan transaction under the Truth in Lending Act (TILA). The petitioners refinanced their home with Countrywide Home Loans, Inc. in 2007. Exactly three years later, they sent a written notice to the lender, stating their intention to rescind the transaction due to alleged violations of TILA disclosure requirements. However, Countrywide contested that the notice was insufficient, arguing that the Jesinoskis needed to file a lawsuit within the three-year window to properly exercise their right to rescission.

In *Jesinoski v. Countrywide Home Loans, Inc.*, the lower court’s conservative decision favored the interests of the business (the lender, Countrywide Home Loans, Inc.) by requiring borrowers to both provide written notice and file a lawsuit within the three-year window to exercise their right to rescind under the Truth in Lending Act (TILA).
This interpretation placed a higher burden on borrowers and was more advantageous to the lender.

The Supreme Court’s unanimous decision, however, overturned the lower courts’ rulings and adopted a more liberal interpretation of TILA. By holding that borrowers need only provide written notice within the three-year period, the Court’s ruling expanded the protection for borrowers and made it easier for them to exercise their rights under the law.

Figure 32: Percentage of Status Quo Changes on Merits Cases per Term

Figure 32 illustrates the percentage of cases in which the Supreme Court changed the status quo in merits cases during the terms from 2014 to 2021. In 2014, the Supreme Court changed the status quo in 71.1% of cases. This figure decreased to 60% in 2015...
but increased again to 69.7% in 2016. In 2017, the percentage of cases with a changed status quo dropped to 63.7% and continued to decline to 61.8% (47 out of 76) in 2018 and 57.9% in 2019. However, the trend reversed in 2020, with the Supreme Court changing the status quo in 71.2% of cases. The percentage increased further in 2021, with 79.2% of cases experiencing a change in the status quo.

The fluctuations in the percentage of cases with a changed status quo suggest that the Court’s inclination to reshape policy outcomes varies over time. During periods with higher percentages of cases experiencing a change in the status quo, such as 2016, 2020, and 2021, the Court can be seen as actively shaping policy outcomes and challenging established legal norms. On the other hand, during periods with lower percentages of cases experiencing a change in the status quo, such as 2015, 2017, 2018, and 2019, the Court may be perceived as more cautious in altering the legal landscape. However, it is crucial to consider that when the Court affirms a liberal or conservative lower court decision, it may still impact the status quo for other lower courts. By picking a side, the Court potentially affects the status quo for half of the lower courts while upholding it for the other half, given its proclivity to hear cases involving conflict. Mere reversal numbers cannot adequately capture this nuance. It is important to also take into account that the Court’s case selection also plays a significant role in its influence on policy outcomes.
Figure 33 displays the percentage of cases where the status quo changed for merits cases by issue area. The issue areas most likely to change the status quo include Criminal Procedure, Economic Activity, First Amendment, Federalism, Due Process, and Privacy.

The data from Figure 33 highlights the variations in the extent to which the status quo is changed across different issue areas in merits cases. These changes in the status quo can have significant policy implications, as they reflect the Supreme Court’s influence on shaping legal outcomes and policy directions in various domains.

*Shelby County v. Holder* (2013) discussed earlier in this chapter, had a substantial policy-making impact in the issue area of civil rights. First, the decision effectively weakened the Voting Rights Act, as it eliminated the preclearance requirement for jurisdictions with a history of discriminatory voting practices. This has made it more challenging to address voting discrimination proactively. Also, in the absence of the preclearance requirement, some states and local jurisdictions have enacted new voting laws and procedures, including voter ID laws, redistricting plans, and polling place closures, which
have been criticized for potentially suppressing minority voters and impacting electoral outcomes.

**Issue Attention on the Emergency Docket**

The Supreme Court’s approach to its shadow docket differs significantly from its approach to the merits docket and the certiorari process. In the certiorari process, the Court signals its issue attention by choosing to grant or deny review in particular cases, which reflects the justices’ interest in addressing specific legal questions or resolving conflicts among lower courts.

In contrast, on the shadow docket, the Court signals its issue attention through the outcomes of emergency applications: in granting relief, issuing written opinions, or publishing dissents. The justices vote on whether to grant or deny the requested relief for each emergency application and sometimes they choose to express their reasoning or disagreement through written opinions or dissents. This process allows the Court to indicate its priorities and interest in specific issue areas more directly and rapidly than through the certiorari process.

This section explores the Court’s issue attention in emergency applications, focusing on the same areas we focused on above, at the merits: criminal procedure, civil rights, First Amendment, due process, privacy, attorneys, economic activity, judicial power, and federalism.\(^{40}\) By examining the frequency and distribution of when the Court decides whether or not to intervene and whether or not to explain across these issue areas, we obtain more (and different) information about the Court’s issue attention and policy outcomes.

To code the issue area of emergency applications from OT 2014- OT 2021, I employed a systematic approach to ensure consistency and accuracy in my analysis. First, I carefully

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\(^{40}\)There were no emergency applications granted in the issue areas of Attorneys, Unions, Judicial Power, Interstate Relations, Federal Taxation, and Miscellaneous.
read over each emergency application from the Supreme Court docket, paying particular attention to the legal questions and arguments raised by the parties. This helped me identify the primary issue area that each case addressed. Next, I reviewed the lower court rulings to gain insights into each case’s history, the legal reasoning employed by the lower court, and the specific issue being appealed. This information further clarified the issue area and allowed for more precise coding using the Spaeth coding rules (See Table 6). Finally, if a case was eventually heard on the merits docket, I consulted the Supreme Court Database to verify the issue area coding assigned to the case. Comparing my coding with the database’s classification helped ensure consistency and accuracy. Additionally, this step enabled me to identify any discrepancies in the issue area coding and make necessary adjustments to align with the Supreme Court Database’s classification system.

Issue Attention through Grants of Emergency Applications

Figure 34: Percentage of Applications Granted by Issue Area OT 2014-2021

41 Emergency Applications numbers were taken from the dataset used in Chapter Two; the copies of the application filed with the circuit justice are hyperlinked in the Supreme Court Docket under the application number.
Figure 34 highlights the use of the emergency docket primarily in Civil Rights and Criminal Procedure. It is important to note that the percentages shown represent the proportion of total grants in each issue area to the total number of grants of emergency relief. This calculation mimics the data analysis on the merits docket in the prior section to highlight the attention that the Court is paying to each issue. This information offers valuable insights into the Court’s priorities and responsiveness to pressing matters in specific issue areas, revealing which areas the Court draws the most attention to on its emergency docket.\footnote{The Court did not issue any grants on the emergency docket for the issue areas of attorneys, unions, judicial power, interstate relations, miscellaneous, private action, and federal taxation.}

Between 2014 and 2021, there were a total of 587 emergency applications filed. Of those, 115 or around 20% were granted. 32.2% of the Court’s total grants of relief on the emergency docket (37) were in the area of Civil Rights. Criminal Procedure follows closely behind, with 29.6% of the Court’s grants on the emergency docket being in this issue area, reflecting the Court’s commitment to giving prompt attention to time-sensitive matters within this domain. On the other hand, certain issue areas exhibit significantly lower proportions of emergency applications granted, implying that the Court considers these areas less pressing or less suited to the emergency docket framework. While Criminal Procedure and Civil Rights garnered the most attention through grants, there was plenty of policy being made across issues on the emergency docket, which I will discuss examples (both grants and denials) of in the next section to help explain how these cases fit in each issue area.

**Issue Area #1 Criminal Procedure**

Of all of the emergency applications granted, 29.6% of them were in the Criminal Procedure issue area. Many of these cases involve constitutional claims related to stays of execution. In general, the issue of fair procedure in relation to a stay of execution is about
ensuring that defendants have an opportunity to fully litigate any legal claims or factual issues that may impact their sentence. The Supreme Court’s role is to determine whether the lower court’s decision to grant or deny a stay of execution was legally correct and consistent with the defendant’s constitutional rights. Seventy-four percent of emergency applications in the criminal procedure issue area are requests for stays of execution. One example is *Richard E. Glossip, et al. v. Kevin J. Gross, et al.*, Application No. 14-7955 (14A796). The Court granted the application, staying the executions of the petitioners who challenged the use of midazolam in Oklahoma’s lethal injection protocol, pending the final disposition of the case. This stay allowed the Supreme Court to review the case and eventually issue a decision on whether the use of midazolam in lethal injections violated the Eighth Amendment’s prohibition on cruel and unusual punishment. The Court ruled 5-4 in favor of the state, holding that the petitioners failed to establish that the use of midazolam entailed a substantial risk of severe pain.

In Chapter One, I discussed three closely watched cases in which the Supreme Court vacated stays of execution for Daniel Lewis Lee, Wesley Ira Purkey, and Dustin Lee Honken, despite lower courts having granted stays in each due to concerns related to lethal injection protocols and the mental capacity of the defendants. These decisions, which allowed for the resumption of federal executions after a 17-year hiatus, were reached with a 5-4 split among the justices, indicating significant disagreement.

**Issue Area #2 Civil Rights**

Civil Rights cases received the highest number of grants of all the issue areas on the emergency docket. A remarkable 32.2% of all grants of emergency applications are civil rights cases. Voting cases fall under this issue area, including the process of drawing electoral district boundaries, known as redistricting. In January of 2022, Alabama’s Secretary of State submitted an emergency application for a stay of a lower court order that would have forced Alabama to redraw its congressional maps. The Court granted the stay and
then took the extraordinary step of scheduling the case for oral argument in the next OT. This, in essence, left in place maps that the lower court ruled were unconstitutional for the 2022 midterm election. When the Court heard oral argument in *Merrill v. Mulligan* in October 2022, the Court considered the redistricting of Alabama’s congressional and state legislative districts following the 2020 census. Voters and organizations in Alabama challenged the state’s redistricting plan, arguing that it violated the Constitution and the Voting Rights Act by diluting the voting power of African American voters. They alleged that the state had engaged in racial gerrymandering by packing African American voters into a small number of districts and diluting their voting power in other districts. They also argued that the state had failed to create a sufficient number of majority-minority districts, which would have given African American voters a greater ability to elect candidates of their choice. In Alabama, Black people comprise 27% of the state’s population but control only 14% of the state’s congressional districts. During oral arguments, the Court considered whether the redistricting plan was drawn with discriminatory intent and whether it resulted in unconstitutional racial gerrymandering. A decision is expected to be announced in June of 2023, and commentators expect that Alabama will win this case (*Khan, n.d.*).

This example highlights the power and influence of the Court’s actions on the shadow docket in Civil Rights cases. The stay issued here shaped electoral outcomes even before a final ruling on the merits. The Supreme Court’s decision to grant a stay in the Alabama redistricting case allowed maps deemed unconstitutional by the lower court to be used in the 2022 midterm elections.

Another salient Civil Rights policy issue the Court pays attention to on the shadow docket is immigration. One example case is *Chad Wolf, Acting Secretary of Homeland Security, et al. v. Cook County, Illinois, et al.* Application No. 19A905. This case revolves around the controversial “public charge” rule, which was implemented by the Trump ad-
administration. The “public charge” rule expands the criteria for determining whether an immigrant is likely to become a public charge, i.e., dependent on government assistance, making it more difficult for immigrants who have used certain public benefits such as Medicaid, food stamps, or housing assistance in obtaining green cards or permanent residency in the United States. In this case, the Supreme Court granted an emergency stay of a lower court injunction of the rule, allowing the “public charge” rule to be enforced nationwide while legal challenges continued in lower courts. This means the Court can engage with significant immigration policy issues on the shadow docket, even when there is no comprehensive decision or opinion.

**Issue Area #3 First Amendment**

In 2021, the United States Supreme Court addressed a series of First Amendment religious exercise cases through the shadow docket. First Amendment cases made up around 8% of emergency orders granted between 2014-2021. Among these cases were *South Bay United Pentecostal Church v. Newsom* Application No. 20A136, *Harvest Rock Church v. Newsom* Application No. 20A136, and *Gateway City Church v. Newsom* Application No. 20A138. These cases involved challenges to California’s COVID-19 restrictions on religious gatherings, asserting that such restrictions violated the Free Exercise Clause of the First Amendment. In all three cases, the Court ruled in favor of the religious institutions, emphasizing that the state’s restrictions could not treat religious activities less favorably than comparable secular activities. These decisions set a precedent for evaluating pandemic-related restrictions on religious gatherings in the context of the First Amendment, especially given the time-sensitive nature of such restrictions.\(^{43}\) This outcome served as a reminder for governments at all levels to carefully consider the implications of their actions on constitutionally protected rights, including the free exercise of religion while addressing public health emergencies and other pressing concerns.

\(^{43}\)The use of shadow docket rulings as precedent will be discussed in greater detail in chapter four.
**Issue Area #4 Due Process**

Due Process cases only make up around 4% of the emergency grants. Examples include cases like *Anthony Jackson, Applicant v. Supreme Court of Illinois Application No. 20A13*. In which the Court denied a defendant’s request for an emergency stay. Jackson argued that his due process rights were violated because he was not allowed to present evidence at trial (specifically a recorded interview of a key witness). Jackson also contended that the state court did not adequately consider the impact of the witness’s recorded interview on the outcome of the trial.

**Issue Area #5 Privacy**

Only 3.5% of emergency applications in the privacy issue area from 2014-2021 were granted. An example Application No. 14A365 *Whole Woman’s Health, et al., Applicants v. David Lakey, Commissioner, Texas Department of State Health Services, et al.* In this 2014 case, the applicants sought an emergency stay to prevent the enforcement of certain provisions of Texas House Bill 2 (HB2), a law that imposed strict regulations on abortion clinics in the state. The contested provisions required abortion providers to have admitting privileges at a hospital within 30 miles of their clinic and required clinics to meet the standards of ambulatory surgical centers. The applicants argued that these provisions, if allowed to take effect, would result in the closure of a significant number of abortion clinics in Texas, thus creating an undue burden on women seeking abortion services and violating their constitutional right to privacy.

On October 14, 2014, the Court granted the emergency stay, effectively blocking the enforcement of the contested provisions of HB2. The Court’s order allowed the clinics to continue providing abortion services while the case proceeded through the legal system. The decision was unsigned but had the support of at least five justices, with Justice Scalia, Justice Thomas, and Justice Alito saying they would have denied the application. No
written opinions were issued. L

The HB2 ruling stands in contrast to the Court’s handling of Texas Senate Bill 8 (SB-8) in 2021, a more restrictive abortion law, in which the Court did not grant relief on the shadow docket. Without a written opinion in the HB2 case, it is impossible for us to know why the Court chose to grant relief in that instance but not in the case of SB-8. Perhaps the makeup of the Court played a role in these decisions, as the Court’s composition has changed between the two cases. Like on the merits, few cases deal with privacy. But both of these orders had a huge impact on the ability of women to effectuate a right to privacy in our timeframe.

Issue Area #8 Economic Activity

Economic issue area cases make up around 11% of the orders granted on the emergency docket. *Alabama Association of Realtors, et al., Applicants v. Department of Health and Human Services, et al.* 20A169 involved a challenge to the nationwide eviction moratorium imposed by the Centers for Disease Control and Prevention (CDC) during the COVID-19 pandemic.

The CDC had issued a temporary halt on residential evictions to prevent the further spread of COVID-19 under Section 361 of the Public Health Service Act. The Alabama Association of Realtors and other plaintiffs challenged the legality of this moratorium, arguing that the CDC had exceeded its authority in imposing such a broad restriction on evictions. The Supreme Court denied the application for vacatur of stay, allowing the eviction moratorium to remain in place temporarily. Justices Thomas, Alito, Gorsuch, and Barrett would have granted the application.
Issue Area #10 Federalism

Federalism cases make up almost 10% of emergency grants. Application No. 19A785 Department of Homeland Security, et al., Applicants v. New York, et al. discussed earlier is one such case (involving the Trump administration’s “public charge” rule). Several states, including New York, challenged the rule, arguing that it exceeded the federal government’s authority and infringed on the states’ rights to protect their residents. In response, the Department of Homeland Security sought a stay of the lower court’s nationwide injunction that had blocked the implementation of the rule. The Supreme Court granted the stay on January 27, 2020, allowing the rule to go into effect while the legal challenges continued in the lower courts. This was another example where the Supreme Court allowed a rule to go into effect that a lower court deemed unconstitutional that had nationwide policy implications impacting immigration without addressing the merits of the case.

Issue Area #14 Private Action

Private action cases make up fewer than 2% of emergency grants. One example is Tobie J. Smith, Guardian ad Litem, as representative of three minor children, Applicant v. E.L., et al. (No. 15A532), which involved a child custody dispute. V.L. applied to the U.S. Supreme Court for a stay of the Alabama Supreme Court’s decision that revoked visitation rights, pending the filing and disposition of a petition for a writ of certiorari. The Supreme Court granted V.L.’s application for a stay in December 2015, effectively putting the Alabama Supreme Court’s decision on hold and allowing V.L. to maintain her visitation rights with the children while the case proceeded.

To summarize the Supreme Court’s issue attention on the shadow docket, the Court disproportionately addresses criminal procedure and civil rights issues through the shadow docket. In the realm of criminal procedure, the Court focuses on execution cases, a concentration that can be attributed to the time-sensitive nature of these life-or-death matters,
which require swift resolution to ensure justice is served. Within the civil rights issue area, the Court is predominantly concerned with election and immigration matters. Both of these case areas often entail time-sensitive situations, as election cases frequently necessitate prompt decisions to avoid disrupting electoral processes, and immigration cases can have profound, immediate consequences on the lives of individuals and families involved.

**Issue Attention through Written Opinions**

Written opinions in emergency applications, though relatively rare, can offer valuable insights into the Court’s issue attention as well. Since written opinions are provided in only 4% of emergency application outcomes, their presence signifies that the Justices felt it necessary to provide a more detailed explanation of their reasoning and rationale behind the decisions.

