Procedural Justice and the Shadow Docket

Taraleigh Davis, Bradley University

Sara C. Benesh, University of Wisconsin – Milwaukee

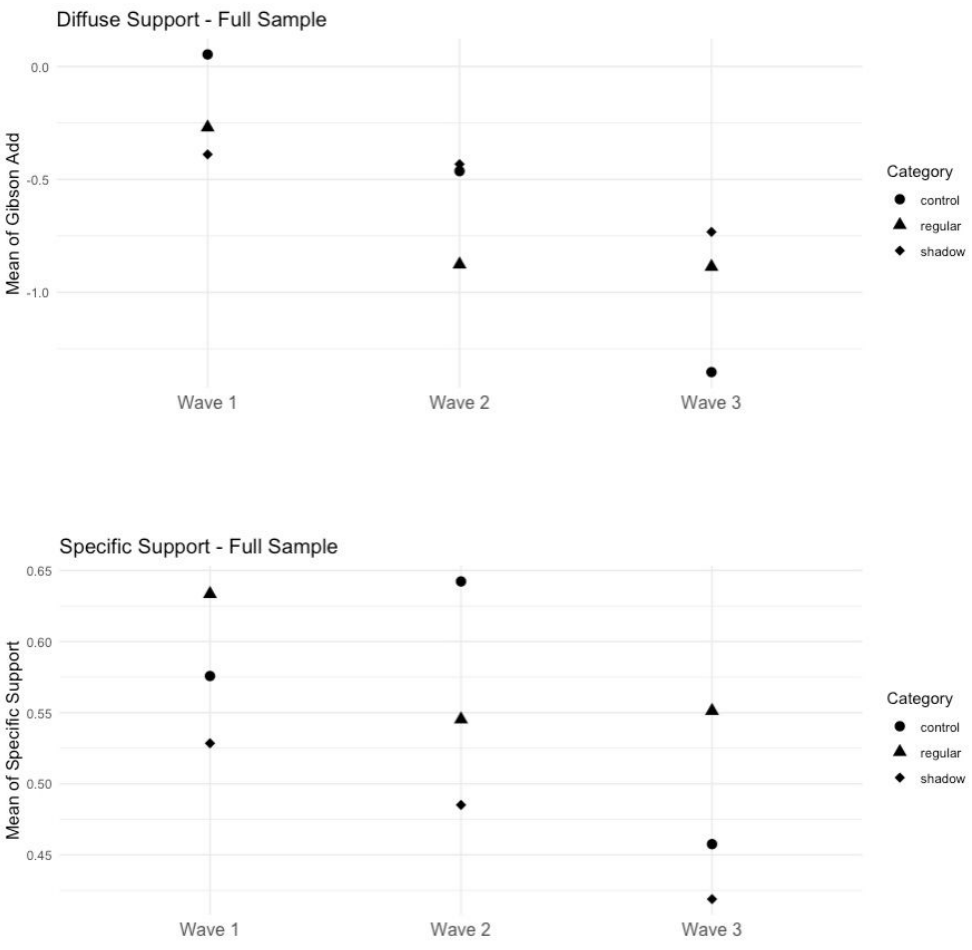
Abstract

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

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

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

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



In Figure 1 we consider all respondents together, showing that there is variation across groups and waves (though most of the differences are not statistically distinguishable from one another and the range in variation is, as expected, fairly small). Immediately of note is that for both specific support and diffuse support, and nearly regardless of whether respondents are in the control group, the "regular process" treatment or the "shadow docket" treatment, support for the Court is highest in Wave 1 and lowest in Wave 3. This suggests that the environment in which the Court was being evaluated mattered in some way. Respondents in each wave differed from one another in how they viewed the Supreme Court.

