# The docket debate

# Emergency appeals to the Supreme Court are on the rise, giving way to more and more cases in which the Court skips the processes that help explain its work. Is that so bad? A scholar and a judge discuss.

In 2015, University of Chicago Professor Will Baude coined a now-mainstream term: shadow docket.[1] Baude used the term to refer to the Supreme Court's non-merits work, or the collection of orders the justices hand down without the extensive briefing, oral argument, or written opinions we typically associate with the Court's output. Baude suggested this "range of orders and summary decisions . . . [does] not always live up to the high standards of procedural regularity set by [the Court's] merits cases."[2] Empirically speaking, though, merits cases are the exception and not the rule: Merits cases constitute only about 1 percent of the Court's docket. The remaining 99 percent happen on the "shadow docket."[3]

The bulk of this shadow docket is uncontroversial. The Court disposes of things like requests for extensions of time or certiorari appeals without much scrutiny.[4] A debate, though, has centered primarily on one key portion of the shadow docket: the emergency docket, or the group of cases in which the Court is asked to adjust the effect of lower-court rulings *while* a case works its way through the lower courts, but without the procedures usually followed in cases receiving plenary review.[5] The growth in the president's use of emergency appeals (41 times during the Trump administration as compared to just 16 times during the G. W. Bush and Obama administrations combined) gained national attention,[6] as did Justice Elena Kagan's invocation of the shadow docket when she dissented from the Court's denial of a stay on the Texas abortion ban on emergency appeal in September 2021 — well before the Court decided *Dobbs* on the merits. ("[T]his court's shadow-docket decision making," she said, ". . . every day becomes more unreasoned, inconsistent and impossible to defend."[7]) And just this April, Justice Brett Kavanaugh devoted a 13-page concurrence to the subject of the emergency docket — specifically in cases where a party seeks to enjoin a new law's enforcement pending a final merits decision.[8] He concluded that while the Court might be able to "reduce the number" of these kinds of emergency applications, "resolving questions of national importance . . . [would] sometimes require [it] to assess likelihood of success on the merits," despite the disadvantages of that posture.[9]

Where are we now, roughly a decade and three presidential administrations out from Baude's original article? We asked University of Georgetown Law Professor **STEPHEN VLADECK**, author of *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), and Judge **TREVOR N. MCFADDEN** of the United States District Court for the District of Columbia to weigh in.

**In recent years, the Supreme Court's emergency docket or shadow docket has increasingly become the subject of attention from academics, judges, and practitioners. What is this docket, and why has it become such a topic of interest, as well as the subject of criticism from some corners?**

**VLADECK**: The shadow docket is an umbrella term coined by University of Chicago professor Will Baude in 2015 to describe *all* of the orders the Supreme Court hands down without briefing, argument, or written opinion — not just orders with respect to emergency applications but also orders granting or denying certiorari petitions, and other rulings, as well.[10] Baude contended that it's impossible to fully understand how the Supreme Court operates *without* understanding and paying attention to what the Court does through unsigned and usually unexplained orders — which comprise more than 99 percent of the Court's rulings. These rulings can play a critical role not only in their own right but also in shaping the 60ish decisions that the justices hand down each term after briefing and argument through the merits docket.

The term shadow docket thus encompasses the full range of these orders. But part of why it has become ▸

a lightning rod in recent years is because of the quantitative and qualitative shift in one small but significant slice of it — rulings respecting emergency applications. Since the mid-2010s, the full Court is *granting* more requests for emergency relief than it has across any comparable period in its history, and the *nature* of the grants has changed. As recently as 15 years ago, even when the Court granted emergency relief, it was usually in death penalty cases — in which the justices' intervention paused (or unpaused) an execution. As significant as those rulings were, they tended not to have broader consequences for statewide or nationwide policies.

