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Supreme Court Legitimacy Under Threat? The Role of Cues in How the Public Responds to Supreme Court Decisions

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At first blush, the notion of judicial independence appears to be at odds with public support: Supreme Court justices have a duty to be “guardians of the Constitution” and not subject to the whims of the populace. However, public support for the institution is vital to maintain the “reservoir of goodwill” necessary to weather the storm of individually unpopular decisions.¹ Without public legitimacy, the Court would be ineffective because it lacks the power of the purse or the sword, as Alexander Hamilton famously noted.²

Over the past 50 years, public confidence in the Supreme Court has fluctuated but remained generally strong, with an average of 43 percent of Americans indicating “a great deal” or “quite a lot” of confidence in the Court.³ In 2000, public approval was as high as 60% in Gallup surveys.⁴ Opinion about the Court is sensitive to the party of the president in office, as it appears that the public extrapolates from the president’s ideology to infer about the ideological placement of the Court.⁵

The Supreme Court has long appeared as a more popular institution relative to public opinion about Congress. The percentage of Americans who approve of Congress has remained at most 40 percent

¹ DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* (1965).

² THE FEDERALIST NO. 78 (Alexander Hamilton), [citation to page and edition].

³ *Public Confidence in the U.S. Supreme Court is at its lowest since 1973*, AP NORC (May 17, 2023), <https://apnorc.org/projects/public-confidence-in-the-u-s-supreme-court-is-at-its-lowest-since-1973/>.

⁴ *Supreme Court*, GALLUP, <https://news.gallup.com/poll/4732/supreme-court.aspx> (last visited July 31, 2023).

⁵ Michael A. Zilis, *Cognitive Heuristics, Inter-Institutional Politics, and Public Perceptions of Insulated Institutions*, 33 INT’L J. OF PUB. OP. RSCH. 76 (2021).

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since 2005⁶, and a recent report showed trust in Congress last among all institutions included in the poll.⁷ Even in 2022, the Court enjoyed greater support than the dismal numbers reported for Congress. For instance, in June 2022, before the release of *Dobbs v. Jackson Women’s Health Organization*⁸ (but after the majority opinion was leaked), only 17% of Americans approved of the job Congress was doing, compared to 40% approval for the Supreme Court.⁹ For comparison, average approval ratings for recent presidents are more comparable to the Supreme Court than Congress.¹⁰

However, things appear to be changing, as polling firms and national media outlets report dire assessments of public confidence in the Supreme Court. For instance, Jeff Jones of Gallup noted that “Americans’ confidence in the Court has reached a new low in Gallup’s nearly 50-year trend,” though this trend was largely driven by Democratic and Independent voters.¹¹

Similarly, scholars caution that “[T]he Court has been running a legitimacy deficit in recent years, burning more goodwill than it has built up.”¹² Data shows that both liberals and conservatives are increasingly likely to translate individual policy disagreements with particular court cases into negative assessments of job performance for the

⁶ Congress and the Public, GALLUP, <https://news.gallup.com/poll/1600/congress-public.aspx> (last visited July 31, 2023).

⁷ Lydia Saad, *Historically Low Faith in U.S. Institutions Continues*, GALLUP (July 6, 2023), <https://news.gallup.com/poll/508169/historically-low-faith-institutions-continues.aspx>.

⁸ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022)

⁹ Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Sept. 29, 2022), <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx>.

¹⁰ *Presidential Approval Ratings—Gallup Historical Statistics and Trends*, GALLUP, <https://news.gallup.com/poll/116677/presidential-approval-ratings-gallup-historical-statistics-trends.aspx> (last visited July 31, 2023).

¹¹ Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), <https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx>.

¹² Kathryn Haglin, Soren Jordan, Alison Murrell, & Joseph Daniel Ura, *Americans Don’t Trust the Supreme Court. That’s Dangerous*, WASH. POST: THE MONKEY CAGE (Oct. 10, 2022), <https://www.washingtonpost.com/politics/2022/10/10/supreme-court-public-opinion-legitimacy-crisis/>.

