Putting the "Shadow Docket" in Perspective

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The First Monday of the Supreme Court's October 2022 Term is an opportune moment to reflect upon both recent developments on, and the growing public attention being paid to, what University of Chicago law professor Will Baude dubbed the Court's "shadow docket."[1] Baude didn't intend the term as a pejorative; rather, he used it as a catch-all for everything the Justices do *beyond* the lengthy, signed rulings the Court hands down each spring on the "merits docket"—in cases that have received multiple rounds of briefing and oral argument. From grants and denials of certiorari to grants and denials of emergency relief, and everything in between, the "shadow docket" was meant simply as a descriptor—in which the "shadow" metaphor is a reference to the obscurity and inscrutability of the Justices' output, and not (necessarily) to any nefariousness.[2]

That's not how it's been received by other conservatives. In a September 2021 speech, Justice Alito, for instance, complained that "the catchy and sinister term 'shadow docket' has been used to portray the Court as having been captured by a dangerous cabal that resorts to sneak and improper methods to get its ways."[3] Alito's speech tried to re-brand the topic as the Supreme Court's "emergency docket," even though that reduces to a very small subset the actual universe of unsigned, unexplained orders to which Baude was originally referring.[4] Likewise, Texas Senator Ted Cruz suggested that "Democrats are fond of concocting ominous terms like 'dark money' and 'shadow docket.'"[5] And the editorial board of the *Wall Street Journal*, not to be outdone, wrote that "what is formally known as the 'orders list'" became a "lightning rod" only because "the Supreme Court has moved in a conservative direction, so Democrats and the legal establishment have ramped up the volume on their criticism."[6] Even Justice Kavanaugh, in a February 2022

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[1] William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1, 5 (2015).

[2] *See* William Baude, *The Supreme Court's Secret Decisions*, N.Y. Times, Feb. 3, 2015, at A23.

[3] Hon. Samuel A. Alito, Jr., "The Supreme Court's Emergency Docket," Speech at Notre Dame Law School (Sept. 30, 2021) (transcript on file with the author).

[4] For instance, Baude's 2015 article was focused primarily on summary reversals at the certiorari stage—orders that do not fall within Alito's "emergency docket" framing. *See* Baude, *supra* note 1, at 18–40.

[5] Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary, 117th Cong., 1st Sess. (2021) (statement of Sen. Cruz), *available at* https://www.judiciary.senate.gov/meetings/texass-unconstitutional-abortion-ban-and-the-role-of-the-shadow-docket [https://perma.cc/R7WF-JKB3].

[6] Editorial, *The "Shadow Docket Diversion,"* Wall St. J., Oct. 2, 2021, at A12.

concurring opinion joined by Justice Alito, complained about the "catchy but worn-out rhetoric" surrounding the term.[7]

These critiques are themselves a response to mounting public criticism of what the Court has *done* on the shadow docket—to the perception, if not the reality, that the Justices in recent years have used unsigned and unexplained procedural orders in both substantive ways and absolute numbers that go beyond historical practice; in ways that have had massive effects on millions of Americans; often in defiance of the rules and norms governing these technical orders; and, perhaps most importantly, *inconsistently* in ways that have tended to favor Republicans and/or hurt Democrats. Indeed, it's no coincidence that the Alito, Cruz, and the *Wall Street Journal* responses all came at the end of September 2021—a month that began with the Supreme Court's highly visible and deeply controversial 5-4 ruling refusing to block Texas's "Heartbeat Act," a ban on all abortions after the sixth week of pregnancy.[8]

The ruling about Texas's Senate Bill 8 was, for many, the first public exposure to the modern Court's use of unsigned and, in that case, thinly explained orders in ways that directly affect the rights of millions of Americans. And it was the first time that any of the Justices had publicly criticized the majority's use—and abuse—of these procedural rulings. As Justice Elena Kagan closed her short but fiery dissenting opinion, "the majority's decision is emblematic of too much of this Court's shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend."[9]

But the real debate over the shadow docket has nothing to do with its name. We could call it the "banana docket," and it would raise the same questions. And so my goal in our time together today is to ask—and attempt to answer—two questions about the shadow docket. First, is Justice Kagan's descriptive charge accurate? That is to say, is the current Court's use of the shadow docket "more" unreasoned and inconsistent from its predecessors? And second, if so, is the current Court's use of the shadow docket "impossible to defend"? Perhaps not surprisingly, I aim to demonstrate that the answer to both questions is an emphatic "yes."