In contrast, since 2016, the Court has regularly granted emergency relief with far *broader* effects — from blocking President Barack Obama's Clean Power Plan in 2016 to unblocking an array of President Donald Trump's immigration policies to striking down state and federal COVID mitigation measures to allowing Alabama and Louisiana to use congressional district maps that the Court would later conclude likely violated the Voting Rights Act. But even as the effects of these interventions have broadened, the Court has hewed to its older norms in such cases — of not (generally) holding argument, not receiving full briefing, and not providing a rationale to justify its decision. In other words, the shadow docket has become a far more significant place for the Supreme Court to hand down decisions that affect all of us — in contexts in which we're often left to speculate as to why the justices ruled as they did.[11]

**MCFADDEN**: Professor Vladeck is right about the origins of the term shadow docket. But, as he points out, most people are really interested in the emergency applications, not the numerous orders granting extensions of time or denying petitions for writs of certiorari. Using the term shadow docket when we're really talking about the Court's emergency docket is both confusing — because it's over-inclusive — and misleading, because it conjures images of something sinister or foreboding. In reality, most courts have a docket to handle matters that require expedited treatment.

**VLADECK**: A big part of why I wrote my book was to reframe not just discussions about the shadow docket, but also discussions about the Supreme Court in general — to include the enormous amount of power and discretion that the shift toward certiorari jurisdiction has conferred upon the Court, and how that power and discretion ought to inform our understanding of everything that the contemporary Court does. So while "most people" might "really" be interested in the emergency applications, that, to me, is only further evidence of the need for broader public awareness of the *full* ambit of what the Court does through procedural orders. Just because things are opaque doesn't mean that they are necessarily nefarious.

### Why has the Court increased the frequency with which it provides emergency relief?

**MCFADDEN**: There's no easy explanation for this trend, although I see a few likely contributing factors. First, the rise in emergency docket relief has followed a similar rise in so-called "nationwide injunctions" issued by lower courts.[12] These injunctions, which typically halt or mandate a federal executive branch policy, were virtually unheard of 25 years ago.[13] But then six nationwide injunctions were issued during George W. Bush's presidency, 12 during Barack Obama's (both lasting eight years), and 64 during Donald Trump's

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tenure.[14] Already during President Joe Biden’s administration, district courts have issued 14 more.[15] It’s not surprising that recent solicitors general have responded to these sweeping injunctions — which often involve high-profile presidential priorities — by urgently seeking Supreme Court intervention. Nor is it surprising that the Court has often obliged these requests.

Relatedly, the rise in executive orders and other robust uses of presidential or gubernatorial power has paralleled emergent situations like COVID and spikes in illegal immigration.[16] These actions, generally taken without explicit legislative approval, can be vulnerable to challenge in court. But the very nature of these urgent situations means that the executive branch — regardless of political party — is likely to seek quick review of an adverse ruling. And the Court, understandably uncomfortable forcing the litigation to play out in the normal lengthy process, will likely rule quickly on these emergency petitions.

Finally, the uptick in emergency cases caused by these factors and the attendant publicity have encouraged parties to seek emergency review in other matters that would typically have waited for the merits docket. In short, the emergency docket’s “open for business” sign is visible in a way that it wasn’t a decade ago. More publicity means more applications for relief, which in turn leads to more grants and more publicity.

**VLADECK**: Even during the Trump administration, a majority of the federal government’s 41 applications for emergency relief were *not* challenging nationwide injunctions. And the hostility of certain justices to nationwide injunctions during the Trump presidency has not necessarily continued during the Biden administration. To that end, I give a fair amount less weight to the role of nationwide injunctions in this shift than others.[17]

In that sense, though, I suspect that Judge McFadden and I differ only in the relative weights that we might assign to each of the possible causes he identifies. I believe the “open for business” point he makes has been a major part of this phenomenon. As the Court increasingly granted emergency relief in 2019, 2020, and 2021 in contexts in which it hadn’t done so before, I think that necessarily invited both more requests overall and more novel contexts in which those requests were brought. And as the justices increasingly provided relief that they had historically viewed as “extraordinary,” and in contexts in which the traditional criteria for emergency relief might not have been satisfied, it necessarily became less extraordinary for the justices to do so.

