

THE UNITED STATES SUPREME COURT'S SHADOW DOCKET:
PROCEDURE AND IMPLICATIONS

by

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Despite numerous criticisms of the Supreme Court in recent years, the emergence of the “shadow docket” presents one of the largest existential threats to the Court’s legitimacy and the democratic system writ large. The shadow docket is a term to describe rulings on procedural matters and emergency applications. Through case studies of *Tandon v Newsom* and *Whole Women’s Health v Jackson*, this thesis examines the emergence of the shadow docket, how it undermines traditional legal procedures and norms, and the multifaceted implications of this practice. The results indicate that the shadow docket is being used to create new legal interpretations and undermine existing precedent such as *Roe v Wade* and *Employment Division v Smith*, all without the Court practices that have legitimized controversial decisions for centuries. The findings of this thesis emphasize the need to increase Court transparency and accountability in order to preserve the system of checks and balances.

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Introduction

The Supreme Court is no stranger to controversy. Throughout its tumultuous history, it has decided some of the most pressing questions on issues ranging from interstate commerce to civil rights. It has been condemned for catastrophes like *Dred Scott v Sandford* (1857) and praised for expanding rights in cases like *Gideon v Wainwright* (1963). More often, the Court's decisions split America right down the middle, igniting fierce debate and sometimes even violence. *Brown v Board of Education* (1954) and *Roe v Wade* (1973) exemplify the power of the Court to dominate the national discourse for decades. Yet through all of these controversies, the Court has been mostly successful at hiding behind two key defenses: process and procedure. Critics are admonished by the Justices to “read the opinion”¹ and ignore the “false and inflammatory”² accusations against them. However, can the American people *read an opinion* that is barely *one paragraph* long? Especially when that opinion is dropped at 11:56 pm the night before Thanksgiving with no public warning?³ How can they track the Court's legal reasoning without publicly released oral arguments?

These practices are all typical of the Supreme Court's “shadow docket.” The shadow docket is a term describing rulings on the Court's emergency docket, such as last-minute petitions to halt an execution, issue an injunction, or grant a stay. Americans are taught that the Supreme Court follows a rigorous procedure, complete with briefings, oral arguments, and written opinions. Yet all of these procedural safeguards do not apply to the shadow docket. And while some Justices love to claim that this is an innocuous, boring, misunderstood procedural function, it has had real and lasting impacts on jurisprudence and American society as a whole.⁴

¹ Amy Coney Barrett Speech at the Ronald Reagan Presidential Library, April 7, 2022.

² Casey Smith, *A “Dangerous Cabal”? Alito Says High Court is No Such Thing*, (The Associated Press, 2021).

³ *Roman Catholic Diocese of Brooklyn v Cuomo*, 592 U. S. ____ (2020).

⁴ Casey Smith, *A “Dangerous Cabal”? Alito Says High Court is No Such Thing*, (The Associated Press, 2021).

This thesis will examine the emergence of the shadow docket as a partisan tool, how it is used, and the impact it has had. In order to accomplish this, the thesis will analyze and compare two recent and significant shadow docket cases: *Tandon v Newsom* (2021) and *Whole Women's Health v Jackson* (2021). Though these cases cover different areas of law, free exercise and abortion, respectively, they share a key common trait. Both of these cases undermined decades worth of case law in brief, unsigned opinions and had tragic consequences for those affected by their rulings. Focusing on two very recent and impactful cases in distinct areas of the law in this thesis allowed for in-depth analysis. However, it is important to add that there are many consequential shadow docket cases in areas ranging from election law to the limits of executive power.

In addition, I only chose cases involving emergency applications for injunctions and stays, not petitions for writs of certiorari. This is because petitions for writs of cert are a regular part of Supreme Court behavior, and they receive too many petitions of cert every year to have a full hearing on them. Furthermore, denying cert only results in the lower court's decision standing, whereas injunctions and stays often overrule the lower courts and have an immediate and distinct impact on the legal landscape. Nor did I select emergency death penalty petitions, even though they are on the emergency docket. Again, the Court has no tradition of holding a full hearing on these cases, and rarely if ever grants a stay. The regularity of death penalty decisions and their consistent procedure therefore exempt them from analysis in this thesis.

