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Orders Without Law

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THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC. By *Stephen Vladeck*. New York: Basic Books. 2023. Pp. xv, 334. $30.

INTRODUCTION

If, as is sometimes said, an "institution is the lengthened shadow of one man,"[1] Professor Stephen Vladeck[2] makes a compelling case that, when it comes to the modern Supreme Court, the shadow in question was cast by William Howard Taft.[3] It was Chief Justice Taft, after all, who persuaded Congress in 1925 to make most of the Court's docket discretionary.[4] Though that change may sound like the staid stuff of federal jurisdiction, in practice, the law—known as the Judges' Bill—marked a radical rethinking of the Supreme Court's role in the constitutional order.[5] The Court would no longer sit as a supreme appellate tribunal, resolving every dispute that wended its way up. Rather, the Court's function would be (in Taft's own words) "expounding and stabilizing principles of law for the benefit of the people of the country."[6] And the Court would pick and choose the cases that, in its discretion, best conduced to that function.

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1. R.W. EMERSON, ESSAYS 50 (1841).

2. Professor of Law, Georgetown University Law Center.

3. P. 28; *see generally* ROBERT C. POST, THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921–1930, at 373–593 (2024).

4. POST, *supra* note 3, at 485.

5. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1730–37 (2000).

6. *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10479 Before the H. Comm. on the Judiciary*, 67th Cong. 2 (1922) (statement of Hon. William Howard Taft, Chief Justice of the United States) [hereinafter Statement of Chief Justice Taft]; *see* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 260–61 (1927).

Were that reform not enough to cement Taft's place as an institution builder, he also energetically lobbied for and oversaw the construction of a grand new marmoreal home for the Court. For years the Court had met in the Old Senate Chamber in the Capitol building, making do without office space.[7] Taft ensconced the Court behind gleaming colonnades across the street from Congress. As much as anyone, Taft made the modern Court.[8]

The Judges' Bill bifurcated the Court's work. On the one hand, the Court would (on the surface anyway) continue to do what it had always done: decide cases on the merits through written opinions. On the other hand, many momentous decisions would now occur at the threshold through the relatively obscure process of deciding what cases to decide in the first place—by ruling on petitions for certiorari ("cert," for short).[9] In numerical terms, decisions at the cert stage quickly came to overwhelm "merits" decisions. These days, the Court grants only about 1.5 percent of cert petitions filed, disposing of the rest through unexplained orders.[10] Due to the importance and visibility of decisions rendered on the "merits" docket, however, cases resolved in that manner tend to dominate public perceptions of the Court. Traditional and social media buzz with the results of the Court's written decisions as they burst forth in late June. Orders granting or denying cert usually attract far less notice.

The Supreme Court's new building reflected the bifurcation of its work.[11] The justices were and are officially visible to the public only when they emerge, enrobed and stately, from behind the red curtains in their ornate courtroom. They are seen in their judicial capacities when engaged in merits activities: hearing oral arguments and handing down opinions orally. The Court's other activities—including, most importantly, the Court's construction of its own agenda—unfold in private behind the imposing bronze gates guarding the justices' chambers and conference room.[12]

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7. POST, *supra* note 3, at 550.

8. The decision to build the new Supreme Court building must go down as one of the most significant decisions ever made on the "shadow" docket. Taft testified that the vote to request a new building was 5–4, with Justices Holmes, McReynolds, Brandeis, and Sutherland dissenting. *Id.* at 552 & n.31.

9. POST, *supra* note 3, at 484.

10. *See The Supreme Court 2021 Term: The Statistics*, 136 HARV. L. REV. 500, 508 tbl.II(B) (2022).

11. Judith Resnik & Dennis Curtis, *Inventing Democratic Courts: A New and Iconic Supreme Court*, 38 J. SUP. CT. HIST. 207, 208 (2013).

12. Admin. Off. of the U.S. Cts., *Supreme Court Procedures*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [perma.cc/HK4L-KD3M]. Taft arranged for a press box in the new courtroom. Cass Gilbert, Jr., *The United States Supreme Court Building*, 72 ARCHITECTURE 301, 302 (1935). But, being in the courtroom, it invited observation of only a narrow and choreographed slice of the Court's business—the merits activities of arguments and hand-downs. *See id.*

The broad aim of Vladeck's new book, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic*, is to take readers behind those bronze gates. In impressive detail, Vladeck tours the various types of decisions the justices make in private that not only shape the more public output of the merits docket but also directly impact the real world. He gathers these activities together under the capacious term "shadow docket," coined by William Baude in 2015, to describe everything the Court does *other* than the merits docket.[13] The shadow docket encompasses decisions on certiorari petitions, emergency applications, summary reversals, so-called GVRs (short for "grant, vacate, and remand"), and more (pp. 23–24, 87–89). The "shadow" metaphor was meant to make a point about transparency: Many of the Court's shadow docket orders "lack the transparency that we have come to appreciate in its merits cases."[14] Baude also suggested, somewhat tentatively, that "the Court's non-merits orders do not always live up to the high standards of procedural regularity" set by the merits docket.[15]

The shadow docket has exploded in salience since it was first given a name. The Court was highly active in granting relief on the emergency docket during the Trump Administration—a trend that began with the Court's partial stay of the nationwide injunctions in the 2017 travel ban case.[16] The term "shadow docket" has appeared in Supreme Court opinions and the justices' extrajudicial speeches.[17] It was the subject of an entire hearing in Congress.[18] And it is ubiquitous in popular and academic commentary about the Court.

No one is more responsible for this attention than Vladeck, and his new book is a consummation of his tireless public commentary. It is the most comprehensive analysis and critique we have of the shadow docket phenomenon. Vladeck argues that the Court's decisionmaking on the shadow docket—and particularly its behavior in emergency applications—has endangered its legitimacy (pp. 276–77). He is adamant that he

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

14. *Id.*

15. *Id.* at 3.

16. *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 5 tbl.1 (2021) (statement of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law) [hereinafter *Vladeck Testimony*]; Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 138 (2019). I was part of the team that represented the plaintiffs in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

17. *E.g.*, Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting); Adam Liptak, *Alito Responds to Critics of the 'Shadow Docket'*, N.Y. TIMES, Oct. 1, 2021, at A17.

18. *Vladeck Testimony*, *supra* note 16.

is not driven by disagreement with conservative outcomes; rather, he targets the process by which these outcomes have been reached.[19] Vladeck insists "that our constitutional republic *needs* a legitimate Supreme Court, even one staffed by a majority of justices with whom many of us routinely disagree" (p. 278). It is for that reason that the Court must be protected from "delegitimizing itself" (p. 277). Vladeck's book, then, is the cry of idealism betrayed, not the crowing of cynicism fulfilled.

This Review has two goals. The book, by design, largely steers clear of concrete reform proposals; its object is to trace the ways that the Court's practices around emergency applications shifted over the Trump years and to urge that these developments warrant critical attention (pp. 24–25). My first goal, then, is to propose some reforms. These proposals orbit around a central contention: Any critique of the shadow docket and any proposed solution must depend, explicitly or implicitly, on a theory of the Court—its role in the constitutional order and how it can best serve that role. As a descriptive matter, the Court's present role was articulated by Taft and realized by the Judges' Bill; it sits primarily to declare broadly important legal norms. The emergency docket should be understood as an adjunct to that primary function, not as an alternative route to fulfill it.[20]

My second goal is to suggest that, in some respects, Vladeck's critique of the shadow docket does not go far enough. One of the challenges in assessing the "shadow docket" is that it is not a single thing, but an amalgam of varied practices not susceptible to a uniform prescription. Vladeck's focus is the emergency docket, and his claim, at bottom, is that the merits docket—with its signed opinions, reasoned orders, oral argument, and so on—is the paradigm of regularity to which the Court's emergency docket should aspire.[21] At times, though, Vladeck gestures toward a more radical thesis: Since the Judges' Bill, it is the *shadow* docket—in particular, certiorari—that has really defined the Court's institutional identity, not the merits docket (p. 276). Everything the Court does on the merits docket happens only because of a prior shadow docket decision. And when it makes those shadow decisions, the Court has virtually unbounded discretion. The merits docket, in other words, is a small, manicured island on a vast sea of discretion. I close by suggesting that public

19. *See* pp. 278–79. Indeed, he goes out of his way to point out the occasional shadow docket decision he disagrees with substantively but that was "by the book" procedurally. P. 248.

20. In keeping with Vladeck's premises, I bracket the possibility of more fundamental reforms to the Supreme Court—expanding its size, imposing term limits, stripping its jurisdiction, and so on. *See generally* PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT (2021). The Court's practices on the emergency docket may be reformable in the near term in a way that the Court more broadly is not. *Cf.* Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154 (2006) (describing political obstacles to "structural" reform of the Court).

21. *See* pp. 23–24, 276–77.

law theory often fails to confront this stubborn institutional fact. If that is right, the debate about the shadow docket will and should long outlive the present controversy over standards for emergency relief.

I. THE RISE AND RISE OF THE SHADOW DOCKET

The Shadow Docket advances both "descriptive" and "normative" claims (p. 243). The descriptive claim is that there has been a "massive uptick" in "inconsistent, unsigned, and unexplained decisions that are affecting more and more Americans" (p. 243). The normative claim is "that these developments are deeply problematic" (p. 243). I begin with the normative argument because it furnishes the conceptual framework for Vladeck's descriptive claims.