**In *The Shadow Docket*, Professor Vladeck writes that the “rise of the Court’s discretion over its docket coincided with the birth of what’s generally viewed as ‘modern’ constitutional law.” How do you both see — or not see — this evolution?**

**VLADECK**: Until 1891, the Supreme Court had no control over its docket. If the justices had jurisdiction over a case, they *had* to hear it. That meant not only that the Court’s docket became increasingly unmanageable as federal litigation skyrocketed after the Civil War, but also that the justices were inevitably engaged in triage — more like trial judges trying to clear their docket than constitutional court jurists taking a longer view on the biggest questions of the day.

As Congress gradually gave the justices more control over which appeals they heard, culminating in the Judiciary Act of 1925, the argument for doing so was to allow the Court to step back from ▸

the fray of ordinary judicial business — to better function as a constitutional court. So that evolution was *intended*. And I think history has borne that out. As others, like Professor Ed Hartnett, have pointed out, the Court's discretion to choose which cases to resolve facilitated the justices' ability to stake out new frontiers in constitutional law — largely because they didn't have to worry about opening their own floodgates.[18] Holding, for instance, that the Fourth Amendment applies to local and state governments would not require the Court to take hundreds (or even thousands) of cases fleshing that out; they could leave that job to the lower courts. That's not to condone or condemn this transformation, but it certainly seems like far more than a coincidence.

**MCFADDEN**: We should avoid conflating correlation and causation here. It may be true that modern constitutional law was born around the time of the Judiciary Act — though even that is far from clear. But if so, I think other factors likely explain it. Professor Vladeck's examples (the rise of judicial deference on economic issues and increased protection of individual rights)[19] have little to do with the advent of certiorari jurisdiction and more to do with the advent of the New Deal Court — a Court whose justices were overwhelmingly liberal and were closely aligned with President Franklin Roosevelt.[20] It is hard to view these doctrinal shifts as anything other than a realignment toward FDR's policies and away from the perceived excesses of the *Lochner* era. Would the outcomes in cases like *Wickard v. Filburn* and *Mapp v. Ohio* be different in the absence of certiorari? That seems doubtful. Certainly nothing stopped the *Lochner*-era Court from being a vigorous defender of its favored rights, despite its more limited certiorari jurisdiction. This transition of the Court's role, from "aggressive judicial protection of economic rights" to protection of "individual rights and subordinated minorities,"[21] likely was not the result of the Court's certiorari jurisdiction but rather the victory of Justice Louis Brandeis' approach to judging, which emphasized the importance of individual autonomy and became "incorporated into the basic fabric of American public law" in the 1930s and beyond.[22]

**VLADECK**: In a world in which the justices had no control over their docket, (1) they'd have less time and resources to devote toward developing and expanding upon new legal (and constitutional) principles; and (2) any decision *articulating* such a new principle would immediately provoke a flood of new appeals seeking application thereof, which the justices couldn't avoid. Given that some of the Court's current justices have pointed to the lack of comparable concerns about floodgates in defending the articulation of new constitutional rules today,[23] it seems a bit dismissive — and inconsistent with the scholarship of Professor Hartnett and others — to see *no* connection here, even if, as Hartnett (and I) concede, other shifts were also at play.

**How should judges and litigants in ongoing cases approach these emergency or shadow docket decisions? Among other considerations, should these decisions be treated as precedential?**

**MCFADDEN**: Emergency docket decisions generally fall into three main buckets.[24] In the first are decisions accompanied by a majority opinion explaining the Court's reasoning.[25] These opinions are fully precedential, as demonstrated by the Court's important COVID religious freedom ruling, *Roman*

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*Catholic Diocese of Brooklyn v. Cuomo*.[26] That decision has now been cited by lower courts hundreds of times and formed the basis for the Court’s subsequent reversal of several Ninth Circuit decisions on state COVID orders.[27] Of course, expedited decisions may not address some issues with the normal comprehensiveness of an opinion in an argued case, so lower courts should be wary of reading too much into drive-by assertions.[28] But where the Court speaks clearly, the precedential value of the holding is not diminished simply because it arose on the emergency docket.

In the second bucket are grants of emergency relief unaccompanied by an opinion of the Court. I think these orders are most comparable to the Court’s summary affirmances, which are precedential only as to those findings the Court necessarily made to enter the order.[29] Given that emergency docket relief invariably involves a multifactor analysis, it will usually be difficult to tell what the Court’s holding on any particular factor may have been. Still, the order may require some implicit finding by the Court, like whether the plaintiff has stated a plausible claim. At the very least, lower courts should think hard before entering contrary orders on substantially similar cases.