I selected *Tandon v Newsom* for several reasons. First, the case pertained to the Covid pandemic, which saw a spike in shadow docket cases. I wanted to use the case to analyze whether or not the shadow docket was purely a pandemic phenomenon. More importantly, *Tandon* is notable because it fatally undermined longstanding precedent. The shadow docket is

not supposed to be used for consequential cases with new legal questions, nor are shadow docket cases supposed to be used as precedent themselves. *Tandon* broke both of these rules. And because it received less public attention at the time, it provides a useful contrast to some of the more publicized shadow docket decisions. *Tandon* exemplifies the subtle, often unrealized consequences that shadow docket cases can and do have.

I chose *Whole Women's Health* because of the intense public backlash to the decision. The ruling received a significant amount of attention from the national press and was therefore helpful to track the potential impact that the shadow docket has on the Court's public image. Furthermore, the legal chaos and controversy resulting from the ruling had tragic impacts for women in Texas seeking an abortion. Hence, the case offered the opportunity to interrogate which factors the Court analyzes in coming to its decisions, and how harmful shadow docket decisions can be.

The shadow docket is just one of several criticisms that has been lodged against the Court in recent years, but it is arguably one of the most pernicious practices of the modern institution. This thesis will break down the history, emergence, and current controversy surrounding this procedure in order to determine the scope of the problem and how it could potentially be remedied.

The Court's Institutional Setting

The Supreme Court of the United States operates with few explicit constitutional guard rails. The scope of their power is derived from a patchwork of early laws and the court's own interpretation. The Framers did not anticipate the modern role of the court, as "neither the words of the constitution nor the provable intent of those who framed and ratified it justified in 1790 any certitude about the scope or finality of the Court's power to superintend either the states or

Congress.”⁵ In contrast to Article 1’s detailed 8 sections on Congressional power, the entire judiciary is defined in Article 3 in just 3 sections. Section 1 states:

“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”⁶

Notably, Section 1 grants Congress the power to establish and regulate the judiciary, providing a key check. However, the scholarly consensus is that the Framers did not fully conceptualize the full power of the court. Robert McCloskey’s classic book on the Court admits that “the constitution has comparatively little to say about the Court or the federal judiciary in general.”⁷ Hence, most of the power and processes used by the Court today were established by Congress or by the Court itself.

In fact, the seminal work conceptualizing the Court underestimated the power of the institution. In Federalist 78, Hamilton imagined the court as the “least dangerous to the political rights of the constitution.”⁸ The executive “holds the sword of the community,” while the legislature “not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated.”⁹ The Court, however, has “neither Force nor Will, but merely judgment” and “can take no active resolution whatever.”¹⁰ The Supreme Court therefore does not have either budgetary power or enforcement mechanisms to compel the people to follow its judgements. Instead, the Court relies on norms of legitimacy to have its decisions

⁵ Robert McCloskey, *The American Supreme Court* (University of Chicago Press, 1994), 5.

⁶ U.S. Const. Art. 3 § 1

⁷ Robert McCloskey, *The American Supreme Court* (University of Chicago Press, 1994), 3.

⁸ Alexander Hamilton, Federalist 78 (1788).

⁹ Ibid.

¹⁰ Ibid.

respected. Should a President refuse to recognize a ruling, the Court is essentially powerless to respond. Andrew Jackson, for example, is infamous for having ignored the decision in *Worcester v Georgia* (1832), instead supposedly declaring “John Marshall has made his decision, now let him enforce it.”¹¹

The first major piece of legislation on the Supreme Court was the Judiciary Act of 1789. Section 25 outlined an unprecedented expanse of federal power by allowing the Court to “reverse or affirm state court decisions which had denied claims based on the federal constitution, treaties, or laws.”¹² The Court was really defined by John Marshall’s “masterful sense of strategy” in deciding *Marbury v Madison* and articulating the power of judicial review.¹³ In one decision, artfully crafted to avoid political blowback, Marshall formally gave the Court the power to arbitrate Constitutional questions.

