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Court Legitimacy & the Shadow Docket

by

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Undergraduate honors thesis under the direction of

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Introduction

In the past several years, the Supreme Court's continued use of the emergency docket – now coined as the "shadow docket" – has slowly gained attention from the public and academics alike. However, the body of work regarding the "shadow docket" is still very thin. The "shadow docket" – coined by University of Chicago Law School professor William Baude (2015) – refers to the use of the Supreme Court's emergency docket to pass summary orders that depart from normal Court procedure. A phenomenon that has risen in both qualitative and quantitative measures since 2017 (*Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket,* 2021). This change in Court procedure became a major element of publicity when the Supreme Court left a novel Texas abortion law in place in September 2022[1].

Cases typically reach the Supreme Court through a tedious – somewhat drawn-out – method that involves the deliberations of lower courts and sometimes a year or two of court proceedings. These proceedings then end in piles of case briefings, oral arguments, and deliberation between the nine justices of the Supreme Court. After these proceedings, the Court typically releases an opinion ruling on the legal question; this opinion is frequently joined by concurring and dissenting opinions for the remaining justices. In a stark difference, however, the shadow docket typically sees no oral arguments and no formal opinion; in fact, the voting pattern of the justices is typically secret when a shadow docket opinion is released. It is important to note that these summary decisions do not hold any precedent – meaning that the Court does not have to follow the same legal logic used in a typical ruling. This legal logic and reasoning are also typically absent in summary decisions. The emergency ruling that allowed Texas to pass their novel abortion law, for example, had no clear legal framework and was less than two

[1] For more information on the abortion ban and the shadow docket's role in it se the following NY Times article: https://www.nytimes.com/2021/09/02/us/politics/supreme-court-shadow-docket-texas-abortion.html

paragraphs long. Observers of the Court can typically use summary rulings to measure the *possible* attitude of the Court regarding certain issues.

Media coverage of the shadow docket has been seemingly negative; the term "shadow docket" carries a negative weight. Multiple articles from many prominent outlets paint the shadow docket as a concerning phenomenon – an attitude shared by many Court observers and scholars as well (Inskeep 2021; Savage 2021). The concern, many would argue, is valid. If the Court can block or approve the passing of laws in such a secretive and expedited way, it presents many questions on how the Supreme Court can be held accountable and how many other actors in the legal system can anticipate the attitude and reasoning of the Court. This in turn makes it harder for attorneys, officials, and representatives to build and implement laws if they do not know the Court's reasoning for blocking or allowing certain laws to remain in effect.

However, our focus here lies with the shadow docket's effect on perceived legitimacy of the Court by the public. The public's perception of the shadow docket and the continued use of this procedural path has little to no formal academic study. This lack of academic study is a concern; regardless of the media's reporting and Court observer's concerns, the amount of knowledge and concern the public has about its use is important to understand. During the current confirmation hearings of Ketanji Brown Jackson, the nominee was asked about her attitude towards the Court's use of the "shadow docket" (Carlisle 2022)[2]. This further displays a growing concern that even the Senate Judiciary Committee is interested in the use of the shadow docket.

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[2] Jackson vaguely answered concerns about the shadow docket saying she is not "privy at the moment to the justices' views on why and how they're using the emergency docket", and that its use is "a balance the court has to consider". Jackson did express in investigating the issue further but declined to elaborate. Quotes via Times.

My concern here lies with the public's knowledge of the shadow docket and how it affects the Court's perceived legitimacy. The conclusions drawn stem from a survey administered from February 22, 2022 to March 7, 2022. A main focus lies in what effects, if any, does the use of the shadow docket have on the public's perception of the Court. More specifically, it distinguishes the use of framing such as the "shadow docket" and the formal title of "emergency docket". If the press is frequently presenting the Court's use of the emergency orders and summary decisions (i.e. the "shadow docket") in a negative light, what effect does this have when presented to the public? This thesis seeks to address both of those concerns. First, I will outline the prior and emerging research regarding the shadow docket – which is more of a brief explanation of the "shadow docket" as an emerging issue with very little work surrounding it. Second, I will delve into the hypothesis and methods in which data was collected and what I anticipated in that data along with the nature of the data itself. Thirdly, I will share the results of the survey and what findings I have (or have not) concluded from the data. Finally, I will end with a discussion on what the data suggests and conclude on the need for further study into this emerging and relevant issue in judicial politics.

Prior Research Regarding Shadow Docket, Court Legitimacy, & Framing

When discussing prior research regarding the shadow docket it is important to preface that this phenomenon is a relatively new and emerging issue. This is exemplified by the fact that the term "shadow docket" itself is new; a term not used until it was coined by William Baude in an article published in 2015. This makes this phenomenon, as we know it now, less than a decade old. What the "shadow docket" refers to, however, is not. The emergency docket and summary decisions that the shadow docket refers to have been a path of Court jurisdiction for

well over a century (Vladeck, 2022)[3]. A Report's Guide to Applications highlights this process of emergency action and cites that its traditional use is frequently "to buy time [and] to maintain the status quo" (Public Information Office Supreme Court of the United States, 2021). In layman's terms, the emergency docket has typically been used to allow more time for preparation, offer stays of executions, and other actions in extraordinary circumstances such as matters of habeas corpus. However, the term "shadow docket" must be understood in terms of the context in which these procedural tools are used by the Court. That is the use of these procedural tools to intervene in the implementation and passing of laws (e.g. the use of these tools regarding the Texas abortion law, DACA status, and some election laws).