Written opinions in certain issue areas indicate the Court’s recognition of the importance, complexity, or contentious nature of those issues. By providing a written opinion, the Justices can clarify their legal reasoning, address any potential misunderstandings, and shape the discourse surrounding the case. This can be particularly relevant in the context of emergency applications, where the Court often has to make decisions with limited time and information.

An often-cited example of a written opinion on the emergency docket is in *South Bay United Pentecostal Church v. Gavin Newsom*, Application No. 20A136. The Court’s 15-page opinion centered on California’s restrictions on the size and nature of religious gatherings and their impact on the Free Exercise Clause of the First Amendment.
Figure 35: Percentage of Written Opinions by Issue Area OT 2014-2021

![Graph showing percentages of written opinions by issue area.]

Figure 35 reveals that out of all the written opinions in emergency applications, nearly 38% of them pertain to the area of civil rights. Another 35.7% are criminal procedure cases. First Amendment issues constitute 10.7% of the written opinions, while due process and privacy issues account for 5.4% and 7.1%, respectively. Finally, federalism-related matters comprise 3.6% of the total written opinions in emergency applications.

Again we see the Supreme Court is particularly attentive to criminal procedure and civil rights issues granting relief more frequently and explaining their choices more often in emergency applications. The Justices may see these orders as more complex or contentious, necessitating a deeper exploration of the legal reasoning behind their decisions. This level of attention might be attributed to the profound implications that rulings in criminal procedure and civil rights cases can have on the lives of individuals and the broader society. Additionally, the presence of written opinions in First Amendment, due process, privacy, and federalism cases, albeit at lower rates, further highlights the Court’s

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44It is worth noting that several issue areas from the Supreme Court Database did not have any written opinions in emergency applications. These areas include Economic Activity, Judicial Power, Interstate Relations, Private Action, miscellaneous, Attorneys, Unions, and Federal Taxation.
recognition of the importance of these issues.

**Issue Attention through Dissents**

Expressions of disagreement or dissent in emergency applications could provide valuable insights into the priorities and concerns of the Court. When a Justice explicitly states that they would have granted or denied an application, it may indicate strong views shedding light on the individual Justice’s preferences, values, and legal reasoning, which could ultimately influence the Court’s broader approach to similar cases in the future.

The presence of dissent or disagreement in emergency applications can also highlight the contentious nature of certain issue areas, signaling that these areas might be subject to greater scrutiny or debate among the Justices. This can be particularly relevant in the context of emergency applications, where the Court often has to make decisions with limited time and information. Dissents may draw more attention to an emergency docket making it appear as though the numbers of such rulings are rising, for example, when in fact, they’re not. This section displays data from emergency applications with dissent by issue area.\(^{45}\)

\(^{45}\) The dissents and disagreements are combined in this chapter and are both considered dissents modeled after the statistics in the *Supreme Court Journal*
Emergency Applications have an overall rate of dissent of 21%. According to Figure 36, of these dissents, 42.3% of them are in the criminal procedure issue area, and 24.4% are in the civil rights issue area, a consistent finding. Again, contentiousness and complexity may lead the Justices to more carefully scrutinize these cases and engage more actively in the decision-making process perhaps driven by ideological preferences. Other issue areas that justices attribute their disagreement are First Amendment, Federalism, Due Process, Economic Activity, and Privacy.46

The analysis of the Supreme Court’s issue attention on its shadow docket reveals clear patterns across the granting of relief, writing of opinions, and writing of dissents in emergency applications. A consistent focus on Criminal Procedure and Civil Rights issue areas across all three measures highlights the Court’s priorities and concerns. The data underscores the significant attention given to Criminal Procedure and Civil Rights in all aspects of the shadow docket. For granting relief, 29.6% of emergency applications granted were

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46It is worth noting that several issue areas from the Supreme Court Database did not have any dissents in emergency applications. These areas include Judicial Power, Interstate Relations, Private Action, Miscellaneous, Attorneys, Unions, and Federal Taxation.
in the Criminal Procedure area, and 32.2% were in the Civil Rights area. In written opinions, these areas accounted for 35.7% and 37.5%, respectively. Furthermore, in cases with dissent, Criminal Procedure and Civil Rights constituted 42.3% and 24.4% of cases. This consistent focus on Criminal Procedure and Civil Rights demonstrates the Court’s issue attention in these areas.

While First Amendment, Due Process, and Privacy issue areas also receive attention from the Court, the emphasis on Criminal Procedure and Civil Rights is particularly pronounced. The persistent attention given to these areas across the various measures suggests that the Justices are especially concerned with the profound societal implications and the potential challenges in interpreting and applying the relevant laws in these cases.

**Policy Outcome on the Shadow Docket**

Examining the Supreme Court’s emergency docket provides a unique perspective on the Court’s policy-making role. As a significant policy-making institution, the Supreme Court’s decisions on the emergency docket also play a crucial role in shaping the legal and policy landscape across the country. By evaluating the ideology direction and changes in the legal status quo on the emergency docket, we can gain further insight into the Court’s influence on policy development under time-sensitive and pressing circumstances.

**Ideological Leannings of the Court’s Judgments on the Shadow Docket**

In this section, I explore the ideology of the Supreme Court’s judgments on the shadow docket. As mentioned in Chapter 2, I have utilized the coding scheme from the Supreme Court Database to analyze emergency applications from 2014-2021. It is essential to highlight that the coding process is not based solely on whether the Court granted or denied the application; rather, the ideological outcome of the decision is the determining factor. While one might argue that interfering with lower court decisions could be seen as in-
herently liberal due to its association with judicial activism and the exercise of judicial power, this perspective does not fully capture the nuances of the Court’s interventions on the shadow docket. In fact, these interventions often serve to further conservative goals, as demonstrated by the specific outcomes of the decisions. For instance, if the Court’s denial of an application resulted in a voting restriction remaining in place, this would be coded as a conservative decision. By focusing on the outcomes of the decisions rather than the act of intervention itself, the coding process more accurately reflects the political leanings of the Court’s actions in the context of emergency applications.

**Granted by Ideology**

![Figure 37: Applications Granted by Term and Decision Direction](image)

In Figure 37, the data on the percentage of emergency applications granted by the Supreme Court in a conservative direction from 2014 to 2021 reveals a fascinating pattern. In the earlier years, there was a low proportion of conservative decisions, with 22% in 2014 and
33% in 2015. However, a substantial increase in conservative decisions occurred from 2016 onwards, reaching 77% in the 2021 term.

This trend suggests a marked shift in the Supreme Court’s policy output in emergency applications, with a clear inclination towards conservative outcomes in recent years. The increase in conservative decisions may be attributed to various factors, such as changes in the Court’s composition, evolving legal and political landscapes, or the nature of cases presented for emergency applications during these terms. This clear ideological output of the Court could also be contributing to public perception of the Court.

Figure 38: Applications Granted by Issue Area and Decision Direction

Figure 38 reveals an unmistakable conservative bent in Criminal Procedure, Civil Rights, and Privacy cases, which are arguably some of the Court’s most important and salient cases. This trend has significant implications for policy development and the
broader legal landscape in the United States.

The strikingly high conservative direction in Civil Rights cases (97%) on the shadow docket can be illuminated by considering the prominence of voting and immigration cases, which are often characterized by their time-sensitive nature and conservative inclinations. As previously discussed, examples such as *Merrill v. Mulligan* and *Wolf v. Illinois* showcase the Court’s engagement with these urgent matters.

*Merrill v. Mulligan*, a voting rights case, exemplifies the Court’s conservative approach to addressing crucial election-related issues on the shadow docket. The Court’s decision, in this case, had significant implications for voting access and policy, demonstrating its willingness to intervene in the electoral process through expedited decisions that often favor conservative policy preferences. *Wolf v Illinois*, an immigration case, highlights the Court’s attention to pressing immigration matters on the shadow docket, often resulting in conservative policy outcomes. The Court’s involvement in this case, which centers around the controversial “public charge” rule, underscores its role in shaping immigration policy and addressing civil rights concerns through decisions that lean conservative, even in the absence of comprehensive decisions or opinions.

Reproductive health cases, including those related to abortion access and contraceptive coverage, are among the most contentious subjects within the privacy issue area. The Court’s conservative-leaning decisions on the shadow docket in such cases could be seen as a precursor to the *Dobbs v. Jackson Women’s Health Organization* decision, which ultimately overturned the precedents set by *Roe v. Wade* and *Planned Parenthood v. Casey*. The *Dobbs* decision significantly altered the legal landscape around reproductive rights in the United States, and the Court’s prior conservative decisions in Privacy cases on the shadow docket may have hinted at the Court’s willingness to reconsider and ultimately overturn established precedents. The Supreme Court’s conservative inclinations in shadow docket privacy cases likely played a crucial role in shaping the legal landscape
around reproductive health, leading up to the landmark *Dobbs* decision.

The strong conservative orientation in Criminal Procedure cases (65%) on the shadow docket suggests that the Court’s decisions in this area tend to favor prosecutorial interests, particularly in the context of executions. This may lead to policies that prioritize public safety and crime deterrence, potentially at the expense of individual rights and liberties. In some cases, the Court even goes beyond merely upholding prosecutorial interests by vacating stays of execution, which highlights its inclination to support the state in carrying out capital punishment.

**Status Quo Changes on the Shadow Docket**

Examining status quo changes on the shadow docket provides valuable insights into the Court’s influence on policy outcomes and legal doctrines beyond the merits docket. When the Court’s emergency orders or decisions on the shadow docket result in alterations to the existing state of affairs, it emphasizes the institution’s role in shaping policy change and its effects across various issue areas.

This section emphasizes the frequency with which the Supreme Court alters the status quo through its decisions on emergency applications. To determine a change in the status quo, I compared the Supreme Court’s decision either to the lower court’s ruling or to the actual situation at the time the emergency application was filed in cases where there was no lower court decision to reference. A deviation from the lower court’s decision or the existing situation represents a change in the status quo, irrespective of whether that change was liberal or conservative in direction.

Using the voting restriction example, if an emergency application is filed while drive-through voting is allowed (a generally perceived liberal policy), and the Court subsequently grants relief resulting in the prohibition of drive-through voting (which would generally be perceived as being conservative as it limits the ease with which people can
cast ballots), this would be considered a change in the status quo. The nature of emergency applications sometimes means that there may not be a lower court ruling to reference. In such cases, assessing a status quo change is based on the reality of the situation when the application is filed and the outcome of the Supreme Court’s decision on the emergency application.

To further illustrate the coding scheme, consider another example: If a lower court issues a stay of execution, this is deemed a liberal decision. Should the Department of Corrections submit an emergency application requesting the Court to lift or vacate the stay of execution and the Court grants it, this would be viewed as a conservative decision. In this situation, our analysis would register a change in the status quo.

Figure 39: Percentage of Status Quo Changes on Emergency Applications per Term

Interestingly, Figure 39 reveals a significant increase in the percentage of cases in which the Court has altered the status quo over time and especially in the two most recent terms. This trend, combined with the conservative bent in key issue areas such as Criminal Procedure, Civil Rights, and Privacy, may contribute to the perception that
the shadow docket is increasing in prominence and influence. Specifically, emergency application decisions that contradict the lower court’s ruling accounted for over 30% of the total cases in the 2021 term.

Figure 40 displays the percentage of times the Supreme Court has modified the status quo in emergency application decisions in each issue area. Federalism had the highest overall rate. 62.5% of federalism emergency applications decisions between 2014 - 2021 changed the status quo. Overall, this data demonstrates the Supreme Court’s willingness to modify the status quo in emergency application decisions varies depending on the issue area, with higher rates in cases involving Civil Rights, Privacy, and Federalism.
Comparing Emergency Applications with Merits Cases

The focus of this chapter has been on policy making on both the merits and the shadow dockets as defined as issue attention and ideological outcome. Here I carefully focus on how the two differently tell the policy story of the Court between 2014-2021. First, the Court has consistently dealt with a considerable number of emergency applications each term, often comparable to the volume of merits cases as displayed in Figure 41. For example, in 2000, the Court addressed 86 merits cases and 88 emergency applications. This pattern continued in subsequent years, with 88 merits cases and 103 emergency applications in 2001, 84 merits cases and 105 emergency applications in 2002, and so on. Interestingly, there were instances when the number of emergency applications even surpassed merits cases, such as in 2005, with 90 merits cases and 125 emergency applications. In more recent years, the number of merits cases and emergency applications has been relatively close, as seen in 2021 with 70 merits cases and 70 emergency applications. This data underscores the importance of examining the shadow docket, as it constitutes a substantial portion of the Court’s workload and carries significant implications for policy outcomes.
When examining the policy-making process of the U.S. Supreme Court, it is essential to consider the distinctions between the Court’s merits docket and its shadow docket, particularly with respect to issue attention. On the merits docket, the Court enjoys greater discretion in selecting cases for review, allowing it to focus on issues it deems most important or legally significant. Through the certiorari process, the Court can pick and choose from a large pool of petitions, granting review only to a small fraction of cases each term. This agenda-setting power enables the Court to shape the development of legal doctrine and public policy by prioritizing certain cases and issues (Black and Owens, 2009; Owens, 2010).

In contrast, the Court’s emergency docket, which includes requests for temporary relief, such as stays of lower court orders or injunctions, presents different challenges and constraints. When a case comes before the Court on the emergency docket, the justices are often compelled to make a decision on short notice and without the benefit of full briefing and oral argument. The urgency of the situation and the potential consequences of inaction may pressure the Court to address the issue at hand, even if it would prefer to wait for a more appropriate case to come through the merits docket.

The more limited agenda-setting power on the emergency docket can have significant implications for policy-making. Forced to confront issues that may not have been their preferred choice, the justices may be compelled to make policy determinations without the thorough examination and deliberation typically associated with merits cases. Additionally, the less detailed explanations for rulings on the emergency docket can create uncertainty and leave questions unanswered, potentially leading to confusion in the lower courts.

Regarding the framing and focus as well as the scope of review, the differences between the merits docket and the emergency docket carry significant consequences for the Court’s policy-making approach. In cases on the merits docket, the Court can choose
cases that pose clear and concentrated legal questions, fostering the evolution of consistent legal doctrine. This meticulous selection procedure focuses on the substantive merits of the legal issues at hand that contribute to the clarification of crucial legal questions. The Court possesses increased control over the scope of review on the merits docket, allowing it to decide which aspects of a case to address and how extensively or narrowly to rule on those matters.

Cases on the emergency docket may present more diffuse or convoluted legal issues, and the Court’s rulings in these cases might not always be based on the actual merits of the case. The urgency of the situation often requires the Court to grant or deny temporary relief based on preliminary considerations, such as whether the case presents a substantial likelihood of being granted certiorari in the future. This means that the Court’s action on the emergency docket may sometimes be influenced by procedural factors, such as the probability of a case being reviewed on the merits docket, rather than a thorough examination of the substantive legal issues at hand. The scope of review on the emergency docket is typically more limited, as the Court is primarily concerned with providing immediate relief rather than addressing the broader legal issues in a case. As a result, the rulings on the emergency docket can be less clear, potentially narrower, and possibly more inconsistent than those on the merits docket. The expedited nature of the emergency docket and the emphasis on preliminary considerations may lead to less well-defined legal questions and rulings that may not fully address the underlying substantive issues. This can create uncertainty in the law and contribute to a more reactive approach to policy-making, as the Court must address urgent matters as they arise without the benefit of the more deliberate and comprehensive process associated with the certiorari process and the merits docket. Given all that, this section aims to provide a comparative analysis of merits cases and emergency applications brought before the Supreme Court between 2014 and 2021 in pursuit of a full picture of policy making.
Comparison of Issue Attention

Figure 42: Percentage of Merits Cases & Emergency Applications Granted by Issue Area OT 2014-2021

Figure 42 displays a comparison between the Supreme Court’s issue attention on the emergency docket and the merits docket and reveals distinct patterns in the Court’s focus across various legal areas. The percentages presented reflect the proportion of total cases in each issue area for both dockets, providing valuable insights into the Court’s priorities and responsiveness in different legal areas. Recall that we measure issue attention on the merits docket by the cases it chooses to grant cert, but for the emergency docket, issue attention is measured by whether they choose to grant relief since they are forced to decide on all cases presented to the full Court.

For the most part, there are disparities in issue attention between the two dockets. The starkest differences can be observed in Civil Rights and Economic Activity cases. Civil Rights cases represent 32.2% of the total cases on the emergency docket while only accounting for 17.2% on the merits docket. Economic Activity cases make up 11.3% of the emergency docket but account for a larger proportion of 23.2% on the merits docket.
The notable difference in the proportion of Civil Rights cases on the emergency docket compared to the merits docket could be explained by the nature and urgency of the issues these cases often involve. Civil Rights cases typically address fundamental rights and liberties, including voting rights and immigration, which may require immediate intervention to prevent irreparable harm or to protect individuals or groups from ongoing discrimination or infringement of their rights.

The shadow docket is used to handle cases that require swift resolution, and Civil Rights cases often meet this criterion due to their time-sensitive nature. For instance, cases involving voting rights or election-related disputes may require immediate action to abide by an election deadline, while cases dealing with discrimination or civil liberties may necessitate prompt resolution to prevent further harm to affected individuals or groups.

The disparity between economic cases on the shadow docket versus the merits docket could also be attributed to the nature of these cases, which often lack the urgency and time-sensitive nature of issues typically handled through the shadow docket. The emergency docket is designed to address cases that require immediate resolution, such as public health crises or individual rights issues, while many economic cases, including those involving economic regulations, antitrust law, and securities regulation, do not generally present the same level of urgency.
Comparison of Policy Outcome

Figure 43: Merits Cases and Emergency Application Granted by Term Percent Conservative Decisions

Figure 43 compares the percentage of conservative decisions in emergency applications granted and merits cases from 2014 to 2021. In comparing policy outcomes through the ideological judgment of the Supreme Court, we can observe differences between the percentages of conservative decision direction in merits cases and emergency application cases.

