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Introduction: The Fragile Legitimacy of the Supreme Court

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INTRODUCTION—THE FRAGILE LEGITIMACY OF THE SUPREME COURT

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This special issue accompanies the Annual Symposium on Ethics & Professionalism, held at Emory University on Friday, September 8, 2023. In the legal context, the role of judges and how judges behave lies at the heart of the concepts of ethics and professionalism. This is particularly true of the judges sitting at the top of the hierarchy of the legal profession, the U.S. Supreme Court Justices. For the legal community and the broader community to have faith in the judiciary, it is important to see that core standards of ethics and professionalism are maintained by those who sit at its apex. Accordingly, in 2023, the Annual Symposium on Ethics & Professionalism was on the topic, "Supreme Court Legitimacy: Stare Decisis, Democratic Institutions, and the Shadow Docket."[1] This topic provided an opportunity to critique the current direction and consider the future of the Supreme Court.

There has been significant discussion in the media and academia over whether the Supreme Court is facing a "legitimacy crisis," as evidenced by survey data that shows that the Supreme Court is currently held in lower regard than at any time in its history,[2] calls for court reform,[3] and scholarly critique.[4] Concerns have been raised about both the substance of what the Supreme Court is doing and the means by which it is doing it—the extent to which established cases are being challenged and overturned[5] and whether the usual process of full

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[1] The Annual Symposium on Ethics & Professionalism is held annually by one of four Georgia law schools. This year, the conference was hosted by Emory University School of Law and cosponsored by the Georgia Association of Women Lawyers ("GAWL").

[2] *See infra* Part II.3.

[3] *See, e.g.*, Tonja Jacobi & Matthew Sag, *The Supreme Court Needs 15 Justices*, BL (May 4, 2021, 4:01 AM), https://news.bloomberglaw.com/us-law-week/the-supreme-court-needs-15-justicejustices?context=search&index=0. President Biden established a commission to consider the various calls for reform, The Presidential Commission on the Supreme Court of the United States. FINAL REPORT: PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES (Dec. 8, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

[4] *See, e.g.*, Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, SUP. CT. REV. 111, 178 (2019) (arguing that there is "a red thread through the Roberts Court's rulings," namely partisanship).

[5] *See infra* Part I.1.

briefing and oral argument is being circumvented at unusually high rates.[6] The Court's decision in *Dobbs v. Jackson Women's Health Organization*,[7] overturning *Roe v. Wade*,[8] is simply the most attention-getting challenge to stare decisis—there are also multiple challenges developing to the modern administrative state[9] and the institutional mechanisms of the democratic process.[10] This conference and its associated special issue address questions such as: Are these critiques driven by simple dissatisfaction with Supreme Court case outcomes or by broader institutional concerns? Is the increasing use of the "shadow docket" a skirting of Supreme Court procedure or merely a response to developments like the increased issuance of wide-reaching preliminary injunctions[11] and the exigencies of the COVID-19 pandemic? Is the Court dismantling the core mechanisms of the democratic process? This debate is highly salient and raises questions directly challenging notions of judicial role, judicial professionalism, and the future of the Supreme Court.

These institutional questions, as well as the controversies that have surrounded the individual justices in recent months, raise serious concerns relating to legal professionalism. The recent controversies over the justices receiving lavish gifts from individuals representing partisan interests and sometimes having business before the Court, and the justices' failure to report such gifts,[12] have highlighted existing challenges and ambiguities about

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[6] *See infra* Part I.2.

[7] 597 U.S. __ (2022) (overturning *Roe v. Wade* and the prior constitutional recognition of freedom of choice in reproduction, including access to abortion).

[8] 410 U.S. 113 (1973) (recognizing a constitutional right to freedom of choice in reproduction, including access to abortion, particularly stemming from the privacy right of a woman to confer with her doctor regarding the choice to continue with or terminate a pregnancy).

[9] *See, e.g.*, West Virginia v. EPA, 597 U.S. ___ (2022) (ruling that the Environmental Protection Agency does not have Congressional authority to limit emissions from existing power plants under the Clean Air Act to control climate change because the proposed action under the Clean Power Plan is a "major question" and thus requires more specific Congressional approval).

[10] *See, e.g.*, Rucho v. Common Cause, No. 18-422, slip op. at 30 (2019) (declaring that partisan gerrymandering is a nonjusticiable political question that will not be reviewed in federal court, even though it may be "incompatible with democratic principles" (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U. S. ___, (2015))); *see infra* Part I.3.

[11] *See* JOANNA R. LAMPE, CONG. RSCH. SERV., R46902, NATIONWIDE INJUNCTIONS: LAW, HISTORY, AND PROPOSALS FOR REFORM (2021), https://crsreports.congress.gov/product/pdf/R/R46902 (defining "an injunction *against the government* that prevents the government from implementing a challenged law, regulation, or other policy *with respect to all persons and entities*, whether or not such persons or entities are parties participating in the litigation" and analyzing the uncertain legal basis for such injunctions).