"We follow the Supreme Court," posits Vladeck, "not because we agree with all (or even most) of its decisions, but because we accept that the justices are exercising judicial, rather than political, power" (p. 244). *Judicial* power, for Vladeck, is characterized by the obligations to follow consistent, fair procedures and to offer principled reasons as grounds for important decisions (p. 249). These premises about judicial power recapitulate some of the tenets of the legal process school: Decisions should be assigned to different institutions of governance based on competence, and institutions have a corresponding obligation to hew to their peculiar norms and strengths.[22]

Vladeck's critique of the shadow docket—particularly the recent proliferation of emergency relief—follows from his legal process premises. The emergency docket allows the Court to avoid its normal deliberative procedures and to rule on major issues of public law without having to explain itself in a principled fashion. This charge does not extend to all aspects of the shadow docket. When an order does not produce "substantive effects" (for instance, an order extending the time to file a brief), then "the absence of a principled justification seems immaterial" (p. 245). But, Vladeck argues, when the Court grants emergency relief that does produce substantive effects (for instance, a stay of a lower court injunction), the Court should provide a reasoned "analysis that identifies the correct standard for such relief and applies that standard to the case at issue" (p. 254).

The bulk of Vladeck's book makes the case that the Court has not lived up to the ideal of reasoned explanation on the shadow docket in recent years. But he begins with history. The first chapter is an engaging account of the rise of certiorari—how it made its first tentative encroachments into the Court's docket in the late nineteenth century before swallowing it almost entirely by the late twentieth century (ch. 1). He then describes

22. 3 G. EDWARD WHITE, LAW IN AMERICAN HISTORY, 1930–2000, at 353–55 (2019); *see* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

how the modern shadow docket—in the more limited, emergency motions sense—developed out of the death penalty docket. Responding to a "flood of emergency applications in capital cases" in the late 1970s, the Court made three changes to its internal practices that are now fixtures of the modern shadow docket.[23] First, the Court stopped recessing over the summer, so that it could formally act as a body at any time. Second, the Court began deciding emergency applications as a body, instead of delegating authority to rule to individual justices. Finally, the Court stopped hearing oral arguments on emergency applications, ruling instead on the papers (p. 106).

Capital cases remain a constant source of applications to the emergency docket.[24] By their nature, though, capital cases often involve party- and fact-specific issues without broader legal significance to the nation.[25] Most of Vladeck's critique of the emergency docket, as a result, concerns not capital cases but the extension of emergency procedures incubated on the capital docket to major public law disputes. "[A]ny narrative," he writes, "of how the shadow docket . . . has exploded in recent years has to start in 2017, with President Trump's travel ban" (p. 129). After lower courts enjoined the various iterations of the travel ban, the Supreme Court allowed the travel ban to go into effect through a series of emergency rulings on the shadow docket (pp. 136–37). This set a pattern for the Trump Administration: broad lower court injunctions followed by a grant of emergency relief by the Supreme Court at the request of the Solicitor General (pp. 137–38).

The numbers Vladeck has compiled are striking. During the sixteen years of the Bush and Obama presidencies, the Solicitor General sought emergency relief from the Supreme Court eight times. Four of those requests were denied, and seven of eight were resolved with no noted dissent (p. 144). During the four years of the Trump presidency, the Solicitor General sought emergency relief *forty-one* times. The Court granted over

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23. Pp. 106–07. The Court has had a mechanism for non-merits orders going back to its early days, when a single justice in Washington would rule on procedural matters that arose between the Court's *en banc* sittings. *See* Ross E. Davies, *The Other Supreme Court*, 31 J. SUP. CT. HIST. 221 (2006).

24. The Trump Administration carried out thirteen federal executions over the course of six months. P. 120. (For context, there had been a total of three federal executions between 1963 and 2020. P. 120.) All thirteen cases passed through the shadow docket before the executions were carried out, often with the justices staying lower court injunctions to clear the way. *See, e.g.*, Barr v. Lee, 140 S. Ct. 2590 (2020). (My former colleagues represented Daniel Lewis Lee, and I advised during the Supreme Court phase of the case.)

25. The significance to the defendant, of course, is ultimate. *Cf.* Bernard E. Harcourt, Opinion, *Alabama Has a Horrible New Way of Killing People on Death Row*, N.Y. TIMES (Sept. 18, 2023), https://www.nytimes.com/2023/09/18/opinion/alabama-executions-botched.html [perma.cc/Z26N-4ZW9] (critiquing the Court for "lifting stays of execution imposed by the lower federal courts at a frightening pace, in unsigned opinions, without explanation").

three-quarters of the applications on which it gave an "up-or-down decision" (p. 144). After the initial travel ban ruling, all but one of those grants contained no articulated justification—meaning that policies struck down by lower courts went into effect with no explanation. Three-quarters of the Court's "up-or-down" decisions had at least one noted dissent, and ten were publicly 5–4 (pp. 144–45). Further, after the Court's shadow docket action, many of these cases were subsequently mooted by President Biden's inauguration. Indeed, one of Vladeck's most notable findings is that the travel ban was the *only* Trump Administration policy that the Court allowed to go into effect on the emergency docket that it later reviewed and upheld on the merits docket; the other cases, for various reasons, never came back to the Court after the initial shadow docket encounter (pp. 158–59).

The first year of the COVID-19 pandemic was the high-water mark of the Court's recent shadow docket (mis)adventures. Up until this point in the story, the typical posture of a shadow docket case was the federal government seeking an emergency stay of a lower-court injunction with which it disagreed. In the COVID era, however, lower courts frequently *denied* relief in deference to public officials, only for the Supreme Court to step in to grant an emergency writ of injunction (pp. 180–81). This difference in posture has procedural consequences—stays of lower court injunctions are governed by a provision of the 1925 Judges' Bill,[26] while writs of injunction are governed by the All Writs Act.[27] Traditionally, justices have been far more reluctant to issue writs of injunction, on the theory that an injunction "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts."[28] Thus, justices have typically demanded that an applicant for a writ of injunction show that its right to relief is "indisputably clear."[29] To obtain a stay, by contrast, an applicant need only show "a fair prospect that a majority of the Court will vote to reverse the judgment below."[30]

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26. 28 U.S.C. § 2101(f).

27. 28 U.S.C. § 1651(a).

28. Respect Me. PAC v. McKee, 562 U.S. 996, 996 (2010) (Kennedy, J., in chambers) (quoting Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)); *see* SUP. CT. R. 20.1 ("Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised."). *See generally* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 17.4, at 17–9 to –10 (11th ed. 2019).

29. Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers) (internal quotation marks omitted); *see also* Hobby Lobby Stores, Inc. v. Sebelius, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers).

30. Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam). The Court may also consider the likelihood of irreparable harm and the balance of the equities. *Id.* In a recent set of opinions, five Justices applied a "likelihood of success on the merits" standard rather than the "fair prospect" standard in granting a stay. *See* Labrador v. Poe *ex rel.* Poe,

In its early COVID decisions, the Court seemed to heed this distinction. When the Court first confronted a free-exercise challenge to attendance caps on religious services, the Court declined to intervene when the lower courts had not.[31] Chief Justice Roberts, in a solo concurrence, leaned on the "indisputably clear" standard and the deference owed to "politically accountable officials."[32] But soon after Justice Barrett's appointment, with the Chief Justice now in dissent, the Court granted a writ of injunction against a New York policy limiting attendance at houses of worship.[33] In its per curiam order in the case, the Court made no reference to the "indisputably clear" standard.[34] Instead, it applied the traditional four-factor test for a preliminary injunction, as if it were a trial court, which requires only that the applicants show they are "likely to prevail" on their claims.[35] Not long after, the Court issued another writ of injunction in *Tandon v. Newsom*.[36] In its per curiam order there, the Court articulated a broad understanding of the scope of the Free Exercise Clause that seemed to redraw the doctrinal landscape.[37]

The Court also sent a strong signal that these per curiam orders should be treated as precedential in some sense.[38] When the Court decided *Cuomo*, another application for an injunction was pending. Rather than rule directly on the application, the Court "treated" the application "as a petition for writ of certiorari before judgment," and then granted, vacated, and remanded to the Ninth Circuit to reconsider in light of its per

144 S. Ct. 921, 922 (2024) (Gorsuch, J., concurring in the grant of stay); *id.* at 929 (Kavanaugh, J., concurring in the grant of stay). Justice Kavanaugh wrote in a footnote that he "tend[ed] to doubt" that there is "any meaningful difference" between these two "formulations" of the stay standard. *Id.* at 929 n.2. That is in some tension with Justice Kavanaugh's concurrence in *Merrill v. Milligan*, where he suggested that *both* parties may simultaneously have a "fair prospect of success" in a close case. 142 S. Ct. 879, 881 n.2 (2022) (Kavanaugh, J., concurring in grant of applications for stays). To my ear, "fair prospect" is less demanding. It may be true that the slight difference in formulation—"likelihood" rather than "fair prospect" of success—will not affect the outcome of many cases as a practical matter. But I would favor the latter formulation because it could encourage pragmatic resolution of stay motions on equitable factors and thus steer the shadow docket away from "merits preview[s]." Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief); *see infra* Part II.B.2.

31. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).

32. *Id.* at 1613–14 (Roberts, C.J., concurring in denial of application for injunctive relief). Even Justice Kavanaugh's dissent referenced the higher standard. *Id.* at 1615.

33. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).

34. *Id.*

35. *See id.* at 66 (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)).

36. Tandon v. Newsom, 141 S. Ct. 1294 (2021).

37. *See* Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. 1067, 1123 (2022).