Between 2014 and 2021, the percentage of conservative decision direction in merits cases varied, with a general upward trend in the later years. On the other hand, emergency application cases exhibit a distinct pattern with higher percentages of conservative decision direction throughout the same period. In 2014, the percentage of conservative decision direction in merits cases was 45.1%, while emergency applications granted had 22.2% conservative decisions. This difference in percentages widened in 2015, with merits cases having 47.3% conservative decisions and emergency applications granted having
33.3%. The gap increased even more in 2016, with merits cases at 52.6% and emergency applications at 80%. From 2017 onwards, the percentage of conservative decisions in merits cases continued to fluctuate. There is a notable difference between the percentages in merits and emergency dockets with respect to direction: emergency applications consistently exhibit higher percentages of conservative decisions.

One possible explanation for the higher percentage of conservative decisions in emergency docket cases compared to merits docket cases could be the procedural differences between the two types of dockets. The shadow docket, characterized by expedited procedures that often do not involve full briefing and oral arguments, may result in less deliberation and a more conservative approach to decision-making. Justices may be more inclined to rely on established legal principles and precedents without extensively exploring alternative viewpoints or engaging in in-depth analysis, leading to a higher proportion of conservative decisions in emergency cases.

On the other hand, the composition of the Supreme Court between 2014-2021 may be a more compelling reason. The Court shifted towards a more conservative majority, particularly with the appointments of Justices Gorsuch, Kavanaugh, and Barrett. This conservative majority may be more likely to exercise its influence in emergency docket cases, where the stakes are often high, and the opportunity to shape policy and legal outcomes is more immediate. The conservative-leaning Court may thus be more inclined to issue conservative decisions in shadow docket cases where their votes are not public, contributing to the observed disparity in the decision direction between the emergency and merits dockets.
Figure 44: Merits Cases and Emergency Application by Issue Area Percent Conservative Decisions

Figure 44 displays a comparison of the merits cases and emergency applications in terms of the percentage of conservative decisions across different issue areas from 2014 to 2021. In general, there seems to be a higher percentage of conservative decisions in emergency applications than in merits cases across most issue areas. As shown above, in the Civil Rights issue area where 49.5% of merits cases had a conservative decision direction, while a notably higher 97.2% of emergency applications did. This pattern holds true for several other issue areas as well, such as Criminal Procedure (52.1% for merits cases vs. 64.7% for emergency applications) and Privacy (66.7% for merits cases vs. 75% for emergency applications). However, there are some exceptions, like First Amendment (35.7% for merits cases vs. 33.3% for emergency applications) and Federalism (44% for merits cases vs. 45.5% for emergency applications), where the difference in the percent-
age of conservative decisions between merits cases and emergency applications is not as significant.

In issue areas where there is a significant difference between the percentage of conservative decisions in merits cases and emergency applications, such as Civil Rights and Criminal Procedure, the policy outcomes could be substantially affected by the nature of the case being heard by the Court. For example, since emergency applications in the Civil Rights area have a much higher proportion of conservative decisions (97.2%), policies in this area may tilt more toward conservative interpretations and enforcement when dealing with urgent situations, as opposed to regular merits cases (49.5%). One possible explanation for the higher percentage of conservative decision direction in civil rights cases on the shadow docket could be the prevalence of voting rights cases in this issue area. The Court has signaled its propensity to rule conservatively on voting rights issues on the shadow docket.
**Status Quo**

Another perspective on examining policy outcomes involves comparing the propensity to change the status quo on merits versus emergency dockets.

*Figure 45: Merits Cases & Emergency Applications Status Quo Changes by Term*

Figure 45 compares the change in status quo between emergency applications and merits cases during the 2014-2021 terms. For merits cases, the change in status quo percentage is higher than emergency applications but only fluctuates slightly and not systematically over the years. On the other hand, emergency applications exhibit a different pattern. While the overall percentage of status quo changes is much lower on the emergency docket, there is a steady increase starting at 11.1% in 2014, and increasing steadily reaching 32.9% in 2021.

The higher percentage of merits cases leading to status quo changes suggests that the Court primarily employs its regular docket to drive substantial shifts in policy and legal frameworks. This may be due to the comprehensive deliberation and thorough
legal analysis in merits cases, which enables the Court to scrutinize the implications of modifying established policies or overruling previous decisions.

But, while the percentage of emergency applications resulting in status quo changes is generally lower on the emergency docket, there does appear to be a trend toward increased intervention, displaying a more consistent increase over time. This pattern might indicate the Court’s cautious approach toward policy outcomes in urgent legal matters, where limited time and information could hinder well-informed decisions is waning. However, this observation could also suggest that there may be many emergency applications filed that are not true emergencies, as parties might attempt to expedite their cases or gain a strategic advantage by presenting them as urgent matters to a sympathetic Court.

Figure 46: Percentage of Status Quo Changes on Merits Cases & Emergency Applications by Issue Area

Figure 46 highlights the striking contrasts between emergency applications and mer-
its cases in terms of changes in the status quo across various issue areas, shedding light on the Court’s differing approach to these dockets. In Criminal Procedure, the stark difference between emergency applications (10.3%) and merits cases (68.5%) in changing the status quo may reflect the Court’s stance on rarely granting a request for a stay of execution. Overall, this data suggests that the Court prefers to utilize its regular docket for more transformative policy shifts, as these cases allow for comprehensive deliberation and analysis of legal issues and policy implications. Similarly, Civil Rights cases show a lower change in status quo for emergency applications (42.3%) compared to merits cases (65.5%), indicating the Court’s cautious approach to potentially sensitive issues. First Amendment cases exhibit an even more pronounced disparity, with emergency applications changing the status quo at 36% while merits cases reach a remarkable 71.4%. The higher percentage of status quo changes in merits cases across most issue areas underline the Court’s inclination to leverage its primary docket for driving substantial policy changes. In contrast, emergency applications generally result in more modest shifts. The comparison continues to highlight the nuanced ways in which the Supreme Court influences policy outcomes across different issue areas.

**Conclusion**

In this chapter, I have explored the U.S. Supreme Court’s policy-making process, defined as attention to issues and policy outcomes, by examining both the merits docket and the shadow docket from 2014 to 2021. I argue that the Court signals its issue attention on the shadow docket by granting relief and issuing written opinions or dissents alongside its orders. The shadow docket’s unique characteristics, such as rapid case consideration and less detailed explanations for rulings, enable policy entrepreneurs to advance their agendas more swiftly and flexibly than the merits docket. The shadow docket can be seen as a policy window that opens more frequently and unexpectedly, providing opportunities for parties and interest groups to advance their legal strategies.
My analysis of the merits docket reveals that the Court primarily focuses on economic issues, criminal procedure, and civil rights over this time period. Policy outcomes across time and issue areas are relatively balanced, except for a conservative shift in 2020 and 2021. On the emergency docket, issue attention is predominantly directed toward the criminal procedure and civil rights issue areas, reflecting the salient policy matters witnessed in executions, voting rights, and immigration cases. Policy outcomes on the emergency docket are significantly more conservative over time, particularly in civil rights and criminal procedure cases.

I have found that the distinct agenda-setting constraints on the shadow docket, compared to the merits docket, lead to differing patterns of issue attention. The most noticeable differences can be seen in Civil Rights and Economic Activity cases. Civil Rights cases represent a more substantial portion of the total cases on the emergency docket than on the merits docket. In contrast, Economic Activity cases account for a smaller share of the emergency docket compared to their prevalence on the merits docket. Moreover, the unique nature of the shadow docket leads to different policy outcomes, with a noticeable increase in conservative decisions on the shadow docket over time, especially since 2016. While the merits docket exhibits a higher rate of status quo changes, the emergency docket demonstrates a steady increase over time.

When we consider the emergency docket in the story of the Court’s policy making, it reveals a significant portion of policy output that might have gone unnoticed otherwise. On the emergency docket, the Court’s heavy conservative-leaning policy outcomes on salient matters, such as elections, executions, and reproductive health, have far-reaching consequences for society. Incorporating the emergency docket into our analysis also allows us to observe how the Court’s policy output has evolved over time, signaling to litigants that it is more willing to intervene sympathetic to conservative policy goals.

In conclusion, this chapter illuminates the Supreme Court’s policy-making process by
examining both the merits and shadow dockets, underscoring the significance of considering both dockets to obtain a comprehensive understanding of the Court’s issue attention and policy output. By analyzing these distinct aspects, we can better appreciate the Court’s influence on the American legal landscape. As the Court continues to shape policy outcomes and issue attention, it is essential to acknowledge the unique features and implications of each docket to gain a thorough grasp of the Court’s role in shaping policy outcomes across the nation.
Chapter 4 Precedent

Introduction

On September 30, 2021, Justice Samuel Alito delivered a noteworthy speech at the University of Notre Dame Law School. Amidst growing concerns and critiques surrounding the U.S. Supreme Court’s use of the shadow docket, Alito addressed the role of the Court and the justices’ commitment to maintaining their independence from external influences. A key focus of his speech was the shadow docket, a term coined to describe the Court’s handling of emergency applications and orders outside the regular docket (Baude, 2015). Justice Alito sought to emphasize that decisions made through the shadow docket were not intended to establish precedent or set long-term policies. He argued that these cases were meant to address urgent matters requiring an immediate attention, often with limited information available to the justices, and not intended to serve as a basis for future decisions.

However, just five months earlier, the Court criticized the Ninth Circuit in a religious gatherings shadow docket case for not granting an injunction. In the per curiam order, the Court emphasized its decisions in Roman Catholic Diocese No. 20A87 (2020) and South Bay No. 19A1044 (2020), both shadow docket cases, had made it clear that an injunction of California’s covid-19 restrictions on at-home religious gatherings should have been granted in this instance. The Court was faulting a lower federal court for NOT using its emergency docket rulings on point as precedent.

In Chapter 3, I focused on the issues that the Court addressed through its use of the Shadow Docket; in this chapter, I shift my focus to other members of the legal community who are paying attention to the shadow docket. In this analysis, the number of citations a

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47 The speech was live-streamed but not recorded.
49 in Tandon v. Newsom (Application No. 20A151)
shadow docket decision receives is used as a proxy for the amount of attention it garners from the courts and the legal community. A higher number of citations indicates that a decision is more frequently referenced in legal arguments and judgments, suggesting greater interest and influence within the judicial system. By analyzing citations to each emergency application from 2000-2021, I can examine which legal elites are focusing on the shadow docket, how their focus has changed over time, and which issue areas are of most interest to them.

This chapter begins with a brief overview of precedent and its importance. Then, I discuss how lower courts have grappled with the shadow docket’s precedential effects. Finally, I outline the data gathering process and present my initial findings on the legal community’s focus on the shadow docket. I show that the shadow docket receives attention from lower courts and the legal community, and there is an enhanced focus on the first amendment issue area of religious freedom. I also show that the Supreme Court cites shadow docket decisions in other shadow docket decisions and in their written opinions in merits cases. This increased focus on the shadow docket could lead to unintended consequences as lower courts and litigants attempt to navigate a legal landscape shaped by decisions with uncertain foundations.

**Influence of Precedent**

Precedent refers to the legal principle that establishes the authority of prior judicial decisions in shaping the interpretation and application of the law in future cases. It is a fundamental aspect of the common law legal system, where lower courts must demonstrate deference to higher courts’ rulings, and subsequent courts rely on past decisions for authority, ensuring consistency and predictability in the judicial process (McFadden and Kapoor, 2021). As Alexander Hamilton emphasized in The Federalist Papers, “[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down
by strict rules and precedents” (Federalist No. 78, as quoted in (McFadden and Kapoor, 2021)). This foundational principle has guided the American legal system, with lower courts adhering to the decisions of higher courts to ensure consistency and predictability. The Supreme Court’s decisions may not be infallible, but they are “final.” Brown v. Allen 344 U.S. 443 (1953). In essence, the doctrine of precedent ensures that similar cases are treated similarly, fostering stability and fairness within the legal system.

While the importance of precedent is widely recognized, there are varying perspectives on the concept of vertical stare decisis, which concerns the weight accorded to higher courts’ rulings. For proponents of the predictive theory of stare decisis, lower courts should decide cases based on their reasoned view of how the Supreme Court would resolve the matter today (Re, 2016). While shadow docket orders offer a recent and highly indicative insight into the Court’s likely position on an issue, treating them as precedential aligns with the predictive theory’s rationale. We have seen the Court’s decisions on the shadow docket, even when focused on some aspect other than the merits, foreshadow later decisions on the merits docket.⁵⁰

However, the shadow docket’s unique nature raises concerns about using them as precedent in subsequent cases. Unlike decisions reached through the merits docket, the rulings from the shadow docket often lack comprehensive deliberation and reasoning, and only 4% of all shadow docket decisions between 2000-2021 had written opinions explaining their legal reasoning. Even more, lower court judges do not know the extent to which all of the justices agreed on a given order, as the votes are not known unless a justice publicly dissents. This uncertainty presents challenges for lower courts attempting to apply the principles of vertical stare decisis, as they must navigate the Court’s intentions and the precedential value of these rulings within the context of the larger legal landscape.

⁵⁰The Court’s decision in Jackson Women’s Health on the shadow docket, which failed to protect the right to abortion, foretold the Dobbs decision on the merits docket. The Court’s disposition in COVID-19 religious cases like South Bay on the shadow docket predicted the decision in Kennedy v. Bremerton on the merits docket. Election cases on the shadow docket may also foretell upcoming conservative outcomes in Merrill v. Alabama and Moore v. Harper (anticipated in June 2023).
The Supreme Court itself has acknowledged that decisions from the shadow docket should not carry the same weight as precedent as those decided on the merits. This viewpoint aligns with Justice Alito’s speech, in which he emphasized that shadow docket decisions were not intended to establish precedents or set long-term policies. In *Lundring v. N.Y. Tax Appeals Tribunal* 522 U.S. 287, 307 (1998), the Supreme Court stated that while summary dismissals are considered rulings on the merits in the sense that they reject specific challenges presented and leave the appealed judgment undisturbed, they do not have the same precedential value as an opinion reached after briefing and oral argument on the merits. Despite the Supreme Court’s recognition of the limited precedential value of its resolution of emergency petitions, lower courts and other legal actors must still grapple with the implications of these rulings.

Judge McFadden of the District Court for the District of Columbia has proposed a typology of emergency docket decisions that can help lower courts determine how to treat them in terms of precedent. This classification system aims to provide guidance on the varying levels of authority that different types of shadow docket decisions may hold.

1. The first category consists of decisions with little precedential value. These include denials of stays or decisions issued by a single justice without an accompanying opinion. Given the absence of comprehensive reasoning, these decisions offer limited guidance for future cases.

2. The second category encompasses decisions that may serve as persuasive authority. This category includes stays granted by a single justice who provides an opinion explaining their views on the merits of the case, as well as concurrences, dissents, and statements respecting a decision to grant a stay. Although not binding, these decisions can offer valuable insight into the legal reasoning of the justices involved.

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51 Judge McFadden’s article, “The Precedential effects of the Supreme Court’s Emergency Stays” was discussed in Chapter One.
and may influence lower court rulings.

3. The third and most authoritative category comprises stay grants 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. Decisions in this category carry significant weight as they reflect a consensus among the justices and can be considered authoritative with respect to future cases addressing the same legal questions.

However, it is important to note that the typology covers only a small portion of the shadow docket dataset, with a mere 4% of all emergency applications featuring written opinions. Therefore, according to Judge McFadden, the majority of the other 96% of shadow docket cases should hold little value for the courts in terms of precedent. We might expect the majority of these cases, then, not to be cited frequently, given that they may be of limited use as precedent. In light of the emergency docket data collected and discussed in prior chapters, we can now assess the frequency with which lower courts cite shadow docket cases, the evolution of this trend over time, the specific courts that cite them more frequently, and the issue areas involved. Despite the mixed signals from the Supreme Court regarding the precedential effect of shadow docket decisions, Judge McFadden’s typology provides a helpful starting point for understanding their potential impact.

By analyzing the data, I can gain insights into the focus of other legal actors on the shadow docket, shedding light on how various stakeholders within the legal community perceive and engage with these emergency rulings. In this analysis, the number of citations a shadow docket decision receives is used as a proxy for the amount of attention it garners from the courts and the legal community. A higher number of citations indicates that a decision is more frequently referenced in legal arguments and judgments, suggesting greater interest and influence within the judicial system. The next section of this study will focus on data collection and the findings derived from it. By examining
the patterns and trends that emerge from this data, I can further our understanding of the shadow docket’s impact on the American legal system and explore the implications of these emergency rulings on various stakeholders within the legal community.

**Data Collection**

Shepardizing a case is a well-established method for identifying and evaluating the prece- dential value of a legal decision. Listing all entities that cite a specific case helps determine whether the law in the case is still considered “good law.” There are other methods to ob- tain citation information, such as using the KeyCite service from Westlaw or conducting manual searches within legal databases. However, I chose to use Shepard’s online legal research tool, available through Nexis Uni, for its long-standing reputation and reliability in the legal research community *(Spriggs and Hansford, 2000)*.

In April of 2023, I utilized Shepard’s to analyze the 1843 emergency applications from the 2000 to 2021 terms.\(^{52}\) When a citation is Shepardized, the results are displayed in four categories: Appellate History, Citing Decisions, Other Citing Sources, and Table of Authorities, as discussed in Table 7. The comprehensiveness of Shepard’s results pro- vides confidence in its reliability, making it a suitable choice for measuring citations of emergency applications *(Spriggs and Hansford, 2000)*.