[12] Justice Thomas, in particular, breached numerous rules regarding reporting gifts received, as extensively reported by ProPublica. *See, e.g.*, Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, 5:00 AM), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow.

fundamental topics of judicial ethics and professionalism.[13] Such questions include: When should judges and justices recuse themselves? When should judges and justices feel ethically bound not to accept gifts? And what are they required to report? Having so many doubts raised about the conduct of Supreme Court Justices prompts questions about whether we can expect more from lower court judges than from their superiors and from the attorneys and lawyers appearing before them than we do of the justices themselves. And it ultimately prompts the question: Where does this situation leave both the aspirational goals of a professionalism system, as well as the practical realities of a discipline system, if those higher in the judicial hierarchy are held to a lower standard than those lower in the hierarchy?

I. WHY DO THESE ISSUES POTENTIALLY RAISE A LEGITIMACY CRISIS? THE SYMPOSIUM

The Symposium explored these issues through the participation of an intellectually and ideologically diverse slate of high-profile speakers appearing in four panels addressing: (1) Stare decisis; (2) The shadow docket; (3) Mechanisms of democracy; (4) The future of the Court. Our panelists and audience were multidisciplinary, drawing on various strands of academia, including law and political science, as well as practitioners, judges, and others.

1. Stare Decisis

The stare decisis panel featured Justice David Nahmias, former Chief Justice of the Georgia Supreme Court, now a partner at Jones Day; David Frederick, an advocate who has appeared before the Supreme Court in over fifty cases and is a partner at Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C.; and Professor Kate Shaw, Professor at Cardozo School of Law and co-host of the popular podcast analyzing the Supreme Court and its key decisions, Strict Scrutiny. Unfortunately, Professor Shaw was unable to travel due to a storm and Professor Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, stepped in to replace her.

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[13] *See, e.g.*, Tonja Jacobi, *Justices Sign on to Loosened Ethics In and Out of the Courtroom*, BL (May 17, 2023, 4:00 AM), https://news.bloomberglaw.com/us-law-week/justices-sign-on-to-loosened-ethics-in-and-out-of-the-courtroom (arguing that the Supreme Court justices' seeming lack of concern about ethics breaches by their own members is a counterpart to their permissive attitude to unethical conduct by other governmental actors); Tonja Jacobi, *Thomas Gives Himself a Pass, But Judges Others by the Book*, BL (Apr. 21, 2023, 5:30 AM), https://news.bloomberglaw.com/us-law-week/thomas-gives-himself-a-pass-but-judges-others-by-the-book (highlighting the inconsistency between Justice Thomas's permissive attitude to his own wrongdoing, in the form of numerous excuses such as not knowing the law, and his strict attitude toward criminal defendants).

The role of stare decisis is vital to an analysis of Supreme Court legitimacy. Stare decisis ensures that judges are bound by prior law in superior or equivalent courts.[14] In this way, stare decisis is meant to constrain judicial decision-making, providing certainty and consistency to the law and prohibiting judges from simply making up what rules apply in any given case. It is foundational to judicial legitimacy because if judges do not follow prior law, it is difficult to differentiate them from politicians, who decide each issue de novo based on their own personal preferences and the pressures of their constituents. Judges are meant to apply rules in a neutral and objective manner, and doing so requires respecting prior precedent.[15]

In recent Terms, the Supreme Court has overturned major precedents,[16] most notably[17] *Roe v. Wade*, in *Dobbs v. Jackson Women's Health Organization*.[18] *Dobbs* was shocking to many because it was the first time that a recognized constitutional right was withdrawn from the public. Never before had the Constitution been interpreted to shrink, rather than expand. But *Dobbs* is remarkable not only for overturning the fifty-year-old *Roe* precedent that was vital to women's ability to control their bodies and to fully participate in the workplace and society,[19] but also because *Dobbs* overturned *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[20] the case that laid out the guidelines for when stare decisis ought to be followed, and when, rarely, the

[14] Sometimes called vertical and horizontal stare decisis, respectively. *See, e.g.*, *Understanding Stare Decisis*, ABA (Dec. 16, 2022), https://www.americanbar.org/groups/public_education/publications/preview_home/understand-stare-decisis/.

[15] Whether judges do apply rules in an objective manner is subject to question, as exemplified by Jacobi and Mascia's contribution to this volume, see *infra* Part II.2.

[16] The Court seldom formally overturns precedents—technically, the Roberts Court has only overruled twenty-seven cases. *See Table of Supreme Court Decisions Overruled by Subsequent Decisions*, CONST. ANNOTATED, https://constitution.congress.gov/resources/decisions-overruled/ (last visited Sept. 12, 2023). But far more often it renders those precedents effectively null, see *infra* notes 17 and 32, for two notable examples.

[17] Other major decisions include the decision to end use of affirmative action in university admissions. *See* Students for Fair Admissions v. Harvard, 600 U.S. ___ (2023) (effectively overruling both *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) without formally overruling either).

[18] 597 U.S. ___ (2022).