The final bucket involves unexplained denials of emergency stays. These carry no precedential weight and do not necessarily reflect any agreement with the decision of the lower court.[30] Similarly, opinions by less than a majority of the Court are not precedential, although they can certainly have persuasive authority, just like other solo opinions.

**VLADECK**: Judge McFadden’s proposed taxonomy makes a lot of sense. The problem is that the justices themselves don’t seem committed to following it — especially the second “bucket.” Consider the Court’s February 2021 grant of an emergency injunction in *South Bay II (South Bay United Pentecostal Church v. Newsom)*.[31] Although several separate concurrences and dissents accompanied the order, no “opinion of the Court” or majority rationale explained the Court’s (mixed) disposition. And yet, within days, the Court issued “grant, vacate, remand” orders (granting certiorari, vacating lower-court rulings, and remanding for further consideration) “in light of” *South Bay II*.[32] In other words, the Court was treating the decision in *South Bay II* as if it had clearly decided an issue.

And in *Gateway City Church v. Newsom*, the Court chastised the Ninth Circuit for not following *South Bay II*, noting that the outcome of a challenge to Santa Clara County’s COVID-based restrictions on religious services was “clearly dictated” by *South Bay II*, even though there were plausible (if not substantial) arguments that Santa Clara County’s restrictions were far more carefully tailored.[33] When the Supreme Court tells a lower court that its ruling was “clearly erroneous” because it failed to properly read the tea leaves and piece together what different coalitions of justices said in separate opinions (in a case that wasn’t fully briefed or argued in the first place), that strikes me as a real affront to any coherent framework for precedential effects.[34]

More generally, I think it says a lot — little of it good — when a district judge and their colleagues on the court of appeals invest their limited resources in full-throated rulings on, among other things, preliminary injunctions, only to have those rulings undone by an unsigned, unexplained order from the Supreme Court. In the Louisiana redistricting case, for example, the district court, after conducting a multiday evidentiary hearing, wrote a 152-page opinion exhaustively setting forth ▸

its factual findings and legal conclusions. The Fifth Circuit contributed 33 pages of its own respecting its denial of Louisiana's stay application. The justices froze those rulings with a single sentence — and then later ended up adopting a form of the district court's reasoning on the merits.[35] So even beyond the specific question of precedential effects, there are, in my view, broader institutional concerns about the relationships between lower courts and appellate courts when the latter are repudiating the former without telling them why.

**MCFADDEN**: I'd respectfully disagree with Professor Vladeck's characterization of *South Bay II*. Justice Neil Gorsuch, speaking for three justices, explained the Court's basis for its order.[36] And Justices Amy Coney Barrett and Brett Kavanaugh explicitly seconded his reasoning, save one caveat.[37] So I wouldn't agree that there was no majority rationale. Under standard *Marks v. United States* principles,[38] Justice Gorsuch's opinion was controlling, except for the caveat Justice Barrett flagged. And in subsequent cases, the Supreme Court clearly believed that lower courts were defying its holdings in *Diocese of Brooklyn* and *South Bay II*.

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**VLADECK**: With sincere respect to Judge McFadden, I'm unaware of any prior example in which the Supreme Court has applied "standard *Marks* principles" to an order on an emergency application. If the Court wants one of those orders to produce precedential effects, there is no obvious reason why it can't (or shouldn't have to) produce even a brief majority opinion explaining what that precedent *is* — as it did in both *Roman Catholic Diocese of Brooklyn v. Cuomo* and *Tandon v. Newsom*.

**Professor Vladeck, in your book you explain that you view the "story of the shadow docket" as part of "a broader narrative about the importance of involving and investing the public in understanding the technicalities of legal process itself." How do each of you understand this docket's relationship to public engagement with the Court's decision-making? Do you think that extensive use of the docket "hides the ball" from the public?**

**VLADECK**: I don't think that the Court intentionally "hides the ball" from the public, but I do think that there are lots of ways in which the Court's internal norms have the effect of making its rulings far harder to understand (or even find — since shadow docket rulings can come at almost any time and can appear on any one of five different pages on the Supreme Court's website).