The most prominent works regarding the Shadow Docket stem from Steve Vladeck and William Baude – both of whom have cataloged and analyzed the continued use of the shadow docket. Their works have been accompanied by various other academic works regarding the shadow docket. However, these works are fairly limited to reporting on the Court's varied use of the shadow docket, and the effects some of these decisions have had on the system at large. Many of these works suggest concern about this growing phenomenon, and some offer remedies to this ongoing issue. The reality is, however, that very little work exists regarding the public's perception of the issue currently.

On another hand, there are various works that address Court legitimacy in a more general sense. These are varied and plentiful including theses, studies, and books. There are a few key concepts to know regarding Court legitimacy for this thesis. Legitimacy, especially in regard to government institutions, has a wide and somewhat convoluted body of work. As any scholar of

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[3]This exercise of Court power has been implemented using various statutes including the All Writs Act. Many of these statutes lie within the U.S. Code: Title 28. The use of these statues and their relevance is discussed in depth in Steve Vladeck's works – specifically *Power versus discretion: Extraordinary relief and the Supreme Court* (https://www.scotusblog.com/2018/12/power-versus-discretion-extraordinary-relief-and-the-supreme-court/)

government – even undergraduates – knows, political legitimacy in modern democracies stems largely from the Lockean social contract (Riley, 2013). The Court, however, is somewhat removed from this contract. Federal judges are appointed via elected executives with approval from elected representatives. Thus, the public is far removed from the process of checking federal Courts – suggesting a lack of accountability that puts the Court at risk. Scholars such as Gibson and Nelson (2014) suggest in their work that legitimacy of the Court is a complex system with various possible hypotheses explaining a seemingly paradoxical sense of legitimacy. Analysis of Court legitimacy concludes that the Court enjoys a relatively secure legitimacy and that individual rulings seemingly have little effect on institutional support by the public (Gibson & Nelson, 2014).

Gibson's and others' works on Court legitimacy proved to be a major component in the hypotheses produced prior to my study. Conventional wisdom and perceived public opinion via the media and Court observers come into conflict with these academic conclusions as I discuss the methods and hypotheses section of my thesis.

Prior Research on Framing

The framing of the issue of the shadow docket is a major element of this study. Framing involves how a change in presentation can affect the opinion of the public. The survey applied to respondents seeks to identify – if any – a framing effect. A general conclusion of academics in the field of framing agrees that the public often has low-quality opinions that are prone to altercation (Chong & Druckman, 2007). The range of work on framing is wide and varied. There are two important types of framing to note for this study. The first is equivalency frames. This type of framing presents logically equivalent phrases with negative and positive spins. For example, phrases such as "90% employment" versus "10% unemployment" express the same

information with different connotations. Druckman has found that, if an individual is motivated to judge the applicability of the phrase, the equivalence of the two frames would be obvious and nullify the framing effect (2004).

The second type of framing is issue framing. This type of framing is much broader and deals with the highlighting of certain aspects of an issue over others. A study on immigration found that issue frames tended to have a much more substantial effect on public opinion than equivalency frames (Merolla et al., 2013). The study found that this difference in effect could possibly be contributed to the fact that equivalency frames were not effective when discussing immigration because the general public had limited knowledge of immigration terms. This same effect can be drawn here in which the public has limited knowledge of terms regarding the shadow docket. Furthermore, the study found that if individuals are too educated or familiar with the terminology around the issue they would be unaffected by equivalency frames.

Methods & Hypotheses

My data was derived from a survey study administered from February 22, 2022 to March 7, 2022. The sample was initially 407 survey-takers with a median completion time of 486 seconds. Those in the lowest quantile were dropped due to the likelihood that they did not pay attention or read the treatment thoroughly, which left 381 respondents. 117 of those remaining failed an attention check prior to treatment, which reduced the sample to 264[4]. Furthermore, 47 respondents failed a post-treatment manipulation check leaving a final sample of 217 respondents. The lowest quantile drops, attention check, and manipulation check were used to ensure quality responses (Berinsky et al., 2014).

[4] The attention check was in the form of a question that asked participants to select two specific colors regardless of prior instructions. The manipulation check asked participants about the main issue discussed in the mock article (i.e voting laws).