[19] Office of the UN High Commissioner for Human Rights, Joint Web Statement by UN Human Rights Experts on Supreme Court Decision to Strike Down Roe v. Wade, (June 24, 2022), https://www.ohchr.org/en/statements/2022/06/joint-web-statement-un-human-rights-experts-supreme-court-decision-strike-down ("Legal protections for abortion access and abortion rights have been established under international law as a matter of ensuring women's ability to enjoy their legally protected human rights to life, health, equality and non-discrimination, privacy, freedom from torture, cruel, inhuman, and degrading treatment and to ensure their freedom from gender-based violence.").

[20] *Dobbs*, No. 19-1391, slip op. at 5 (2022) ("We hold that *Roe* and *Case*y must be overruled.").

Court is justified in overturning its own precedent.[21] The *Dobbs* Court offered no alternative and so the public is left not knowing what limits apply to judicial discretion or how we are to know if and when the same rules will apply from one case to another.

2. The Shadow Docket

The shadow docket panel featured former Solicitor General Noel Francisco, now a partner at Jones Day, and Professor Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, perhaps the country's leading expert on the Supreme Court's increasing use of the shadow docket. The "shadow docket" or the "emergency docket process" is described pithily in one of the articles in this special issue:

> An emergency petition made to a single justice before or during lower court consideration of the case and referred to the Court, dealt with in the middle of the night after limited briefing and announced immediately, without oral argument, unaccompanied by reasoning or even an indication of how many or which justices agreed with the disposition.[22]

The second element of a fair justice system—after the same rules applying to everyone, operationalized through stare decisis—is that a regular process be followed. When individuals go to the courts, they are not guaranteed their desired outcome; rather, they are guaranteed that the same process applies to everyone and that the process be fair, transparent, and consistent.[23] In recent years, the Supreme Court has, in numerous cases, bypassed its ordinary process of briefing, oral argument, and written decision-making and utilized the shortcut of the shadow docket.[24] The increasing use of the shadow docket may have arisen due to exceptional circumstances, such as the COVID-19 pandemic, or in

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[21] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (stating that the Court will inquire whether the precedent's "central rule has been found unworkable"; whether the precedent could be changed "without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left [the precedent]" anachronistic; and whether the precedent's "premises of fact have so far changed . . . as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed").

[22] Taraleigh Davis & Sara C. Benesh, *Procedural Justice and the Shadow Docket*, 73 EMORY L.J. 448 (2023).

[23] The Constitution provides: "No person shall be . . . deprived of life, liberty or property without due process of law." U.S. CONST. amend. V, amend. XIV.

[24] Ben Johnson & Logan Strother, *Shedding Light on the Roberts Court Shadow Docket*, SSRN (Sept. 15, 2022), http://dx.doi.org/10.2139/ssrn.4202390 (showing that the use of the shadow docket has increased significantly in recent years and often involves ideological decision-making as well as other unusual procedures, such as changing the questions to be answered).

response to other changes, such as the increasing use by lower courts of nationwide injunctions, which need to be reviewed by a higher court expeditiously given the breadth of their impact. But many have questioned whether this irregular procedure is politically driven to favor some parties over others without the accountability that normally goes along with Supreme Court decision-making.[25] And even if the intention behind the use of the shadow docket is not Machiavellian, its use may still undermine faith in the justice system.[26]

3. Mechanisms of Democracy Panel

Discussing the Supreme Court's modern approach to analyzing the mechanisms of democracy were Professor Nicholas O. Stephanopoulos, Kirkland & Ellis Professor at Harvard Law School; Allegra Lawrence-Hardy, Partner at Lawrence & Bundy and chair of the Stacey Abrams gubernatorial campaigns, 2018 and 2022; and Ryan Germany, former general counsel to the Georgia Secretary of State and now a partner at Gilbert, Harrell, Sumerford & Martin. These three panelists come from very different perspectives on the issue: Ryan Germany oversaw the voting rules that were challenged in court by the Abrams campaign,[27] the type of rules strongly criticized by academics including Professor Stephanopoulos.[28]

As the sole non-elected branch of the Federal Government, the Supreme Court arguably has one role within the separation of powers that supersedes all its other responsibilities: to ensure that the two other branches are elected via a fair and proper process. If that is done, any other failure by the courts can be fixed through the political process, which will be responsive to the people.[29] Some argue that the courts also have a special responsibility to protect "discrete and insular minorities" from the will of the people.[30] But there is little doubt that it is vital for a proper working democracy that the courts protect it from the incentive of legislators to bias the process in their own favor.

Yet, arguably, the Supreme Court has failed in its responsibility to protect minorities and other vulnerable groups in recent years. For instance, the Court

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[25] *See, e.g.*, STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023).

[26] *See id.* (showing that use of the shadow docket undermines the legitimacy of the Court).

[27] *See* Fair Fight Action, Inc. v. Brad Raffensperger, 413 F. Supp. 3d 1251 (N.D. Ga. 2019).

[28] *See, e.g.*, Nicholas Stephanopoulos, *The South After* Shelby County, 2013 SUP. CT. REV. 55 (2013).