38. *See* Lisa Schultz Bressman, *The Rise and Fall of the Self-Regulatory Court*, 101 TEX. L. REV. 1, 56–57 (2022).

curiam order.[39] This order was a strange beast indeed. The "cert before judgment" procedure is itself extraordinary.[40] Between 2004 and 2019, the Court did not grant certiorari before judgment a single time. In *Harvest Rock*, the Court granted cert before judgment even though no party had asked, only to GVR in light of a per curiam order.[41] The GVR procedure is typically used to send a case back to a lower court for reconsideration in light of an intervening Supreme Court merits ruling.[42] By employing the GVR mechanism, then, the Court was signaling that its per curiam shadow docket orders had some effect in changing or clarifying the law, necessitating a lower-court redo.[43]

The last category of shadow docket cases that Vladeck explores is election disputes, which are "a natural source of emergency applications" (p. 204). Elections, like executions, present hard deadlines that often compress the time available for judicial review. Even after Election Day has passed, it is often imperative not to drag out election controversies (p. 204). Further, because political candidates or parties are often direct winners and losers, election disputes can present particular peril to the ideal of the judiciary as a nonpartisan actor.[44]

The troubled protagonist of Vladeck's election law chapter is *Purcell v. Gonzalez*[45]—itself a per curiam order issued on the shadow docket in 2006. In *Purcell*, the Court stayed a Ninth Circuit order blocking an Arizona ballot initiative that would have required ID to vote in person on election day. The Court invoked "considerations specific to election cases" that should inform a court's equitable discretion.[46] One such con-

39. Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 889 (2020) (mem.) ("[T]he case is remanded to the United States Court of Appeals for the Ninth Circuit with instructions to remand to the District Court for further consideration in light of [*Cuomo*]."). As a reminder, "GVR" is short for "grant, vacate, and remand."

40. The Supreme Court Rules say that it "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." SUP. CT. R. 11.

41. *See Harvest Rock*, 141 S. Ct. at 889.

42. SHAPIRO ET AL., *supra* note 28, § 5.12(b), at 5–38.

43. Even more strikingly, the Court even once GVR'd in light of a shadow docket ruling that did not produce a per curiam opinion or any other statement on behalf of the whole Court. *See* Gish v. Newsom, 141 S. Ct. 1289 (2021) (mem.). Since then, the Court may be reverting to what has long been taken as the norm—that emergency rulings have no formal precedential effect. *See* Bert I. Huang, *The Foreshadow Docket*, 124 COLUM. L. REV. 851, 858, 867–68 (2024) (book review).

44. *Cf.* Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019). *Bush v. Gore*, of course, exemplifies these features of the shadow docket. Bush v. Gore, 531 U.S. 1046 (2000) (granting stay on shadow docket); Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

45. Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam).

46. *Id.* at 4.

sideration was that court-ordered changes to voting procedures right before an election can cause confusion.[47] Several justices have taken this Delphic opinion to stand for the general proposition—the so-called "*Purcell* principle"—that election rules should not be changed too close to an election. As Vladeck points out, though, to state that rule is to invite questions about its scope (pp. 205–06). The most obvious is the line-drawing problem: How close to an election is too close? The Ninth Circuit had enjoined the initiative at issue in *Purcell* thirty-three days before the election. What about two months? Or nine months? Second, changes to election rules can come from any number of sources. Does the *Purcell* principle apply to state courts, or state election administrators? Or to the Supreme Court reviewing the order of a lower court—federal or state? Vladeck surveys this labyrinth, examining recent election decisions involving Wisconsin, Florida, South Carolina, North Carolina, and Pennsylvania (pp. 206–18).

I will describe only one particularly controversial episode whose denouement postdates the publication of Vladeck's book. On January 24, 2022, a three-judge district court in Alabama—including, for what it's worth, two Alabamians and two Trump appointees[48]—found that Alabama had likely violated the Voting Rights Act (VRA) by diluting the voting power of its Black citizens.[49] After a seven-day hearing, and based on "a record that is extensive by any measure," the district court ruled that the merits question was not "a close one."[50] The court added that the election was still ten months off, no relevant deadline was imminent, and Alabama had not testified that making a new map was "undoable."[51]

But the Supreme Court granted a stay by a 5–4 vote, decreeing that the 2022 election should proceed under the maps that the district court had found unlawful under the VRA.[52] Its order contained no reasoning. Justice Kavanaugh wrote a concurrence, joined by Justice Alito, relying expressly on *Purcell*.[53] Chief Justice Roberts dissented on the ground that

47. *Id.* at 4–5 ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."). The Court seemed to offer this observation while speculating about the Ninth Circuit's motive for issuing a prompt injunction, and its vacatur seemed to be based on the Ninth Circuit's failure to give proper deference to the district court. *Id.* at 5.

48. *Anna Marie Manasco*, FED. JUD. CTR., https://www.fjc.gov/history/judges/manasco-anna-marie [perma.cc/N6KX-KD22]; *Terry Fitzgerald Moorer*, FED. JUD. CTR., https://www.fjc.gov/history/judges/moorer-terry-fitzgerald [perma.cc/94JT-DG3N].

49. Singleton v. Merrill, 582 F. Supp. 3d 924, 934–37 (N.D. Ala. 2022).

50. *Id.* at 935, 1026.

51. *Id.* at 1028; *see also* Singleton v. Merrill, No. 2:21-cv-1291-AMM, 2022 WL 272636, at *11 (N.D. Ala. Jan. 27, 2022) (distinguishing *Purcell*).

52. Merrill v. Milligan, 142 S. Ct. 879 (2022).

53. *Id.* at 880–81 (Kavanaugh, J., concurring in grant of applications for stays).

the district court had "properly applied existing law in an extensive opinion with no apparent errors."[54] And Justice Kagan pointed out in her dissent that Alabama was not really arguing that the district court erred under "current law" but rather that the Court's precedents should be revisited.[55] That, for Justice Kagan, was not an appropriate basis for relief on the shadow docket.[56]

When the Court decided the case on the merits docket after the election, the shadow docket dissenters proved to be right. The Court affirmed the district court, finding it had "faithfully applied our precedents and correctly determined that, under existing law," Alabama's map violated the VRA.[57] And it recognized that the "heart" of the case was "Alabama's attempt to remake our [VRA] jurisprudence anew"—an attempt the Court rejected.[58] Even Justice Kavanaugh agreed that "the upshot of Alabama's argument is that the Court should overrule *Gingles*."[59] On the shadow docket, then, the effect of the *Purcell* "principle" was to allow a map drawn in violation of the VRA under existing law to govern the 2022 election.

The stay order in the Alabama case also had broader radiations. Not long after the Alabama order, the Court stayed another district court decision finding Louisiana's maps violated the VRA—even after the Fifth Circuit had upheld the district court's order over a *Purcell* objection.[60] And in Georgia, a district court found that the state's maps likely violated the VRA but declined to issue a preliminary injunction due to the impending election.[61] While stating that the Supreme Court's stay order in the Alabama case was "not precedential," the district court thought "it would be unwise, irresponsible, and against common sense for this [c]ourt not to take note of *Milligan*."[62] The Supreme Court's stay order had operated

54. *Id.* at 882 (Roberts, C.J., dissenting from grant of applications for stays).

55. *Id.* at 883 (Kagan, J., dissenting from grant of applications for stays).

56. *Id.*

57. Allen v. Milligan, 143 S. Ct. 1487, 1506 (2023).

58. *Id.* Apparently undaunted, Alabama passed a similar map after the Supreme Court's merits decision, only to have the district court enjoin it again. Singleton v. Allen, No. 2:21-cv-1291-AMM, 2023 WL 5691156, at *3 (N.D. Ala. Sept. 5, 2023) ("[W]e are deeply troubled that the State enacted a map that the State readily admits does not provide the remedy we said federal law requires."). This time around, the Supreme Court denied a stay without noted dissent. Allen v. Milligan, No. 23A231, 2023 WL 6218394 (U.S. Sept. 26, 2023).

59. *Allen*, 143 S. Ct. at 1517 (Kavanaugh, J., concurring in part).

60. Ardoin v. Robinson, 142 S. Ct. 2892 (2022); Robinson v. Ardoin, 37 F.4th 208, 228–31 (5th Cir. 2022) ("The defendants cite no case applying *Purcell* to stay an injunction this far from an election.").

61. Alpha Phi Alpha Fraternity Inc. v. Raffensperger, 587 F. Supp. 3d 1222, 1326–27 (N.D. Ga. 2022).

62. *Id.* at 1326.

as a kind of scarecrow precedent, dissuading judges from entering relief to which the plaintiffs were entitled.

The stay in *Milligan* foregrounds many of the troubling aspects of emergency decisionmaking on the shadow docket: the Court provided no reasoning on behalf of a majority; the stay order was hugely consequential because it decided which congressional map would govern the 2022 election in more than one state; the map in question was ultimately found unlawful by the Court; and the stay order, whatever its formal status as precedent, dissuaded a lower court from entering relief. *Milligan* provokes two questions: In what circumstances is shadow docket intervention from the Supreme Court justifiable, and how can its shadow docket procedures be improved?

II. WHAT TO DO

A. *Defining the Problem*

Before those questions can be answered, it is important to get a handle on the scope of the problem. The "shadow docket" is a catch-all category—referring to "everything *other* than the Court's 'merits docket' " (p. xii). A single prescription is not appropriate for such a broad class of practices. It is important, then, to specify what aspects of the shadow docket are problematic.

The shadow docket breaks down into several categories of rulings: first, rulings on procedural motions, like motions for extensions of time or for divided argument; second, GVRs; third, summary reversals; fourth, decisions on certiorari petitions (including allied agenda-setting decisions, like selecting questions to decide); and finally, emergency applications.

The first two categories can be dealt with quickly. The vast majority of applications on the shadow docket are procedural requests, like extensions of time for filing a brief.[63] This category of shadow docket activity is uncontroversial, and there does not appear to be any impetus for reform (p. 245). GVRs similarly tend to be routine. There are a few pockets of cases where GVRs become more exceptionable—like when the Solicitor General "confesses error" in response to a cert petition—but they are relatively rare and not a focus of Vladeck's book.[64]

Summary reversals have been intermittently controversial. They were the subject of the 1958 *Foreword* in the *Harvard Law Review*, which warned that "a court acting summarily on its own conclusion that it is

63. Pablo Das, Lee Epstein & Mitu Gulati, *Deep in the Shadows?: The Facts About the Emergency Docket*, 109 VA. L. REV. ONLINE 73, 79 (2023).