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For as long as there has been a Supreme Court, the Court has issued unsigned procedural orders shaping and structuring how the Justices process and ultimately resolve each of the cases before (and perhaps in lieu of ever) reaching the merits. If the Justices grant a party more time to file a brief, that happens on the shadow docket. If they reallocate how much time parties have to argue, that happens on the shadow docket. If they refuse to take up

[7] Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring).
[8] Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021) (mem.).
[9] *Id.* at 2500 (Kagan, J., dissenting).

an appeal, that happens on the shadow docket, too. The effects of individual orders may sometimes have elicited public interest, as when Justice Douglas attempted to stop the bombing of Cambodia.[10] But the shadow docket itself is longstanding, and its output has historically been, with some notable but limited exceptions, largely uncontroversial. The Court's output on the shadow docket may be larger than the merits docket in terms of sheer number of cases disposed of, but at least traditionally, it has been far less significant.

But things have changed. Since the mid-2010s, there has been a radical shift in how (and how often) the Justices use the shadow docket—not just to manage their workload, but to change the law both on the ground and on the books. From immigration to elections; from abortion to the death penalty; from religious liberty to the power of federal administrative agencies; the Supreme Court has, with increasing frequency, intervened preemptively, if not prematurely, in some of our country's most fraught political disputes through decisions that are unseen, unsigned, and almost always unexplained. In the process, these rulings have run roughshod over long-settled understandings of both the formal and practical limits on the Court's authority. Because they are unsigned and unexplained, shadow docket orders are supposed to be exceedingly limited in what they can accomplish. And yet, dozens of times each Term, we're now seeing shadow docket orders that fly in the face of those understandings.

Consider, in this respect, the Justices' February 2022 intervention in a dispute over congressional redistricting in Alabama. Shortly after Alabama adopted new maps for its seven U.S. House seats in response to the 2020 Census, two different federal district courts blocked the maps, concluding that the way the new districts were drawn diluted the voting power of Black Alabamians in violation of the Voting Rights Act of 1965.[11] These rulings were based upon the Supreme Court's own prior interpretations of the Voting Rights Act, specifically the standard that the Justices had articulated for proving such "vote-dilution" claims.[12] The district courts ordered Alabama to redraw the maps, this time with a second "majority-minority" district. Such a map would almost certainly have created a second safe Democratic seat in Alabama's 6-1 Republican-majority House delegation.

Alabama immediately appealed those rulings, arguing that the Supreme Court was likely to, and should, revisit its prior interpretation of the Voting Rights Act. In the ordinary course, if the Justices wanted to, they would have taken up the appeal and set it for plenary consideration, including oral argument, sometime in the fall of 2022. While that happened, the district court's rulings, requiring Alabama to re-draw its maps, would have remained in effect for the 2022 primary and general elections. But Alabama also asked

[10] Holtzman v. Schlesinger, 414 U.S. 1316 (1973).

[11] Singleton v. Merrill, No. 2:21-cv-1291, 2022 WL 265001 (N.D. Ala. Jan. 24, 2022) (three-judge court); Caster v. Merrill, No. 2:21-cv-1536, 2022 WL 264819 (N.D. Ala. Jan. 24, 2022).

[12] *See* Thornburg v. Gingles, 478 U.S. 30 (1986).

the Justices to short-circuit that entire process. Specifically, Alabama applied for "emergency" relief in the form of a stay that would freeze the effects of both district court rulings, so that the state could continue to use the invalidated maps throughout the 2022 election cycle.