[29] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[30] United States v. Carolene Products Co., 304 U.S. 144, 155 n.4 (1938).

decided that partisan gerrymandering, however inimical it may be to democracy, is nonjusticiable in the federal courts;[31] the Court also effectively nullified Section 5 of the Voting Rights Act of 1965, which had required that jurisdictions with a history of racial discrimination must have any new laws precleared by the Department of Justice, to prevent the "denial or abridgement of the right of any citizen . . . to vote on account of race or color."[32] The Court's treatment of the mechanisms of democracy is vital not only to the well-being of the democratic system, but also to its own perception as a safe haven from the turmoil of cutthroat partisan competition. That loss may come at the cost of fundamental institutions, and of the Court playing its role in ensuring the separation of powers remains functional.

4. The Future of the Court

The final panel of the symposium, on the future of the Court, featured experts of diverse backgrounds and specialties, including Judge Lucy Inman, former judge of the North Carolina Court of Appeals and now Senior Counsel at Milberg LLC; Professor Fred Smith Jr., Professor and Charles Howard Candler Professor of Law at Emory University School of Law; Professor Sara Benesh, Associate Professor and Chair, University of Wisconsin, Milwaukee, Political Science; and Professor Amy Steigerwalt, Professor and Chair, Georgia State Department of Political Science.

As discussed in more detail below, the Court's legitimacy has always been the core source of its power, lacking as it does Congress's power to appropriate money and the Executive's power of enforcement.[33] Yet, the Supreme Court is considered the most powerful court in the world, largely due to its good standing, and it has always been the most highly regarded of the three branches.[34] But the recent changes discussed in the three other panels—both substantive and procedural—have rendered the Court both unpopular and lacking the faith of the majority of the people, for the first time in history.[35] In response, some have

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[31] Rucho v. Common Cause, 588 U.S. ___ (2019) (ruling that partisan gerrymandering is nonjusticiable).

[32] Shelby County v. Holder, 570 U.S. 529 (2013). *Shelby* overturned the application of the preclearance requirement, thus rendering Section 4 ineffective, an example of how the Court can gut prior precedent or indeed legislation without formally overturning anything. *Id.*

[33] *See infra* Part II.3.

[34] *See, e.g.*, Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL'Y 261, 270 (2000) (analyzing the exceptional power of the Supreme Court and explaining that early in the Court's history, Chief Justice Marshall laid the groundwork for the Court's power by insisting on consolidated opinions, to avoid fractured, seriatim decisions and have the Court speak with one voice).

[35] *See infra* Part II.3.

called for abolishing life tenure of the justices,[36] limited terms for the justices,[37] jurisdiction stripping of the Court,[38] as well as reforms addressing the scandals involving gifts to the justices.[39] The future good standing of the Court is less clear than ever.

II. EXPLORING THESE THEMES IN DETAIL: THE SPECIAL ISSUE

This special issue consists of four Articles exploring these themes by four of our esteemed conference panelists and their co-authors. Ruth M. Greenwood and Nicholas O. Stephanopoulos examine the Court's treatment of mechanisms of democracy, in particular gerrymandering and voting rights. They catalogue and analyze state voting rights acts, which have arisen partially in response to the Supreme Court's limiting of the federal Voting Rights Act. Tonja Jacobi and Eryn Mascia empirically assess whether the Supreme Court Justices decide cases in a manner that is both neutral and independent, as the rule of law requires. They show empirically that, even just looking to the supposedly neutral and objective facts set forth in Supreme Court opinions, the justices use various linguistic techniques to favor their preferred side of the argument. Taraleigh Davis and Sara Benesh provide an empirical analysis of the shadow docket, using an experimental survey to explore the association between the Supreme Court's use of these unusual procedural methods and public's declining confidence in the Court. They ascertain to what extent the shadow docket harms the legitimacy of the Court. Finally, Lauren Hansen-Figueroa, Alexandra Piccirillo, and Amy Steigerwalt empirically assess gender roles and public expectations of courts, particularly in contrast to legislatures. They show that the courts do far more work than Congress, and that can lead to public

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[36] *See, e.g.*, David R. Dow & Sanat Mehta, *Does Eliminating Life Tenure for Article III Judges Require A Constitutional Amendment?*, 16 DUKE J. CONST. L. & PUB. POL'Y 89, 89 (2021) (describing how various academics "across the ideological spectrum" have called for this reform).

[37] *See, e.g.*, Maggie Jo Buchanan, *The Need for Supreme Court Term Limits*, AM. PROGRESS (Aug. 3, 2020), https://www.americanprogress.org/article/need-supreme-court-term-limits/ ("Longer terms have led to an increasingly political confirmation process and a court more likely to be out of touch with the general public."); Alicia Bannon & Michael Milov-Cordoba, *Supreme Court Term Limits*, BRENNAN CTR. FOR JUST. (June 20, 2023), https://www.brennancenter.org/our-work/policy-solutions/supreme-court-term-limits ("Staggered 18-year terms would [result in] a Court that better reflects prevailing public values.").

[38] Christopher Jon Sprigman, *Jurisdiction Stripping as a Tool for Democratic Reform of the Supreme Court: Written Testimony for the Presidential Commission on the Supreme Court of the United States*, WHITE HOUSE (Aug. 15, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Christopher-Jon-Sprigman.pdf.