The survey involved a 2 by 1 treatment. Each participant was unknowingly and randomly given one of two treatments. One treatment focused on a negative framing of the Court's shadow docket. This treatment started with a brief explanation of the "shadow docket" along with a fake news article that portrayed the Supreme Court's use of the shadow docket on a case regarding election rules. The "Shadow Docket" treatment definition was as follows:

> *The following is a brief explanation of the Supreme Court's use of the shadow docket:*
>
> *The shadow docket is a break from normal Court procedure to offer a remedy to cases that the Court believes will cause irreversible harm if not addressed immediately. These summary decisions can be issued without a full briefing or oral argument. This break of the procedure is known as the shadow docket. Historically, the shadow docket has been used to give parties more time to prepare, allow for the temporary pause or continuation of a law in question, and in more extreme cases, offer stays of execution.*
>
> *Through the conventional track, the Court can sometimes take over a year to address and rule on cases. The shadow docket gives the Court the ability to address cases of immediate concern. Recent examples of the Court's use of the shadow docket include cases regarding changes to election rules, exposure to COVID-19, and restrictions on religious gatherings. These expedited rulings also do not create a precedent, which means that the Court does not need to follow the legal logic used in these extraordinary cases.*

Shadow docket decisions can be passed without a full opinion; thus, the public and lower courts have no idea what legal reasoning was used in the decisions making process, or even how each justice voted. This allows the Court to strike down or allow laws to go into effect without providing legal reasoning. Some say that this leaves the Court somewhat unaccountable for the decisions they make.

Following the above treatment, the participant was asked to read the following "Shadow Docket" mock news article:

The Supreme Court is the judicial authority of our national government. As such, the Supreme Court and its nine lifetime-appointed justices have the power to rule on the constitutionality of laws and other government activities. This process of judgment is long and tedious involving petitions, case briefings, oral arguments, and the drafting of one or multiple opinions. This means it can take the Supreme Court months or even years to pass judgment on the law.

The Court, however, has the ability to pass judgment in an expedited manner using the shadow docket, which has been used throughout the Court's history but has gained notoriety of late as they have been used for cases involving census management. In the latest use of the shadow docket, the Court blocked a set of new voting laws shortly before elections were slated to take place. The Court granted an injunction to a lower court's ruling on the laws. The Court

dealt with the case within a week. No oral arguments were heard, and the majority's opinion was unsigned and less than two paragraphs long. The majority's short opinion did not rule on the constitutionality of the voting laws but sought to block the implementation of the laws before the upcoming election. The Court, however, expressed that they would offer a full opinion on the constitutionality of the new election laws once the case came through conventional channels. In the meantime, this expedited ruling carries no permanent precedent but could signal the Court's attitude towards similar voting laws.

Nonetheless, with the Court's injunction, the voting laws will not be implemented in time for next month's elections. The opinion itself was vague and brief leaving little to no guidance for lower courts when ruling on similar cases. The Court's use of the shadow docket petition has increased substantially in recent years. This phenomenon does not seem to be ending anytime soon.

Participants that did not receive the "Shadow Docket" treatment received the "Emergency docket" treatment. This treatment replaced any mention of "shadow docket" with "emergency docket"; participants receiving this treatment also read an altered definition of the use and effects of the Court's emergency docket. That treatment is as follows:

The following is a brief explanation of the Supreme Court's use of the emergency docket:

The emergency docket is a break from normal Court procedure to offer a remedy to cases that the Court believes will cause irreversible harm if not addressed immediately. These summary decisions can be issued without a full briefing or oral argument. This break of the procedure is known as the emergency docket. Historically, the emergency docket has been used to give parties more time to prepare, allow for the temporary pause or continuation of a law in question, and in more extreme cases, offer stays of execution.

Through the conventional track, the Court can sometimes take over a year to address and rule on cases. The emergency docket gives the Court the ability to address cases of immediate concern. Recent examples of the Court's use of the emergency docket include cases regarding changes to election rules, exposure to COVID-19, and restrictions on religious gatherings. These expedited rulings also do not create a precedent, which means that the Court does not need to follow the legal logic used in these extraordinary cases.

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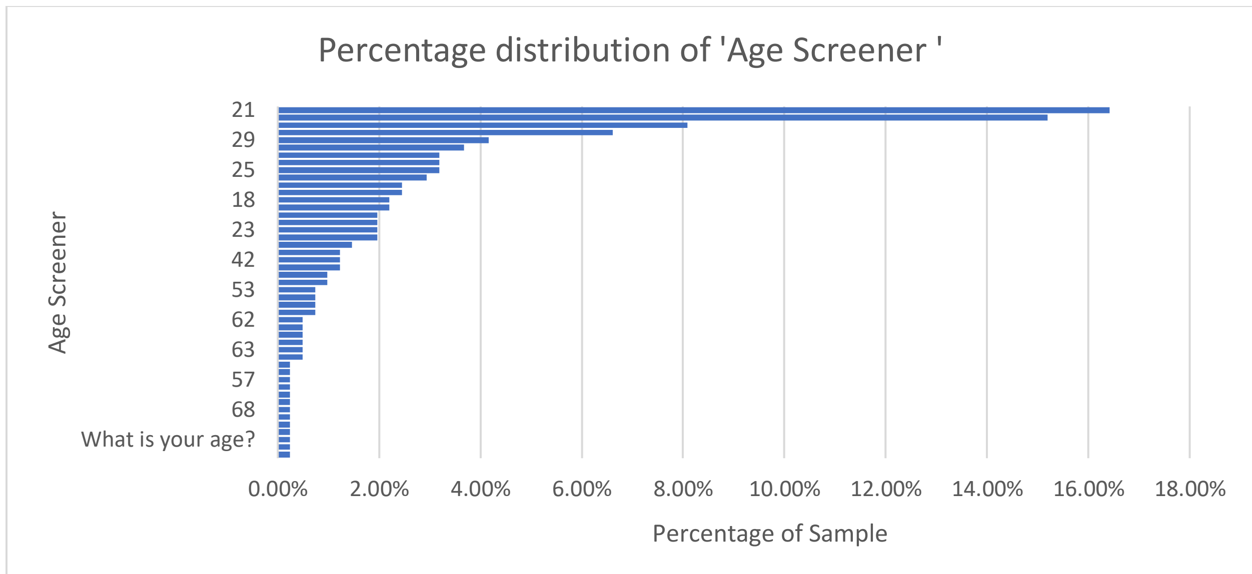
Both treatments had a time check in which the participant could not move past each definition and article segment until enough time had passed; this further encouraged quality participants to read the articles fully. Of the 217 responses kept, 104 respondents received the "Emergency Docket" treatment, and 113 respondents were given the "Shadow Docket" treatment.