Court.¹³ If this pattern continues, support for the institution may suffer regardless of the direction the Court as a whole takes.¹⁴

Understanding how the public views the Court and its rulings is crucial to assessing its institutional stability. However, as scholars note, “[P]eople are broadly supportive of the court and believe in its ‘legitimacy’—that is, that Supreme Court rulings should be respected and followed. But we don’t know that much about whether people actually *agree* with the case outcomes themselves.”¹⁵ In this article, we highlight empirical research investigating the factors that affect public agreement with Court decisions, highlighting recent developments from our work.

At the onset, it is to note that the public generally hears about the Court’s decisions from media sources, not from the Court itself.¹⁶ Legal rulings are jam-packed with jurisprudential jargon and technical language that can be difficult for a lay audience to understand, which is why the general public is especially likely to rely on heuristics—cognitive shortcuts—as cues to help them decipher the ruling and assess whether they agree or disagree. So, what do we know about the heuristic cues that affect how the public receives Supreme Court rulings? And how is the Court faring after the controversial 2022 ruling in *Dobbs* and other recent politically volatile case decisions?

Heuristics and Public Support for the Supreme Court and its Rulings

Public opinion following any given Supreme Court case generally reveals those who agree with the Court’s holding and those who do not—those who perceive themselves as “winning” the case and

¹³ *Id.*

¹⁴ As Easton (1965) and others note, institutional legitimacy is primarily driven by ‘diffuse support’ – broad based support for the institution as one that is upright and worthy of public loyalty and protection. He compares this to ‘specific support’ which denotes public approval for institutional outcomes and performance. The former is enduring and helps support the institution through the sometimes ephemeral public sentiment associated with specific policy outcomes.

¹⁵ James F. Smith, *U.S. Supreme Court v. American public opinion: the verdict is in*, HARVARD KENNEDY SCHOOL (July 13, 2020), <https://www.hks.harvard.edu/faculty-research/policy-topics/democracy-governance/us-supreme-court-v-american-public-opinion>.

¹⁶ See RICHARD DAVIS, *DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS* (1994).

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those who believe they “lost.” Despite public disapproval of specific policy rulings, the Court has maintained its institutional footing by drawing upon a “reservoir of goodwill.”¹⁷ This reservoir is filled throughout a long tenure horizon, among other elements, by notions of procedural fairness. So, while a portion of the public may disagree with a particular policy, they nonetheless accept it as being conveyed by a legitimate and ethically acting political entity.¹⁸

This base of legitimacy (“diffuse support”) ebbs and flows throughout an institution’s history. We see this fluctuation from one Supreme Court term to the next, as well as during a given term as opinions are released to the public. Institutional legitimacy is particularly important to the Supreme Court because of its setting within our political system. With no mechanism to enforce its decisions¹⁹, the Court would face an institutional crisis if the public and its political agents began disregarding or ignoring altogether the Court’s holdings.

As a policy-maker, the Court is unique compared to Congress and the Executive. Whereas the elected political branches routinely explain and defend their policy stances in the hope of garnering public support, the Court does nothing of the sort. Rather, it simply releases a written opinion that resolves the controversies among the litigants, leaving the interpretation of that holding to lower courts, elite commentators, and the public at large. Before his retirement, Justice Anthony Kennedy put a finer point on this matter when asked to explain an issue in one of his opinions, *Citizen United v. Federal Election Commission*.²⁰ He responded by saying, “[W]ell, I don’t comment [on my cases]. That’s for the bar and the lower bench to figure out.”²¹ With little to no public engagement, the Court’s opinions are filtered to the general public through the media, and the messages that are conveyed by these outlets rarely contain dense, nuanced legal analysis. Instead, the public reporting of Supreme Court cases is usually boiled down to

¹⁷ Easton, *supra* note 1.

¹⁸ Easton, *supra* note 14

¹⁹ THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 2.

²⁰ *Citizens United v. FEC*, 558 U.S. 310 (2010).

²¹ Lee Fang, *Justice Kennedy, Author of Citizens United, Shrugs off Questions about his Deeply Flawed Premise*, THE INTERCEPT (Sept. 20, 2016 7:24 PM), <https://theintercept.com/2016/09/20/justice-kennedy-citizens-united/>.

a brief article, or a short snippet on a television or radio news program. Chief among the case aspects reported to the public is the identification of the majority opinion author and whether the conservative or liberal bloc voted in unison.