[39] Supreme Court Ethics, Recusal, and Transparency Act of 2023, S. 359, 118th Cong. (2023) (proposing "changes related to the ethical standards, financial disclosure requirements, and recusal requirements that apply to Supreme Court Justices"); Judicial Ethics and Anti-Corruption Act of 2023, H.R. 3973, 118th Cong. (2023) ("[E]stablish[ing] judicial ethics.").

dissatisfaction. Together, these four Articles provide an in-depth examination of the questions described above.

1. Greenwood and Stephanopoulos: Voting Rights Federalism[40]

The recent Supreme Court jurisprudence affecting the mechanisms of democracy, described above, has raised great concern among many academics that voting rights protections are being weakened.[41] Yet, Ruth M. Greenwood and Nicholas O. Stephanopoulos identify an area of voting rights *strengthening* that is given little attention: the significant rise in state voting rights acts ("SVRAs") and bills, which provide various mechanisms of protections against racial vote denial, racial vote dilution, and retrogression (diminishment in the electoral position of minorities).

Greenwood and Stephanopoulos provide the first catalog of these state acts and proposals. They show that many SVRAs provide far greater protection than their federal counterpart. This is the case in terms of the textual requirements of the statutes, with some imposing fewer restrictions and providing additional remedies, as well as providing broader application. For example, New York's SVRA prohibits voter deception and obstruction in its definition of voter intimidation, which in the federal statute covers only intimidation, threats, and coercion. It is also the case in terms of some SVRAs' impact, with earlier adopters such as California having witnessed hundreds of reforms to electoral procedures at the local level, which have been attributed to the California SVRA in empirical studies.

Greenwood and Stephanopoulos also analyze and rebut the numerous constitutional challenges to SVRAs, particularly the claim that SVRAs can constitute racial gerrymandering. That term is a misnomer, as it only applies to an individual district's improper use of race in drawing its boundaries, rather than a system of restrictions and requirements over line-drawing applying throughout a state. Similarly, they argue that heightened judicial scrutiny should not apply to SRVAs because, while the acts generally refer to race, they do not "distribute benefits or burdens to individuals on racial grounds."[42] Nor are they intended as racially discriminatory, but rather they aim to prevent and combat racial discrimination.

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[40] Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 EMORY L.J. (2023).

[41] *See supra* Part I.3.

[42] Greenwood & Stephanopoulos, *supra* note 40, at 304.

Finally, Greenwood and Stephanopoulos propose how SVRAs could be made even stronger. They encourage states to engage in broad reform rather than incremental improvements, particularly through ex ante mandating of more fair electoral mechanisms, rather than relying on post hoc enforcement of wrongdoing through lawsuits, akin to the federal approach. For instance, despite the gains in California due to its SRVA, there are still far more localities that still use at-large elections, which are generally racially dilutive. If California were instead to mandate single-member districts or proportional representation, the effect would be immediate and universal throughout the state. This category of reforms could also be written to make no mention of race, completely circumventing the critiques rebutted above.

There are numerous other suggestions and insights provided in this comprehensive and thoughtful Article. It is a valuable contribution to the literature and offers a positive path forward for those concerned that the Supreme Court is dismantling the mechanisms of democracy at the federal level.

2. Jacobi and Mascia: Alternative Facts: The Strategy of Judicial Rhetoric[43]

For decades, it has been well-established that Supreme Court behavior is highly predictable based on political ideology,[44] be it the ideology of Presidents nominating the justices[45] or the justices themselves.[46] This consistent series of results is central to notions of judicial legitimacy, because if judges are political in this way, it raises concerns about whether parties will be treated fairly before the Court and whether the Supreme Court Justices are really just unelected

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[43] Tonja Jacobi & Eryn Mascia, *Alternative Facts: The Strategy of Judicial Rhetoric*, 73 EMORY L.J. (2023).

[44] *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 280 (2002) (establishing the strong predictive effect of ideology on vote outcomes); Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819 (2002) (summarizing the history of the field of empirical legal studies); Lee Epstein & Tonja Jacobi, *The Strategic Analysis of Judicial Decisions*, 6 ANN. REV. L. & SOC. SCI. 341, 342 (2010) (summarizing the extensive literature of strategic judicial behavior, in which judges not only behave ideologically but engage in the long-term manipulation of doctrines, for instance through sacrificing outcomes in cases in the short term in order to achieve larger, long-term doctrine shifts).

[45] *See, e.g.*, Matthew Sag, Tonja Jacobi & Maxim Sytch, *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CALIF. L. REV. 801, 804 (2009) (describing the extensive use of a measure of the Party of the Appointing President to predict judicial behavior).

[46] The dominant direct measures of judicial ideology are the Martin-Quinn scores, in which justices are categorized as conservative or liberal according to whether they are above or below the approximate historical average of the Court over time. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002). Updated data is available at mqscores.wustl.edu/measures.php (last visited May 1, 2023).