64. SHAPIRO ET AL., *supra* note 28, § 5.12(b), at 5–38 to 5–42; *see also* Chapman v. Doe *ex rel.* Rothert, 143 S. Ct. 857, 858 (2023) (Jackson, J., dissenting) (questioning the "sharp uptick in the number of [*Munsingwear*] vacaturs awarded"). GVRs on the emergency docket, like the *Harvest Rock* order discussed above, are of course a different story.

fully informed without brief or argument might be thought to take on more of a managerial or executive character than is usually associated with judicial tribunals."[65] More recent critiques of summary reversal—like the Baude article that coined the term "shadow docket"—have tended to focus on the opacity or arbitrariness of the criteria for granting one.[66] Summary reversal is, after all, atypical for a Court that generally eschews error correction.[67] In recent years, the Court has seemed to save its summary reversal thunder for cases in which lower courts granted habeas relief to prisoners.[68] It is fair to ask why the Court has prioritized this class of cases, given that its attention is such a scarce resource. But, while many of these criticisms have force, summary reversals are not a focus of Vladeck's book,[69] so I put them aside for the remainder of this Review.

Certiorari decisions are a different matter. One of Vladeck's core contentions is that shadow docket decisions are a "much more serious problem" when they "produce substantive effects" (pp. 245–46). Separately, Vladeck acknowledges that "unsigned, unexplained denials of certiorari can produce significant substantive effects" (p. 92). As an illustration, Vladeck discusses the denial of cert in a cluster of gay marriage cases before *Obergefell* was decided (ch. 2). Vladeck does not argue directly that the denial of certiorari there was improper, but the logic of his critique evinces some ambivalence. I return to certiorari in Part III.

We arrive finally at the emergency docket. This is the heart of Vladeck's book—that the Court has been doing more on its emergency docket in recent years. The numbers bear this out. During Roberts's first several years as Chief Justice, the Court averaged about five grants of emergency relief per Term. In the 2019 and 2020 Terms, the Court granted nineteen and twenty emergency applications, respectively—nearly a fourfold increase.[70] That is a major change. Indeed, with the Court now deciding roughly sixty cases per term through full written

65. Ernest J. Brown, *Foreword: Process of Law*, 72 HARV. L. REV. 77, 94 (1958). The prominent "Stern & Gressman" treatise argued that the Court should forewarn parties and invite briefs when it is considering a case for summary reversal. *See* ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE 187 (3d ed. 1962).

66. *See* Baude, *supra* note 13, at 41–55; Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 CARDOZO L. REV. 591 (2016).

67. *See* SUP. CT. R. 10 ("[C]ertiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); SHAPIRO, ET AL., *supra* note 28, § 5.12(c)(3), at 5–45 ("[E]rror correction . . . is outside the mainstream of the Court's functions . . . .").

68. Hartnett, *supra* note 66, at 594–95.

69. Vladeck discusses summary reversals briefly. Pp. 87–89.

70. *Vladeck Testimony*, *supra* note 16.

opinions,[71] these applications form a substantial proportion of the Court's work.

Justice Alito suggested in a recent speech that this increase was not due to a change in the Court's practices but due to the increased number of applications.[72] The problem with this explanation is that the increase in applications may be due to the Court's increased willingness to grant emergency relief.[73] And whatever the cause, the phenomenon still warrants attention. Beyond the raw numbers, it also seems that the *type* of issue the Court is addressing on the shadow docket has changed. Whereas it used to be that emergency applications mostly dealt with impending executions (so much so that the member of the clerk's office responsible for emergency applications was known informally as the "death" clerk),[74] shadow docket rulings increasingly deal with salient and controversial questions of public law—abortion,[75] immigration,[76] religious freedom,[77] and the like. They often define our legal reality on the ground for significant stretches of time.

B. *Some Solutions*

The Shadow Docket is primarily a work of diagnosis, exploring how the Court's practices on the shadow docket have changed and how those changes threaten the Court's legitimacy. By design, it does not offer many specific proposals for reform. But the uptick in emergency docket activity that it describes invites creative institutional thinking about how the Court might improve its procedures. My contention here is that to fix the emergency docket, one needs to consider the role of the Supreme Court in the judiciary and in American democracy more broadly. Without a theory of the Court's role, there is nothing against which to measure its performance on the shadow docket.

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71. *The Supreme Court 2021 Term: The Statistics*, 136 HARV. L. REV. 500 (2022); *The Supreme Court 2022 Term: The Statistics*, 137 HARV. L. REV. 492 (2023).

72. Liptak, *supra* note 17, at A17.

73. *See* William Baude, *Reflections of a Supreme Court Commissioner*, 106 MINN. L. REV. 2631, 2650 (2022) ("[The Court] appears to have triggered a cycle of increasing requests for emergency relief."); *cf.* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17 (1984) (suggesting that the relevant decision standard will affect the disputes selected for litigation).

74. Adam Liptak, *To Beat the Execution Clock, the Justices Prepare Early*, N.Y. TIMES, Sept. 4, 2012, at A19.

75. *Vladeck Testimony*, *supra* note 16.

76. Shoba Sivaprasad Wadhia, *Symposium: From the Travel Ban to the Border Wall, Restrictive Immigration Policies Thrive on the Shadow Docket*, SCOTUSBLOG (Oct. 27, 2020, 3:51 PM), https://www.scotusblog.com/2020/10/symposium-from-the-travel-ban-to-the-border-wall-restrictive-immigration-policies-thrive-on-the-shadow-docket [perma.cc/S2UN-9U4G].

77. *See supra* notes 33–34, 36–37 and accompanying text.

As noted above, the Judges' Bill—pushed through Congress by Chief Justice Taft—embodied a particular vision of the Supreme Court's role: It sits to answer important questions of law for the benefit of the country, rather than to resolve disputes for the benefit of the litigants.[78] In that respect, the Supreme Court is different from lower courts who are generally obligated to decide any case brought before them. To borrow a familiar heuristic from the federal courts literature, the Supreme Court is predominantly a law-declaration court, not a dispute-resolution court.[79] Of course, all courts partake of both functions to some extent.[80] But the law-declaration mentality is apparent in a number of the Court's practices, from the criteria for certiorari to the way it selects and frames questions within cases to decide exactly what it wants to.[81] Consider, for instance, Justice Gorsuch's observation during the recent oral argument in *Trump v. United States*: "We're writing a rule for the ages."[82] That is not the attitude of dispute resolution.

This aspect of the Court's institutional identity makes the emergency docket anomalous. When the Court rules on emergency applications—and even when it *grants* the application—it usually issues a one-sentence order without explanation.[83] The Court resolves a pressing dispute without "say[ing] what the law is."[84]

There is, of course, a good reason for that reticence: Law declaration is a difficult, time-intensive process. An emergency application for relief does not afford time for the "maturing of collective thought" that is the hallmark of the Court's deliberative approach on the merits docket.[85] When it receives an emergency application, the Court's aim should be to resolve the emergency, not to settle the law for other litigants. But this limited role is in tension with the Court's basic institutional identity that has emerged over our history. As a general matter (and as Chief Justice Taft recognized), we are happy to let lower courts resolve disputes in all but a fraction of cases where the Court's broad guidance is needed.[86]

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78. POST, *supra* note 3, at 651.

79. Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 684 (2012) ("The Court's current place in our constitutional order distinguishes it in kind, not in degree, from other courts."); Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 857–58 (2022).

80. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 75–76 (7th ed. 2015).

81. *See* Monaghan, *supra* note 79, at 668–69 ("The Court has in significant measure embraced the premises of the law declaration model.").

82. Adam Liptak, *Split Court Hints at Some Immunity for Ex-Presidents*, N.Y. TIMES, Apr. 26, 2024, at A1.

83. Das, Epstein & Gulati, *supra* note 63, at 87.

84. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

85. Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100 (1959).

86. *See Statement of Chief Justice Taft*, *supra* note 6, at 2–3.

One escape from this anomaly would be simply to say that the Court should get out of the emergency motions business entirely. But that will not work. First, sometimes granting an emergency application is necessary to make law declaration possible. For a stark example, the Court may have to stay an execution in order to have time to decide a legal question presented by the case; otherwise, the execution itself would moot the case. Second, some disputes may just be too important to leave solely to lower courts, even temporarily. It may be that the Supreme Court, for all its imperfections, is the only tribunal with national legitimacy to resolve a dispute. The recent mifepristone case probably convinced some skeptics of the need for an emergency mechanism when lower courts go too far on vitally important questions touching the whole nation.[87] The Court needs an emergency docket to deal with emergencies that demand an answer and cannot await the time-consuming frills of merits consideration (as Vladeck acknowledges, p. 247).[88]

That said, the modern emergency docket should be understood as a small pocket of dispute resolution (or dispute *preservation*) in a predominantly law-declaration Court. This point yields two lessons: First, emergency docket interventions should be as rare as possible. The Supreme Court could not review every decision to grant or withhold an injunction on constitutional grounds in the lower courts. It must be selective and intervene only in extraordinary circumstances. Second, the emergency docket is not generally the right venue for law declaration—for "writing a rule for the ages."[89] The circumstances of the emergency docket call for judicial minimalism—for doing less rather than more.[90] There is not sufficient time for reflection and collective deliberation to produce a sound opinion.