In general, the public has weakly held policy opinions²², and whatever opinions are expressed tend to be heavily influenced by elites.²³ The manner in which the Court's decisions are reported to the public, then, has the ability to augment public support for those decisions because the public relies on summary reports rather than reading the Court's opinion in full. When deciding whether they agree with a Court decision, individuals tend to use cues or other heuristics to help them decide whether they agree with a case's disposition. These heuristics can be the majority opinion author's identity, the case's vote split, or simply whether the reporter thought the opinion was strong or weak, among others.²⁴ Indeed, historical evidence shows that the justices themselves are aware of the impact opinion authorship has on how the public reacts to its opinions. Leading up to the Court's decision in *Smith v. Allwright* (1944),²⁵ the majority opinion, which struck down Texas's white primary system, was reassigned to a Southerner for fear that the affected region would balk at an opinion authored by the original opinion author (a Northeasterner).²⁶

Our research supports the strategy pursued by the justices in *Smith v. Allwright*. Specifically, the identification of the majority opinion author has a significant impact on an individual's agreement with a given Supreme Court holding, even more so than the ideological outcome of the opinion itself.²⁷ When holding the Court's legal decision constant, individuals are more likely to agree with the decision if it is authored by an ideologically compatible justice. Importantly, this result is pronounced among individuals with high political knowledge. This effect also holds across conservative and liberal legal holdings, suggesting the messenger, the majority opinion author, is a powerful

²² See Philip E. Converse, *The Nature of Belief Systems in Mass Publics*, in IDEOLOGY AND DISCONTENT 206-261 (David E. Apter ed., 1964).

²³ See JOHN R. ZALLER, *THE NATURE OF ORIGINS OF MASS OPINION* (1992).

²⁴ Bodery 2023, supra note 33.

²⁵ *Smith v. Allwright*, 321 U.S. 649 (1944).

²⁶ ALPHEUS T. MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW*, 614-616 (1956).

²⁷ Scott S. Bodery & Jeff Yates, *Do Policy Messengers Matter?: Majority Opinion Writers as Policy Cues in Public Agreement with Supreme Court Decisions*, 67 POL. RSCH. Q. 851 (2014).

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cue to the public that spans across the political divide that can bolster support and insulate the Court from public reprisals.

In a separate study, we continued our investigation into the messenger effect by assessing whether case-level agreement is impacted by the majority opinion author's gender and whether shielding the author's identity entirely, through the use of a per curiam opinion, further affected the support a decision receives.²⁸ In this seminal investigation, we find that the level of support a female-authored case receives varies depending on the female sociopolitical culture of the state in which an individual resides. People in states where female political candidates tend to have better odds of winning office are more deferential to a case's gender cues, whereas respondents from states with lower levels of female sociopolitical culture view cases authored by women less favorably.

The use of per curiam opinions emerged as the most effective judicial source cue of all. When a case is attributed to the Supreme Court as a whole rather than an individual justice, the level of support a case receives is at its highest.²⁹ Unsigned opinions undoubtedly evoke symbols that underlie judicial positivity theory; that of a learned institution staffed with robed jurists surrounded by a slew of legalistic symbols.³⁰ In these instances, when the Supreme Court speaks as an institution rather than an individual justice, deference to the Court's legal holding is at its pinnacle.³¹

In an era of heightened judicial politicization, our findings on judicial source cues have important implications for how the Supreme Court releases its opinions to the public. Two tactics stand out. First, strategically assigning opinion authorship when the majority bloc consists of a seemingly incongruent ideological makeup of justices is a wise approach. Second, increasing the frequency with which the Court issues per curiam opinions, particularly for salient decisions, will go a

²⁸ Scott S. Bodderly, et al., *Naming Names: The Impact of Supreme Court Opinion Attribution on Citizen Assessment of Policy Outcomes*, 53 *LAW & SOC. REV.* 353 (2019).

²⁹ *Id.*

³⁰ JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* (2009).

³¹ Bodderly, *supra* note 26.

long way toward reducing backlash against the institution. When taken together, our research suggests these tactics serve the Court well in maintaining and replenishing its reservoir of goodwill.