"politicians in robes."[47] This is a long, historic debate, in which the fundamental philosophical and theoretical question of the role of judges has had to confront overwhelming empirical evidence that judges—Supreme Court Justices and lower court judges[48]—not only behave in a way that is predictable based on judicial ideology (which can at least coincide with judicial methodology), but also partisanship.[49]

As much as the struggle has engrossed scholars, this inquiry has generally only addressed how judges determine the outcome of cases—that is, how they develop the answers to legal questions before them. Tonja Jacobi and Eryn Mascia go even deeper into the difficult question of judicial bias and political behavior by looking at how the justices characterize the questions that arise before the Court, and whether those characterizations are similarly predictable based on judicial ideology. Specifically, they conduct an empirical study of how the facts of cases—separate from any legal analysis in the opinions—are characterized by the justices in constitutional criminal procedure cases. The study shows that the justices exploit a variety of linguistic techniques when describing the facts of these cases to strategically frame the inquiry, to lend itself to an ideologically preferred outcome.

Jacobi and Mascia undertake this analysis both qualitatively and quantitatively. Qualitatively, they examine numerous cases and illustrate the inconsistencies, the strategic selection process of which factual elements to include or exclude, and the ways in which the facts are described using linguistic techniques that push the reader toward sympathy for the defense or the prosecution, in ways that align with the justices' overall preferences in criminal procedure doctrine. Quantitatively, they create a novel data set containing the factual analysis in all opinions of all police investigation cases since the beginning of the Roberts Court, 2005–2022 terms. They examine the differential use of six sets of linguistic variables: hedgers and intensifiers; extent of abstract and specific language; positive versus negative framing; inclusion of surplus

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[47] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986) (critiquing the ability of nonelected judges to invalidate legislation passed by elected politicians, which is particularly problematic if judges are politically influenced).

[48] *See, e.g.*, Sara C. Benesh & Jason J. Czarnezki, *The Ideology of Legal Interpretation*, 29 WASH. U. J.L. & POL'Y 113, 122 (2009) (discussing the literature showing that lower court judges' decisions are predictable based on judicial ideology).

[49] Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore*: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1436–43 (2016) (showing that judicial partisanship is highly predictable in election cases); Michael S. Kang & Joanna M. Shepherd, *Judging Law in Election Cases*, 70 VAND. L. REV. 1755 (2017) (showing that election law decisions that go against a judge's ideological preference can be used as a sign of case strength, given such votes are so unusual).

facts and omission of relevant facts; stigmatization versus personalization of individuals; and use of active versus passive voice. They show that the use of these variables aligns with judicial preferences in not only criminal procedure cases but all other Supreme Court jurisprudence.

To undertake this analysis, Jacobi and Mascia create two new measures of judicial behavior—the "pro-prosecution score" of judges' ideological proclivities in criminal procedure cases and the "pro-conservative score" of judicial ideology in all other cases, excluding constitutional criminal procedure cases. They show that the justices make use of strategic fact manipulation to bring about outcomes in line with their pro- or anti-prosecution tendencies, as well as their pro- or anti-conservative tendencies. That is, how justices describe the facts before them—not the difficult questions of law but the very basic contours of the dispute before them and what has occurred—is highly predictable based on not only how each justice voted in other criminal procedure cases, but in all other cases, such as First Amendment, abortion, taxation, intellectual property, etc.

Specifically, they find that all the linguistic variables examined were used strategically, at least to some extent, by the justices, and the variables that raise the most concerns in terms of judicial legitimacy show the strongest effects. For instance, pro-prosecution justices use more hedging language in describing police behavior, camouflaging police culpability in constitutional violations; those same justices use more intense language for defendants in non-majority opinions, emphasizing defendant wrongdoing. Pro-prosecution justices use far less negative framing about police behavior and far more positive framing about police behavior, even though these cases typically concern police misbehavior; pro-prosecution justices praise police dozens of times more per opinion than defendants when laying out the supposedly neutral facts of cases. Pro-prosecution justices also significantly tend to stigmatize, especially against defendants, and are much more likely to personalize police. Pro-prosecution justices also tilt the scales by describing police as actively doing their jobs: consistently using active language in describing police while using passive language to describe defendants. And finally, and perhaps most controversially, pro-prosecution justices introduce doctrinally irrelevant facts into their narratives significantly often. For each of these results, pro-defendant justices do the opposite, also at statistically significant levels. Altogether, these results show that even when the justices are only describing the facts, they are already introducing their ideological preferences into those descriptions and tilting the

narrative to support the pro-prosecution or pro-defense tendencies of the given justice.

Yet, not all of the justices are equally likely to tilt the playing field in favor of the party they are most sympathetic toward by unequally characterizing the case facts. The extremist justices on either end of the Court use these techniques in a strategic and predictable way far more than the justices who sit in the middle of the Court. These results, then, mirror political division arising due to polarization.

Framing a characterization as a "fact" presents an impression of objectivity and reliability[50] ; yet, if even the starting place for a Supreme Court opinion is ideologically biased, if each side is entitled to their "alternative facts,"[51] then legal decision-making loses the promised legitimacy of being differentiable from the political process.