That, to me, is the problem with *Tandon*. At the time the Court's brief per curiam opinion was handed down, there was a lively debate about whether a law containing exceptions for some secular conduct was also

87. *See* Danco Lab'ys, LLC v. All. for Hippocratic Med., 143 S. Ct. 1075 (2023).

88. The Court has apparently had a mechanism for procedural orders going back to its early days. *See* Davies, *supra* note 23, at 224. This historical persistence suggests practical need.

89. Liptak, *supra* note 82, at A1.

90. *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 16 (1996).

required to make exceptions for religious practices under the Free Exercise Clause.[91] *Tandon* purported to end that debate.[92] The *Tandon* decision has now been cited 179 times by courts, and lower courts have treated it as precedential.[93] Even the Court seems to have treated it as precedential, GVR'ing a case out of the Ninth Circuit "in light of *Tandon*."[94] If *Tandon* did not effect some relevant legal change, why GVR?[95] Whatever one thinks of *Tandon* on the merits, significant renovations of existing doctrine should not occur on the emergency docket.[96] It is not the place to advance a controversial substantive agenda. That is especially true of *Tandon*, since the Court had an opportunity the same Term to articulate its understanding of the Free Exercise Clause on the merits docket, in *Fulton v. Philadelphia*.

This is not to say that the Court should give *no* reasons when it rules on an emergency application. Giving reasons is deeply ingrained in our legal culture and should be the default when an apex appellate court takes a significant action.[97] As Vladeck points out, it enables those outside the Court to understand its grounds for acting, to critique those grounds, and to monitor the Court for consistency (pp. 244–46). It also furnishes material to lawyers to craft helpful briefs in the future. But reason giving ought to be different at the merits stage and the emergency stage. At the merits stage, to give reasons is to answer the question(s) presented by a case with all the thoroughness necessary for the Court to discharge its

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91. *Compare* James M. Oleske, Jr., *Free Exercise (Dis)Honesty*, 2019 WIS. L. REV. 689, 726–39, *with* Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 24–26 (2016). When it persuaded the Supreme Court to grant certiorari in *Fulton*, the Becket Fund argued that there was a circuit split on this basic issue. Petition for a Writ of Certiorari at 19, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123). I was part of the team representing the respondent in *Fulton* at the merits stage.

92. On the novelty of *Tandon*, see Laura Portuondo, *Effecting Free Exercise and Equal Protection*, 72 DUKE L.J. 1493, 1532–34 (2023).

93. A Westlaw search of *Tandon*'s citing references conducted on March 15, 2024 revealed that federal and state courts frequently cite *Tandon*. *See, e.g.*, Clark v. Governor of N.J., 53 F.4th 769, 780 (3d Cir. 2022) (referring to *Tandon* as Supreme Court "precedent").

94. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 2563 (2021) (mem.).

95. For these reasons, Justice Alito's claim in a speech that emergency rulings are not "precedential," pp. 241–42, is hard to square with judicial practice.

96. *Cf.* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109 (2015) (critiquing the Court for making significant innovations in constitutional law using the avoidance canon).

97. Monaghan, *supra* note 79, at 723; David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, *in* COMMON LAW THEORY 134, 137 (Douglas E. Edlin ed., 2007) ("For much of the past 800 years or so, common law judges in appellate courts did usually give reasons . . . ." (footnote omitted)). *See generally* Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483 (2015); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

"guidance function."[98] At the stay stage, the Court may offer a tentative view on the merits, but it must also consider irreparable harm, the balance of equities, and public interest. When the Court gives reasons at the stay stage, the Court can and often should focus on the non-merits equitable factors to avoid prejudging the merits and engaging in undue law declaration.

Let me reduce these precepts to some concrete suggestions.

1. Rarity

As noted, emergency docket interventions should be as rare as possible. The Court cannot get involved every time a party seeks injunctive relief against the government, let alone in disputes between private parties. The Court needs a principled framework to identify those cases where emergency intervention is appropriate. The best strategy is to consider an application in relation to the Court's Taftian role, which is embodied in its certiorari practices. Grants of emergency relief should be limited to circumstances where emergency relief is needed to preserve the Court's capacity to furnish guidance on federal law, or where the underlying case is so exceptionally important that the Court ought to lend its national prestige. In other words, the emergency docket should be reserved for cases that are cert-worthy.

As it happens, the Court seems to be moving in this direction. In the 2022 Term, the Court only granted six applications for emergency relief (the fewest since the 2013 Term),[99] and, outside the capital context, the Court only once granted an application over the dissent of the three Democratic appointees.[100] During the 2020 Term, by contrast, the Court granted twenty-four emergency applications.[101] The reduction seems to have been driven by a refinement of the stay standard articulated by Justice Barrett (and joined by Justice Kavanaugh) in a brief concurrence in *Does 1–3 v. Mills*.[102] One of the traditional stay factors is whether an applicant is likely to succeed on the merits. "I understand this factor," Justice Barrett wrote, "to encompass not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should

98. *Cf.* Frederick Schauer, *Abandoning the Guidance Function:* Morse v Frederick, 2007 SUP. CT. REV. 205.

99. *The Supreme Court 2021 Term: The Statistics*, 136 HARV. L. REV. 500, 516 (2022); *see Vladeck Testimony*, *supra* note 16, at 5.

100. Steve Vladeck (@steve_vladeck), TWITTER (Oct. 1, 2023, 8:56 AM), https://twitter.com/steve_vladeck/status/1708465946724069830 [perma.cc/9TDK-KM4K]; *see* Arizona v. Mayorkas, 143 S. Ct. 478, 478 (2022) (mem.).

101. *See The Supreme Court, 2020 Term: The Statistics*, 135 HARV. L. REV. 491, 505 (2021).

102. Does 1–3 v. Mills, 142 S. Ct. 17, 18 (2021).

grant review in the case."[103] Otherwise, "applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument."[104]

That is a sound refinement. Justice Barrett would ask whether a case meets the traditional cert factors before getting involved on an emergency basis. Confining emergency relief in that way properly subordinates the emergency docket to the Court's core function because it means emergency relief will be withheld unless the case independently belongs on the docket. This simple intervention seems to have been a turning point in the Court's shadow docket practices.

2. Giving Reasons

Unless exigency makes it infeasible,[105] the Court should generally strive to offer some reasoning when it rules on emergency applications with significant and potentially long-lasting effects.[106] But the obligation to give reasons must be tempered with a dose of pragmatism. It is, practically speaking, impossible for the Court to put emergency rulings through its full deliberative process. For that reason, the Court should not use emergency rulings to authoritatively declare the law in broad strokes. Often, it will be enough to note that a case is close—that there is a "fair prospect" of success on both sides—and have the ruling turn on the other stay factors.[107] That approach has the salutary effect of not prejudging cases on the merits.

Sometimes, though, the Court will be impelled to say something about the merits. When it does, it should favor minimalist dispositions

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103. *Id.*

104. *Id.*

105. One circumstance where exigency might make reason giving impossible is when a single justice must act on a request for an administrative stay. *See United States v. Texas*, 144 S. Ct. 797, 799 (2024) (Barrett, J., concurring in denial of applications to vacate stay) ("[S]uch orders rarely generate opinions, which means that there is no jurisprudence of administrative stays . . . ."). *See generally* Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 NOTRE DAME L. REV. 1941 (2022).

106. A good way to identify such an application is to ask whether it is referred to the full Court. When the resolution of an application is so straightforward that a justice feels comfortable acting alone, there is no reason to presume that giving reasons would be worth the candle. When an order is referred to the whole Court, and relief is granted, the presumption is the opposite: It is controversial and important enough to warrant some explanation. *Cf.* SHAPIRO ET AL., *supra* note 28, § 17.12, at 17–29 ("[A] referral usually occurs where very important or complex questions are raised by the application.").

107. *E.g.*, Merrill v. Milligan, 142 S. Ct. 879, 881 n.2 (2022) (Kavanaugh, J., concurring in grant of applications for stays); Ruckelshaus v. Monsanto Co., 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers) ("An applicant's likelihood of success on the merits need not be considered, however, if the applicant fails to show irreparable injury from the denial of the stay.").

that respect the abbreviated procedures the Court must follow.[108] Relatedly, any statement the Court makes about the merits at the stay stage should not be taken as gospel by lower courts and should not be regarded as precedential by the Supreme Court in the future.[109] Any such statement is an equitable prediction that will govern the legal status of the parties while a case is pending and nothing more. It should not fetter the lower courts' deliberative processes. It can, after all, be quite helpful to the Supreme Court for lower courts to give their full and honest analyses of the pending case measured against current law.[110]

Further, because stay relief often turns on an equitable judgment, rather than bright-line articulations of the law, the Court should be open to pragmatic compromises. Consider, for instance, Justice Breyer's proposal in the border wall case, *Trump v. Sierra Club*.[111] The Court stayed a lower court injunction against President Trump's reprogramming of appropriated funds to build a border wall. Its order stated that "the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review."[112] Justice Breyer, in a separate opinion, fastened onto the particular harms claimed by both the plaintiffs and the government and proposed a compromise: "Allowing the Government to finalize the contracts at issue, but not to begin construction . . . ."[113] That resolution would have allowed the Court to address the parties' concrete interests directly, while avoiding the creation of unnecessary scarecrow precedent. After all, the Court's goal at the emergency phase is to sensibly set the state of the world while the litigation is pending, not to solve legal questions once and for all. Even the Court's single sentence on the cause of action question—belying the complexity of the issue—may have a scarecrow effect going forward.[114]

3. Writs of Injunction

Writs of injunction should be particularly rare. The Supreme Court is not the first line of defense in the protection of federal rights; it is "a court

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108. *Cf.* Sunstein, *supra* note 90.