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\(^{52}\)Data gathering information on the emergency applications was discussed in Chapter Two. Four cases from the original dataset were not found in the Nexis Uni search.
Table 7: Shepardizing Categories

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appellate History</td>
<td>Includes prior and subsequent appellate history cases related to the case being Shepardized. Refers to the direct treatment of the case, tracing its journey from the trial court to the present case, and moving forward through the appellate process.</td>
</tr>
<tr>
<td>Citing Decisions</td>
<td>Covers federal and state court cases and agencies that cite the Shepardized citation.</td>
</tr>
<tr>
<td>Other Citing Sources</td>
<td>Encompasses non-case citing references such as statutes, regulations, law reviews, Restatements, treatises, briefs, motions, and other secondary sources. Includes secondary sources and statutes citing the case.</td>
</tr>
<tr>
<td>Table of Authorities</td>
<td>Lists cases cited by the case being Shepardized.</td>
</tr>
</tbody>
</table>

This analysis focuses on the citing decisions and the other citing sources categories from Shepardizing the emergency applications. Table 8 displays the information gathered from shepardzing emergency applications from 2000-2021. For each case, I coded whether there was positive, negative, neutral, caution, or questioned treatment notated for the emergency application. I also coded the number of times each entity cited the case. The number of citations by federal courts will give us a rough picture of the precedential impact that shadow docket cases are having on the lower courts (or at least how much attention the lower courts are paying to the shadow docket). The number of citations under the "other citing courses" category will help paint a picture of the level of attention the Court’s resolution receives from members of the legal community.

Badas, Justus, and Li (2022a) analyzed the precedential effect of the shadow docket

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53 Throughout this chapter, I discuss the term when the emergency application was filed, not when the citation occurs.
compared to the merits docket from 2006-2021. However, they only looked at shadow docket cases with written opinions. They found that shadow docket cases had an average rate of citation of 25 compared to merits cases of 1382.87 for the same time period.\textsuperscript{54}

Table 8: Shepardizing Emergency Applications

<table>
<thead>
<tr>
<th>Cited By</th>
<th>Neutral</th>
<th>Questioned</th>
</tr>
</thead>
<tbody>
<tr>
<td>Positive</td>
<td>Negative</td>
<td>Caution</td>
</tr>
<tr>
<td>State Courts</td>
<td>U.S. Supreme Court</td>
<td>1st Circuit</td>
</tr>
<tr>
<td>2nd Circuit</td>
<td>3rd Circuit</td>
<td>4th Circuit</td>
</tr>
<tr>
<td>5th Circuit</td>
<td>6th Circuit</td>
<td>7th Circuit</td>
</tr>
<tr>
<td>8th Circuit</td>
<td>9th Circuit</td>
<td>10th Circuit</td>
</tr>
<tr>
<td>11th Circuit</td>
<td>D.C. Circuit</td>
<td>Federal Circuit</td>
</tr>
<tr>
<td>Claims Court</td>
<td>Comptroller General</td>
<td>Statutes</td>
</tr>
<tr>
<td>Regulations</td>
<td>Law Reviews</td>
<td>Treatises</td>
</tr>
<tr>
<td>Court Filings</td>
<td>Other Citations</td>
<td>Table of Authorities</td>
</tr>
<tr>
<td>Administrative Agency</td>
<td>Subsequent Negative</td>
<td>U.S. Court of International</td>
</tr>
<tr>
<td>Decisions</td>
<td>History</td>
<td>Trade</td>
</tr>
</tbody>
</table>

Results

Overall I 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. According to Table 9, most citations were neutral (meaning neither positive nor negative, according to Shepard’s).

Table 9: Shadow Docket Citations (2000-2021)

<table>
<thead>
<tr>
<th>Type of Citation</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Neutral</td>
<td>158</td>
</tr>
<tr>
<td>Positive</td>
<td>78</td>
</tr>
<tr>
<td>Caution</td>
<td>71</td>
</tr>
<tr>
<td>Any Court</td>
<td>444</td>
</tr>
<tr>
<td>Supreme Court</td>
<td>102</td>
</tr>
<tr>
<td>Total Cases</td>
<td>1843</td>
</tr>
</tbody>
</table>

\textsuperscript{54} Shadow docket cases from 2006-2021 (with and without written opinions) had an average citation rate of 3.18
Figure 47: Citations by Term (with Emergency Applications)

Citations from emergency applications are present in every year of the data, ranging from 2000 to 2021, spanning from a low of 18 citations in 2004 to a remarkable high of 1,146 citations in 2020 (see Figure 47).\(^{55}\) This striking increase in citations from emergency applications in recent years, specifically 2019 and 2020, can be attributed to two main factors.

First, the Trump administration in 2019 sought emergency relief in numerous high-profile cases, which contributed to the surge in citations. These cases often involved significant legal disputes and controversial policy decisions, garnering widespread attention from both the legal community and the general public.\(^{56}\)

Second, the unprecedented challenges posed by the COVID-19 pandemic in 2020 led to a series of emergency applications related to religion and elections.\(^{57}\) The pandemic prompted numerous legal battles surrounding public health measures and their impact on religious freedoms, as well as the administration of elections in the face of extraor-

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\(^{55}\) The number of emergency applications filed per term is plotted as an overlay to demonstrate that the increase in citations is not due to an increase in applications.

\(^{56}\) *Trump v Sierra Club* (Border wall case) and *Barr v. East Bay Sanctuary Covenant* (Asylum rule)

\(^{57}\) *Roman Catholic Diocese of Brooklyn v. Cuomo* (Religious gathering case) and *RNC v. DNC* (Election case)
ordinary circumstances. These cases, grappling with the delicate balance between public safety and individual rights, further contributed to the dramatic increase in citations during this period.

### Table 10: Top 10 Cited Shadow Docket Cases

<table>
<thead>
<tr>
<th>Term</th>
<th>Docket</th>
<th>Case Name</th>
<th>Total Citations</th>
</tr>
</thead>
<tbody>
<tr>
<td>2020</td>
<td>20A87</td>
<td>Roman Catholic Diocese of Brooklyn v. Cuomo</td>
<td>493</td>
</tr>
<tr>
<td>2019</td>
<td>19A1044</td>
<td>South Bay United Pentecostal Church v. Newsom</td>
<td>329</td>
</tr>
<tr>
<td>2019</td>
<td>19A1016</td>
<td>RNC v. DNC</td>
<td>173</td>
</tr>
<tr>
<td>2020</td>
<td>20A151</td>
<td>Ritesh Tandon v. Newsom</td>
<td>146</td>
</tr>
<tr>
<td>2019</td>
<td>20A8</td>
<td>William P. Barr v. Daniel Lewis Lee</td>
<td>112</td>
</tr>
<tr>
<td>2008</td>
<td>08A1100</td>
<td>Patricia Pascale v. Chrysler, LLC</td>
<td>104</td>
</tr>
<tr>
<td>2020</td>
<td>20A169</td>
<td>Alabama Association of Realtors v. DHHS</td>
<td>87</td>
</tr>
<tr>
<td>2020</td>
<td>21A8</td>
<td>Pantelis Chrysafis v. Lawrence K. Marks</td>
<td>78</td>
</tr>
<tr>
<td>2019</td>
<td>19A1070</td>
<td>Calvary Chapel Dayton Valley v. Sisolak</td>
<td>69</td>
</tr>
</tbody>
</table>

Several cases listed in Table 10 involve religious gatherings, such as *Roman Catholic Diocese of Brooklyn v. Cuomo*, *South Bay United Pentecostal Church v. Newsom*, and *Calvary Chapel Dayton Valley v. Sisolak*. These cases highlight the ongoing legal debates surrounding the balance between public health measures and religious freedom during the COVID-19 pandemic. The other shadow docket cases on the list that are most cited cover a wide range of legal issues, including voting rights (*RNC v. DNC*), capital punishment (*William P. Barr v. Daniel Lewis Lee*), business disputes (*Patricia Pascale v. Chrysler, LLC*), public health regulations (*Alabama Association of Realtors v. DHHS*), and eviction moratoriums (*Pantelis Chrysafis v. Lawrence K. Marks*).

One of the cases that stands out from Table 10 and has not been discussed yet is from the 2008 term *Pascale v. Chrysler* (No. 20A169). In the midst of the 2008-2009 financial crisis, Chrysler filed for bankruptcy and sought to sell its assets to a new entity formed by a partnership between Fiat, the United Auto Workers, and the U.S. and Canadian governments. The plaintiffs objected to the sale, arguing that it violated bankruptcy law and their rights as secured creditors.
The plaintiffs requested a stay on the sale of assets, but both the bankruptcy court and the Second Circuit Court of Appeals denied their request. Then they applied to the Supreme Court for an emergency stay. The full court denied the emergency request on June 10, 2009, allowing the sale to proceed.

What is fascinating about this example is that the citations do not stem from the legal questions surrounding bankruptcy law but the factors the Supreme Court considers when determining whether to grant a stay. In the per curiam opinion accompanying the order denying the stay, the Court emphasized that it was not a decision on the merits of the underlying legal issues.

The Court outlined the following criteria for granting a stay:

1. A reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction.

2. A fair prospect that a majority of the Court will conclude that the decision below was erroneous.

3. A likelihood that irreparable harm will result from the denial of a stay.

The Court also noted that in close cases, it may be appropriate to balance the equities and assess the relative harms to the parties, as well as the interests of the public at large. The decision to grant a stay is an exercise of judicial discretion, and the party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion. The Supreme Court’s reasoning and explanation of the factors to be considered in granting a stay have been widely cited in subsequent cases involving stay applications.
Analyzing the Federal Court’s Engagement with the Shadow Docket

Figure 48: Shadow Docket Citations by Court 2000-2021

The Ninth Circuit is notably active in citing cases from the shadow docket, demonstrating its ongoing engagement with the Supreme Court’s emergency decisions (see Figure 48). Among the shadow docket cases most cited by the Ninth Circuit, a group of particularly prominent ones involves religious gatherings, highlighting the relevance and impact of these decisions on an important aspect of civil liberties.

- *The Roman Catholic Diocese v. Cuomo* with 106 citations
- *South Bay v. Newsom* with 71 citations
- *Tandon v. Newsom* with 34 citations
- *Harvest Rock Church v. Newsom* with 26 citations
- *South Bay v. Newsom II* with 26 citations
Figure 49 displays the average citation per case by issue area from 2014-2021, with First Amendment cases emerging as the clear front-runner. This finding is consistent with the broader legal landscape during this time, as the COVID-19 pandemic led to a surge in religious gathering cases that gained widespread attention and citation in the judiciary. The collision of public health concerns with deeply-held beliefs about religious freedom sparked a series of legal battles that made their way into the shadow docket. As governments imposed restrictions on mass gatherings in an effort to curb the spread of the virus, religious institutions and their followers sought judicial intervention to protect their rights to worship.

Interestingly, these results contrast with the Supreme Court’s issue attention through grants discussed in Chapter Three. While issue attention is predominantly directed toward the criminal procedure and civil rights issue areas, those cases are rarely cited, despite making up the highest number of applications submitted.
Figure 50: Percentages of Cases with Citations by Issue Area 2014-2021

Figure 50 displays the percentage of emergency applications with citations by issue area from 2014-2021. While the previous figure (Figure 49) emphasized the dominance of First Amendment cases in terms of the raw number of citations, this perspective provides a different understanding of the shadow docket’s influence across various issue areas. Privacy cases, mainly dealing with reproductive health, have a high rate of citation, with federal courts citing over 66% of these cases. Similarly, federalism cases also exhibit a high percentage of citations, at 60%.

This alternative view highlights the importance of issue areas that may not have garnered as many total citations but have a substantial proportion of cited cases, indicating their relevance and potential influence in the legal community. For instance, while due process and civil rights cases may not be cited as frequently on average, a significant percentage of these cases (55% and 49.5%) have been cited by at least one federal court.
Analyzing the Supreme Court’s Engagement with the Shadow Docket

The Supreme Court only recently has begun to regularly cite its own shadow docket decisions. In this section, I will provide three different ways the Supreme Court uses shadow docket case citations. The Supreme Court references emergency application decisions in the procedural history of the case’s written opinion if it is later heard on the merits docket. The Supreme Court also cites emergency application decisions in other emergency application decisions. Lastly, the Supreme Court cites emergency application decisions in other merits cases’ written opinions.

In the first type of citation, the Court cites shadow docket cases in the procedural history section of their written opinions on the merits docket if the shadow docket case is later heard on the merits docket. The Court cites shadow docket decisions in the data beginning in the 2000 term. In *Mickens v. Taylor* Application No. 00A874, a case where the Court stayed an execution, was cited in the opinion of *Mickens v. Taylor* 535 U.S. 162 simply stating they had issued a stay of execution and granted certiorari. Another example is in *Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*
537 U.S. 371, where the Court cites a granting of stay in Application No. 01A557 Wash. Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler as it describes the procedural history of the case. Obviously, this is not the Supreme Court citing emergency orders as controlling. They are merely providing the history of the case they are considering on the merits.

In the second type of citation, the Court cites shadow docket cases in other shadow docket cases or orders. A really interesting example of how the Court treats shadow docket decisions is Scarnati v. Boockvar (No. 20A53) from the 2020 term. In September 2020, the Pennsylvania Supreme Court extended the deadline for receiving mail-in ballots to three days after Election Day, November 3, 2020, as long as the ballots were postmarked on or before Election Day. This decision was made in response to concerns about mail delivery delays due to the COVID-19 pandemic.

Republicans in the state requested a stay of the Pennsylvania Supreme Court’s ruling, arguing that the extended deadline violated federal election law and the U.S. Constitution. The Supreme Court denied the stay (with Justice Thomas, Alito, Gorsuch, and Thomas saying they would grant the application). No other explanation was provided. The case was then cited in a denial of cert by Justice Thomas in Republican Party v. Degraffenreid 141 S. Ct. 732. “Despite petitioners’ strong showing that they were entitled to relief, we divided 4-4 and thus failed to act.” Third, it was cited by Chief Justice John Roberts in a concurrence on a request for emergency relief that was denied in Democratic Nat’l Comm. v. Wis. State Legis. Application No. 20A66. He is writing to note that this case presents a different issue than the Scarnati case. Based on the Court’s comment in Tandon v. Newson, the Court would expect these types of citations to be used as precedent.

In the third type of citation, the Court cites shadow docket cases in written opinions on the merits docket in other cases. For example, in West Virginia v. EPA, the Court references the Alabama Realtors (No. 20A169) eviction moratorium shadow docket case
from 2021 in an interesting way. Specifically, the Court cites the case as precedent for the proposition that “extraordinary cases” exist where the “history and breadth of the authority” asserted by an agency, as well as the “economic and political significance” of that assertion, provide a reason for caution in concluding that Congress intended to confer such authority (West Virginia v. EPA, 142 S. Ct. 2587 at *2595). In other words, the Alabama Realtors case was cited as an example of the type of extraordinary case where courts may hesitate to defer to an agency’s interpretation of a statute. The Court’s use of shadow docket citations in written opinions on the merits docket can have significant implications for how legal precedent is established. By citing shadow docket cases in opinions on the merits, the Court may be signaling that these decisions should be given more weight in future legal proceedings.

Table 11: Top 10 Supreme Court Citations

<table>
<thead>
<tr>
<th>Term</th>
<th>Docket</th>
<th>Case Name</th>
<th>SC Citations</th>
</tr>
</thead>
<tbody>
<tr>
<td>2021</td>
<td>21A244</td>
<td>NFIB v. Department of Labor, OSHA</td>
<td>14</td>
</tr>
<tr>
<td>2020</td>
<td>20A87</td>
<td>Roman Catholic Diocese of Brooklyn v. Cuomo</td>
<td>14</td>
</tr>
<tr>
<td>2019</td>
<td>19A1044</td>
<td>South Bay United Pentecostal Church v. Newsom</td>
<td>10</td>
</tr>
<tr>
<td>2018</td>
<td>18A815</td>
<td>Jefferson S. Dunn v. Domineque H. M. Ray</td>
<td>8</td>
</tr>
<tr>
<td>2018</td>
<td>18A985</td>
<td>Patrick H. Murphy v. Bryan Collier, et al.</td>
<td>6</td>
</tr>
<tr>
<td>2019</td>
<td>19A1016</td>
<td>RNC v. DNC</td>
<td>6</td>
</tr>
<tr>
<td>2020</td>
<td>20A66</td>
<td>DNC v. WI State Legislature</td>
<td>6</td>
</tr>
<tr>
<td>2018</td>
<td>18A376</td>
<td>Edmund Zagorski v. Tony Parker, et al.</td>
<td>5</td>
</tr>
<tr>
<td>2020</td>
<td>20A151</td>
<td>Ritesh Tandon v. Newsom</td>
<td>5</td>
</tr>
</tbody>
</table>

The data presented in Table 11 shows the top 10 Supreme Court citations from 2000-2021. As expected, the majority of the cases cited involve issues related to religious freedom, public health, and individual rights. This is consistent with the broader trend of courts grappling with legal questions arising from the COVID-19 pandemic and its impact on society. It will be interesting to see how these trends continue to evolve in the coming years and what impact they will have on the legal landscape.

In summary, the Supreme Court’s citation of shadow docket cases demonstrates that
some of these decisions are indeed regarded as significant legal authority. However, a deeper understanding of the Court’s reliance on shadow docket decisions requires further research, including coding each citation into categories that distinguish between instances when the Court references shadow docket cases as part of the procedural history or as precedential authority. Such analysis will shed more light on the patterns of behavior exhibited by the Court.

Analyzing the Legal Community’s Engagement with the Shadow Docket

The process of shepardizing shadow docket cases extends beyond the realm of judicial opinions, as these decisions are frequently cited in various other legal contexts. An analysis of the “other citations” component of shepardizing shadow docket cases reveals a noteworthy pattern of engagement with these decisions in court filings, law reviews, statutes, and treatises as displayed in Figure 52.