3. Davis and Benesh: Procedural Justice and the Shadow Docket[52]

Traditionally, the Supreme Court has always had an exceptionally high level of support and trust by the public, particularly compared to the other apex institutions of the federal government: the President and Congress.[53] This is not simply fortunate for the Court, it is essential to the Court's power to remain a coequal branch, given that the judiciary lacks the power of "the sword or the

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[50] Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 721 (1988) ("It is of course clear that 'the fundamental aspiration of judicial decisionmaking . . . [is the] application of neutral principles 'sufficiently absolute to give them roots throughout the community and continuity over significant periods of time . . . .'" (quoting Akron v. Akron Ctr. For Reproductive Health, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting))).

[51] This phrase was coined by then-President Donald Trump's counselor Kellyanne Conway, in defending seemingly intentional misstatements by White House press secretary Sean Spicer about the size of the crowds at Trump's swearing-in ceremony. The interviewer, Chuck Todd, responded "Alternative facts are not facts. They are falsehoods." Mahita Gajanan, *Kellyanne Conway Defends White House's Falsehoods as 'Alternative Facts'*, TIME (Jan. 22, 2017, 11:26 AM), https://time.com/4642689/kellyanne-conway-sean-spicer-donald-trump-alternative-facts/.

[52] Taraligh Davis & Sarah C. Benesh, *Procedural Justice and the Shadow Docket*, 73 EMORY L.J. (2023).

[53] *In Divided Washington, Americans Have Highly Negative Views of Both Parties' Leaders*, PEW RSCH. CTR. (Apr. 7, 2023), https://www.pewresearch.org/politics/2023/04/07/views-of-congress-the-supreme-court-and-the-political-system/ (comparing views of Congress and Supreme Court over time).

purse."[54] It is generally understood that the Court's power is drawn from its legitimacy.[55] But support for the Supreme Court is at a historic low.[56]

Taraleigh Davis and Sara Benesh acknowledge that there have been multiple other controversies that may have contributed to this historically unique low standing of the Court but note that one cause posited by many other scholars for this loss is procedural.[57] The Court has traditionally been seen as neutral and is now seen as more political and less procedurally reliable. Their study tests whether the Court's recent reliance on unorthodox procedure has significantly contributed to this loss of support.

The experiment Davis and Benesh conduct compares the responses of participants to two contrasting procedural scenarios, one capturing the usual, rigorous procedure of the Supreme Court, and the other using the shadow docket procedure, which skips multiple of the ordinary steps in the decision-making process and provides a decision bereft of reasoning or even an indication of the extent of support by the justices for the outcome. By comparing participants' subsequent assessments of the Court of these two groups, Davis and Benesh assess the impact of unorthodox procedure on the standing of the Court.

Along the way, Davis and Benesh are also able to assess a more substantive (versus procedural) question: What was the effect of the leak of the preliminary opinion in the *Dobbs* case and of *Dobbs* itself? The study was conducted on three separate days: at the time of the leak of the initial *Dobbs* opinion, at the time of the announcement of the formal opinion and the decision to overturn *Roe*

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[54] THE FEDERALIST NO. 78 (Alexander Hamilton) ("The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.").

[55] *See, e.g.*, James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 L. & SOC'Y REV. 469 (1989) (showing that public views of Court legitimacy rest on perceptions of fairness of the Court's procedures but that noncompliance does not actually follow from loss of that legitimacy). Note, however, that noncompliance is the extreme outcome and there can be harm to Court power without direct refusal to follow its commands. *See* Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534 (2002) (showing that lower court compliance with Supreme Court precedent varies with aspects of Supreme Court precedent).

[56] Jeffrey M. Jones, *Supreme Court Approval Holds at Record Low*, GALLUP (Aug. 2, 2023), https://news.gallup.com/poll/509234/supreme-court-approval-holds-record-low.aspx (showing the U.S. Supreme Court's approval rating at 40% in July 2023, the equal lowest score, with September 2021, in the last 23 years).

[57] The most influential scholar in making this argument is one of the panelists from our shadow docket panel, see Vladeck, *supra* note 25.

v. Wade, and sometime later, when the controversy could potentially have settled down.

What could be impacted? Davis and Benesh consider two important elements of Supreme Court legitimacy: diffuse support for the Court as an institution and specific approval of the Court, given particular decisions.[58] While some have questioned whether ordinary citizens make these kinds of sophisticated differentiations,[59] Davis and Benesh's results differ meaningfully between these two elements.

They find that, when looking at all participants in the most general overview, over the course of the three dates of the study, both diffuse support and specific support for the Court dropped consistently over the three dates. They also show that those who are told that the Court has made the decision under discussion via the shadow docket process rather than through the usual process have the lowest regard for the Court, in both diffuse and specific terms. They find that the awareness of the *Dobbs* decision, the leak, and the disagreement with the outcome are each, unsurprisingly, also highly predictive of low opinion of the Court in both variants of legitimacy. But even controlling for this kind of policy disagreement, Davis and Benesh find that the shadow docket process produces a lower opinion of the Court in terms of specific support. However, the diffuse support effect is no longer statistically significant. They also show that assessments of the fairness of the Court's procedures is highly salient and whether people perceive the Court to be making decisions in a fair way "influences the estee, in which the public hold the Court."[60]

Ultimately, then, Davis and Benesh find that the Court's use of the shadow docket harms approval but in the long term it does not affect diffuse support for the Court as an institution. In addition, the *Dobbs* decision and leak had a significant negative impact on approval for the Court. This leads Davis and Benesh to an important normative conclusion: that there is an urgent need for the Court to embrace normal due process—to "carefully apply fair procedures

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[58] For more on this distinction and its significance, see James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354 (2003) (finding that regard for the Court has both short-term and long-term elements, with shorter-term satisfaction being more influential on opinions).