Consider, in this respect, the Court's 5–4 ruling in January 2024 that allowed the Biden administration to continue removing razor wire that Texas had placed along the U.S.–Mexico border — vacating an injunction pending appeal that had been issued by the Fifth Circuit. There was no explanation, either from the majority or the dissent, about *why* the Fifth Circuit's injunction could not stand.[39] This led to significant public confusion, from both ends of the ideological spectrum, about what the Court had held (and whether subsequent actions by Texas Governor Greg Abbott were "defying" the Court). If you multiply that confusion by the increased

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frequency with which the Court has granted emergency relief in recent years (mostly with no more explanation than the order in the razor-wire case), then I think it's reasonable to worry about the public's ability to fully engage with the Court's decision-making. To be sure, it's not realistic, given the current nature of the Court's docket, to expect justices to always provide explanations. But it ought not to be a controversial view that, at least when the Court is granting emergency relief (and thereby upsetting the status quo relative to how the dispute reached it), it is incumbent upon the justices to provide at least a modicum of explanation to set out what they did — and didn't — decide.

**MCFADDEN**: Legal commentators have levied many complaints about the emergency docket over the last few years, including the time of day the order is issued, which part of the Court's website the orders are posted on, and the lack of oral argument before a decision. These complaints are difficult to take seriously if one accepts that these matters may in fact be urgent. Indeed, these complaints have largely died down now that a new administration is the main beneficiary of the emergency docket. That change suggests that the real objection was to the outcomes of the orders, not their form.

The most compelling objection to the emergency docket is that these orders typically — although not always — come without an opinion from the Court. Dissenting justices also made this complaint in the past. I agree with Professor Vladeck that this is a frustrating feature, and I think it exacerbates the likelihood of confusion and the risk that a dissenter or commentator will misconstrue the decision. However, I imagine this practice is driven by the difficulty of crafting an opinion that satisfies a majority of justices on an emergency timeline, especially given the precedential implications that I described. An unexplained order has the advantage of enhancing the justices' ability to later change their minds or at least tweak their reasoning with the benefit of full briefing and oral argument.[40]

**VLADECK**: I can't speak for others, but many of my concerns about the Court's behavior on emergency applications have persisted even as the results have started to break down less uniformly along ideological lines. Again, the razor-wire ruling is a good example. There will always be emergencies that force the Court to act by a specific date and time — a scheduled execution, an impending election, a challenged state or federal law going into effect. But plenty of these rulings are coming in contexts in which there is no ticking clock — or in which the justices could pause the clock (through an "administrative" stay) to buy themselves more time. The notion that the Court should be excused from writing in those cases because it's hard to coalesce around a rationale for its intervention strikes me as underscoring the problem, not defending it.

**What do you foresee as the future for the emergency docket? Should we expect to see its use contract, expand, or stay roughly the same moving forward?**

**MCFADDEN**: The emergency docket is not going anywhere anytime soon. It acts as a necessary and important safety valve for supervising lower courts' own emergency dockets.

That said, a nine-member collegial court whose pronouncements carry outsized implications for the law is not well-suited to making quick decisions on novel and controversial matters. So it's fair to suspect that the Court would ▸

prefer to minimize the use of the emergency docket.[41] Indeed, despite all the attention paid to the emergency docket, the only litigant who has repeatedly found a receptive audience there is the solicitor general.[42]

We may see other developments, too. Recently, the Court has occasionally moved cases off the emergency docket by granting certiorari and setting an expedited briefing and argument schedule.[43] More radical changes could involve the creation of a nonprecedential unpublished docket, like those used by federal appellate courts to quickly dispose of more straightforward matters, or the return of circuit justices' in-chambers memorandum opinions. These changes would address complaints that the Court uses equitable powers in sensitive cases without providing reasoning. They would also avoid the precedential drawbacks that come from a per curiam opinion issued under tight timelines with limited briefing.