Demographics of Usable Sample		
Gender	*n*	*Percentage (%)*
Male	82	38%
Female	130	59%

Table 1 Gender distribution across sample.

Along with the two treatments, the participants were asked a series of post- and pre-treatment questions regarding their feelings towards the Supreme Court. This question battery was heavily modeled and borrowed from an article written by James L. Gibson, Gregory A. Caldeira, and Lester Kenyatta Spence (2003). These questions were designed to measure respondents' sense of institutional legitimacy towards the Supreme Court. These questions were administered with a Lickert scale – typically a four-level or three-level Likert item. Additionally, respondents were asked about their knowledge regarding the Supreme Court and its docket using a Likert item.

Table 2. Age distribution across sample.



Prior to treatment, respondents were asked a matrix question regarding their feelings towards certain Court actions regarding controversial issues including affirmative action, the U.S Census' citizenship question, 2nd Amendment rights, eminent domain, and voting rights. This question was used to covertly measure and control for respondents' feelings towards voting rights – the issue involved in the mock news articles. This was the only time in the study that this matrix was administered to participants.

Race	Percentage of race
White/Caucasian	76.47%
Latino or Hispanic	5.88%
Black or African American	5.64%
Asian American	4.41%
No Response	3.43%
Other	2.94%
Native American	0.98%
Unusable Response (corrupted data)	0.25%
Entire Usable Sample	**100.00%**

Table 3. Race distrbution across sample.

Post-treatment, respondents were asked the previously mentioned question battery regarding Court legitimacy. Furthermore, there we asked questions regarding their knowledge and opinion on the Court's use of the shadow docket or emergency docket depending on which treatment they received. The first post-treatment question measured their prior knowledge of the shadow docket or emergency docket using a six-level Likert item. The second post-treatment question used a 0-100 scale to measure the respondent's feelings towards the Court's use of the shadow docket or emergency docket. This question was then followed by a third that asked how the respondent felt towards the Supreme Court (in general) using a 0-100 scale – this question was near identical to the one administered in pre-treatment. Finally, the respondent was asked how much confidence they had in the Supreme Court using a three-level Likert item – an item that was also asked in pre-treatment.

Hypotheses

Now that the methods of the study have been covered, I would like to briefly overview the two hypotheses I established before the study. The first hypothesis was largely based on growing concern over the Court's use of the shadow docket and general knowledge around issue framing. With a lack of formal study over specific public opinion regarding the shadow docket, the media's negative portrayal and Court observers' growing concern over the shadow docket suggests that public opinion would reflect the same sentiment. Thus, the more knowledgeable a citizen was of this departure from normal procedure and its effects, then the legitimacy of the Court would fall. Studies on farming – as Chong and Druckman found – reveal that "alternative phrasing of the same basic issue significantly alter its meaning to respondents…" (2007). Thus, one would also assume that those given the "shadow docket" treatment would see a starker decrease than those presented with the lighter "emergency docket" treatment. Formal study on

Court legitimacy by Gibson and others, however, suggests that Court legitimacy would be relatively unaffected. Thus, a second conflicting hypothesis emerges. Regardless of the perceived evils in the portrayal and use of the shadow docket, one would expect Court legitimacy to remain relatively unchanged. The results demonstrate that one of these hypotheses does not fail in regard to this study.

Findings

The results of the study indicate a few important conclusions. First, the respondents seemed to have a moderate knowledge of the Supreme Court. On average, respondents were rated to have a near "moderate" knowledge of the Supreme Court in general (average being valued at 2.97 with "minimal knowledge: being valued at 2 and "moderate knowledge" valued at 3). Knowledge regarding agenda-setting of the Supreme Court was valued somewhat higher with respondents being on average moderately knowledgeable (average valued at 3.38). These two factors were correlated at about 54%; unsurprising since a general knowledge of the Court would indicate some knowledge of how cases get to the Court. Thus, the sample demonstrates to be more knowledgeable about the Court than might had been anticipated. This is somewhat unsurprising considering the distribution method of the survey. Using largely word of mouth along with campus and social media distribution, it is possible that the sample reflected a largely more educated and more politically involved and aware population. This is something important to consider when analyzing the data.

Secondly, the sample tended to have no significant difference between prior knowledge for either the shadow docker or emergency docket. 27% of the sample rated that they had minimal knowledge of the shadow docket; 26% of the sample rated that they had minimal knowledge of the emergency docket. The results here are mixed.