A few minutes after 5:00 p.m. on Monday, February 7, 2022, the Supreme Court acquiesced. By a 5-4 vote, but with no opinion or even cursory explanation on behalf of the majority, the Court issued stays that guaranteed that the challenged maps would remain in place until the Justices decided Alabama's appeals, which would not happen before the 2022 elections.[13] (Oral argument would later be scheduled for October 4, 2022.) The February order was as short as it was inscrutable: "The district court's January 24, 2022 preliminary injunctions in No. 2:21–cv–1530 and No. 2:21–cv–1536 are stayed pending further order of the Court."[14]

Chief Justice John Roberts, who had written for the 5-4 majority in *Shelby County* v. *Holder*,[15] a decision that had itself heavily weakened the Voting Rights Act, wrote a rare dissent in which he criticized the other five Republican-appointed Justices for blocking the district courts' rulings. In his words, the lower courts "properly applied existing law in an extensive opinion with no apparent errors for our correction."[16] From his perspective, Alabama might persuade the Court to change the meaning of the Voting Rights Act on appeal, but because the law as it stood supported the lower courts' rulings, the state couldn't come close to making the case for a stay while that appeal unfolded. Emergency interventions from the Supreme Court are supposed to be for emergencies. For obvious reasons, lower courts faithfully following the Justices' existing precedents had not historically qualified as such.

The more acerbic dissent came, as in the Texas Senate Bill 8 case, from Justice Kagan. Writing for herself and the other two more liberal members of the Court, Justices Breyer and Sotomayor, Kagan tore into the majority. "Accepting Alabama's contentions," she wrote, "would rewrite decades of this Court's precedent about Section 2 of the VRA," a change that "can properly happen only after full briefing and argument—not based on the scanty review this Court gives matters on its shadow docket."[17] By overriding the district courts, even temporarily, Kagan concluded, "today's decision is one more in a disconcertingly long line of cases in which this Court uses its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument."[18]

The order in the Alabama cases produced immediate effects not just in Alabama, but elsewhere. Just 10 days after the ruling, for example, a Georgia district court held that it couldn't block Georgia's proposed new district maps, even though they suffered from the exact same legal infirmity as Ala-

[13] Merrill v. Milligan, 142 S. Ct. 879 (2022) (mem.).
[14] *Id.* at 879.
[15] 570 U.S. 529 (2013).
[16] *Merrill*, 142 S. Ct. at 882 (Roberts, C.J., dissenting).
[17] *Id.* at 883 (Kagan, J., dissenting).
[18] *Id.* at 889.

bama's.[19] The problem, the district judge wrote, was the Supreme Court's unexplained order in the Alabama cases—and the assumption that the Justices would likewise allow Georgia's maps to go back into effect if he blocked them.[20]

A few months later, a Louisiana district court blocked Louisiana's proposed congressional maps as violating of the Voting Rights Act, much as the Alabama district court judge had done in that state. Given the Supreme Court's subsequent actions in the Alabama case, the judge in Louisiana wrote a 152-page decision that carefully explained why it was appropriate to issue an injunction requiring Louisiana to re-draw its maps even if it hadn't been appropriate in the Alabama and Georgia cases.[21] The Fifth Circuit, by any measure the most conservative federal appeals court in the country, refused to block the district court's ruling, writing 33 pages of its own affirming the lower court decision.[22] But the Supreme Court once again intervened to put the blocked maps into effect, without providing a single word of explanation for why the voluminous analysis the lower courts had provided was wrong.[23] Together, these rulings all but guaranteed that three House seats that would likely have been safe seats for Democratic candidates in the 2022 midterm elections were instead safe seats for Republicans. A subsequent *New York Times* report concluded that the rulings were likely to impact as many as seven House seats—and, as it would turn out, which party controlled the House in the 118th Congress.[24]

The Justices' interventions in the Alabama and Louisiana cases were emblematic of a much larger pattern. During its October 2019 and October 2020 Terms, the Court granted more than 40 applications for emergency relief—staying lower-court decisions like the ones in the Alabama cases; vacating lower-court stays or injunctions; or reaching out to enjoin state executive action directly.[25] Only in the mid-1980s had the shadow docket ever been quite so active—and the overwhelming majority of that activity involved last-minute appeals by death-row inmates seeking to halt their executions.[26]

For the prisoners involved in those 1980s cases, the matter was literally one of life or death. However, the disputes they brought before the Court,

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[19] *See* Alpha Phi Alpha Fraternity v. Raffensperger, 587 F. Supp. 3d 1222, 233–34, 1327 (N.D. Ga. 2022).