Shadow docket decisions have been cited in court filings 3,239 times from 2000-2021, highlighting their influence on litigation strategies and legal arguments. Court filings include briefs, motions, and pleadings. Attorneys may reference shadow docket decisions to bolster their cases or provide additional context for their arguments. Shadow docket decisions have been cited 2,516 times in law review articles. Law professors, scholars, and students explore the implications of these decisions, analyze their merits, and discuss their potential consequences for jurisprudence and the legal system. There have been 367 shadow docket decisions cited in statutes demonstrating the extent to which these decisions inform legislative processes and policymaking. Lawmakers may refer to shadow docket decisions when drafting legislation or interpreting existing statutes. The citation of shadow docket decisions in treatises 264 times indicates their role in the broader body of legal knowledge and their influence on the understanding of legal concepts and principles. Treatises are detailed legal essays that explore a specific topic. Legal scholars and practitioners consult treatises as authoritative sources of information on various areas of
Figure 52: Citations by Legal Community 2000-2021

Figure 53 presents a captivating visualization of the average number of citations per case by issue from 2014 to 2021. What stands out in this analysis is the remarkable parallel between the citation patterns of the legal community and those of the Court, with First Amendment cases receiving the lion’s share of attention in both arenas. By devoting substantial attention to First Amendment cases, the Court signals their importance and sets the stage for the legal community to engage with and respond to these decisions.
The data presented in Table 12 shows the top 10 shadow docket citations from the legal community from 2000-2021. The majority of these cases involve issues related to religious freedom, public health, and individual rights, which is consistent with the broader trend of courts grappling with legal questions arising from the COVID-19 pandemic.

It is interesting to compare what cases are being cited by the courts (Table 10) with the top cases the legal community is citing (Table 12). The fact that the top cited shadow docket by the court cases differs somewhat from the cases that are most frequently cited
by the legal community suggests that there may be differences in how these cases are being perceived and used by different groups.

It is notable, however, that there is some overlap between the two lists, particularly with regard to cases such as Roman Catholic Diocese v. Cuomo and South Bay v. Newsom, which are among the most cited cases overall as well as being among the most cited by the legal community. This suggests that these cases are having a significant impact on legal practice and precedent across a range of contexts.

One notable difference between the two tables is that the top cited shadow docket cases overall include cases from a wider range of terms, including 2008, while the top cited cases by the legal community are all from the past few years. This suggests that the legal community has only recently become interested in analyzing shadow docket decisions. Also, Barr v. Lee (an execution case) appears on the list of top-cited shadow docket cases by the courts but not on the list of top shadow docket citations from the legal community, while Alabama Association of Realtors v. DHHS (eviction moratorium case) appears on the list of top shadow docket citations from the legal community but not on the list of top-cited shadow docket cases overall. While shadow docket cases have a significant impact on the legal landscape as a whole, different cases may resonate more with different groups depending on their specific legal interests and concerns.

**Conclusion**

In conclusion, this chapter has provided a preliminary examination of the shadow docket and its role as a source of precedent in the American legal system. By analyzing citations to emergency applications from 2000-2021, I have illuminated the extent to which legal elites have engaged with the shadow docket, how their focus has evolved over time, and which issue areas have garnered the most interest.

Despite concerns that the shadow docket’s lack of written explanation and clear legal
rationale should potentially limit the application of precedent, my analysis has revealed that these decisions do indeed carry weight in the legal landscape. Lower courts have cited shadow docket decisions, and the Supreme Court has referenced them in their own written opinions, demonstrating that these rulings are not to be disregarded.

The COVID-19 pandemic and its intersection with religious freedom have emerged as recurring themes throughout my analysis. The substantial number of citations involving these issues highlights the profound impact the pandemic has had on the legal community’s priorities and the complexities of navigating the delicate balance between public health and individual rights.

Furthermore, my examination of shadow docket citations in various legal contexts, including court filings, law reviews, statutes, and treatises, underscores the pervasive influence of these decisions on the broader legal discourse. This influence is also evident in the notable parallel between the citation patterns of the legal community and the federal courts.

In light of these findings, it is evident that the shadow docket, despite its controversial nature, has citation activity signaling attention from the federal courts and legal community, which can impact legal precedent and inform the decisions of the judiciary and the legal community at large. Understanding this phenomenon is crucial for comprehending the ongoing influence of the shadow docket. As the legal landscape continues to shift and adapt, so too will the role of the shadow docket in shaping the legal principles that underpin our society.
Chapter 5 Experiment

Introduction

The media coverage of the Supreme Court’s shadow docket often highlights the secretive and expedited nature of the Court’s decision-making process, drawing attention to the potential consequences of these rulings for the public. A prime example of such coverage is Adam Liptak’s article in The New York Times, titled “Missing From Supreme Court’s Election Cases: Reasons for Its Rulings.”58 The article explores how the Court has addressed numerous election disputes on its shadow docket without providing any reasoning or explanation. Liptak’s reporting underscores the opaque nature of the shadow docket, where unsigned orders are issued quickly, without full briefing or oral arguments. Some news reports may focus on the technical aspects of the court’s decision-making process and the legal issues at play, while others may focus on the political implications of the court’s decisions and the impact on specific groups or issues. The media may also report on the lack of transparency surrounding the shadow docket and the implications for the court’s legitimacy and accountability (Barnes, 2022; Grzincic, 2022). This coverage can highlight the need for more transparency in the court’s decision-making processes. The media coverage of the shadow docket can play an important role in shaping public perceptions of the Supreme Court and its decision-making processes (Baird and Gangl, 2006; Ramirez, 2008).

This chapter examines the impact of the Court’s use of the shadow docket on public opinion of the U.S. Supreme Court. While a long line of research looks at factors that impact the Court’s legitimacy, existing research has not considered the possible impact of the shadow docket on legitimacy. I argue that substantive legitimacy can stem from procedural regularity, something Tyler and others have been talking about for a long time (Tyler, 1988; Gibson, 1989; Tyler and Rasinski, 1991; Gibson, 1991; Mondak, 1993).

The Court’s process in deciding cases usually follows a specific procedure. The petitioner files a cert petition, the Court grants cert, the case is orally argued at some point during the Court’s term, and then an opinion is released sometime between when the case is argued and June. The opinion contains a statement of the legal questions being considered by the Court and an examination of the relevant legal principles, statutes, and precedents. The Court also provides an explanation of the court’s rationale for its decision, including a summary of the arguments made by the parties and the court’s response to them.

But the procedures differ when the Court uses the shadow docket to decide cases. These cases start with a request addressed to an individual justice assigned to the circuit where the appeal is filed. The case receives only one round of abbreviated written briefing and rarely oral argument. Orders can be released in the middle of the night instead of scheduled opinion days and usually do not contain legal reasoning or any explanation for the Court’s decision. Less than 4% of all emergency docket decisions contain a written opinion.59 Shadow docket cases also do not reveal the justices’ votes unless they publicly dissent. In summary, the shadow docket process is rushed and less transparent than the regular procedure.

I consider whether procedural regularity affects support for the Court, presenting respondents from a nationally-representative survey with an experimental vignette containing a news report that manipulates the Court’s process in a hypothetical case. Each treatment group receives a news report on one of two issue areas, immigration or criminal justice, decided in either a liberal or conservative direction, and using either regular or truncated procedures. To examine whether support for the Court stems from procedural regularity, I portray the Court’s decision-making process to half the respondents to mimic what we see in cases with full decision-making and the other half to mimic the shadow docket process.

59 Data collected by the author
Testing multiple hypotheses about Court legitimacy from a procedural regularity and fairness model on a multi-wave survey of 3793 nationally-representative respondents, I find that procedural regularity significantly impacts public support for the Court even after controlling for factors including democratic values, policy agreement, and perceived ideological distance from the Court. This research yields important contributions, suggesting that at least some of the Court’s legitimacy is in its own hands (Tyler, 2001; Baird, 2001).

Public Support for the Court

The judicial branch possesses neither the power of the purse nor enforcement powers; it thus relies on the goodwill of other branches and institutions, and the public more generally, to implement its rulings (Caldeira 1986; Caldeira and Gibson 1992; Rosenberg 1991). As the court itself noted in *Casey*:

“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.”


Affording the Court legitimacy means believing that, as an institution, it has the right to make authoritative decisions. When the Supreme Court is seen as legitimate, the public trusts that it will make reasonable decisions and will deem its decisions to carry authority (Gibson and Nelson, 2016). Legitimacy helps facilitate compliance with the Court’s rulings. When an institution garners a higher level of legitimacy, its ability to procure compliance with its decisions increases (Tyler and Rasinski, 1991; Doherty and Wolak, 2012; Walters and Bolger, 2019). Legitimacy also has been found to reduce demands for institutional change (Doherty and Wolak, 2012; Bartels and Johnston, 2013; Gilley, 2009). Most scholars agree that the Court must maintain trustworthiness and impartiality as an
Members of the American public largely believe that the Supreme Court is worthy of trust and that its actions are legitimate (Caldeira and Gibson, 1992). However, for the public to see the Court’s actions as legitimate, the public needs to see that the Court makes decisions fairly and without regard to politics (Tyler and Rasinski, 1991). The procedures the Court uses on the shadow docket might call into question its legitimacy.

The understanding of what drives feelings of legitimacy has been the subject of numerous studies see, e.g., (Armaly, 2018; Bartels and Johnston, 2013; Christenson and Glick, 2015; Clark and Kastellec, 2015; Gibson, Caldeira, and Spence, 2003; Gibson et al., 2009; Gibson and Nelson, 2015, 2017) Determinants of legitimacy deemed important in the literature include race and other demographics, partisanship, ideology, policy congruence, confirmation hearings, performance evaluations, political events, political knowledge, perceived ideological distance from the Court, and support for democratic institutions.

Of course, measuring legitimacy is not that simple. Consider a focus on diffuse support, which by definition, ought not to be too related to agreement with outputs (Gibson, Caldeira, and Spence, 2003). Gibson and Nelson (2015) argue that diffuse support is primarily grounded in fundamental democratic values and is resistant to change. A reservoir of positive attitudes protects the legitimacy of the Court even when people do not agree with its decisions (Gibson, Caldeira, and Spence, 2003). Diffuse support maintains that even when people may not agree with specific policies or output by the Court, the institution of the Court is still to be trusted and granted its full powers (Baird, 2001).

This leads to a measurement strategy that includes questions tapping into the extent to which respondents will countenance fundamental institutional change. These questions include asking whether respondents would rather do away with the Court or remove judges if it began making decisions most people did not agree with (Armaly, 2021;
Gibson, Caldeira, and Spence, 2003). Other questions related to diffuse support include a focus on confidence, trust, or approval with questions such as whether the Court “can usually be trusted to make decisions that are right for the country as a whole” or how much people trust the Supreme Court to “operate in the best interests of the American people” (Bartels and Johnston, 2013). More recently, Bartels and Johnston (2020) argue for a legitimacy measurement that includes questions that tap into court curbing proposals, perceptions of procedural propriety, and general trust. These include questions about whether we should make the Court less independent, the Court gets too mixed up in politics, and the Court favors some groups more than others (Armaly and Lane, 2023).

Specific support or the approval of the Court’s outputs is another way to measure the legitimacy of the Court. Legitimacy can be measured as satisfaction with the immediate outputs of the institution or the individual justices (Gibson, Caldeira, and Spence, 2003). There is evidence that specific output influences specific support (Caldeira, 1986; Ramirez, 2008; Armaly, 2018). Oftentimes, specific support is measured with questions about job approval, such as, “How well do you think the U.S. Supreme Court does its main job in government?” (Gibson, Caldeira, and Spence, 2003; Gibson and Nelson, 2017)

More recent studies on what influence the Supreme Court’s legitimacy take an applied approach. The accepted battery from Gibson, Caldeira, and Spence (2003) asks questions that many respondents might see as complicated or “hard.” The public may not understand concepts such as jurisdiction and judicial review or picture what the government would be like if we just did away with the Court. This confusion may cause respondents to skip the question or simply pick the middle response (Badas, 2019). To achieve a more valid survey response, some judicial scholars have shifted to “applied” questions, such as whether respondents support proposals that add to the number of justices on the court, institute a term limit for the justices, and elect justices instead of appointing them (Badas, 2019; Braman, 2023).
Legitimacy as a product of procedural regularity

Procedural regularity and perceptions of fairness may also matter to evaluations of the Court and tend not to be included in the most visible studies of legitimacy, see (Baird, 2001; Baird and Gangl, 2006; Ramirez, 2008). The procedural justice model suggests that legitimacy is procedurally based (Tyler, 1993). How the public views the Court is connected to the perceived fairness of the process rather than only the perceived fairness of the outcome. This would advance the theory that legitimacy comes from more than just what the Court is but also how it goes about what it does. A focus on procedural justice argues that the public must see the Court’s procedures as fair in order to perceive the court as legitimate (Tyler and Rasinski, 1991; Baird and Gangl, 2006). Studies by Gibson (1989) and Tyler (1988) suggest that Supreme Court legitimacy is connected to perceived procedural justice. The Court has control over the process it uses to resolve disputes, and citizens may evaluate the consistency of the procedure when asked about the legitimacy of the Court or of particular decisions (Tyler, 1988; Meyerson, Mackenzie, and MacDermott., 2021). Tyler (1990) argues that perceived fairness increases legitimacy leading to increased compliance. Citizens comply with court rulings out of obligation seeing that the decision is appropriate, proper, and just (Tyler, 2006). The Court, then, can build legitimacy through procedural justice (Tyler, Goff, and MacCoun, 2015).

Given the literature on legitimacy and procedural justice, I suggest that the Court’s use of its emergency docket with the inconsistent process followed in those cases compared to merit cases may have ramifications for its legitimacy. I explore the effect on respondents of two different examples of Supreme Court decision-making.

Hypothesis 1: Respondents who view information on Supreme Court action that depicts procedural regularity will have more support for the Court than respondents who view information on Supreme Court action that mimics emergency docket procedures.

Hypothesis 2: Respondents who view information on Supreme Court action that de-
picts procedural regularity will see the Court’s procedures as more fair than respondents who view information on Supreme Court action that mimics emergency docket procedures.

**Research Design**

I employ a 2x2x2 between-groups experimental design to test the preceding hypotheses. The experiment consists of a total of eight press releases and a true control group. The experiment varies the procedural treatment of a case in a particular policy that is decided in a liberal or conservative direction. I vary the Court’s process from its full merits process to its emergency docket process. I also vary the issues (immigration or criminal justice) and decision outcomes (liberal or conservative). The survey design also includes a non-experimental factor: whether the respondent’s policy preference (measured pretreatment) agrees with the policy outcome of the Court’s decision.

Before fielding the survey, I conducted a pilot study in December 2021 at a large research university in Wisconsin with 234 undergraduate students to test the survey. Following the pilot study, the survey was improved by expanding the legitimacy battery and editing the vignettes to fully isolate the experimental treatment. The survey was administered online 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 (Gaines, Kuklinski, and Quirk, 2007).

In the “regular” press release, the report highlighted the usual procedure of the Court...

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60 Treatment conditions are listed in Appendix A.
61 Full survey questionnaire is listed in Appendix C.
62 The students were recruited via email from the College of Letters and Science (a total of 4879 emails were sent and represented various majors within the college.) The study received IRB approval on December 4, 2021, and the survey was preregistered the same day. The median completion time was 10 minutes.
followed on its merits docket: The case arrived at the Court via cert after being decided in the circuit court, briefs were filed, amici participated, oral argument was held, and a written opinion was released at a normal and scheduled time of day. The "shadow docket" treatment's report highlighted emergency docket procedures: The opinion was published in the middle of the night, it offered emergency relief, there was no oral argument, and the case did not work its way through the lower courts. For example, in the case of immigration with a liberal decision, respondents 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" press release:

"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 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, including specific and diffuse support. The survey was preregistered on aspredicted.org prior to data collection and fielded using Lucid Theo-
Dependent Variables. The dependent variables seek to measure diffuse and specific support for the Court and the perceived fairness of the Court’s decision-making process. Diffuse support captures attitudes toward the Court as an institution, and specific support captures attitudes toward the Court’s output (Ramirez, 2008; Gibson, Caldeira, and Spence, 2003). Judicial scholars have used several batteries of questions to attempt to measure diffuse support for the Court. This paper utilizes the legitimacy battery from Gibson, Caldeira, and Spence (2003) to measure diffuse support. This battery has been used in the literature for decades see Gibson et al. (2009); Gibson and Nelson (2015); Boston et al. (2023). 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?”

As an indicator of the Court’s fairness, respondents in the experimental condition were asked post-treatment, ”In this case, how fair do you think the Supreme Court’s decision-making process was?” The scale ranged from extremely unfair to extremely fair.

Explanatory Variables. The main explanatory variable in this study is the experimental treatment. However, to be certain we control for the multiple factors scholars have argued impact public support for the Court, I estimate a multivariate model with a set of controls. These include democratic values (Gibson and Nelson 2015; Gibson and Caldeira 2023). Many recently published studies have used Lucid in social science research, including in the American Journal of Political Science; see Armaly (2021); Clayton et al. (2021). I collected data at three-time points: Wave 1 was administered in May of 2022, shortly after the leak of the Dobbs opinion. Wave 2 was administered on June 24, 2022, when the Court released the opinion in Dobbs v. Jackson Women’s Health. Wave 3 was administered on August 22, 2022, long after the announcement. Overall I obtained a total of 3793 nationally representative respondents. No respondents were allowed to participate in more than one wave of the survey. I also 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), but I refrained from dropping these respondents to avoid post-treatment bias (Aronow, Baron, and Pinson, 2020). The substantive results presented in the following section remain unchanged when excluding non-attentive respondents.

This battery includes questions about whether we should do away with the Court, reduce the Court’s jurisdiction, whether the Court can be trusted, favors some groups, gets too mixed up in politics, and should interpret the Constitution.
2009), fairness\textsuperscript{65} (Gibson, 1989), political knowledge (Gibson and Nelson 2015; Gibson and Caldeira 2009), policy congruence (Zilis, 2018, 2021 - 2021), subjective ideological disagreement (Bartels and Johnston, 2013; Nelson and Gibson, 2020), efficacy (Armaly and Enders, 2021), affective polarization (Armaly and Enders, 2021; Levendusky, 2018), and political sophistication (Gibson et al., 2009; Gibson and Nelson, 2015).\textsuperscript{66} I also consider several additional demographic control variables, including party identification, education, gender, church attendance, and race.