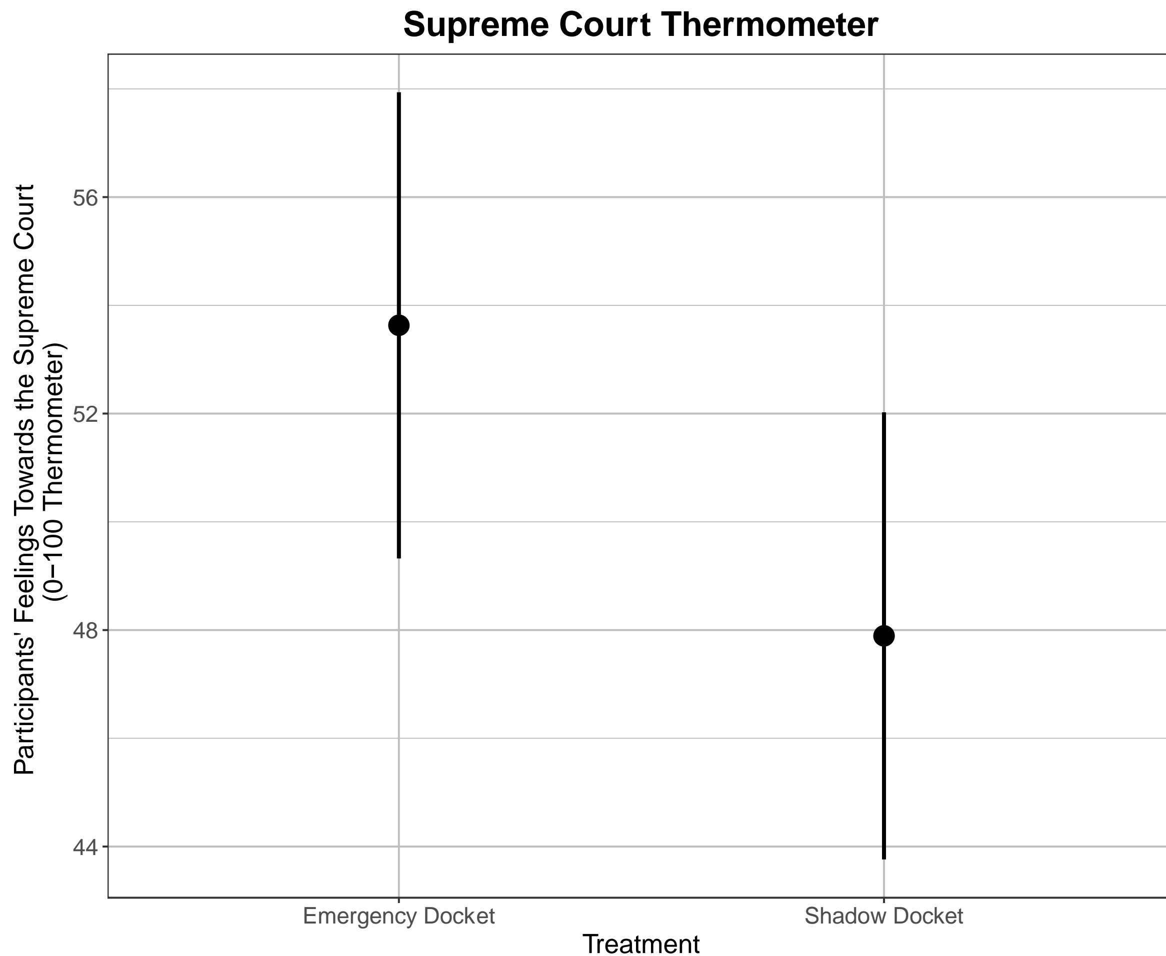


Figure 1. Feelings towards the Court across both treatments

The results of the study between treatments are insignificant. No large differences lie between the respondents' feelings regarding the Court's use of the docket or the Court in general. **Figure 1** shows how each treatment explained the participant's feelings towards the Court in general according to a 0-100 point scale. Respondents did tend to rate the court with lower confidence if they received the shadow docket treatment – on average those that received the negative treatment rated the Court with a 47.89. However, respondents who received the positive treatment rated the Court with 53.63 confidence. This is a significant difference at the $p < .10$ level despite the overlapping feeling intervals. The overlay of confidence scores for both treatments show this. For confidence regarding the Court's use of the docket, the same can be

seen **(Figure 2)**. While confidence towards the Court's docket tended to be lower for those that received the negative shadow docket treatment, there tends to be no significance between the two.