The Supreme Court must balance this tension between the exceptional power of judicial review with its reliance on legitimacy. Hypothetically, this need for external respect should constrain the actions of the Court and prevent it from stepping too far out of line with the public opinion. This was the traditional understanding of the Court, but recent scholarly literature has begun increasingly to critique judicial review and the institution itself.

Scholarly Understandings of the Court

The idealistic interpretation of the Court is epitomized by Rostow’s *The Sovereign Prerogative*. Rostow, a former dean of Yale Law, views the Court not in opposition to popular sovereignty, but an important partner of the people. He argues that “the judges... are partners

¹¹ Jeffrey Rosen, *Court History* (Public Broadcasting Service, 2006).

¹² Robert McCloskey, *The American Supreme Court* (University of Chicago Press, 1994), 3.

¹³ Robert McCloskey, *The American Supreme Court* (University of Chicago Press, 1994), 27.

with us, the citizenry, in an agreed procedure for reaching responsible decisions.”¹⁴ Scholars like Rostow tend to give significant discretion to judges, assumed to “represent the honorable attempt of honorable judges, sensitive to their calling, to do their duty as judges, not as legislators or as rulers by fiat.”¹⁵ This sympathetic view is reflective of the Court’s mythology as a quasi-religious institution, led by noble men with almost god-like power to parse out constitutional questions. Attitudes like those professed by Rostow shield the Court from accountability by placing exceptional trust in the people and processes of the institution. Remarkably, Rostow agrees with the “cold but correct proposition that we should obey an erroneous construction of the law-- even one lacking legal quality-- until it is changed.”¹⁶

The scholarly framework of popular constitutionalism, as articulated by Larry Kramer, repudiates the idea of such an imperial judiciary. Kramer argues that the modern Supreme Court has been essentially emboldened in recent years by a culture of permissiveness. He claims that there is a tendency “to portray opposition to the court as something rare, exceptional, dangerous, and revolutionary: an act of civil disobedience to properly constituted authority.”¹⁷ This has led the Court to underestimate and undervalue their most important check: the people. This allows the Court to overreach and expand its power, as “a court that embraces a philosophy of judicial supremacy and claims to be the Constitution’s sole authoritative expositor will reach farther and do more than a court that does not.”¹⁸ If the Court views itself as unassailable, it may be more willing to transgress on long standing norms and procedures. While Kramer wrote his theory in 2005, long before the modern iteration of the shadow docket, his framework is important context

¹⁴ Eugene Rostow, *The Sovereign Prerogative* (Yale University Press, 1963), 89.

¹⁵ Eugene Rostow, *The Sovereign Prerogative* (Yale University Press, 1963), 35.

¹⁶ Eugene Rostow, *The Sovereign Prerogative* (Yale University Press, 1963), 30.

¹⁷ Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2005), 229.

¹⁸ Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2005), 231.

for why exactly the Court may have begun violating its own traditions, and how the American people can begin pushing back if they so choose. Hence, this thesis will continue to refer back to Kramer's ideas as a framework for understanding the current Court. Kramer argues that fundamentally, "the Supreme Court is not the highest authority in the land on constitutional law. We are."¹⁹

In fact, while critiques of the Court have existed since its founding, the trend of criticizing the Supreme Court has proliferated. Many scholars argue that the fundamental issue is that "the root difficulty is that judicial review is a counter-majoritarian force in our system."²⁰ The essential critique is that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."²¹

The court was designed to be inherently anti-democratic and insulated from the masses. Article 3 requires that during "good behavior," justices are guaranteed lifelong appointments and cannot have their compensation diminished during their service.²² This prevents Congress from arbitrarily removing unpopular justices, or effectively destroying the court by refusing to pay its wages. Furthermore, Article 2 Section 2 has the court appointed by the President, with "Advice and Consent" from the Senate.²³ Before the 17th Amendment was ratified in 1913, Senators were not directly elected from the people, and were instead appointed by the legislature of their state.²⁴ This, combined with the Electoral College process for electing the President, ensured that the two bodies responsible for appointing court justices were already insulated from the whims

¹⁹ Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2005), 248.