**VLADECK**: I agree with Judge McFadden that the Court's behavior already suggests — at least in some respects — that the justices are trying to have fewer major disputes resolved entirely through emergency applications. As just one data point, after going 15 years without granting a single petition for certiorari "before judgment" (i.e., leapfrogging over a federal court of appeals), the Court since February 2019 has granted 21 of them — expediting the justices' review. These grants often come at the same time as, or in lieu of, a ruling on an application for emergency relief. That pattern may raise concerns all its own, but it certainly testifies to at least some discomfort inside the Court about deciding so much through the emergency docket.

That said, when the Court is resolving emergency applications, it is still regularly reflecting what, to me, are the most troubling pathologies of the past seven years — rulings with no explanation even when granting emergency relief; at least anecdotal evidence that the Court is behaving inconsistently in cases in which the only obvious difference is the partisan valence of the dispute; and interventions in contexts in which, as recently as the mid-2010s, the Supreme Court would surely have left the question of emergency relief to the lower courts. I suspect that we'll see marginal contraction in the use of the emergency docket as the justices find other ways of dealing with the tensions that are pushing them to act in this respect. But the larger point is that we ought to have a broader conversation about the entirety of the Court's docket and the pressures being placed on it by broader shifts in public policy, politics, and litigation — and whether there are reforms not just for the justices to undertake on their own but also for Congress (which exercised far more control over the Court's docket until 1988) to pursue. For instance, since the beginning of the October 2019 term, the Court has been deciding fewer "merits" cases than at any point since 1864. That may seem surprising given how significant the decisions handed down have been, but it's a broader trend that doesn't get enough attention or discussion because we tend not to look at these broader, institutional features of the Court's behavior.

Ultimately, the Court's uses (and, in my view, abuses) of the shadow docket in recent years are symptoms of a broader disease — one in which

1 *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1 (2015).
2 *Id.* at 1, 4.
3 *See* Jennifer Szalai, *Casting a Bright Light on the Supreme Court's 'Shadow Docket,'* N.Y. Times (May 17, 2023).
4 *See* Pablo Das, et al., *Deep in the Shadows?: The Facts About the Emergency Docket*, 109 Va. L. Rev. O. 73, 77 (2023) (describing the general lack of controversy over the majority of the Supreme Court's emergency docket).
5 *See* Nken v. Holder, 556 U. S. 418, 432 (2009) (explaining the irreparable harm factor).
6 *See* Szalai, *supra* note 3.
7 Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting)
8 Labrador v. Poe, No. 23A763, slip. op. at 4–5 (Apr. 15, 2024) (Kavanaugh, J., concurring in the grant of stay).
9 *See id.* at 13, 1.
10 *See* Baude, *supra* note 1.
11 *See generally* Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic (2023).
12 *E.g.*, Labrador v. Poe, No. 23A763, slip. op. at 4–5 (Apr. 15, 2024) (Gorsuch, J., concurring in the grant of stay).
13 *See* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 Harv. L. Rev. 920, 943–54 (2020) (identifying almost no such injunctions from 1890 to 2001). In describing this trend, I don't opine on the legality of nationwide injunctions in general or in any particular case.
14 *Developments in the Law—District Court Reform: Nationwide Injunctions*, 137 Harv. L. Rev. 1701, 1705 (2024); *see also* Jeffrey A. Rosen, Deputy Att'y Gen., U.S. Dep't of Just., Opening Remarks at the Forum on Nationwide Injunctions and Federal Regulatory Programs (Feb. 12, 2020) (slightly different numbers).
15 *Id.*; *e.g.*, Garland v. Vanderstok, No. 23A82, 2023 WL 5023383 (Aug. 8, 2023); Murthy v. Missouri, No. 23A243, 2023 WL 6935337 (Oct. 20, 2023).
16 Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 Harv. L. Rev. 937, 992 (2022) ("Every modern case in which a federal court has issued a nationwide injunction involves presidential or administrative action; none includes an act of Congress.").
17 *See, e.g.*, Vladeck, *supra* note 11, at 131–32.
18 *See, e.g.*, Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 Colum. L. Rev. 1643, 1730–34 (2000).
19 Vladeck, *supra* note 11, at 51–52.
20 *See* Cliff Sloan, The Court at War: FDR, His Justices, and the World They Made 1–3 (2023) (surveying President Franklin Roosevelt's judicial appointments).
21 Vladeck, *supra* note 11, at 51–52.
22 Robert C. Post, The Taft Court: Making Law for a Divided Nation, 1921–1930, at xxvii–xxx (2024).
23 *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1419 (2020) (Kavanaugh, J., concurring in part).
24 *See generally* Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 Harv. J. L. & Pub. Pol'y 827 (2020).
25 *Id.* at 853.
26 592 U.S. 14 (2020).
27 *See, e.g.*, Tandon v. Newsom, 593 U.S. 61, 62 (2021).