109. For one attempt to untangle the precedential effect that ought to be given to different sorts of emergency orders, see Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827 (2021). Bert Huang has recently argued that a Supreme Court ruling should not have precedential status unless the Court has granted certiorari first. Huang, *supra* note 43, at 865–68.

110. H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 230–34 (1991) (describing the perceived benefits of "percolation").

111. Trump v. Sierra Club, 140 S. Ct. 1 (2019) (mem.).

112. *Id.* For an analysis of the complex cause-of-action issue, see Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1122–24 (2021).

113. *Sierra Club*, 140 S. Ct. at 2 (Breyer, J., concurring in part and dissenting in part from grant of stay).

114. *See* Metzger, *supra* note 112, at 1123 (noting that the Court "signaled skepticism").

of review, not of first view," as it often says.[115] In keeping with that principle, the Court rarely operates directly on the parties. Outside its small original docket, it generally leaves lower courts to issue compulsory orders to parties and then reviews those orders. This is reflected in the Court's writ of injunction standard: The applicant's right to an injunction must be "indisputably clear."[116] The Court should adhere to that standard, which it seems (temporarily?) to have lowered during the COVID-19 pandemic. The Court might even consider hard wiring that standard in a manner similar to the summary reversal context. Summary reversals—rare instances of Supreme Court error correction—are supposed to be reserved for particularly egregious errors in the lower courts. One way the Court has enforced that standard, at least historically, is to require six votes—rather than five votes—to summarily reverse a case.[117] It could follow a similar rule in the injunction pending appeal context.[118]

4. Protecting the Merits Docket

When the Court does grant relief on the emergency docket, it should take measures to ensure the case can come back for a full consideration on the merits. One of Vladeck's most striking findings is that, during the Trump Administration, a large proportion of cases in which the Court granted emergency relief on the shadow docket never returned (pp. 145, 158–59). As a result, the Court's grant of relief on the emergency docket, often without articulated reasons, was the only action it took in the case (p. 155). Whatever one's views of the Court's shadow docket actions when they are merely *interim* measures, it is especially problematic for the fate of important federal or state policies to hinge entirely on such abbreviated treatment. The Court can lessen the risk of this happening by granting certiorari before judgment, setting expedited briefing schedules or decision deadlines for lower courts, or convening oral argument outside its regularly scheduled sessions. These are extraordinary measures that should be used sparingly—but when the reality on the ground will

115. Jack Daniel's Props., Inc. v. VIP Prods. LLC, 143 S. Ct. 1578, 1592 (2023) (quoting Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005)).

116. *See supra* notes 28–29 and accompanying text.

117. PERRY, *supra* note 110, at 100; Bressman, *supra* note 38, at 26. There is some dispute whether this convention was ever firmly established. In recent practice, it seems only to prevent summary reversal when there are four dissenting votes to grant cert and thus give a case full merits review. SHAPIRO ET AL., *supra* note 28, § 5.12, at 5–35.

118. This is another area where the Court seems recently to have moderated its practice. As noted above, the number of writs of injunction that the Court issued leapt up after Justice Barrett joined the Court. In the 2020 Term alone, the Court granted six applications for injunctive relief, more than it had granted in the prior fifteen terms combined. But the Court granted only three applications for injunctive relief in the 2021 Term and none in the 2022 Term. *The Supreme Court 2020 Term: The Statistics*, 135 HARV. L. REV. 491 (2021); *The Supreme Court 2021 Term: The Statistics*, 136 HARV. L. REV. 500 (2022); *The Supreme Court 2022 Term: The Statistics*, 137 HARV. L. REV. 492 (2023).

be dictated by an emergency order and nothing else, they seem warranted.[119]

5. Reforming *Purcell*

The so-called *Purcell* principle should be clarified or reformed.[120] Ruling on emergency applications in election disputes is one of the Court's most delicate, consequential, and ineluctable functions. The present level of uncertainty regarding the stay standard is too great and potentially destabilizing. *Purcell* itself is obscure, and the Court, since *Purcell*, has produced only a confused mishmash of unexplained orders and concurrences.[121] The first order of business, then, is to provide some clarity and predictability.

The second is getting the standard right. Justice Kavanaugh has made an effort at distilling a four-part test.[122] One requirement he would impose for plaintiffs to obtain injunctions is that the merits be "entirely clearcut" in their favor.[123] But if the Alabama case failed to meet Justice Kavanaugh's proposed standard, then the bar is too high. The district

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119. I say "sparingly" because I am skeptical that routinely giving emergency applications a quick, merits-like treatment is a panacea. Indeed, my overriding theme is that the Court should keep the merits docket and emergency docket separate. Holding oral argument risks confusing these two functions, because it may embolden the Court to declare the law. For instance, the Court held oral argument on the application in the vaccine mandate case, *Nat'l Fed. of Indep. Bus. v. OSHA*, 142 S. Ct. 661 (2022) (per curiam). It then used the case to innovate the law, reformulating the major questions doctrine as a clear statement rule. *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1027–29 (2023). Because the case came in an emergency posture, the stay standard required the Court to balance the equities. Its analysis of that issue was strange: "It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes." *Nat'l Fed. of Indep. Bus.*, 142 S. Ct. at 666. As Vladeck points out, weighing the tradeoffs is the Court's exact role in a stay application. P. 158. Indeed, this opinion prompted Richard Re to ask whether the Court had "overruled" equity. Richard Re, *Did the Supreme Court Overrule Equity?*, RE'S JUDICATA (Jan. 14, 2022, 6:01 AM), https://richardresjudicata.wordpress.com/2022/01/14/did-the-supreme-court-overrule-equity/ [perma.cc/F2B4-MGZX]. My view is that holding the oral argument engendered a kind of role confusion; the Court went into law declaration mode, in which it is more common to disclaim, in a rhetorical flourish, any power to balance the equities.

120. *See generally* Wilfred U. Codrington III, Purcell *in Pandemic*, 96 N.Y.U. L. REV. 941 (2021); Nicholas Stephanopoulos, *Freeing* Purcell *from the Shadows*, TAKE CARE (Sept. 27, 2020), https://takecareblog.com/blog/freeing-purcell-from-the-shadows [perma.cc/22H7-TJVE]; Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427 (2016).

121. *See, e.g.*, Codrington, *supra* note 120, at 969–83 (2020 election cycle); Hasen, *supra* note 120, at 444–60 (2014 election cycle).

122. Merrill v. Milligan, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of applications for stays).

123. *Id.*

court found the merits question was "not . . . a close one,"[124] and Alabama's contention in the Supreme Court—as Justice Kavanaugh himself acknowledged—was that the Court ought to revisit its precedents interpreting the VRA. If the fact that the Court might overrule a statutory precedent is enough to render the legal question not "clearcut," then immediate relief in a voting rights case will be rare indeed. It is also questionable whether *Purcell* should have been triggered at all, given that the district court ruling came ten months before the election and the plaintiffs could not possibly have moved with more diligence. In short, Justice Kavanaugh's proposal would often mean in practice that states can violate election law with impunity for one election cycle (p. 220).

6. Fixing the Shadow Docket from the Outside

Professors Frankfurter and Landis recognized, in their landmark work about the Supreme Court, that the federal judiciary "articulates as a system."[125] As a result, sometimes the Court displays symptoms of a sickness located elsewhere in the judiciary. When it comes to the shadow docket, lower courts contribute to the pathology. Vladeck is convincing that the problem of the shadow docket is not *entirely* explicable by the rise of nationwide injunctions,[126] but it is nonetheless an important factor. When a lower court enjoins a major policy nationwide, it puts tremendous pressure on the Supreme Court to intervene and vastly amplifies the importance of the shadow docket. I have written elsewhere that these developments are bad on their own terms—lower courts are doing too much and should generally be more "minimalist" in several senses of that word.[127] The shadow docket furnishes another reason against lower court "maximalism": It often requires the Supreme Court to decide issues in circumstances that do not promote sound decisionmaking.

The broader point is that the problems of the shadow docket are often exacerbated by things external to the Court itself. The shadow docket would be less controversial if lower courts showed more restraint; the Court would not have to face last-minute applications in capital cases if the death penalty were abolished; shadow docket orders might be less consequential if there were a stronger norm in lower courts not to accord them any precedential effect (even of the scarecrow variety). In this vein, one of the best ways to reform the shadow docket would be to curtail judge-shopping in district court, because it contributes to lower court

124. Singleton v. Merrill, 582 F. Supp. 3d 924, 1026 (N.D. Ala. 2022).

125. FRANKFURTER & LANDIS, *supra* note 6, at 3.

126. Vladeck, *supra* note 16, at 153.

127. *See generally* Schmidt, *supra* note 79.

maximalism and puts great pressure on the shadow docket.[128] A large number of the Court's recent emergency stays blocked injunctive relief issued by a plaintiff-picked judge.[129] The shadow docket, in short, sometimes reflects pathologies exogenous to the Supreme Court.

C. *A Note on Transparency*

The "shadow" docket metaphor was meant from the beginning to draw attention to the relative lack of transparency on the shadow docket as compared to the merits docket. When the Supreme Court decides a case on the merits, the opinion is almost always signed by a justice, and the vote count is disclosed. When the Court rules on an emergency application, by contrast, there is no requirement or convention to disclose how the justices voted. It is up to dissenting voters to choose whether to "note" their dissenting votes in a public fashion. As a result, an order on the emergency docket that appears to be unanimous may in fact be 5–4. The same goes for votes on whether to grant certiorari (governed by the Rule of Four). For many shadow docket critics, this is a failure of transparency.