²⁰ Alexander Bickel, *The Least Dangerous Branch* (Yale University Press, 1962), 16.

²¹ Alexander Bickel, *The Least Dangerous Branch* (Yale University Press, 1962), 17.

²² U.S. Const. Art. 3 § 1

²³ U.S. Const. Art. 2 § 2

²⁴ U.S. Const. Art. 1 § 3

and passions of the people. Essentially, the Supreme Court is at once one of the most powerful branches of government, but also the least representative.

Some have argued that the Court is not just counter-majoritarian, but imperial. Stanford University Law professor Mark Lemley wrote “the only consistency I can find in modern Supreme Court cases is that the Court always wins.”²⁵ The Court might have made different ideological decisions over recent decades, but the effect of those decisions was usually to further cement the power of the Court in the American system. He further argues that the Court is centralizing power to become “the most activist of any Court in the past century, but increasingly the locus of all legal power.”²⁶ Worse, the Court is not just centralizing power, but losing key aspects of consistency and process that supported its legitimacy. Put another way, “the imperial Supreme Court is dismantling those norms.”²⁷ Another Stanford Law Professor, Pamela Karlan, argues that the new court also entrenches existing inequalities that allow a “shrinking white, conservative, exurban numerical minority to exert substantial control over the national government and its policies.”²⁸ These critiques work well with Kramer’s popular constitutionalism framework. The Court, when empowered, can become actively damaging to democratic checks and balances by violating long held norms.

This thesis will build off these scholarly understandings to unpack the role of the shadow docket in Supreme Court jurisprudence and its potential implications for the American legal system and society at large. While the scholars referenced above did not specifically mention the shadow docket, their theories on the Court help explain the rise of the shadow docket and provide context for the challenges to holding the Court accountable.

²⁵ Mark Lemley, *The Imperial Supreme Court* (Harvard Law Review, 2022).

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Pamela Karlan, *The New Counter-majoritarian Difficulty* (California Law Review, 2020).

The Shadow Docket and the American Judicial System

In order to contextualize how the modern “shadow docket” departs from traditional Supreme Court practice, it is helpful to outline how the American judiciary should function in theory.

The lowest level of federal court are the district courts. There are 94 throughout the country, responsible for holding both civil and criminal cases.²⁹ Federal cases originate in the district courts, after which they can be appealed to the circuit courts, each of which is responsible for appeals from a set geographic area.³⁰ From there, cases may be appealed to the Supreme Court. Under the Judiciary Act of 1925, the Court has significant discretion over which cases they choose to hear. This process, known as “granting a writ of certiorari,” requires just four of the nine justices to agree that the case presents a compelling issue of federal law and/or that a final decision is necessary to resolve conflicting decisions in the lower courts.³¹ Traditionally, the Court has ensured that in the cases they took, “Prior to applications for review, *all remedies below must have been exhausted* in prescribed lower court procedure, scrupulously followed.³²” These procedures help control the Court’s workload, respect the discretion of lower courts, and limit confusion by providing clarity on which legal questions have been settled.

For cases originating in the state court system, the Supreme Court has traditionally held significant deference for the right of each state to interpret their own laws. This principle is known as comity, and generally requires that federal judges should “refrain from acting or

²⁹ Offices of the United States Attorneys, *Introduction to the Federal Court System*.

³⁰ *Ibid*

³¹ Cornell Law School Legal Information Institute, *Considerations Governing Review on Writ of Certiorari*.

³² Henry Abraham, *The Judiciary: The Supreme Court in the Governmental Process* (New York University Press, 1996), 84.

asserting federal jurisdiction over a matter within state hands until the state courts have had a full opportunity to correct the situation at issue.”³³ Still, the Court has exceptionally broad discretion to choose which cases are worthy of being heard, and “the Court grants review in these cases for its *own* rea-sons—it is free to decide which precedents to revisit, which new circum-stances to confront, and which errors to correct.”³⁴

There are a small number of cases, as outlined by Article 3, Section 2 of the US Constitution, where the Supreme Court has original jurisdiction. In those limited circumstances, cases are heard first in the highest court. However, given their exceedingly rare and technical nature, they are not the focus of this thesis.