Figure 1

Diffuse (top) and Specific (bottom) for Aware of the leak/opinion & Disagree

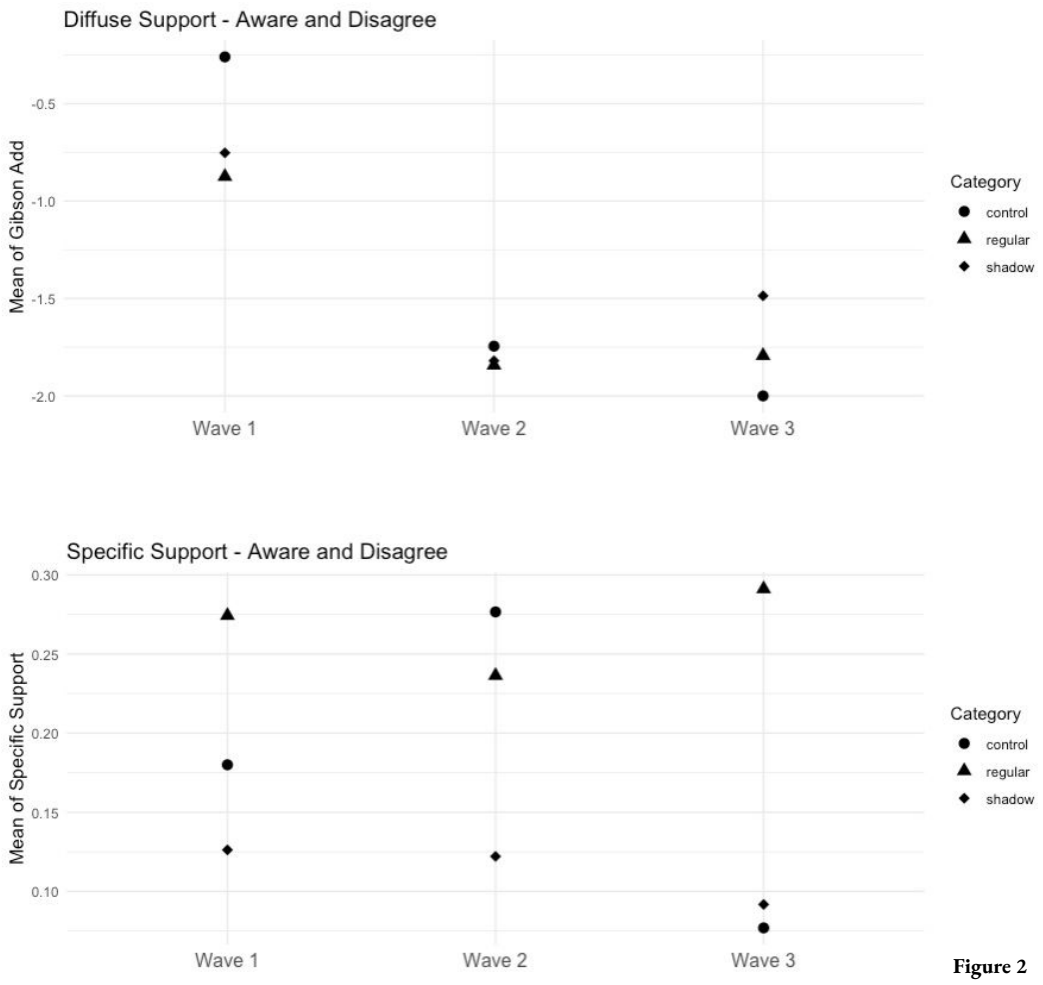


Figure 2

In Figure 2 we take advantage of the environment surrounding the spring and summer of 2022 to get some purchase on whether or not the Court's leak and eventual decision in Dobbs influences legitimacy. Considering those likely most affected by the Court's ruling in Dobbs – those who had both heard of the leak or the decision AND who likely disagreed with the Court's decision – support is a little more wonky. Figure Two shows diffuse and specific support across waves and by treatment for those who heard of the leak/decision and disagreed with the ruling. Diffuse support takes a dive right after the leak and then rebounds for all groups, but specific support is different depending on treatment. Those in the shadow docket treatment have the lowest levels of support, but that low level doesn't change much by wave. Those in the control group become first more and then less supportive. And those in the regular group remain higher than the other two groups throughout. Overall, though, comparing Figure 1 with Figure 2, you can see that support for the Court is much lower for those who heard of the leak/decision and disagreed with it, as expected (if we expect that the Court's decisions can influence public perception of the institution).