\textsuperscript{65}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.” This is different than the fairness measure used as a dependent variable. For the fairness index, I am capturing how fair they think the Court is as an institution. The dependent variable fairness captures attitudes of fairness in the decision-making process of the treatment.

\textsuperscript{66}Full Survey Questionnaire can be found in Appendix C
Results

Figure 54 displays the results from the fully specified model on measures diffuse support. The Diffuse Support Model uses the Gibson 2003 legitimacy battery as the dependent variable to measure diffuse support for the Court. As shown there, the shadow docket treatment variable returns a negative result, as expected but is not statistically significant. Policy congruence is also insignificant. However, the democratic values variable is. Respondents who view the Court as more fair do appear to have more diffuse support for the Court. In fact, respondents with a higher score on the fairness index exhibited higher levels of support across all models. Other variables deemed important to the literature, including efficacy, political knowledge, sophistication, ideological distance, and party identification, return significant results as well.

Figure 54: Diffuse Support Model

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67 Demographic controls mentioned above are included in the models but are not displayed in the figure due to space constraints. The table is provided in the appendix.
Figure 55, which uses specific support as the dependent variable, does lend support to the primary hypothesis: procedural regularity increases specific support for the Court. Respondents who agree with the Court’s decision have significantly more specific support for the Court as well. Political sophistication and the fairness index (asked pretreatment) both return positive and significant results. As respondents’ perceived ideological distance from the Court increased, their specific support for the court decreased. Interestingly, democratic values, efficacy, political knowledge, authoritarian beliefs, polarization, party identification, ideology, gender, and race are not significantly related to specific support. Respondents with increased perceived ideological distance from the Court across both the diffuse and specific models yield a negative and significant result confirming previous findings by Bartels and Johnston (2013) of its negative impact on legitimacy.

Recall specific support is measured with the following question: “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?”

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68Recall specific support is measured with the following question: “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?”

173
Figure 4, the fairness model, demonstrates that participants who view information on Supreme Court action that depicts procedural regularity will see the Court’s procedures as more fair. Of course, those who agree with the Court also do so. Respondents with a higher pre-treatment fairness index score also saw the Court’s decision-making process in the hypothetical decision as more fair. Democratic values, political knowledge, efficacy, polarization, and authoritarian attitudes do not impact how fair respondents viewed the Court’s decision-making process in their press release.

Figure 56: Fairness Model

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69"In this case, how fair do you think the Supreme Court’s decision-making process was?"
Discussion

Did respondents even notice that the shadow docket treatment was a different process? A post-treatment manipulation check assessed whether respondents could differentiate the shadow docket treatment from the regular decision-making process used by the Supreme Court. A post-treatment question was used to gauge respondents’ perception of the fairness of the Court’s process in the case they were assigned to. A t-test was conducted to compare the means of the fairness question between those who received the shadow docket treatment and those who did not. The results show that the mean of the fairness question is lower among those who received the shadow docket treatment and is statistically significant, indicating that the difference in means between the two groups was unlikely to have occurred by chance. This provides evidence that the shadow docket treatment had an impact, but a statistically significant difference does not necessarily imply a practically significant one.

The process the Court uses to make decisions can affect public support for it. The procedural justice model argues that when people observe an institution’s processes as fair and transparent, they are more likely to have positive attitudes toward the institution. On the other hand, when people feel that the processes used by an institution are unfair or arbitrary, they are more likely to have negative attitudes toward the Court. This can lead to a sense of dissatisfaction and can ultimately undermine the legitimacy of the institution in the eyes of the public. The shadow docket treatment group read about how the Supreme Court made a decision in a case after six days without signing the decision or explaining their reasoning. This was in contrast to the regular process highlighting the full plethora of procedures of the Court in their decision-making process. Across all of the models, respondents receiving the shadow docket treatment showed less support for the Court, regardless of how it was measured. The public may not be knowledgeable about Court procedures, but they can exude a difference in how they view the institution when
it uses less transparent and less fair processes via the shadow docket (Dost, 2015).

This experiment provides insights into our understanding of the different measures of legitimacy for the Supreme Court. Diffuse support refers to a general, overall favorable attitude toward the Court without any specific knowledge of its decisions or actions. Specific support, in contrast, takes into account the Court’s decisions and actions. The experiment measured both forms of support and the impact of various factors on them.

The findings show that respondents’ policy preferences have a significant impact on specific support. Those who agreed with the Court’s decision in the randomly assigned case showed no significant change in diffuse support but a decrease in specific support, consistent with recent research by Gibson and Nelson (2015), Bartels and Johnston (2020), and Armaly and Lane (2023). Increased levels of democratic values held by respondents led to an increase in diffuse support, supporting Gibson’s (2015) theory. However, democratic values did not impact specific support, in line with Bartels and Johnston (2020)’s argument that democratic values have a weak effect on support for the Court compared to policy agreement.

Political knowledge was also found to impact both diffuse and specific support differently. Individuals with higher levels of political knowledge are more likely to have a better understanding of the Court’s role and functions, which can positively impact their support for the Court. Alternately, individuals with limited political knowledge may form opinions based on limited or inaccurate information, which can negatively impact their support. The experiment confirms what Gibson, Caldeira, and Baird (1998); Gibson et al. (2009); Gibson, Lodge, and Woodson (2014) have shown, that political knowledge can influence diffuse support for the Supreme Court. Interestingly we do not see an impact of political knowledge on respondents’ views of the Court’s performance as

Policy congruence is indicated by matching the answer to the policy question of the type of case they were randomly assigned to. A respondent who supported immigration during the policy battery of questions and randomly assigned to the liberal decisions immigration case was indicated as having policy agreement.
measured by specific support.

**Conclusion**

The public has been increasingly exposed to decision-making from the Court that is less transparent than its usual process. The shadow docket is an important mechanism for the Supreme Court to manage its workload and to prioritize cases that it views as particularly urgent or important. However, the lack of transparency and the limited public understanding of the shadow docket can raise questions about the fairness and impartiality of the court’s decision-making process. The increased high-profile use of the shadow docket makes this an important topic to study as the Court relies on goodwill from the public and other institutions to implement its rulings (Caldeira, 1986). The Court needs to be seen as fair and legitimate so the public will accept its decisions (Gibson, 1989, 1991; Tyler, 1988, 1990). Shadow docket cases lack transparency, are usually rushed, and give the public little insight into what the justices base their decisions on or even which justices agree or disagree with a given output.

This study sheds light on the impact of shadow docket on public perception of the Supreme Court. The results suggest that the lack of transparency in shadow docket cases may raise questions about the fairness and impartiality of the Court’s decision-making process. This is important as the Court relies on public goodwill and legitimacy to implement its rulings. The experimental analysis showed that procedural regularity significantly impacted specific support and fairness evaluations, while it did not significantly impact diffuse support. Specifically, the analysis indicates that procedural regularity significantly impacts *specific* support and fairness evaluations, even when controlling for factors such as democratic values, ideological distance from the Court, and policy congruence. However, procedural regularity does not significantly impact *diffuse* support. This supports scholars’ previous findings that diffuse support is resistant to change and
maintained even when people are exposed to a less transparent decision-making process of the Court (Baird, 2001; Gibson, Caldeira, and Spence, 2003; Gibson and Nelson, 2015).

Future research should continue to consider both the measures of legitimacy and the consequences of procedure on Supreme Court support. The question about doing away with the Court, for example, is a jarring one. My survey gives the option for respondents to explain “why” they think we should do away with the Court altogether, providing potential insight into how respondents view this often-used question (Gibson, 1989; Gibson, Caldeira, and Baird, 1998; Gibson, Caldeira, and Spence, 2003; Gibson et al., 2009; Bartels and Johnston, 2013; Boston et al., 2023). Open-ended questions may also provide a window into what the public understands about the Court and what drives them to negative or positive perceptions.
Chapter 6 Conclusion

Addressing the Key Research Questions

As I near the conclusion of this dissertation, I contemplate the intricate and multifaceted nature of the shadow docket. This analysis has unveiled that the shadow docket is not a new phenomenon; the number of emergency applications remained consistent throughout the study period. However, the Court’s approach to the shadow docket and its output, trending towards more conservative decisions and substantial status quo changes, have evolved over time. It is important to recognize that the Court’s use of the shadow docket is not always inappropriate. In certain circumstances, such as addressing urgent, time-sensitive matters like executions, elections, and public health emergencies, the use of expedited procedures may be necessary. Nevertheless, the often scant legal reasoning provided by the Court in shadow docket decisions leaves much to be desired and raises concerns about transparency and accountability. The shadow docket is not as clandestine as it may initially appear. This dissertation has demonstrated that a wealth of information is available for those willing to dig beneath the surface. By compiling and analyzing this data, we can now systematically study the shadow docket and its impact on the legal landscape. With this foundation laid, let us now address the key research questions this dissertation has sought to answer and explore the implications of the findings.

What does the entirety of the Court’s workload comprise?

It is imperative to take into account emergency applications to understand the entirety of the Court’s workload. 1847 emergency applications were filed over 22 terms, with an average of 85 applications of emergency relief per year. There are many terms in the data where there are more emergency applications that merits decisions, as displayed in Figure 41. Emergency applications request thirty-two different types of relief. Stays of execution are the most frequent, comprising 60% of all emergency applications between 2000 - 2021.
The next highest are requests for stays, certificates of appealability, and requests to vacate a stay of execution (see Figure 8 and Figure 9).

Chapter Two found the ways in which justices have engaged with the shadow docket has changed over time. In the early years, between 2000 and 2002, the percentage of emergency applications with no action was very high, around 98-99%, but by the 2021 term, that had dropped to 27.1% (see Figure 10). Justices request responses and often distribute applications for conference (see Figure 13 and Figure 14). This suggests that considering requests for emergency relief has made up an increasing portion of the Court’s workload over time.

Emergency applications were more likely to be granted when a justice requested a response or when a temporary stay was issued. The application was 8 times more likely to be granted if a response was requested. A temporary stay made it 2 times more likely that an emergency application would be granted. Emergency applications were less likely to be granted when the application was refiled. Other indicators of the Court’s workload of written opinions and dissents have all increased over time (see Figure 23 and Figure 24). When an emergency application is granted, the likelihood of the Court issuing a written opinion and dissent significantly increases. Overall, gathering and analyzing data on the shadow docket has revealed the nuances and complexities of the Court’s workload.

To what extent is the Supreme Court using its emergency docket to make policy?

In Chapter Three, I explored the U.S. Supreme Court’s policy-making process, defined as attention to issues and policy outcomes. I argue that the Court signals its issue attention on the shadow docket by granting relief and issuing written opinions or dissents alongside its orders. The shadow docket’s unique characteristics, such as rapid case consideration and less detailed explanations for rulings, enable policy entrepreneurs to advance their agendas more swiftly and flexibly than the merits docket. The shadow docket
can be seen as a policy window that opens more frequently and unexpectedly, providing opportunities for parties and interest groups to advance their legal strategies.

On the shadow docket, issue attention is predominantly directed toward the criminal procedure and civil rights issue areas, reflecting the salient policy matters witnessed in executions, voting rights, and immigration cases. Policy outcomes on the emergency docket are significantly more conservative over time, particularly in civil rights and criminal procedure cases.

I have found that the distinct agenda-setting constraints on the shadow docket, compared to the merits docket, lead to differing patterns of issue attention. The most noticeable differences can be seen in Civil Rights and Economic Activity cases. Civil Rights cases represent a more substantial portion of the total cases on the emergency docket than on the merits docket. In contrast, Economic Activity cases account for a smaller share of the emergency docket compared to their prevalence on the merits docket. Moreover, the unique nature of the shadow docket leads to different policy outcomes, with a noticeable increase in conservative decisions on the shadow docket over time, especially since 2016. The shadow docket has also seen a steady increase in changes in the legal status quo over time.

When we consider the shadow docket in the story of the Court’s policy making, it reveals a significant portion of policy output that might have gone unnoticed otherwise. On the shadow docket, the Court’s heavy conservative-leaning policy outcomes on salient matters, such as elections, executions, and reproductive health, have far-reaching consequences for society.

To what extent are these orders used as precedent in other cases?

In Chapter Four, I examined citations to the shadow docket rulings in lower court decisions to determine their use as precedent, as well as citations in law reviews, statutes,
and treaties to ascertain the attention other legal elites are giving to the shadow docket. By analyzing citations to each emergency application from 2000-2021, I can demonstrate which legal elites are focusing on the shadow docket, how their focus has changed over time, and which issue areas are of most interest to them.

I found that 24% of emergency applications from 2000-2021 have been cited by federal courts, and 5.4% have been cited by the Supreme Court. New shadow docket decisions are not the only decisions courts are citing. Emergency applications in every term of the data have citations ranging from 18 in 2004 to 1146 in 2020 (see Figure 47). The Ninth Circuit cites shadow docket cases most often, followed by the Fifth Circuit. Between 2014-2021 First Amendment cases received the most citations per case on average, and over 66% of all privacy cases are cited (see Figure 47 and Figure 50).

Interestingly I found that shadow docket decisions are often used in court filings (3239 times), law reviews (2516 times), statutes (367 times), and treatises (264 times). The legal community also mainly focuses on first amendment cases between 2014-2021. Overall, while not nearly at the rate of merits cases (shadow docket cases 2006-2021 had an average number citations of 3.18 per case and merit cases 1382.87 per case (Badas, Justus, and Li, 2022b)), the data shows that the legal community, federal courts, and the Supreme Court are citing shadow docket decisions are far more likely to be relied upon as precedent than Supreme Court decisions and legal commentary suggest.

To what extent do decisions made outside the usual procedural process affect public opinion of the Court?

The public has been increasingly exposed to decision-making from the Court that is less transparent than its usual process. The shadow docket is an important mechanism for the Supreme Court to manage its workload and to prioritize cases that it views as particularly urgent or important. However, the lack of transparency and the limited public
understanding of the shadow docket can raise questions about the fairness and impartiality of the Court’s decision-making process. The increased high-profile use of the shadow docket makes this an important topic to study as the Court relies on goodwill from the public and other institutions to implement its rulings (Caldeira, 1986). The Court needs to be seen as fair and legitimate so the public will accept its decisions (Gibson, 1989, 1991; Tyler, 1988, 1990). Shadow docket cases lack transparency, are usually rushed, and give the public little insight into what the justices base their decisions on or even which justices agree or disagree with a given output.

In Chapter Five, I explored the impact of the shadow docket on public perception of the Supreme Court. I argue that when people observe an institution’s processes as fair and transparent, they are more likely to have positive attitudes toward the institution. On the other hand, when people feel that the processes used by an institution are unfair or arbitrary, they are more likely to have negative attitudes toward the institution. This can lead to a sense of dissatisfaction and can ultimately undermine the legitimacy of the institution in the eyes of the public.

I consider whether procedural regularity affects support for the Court, presenting respondents from a nationally-representative survey with an experimental vignette containing a news report that manipulates the Court’s process in a hypothetical case. Each treatment group receives a news report on one of two issue areas, immigration or criminal justice, decided in either a liberal or conservative direction, and using either regular or truncated procedures. To examine whether support for the Court stems from procedural regularity, I portray the Court’s decision-making process to half the respondents to mimic what we see in cases with full decision-making and the other half to mimic the shadow docket process.

The results suggest that the lack of transparency in shadow docket cases may raise questions about the fairness and impartiality of the Court’s decision-making process. This
is important as the Court relies on public goodwill and legitimacy to implement its rulings. Specifically, the analysis indicates that procedural regularity significantly impacts *specific* support and fairness evaluations, even when controlling for factors such as democratic values, ideological distance from the Court, and policy congruence. However, procedural regularity does not significantly impact *diffuse* support. This supports scholars’ previous findings that diffuse support is resistant to change and maintained even when people are exposed to a less transparent decision-making process of the Court (Baird, 2001; Gibson, Caldeira, and Spence, 2003; Gibson and Nelson, 2015).

**Reflections on the Research Journey**

In 2019, like many Court watchers, I started observing a growing trend of high-profile cases being decided through an expedited process. Intrigued by this phenomenon, I found that these cases were not well-documented, and obtaining information about them was challenging. Realizing that a systematic study of the shadow docket required comprehensive data, I embarked on a quest to collect and analyze information related to these cases.

As I explored the Supreme Court website searching for shadow docket orders, I came across the *Supreme Court Journal*. To my surprise, the journal contained emergency applications along with a wealth of additional information, which opened a new avenue for my research. Initially, I planned to create a text analysis algorithm to gather the orders; however, while manually coding the first term, I realized the diversity and complexity of the cases. These applications were not limited to stays, injunctions, or executions; they encompassed a wide array of issues. Any automated system risked missing crucial data, prompting me to meticulously review the journals by hand.

Through this painstaking process, I examined over 20,000 pages, compiled 1,847 emergency applications, and accessed each docket to code the procedural history of the appli-
cation. I hand-coded 587 cases for issue area and decision direction by reading the emergency applications and lower court decisions. Finally, I shepardized (with a borrowed login because UWM canceled our Nexis Uni subscription the day before my prospectus defense) 1,847 cases, coding up to 39 possible citing entities per case. The resulting shadow docket dataset has almost 180,000 data points that I plan to make publically available over the summer of 2023.

This immersive research journey not only expanded my understanding of the shadow docket but also unveiled novel insights (detailed below) that, to my knowledge, had not been previously discussed or studied within the discipline. The experience has been enlightening and invaluable, emphasizing the importance of thorough, hands-on research in uncovering hidden aspects of a subject matter.