Cues from Media Personalities

While the news media has long been identified as a key influence on public opinion,³² cable news personalities have been an increasingly popular source for Americans,³³ with strong ideological brands and devoted audiences.³⁴ Past research shows that individuals who learn about Supreme Court decisions solely through “political sources” like cable news and talk radio express more negative attitudes about the Court than those who consume news from more neutral sources.³⁵ In a 2021 survey experiment, we were interested in how media figures who are typically associated with a distinct ideological outlook, like Rachel Maddow and Tucker Carlson, could provide heuristic cues to audiences about how to feel about Supreme Court rulings.³⁶

³² Benjamin I. Page, et al., *What Moves Public Opinion?*, 81 AM. POL. SCI. REV. 23 (1987).

³³ *Cable News Fact Sheet*, PEW RSCH. CTR. (July 13, 2021), <https://www.pewresearch.org/journalism/fact-sheet/cable-news/>.

³⁴ Mark Joyella, *Rachel Maddow Has Most-Watched Show in First Quarter Cable News Ratings*, FORBES (March 30, 2021), <https://www.forbes.com/sites/markjoyella/2021/03/30/rachel-maddow-has-most-watched-show-in-first-quarter-cable-news-ratings/?sh=6804639>

77505; Mark Joyella, *Fox News Dominates July Cable News Ratings as All Networks See Declines*, FORBES (July 27, 2021), <https://www.forbes.com/sites/markjoyella/2021/07/27/fox-news-dominates-july-cable-news-ratings-as-all-networks-see-declines/?sh=96583643eff3>; Nicholas Confessore, *What to Know about Tucker Carlson’s Rise*, N.Y. TIMES (April 30, 2022), <https://www.nytimes.com/2022/04/30/business/media/tucker-carlson-fox-news-takeaways.html>.

³⁵ Christopher D. Johnston & Brandon L. Bartels, *Sensationalism and Sobriety: Differential Media Exposure and Attitudes toward American Courts*, 74 PUB. OP. Q. 260 (2010).

³⁶ Scott S. Boddery, Damon Cann, Laura P. Moyer, & Jeff Yates, *The Role of Cable News Hosts in Public Support for Supreme Court Decisions*, forthcoming in the JOURNAL OF EMPIRICAL LEGAL STUDIES (2023). An earlier version of the manuscript can be found at: Boddery, Scott and Cann, Damon and Moyer, Laura P. and Yates, Jeff L., ‘Being’ The News: Cable News Hosts and Public Support for Supreme Court Decisions (May 16, 2022). Available at SSRN: <https://ssrn.com/abstract=4111302> or <http://dx.doi.org/10.2139/ssrn.4111302>

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In our experiment (conducted in May 2021), we randomly assigned over 2,000 respondents to one of five conditions, which included a visual source cue (Tucker Carlson, Rachel Maddow, or AP News) and information about whether the source agreed or disagreed with a ruling. The AP News vignette did not include information about agreement or disagreement. After reading the vignettes, respondents were asked about their own levels of agreement with the decision. We then analyzed their responses, controlling for demographic factors and other variables that have been shown to affect public support for the Court. An important focus of the study was to see how the public responded to unexpected (or “counter”) positions taken by hosts. For instance, when Rachel Maddow endorses a conservative view, prior work indicates that surprising or counterintuitive messages are likely to be more impactful in shaping public opinion, in part because they may be more “costly” for the messengers.³⁷ However, we found key differences for each of our messengers.

Among co-ideologues, when Maddow was ascribed with taking a conservative position (counter to her ideological brand), this unexpected messaging had the effect of moving opinion more than when she took an expected (liberal) position, particularly for those who described themselves as “slightly liberal.” When conservatives read about Maddow taking a counter position, this also had a greater impact on their assessments of the Court decision than when Maddow took her expected position. (That is, they were more supportive of the ruling, even if they were likely not fans of Maddow herself.) This suggests that counter-messaging caught the attention of respondents more so than when Maddow adhered to her typical liberal positions. It also highlights the important role that media figures can have on shaping opinion in a polarized society.

However, findings differed when Tucker Carlson was identified as the messenger. Among conservatives, there was a larger effect when Carlson took his expected (conservative) position than when he took a counterintuitive position. This was also true for liberal

³⁷ Tim Groeling & Matthew A. Baum, *Crossing the Water's Edge: Elite Rhetoric, Media Coverage, and the Rally-Round-the-Flag Phenomenon*, 70 J. OF POL. 1065 (2008); Chun-Fang Chiang & Brian Knight, *Media Bias and Influence: Evidence from Newspaper Endorsements*, 78 REV. OF ECON. STUD. 795 (2011).

respondents, who were less responsive to his counter-messaging. While the reason for the Maddow-Carlson difference is not clear, it is possible that there may be different underlying reasons for support for each news personality. Either that, or there were differences in cue strength between the hosts. The bottom line is that it matters how news commentators and media personalities talk about Supreme Court cases, particularly when those messengers have clear ideological brands.