[20] *See id.* at 1326.

[21] Robinson v. Ardoin, No. 22-211, 2022 WL 2012389 (M.D. La. June 6, 2022).

[22] Robinson v. Ardoin, 37 F.4th 208 (5th Cir. 2022) (per curiam).

[23] Ardoin v. Robinson, 142 S. Ct. 2892 (2022) (mem.).

[24] Michael Wines, *Maps in Four States Were Ruled Illegal Gerrymanders. They're Being Used Anyway*, N.Y. Times, Aug. 9, 2022, at A16.

[25] For the data, see Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary, 117th Cong., 1st Sess. (2021) (testimony of Stephen I. Vladeck), *available at* https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf [https://perma.cc/3DXN-W9ZA].

[26] *See* Stephen I. Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic 93–128 (2023) (tracing the evolution of the shadow docket in 1980s-era capital cases).

and the Court's resolution of them, tended not to have broader legal or practical ramifications. The Court halted a prisoner's execution or allowed it to proceed, but in either case, the result applied to that prisoner alone. In contrast, as the redistricting cases underscore, the Court's recent decisions on requests for emergency relief have regularly produced statewide or nationwide effects. During the Trump administration, for instance, many of the Court's grants of emergency relief had the effect of putting back into place immigration policies affecting millions of non-citizens, including some policies that would eventually be deemed unlawful by every court that actually ruled on their merits.[27]

Likewise, the Supreme Court's January 2022 emergency order blocking the Occupational Safety and Health Administration's COVID vaccination-or-testing mandate for large employers directly affected more than 83 million Americans, roughly one-quarter of the country's population.[28] And emergency rulings refusing to intervene have had equally broad impacts, such as the Court's September 2021 ruling allowing Texas's six-week abortion ban, Senate Bill 8, to go into effect, halting almost all legal abortions in the country's second-largest state.[29] Unsigned and unexplained orders that used to do little more than adjust the status quo between the parties are now the difference between whether state and federal policies affecting all of us, and perhaps even depriving us of our constitutional rights, will or will not be enforced for years on end.

Although the beginning of this trend can be dated to early 2017, it accelerated precipitously after Justice Ruth Bader Ginsburg's death in September 2020 and the confirmation of Justice Amy Coney Barrett to replace her. Justice Barrett's impact was especially visible in the context of emergency orders directly blocking state policies that lower courts refused to freeze pending appeal. These orders, known as "injunctions pending appeal," are supposed to be the rarest form of emergency relief because, by the time the matter reaches the Supreme Court, at least two different lower courts have already refused to provide them—and now the Justices are being asked to reach out and directly restrain government actors. During Chief Justice Roberts's first 15 years on the bench, for instance, the Court issued a total of four such orders. In Justice Barrett's first five months on the Supreme Court (from November 2020 to April 2021), the Court issued seven of them. A number of popular and scholarly assessments of the Court's October 2020 Term that focused only on the merits docket wondered if Justice Barrett had really made that much of a difference. On the shadow docket, though, the effects of her confirmation were both immediate and stark.[30]

For generations, law students have been taught that the typical case reaches the Supreme Court only at the end of what is often a lengthy pro-

[27] *See id.* at 129–61.

[28] Nat'l Fed. of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661, 662 (2022) (per curiam).

[29] Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021) (mem.).