Specific and Diffuse Support for the Court Summer 2022

Table 1:

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

Table 1

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

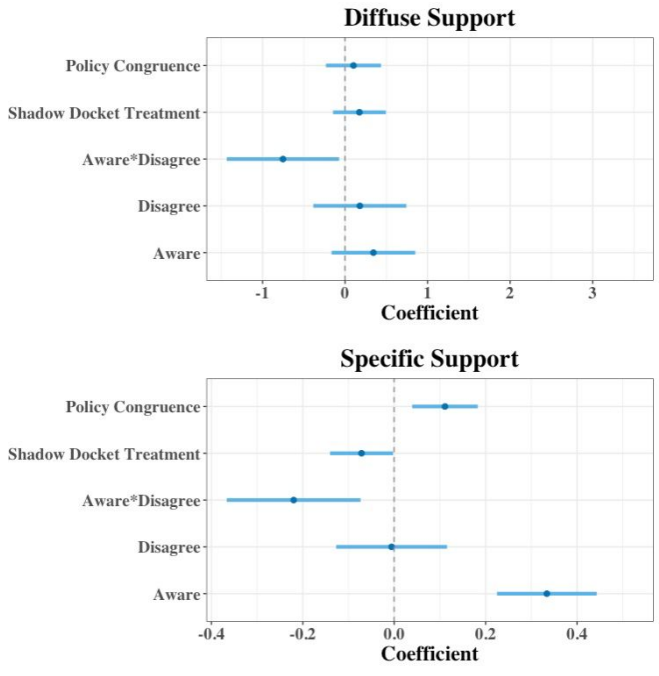


Figure 3

Congress is from Mars & Courts are from Venus: Reconceptualizing Our Understanding of Interbranch Relations

Lauren Hanson-Figueroa, Georgia State University

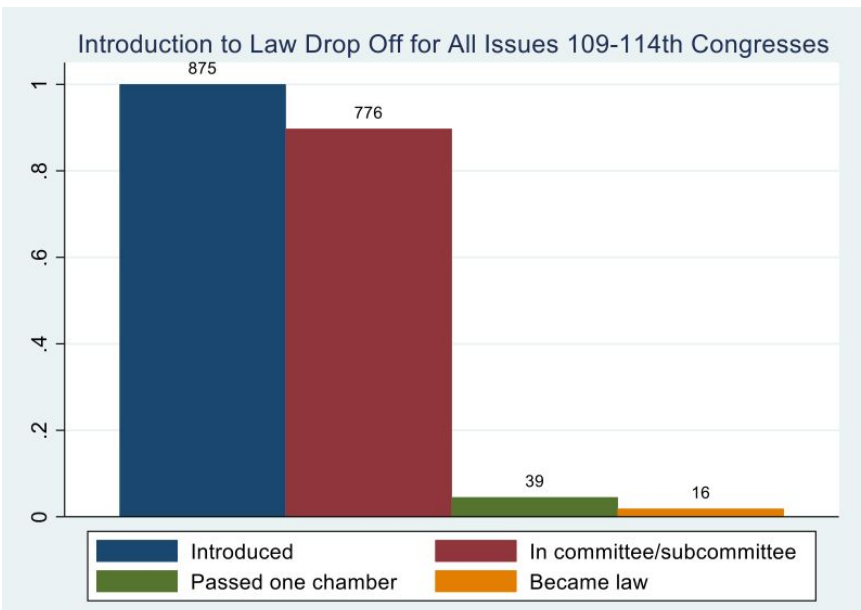
Alexandra Piccirillo,Georgia State University

Amy Steigerwalt, Georgia State University

Abstract

We argue for a reconceptualization of how to understand legislative-judicial relations in the United States. We propose that the legislative and judicial branches of US government broadly reflect gender-stereotypical relations and divisions of labor in terms of both function and design. Congress was intended to be agentic and public, securely positioned as the public, lawmaking body; it fits the prototypical definition of Arendt's "space of appearance." The legislative branch can be conceptualized as men in a patriarchal culture, given agency and invited to action. In contrast, the courts reside in a more private sphere, toiling away in relative obscurity, removed from public eye. Much like women in a prototypical patriarchal culture, the courts' work is both reactionary and mandatory, and many times greatly undervalued. The broader implication is that Congress takes advantage of its public nature to shout loudly and do little, while transferring the work – and many times the blame – to the courts. Part I provides an overview of our theoretical reconceptualization of the Court-Congress relationship, while Part II provides empirical support for these theoretical claims. Part III then discusses the implications of these empirical realities for the work of each branch and the views of the public.