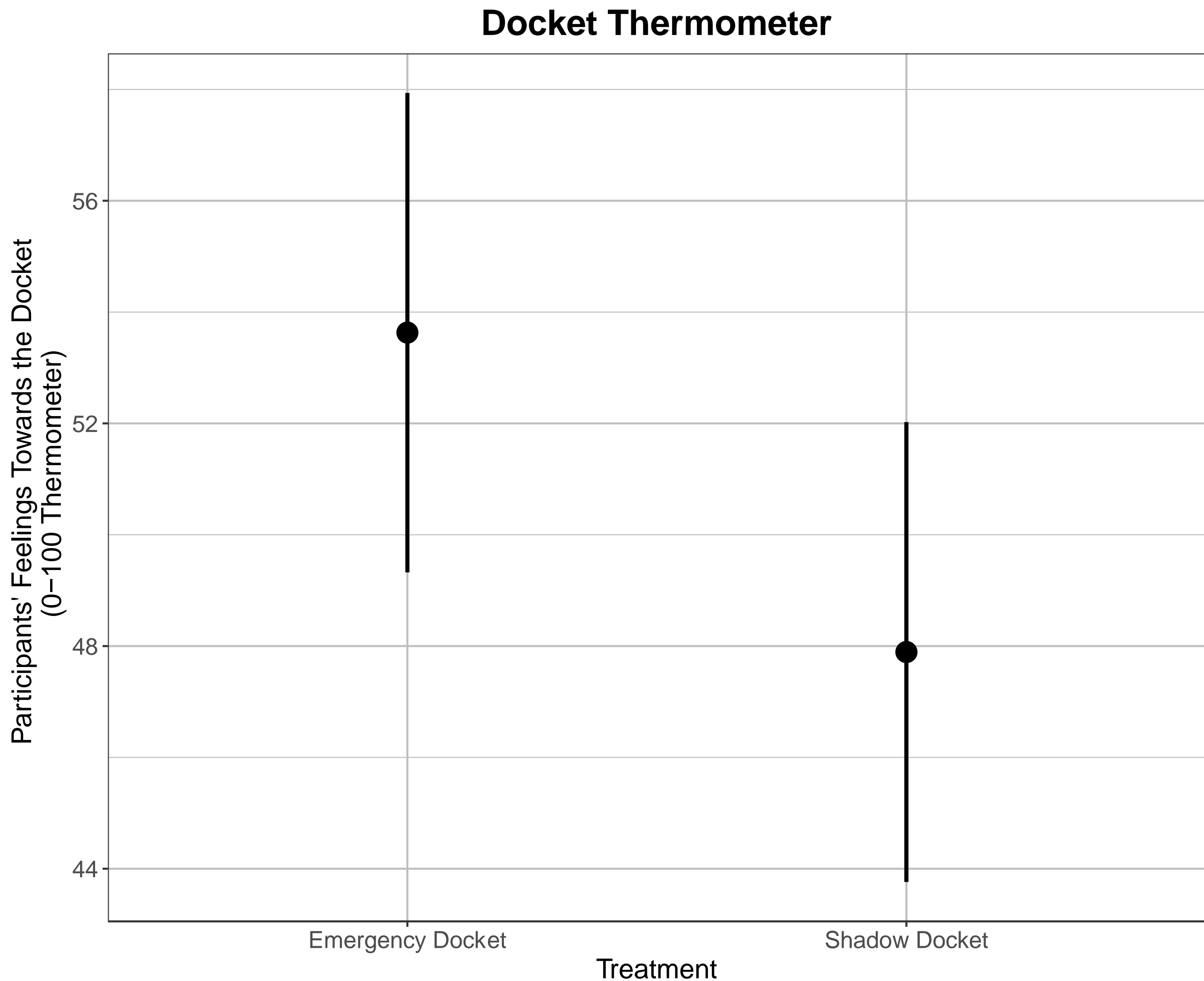


Figure 2. Feelings towards the Court's docket use across treatments

Outside of participants' "feelings" for the Court and their docket, it is interesting to note that the difference between treatments is even smaller when asking about "confidence" in the Court. As **Figure 3** shows, on average, all participants rated the Court on generally the same level of confidence. This could be largely due to the fact that this data comes from a three-level Likert item, but it is interesting nonetheless. This mildly suggests that, even if the participants

did not personally "feel" good about the Court and their docket, they still had confidence that the Court would act properly. It must be prefaced, however, that this requires further in-depth study.