That is true, but I am not convinced it is bad. As David Pozen has argued, "transparency is not . . . a coherent normative ideal" on its own; it is, rather, an *instrumental* value—"a means to other ends."[130] And, when it comes to the Court, it cannot be taken for granted that more transpar-

128. The Judicial Conference has endorsed this reform, Mattathias Schwartz, *New Rule Limits 'Forum Shopping' by Plaintiffs*, N.Y. TIMES, Mar. 14, 2024, at A16, but at least some judicial districts have refused to follow the Judicial Conference's guidance, Mattathias Schwartz, *An Effort to End 'Judge-Shopping' for Plaintiffs Turns Into a 'Political Firestorm*,' N.Y. TIMES, Apr. 7, 2024, at A20.

129. *See, e.g.*, Murthy v. Missouri, 144 S. Ct. 7 (2023) (mem.); Garland v. Blackhawk Mfg. Grp., Inc., 144 S. Ct. 338 (2023) (mem.); Garland v. Vanderstok, 144 S. Ct. 44 (2023) (mem.); Danco Lab'ys, LLC v. All. for Hippocratic Med., 143 S. Ct. 1075 (2023) (mem.). All of these cases were filed in divisions where it was guaranteed that the case would be assigned to a Republican appointee, and all resulted in broad nationwide relief. *See* Complaint, Missouri v. Biden, 680 F. Supp. 3d 630 (W.D. La. 2023) (No. 3:22-cv-01213); Standing Order – SO 1.61, Assignment of Cases (W.D. La. Mar. 16, 2022), https://www.lawd.uscourts.gov/sites/lawd/files/UPLOADS/SO_1.61_2022March16_Signed.pdf [perma.cc/Q6FX-P5WY]; Petition for Judicial Review of Agency Action and Request for Declaratory Judgment and Injunctive Relief, Vanderstok v. Garland, 680 F. Supp. 3d 741 (N.D. Tex. 2023) (No. 4:22-cv-691); BlackHawk Mfg. Grp., Inc.'s Complaint for Declaratory and Injunctive Relief, *Vanderstok*, 680 F. Supp. 3d 741 (No. 4:22-cv-691); Special Order No. 3-337 (N.D. Tex. May 25, 2020), https://www.txnd.uscourts.gov/sites/default/files/orders/SO3-337.pdf [perma.cc/7HPE-ENZ8]; Complaint, All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507 (N.D. Tex. 2023) (No. 2:22-cv-223); Special Order No. 3-334 (N.D. Tex. Sep. 14, 2022), https://www.txnd.uscourts.gov/sites/default/files/orders/3-344.pdf [perma.cc/HD5T-589F].

130. David E. Pozen, *Seeing Transparency More Clearly*, 80 PUB. ADMIN. REV. 326, 326–27 (2020).

ency is an improvement. Relative to the other branches, the Court is a notably nontransparent institution.[131] Justice Frankfurter observed that nontransparency "is essential to the effective functioning of the Court."[132] For instance, the Court's internal deliberations are secret, and the drafting and negotiation of written opinions are secret. Few would advocate for a camera in the conference room due to a justifiable fear it would harm the deliberative process.[133]

The question should be: Is more transparency better in the context of emergency applications, and why? One argument for transparency is that disclosing vote counts would enable holding individual justices accountable for inconsistencies.[134] For instance, if a justice treats conservative and liberal applicants differently on the shadow docket, that difference should be made conspicuous. But there is a countervailing concern. Sometimes it is appropriate for the Court to act in its *institutional* interest. In the emergency context, particularly, it may be salutary for the Court to act in a depersonalized fashion, through per curiam opinions without the exact voting lineup disclosed. Anonymity may allow the justices to vote in a manner that best serves the Court's proper institutional role (or even the role of the judicial system as a whole), rather than in a manner that best coheres with their individual views of the law.[135] This is especially the case when any views expressed are necessarily preliminary and provisional. When justices hastily affix their name to a legal position, it may have the effect of hardening their views and making it less likely that their position will be revisited. When I was in practice, it was quite discouraging when a justice expressed a strong view on the merits at a preliminary stage; it made the merits stage of the case feel futile, at least as to that justice.

One of the beneficial features of the Court's prior shadow docket regime, where justices acted alone on emergency applications, was that it

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131. Katherine Shaw, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 CORNELL L. REV. 1533, 1542 (2016).

132. Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 313 (1955).

133. *Cf.* David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1126 & n.170 (2017). As Justice Breyer said in an interview: "The reason not to have the transparency is that it very important for people to say what they think . . . ." Joan Biskupic, *Stephen Breyer Says Now Isn't the Time to Lose Faith in the Supreme Court*, CNN (Jan. 26, 2022, 1:32 PM), https://www.cnn.com/2021/10/14/politics/stephen-breyer-cnn-interview-supreme-court-georgetown-law/index.html [perma.cc/JP63-7C5K].

134. *See* Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 851–52 (2023).

135. Lawrence Lessig has drawn a similar distinction between fidelity to role and fidelity to meaning, which are both components of judging. LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION 18 (2019). My suggestion here is that anonymized per curiam opinions may encourage fidelity to *role* on the shadow docket.

encouraged the justices to think of their role as custodians of the institution, not as proponents of their individual views. For instance, when Justice Marshall turned aside an emergency application to halt the bombing of Cambodia—despite indicating a personal sympathy for the applicants' position—he wrote: "[W]hen I sit in my capacity as a Circuit Justice, I act not for myself alone but as a surrogate for the entire Court . . . ."[136] That is a healthy attitude. And nondisclosure of votes might help justices think in terms of institutional rather than personal interests.[137]

* * *

Even when a legal question badly needs an answer, we are not always served by rushing one from the Supreme Court. Part of the Court's function is to serve as a "sober second thought of the community,"[138] a function that naturally requires the passage of some time. The Court is seldom at its best when moving too fast. I have tried to suggest how the Court might use its shadow docket in a manner that does not compromise—and may even protect—its ability to avail itself of the perspective that only time can afford.

III. TAKING CERTIORARI SERIOUSLY

By and large, Vladeck presents the merits docket as the norm to which the shadow docket should aspire: The shadow docket should become more transparent and more principled. At times, though, Vladeck gestures toward a more radical thesis—that "the merits docket exists in the shadows of the shadow docket, not the other way around" (p. 276). That is true in a numerical sense; by denying certiorari, the Court turns away many more cases on the shadow docket than it decides on the merits docket. But it is also true in a more subtle sense, because the very existence and form of the merits docket are themselves products of the shadow docket where cert decisions take place.

Seen in this light, there is an irony in much of the discourse around the shadow docket: While that discourse evinces a great distrust of summary and discretionary decisionmaking, that kind of decisionmaking is at the foundation, not the periphery, of the modern Supreme Court. Put another way, the shadow docket is not some foreign malformation that can be readily excised. The shadow docket instead reflects the discretionary power at the very center of Chief Justice Taft's vision of the Court.

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136. Holtzman v. Schlesinger, 414 U.S. 1304, 1313 (1973) (Marshall, J., in chambers).

137. This point may also hold at the merits stage as well. *See* Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 198–201 (2020) (discussing the benefits of having a single, unsigned opinion).

138. Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936).

As a descriptive matter, the Supreme Court has near-absolute discretion to decide what cases it will take and what questions within those cases it will resolve.[139] Those decisions—made almost always on petitions for certiorari—are rarely explained and are not, in any meaningful sense, limited by statutory law.[140] The Court has promulgated a rule purporting to summarize the considerations that will inform its certiorari discretion (for instance, a "conflict" between the courts of appeals).[141] But the rule itself states that it is "neither controlling nor fully measuring the Court's discretion."[142] Virtually everything the Court does on its merits docket stems from an act of nearly limitless discretion.[143]

Public law theory often fails to appreciate this fact; indeed, a number of debates in public law look quite different when one centers the reality of cert. Take, for instance, stare decisis. There is an evergreen argument about the proper role that precedent should play in constitutional adjudication.[144] This debate often takes the form of articulating principled standards that will govern when a prior case should be overruled. Whatever the content of these standards, however, a precedent will never, as a practical matter, be overruled unless the Supreme Court first grants certiorari on the question whether to overrule it.[145] And *that* decision—the cert decision—is not meaningfully constrained by statutory law,

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139. Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 3 (2011); *see* Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793 (2022).

140. When it grants certiorari, the Court will sometimes offer a brief explanation why. *See* Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 924–36 (2022). But at least as a matter of current practice the Court does not consider itself bound to treat like cases alike.

141. SUP. CT. R. 10.

142. *Id.*

143. By discretion I mean "the power to choose between two or more courses of action each of which is thought of as permissible." HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 144 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

144. *See, e.g.*, RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT (2017); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).

145. *See* William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 323–24; Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1731 (2013). In a recent interview, Justice Barrett said, "If you haven't granted cert [review] on [a] question, I don't think originalists are obligated to take everything down to the studs." Jimmy Hoover, *Justice Barrett on Originalism and Why She Doesn't Write So Many Opinions*, LAW.COM (Sept. 21, 2023, 10:04 PM), https://www.law.com/nationallawjournal/2023/09/21/justice-barrett-on-originalism-and-why-she-doesnt-write-so-many-opinions [perma.cc/75ZG-JPCS] (first alteration in original). If that's right, then stare decisis may do its most important work for originalists at the cert stage, not the merits stage.

promulgated rule, or decisional law. No precedent is ever overruled in the Supreme Court except by discretionary choice.[146]

Dobbs is a salient example.[147] Both lower courts had struck down Mississippi's ban on abortion after fifteen weeks, under the Court's then-governing precedents.[148] The state filed a petition for certiorari, asking the Court to decide "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional."[149] The state wrote: "To be clear, the questions presented in this petition do not require the Court to overturn *Roe* or *Casey*. They merely asks [sic] the Court to reconcile a conflict in its own precedents."[150] There was no reason the Court *had* to hear *Dobbs* or *had* to consider whether *Roe* should be overruled. It could simply have denied cert as a matter of discretion, or it could have granted cert but decided only the question *actually* presented.