Traditional Merits-Docket Procedure

Once the Court has “granted cert,” it closely follows a traditional process of review. These procedures form the backbone of Supreme Court jurisprudence, and help lower courts, the legal community, and the public better understand how the Court came to its decision. Many Americans assume that the Court *always* follows these procedures, or even that the Court is legally required to do so. On the contrary, just as the Court has broad discretion over *which* cases it hears, it also has similar discretion over *how* it chooses to hear those cases. That is precisely what makes the shadow docket so insidious. The modern Court has begun to break its traditional rules, created over generations, to expand its power and manipulate the legal outcomes of the cases it hears. Worse, the highly technical nature of those departures cloaks the current Court’s

³³ Elder Witt, *Guide to the US Supreme Court* (Congressional Quarterly, 1990), 293.

³⁴ Tejas N. Narechania, *Certiorari in Importance Cases* (Columbia Law Review vol. 122 no. 4, 2022), 926.

actions in secrecy and confusion. In order to understand precisely how the Court is departing from tradition, it is helpful to discuss the common understanding of how the process functions.

One of the most illustrious Supreme Court traditions is the oral argument. Attorneys for each party are given a half hour to outline their case and are frequently interrupted by the Justices to be peppered with questions.³⁵ This provides an invaluable opportunity for the justices to explore the relevant legal issues at hand. Numerous justices themselves have underscored this point. Justice Harlan stated that there is “no substitute” for oral arguments, and likewise Justice Harlan noted that they do “contribute significantly to the development of precedents.”³⁶ The arguments can also have tangible impacts on the case outcome, as “at times there are strong parallels between justices’ questioning and their ultimate positions.”³⁷

The Court is also guided by *amicus curiae*, or “friend of the court” briefs. These briefs provide relevant parties, interest groups, professional organizations, and others the opportunity to attempt to influence the final decision by submitting an argument to the Court. *Amicus Curiae* can help illuminate the potential repercussions of each case and provide the Court with relevant context and/or expertise in making their decision.

After a decision is reached, the Court will author a majority opinion, outlining the legal justification for their decision. Individual justices then have the option to write a concurring opinion, which reaches the same decision as the majority but “does not agree with the *reasoning* or line of logic that brought the decision about,” or a dissenting opinion which rebukes the majority.³⁸ The importance of written opinions, even non-legally binding dissents, cannot be

³⁵ Henry Abraham, *The Judiciary: The Supreme Court in the Governmental Process* (New York University Press, 1996), 33.

³⁶ Wasby, D’Amato, and Metrailler, *The Functions of Oral Argument in the Supreme Court* (Quarterly Journal of Speech, 1976), 411.

³⁷ *Ibid.*

³⁸ Henry Abraham, *The Judiciary: The Supreme Court in the Governmental Process* (New York University Press, 1996), 37.

understated. Opinions explain why a decision was reached, instruct lower courts in how to apply the law, and often create new legal standards that have substantive impacts for generations to come. The written opinion allows the Court’s decisions to have lasting precedential impact and clarity. For example, the Brandenburg Test from the opinion in *Brandenburg v Ohio* created the modern free speech standard of imminent and likely incitement of violence.³⁹ Written opinions loom large in our collective culture, transcending any one specific case. They become part of our larger understanding of what the country values and how we understand our rights and limitations. Shouting “fire” in a crowded theater, for example, may have originated with the 1919 *Schenck v United States* majority opinion, but now is used by attorneys and the broader public to understand exactly how far the First Amendment stretches.⁴⁰

The above traditions apply to the Court’s “merit docket.” Nearly all of the Supreme Court’s famous cases have been on this docket, from *Brown v Board of Education* to *Roe v Wade*. Around 60 to 70 cases are decided this way, with full arguments, briefing, and written opinions.⁴¹ It is these cases that create substantive changes to law and policy. University of Chicago Law professor William Baude summarized the importance of the merits docket thus: “We know what the voting rule is; we know that the results of the voting rule will be explained in a reasoned written opinion; and we know that each Justice will either agree with it or explain his or her disagreement.”⁴²

³⁹ Cornell Law School Legal Information Institute, *Brandenburg Test*.