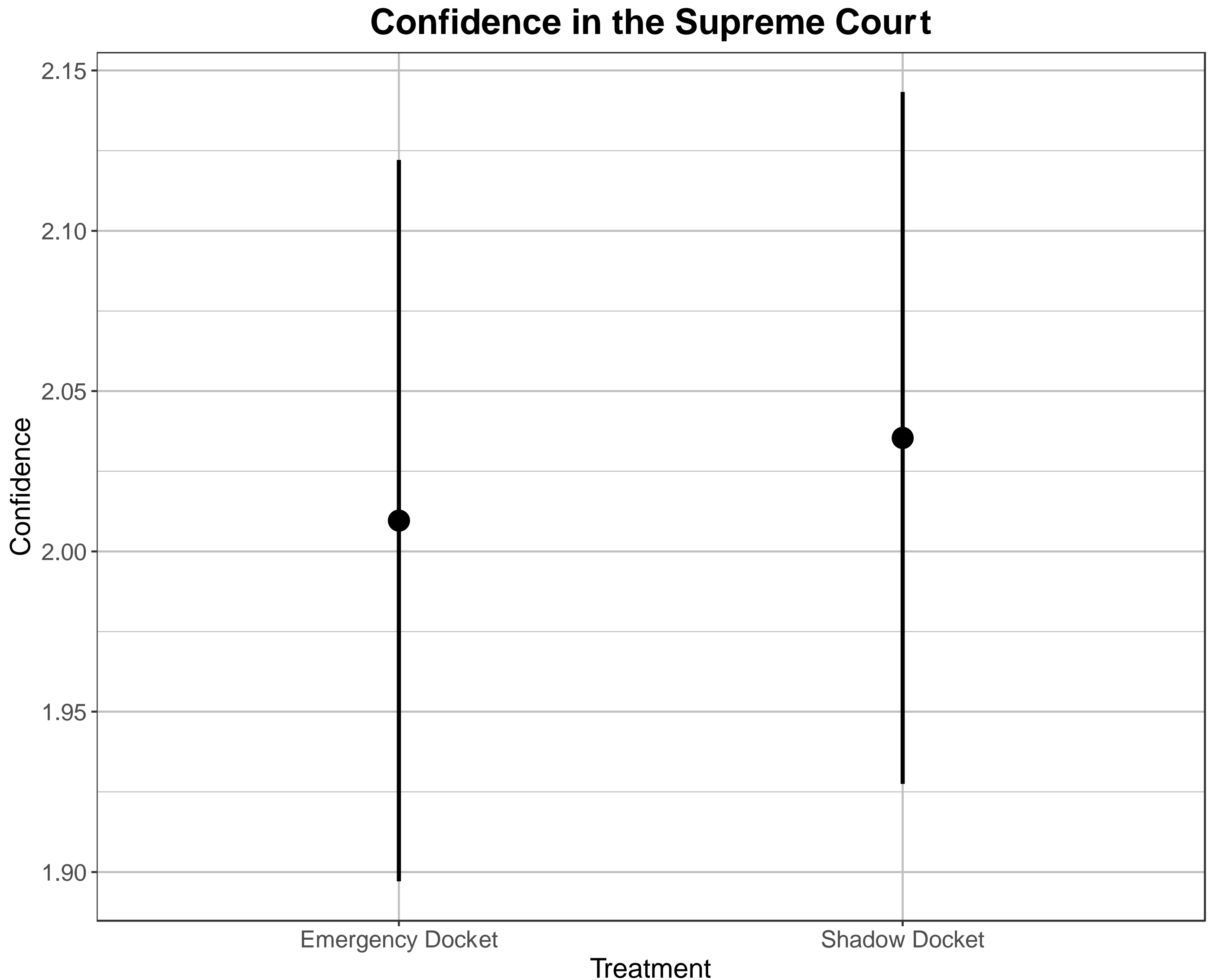


Figure 3. Participants' confidence in the Court across treatments.

As previously stated in the discussion on methods, the study controlled for if the participant agreed or disagreed with the Court's decision in the mock article. In **Figure 4**, it seems that ideology did not significantly affect whether the decision was supported regardless of treatment. As expected, those leaning to the right tended to support the Court's decision to strike down new voting laws. When this outcome was achieved in tandem with shadow docket

framing, conservatives and moderates did see a slight decrease in agreeableness. The difference, however, is insignificant once again.