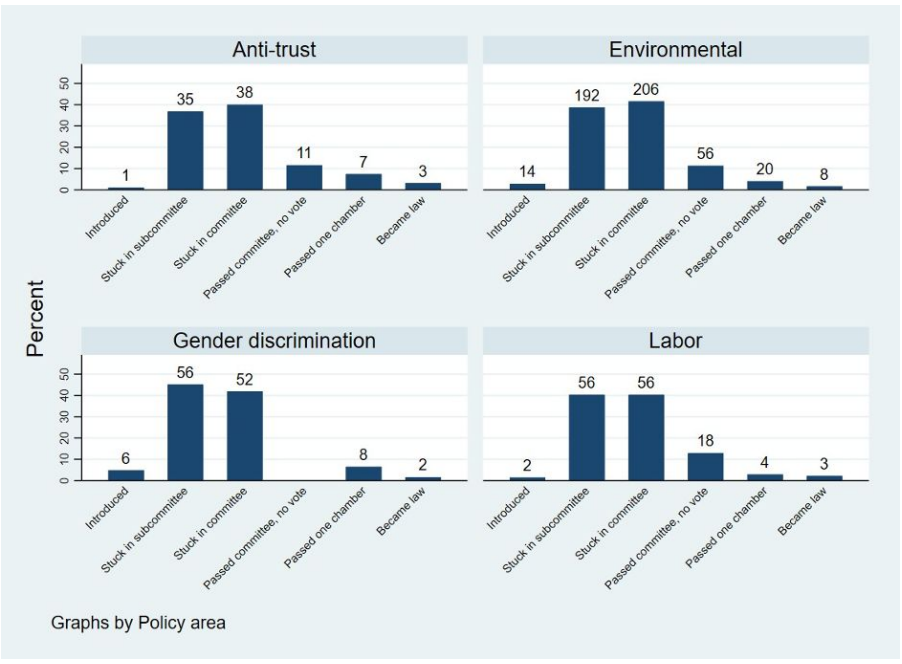
Final Legislative Stage Reached, 2005-2014



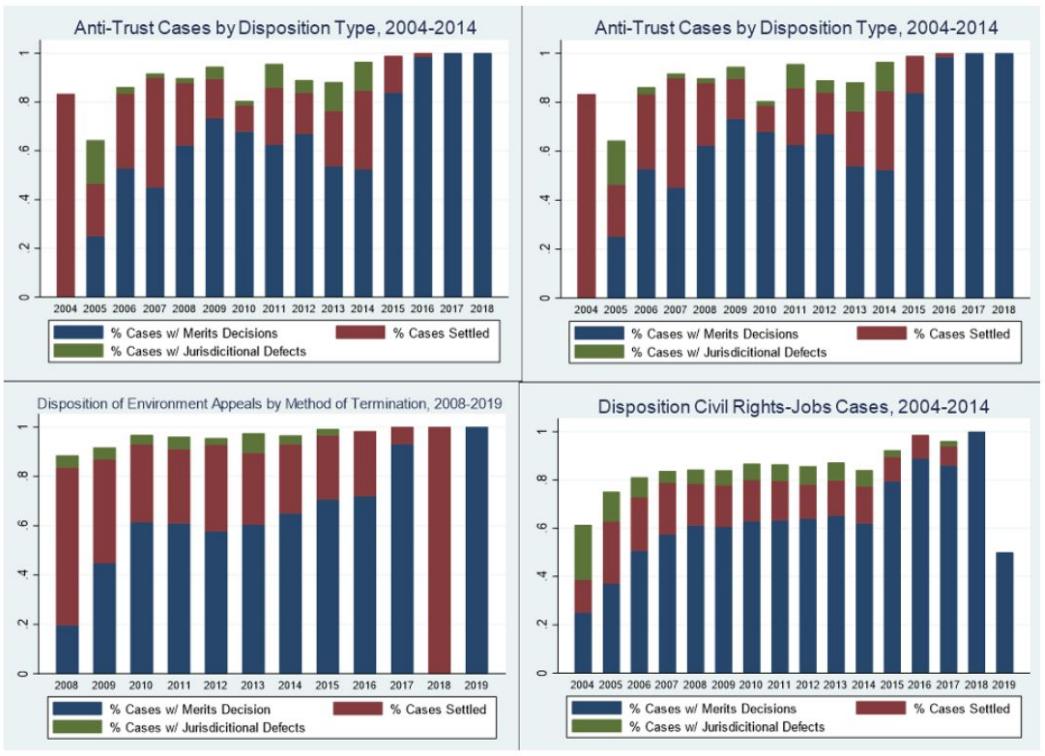
This figure shows how many bills members of Congress introduced between 2005 and 2014 on the four issues selected for analysis. Overall, a total of 875 bills addressing issues related to gender discrimination, environmental issues, labor and anti-trust were introduced between 2005 and 2014. This figure also reveals how many of these bills advanced through the various stages of the legislative process and eventually became law. While 875 bills were introduced, only 39, or 4.5%, passed one chamber, and a mere 16 bills (1.8%) became law. Over 80% of bills never made it out of their respective committees or subcommittees. Of the 20% that did, less than 2% became law.