[30] *See, e.g.*, Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & Liberty 699 (2022).

cess, including detailed (and often lengthy) proceedings before a trial court, and an appeal to intermediate courts of review typically at the end of that litigation. Against that backdrop, the Supreme Court's intended (and self-described) role in our system of government is that it goes last. As Justice Robert Jackson put it in 1953, "we are not final because we are infallible, but we are infallible only because we are final."[31] Or as the Justices regularly describe matters today, the Supreme Court is "a court of final review and not first view."[32] Having the last word cements the Court's role as the authoritative interpreter of federal law, but it also gives it a firmer foundation on which to rest those interpretations. The rigors of litigation have a way of sharpening the record and crystallizing the legal dispute, ensuring that by the time a case makes it way to the Supreme Court's merits docket, it truly and fairly presents the legal question that the Justices have been asked to resolve.

The Justices' recent use of the shadow docket is fundamentally inconsistent with this understanding. It inverts ordinary appellate process, having the Justices answer complicated (and, in some cases, hypothetical) questions of statutory or constitutional law at the outset of litigation, rather than after the issue has worked its way through the lower courts. And it almost certainly diverts the Court's finite resources away from the merits docket. Indeed, as the shadow docket has grown, the merits docket has shrunk, giving the Justices less time and ability to conduct plenary review in cases not presenting real or conjured emergencies. The Court issued 53 signed decisions in cases argued during its October 2019 Term, which was the lowest total since 1862. And the 56 signed decisions handed down during the October 2020 Term were the fewest since 1864. The total increased to only 58 during the October 2021 Term.[33] It's hard to believe that these developments are unrelated.

The shadow docket also invites behavior by the Justices that makes the Court look even more sharply partisan in its shadow docket rulings than in its decisions on the merits docket. It is, by default, easier for a Justice to join an unexplained order than a lengthy, reasoned opinion, where joining it is tantamount to endorsing all of its reasoning. Moreover, it is much harder to accuse a Justice of taking inconsistent positions in a future case if they didn't take a position in the prior one. Justice Barrett unintentionally acknowledged this point in an October 2021 concurring opinion, emphasizing that whether the Court intervenes on the shadow docket should turn not only on whether a party has made the requisite showing for emergency relief, but also on "a discretionary judgment about whether the Court should [one day] grant review in the case."[34] No law, rule, or even norm dictates how the Justices exercise that discretion. Instead, the Justices are free to vote for or against

[31] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

[32] Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (quoting Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 110 (2001) (per curiam)).

[33] *See* Testimony of Stephen I. Vladeck, *supra* note 26, at 19.

[34] Does 1-3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring).

relief for any reason (or no reason) whatsoever. And unlike in cases resolved on the merits docket, they're free to keep those reasons to themselves.

In the context of emergency orders, this has produced unusually rigid ideological homogeneity. During the October 2019 Term, only 12 of the Court's 53 signed merits decisions divided the Justices 5-4, including two with unusual and non-ideological lineups. In contrast, there were 11 decisions on the shadow docket in the same timespan from which four Justices publicly dissented, and perhaps others in which some of the dissents were not public. (One of the other vexing features of the shadow docket is that the Justices are under no obligation to publicly disclose how they voted—so that, unless four Justices publicly note a dissent, it's always possible that there were "stealth" dissents even from rulings that outwardly appear to be unanimous.[35]) In nine of the 11 publicly 5-4 shadow docket cases during the Court's 2019–20 session, the dissenters were the four more liberal Justices—Ginsburg, Breyer, Sotomayor, and Kagan. In the other two, those four were joined by the median Justice, Chief Justice Roberts, to form a majority. Never in its history has the shadow docket produced as many, or as many similar, 5-4 splits as the merits docket in the same Term.[36]

It's one thing when the Court is issuing unsigned orders with dramatic real-world effects where, at least publicly, the Justices appear to be speaking with one voice. It's something else altogether when these orders appear to reflect entirely partisan, or at least ideological, divisions where there's no substantive analysis to rebut that perception. It's difficult to dismiss as a coincidence that the Court's interventions in immigration cases, for example, generally allowed President Trump's policies to go into effect and generally blocked President Biden's policies. Ditto the Court's willingness to block COVID restrictions from New York and California, but not from Texas. Perhaps there are substantive explanations for why one administration's interpretations of immigration law were more valid than another's, or why one state's emergency public health measures were more dubious than another's—but if the Justices have such explanations, they're not providing them.