Impact of the *Dobbs* Decision

The conversation about public support for the Supreme Court has taken on new urgency in light of the 2022 *Dobbs*³⁸ decision overruling *Roe v. Wade* (1973)³⁹ and *Planned Parenthood v. Casey* (1992).⁴⁰ As a number of surveys indicate, the *Dobbs* ruling was out of line with most Americans' views on abortion.⁴¹

In 2022, the University of Louisville conducted two waves of a nationally representative survey in partnership with Qualtrics, who fielded each wave on panels of respondents that the company maintains. Data from Wave 1 was collected between April 18–May 10, 2022, and Wave 2 was collected between October 28–November 7, 2022.⁴² Notably, Wave 1 was fielded prior to the leak of the majority opinion. Wave 2 was in the field prior to the November 2022 election and after the final decision in *Dobbs* had been released in June.

Respondents were asked about their agreement with the statement, “The Supreme Court makes its decisions fairly and objectively.” As the Figure below shows, the percentage of respondents who “strongly disagree” with the statement rose in Wave 2, and the percentage of those who agreed or strongly agreed with the statement declined

³⁸ *Dobbs*, 142 S. Ct. 2228, *Supra* note 8

³⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

⁴⁰ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

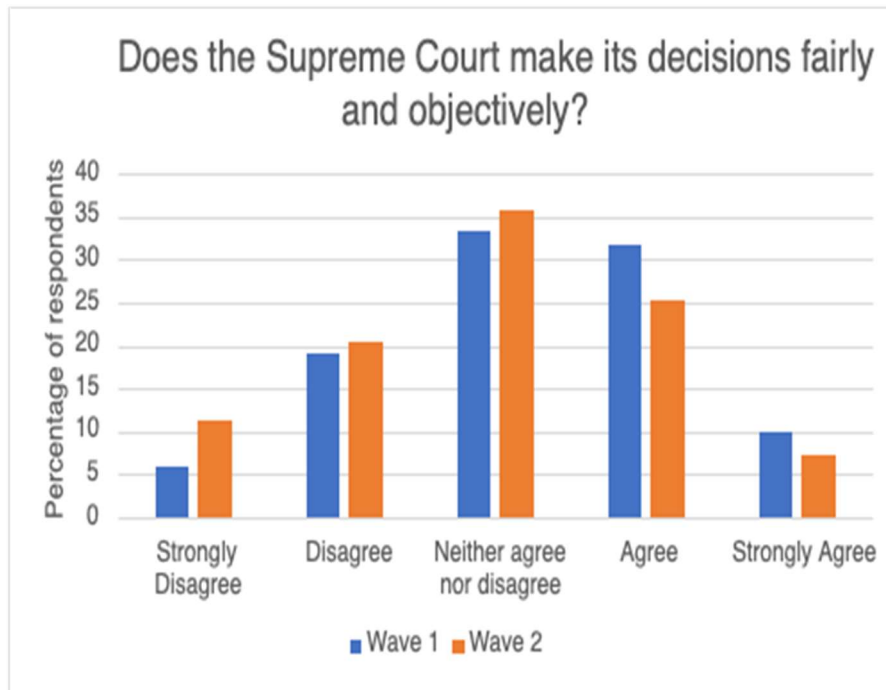
⁴¹ *Majority of Public Disapproves of Supreme Court's Decision to Overturn Roe v. Wade*, PEW RSCH. CTR. (July 6, 2022), <https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/>.

⁴² Data collection was approved by the University of Louisville Institutional Review Board (#22.0312 and #22.0828). The quota sample was designed to match the characteristics of the population on gender, age, race/ethnicity, and educational attainment based on 2020 Census estimates, and the target sample size was 1,785 adults (over the age of 18).

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in Wave 2. This is not good news for the Supreme Court. But how were women’s views, in particular, affected by the *Dobbs* decision?