Contributions

This work on the shadow docket offers several novel and significant contributions to the field, enhancing our understanding of the Court’s overall workload:

1. A comprehensive dataset that contains all emergency applications presented to an individual justice on which the full Court made a decision between 2000 and 2021. This dataset provides a valuable resource for scholars and practitioners interested in exploring the dynamics of the shadow docket and its implications on the Court’s overall functioning.

2. Data on how often a response was requested, a temporary stay issued, or an application distributed for conference. This information allows for a deeper analysis of the patterns and trends associated with the process of how the justices consider emergency applications.

3. Information on emergency applications that were refiled, including the first justice involved and the first date of the refile. This data enables us to study litigant behav-
ior on the shadow docket and how prevalent we see justice shopping.

4. Analysis of the language used in the orders, including whether an order was addressed to or presented to an individual justice, as well as documenting the specific language in shadow docket dissents (ie. would have denied the application, would have granted the stay, dissented, etc). To my knowledge, this detailed data on emergency applications are not currently available.

5. Coding the issue areas associated with emergency applications to better assess the ideological leanings of the Court’s output on the shadow docket. This categorization helps in determining whether the Court’s decisions align more closely with conservative or liberal perspectives, offering a complete picture of the Court’s ideological stance.

6. An in-depth analysis of how justice actions in considering emergency applications impact whether an emergency application is granted. This research identifies the factors that may increase or decrease the likelihood of an application being granted, providing valuable information for legal professionals and researchers seeking to better understand the decision-making process on the shadow docket.

7. A nationally representative multi-wave survey examining the impact of the shadow docket on the public’s view of the Court. The survey findings highlight the importance of procedural regularity in influencing public support for the Court, even after controlling for factors such as democratic values, policy agreement, and perceived ideological distance from the Court. The survey experiment adds an important contribution to the ongoing debate about the Court’s use of the shadow docket.

Future Research

Building upon the foundation of this dissertation, there are several exciting avenues for future work related to the shadow docket:
1. **Interactive Dashboard:** Develop an interactive dashboard with the collected data and make it accessible online. I have already reserved www.shadowdocket.info for this purpose. The dashboard would allow users to explore and analyze the data more easily, fostering a better understanding of the shadow docket’s dynamics and trends.

2. **In-depth analysis of temporary stays:** Investigate the issuance and impact of temporary stays, such as the recent Mifepristone case involving Justice Alito. With the available data, a systematic examination of temporary stays could provide valuable insights and potentially be published in the *Journal of Law and Courts*.

3. **Categorize citations:** Analyze the citations in shadow docket cases to determine their purpose. Are lower courts citing these cases for procedural history, or are they relying on shadow docket decisions as precedent? Examine whether the Supreme Court cites shadow docket decisions in other shadow docket cases or its own opinions throughout the whole dataset.

4. **Litigant analysis:** Identify the most frequent litigants in shadow docket cases by cleaning and analyzing party names. Investigate whether there are repeat players and assess their outcomes, which may provide further insights into the dynamics between litigants and the Court.

5. **Execution cases:** Conduct a thorough study of execution cases, cleaning names and grouping cases to evaluate the impact on individual defendants. Since multiple cases are often filed in the execution of one defendant, this research could reveal patterns and trends in the Court’s handling of such cases.

6. **Dissent analysis:** Examine dissents in shadow docket cases using text analysis. For example, explore whether Justice Sotomayor’s dissents on the emergency docket are similar to those on the merits docket in content, emotion, and tone.
7. **Issue area coding:** Extend the coding of issue areas back to 2000, which may require a subscription to access older applications. This expansion would enable a more comprehensive analysis of the shadow docket’s development and its impact on the Court’s decisions over time.

By pursuing these projects, future research can delve deeper into the complexities of the shadow docket, broadening our understanding of its implications for the Court, litigants, and the legal system as a whole.

**Final thoughts**

On April 21, 2023, the Supreme Court granted a stay in *FDA v. Alliance for Hippocratic Medicine, et al.* (Application No. 22A902). The stay put on hold a ruling out of the U.S. District Court for the Northern District of Texas blocking the FDA’s 2000 approval of mifepristone. This decision marked a significant point in my journey of studying the shadow docket as I finished writing this dissertation.

This dissertation opens with the September 2021 decision refusing to grant a stay in *Whole Woman’s Health.* That decision left in place SB-8, the law banning abortions after a fetal heartbeat is detected. This was the first shadow docket decision in which a Supreme Court justice used the term ”shadow docket” (to the best of my knowledge). My dissertation closes with the *FDA* case, which also references Justice Kagan’s criticism of the shadow docket—though her quote was cut off mid-sentence.71 It is noteworthy to observe the contrast between these two cases: the 5-4 decision in *Whole Woman’s Health* refused to grant relief, while the *FDA* case resulted in a 7-2 decision (by inference) to **grant** relief.

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71 “In all these ways, the majority’s decision is emblematic of too much of this Court’s shadow docket decision making—which every day becomes more unreasoned, inconsistent, and impossible to defend.” *Whole Women’s Health v. Jackson,* No. 21A24, 2021 WL 3910722, at *5 (U.S. Sept. 1, 2021) (Kagan, J., dissenting) referenced again in the *FDA* case, ”a disposition that was labeled as “emblematic of too much of this Court’s shadow-docket decisionmaking— which every day becomes more unreasoned.” *FDA v. Alliance for Hippocratic Medicine* No. 22A902, at *2 (U.S. April 21, 2023) (Alito, J., dissenting)
The story of the shadow docket looks a lot like a tragedy now, but this shift in outcomes sparks a sense of optimism. Perhaps the Court is moving away from its audacious stance of permitting novel cases, such as the SB-8 case, which allowed a law designed to circumvent judicial review and resulted in obvious irreparable harm to women, to stand without offering relief. The FDA case exemplifies the potential for the shadow docket to be used for good, as the Court recognized the irreparable harm that would result from denying the stay. It offers an example that, like Glinda the Good Witch, the Supreme Court can wield its power for good.

As I reflect on my research journey, I am reminded of the complexity and nuance that characterizes the shadow docket. The shadow docket is a realm of uncertainty, where the future is never certain, and the past is constantly being reevaluated. Through this dissertation, I hope I have shed light on its inner workings, highlighting its potential for both harm and good and ultimately contributing to a more profound understanding of its role and impact within the legal system.
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Appendices

Appendix A  Emergency Order Calendars

Figure A.1: When Emergency Orders are Released

Dates Emergency Docket Orders were Issued
OT 2016

No. of Emergency Orders

January

February

March

April

May

June

July

August

September

October

November

December

Data: Shadow Docket OT 2016 - OT2020
Figure A.2: When Emergency Orders are Released

Dates Emergency Docket Orders were Issued
OT 2017

No. of Emergency Orders

January  
- March

April  
May  
June

July  
August  
September

October  
November  
December

Data: Shadow Docket OT 2016 - OT2020
Figure A.3: When Emergency Orders are Released

**Dates Emergency Docket Orders were Issued**

OT 2018

<table>
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<th>No. of Emergency Orders</th>
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Data: Shadow Docket OT 2016 - OT 2020
Figure A.4: When Emergency Orders are Released

Dates Emergency Docket Orders were Issued
OT 2019

No. of Emergency Orders

January

February

March

April

May

June

July

August

September

October

November

December

Date: Shadow Docket OT 2016 - OT 2020
## Appendix B  Vladeck’s Work

### Figure B.1: OT 2021 Orders via Steve Vladeck

### OT 2021 Orders Respecting Stays and/or Injunctions

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<td>20-224</td>
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<td>10/4/2021</td>
<td>Denying Injunctive Relief</td>
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<tr>
<td>2</td>
<td>20-50</td>
<td>Johnson v. Blair</td>
<td>10/5/2021</td>
<td>Denying Stay of Execution</td>
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<tr>
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<td>20-64</td>
<td>Smith v. Dunn</td>
<td>10/21/2021</td>
<td>Denying Stay of Execution</td>
</tr>
<tr>
<td>4</td>
<td>20-85</td>
<td>United States v. Texas</td>
<td>10/22/2021</td>
<td>Deferring Application to Vacate Stay</td>
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<td>20-88</td>
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<td>10/27/2021</td>
<td>Granting Stay of Mandate</td>
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<td>6</td>
<td>21-016</td>
<td>Cow v. Jones</td>
<td>10/28/2021</td>
<td>Granting Stay of Execution</td>
</tr>
<tr>
<td>7</td>
<td>21-030</td>
<td>Dees v. Mills</td>
<td>10/26/2021</td>
<td>Denying Injunctive Relief</td>
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<tr>
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<td>21-043</td>
<td>Heisler v. Girod LoanCo, LLC</td>
<td>11/1/2021</td>
<td>Denying Stay</td>
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<td>8</td>
<td>21-043</td>
<td>Weinstein v. Miller</td>
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<td>12/9/2021</td>
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<td>Breeze Smoke, LLC v. FDA</td>
<td>12/10/2021</td>
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<td>21-98</td>
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<td>13</td>
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<td>1/20/2022</td>
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<td>1/28/2022</td>
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<td>2/13/2022</td>
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<td>4/24/2022</td>
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<td>Bedhe v. Dep’t of Labor</td>
<td>4/24/2022</td>
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<tr>
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<td>33</td>
<td>21-436</td>
<td>Bentley Services, LLC v. Dep’t of Labor</td>
<td>4/24/2022</td>
<td>Dissuading Application</td>
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<td>21-436</td>
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<td>4/24/2022</td>
<td>Dissuading Application</td>
</tr>
<tr>
<td>35</td>
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<td>Abadi v. Dep’t of Labor</td>
<td>4/24/2022</td>
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<td>Grant v. Crow</td>
<td>1/26/2022</td>
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<td>21-436</td>
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<td>1/27/2022</td>
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<td>Merrill v. Milligan</td>
<td>2/7/2022</td>
<td>Granting Stay</td>
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<td>Merrill v. Castor</td>
<td>2/7/2022</td>
<td>Granting Stay</td>
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<td>Doe v. San Diego Sch. Dist.</td>
<td>2/18/2022</td>
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<tr>
<td>43</td>
<td>21-475</td>
<td>Moore v. Harper</td>
<td>3/7/2022</td>
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</tr>
<tr>
<td>44</td>
<td>21-475</td>
<td>W.L. Leggo v. Wis. Elections Comm’n</td>
<td>3/23/2022</td>
<td>Summaringly Reversing*</td>
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<tr>
<td>48</td>
<td>21-475</td>
<td>Louisiana v. American Rivers</td>
<td>4/6/2022</td>
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<tr>
<td>49</td>
<td>21-475</td>
<td>Dunn v. Austin</td>
<td>4/18/2022</td>
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<td>50</td>
<td>21-475</td>
<td>Bunton v. Lambkin</td>
<td>4/21/2022</td>
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<td>51</td>
<td>21-475</td>
<td>Stone v. Smith</td>
<td>4/24/2022</td>
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<td>52</td>
<td>21-475</td>
<td>Coalition for T.J. v. Fairfax City Sch. Bd.</td>
<td>4/25/2022</td>
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<td>53</td>
<td>21-475</td>
<td>Dees v. Mills</td>
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<td>21-475</td>
<td>Dixon v. Shinn</td>
<td>5/11/2022</td>
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<td>21-475</td>
<td>Louisiana v. Biden</td>
<td>5/26/2022</td>
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<td>56</td>
<td>21-475</td>
<td>Guillory v. LOULAC</td>
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<tr>
<td>57</td>
<td>21-475</td>
<td>NetChlor, LLC v. Piston</td>
<td>5/31/2022</td>
<td>Granting Stay</td>
</tr>
</tbody>
</table>

* *= The Court treated an application for a stay as a petition for certiorari, granted it, and summarily reversed the lower court.

Yellow Fill = Grant of Emergency Relief
Blue Fill = Accompanied by Opinion of the Court
Black Fill = Did Not Participate
Orange Fill = Consolidated Ruling
## Appendix C  Regression Analysis for Chapter Two

Table C.1: Emergency Application Outcomes OT 2000-2021

<table>
<thead>
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<th>granted (1)</th>
<th>written opinion (2)</th>
<th>dissent (3)</th>
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<tr>
<td>Granted</td>
<td>0.060***</td>
<td>0.079***</td>
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<tr>
<td>(0.015)</td>
<td></td>
<td>(0.016)</td>
<td></td>
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<tr>
<td>Response request</td>
<td>0.332***</td>
<td>0.122***</td>
<td>0.099***</td>
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<tr>
<td>(0.021)</td>
<td>(0.014)</td>
<td>(0.015)</td>
<td></td>
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<tr>
<td>Temporary stay</td>
<td>0.151***</td>
<td>0.015</td>
<td>0.014</td>
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<tr>
<td>(0.042)</td>
<td>(0.026)</td>
<td>(0.028)</td>
<td></td>
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<tr>
<td>Conference</td>
<td>0.033</td>
<td>−0.009</td>
<td>−0.008</td>
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<tr>
<td>(0.035)</td>
<td>(0.022)</td>
<td>(0.023)</td>
<td></td>
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<tr>
<td>Distributed</td>
<td>0.010</td>
<td>−0.030**</td>
<td>−0.022</td>
</tr>
<tr>
<td>(0.025)</td>
<td>(0.015)</td>
<td>(0.016)</td>
<td></td>
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<tr>
<td>Refiled</td>
<td>−0.115***</td>
<td>−0.016</td>
<td>−0.022</td>
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<tr>
<td>(0.030)</td>
<td>(0.019)</td>
<td>(0.020)</td>
<td></td>
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<tr>
<td>Constant</td>
<td>0.083***</td>
<td>0.021***</td>
<td>0.026***</td>
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<tr>
<td>(0.008)</td>
<td>(0.005)</td>
<td>(0.006)</td>
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Observations 1,829 1,829 1,828

Adjusted $R^2$ 0.162 0.081 0.067

Note: *p<0.1; **p<0.05; ***p<0.01
Appendix D  Treatment Conditions

Treatment (Control is reference category) Procedural Regularity

Jury Lib Shadow - (jury/lib/shadow)
Jury Lib Regular (jury/lib/regular)
Jury Con Shadow - (jury/con/shadow)
Jury Con Regular (jury/con/regular)
Immigration Lib Shadow (immigration/lib/shadow)
Immigration Lib Regular (immigration/lib/regular)
Immigration Con Shadow (immigration/con/shadow)
Immigration Con Regular (immigration/con/regular)
## Appendix E  Regression Results for Chapter Five

Table E.1: Shadow Docket Survey Experiment

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<th>Fair</th>
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<td>Shadow Docket Treatment</td>
<td>−0.015</td>
<td>−0.075**</td>
<td>−0.213***</td>
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<td>(0.021)</td>
<td>(0.032)</td>
<td>(0.040)</td>
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<td>0.184***</td>
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<td>(0.030)</td>
<td>(0.038)</td>
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<td>Fairness Index</td>
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<td>0.246***</td>
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<td>(0.016)</td>
<td>(0.020)</td>
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<td></td>
<td>(0.039)</td>
<td>(0.062)</td>
<td>(0.077)</td>
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<td>Policy Congruence</td>
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<td>0.102***</td>
<td>0.255***</td>
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<tr>
<td></td>
<td>(0.022)</td>
<td>(0.034)</td>
<td>(0.042)</td>
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<td>Ideological Distance</td>
<td>−0.056***</td>
<td>−0.095***</td>
<td>−0.079***</td>
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<td>(0.011)</td>
<td>(0.017)</td>
<td>(0.021)</td>
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<td>Efficacy</td>
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<td>0.017</td>
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<td></td>
<td>(0.012)</td>
<td>(0.019)</td>
<td>(0.024)</td>
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<td>Polarization</td>
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<tr>
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<td>(0.0003)</td>
<td>(0.001)</td>
<td>(0.001)</td>
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<td>Authoritarian</td>
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<td>−0.114*</td>
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<td>(0.054)</td>
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<td>(0.031)</td>
<td>(0.039)</td>
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<td>0.004</td>
<td>−0.006</td>
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<td>(0.005)</td>
<td>(0.007)</td>
<td>(0.009)</td>
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<tr>
<td>Constant</td>
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<td>−0.211**</td>
<td>0.240**</td>
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<tr>
<td></td>
<td>(0.060)</td>
<td>(0.095)</td>
<td>(0.119)</td>
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</table>

Observations 3,793 3,793 3,793  
Adjusted R² 0.353 0.362 0.168

*Note:*  
* p<0.1; ** p<0.05; *** p<0.01
Appendix F  Survey Questionnaire

Attention checks

**[att_consent]** Do you agree to participate in this study?

1. Yes
2. No

**[att_understand]** For our research, careful attention to survey questions is critical! We thank you for your care.

1. I understand
2. I do not understand

**[att_interested]** People are very busy these days and many do not have time to follow what goes on in the government. We are testing whether people read questions. To show that you’ve read this much, answer *both* “extremely interested” and “slightly interested.”

1. Extremely interested
2. Very interested
3. Moderately interested
4. Slightly interested
5. Not interested at all

*(SURVEY ENDS IF ‘att_consent’ != Yes OR ‘att_understand’ != “I understand” OR ‘att_interested’ != “Extremely interested” “Slightly interested”)*

Party identification ideology

First, we would like you to answer a few questions about your political viewpoints.

**[pol_int]** How often do you pay attention to what’s going on in government and politics?

1. Most of the time
2. Some of the time
3. Only now and then
4. Hardly at all
5. Never

**[pol_part]**

Did you vote in the presidential election in 2020?