[59] *See* James L. Gibson & Gregory A. Caldeira, *Knowing the Supreme Court? Reconsideration of Public Ignorance of the High Court*, 71 J. POL. 429 (2009) (describing this common view in the literature and challenging it as a result of mismeasurement).

[60] Davis & Benesh, *supra* note 52, at 468.

to resolve legal questions rather than being (at least perceived as) overtly interested in political wins"—to regain the public trust.[61]

This brief summary only scratches the surface of the results and the interesting analysis contained in the Article. Many people have written thoughtful critiques of the Court's use of the shadow docket and hypothesized about the harmful effect it could have on public trust. Davis and Benesh have shown us that that hypothesized impact is real, although the public is capable of differentiating between its long-term view of the Court and its short-term view. In doing this, Davis and Benesh have given us the grounds from which to proceed with a more informed discussion of how worried we should be about the Court's legitimacy and what, if anything, should be done to reform the Court and its procedures.

4. Hansen-Figueroa, Piccirillo, and Steigerwalt: Congress is from Mars & Courts are from Venus: Reconceptualizing Our Understanding of Interbranch Relations[62]

In this novel take on judicial-legislative relations, Lauren Hansen-Figueroa, Alexandra Piccirillo, and Amy Steigerwalt characterize Congress as public-facing and credit-claiming, and prototypically masculine; whereas the federal courts, in their more obscure, reactive, mandatory workload, are prototypically feminine. They argue that this conception aids not only the understanding of each institution and their outputs, but also the relations between the two branches. The stereotypes that these two gender roles capture translate into gendered expectations of each branch of government, particularly the contrasting high- and low-value associated with each type of work, respectively, as traditionally occurs between the genders. "Courts are therefore the private-sphere-residing workhorse institution, managing the monotonous and messy work of government, while Congress is the public-sphere-residing show-horse institution, introducing legislation to garner attention and favor among other political actors and constituents."[63]

Hansen-Figueroa, Piccirillo, and Steigerwalt explore this theory through empirical examination of a decade (2005–2014) of House and Senate bills in the areas of the environment, gender discrimination, antitrust, and labor and

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[61] *Id.* at 469.

[62] Lauren Hansen-Figueroa, Alexandra Piccirillo & Amy Steigerwalt, *Congress Is from Mars & Courts Are from Venus: Reconceptualizing Our Understanding of Interbranch Relations*, 73 EMORY L.J. (2023).

[63] *Id.* at 484.

compare it to the cases heard by the U.S. Circuit Court of Appeals over the same period and essentially the same subject areas. They hypothesize that the "workhorse" courts will do far more work than the "show horse" Congress. They show that almost two-thirds of the approximately 30,000 non-criminal cases were resolved by the courts, whereas only 15.5% of the approximately 8,500 legislative bills on a given topic even received a committee hearing—from which most bills never emerge. This is the case in all four issue areas.

The implications of this study are threefold. First, the study's findings make it easier to predict future congressional decision-making. Congress has an incentive to craft vague and ambitious bills that allow constituents to believe that policy goals are being met, but it leaves ambiguity for the courts to resolve. This means that, second, Congress will deliberately shift its work burden onto the courts. Third, this, in turn, results in negative backlash for the courts, as the body that has to give the bad news to those who may think that Congress has met its needs when actually Congress has passed a compromise, or indeed a compromised, bill. The courts, with their mandatory dockets, can do little to avoid this outcome.

This fourth and final Article constitutes a more sympathetic account of the courts than the other three contributions. It suggests that some of the unpopularity of the courts is a result of this obligation to decide cases. But this is a role that the Supreme Court no longer has since it convinced Congress to permit it choice over its docket via certiorari.[64] The Court has taken this discretion over its docket to new levels in recent years, reducing its workload from an average of approximately 160 cases in 1960 to less than 70 today.[65] Thus, perhaps, Hansen-Figueroa, Piccirillo, and Steigerwalt's contrast between the quiet workhorse courts and the loud, show horse Congress might more aptly include the Supreme Court in the latter category, rather than the former.

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These four Articles, and the topics of the four symposium panels, all raise concerns about the legitimacy of the Supreme Court going forward. For more than two hundred years, despite its institutional limitations, the Court thrived, expanding its power at the same time as it cemented its esteem among the public, partially through what it abstained from doing. The current Court is wielding its own power with less self-restraint. In doing so, in just a few years, it has

[64] Judiciary Act of 1925, 43 Stat. 936 (1925).

[65] Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. 1161 (2019).

endangered its own institutional good standing, the prestige of the judiciary more generally, and the very foundations of our democratic system. This constitutes a legitimacy crisis that begs for immediate action.