⁴⁰ *Schenck v United States*: 249 U.S. 47 (1919).

⁴¹ Black and Bannon, *The Supreme Court “Shadow Docket”* (Brennan Center, 2022).

⁴² William Baude, *The Supreme Court’s Shadow Docket* (New York University Journal of Law & Liberty vol. 9.1, 2015), 12.

The Emergency Docket

Not all of the Court's decisions follow this procedure. The Supreme Court also has a separate docket of cases, known interchangeably as the emergency docket, orders list, or shadow docket. This docket handles cases with pressing deadlines and immediate importance that require the Court's quick response, and therefore shortened procedural process.

One of the most common types of case on this docket are petitions emergency death penalty stays. Many of these petitions occur at the literal last minute, sometimes just hours before a scheduled execution. Naturally, the time-pressing nature of these claims necessitates accelerated decision-making from the Court. Given the regularity of these petitions since the 1960s and the fairly consistent decisions, death penalty petitions are not a focus of this thesis.

There are several other important types of cases that fall under the "shadow docket." Two of the most common are injunctions and stays, both of which fall under the Court's power under the All Writs Act.

An emergency injunction is "an injunction pending appeal is an appellate court directly halting the defendant's ongoing conduct in circumstances in which the lower courts had necessarily refused to do so."⁴³ Injunctions are designed to be drastic, immediately necessary, and designed to prevent harm from occurring. The All Writs Act, 28 U.S.C. § 1651(a),

"authorizes an individual Justice or the full Court to issue an injunction when

1. the circumstances presented are "critical and exigent";
2. the legal rights at issue are "indisputably clear"; and
3. injunctive relief is "necessary or appropriate in aid of the Court's jurisdiction."⁴⁴

⁴³ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 171.

⁴⁴ Emergency Application for Writ of Injunction or in the Alternative Certiorari Before Judgement or Summary Reversal, *Tandon v Newsom*.

Injunctions “should be issued “of discretion sparingly exercised” and sets forth that a petitioner must demonstrate “exceptional circumstances warrant the exercise of the Court’s discretionary powers, and that adequate relief cannot be obtained in any other form.”⁴⁵

Emergency stays are similar to emergency injunctions, but with a slightly lower bar. The courts essentially press a giant pause button, stopping a certain action from occurring. A common example of a temporary stay is the court agreeing to postpone an execution while they review the case. Traditionally, the Court relies on three standards to determine whether to grant a stay.

“(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari;

(2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and

(3) a likelihood that irreparable harm will result from the denial of a stay”⁴⁶

Professor Vladeck of the University of Texas at Austin simplifies both of these terms as “a stay pending appeal restores the status quo that existed prior to a ruling by a lower court; an injunction pending appeal disrupts that status quo.”⁴⁷

Injunctions are therefore supposed to be reserved for truly extraordinary circumstances. Injunctions and stays are powerful tools that can overrule legislation passed by elected representatives and result in substantive impacts on the everyday lives of Americans. As such, and in recognition of the procedural shortcuts that the Court is often forced to make due to time pressure, emergency writs like injunctions and stays are supposed to have limited precedential

⁴⁵ Erin Murphy, *Substantive Changes in the Shadow Docket of the US Supreme Court* (Kyungpook National University Law Journal, 2021) citing SUP. CT. R. 20.

⁴⁶ McFadden and Kapoor, *The Precedential Effect of Emergency Stays* (Harvard Journal of Law and Public Policy, 2021) 839.

⁴⁷ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 171.

value. The Court itself has proclaimed *Lunding v. N.Y. Tax Appeals Tribunal* (1998) that these cases cannot have the same precedential effect as those with full briefing and oral arguments.⁴⁸ This is because “the legal import of Supreme Court decisions can be established far more definitively when the Justices produce opinions that provide guidance to the lower courts.”⁴⁹ This is important to keep in mind, as the evidence in recent shadow docket decisions indicates that the Court is increasingly abandoning this standard and expecting lower courts to view emergency orders as binding precedents.