All the while, this story has flown under the radar. In response to public perception of the Supreme Court as always dividing along ideological lines, numerous media accounts claiming to take stock of the Court's October 2020 Term, for instance, emphasized that only seven of the 56 argued cases produced 6-3 ideological splits, with all of the conservatives in the majority and all of the more liberal Justices in dissent. As these stories explained, the Court was unanimous far more often than readers might expect, and even when it wasn't, the divisions often produced strange bedfellows. All of that is

[35] For an example in which there was clearly a "stealth" dissent, see *Arthur* v. *Dunn*, 137 S. Ct. 14 (2016) (mem.). There, the Court (with eight Justices) granted a stay of execution over only two public dissents, but Chief Justice Roberts wrote to note that he was providing a fifth vote for a stay. *Id.* at 15 (statement of Roberts, C.J.). In other words, the vote was 5-3, even though only Justices Thomas and Alito had publicly dissented.

[36] *See* Testimony of Stephen I. Vladeck, *supra* note 25.

factually correct, but it's an assessment of an increasingly distorted subset of the Court's workload. Including the shadow docket, there were twice as many unsigned rulings (14) during the same Term from which Justices Breyer, Sotomayor, and Kagan all publicly dissented, and no conservative publicly joined them. Accounting for both the number of those rulings and their substance yields a very different—and more ominous—story about the Court. On the shadow docket, the public perception of Justices who are regularly divided into their partisan camps looks far more accurate.[37]

These developments raise increasingly troubling questions about the Supreme Court's legitimacy. The Justices themselves have long insisted that "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[38] The point is not that we are all supposed to agree with what the Supreme Court is doing, but that we are at least supposed to be persuaded that the Justices are acting as judges. That doesn't just mean wearing robes to oral arguments; it means giving parties a meaningful opportunity to be heard and resolving their claims through principled decision making in which those principles are publicly accessible.

That understanding can't be reconciled with the shadow docket, on which there's usually no opinion to read. That makes it impossible to know why the Justices ruled the way that they did, or even how they voted. And it also provides no guidance to the parties or anyone else about how they can or should adjust their behavior to comply with the Court's ruling and avoid further judicial scrutiny. If the Supreme Court issues a merits decision adopting a new rule to govern traffic stops, for instance, the analysis in that decision quickly makes its way into police department training manuals nationwide, and not just in the jurisdiction in which that case arose. But the same can't be said of most shadow docket orders. In those cases, no one can truly know what the new rule is, or how it does or should apply to other cases.

While all of this has happened, Congress and the Executive Branch, which had historically taken an active role in shaping the Supreme Court's docket, have sat on the sidelines. Indeed, Congress hasn't meaningfully amended the Supreme Court's jurisdiction since 1988, the longest period without such legislation in the nation's history.[39]

The increasing prevalence and public significance of unsigned and unexplained rulings from unelected and democratically unaccountable judges would be problematic enough if the political branches had demanded it. But one of the most remarkable features of the rise of the shadow docket in recent years is that it has been entirely of the Court's own making, reflecting a series of formal rule and informal procedural and doctrinal changes quietly

[37] Steve Vladeck (@steve_vladeck), TWITTER (Sept. 2, 2021, 12:25 a.m.), https://twitter.com/steve_vladeck/status/1433284987806261250 [perma.cc/AZN2-VWTY].

[38] Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 866 (1992) (plurality opinion).

[39] Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662.

adopted by the Court with no external catalyst. In that respect, the rise of the shadow docket reflects a power grab by a Court that has, for better or worse, been insulated from any kind of legislative response.

In all, then, the more one understands the shadow docket, the more troubling the Court's behavior appears to be. In a few short years, the moniker has gone from a clever name for an obscure academic subject to an unintentionally apt metaphor that captures both the problem itself and the reason why it has been difficult for even legal experts to see.