Final Bill Destinations by Issue Area, 2005-2014

This figure shows that this pattern exists across all four issue areas. In all four policy areas, the overwhelming majority of bills were referred to a committee, and no further action was taken; it was only the incredibly lucky few that passed even one chamber of Congress or were successfully enacted as law. Members of Congress thus take many, many positions through their bill introductions, but the work of crafting law and policy is difficult to find



Cases in Each Issue Area by Disposition Method, 2004-2014



This figure shows the primary methods (merits decision, settlement or jurisdictional defects) by which cases were terminated by the appeals courts for each of the four issue areas. Across all four issue areas, the overwhelming majority of cases are terminated through a decision based on the merits of the case. The second most common method of termination is a voluntary settlement between the parties, emphasizing the communal and cooperative nature of the work of the federal appeals courts.

Alternative Facts: The Strategy of Judicial Rhetoric

Tonja Jacobi, Professor of Law and Sam Nunn Chair in Ethics and Professionalism, Emory University School of Law

Eryn Mascia, J.D. '21 Northwestern Pritzker School of Law

Abstract

Studies have established the influence of ideology on the answers justices give to legal questions; this study shows that the questions themselves are often selected, framed, and phrased in a way that promotes ideologically-driven answers. By examining a variety of linguistic techniques used to describe just the facts of constitutional criminal procedure cases—separate from the legal analysis—we show the justices are engaging in highly strategic behavior. The facts included, omitted, or emphasized vary with the ideology of the justices, and are predictable not just based on voting behavior in other criminal procedure cases, but in all Supreme Court cases. We undertake this analysis both qualitatively and quantitatively. For the latter, we created a novel dataset consisting of the complete text of the fact portions of every Supreme Court opinion dealing with police investigation since the beginning of the Roberts Court, 2005–2022 terms. We also created six sets of linguistic variables to test the effect of different factors on judicial framing of case facts: hedgers and intensifiers; extent of abstract and specific language; positive versus negative framing; inclusion of surplus facts and omission of relevant facts; stigmatization versus personalization of individuals; and use of active versus passive voice. We also created two new measures of judicial behavior in terms of outcomes—the "pro-prosecution score" in criminal procedure cases and the "pro-conservative score" in all non-criminal procedure cases. We 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. Yet not all justices partake in this strategy equally: the moderates of the Court make little use of strategic fact manipulation, whereas the extremists on both ends of the Court make far more use of the techniques we identify. Framing a characterization as a "fact" presents an impression of objectivity and reliability; but if even the starting place for a Supreme Court opinion is ideologically tilted, if each side is entitled to their "alternative facts," then legal decision-making loses the promised legitimacy of being differentiable from the political process.

Pro-prosecution & Pro-conservative Scores, By Justice

	Pro-prosecution	Pro-conservative	Difference (P-p – P-c)
Alito	84	60	24
Thomas	83	62	21
Kennedy	73	52	21
Roberts	73	55	18
Scalia	73	59	14
Souter	50	34	16
Breyer	50	38	12
Gorsuch	50	50	0
Kavanaugh	50	57	-7
Stevens	42	30	12
Ginsburg	34	34	0
Barrett	33	59	-27
Kagan	29	34	-5
Sotomayor	21	33	-12

This table shows the pro-prosecution score for each justice, their pro-conservative scores, and the difference between them (pro-prosecution minus pro-conservative). The table is ordered from most-pro-prosecution—Justice Alito at 84%—to least pro-prosecution—Justice Sotomayor at 21%. The only real surprise is Justice Barrett, with a pro-prosecution score of 33%, which puts her in the liberal camp on this dimension. But of course, we have the least data on Justice Barrett, who has not yet even authored an opinion in the area, so we do not want to make too much of her surprising score. Justice Breyer does sit above some of the moderate conservative justices on being pro-prosecution, but for all the attention paid to Justice Scalia, he sits in the center of the conservative justice on both scores.