The definitions and standards of review for emergency petitions can become incredibly technical very quickly, but the true harm of the current shadow docket is only revealed by delving into exactly how these arcane procedures are being violated. These rules are designed to foster clear, consistent decision making throughout the court system. They allow the Supreme Court to intervene when necessary to prevent serious harm, while also preserving the judicial branch’s hierarchy and federalism. It is precisely the highly technical and opaque nature of the current shadow docket process that presents such a challenge. It is extremely difficult for someone, with or without a JD, to comprehend the full scope of the damage this practice causes to the judicial system and faith in democracy at large.

Shadow Docket Implications

All of the Court’s rigid, formulaic, and seemingly antiquated traditions are precisely what allows the Court to legitimize its power. Since the Court relies on legitimacy to enforce its decisions, it must be seen as an unbiased, apolitical, and consistent body. The public may disagree with a decision or two, but they must be able recognize that the Court used an equitable

⁴⁸ *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 307 (1998).

⁴⁹ Earl Maltz, *The Function of Supreme Court Decisions* (Houston Law Review vol. 37 Issue 5, 2000), 1409.

and consistent process to reach that decision. Otherwise, the Court is vulnerable to accusations of arbitrary and imperial behavior. As Professor Baude phrased it, “procedural regularity begets substantive legitimacy.”⁵⁰ Or, as Hamilton intended in Federalist 78, “[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents”⁵¹

That is precisely what makes the Shadow Docket such a threat to the legal system and democracy writ large. Of course, emergency appeals necessitate an abridged process due to time constraints, but that is why emergency decisions are not supposed to make substantive, merit-based decisions or have precedential effects. The Shadow Docket is problematic not because it simply shortchanges the traditional decision-making process, but rather because it does so to create lasting legal change that was never intended to take place on the emergency docket. This poses a problem to both the external legitimacy of the Court, but also the functionality of the judicial branch. A poorly justified decision is easier for the public to criticize and confuses lower courts on which new legal standard to enforce.

This thesis will dive into two modern shadow docket decisions, *Whole Women’s Health* and *Tandon v Newsom*, to explore these implications. By examining the procedural history and legal repercussions of these two quintessential shadow docket decisions, the true magnitude of recent Supreme Court behavior will become apparent.

⁵⁰ William Baude, *The Supreme Court’s Shadow Docket* (New York University Journal of Law & Liberty vol. 9.1, 2015), 12.

⁵¹ Alexander Hamilton, Federalist 78 (1788).

Emergence of the Shadow Docket

While the term “shadow docket” was only first coined in 2015, the Court has had some type of “emergency docket” for much of its history. From 1802 to 1832, after hearing a conventional full term, “a single Justice would return to the nation’s capital to sit alone as a rump Supreme Court for a short August Term” and answer procedural questions.⁵² The rump court arose during the initial, highly politicized debates surrounding the Court at the turn of the century. Termed a “mongrel court” by Federalists, the August term was controversial and designed to allow the Court to counteract partisan efforts to delay litigation.⁵³ For context, *Marbury v Madison*, the hallmark case that institutionalized judicial review at the Supreme Court, was decided in 1803. It was this case that gave the Court much of its modern power and solidified its role in the modern political system. So, from the time the Court effectively established itself, it had used the “rump court” as a part of its decision-making.

However, while the Court had always heard some type of emergency application, the true predecessor of the shadow docket emerged in the 1980s. Since the Civil War, Court reforms had given the institution greater discretion over the cases it heard and the questions it decided to answer. This trend ran up against a sudden swell in death penalty appeals during the “tough on crime” era in the 80s, causing the justices to suspend oral arguments on emergency applications due to the higher number of petitions.⁵⁴ In fact, “these common features of today’s shadow docket, unheard of before 1980, were a direct response to the flood of emergency applications in capital cases,” notes legal scholar Steve Vladeck.⁵⁵ These cases were, by the nature of the death

⁵² Ross Davies, *The Other Supreme Court* (Journal of Supreme Court History, 2006), 221.