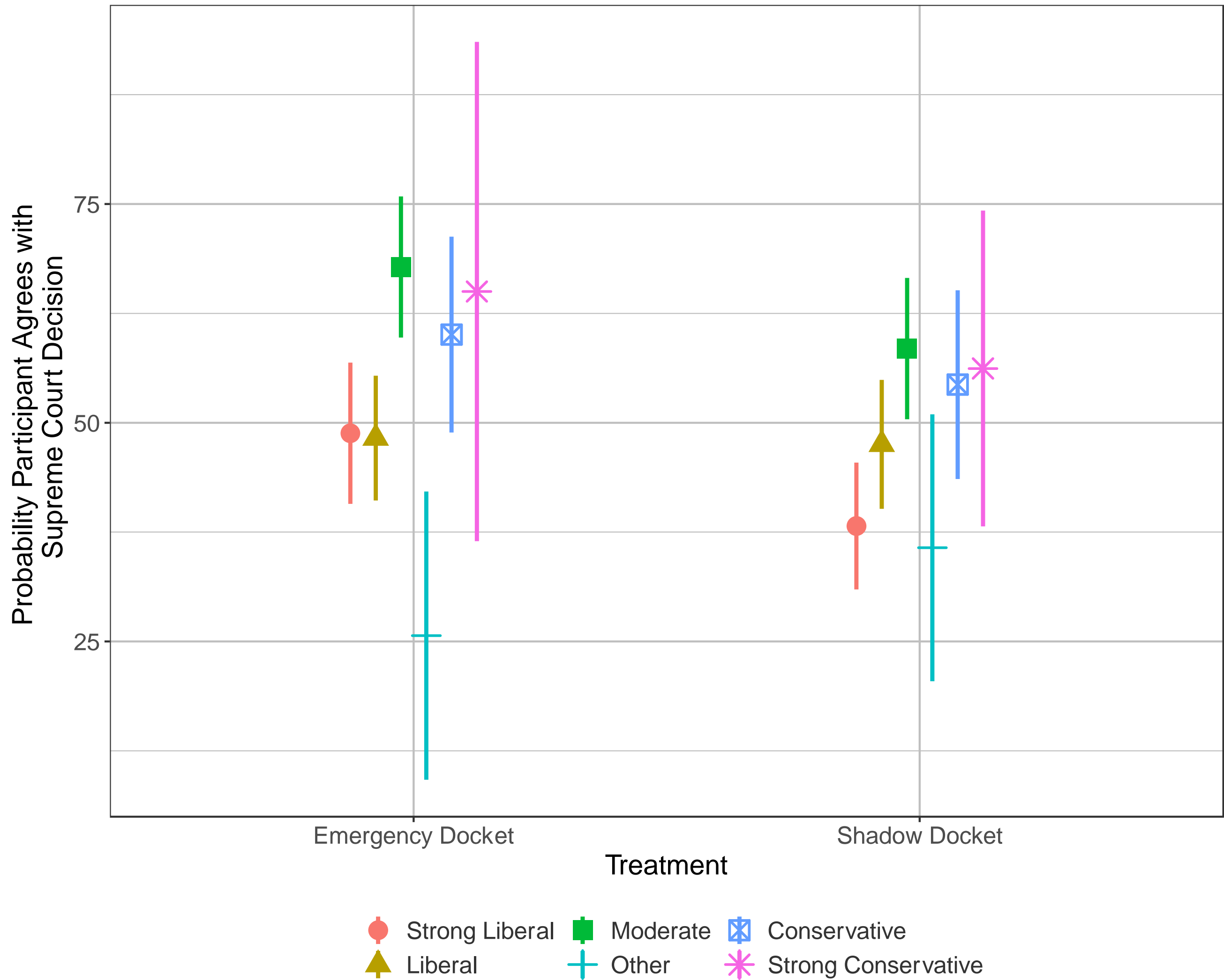


Figure 4. Probability that participants agree with Court's decision across ideologies & treatments.

These results tend to support the conclusion that the Supreme Court might enjoy a more static legitimacy and confidence. Despite what the media and observers are drawing as a concerning phenomenon, it has yet to materialize into anything significant regarding the Court's public confidence. Academics have concluded such in similar studies regarding Court legitimacy (Gibson & Nelson, 2014). The claim that the public's confidence in the Court is

relatively static regardless of individual rulings is, thus, supported here. This begs certain questions regarding the legitimacy of the Court and the prominence of shadow docket rhetoric.

Discussion & Conclusion

While the results in themselves are somewhat unremarkable, their implications of them are not. Here, I draw very important parallels between Gibson's and Nelson's article and the results found in this study. There is an important distinction to be made in the institutional legitimacy of the Court; academics of Judicial politics typically divide Court legitimacy into diffuse and specific support. Diffuse support is regarded as a sort of pool of goodwill and confidence that the Court enjoys – fairly detached from rulings and other Court actions. Diffuse support is much more long-term and static. Specific support, on the other hand, refers to temporary satisfaction with the Court; this is highly sensitive to individual rulings and actions of the Court. Diffuse support acts as a buffer for undesirable court behavior.

The results of the study might reflect this. Specifically, this might explain why, despite participants' "feelings" toward the Court, the Court still enjoyed a fairly consistent rate of confidence. Restating again, the design of the study itself might explain this phenomenon; however, it is an interesting proposal nonetheless. As suggested by Gibson and Nelson, the Court enjoys powerful symbols of law and order along with a tendency to cancel out unfavorable decisions with favorable ones (2014). While this study does not seek to examine the difference between specific and diffuse support, it seems this division might have played a vital role in the results received. The shadow docket will remain an area of concern for observers and the press. It is concerning that this study has shown that the public is relatively unaffected by the Court's use of the shadow docket. Perhaps a control for the traditional docket would have shed more light on this. As many judicial scholars know, the nature of the power invested in the Court in

the Constitution is fairly vague. Congress' rising interest in the Court behavior regarding the shadow docket might be the best was to address this.

The Court has already tried to address the issue internally. Court scholars have found that these procedural "experiments" by the Court have received mix results and are further causing convolution (Pickup & Templin, 2022). The Court enjoys a large range of autonomy for agenda setting and procedure; internal remedies might be the quickest way to address this issue. This would require further interest and pressure from those inside and outside of the Court. As it seems now, general public knowledge and concern over this issue is mild at best. The same cannot be said for observers of the Court and government officials. However, the general public has tended to have little direct effect on the Supreme Court's actions – with the exceptions of a few historical rulings and courts. It might be possible that concern from Congress – one of the most powerful checks to the Court – is all that is needed for reform. I believe that the Court is enjoying a large buffer of diffuse support, but the Court's continued use of the shadow docket will eventually cross a line. If more highly publicized cases are remedied by the shadow docket, it is likely that the public's concern will grow.

The largest takeaway from this study is the need for further study of the shadow docket. Specifically, the public awareness and opinion regarding the Court's continued use of it. If the shadow docket is as big of a concern as its portrayal, the relevancy of studying it is not to be understated. While this study might have suffered from a problematic sample with unclear results, it highlighted the importance of understanding how this emerging phenomenon affects Court legitimacy. If there is a support buffer, how much is left before the Court must address its continued use of the shadow docket? It might be too soon to tell.

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