Use of Linguistic Variables

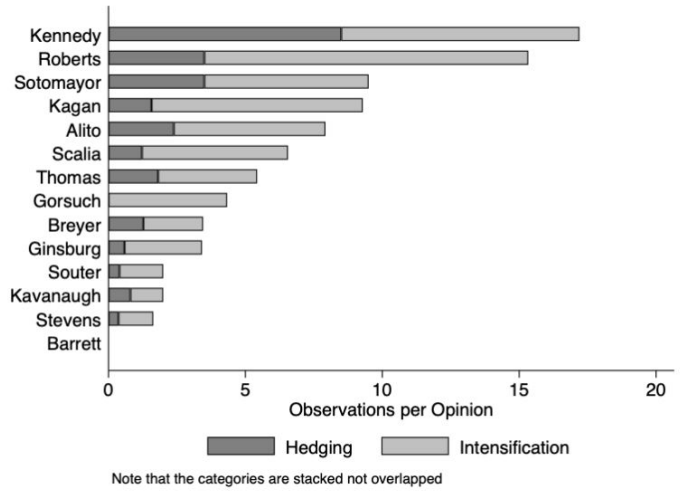
Use of linguistic variables, for majority opinions

	(1) Vote Pro-Prosecution	(2) Background	(3) Majority
Hedging	**3.56****	**7.85****	2.00
Intensification	4.27	**11.78****	**7.42****
Hedging-defendant	1.26	-0.47	0.99
Hedging-police	**2.29***	**8.32****	1.01
Intense-defendant	0.71	-0.54	**3.09****
Intense-police	3.62	**12.33****	4.24
Specific Circumstances	2.09	-3.54	**5.49****
Frame: police-negative	-3.21	**6.32***	**4.23***
Frame: police-positive	**10.18****	**9.07****	2.50
Frame: defendant-negative	**4.48****	-1.86	**4.21****
Frame: defendant-positive	-0.07	0.09	0.61
Surplus Facts	**2.24***	-0.35	1.19
Minimized Facts	-0.09	-0.51	**1.30***
Stigmatize	**5.26****	-3.40	**3.58***
Stigmatize: defendant	**1.31****	-0.81	0.61
Personalize: police	**2.31****	-1.91	**1.69***
Passive: defendant	**2.67****	-1.70	1.23
Active: police	**10.66****	**-9.80***	**16.27****
		***= p<0.05**	****** = p<0.01**

Use of linguistic variables, for concurring, dissenting, and mixed opinions

	(1) Vote Pro-Prosecution	(2) Background	(3) Concurring	(4) Dissenting	(5) Mixed
Hedging	**3.74****	**6.60****	**11.51****	0.86	**7.78****
Intensification	**5.28****	**7.99***	**20.95****	**9.27****	**11.81***
Hedging-defendant	**1.56****	-0.93	**5.86****	0.20	0.49
Hedging-police	**2.18***	**7.53****	**5.64****	0.66	**7.29****
Intense-defendant	**1.93***	-1.12	**6.55****	1.35	1.72
Intense-police	3.35	**9.11****	**14.40****	**7.92****	**10.09***
Specific Circumstances	**4.77****	-2.84	-0.86	1.65	-1.63
Frame: police-negative	**-3.68****	2.81	**14.09****	**9.22****	**8.49***
Frame: police-positive	**10.98****	**8.30****	**8.48***	0.83	3.99
Frame: defendant-negative	**7.20****	-1.14	1.24	-0.56	-2.28
Frame: defendant-positive	-0.45	-0.81	**3.12****	**2.20****	**2.86***
Surplus Facts	**3.16****	0.08	-0.96	-0.52	-0.96
Minimized Facts	0.58	-0.57	**2.38***	0.16	-0.19
Stigmatize	**5.39****	**-5.62***	**10.08****	**5.64****	**7.86***
Stigmatize: defendant	**1.35****	-1.25	**2.29***	**1.17***	-0.35
Personalize: police	**2.96****	**-2.12**	-0.46	**1.88***	-0.60
Passive: defendant	**2.88****	-2.08	2.01	0.53	**6.98****
Active: police	**17.45****	**-11.58***	10.46	**11.13****	2.33
				***= p<0.05**	****** = p <0.01**