Congress has all but abandoned its constitutional role in helping to shape the Court's agenda. We may never agree on how to best strike the balance between congressional engagement with the Court and judicial independence (although my book offers some specific suggestions), but it seems clear, if nothing else, that the consequences of Court dockets left entirely to the justices' own devices are worth at least discussing.

**MCFADDEN**: Other than disagreeing with the merits of certain decisions and calling for the Court to elaborate on its orders, I don't understand what changes Professor Vladeck would suggest to the emergency docket. Surely he doesn't propose doing away with it altogether. That would virtually guarantee that future administrations would be governed by forum-shopped lower courts on an array of sensitive and urgent political matters. Lower court litigation can and frequently does outlast administrations, stymieing presidential initiatives.

Nor do I agree with suggestions that the Court is acting in a partisan manner. Professor Vladeck has elsewhere noted the Biden administration has had a "remarkably" positive record in requests for emergency relief. Given the number of lower court orders with sweeping political implications, solicitors general of both parties are likely to remain the primary beneficiaries of the emergency docket. Perhaps that is fitting for an officer often described as the "tenth justice."

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28 *See* Bryan A. Garner et al., The Law of Judicial Precedent 214–15 (2016).
29 *See id.* at 46, 217–18.
30 Indiana State Police Pension Tr. v. Chrysler LLC, 556 U.S. 960, 960 (2009) (per curiam).
31 S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) ("South Bay II").
32 *See, e.g.*, Gish v. Newsom, 141 S. Ct. 1290 (2021).
33 Gateway City Church v. Newsom, 141 S. Ct. 1460, 1460 (2021).
34 *See* Tandom v. Newsom, 593 U.S. 61, 64 (2021) (per curiam) (referring to principles established by the Court's prior "decisions" in the unsigned, unexplained orders cited in the last three endnotes).
35 *See* Ardoin v. Robinson, 142 S. Ct. 2892 (2022). For the lower court rulings, see Robinson v. Ardoin, 605 F. Supp. 3d 759 (M.D. La.), *stay denied*, 37 F.4th 208 (5th Cir. 2022).
36 South Bay II, 141 S. Ct. at 717–20.
37 *Id.* at 717.
38 Marks v. United States, 430 U.S. 188, 193 (1977).
39 Dep't of Homeland Security v. Texas, No. 23A607, 2024 WL 222180 (Jan. 22, 2024).
40 *See* Labrador v. Poe, No. 23A763, slip op. at 11–12 (Apr. 15, 2024) (Kavanaugh, J., concurring in the grant of stay) (discussing the "lock-in effect" of "[a] written opinion by this Court assessing likelihood of success on the merits at a preliminary stage"). A supermajority of the Court seems to agree that the rise in emergency docket relief is not ideal. *See* Labrador v. Poe, No. 23A763, slip op. at 10–13 (Apr. 15,2024) (Gorsuch, J., concurring in the grant of stay); *id.*, at 12–13 (Kavanaugh, J., concurring in the grant of stay); *id.* at 7–8 (Jackson, J., dissenting from grant of stay).
41 *See, e.g.*, Does 1-3 v. Mills, 142 S. Ct. 17, 17–18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief).
42 *See generally* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123 (2019); *see also id.* at 161–63 (collecting data through 2019).
43 *E.g.*, Whole Woman's Health v. Jackson, 142 S. Ct. 415, 415–16 (2021).