How, then, are we to evaluate the ultimate *Dobbs* decision? One way would be to analyze the written opinion on the legal merits—that is to say, to analyze whether the opinion comports with traditional modalities of constitutional argument.[151] But those modalities presume the existence of a case to decide; they do not obviously inform the discretionary decision whether to take a case like *Dobbs* in the first place or to transform the case from one about the application of the *Casey* framework to one where the framework itself is on the chopping block. Even if one thinks that, applying the traditional modalities, *Roe* was "egregiously wrong,"[152] it does not necessarily follow that one should vote to grant cert.

Imagine a hypothetical Justice John Hart Ely is sitting on the Court. He believes that *Roe* was wrongly decided on the legal merits fifty years ago.[153] But he supports abortion rights,[154] and he believes that the decision has become deeply entrenched in the constitutional order and engendered reliance interests. Further, in his view, if the Court were to overturn *Roe* based on the happenstance of a single justice's death right before an election, it would corrode the Court's legitimacy and the public

146. There are still small pockets of mandatory jurisdiction; arguably the Court is obliged to revisit its own precedents if it disagrees with them. As a matter of practice, though, the Court has long treated its mandatory jurisdiction in a manner similar to its certiorari jurisdiction. Hartnett, *supra* note 5, at 1708–10.

147. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

148. *Id.* at 2244.

149. Petition for a Writ of Certiorari, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

150. *Id.* at 5 (footnote omitted).

151. *Cf.* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

152. *Dobbs*, 142 S. Ct. at 2243.

153. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

154. *Id.* at 926–27.

perception of an impersonal rule of law. What is our hypothetical Justice Ely supposed to do upon receiving Mississippi's cert petition?

Formalism will not really help to answer that question, for the basic reason that "there is no law to apply."[155] There is no doubt that it would be *permissible*, legally speaking, for Justice Ely to vote against cert (or to insist, if cert is granted, that the Court hew to the question actually presented by the petition). At the merits stage in *Dobbs*, formalism was the rhetorical posture of the majority opinion: *Roe* was an exercise of "raw judicial power" (a phrase the Court used five times), in contrast to the formalist brand of originalism the majority was deploying.[156] The Court had similarly sought refuge in formalism in *Bush v. Gore*;[157] it is an understandable judicial reflex when a court's legitimacy is tested. The law wishes to have a formal existence indeed.[158] But formalism cannot illuminate or domesticate the dark arts of certiorari (at least in its current form). No law required the Court to grant cert in *Bush v. Gore*. And the Court's decision to grant cert in *Dobbs* and transform it into a case about whether to overturn *Roe* could fairly be called an exercise of "raw judicial power."

This is the paradox of formalism in the Supreme Court: Although the Court attaches itself to formalism at the level of rhetoric, the occasions for these formalist exercises (that is, judicial opinions) are only brought into being by acts of total discretion. This paradox is the bequest of William Howard Taft and the Judges' Bill: "[T]he Court would throughout the twentieth century be required to search for ways to justify its decisions

155. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 79-752, at 26 (1945)); *cf.* Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 169–70 (2006) ("The core idea of formalism is that the law (constitutions, statutes, regulations, and precedent) provides rules and that these rules can, do, and should provide a public standard for what is lawful (or not).").

156. *Dobbs*, 142 S. Ct. at 2241, 2260, 2265, 2270, 2279 (quoting Roe v. Wade, 410 U.S. 179, 222 (1973) (White, J., dissenting)).

157. Bush v. Gore, 531 U.S. 98, 111 (2000) ("When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.").

158. Stanley Fish, *The Law Wishes to Have a Formal Existence*, *in* THE FATE OF LAW 159 (Austin Sarat & Thomas R. Kearns eds., 1991).

despite the fact that it was selecting its own cases to serve ends extrinsic to the cases themselves."[159] The search continues.[160]

This is not the place to formulate a theory of cert, let alone a grand theory of how to domesticate the Supreme Court's vast discretion. In the legal process school we can discern the lineaments of one theory. It would begin, not with ever more detailed formal rules to govern certiorari, but instead with judicial role morality.[161] A role-based theory would ask what attributes of character and habits of thought we should cultivate or celebrate in judges exercising discretion on the Supreme Court. By "role" I mean a "cluster of norms (e.g., obligations, powers, permissions) that apply to its occupant, together with virtues and expectations that support those norms."[162] The normative pull of role morality might be summarized with something Justice Breyer is fond of saying: "Just do the job."[163] Be a judge—that is, be true to the cluster of norms that attaches to the judicial office.

One facet of the judicial role, certainly, is the duty to apply the law. But where the "law" in question is a standardless jurisdictional statute, the injunction to "apply the law" is not very helpful. H.L.A. Hart once suggested that judges exercising discretion ought to strive to display "characteristic judicial virtues."[164] For Hart, those were "impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision."[165] The third of these virtues strikes me as geared toward merits decisions, rather than cert, but the first two are sound. To these I would add: intellectual humility in the face of disagreement; some deference to past occupants of the office; a sense

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159. Robert Post, *The Incomparable Chief Justiceship of William Howard Taft*, 2020 MICH. ST. L. REV. 1, 85. One could, of course, reject the need for such a search; one could insist that we must get out from under Taft's shadow and return the Court to an appellate court of last resort. But the Taft vision has enjoyed 100 years of institutional solidity that would be difficult to melt. And, absent some radical structural change, I cannot imagine how the Court could manage its docket as a practical matter without significant discretion, given the sheer number of cases adjudicated each year in lower courts.

160. *See* Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 300 (2023) ("The Justices' responsibility for setting their own agenda is a matter of vast, urgently timely consequence.").

161. *Id.* ("[I]t seems plain that any framework for normative prescription and appraisal [in matters of agenda construction] would need to rely heavily on role-inflected moral norms."); *see* Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1476–77 (2007).

162. Leslie Green, *Law and the Role of a Judge*, *in* LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL S. MOORE 323, 329 (Kimberly Kessler Ferzan & Stephen J. Morse eds., 2016).

163. STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS 64 (2021).

164. H.L.A. HART, THE CONCEPT OF LAW 205 (3d ed. 2012).

165. *Id.*

of caution born of the anomaly of judicial power in a democracy; and a custodial concern for the institutional health of the judiciary and the rule of law more broadly. These virtues might be traced all the way back to the Aristotelian ideal of *phronesis*, usually translated as practical wisdom, good judgment, or prudence.[166] And prudence, of course, was the word Alexander Bickel influentially deployed to describe the responsible discharge of docket discretion in an apex court.[167]

This call to judicial role morality will doubtless seem like weak medicine to some, given the present reality of the Supreme Court. It may feel like a quaint exhortation to an audience that is not listening. Perhaps judicial power can only be finally tamed by power from a superior source.[168] And yet, however the current Court reform battles shake out, there will still at the end of the day be justices on the Supreme Court with decisions to make. And at least those of us in the legal academy will be left to ask what it means to make decisions in a properly judge-like fashion, drawing our sense of "judge-like" from the intellectual traditions of the law or the immanent normativity of our institutions. Some engagement with judicial role morality, then, while not a panacea, is inescapable and therefore worthwhile. Further, putting aside the troubled present, it does not seem wholly naïve to think that a judge's socialization in law school and in the profession, combined with a judge's natural concern for their reputation, can result in ideals of role morality having some shaping force on judicial behavior in the long run.[169]

CONCLUSION

Justice Holmes said that we sometimes need an education in the obvious. Vladeck's book satisfies that need. Here, the "obvious" is the Supreme Court's actual design and operation as an institution. A vast amount of the Supreme Court's work involves highly discretionary and relatively invisible decisions on the orders list. Indeed, though Vladeck's book was occasioned by the recent uptick in activity on the emergency

166. *See* Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003). These qualities of judgment sometimes march under the banner of "judicial statesmanship." *See* Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1322 (2010).

167. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 132–33 (1962); Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985). I hesitate to endorse the word "prudence," because it sounds like a shrinking virtue. Prudence, to my ear, tends to say "no." But *phronesis* (and indeed prudence in the Bickelian sense) is not only about knowing when *not* to fight battles, but also when *to* fight battles.

168. *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021).

169. *See* NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 40–46 (2020); Suzanna Sherry, *Politics and Judgment*, 70 MO. L. REV. 973, 980–81 (2005); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 627–31 (2000).

docket, it invites us to consider more broadly how summary acts of discretion are at the core of the modern Court's identity. Merits decisions continue to dominate public commentary and academic theory about the Court (not to mention legal education). But Vladeck rightly insists that any evaluation of the Court's business must account for *all* of its business.[170]

Public law theory should not float free from the institutional reality in which decisionmakers operate. It is quite startling and refreshing that, in a book about the Supreme Court published in 2023, the word "originalism" does not appear once.[171] For the most part, Vladeck puts aside theoretical and ideologically-tinged debates about legal interpretation in favor of looking at how the Supreme Court actually works. Given the ineradicably multimodal nature of constitutional interpretation, that seems like a promising starting point for critique or reform.[172] *The Shadow Docket*, then, in addition to being stimulating and illuminating on its own terms, portends a useful refocusing of debate about the Supreme Court.

170. *See* Stephen I. Vladeck, *The Business of the Supreme Court: How We Do, Don't, and Should Talk About SCOTUS*, 67 ST. LOUIS U. L.J. 571 (2023).

171. I am grateful to my research assistant, Darleny Rosa, for pointing this out to me.

172. *Cf.* Thomas W. Merrill, *Legitimate Interpretation—Or Legitimate Adjudication?*, 105 CORNELL L. REV. 1395 (2020).