Figure 1. Public Support for the Supreme Court as a Fair and Objective Decision Maker

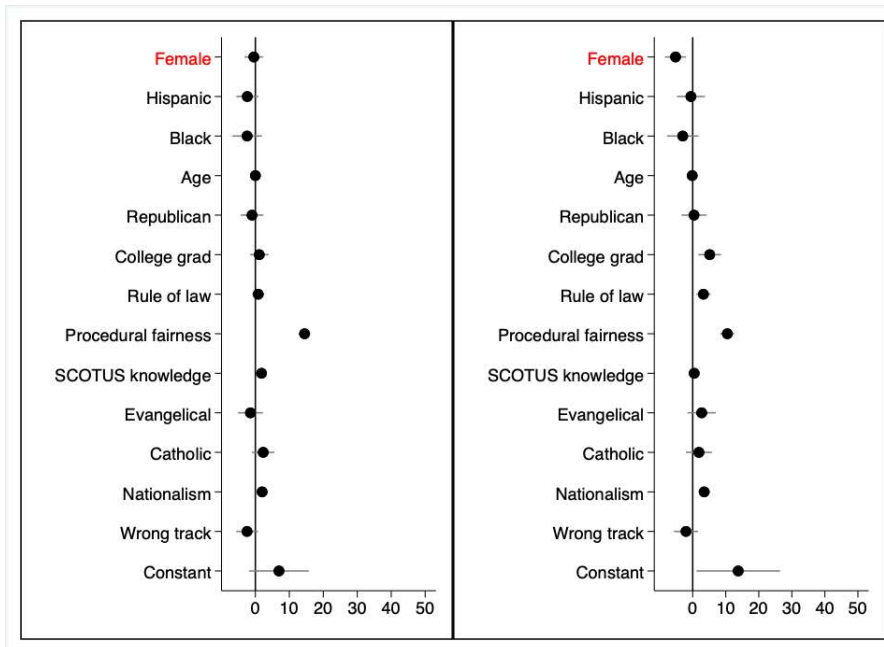


We also asked respondents to rate the Supreme Court from 0 to 100 on a “feeling thermometer” scale, where higher ratings correspond to more positive public feeling. Men’s average thermometer ratings dropped from 59 before *Dobbs* to 53 afterward, while women’s average ratings dropped more substantially (from 57 to 48). While this is suggestive, it is also important to account for other factors that we know affect public support for the Court, such as partisanship, education, race, and beliefs about procedural fairness. Next, we estimated an

ordered logistic regression model with controls for competing influences on Supreme Court support.⁴³

The results show that in April (before the *Dobbs* decision), gender was not a significant predictor of support for the Supreme Court. However, after *Dobbs*, gender does become a statistically significant predictor of support – and it is in the negative direction, meaning that comparing a man to a woman, all else equal, results in a 5-point reduction in support.

Figure 2: Coefficient Plot of Ordered Logistic Regression of Supreme Court Support



Linking to our previous work, it is worth noting that the majority opinion in *Dobbs* was *not* per curiam; rather, it was attributed to a very conservative male justice (Justice Samuel Alito) whose anti-abortion views were well-established from his previous rulings. We can surmise that these cues about opinion authorship likely exacerbated adverse

⁴³ These include standard demographic questions, as well as attitudes about the rule of law, procedural fairness, knowledge about the Supreme Court, nationalist beliefs, and whether the respondent thought the country was on the “wrong track.”

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public reactions to the ruling (compared to a counterfactual scenario where the decision would have been issued per curiam or assigned to a liberal female justice).

Concluding Thoughts

According to the Pew Research Center, there has been a rapid change in Americans' sentiment toward the Court in recent years.⁴⁴ In August 2020, only 25% of Americans agreed that the Supreme Court had too much power, but in August 2022, the percentage had almost doubled to 45%.⁴⁵ Recent work also suggests that institutional legitimacy assessments of the Supreme Court may be driven by identity politics—namely, perceptions over which groups benefit from a ruling.⁴⁶ For these reasons, it is vital to continue exploring how cues in the Court's opinion and the media's dissemination of Court rulings affect public support for both decisions and the judicial institution itself.

⁴⁴ *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RSCH. CTR. (Sept. 1, 2022), <https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/>.

⁴⁵ *Id.*

⁴⁶ ZILIS, *supra* note 5.