Making matters worse, unlike merits decisions, many orders on the shadow docket can come anytime and from anywhere. Depending upon what form they take, they can even be posted to any one of five different pages on the Supreme Court's own website, a technical but telling hindrance. In July 2020, for example, when the Bureau of Prisons carried out the first two federal executions in 17 years, it was only able to do so after a pair of 5-4 decisions on the shadow docket, both of which lifted stays of execution that had been granted by lower courts. The first of those rulings came down at 2:10 a.m. Eastern time on Tuesday, July 14;[40] and the second was issued two nights later at 2:46 a.m.[41] Not surprisingly, those rulings garnered far less attention than the much-ballyhooed merits decisions the Justices had handed down just the previous Monday, including in a pair of cases involving subpoenas for President Donald Trump's financial records. Ditto the Court's companion 5-4 rulings in November 2020 blocking New York's COVID restrictions as applied to houses of religious worship, which were handed down at 11:56 p.m. on the Wednesday night before Thanksgiving.[42] Each of these decisions would have been front-page news if handed down the "usual" way or at the "usual" time. Instead, they were left to be parsed almost entirely on social media.

With truncated briefing, no argument, little to no public explanation or vote tally to guide the parties before the Court or to inform lawyers and lower courts in future cases, and decisions that often come down in the middle of the night, it's hard to think of a better term for the great majority of the Supreme Court's output today than a docket that exists in the literal and metaphorical shadows. But whatever it's called, the upshot is that it is increasingly impossible to tell any story about the work of the Supreme Court that does not include the shadow docket—and that story is increasingly problematic.

After all, the same 5-4 majority that refused to intervene in the Texas Senate Bill 8 case because of unresolved procedural concerns (which it would later resolve at least in part in *favor* of the challengers)[43] was willing to ignore procedural obstacles in intervening to block state COVID restrictions on

[40] Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam). The time mentioned at which the ruling came down is based on timestamps in the e-mails sent from the Court to its press corps, as discussed in VLADECK, *supra* note 26, at 23 & 290 n.40.

[41] Barr v. Purkey, 140 S. Ct. 2594 (2020) (mem.).

[42] Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).

[43] *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021).

religious liberty grounds.[44] Ditto the Justices in the OSHA case who were willing to block the vaccination-or-testing mandate *without* balancing the equities.[45] If principled reasons exist for why the Court is intervening in some of these cases but not others, or why it was so willing to stay injunctions of Trump policies but not of Biden policies, the central problem with the shadow docket is that the Court is not providing them.

In an April 2022 speech at the Ronald Reagan Presidential Library, with an eye toward the controversial merits decisions that were coming down the pike in the coming weeks, Justice Barrett urged her audience to judge the Court's work not by the way it was characterized in the press, or by the bottom lines the Justices reached, but by the substance of the Justices' reasoning. "Read the opinion," she insisted.[46] Two days later, in *Louisiana* v. *American Rivers*, hers was the decisive vote in a 5-4 ruling that put back into effect a Trump-era environmental rule (that challengers claimed made it easier for states to authorize pollution of navigable waterways)—in which there was no opinion to read.[47]

[44] *See* Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam).

[45] Nat'l Fed. of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661, 666 (2022) (per curiam) ("It is not our role to weigh such tradeoffs."); *see also* Stephen I. Vladeck, *Emergency Relief During Emergencies*, 102 B.U. L. Rev. 1787, 1790 (2022) (criticizing the Court's refusal to balance the equities in the OSHA case).

[46] *With Divisive Supreme Court Rulings Coming, Barrett Says: 'Read the Opinion,'* Associated Press (Apr. 5, 2022, 2:53 p.m.), https://apnews.com/article/ketanji-brown-jackson-us-supreme-court-amy-coney-barrett-7aa20b34d9a3e133bf1e2e2a899476f2 [https://perma.cc/6FDY-2G9Z].

[47] 142 S. Ct. 1347 (2022) (mem.).