1. Yes
2. No
3. Not sure

**[ideol]** Thinking about politics these days, how would you describe your own political viewpoint?
1. Very liberal
2. Liberal
3. Moderate
4. Conservative
5. Very conservative
6. Not sure

**[pid]** Generally speaking, do you think of yourself as a Republican, a Democrat, an independent, or something else?
1. Republican
2. Democrat
3. Independent
4. Other

**[pid_lean]** (IF [pid] == other — independent) Do you think of yourself as CLOSER to the Republican party or to the Democratic party?
1. Republican party
2. Democratic party
3. Neither party

**[pid_rep/pid_dem]** (IF [pid] == Republican — Democrat) Would you consider yourself a strong Republican/Democrat or a not very strong Republican/Democrat?
1. Strong
2. Not very strong

**[int_efficacy]** How often do politics and government seem so complicated that you can’t really understand what’s going on?
1. Most of the time
2. Some of the time
3. Only now and then
4. Hardly at all
5. Never
**[feel]** We would like you to rate how you feel about different groups or institutions on a feeling thermometer using a scale of 0 to 100. The higher the number, the warmer or more favorable you feel toward each group, the lower the number, the colder or less favorable you feel. You can pick any number between 0 and 100.

a) Republican Party
b) Democratic Party
c) Congress
d) Supreme Court
e) President Biden

(0) Cold - (100) Warm

**Policy Issue Positions**

We would like to ask your opinion about issues that many people feel are politically relevant

(RANDOMIZE ORDER OF POLICY QUESTIONS)

**[immigrants]** Do you think the number of immigrants from foreign countries who are permitted to come to the United States to live should be:

1. Increased a lot
2. Increased a little
3. Kept about the same
4. Decreased a little
5. Decreased a lot
6. I don’t have an opinion on this

**[criminaljustice]** In general, do you support or oppose the death penalty for someone convicted of first-degree murder?

1. Strongly support
2. Somewhat support
3. Somewhat oppose
4. Strongly oppose
5. I don’t have an opinion on this

**[guncontrol]** In general, do you support or oppose the requirement of universal background checks to purchase a gun?

1. Strongly support
2. Somewhat support
3. Somewhat oppose
4. Strongly oppose
5. I don’t have an opinion on this

**[studentloans]** In general, do you support or oppose the government canceling federal student loan debt?
1. Strongly support
2. Somewhat support
3. Somewhat oppose
4. Strongly oppose
5. I don’t have an opinion on this

**[abortion]** In general, do you support or oppose the government restricting abortion rights?
1. Strongly support
2. Somewhat support
3. Somewhat oppose
4. Strongly oppose
5. I don’t have an opinion on this

**[court_ideol]** Thinking about the United States Supreme Court in Washington and the decisions that it has been making lately, would you say that the Supreme Court is a very liberal court, a liberal court, a moderate court, a conservative court, or a very conservative court.
1. Very liberal
2. Liberal
3. Moderate
4. Conservative
5. Very conservative
6. Not sure

How much do you agree/disagree with the following statements:

**[court_info]** The U.S. Supreme Court obtains all necessary information when deciding a case.
**[court.views]** The U.S. Supreme Court considers multiple views when deciding a case.

**[court.decid.fair]** The U.S. Supreme Court decides cases in a fair way.

**[ext.efficacy]** Public officials don’t care much about what people like me think.

1. Strongly agree
2. Somewhat agree
3. Somewhat disagree
4. Strongly disagree
5. I don’t have an opinion on this

**Political Sophistication (based on Kraft Gender paper 2021 on discursive sophistication under review)**

[gun.soph] On the issue of gun legislation, please outline the main arguments that come to mind in favor and against background checks for all gun sales, including at gun shows and over the Internet.

-(TEXTBOX)

[attn.check] What is your favorite meal of the day?

-(TEXTBOX)

[like.court] Is there anything in particular that you like about the U.S. Supreme Court?

1. Yes
2. No

[like.court.open] If yes, What is that?

-(TEXTBOX)

[dislike.court] Is there anything in particular that you don’t like about the U.S. Supreme Court?

1. Yes
2. No

[dislike.court.open] If yes, What is that?

-(TEXTBOX)

[like.biden] Is there anything in particular that you like about President Biden?

1. Yes
2. No

[like.biden.open] If yes, What is that?
[dislike_biden] Is there anything in particular that you don’t like about President Biden?

1. Yes
2. No

[dislike_biden_open] If yes, What is that?

-(TEXTBOX)

[like_trump] Is there anything in particular that you like about Former President Trump?

1. Yes
2. No

[like_trump_open] If yes, What is that?

-(TEXTBOX)

[dislike_trump] Is there anything in particular that you don’t like about President Trump?

1. Yes 2. No

[dislike_trump_open] If yes, What is that?

-(TEXTBOX)

**Political Knowledge**

We are interested in the guesses people make when they do not know the answer to a question. We will ask you several questions. Some may be easy, but others are meant to be so difficult that you will have to guess.

**[catch_question]**

In what year did Idaho become a state?

1. 1912
2. 1890
3. 1930
4. 1799
5. I don’t know

**[female_question]**

Who is the current Speaker of the House of Representatives in Congress?

1. Lynn Cheney
2. Nancy Pelosi
3. Alexandria Ocasio-Cortez
4. Cynthia Lummis
5. I don’t know

**[court_question]**
Who is the current Chief Justice of the United States?
1. Mitt Romney
2. Amy Coney Barrett
3. John Roberts
4. Clarence Thomas
5. I don’t know

**[knowledge_question]**
How many years is a full term for a US president?
1. 2 years
2. 4 years
3. 6 years
4. 10 years
5. I don’t know

**Democratic Values**

Please tell me how much you agree or disagree with the following statements:

**[egal]** Our society should do whatever is necessary to make sure that everyone has an equal opportunity to succeed.
1. Strongly agree
2. Somewhat agree
3. Somewhat disagree
4. Strongly disagree
5. I don’t have an opinion on this

**[egal_worryless]**
This country would be better off if we worried less about how equal people are.
1. Strongly agree
2. Somewhat agree
3. Somewhat disagree
4. Strongly disagree
5. I don’t have an opinion on this

**[egal_prob]**

It is not really that big a problem if some people have more of a chance in life than others.

1. Strongly agree
2. Somewhat agree
3. Somewhat disagree
4. Strongly disagree
5. I don’t have an opinion on this

**[election_loss]**

An important part of democracy is to accept election losses peacefully

**[election_violent]** Sometimes regular people need to be a little violent to make sure votes are counted correctly

**[governing]** The United States should have a strong leader who does not have to bother with Congress and elections.

**[authoritarian_intro]**

Although there are a number of qualities that people feel that children should have, every person thinks that some are more important than others. Here are pairs of desirable qualities.

Please tell me which which child trait is more important:

**[auth_behave]** Considerate/Well-Behaved
**[auth_obey]** Obedience/Self-reliance
**[auth_manners]** Curiosity/Good Manners
**[auth_respect]** Independence/Respect
Part II: Experimental Component

Experiment A:

**[intro_court]** Below is an article concerning an issue that might appear in a newspaper. *Please read the article carefully*, then, respond to the questions that begin on the next page.

*There will be a brief pause on the next screen so you can read the article. At the end of the pause, an arrow will appear at the bottom of the screen. Once the arrow appears, you may move on to the next screen of the survey by clicking on the arrow.*

(IF RANDOMIZATION == juryshadow_liberal)

(SHOW THE FOLLOWING)

U.S. Supreme Court News Washington D.C.– Just before midnight on Wednesday, the U.S. Supreme Court ruled that the Constitution requires a unanimous jury verdict in order to convict defendants of serious offenses in state court, halting the execution of a convicted felon on death row.

Steven Morgan was charged with first-degree murder and exercised his right to a jury trial. After deliberating, ten of the twelve jurors found that the prosecution had proven its case against Morgan beyond a reasonable doubt, while two jurors reached the opposite conclusion. Under Louisiana’s non-unanimous jury verdict law, agreement of only ten jurors is sufficient to enter a guilty verdict. He was sentenced to death.

Morgan appealed his case, and the state appellate court agreed with the lower court. The Louisiana Supreme Court refused to review the case. Morgan then asked the Supreme Court to consider his whether his conviction was unconstitutional under the Sixth Amendment, which he said required a unanimous verdict.

The Supreme Court’s ruling came only 6 days after the Louisiana Supreme Court denied review and Morgan sought Supreme Court review. The majority opinion was unsigned and consisted of a single long paragraph deeming Morgan’s conviction to be unconstitutional. The Court held that the Sixth Amendment right to a jury trial requires a unanimous verdict to convict a defendant of a serious offense.

(IF RANDOMIZATION == juryregular_liberal)

(SHOW THE FOLLOWING)

U.S. Supreme Court News

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conclusion. Under Louisiana’s non-unanimous jury verdict law, agreement of only ten jurors is sufficient to enter a guilty verdict. He was sentenced to death.

Morgan appealed his case, and the state appellate court agreed with the lower court. The Louisiana Supreme Court refused to review the case. Morgan then asked the Supreme Court to consider his whether his conviction was unconstitutional under the Sixth Amendment, which he said required a unanimous verdict.

The Supreme Court justices decided to hear the case and invited both sides to file their 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 the 87-page written opinion the justices explained their reasons for deeming Steven Morgan’s conviction to be unconstitutional. The Court held that the Sixth Amendment right to a jury trial requires a unanimous verdict to convict a defendant of a serious offense.

(IF RAMDOMIZATION == juryshadow_conservative)

(SHOW THE FOLLOWING)

U.S. Supreme Court News Washington D.C.–Just before midnight on Wednesday, the U.S. Supreme Court ruled that the Constitution does not require a unanimous jury verdict in order to convict defendants of serious offenses in state court, allowing the execution of a convicted felon on death row to move forward.

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The Supreme Court’s ruling came only 6 days after the Louisiana Supreme Court denied review and Morgan sought Supreme Court review. The order was unsigned and consisted of a single long paragraph deeming there to be no need to halt the death sentence. The Court held that the Sixth Amendment right to a jury trial does not require a unanimous verdict to convict a defendant of a serious offense.

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U.S. Supreme Court News

Washington D.C.—On Monday morning, the U.S. Supreme Court ruled that deportations of immigrants detained at the southern border could move forward. This ruling allows officials to deny asylum to anyone who had traveled through a third country on the way to the United States.

For decades, adults, families, and unaccompanied children arriving at the U.S.-Mexico border were able to apply for asylum to seek protection from harm in their home countries. U.S. law allows any noncitizen who is in the United States, or at the border, to apply for asylum. However, a new rule enacted by Homeland Security banned entry from the southern border for those who had traveled through a third country on the way to the United States. Immigration authorities in March granted a group of immigrants a temporary hold of their deportation while they argued to have their immigration case reconsidered.

A federal lawsuit on behalf of the immigrants made its way through the lower courts who said that the ban was unconstitutional. The U.S. government then appealed to the Supreme Court.

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 the 87-page written opinion the justices explained their reasons that the deportations could resume. The Court held that Congress has 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.

(IF RAMDOMIZATION == immigrationshadow_conservative)

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A federal lawsuit on behalf of the immigrants made its way through the lower courts who said that the ban was unconstitutional. The U.S. government then appealed to the Supreme Court.

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 unsigned order consisted of a single paragraph stating that the ban barring entry from the southern border was a legal exercise of authority. The Court held that Congress has 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.

(IF RAMDOMIZATION == immigrationregular_liberal)

U.S. Supreme Court News

Washington D.C.–On Monday morning, he U.S. Supreme Court issued a ruling that blocked deportations of immigrants detained at the southern border. This ruling allows officials to facilitate granting asylum to anyone even if they had traveled through a third country on the way to the United States.
For decades, adults, families, and unaccompanied children arriving at the U.S.-Mexico border were able to apply for asylum to seek protection from harm in their home countries. U.S. law allows any noncitizen who is in the United States, or at the border, to apply for asylum. However, a new rule enacted by Homeland Security banned entry from the southern border for those who had traveled through a third country on the way to the United States. Immigration authorities in March granted a group of immigrants a temporary hold on their deportation while they argued to have their immigration case reconsidered.

A federal lawsuit on behalf of the immigrants made its way through the lower courts who said that the ban was unconstitutional. The U.S. government then appealed to the Supreme Court.

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 87-page written opinion, the justices explained their 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.

(IF RANDOMIZATION == immigrationshadow_liberal)

(SHOW THE FOLLOWING)

U.S. Supreme Court News

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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.

(PAGEBREAK)
Part III: Post-treatment Measures Sociodemographics

Attention checks and evaluation

Please answer the following questions about the News Article you just viewed.

**[about]** *(randomize order)* Broadly speaking, what was the news article about?
1. Immigrant-owned businesses
2. Stock market development
3. Supreme Court ruling
4. Climate change
5. Don’t know

**[manip_check]**

Did the news story mention the Supreme Court participating in oral argument?
1. Yes
2. No

Main Outcome Measures

**[courtagree]**

To what extent do you agree with the Court’s decision?
1. Strongly agree
2. Somewhat agree
3. Somewhat disagree
4. Strongly disagree
5. I don’t know

**[courtfair]** In this case, how fair do you think the Supreme Court’s decision-making process was?
1. Extremely fair
2. Somewhat fair
4. Somewhat unfair
5. Extremely unfair

**[courtapproval]*** Thinking of the Supreme Court as a branch of the U.S. government, do you approve strongly, approve somewhat, disapprove somewhat, or disapprove strongly of the Supreme Court, no matter who the Justices are?
1. Strongly approve
2. Somewhat approve
3. Somewhat disapprove
4. Strongly disapprove
5. I don’t have an opinion on this

**[justiceapproval]** Thinking about the nine individual justices on the Supreme Court, please tell me if you approve strongly, approve somewhat, disapprove somewhat, or disapprove strongly of the way the nine justices on the Supreme Court are handling their job?

1. Strongly approve
2. Somewhat approve
3. Somewhat disapprove
4. Strongly disapprove
5. I don’t have an opinion on this

**[legitimacy_intro]** Some people have proposed the following policies. How much do you approve/disapprove of the following proposals?

Do you approve strongly, approve somewhat, disapprove somewhat, or disapprove strongly?

**[jurisdiction]** The right of the Supreme Court to decide certain types of controversial issues should be expanded.

**[control]** We ought to have stronger means of controlling the actions of the U.S. Supreme Court.

**[removed]** Justices on the U.S. Supreme Court should be able to be removed from their position as justice based on the decisions they make.

**[doaway]** If the U.S. Supreme Court starts making a lot of decisions that most people disagree with, it might be better to do away with the Supreme Court altogether.

**[termlimits]** Congress should institute term limits or a mandatory retirement age for members of the Supreme Court

**[court_size]** Congress should add to the number of justices on the Supreme Court

**[veto]** The President and Congress should be allowed to reverse Supreme Court decisions that they disagree with.

The next two question appear directly following the above legitimacy battery: **[doaway_why]** If doaway = 1 or 2 then ask: Explain why you think we should do away with the Supreme Court altogether?

-(TEXTBOX)
**[removed_why]** if removed = 1 or 2 then ask: Explain why you think we should remove justices based on their decisions.

-(TEXTBOX)

How much do you agree or disagree with the following statements:

**[court_trust]** The Supreme Court can be trusted to do the right thing when deciding cases.

**[court_favor]** The Supreme Court favors some groups more than others

**[court_politics]** The Supreme Court gets too mixed up in politics

**[court_decision]** The Justices on the Supreme Court have made up their minds about a case before they even hear oral arguments

1. Strongly agree
2. Somewhat agree
3. Somewhat disagree
4. Strongly disagree
5. I don’t have an opinion on this

**[postfeel_court]** Returning to the Supreme Court, we would like you to now rate how you feel about the Supreme Court on a feeling thermometer using a scale of 0 to 100. The higher the number, the warmer or more favorable you feel toward the Court, the lower the number, the colder or less favorable you feel. You can pick any number between 0 and 100.

1. Supreme Court

**[appearance]** Have you seen any of the Supreme Court Justices give talks or make appearances outside the Court (that were not a part of oral argument, or issuing opinions) in the last six months?

1. Yes
2. No

If appearance = 1 then ask:

**[who]** Which Justice(s) - check all that apply

If appearance = 1 then ask:

**[event]** What do you recall about that talk or appearance?

-(TEXTBOX)

**[roe]** Did you hear about a leak at the Supreme Court of a draft opinion that overturns Roe v. Wade?
1. Yes
2. No

If roe = yes then display

What was your reaction?

(TEXTBOX)
Sociodemographics

This almost completes our survey, we only need some additional information about your background.

**[age]** What is your age?
- (TEXTBOX)

**[educ]** What is your level of education?
1. Less than high school credential
2. High school graduate - High school diploma or equivalent (e.g. GED)
3. Some college but no degree
4. Associate degree in college - occupational/vocational
5. Associate degree in college - academic
6. Bachelor’s degree (e.g. BA, AB, BS)
7. Master’s degree (e.g. MA, MS, MEng, MEd, MSW, MBA)
8. Professional school degree (e.g. MD, DDS, DVM, LLB,JD)/Doctoral degree (e.g. PHD, EDD)

**[income]** Thinking back over the last year, what was your family’s annual income?
1. Less than 20,000
2. 20,000–39,999
3. 40,000–59,999
4. 60,000–79,999
5. 80,000–99,999
6. 100,000–119,999
7. 120,000 or more
8. Prefer not to say

**[church]** Not counting weddings and funerals, how often do you attend religious services?
1. Never
2. Less than once a year
3. Once a year
4. Several times a year
5. Once a month
6. Two to three times a month
7. Nearly every week
8. Every week
9. More than once per week

**[comments]** Thank you for answering our survey. Do you have any comments for us?
- (TEXTBOX)

**[debriefing_general]** Note: The goal of this research is to advance our understanding of how procedural regularity impacts support for institutions. Specifically, we collected data on people’s political attitudes, policy preferences and support for institutions. In addition, we incorporated experimental components to compare the effectiveness of procedural regularity on support for institutions.

**[debriefing_court]** (ONLY SHOWN IF RESPONDENTS VIEWED A SUPREME COURT PRESS RELEASE): The press release was written specifically for the purpose of this study. The information provided in the press release was based off of real court cases, but names and outcomes were changed for this survey. If you have any questions or concerns, please contact the principal investigator Dr. Sara Benesh (sbenesh@uwm.edu).