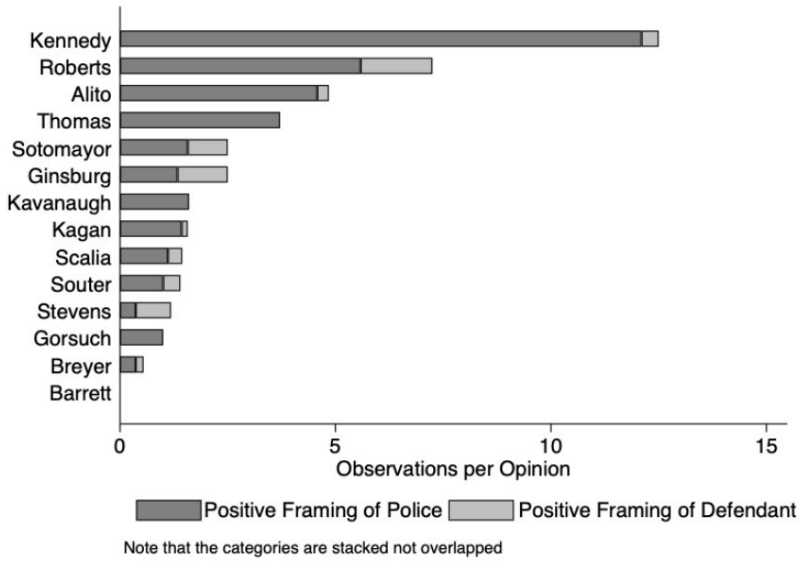
Hedging and Intensification, By Justice



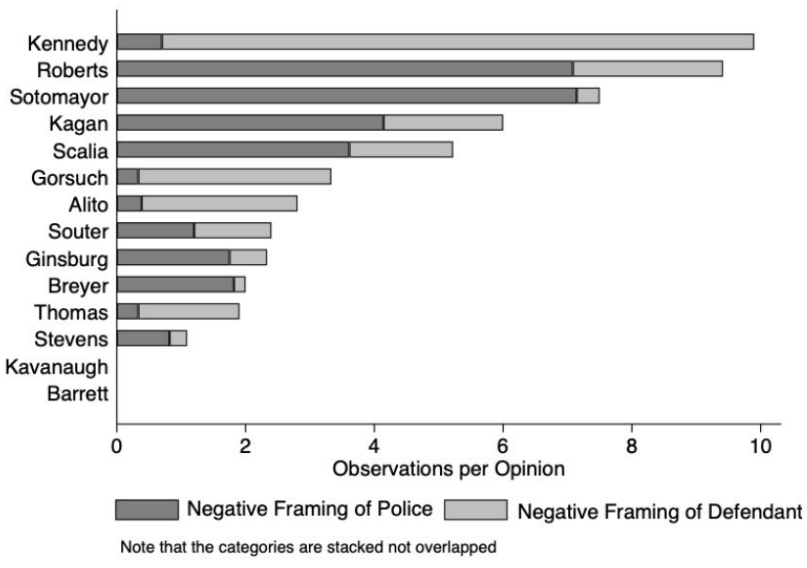
The same justices who tend to use one linguistic technique also tend to use the other; that is, the biggest hedgers are also the biggest intensifiers, and vice versa. This first pattern reinforces our impression from reading the cases that both hedging and intensifying are a form of rhetorical emphasizing.

Positive Framing, By Justice

This figure shows the extent to which each justice uses positive framing, broken down by who they direct such positive framing toward. The results shown are interesting and, we believe, quite surprising. Constitutional criminal procedure is concerned with misbehavior by the police, yet strikingly, Justice Ginsburg is the only one of our 14 justices to direct more positive comments to defendant than police, and her numbers are low: 1.3 compared to 1.2 positive comments per opinion on average, respectively. For every other justice, the majority of the positive framing is concerned with police conduct, as a proportion of total positive framing directed at the two sides combined.



Negative Framing, By Justice



When we turn to negative framing rather than positive framing, the ideologically disordered ranking in the figure does not mean that use of positive and negative framing does not follow the strategic theory. The overall ranking of the justices tells us only how often each justice uses positive or negative framing. What is telling is who the positive and negative frames are directed at, the proportion between police and defendant, which can be predicted once again by each justice's-prosecution score. The order in which the justices frame most negatively in terms of defendant compared to police is once again dominated by three conservative, pro-prosecution justices: Justice Kennedy at more than 13:1, Justice Alito at 6:1, and Justice Thomas at more than 5:1. On the flipside, the liberal justices negatively frame police more than they negatively frame defendant: Justice Sotomayor at 18:1, Justice Kagan at 2:1, Justice Ginsburg at 3:1, and Justice Stevens at 3:1. The only two justices who are not predictable based on pro-prosecution scores are Chief Justice Roberts and Justice Scalia, who frame police negatively more often than they frame defendant, 3 and 2.2 times as often, respectively. But it is worth remembering that these are cases concerned with police misconduct, and so these results show that only two of twelve justices are not predictably partisan.

Voting Rights Federalism

Ruth M. Greenwood, Director, Election Law Clinic at Harvard Law School.
Nicholas O. Stephanopoulos, Kirkland & Ellis Professor of Law, Harvard Law School

Abstract

It's well-known that the federal Voting Rights Act is reeling. The Supreme Court nullified one of its two central provisions in 2013. The Court has also repeatedly weakened the bite of the statute's other key section. Less familiar, though, is the recent rise of state voting rights acts (SVRAs): state-level enactments that provide more protection against racial discrimination in voting than does federal law. Eight states have passed SVRAs so far—five since 2018. Several more states are currently drafting SVRAs. Yet even though these measures are the most promising development in the voting rights field in decades, they have attracted little scholarly attention. They have been the subject of only a handful of political science studies and no sustained legal analysis at all.

In this Article, then, we provide the first descriptive, constitutional, and policy assessment of SVRAs. We first taxonomize SVRAs. That is, we catalogue how they diverge from, and build on, federal protections against racial vote denial, racial vote dilution, and retrogression. Second, we show that SVRAs are constitutional in that they don't violate any branch of equal protection doctrine. They don't constitute (or compel) racial gerrymandering, nor do they classify individuals on the basis of race, nor are they motivated by invidious racial purposes. Finally, while existing SVRAs are quite potent, we present an array of proposals that would make them even sharper swords against racial discrimination in voting. One suggestion is for SVRAs simply to mandate that localities switch to less discriminatory electoral laws—not to rely on costly, time-consuming, piecemeal litigation. Another idea is for SVRAs to allow each plaintiff to specify the benchmark relative to which racial vote dilution should be measured—not to stay mute on the critical issue of baselines.

Taxonomizing SVRAs

	CAVRA	FLFDA	ILVRA	WAVRA	ORVRA	VAVRA	NYVRA	CTVRA
Racial Vote Denial								
Pro-plaintiff liability factors							✓	✓
Liability for disparate impact alone								✓
Specification of remedies							✓	✓
Stronger ban of voter intimidation							✓	✓
Statewide database								✓
Racial Vote Dilution								
Omission of *Gingles*'s first prong	✓			✓	✓	✓	✓	✓
Liability for racially polarized voting alone							✓	
Crossover claims authorized			✓	✓				
Coalition claims authorized			✓	✓			✓	✓
Influence claims authorized	✓		✓		✓	✓	✓	✓
Proportional representation as relief	✓			✓	✓		✓	✓
Applies to statewide district plans		✓	✓					
Applies to all political subdivisions				✓			✓	✓
Applies to at-large elections only	✓					✓		
Applies to school districts only					✓			
Retrogression								
Broader coverage than Section 5		✓				✓	✓	✓
Limited to specified practices						✓		
Opt-in preclearance						✓		
New coverage formula							✓	✓
Retrogression or other violations								✓

The table illustrates several points that were implicit in our above commentary. First, Florida's and Illinois's SVRAs are plainly the least ambitious. In particular, unlike all the other SVRAs, they don't waive *Gingles*'s first prong. Second, California's, Oregon's, and Washington's SVRAs substantially resemble one another. These three SVRAs only address racial vote dilution, and they do so through similar means. The key difference among them is that California's SVRA is limited to at-large elections while Oregon's and Washington's SVRAs also reach single-member districts. Third, Virginia's SVRA is the most difficult to characterize in terms of ambition. Like California's SVRA, it's restricted to at-large elections. But like Connecticut's and NewYork's SVRAs, it also seeks to prevent retrogression (though only for jurisdictions that opt into preclearance). Finally, Connecticut's and NewYork's SVRAs sweep the most broadly. They're the only SVRAs that try to stop racial vote denial, including through voter intimidation, deception, and obstruction. Only the NYVRA imposes liability for racially polarized voting alone (in some cases). And only the CTVRA and the NYVRA use new coverage formulas to force certain jurisdictions to obtain preclearance before changing their electoral policies.