⁵³ Ross Davies, *The Other Supreme Court* (Journal of Supreme Court History, 2006), 225.

⁵⁴ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 106.

⁵⁵ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 107.

penalty, controversial. Still, it was only recently that the norms of shadow docket death penalty appeals spread to other areas of law and proliferated. The precise reason for the expansion remains a subject of debate between scholars.

One group of theories centers on the increased power of the Court itself. Legal scholar Richard Pierce points to the “extreme political polarization that now characterizes the country” as the primary reason that the Court has become more involved in key political and policy conflicts as Congress remains paralyzed.⁵⁶ In his view, this, combined with the ruling in *Massachusetts v EPA* (2007), encouraged attorneys general to legally challenge any policy they disagree with, often appealing all the way to the Supreme Court and asking the Justices to provide the policy relief they seek.⁵⁷ This echoes the theory of Stanford Law’s Larry Kramer, an advocate of significant Court reform. As Ezra Klein summarized Kramer’s theory, “the Court is at its most powerful when other areas of government are at their most divided.”⁵⁸ Kramer also believes that an era of permissiveness towards an imperial judiciary has prevailed, emboldening the Court to step over traditional norms and become “untouchable.”⁵⁹ In an influential Harvard Law Review article, Mark Lemley takes this argument one step further, arguing that an “imperial” Supreme Court, armed with a “bulletproof majority” has undertaken an agenda to engage in “radical restructuring of American Law” and concentrate power with the Court.⁶⁰

Lemley specifically links this agenda with the shadow docket, which he argues is being used as a

⁵⁶ Richard J. Pierce, *The Supreme Court Should Eliminate Its Lawless Shadow Docket* (GWU Legal Studies Research Paper No. 2021-26, GWU Law School Public Law Research Paper No. 2021-26, 2021), 6.

⁵⁷ Richard J. Pierce, *The Supreme Court Should Eliminate Its Lawless Shadow Docket* (GWU Legal Studies Research Paper No. 2021-26, GWU Law School Public Law Research Paper No. 2021-26, 2021), 7.

⁵⁸ Ezra Klein, Liberals Need a Clearer Vision of the Constitution. Here’s What it Could Look Like (The Ezra Klein Show from the New York Times, July 5, 2022).

⁵⁹ Larry Kramer, Statement to the Presidential Commission on the Supreme Court of the United States, 2021, 7.

⁶⁰ Mark Lemley, *The Imperial Supreme Court* (136 Harv. L. Rev. F. 97, 2022).

tool to undermine the “power of lower courts, both by refusing to give deference in places where it has long been held due and by trampling on the rules of equity that govern stays.”

Still, others point to more concrete and external reasons for the creation of the shadow docket. Vladeck argues that the actions of the Solicitor General have been instrumental to making the shadow docket standard practice for the Court. During the Bush and Obama administrations there were only eight applications for emergency relief, as the Solicitor General filed these petitions “only in isolated instances, many of which did not involve high-profile partisan disputes.”⁶¹ However, Trump’s “Solicitor General Francisco has indeed been *far* more aggressive in seeking to short-circuit the ordinary course of appellate litigation — on multiple occasions across a range of cases,” filing 21 applications in the first three years of the Trump administration alone.⁶² Still, Vladeck blames the Court for allowing this to become a successful legal strategy. Solicitor General Noel Francisco found considerable sympathy with the conservative Justices on the Court, especially as the Court appears to be embracing a new theory of “irreparable harm.” Chief Justice Roberts articulated this theory in *Maryland v King* (2012), noting that “[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”⁶³ This, along with the Court’s overwhelming conservative majority, practically guaranteed that the Trump administration could achieve favorable rulings without having to wait through an arduous and costly appeals process. Instead, the Solicitor General could ask for certiorari before judgment and leapfrog the lower courts, going straight to a highly sympathetic Supreme Court. The

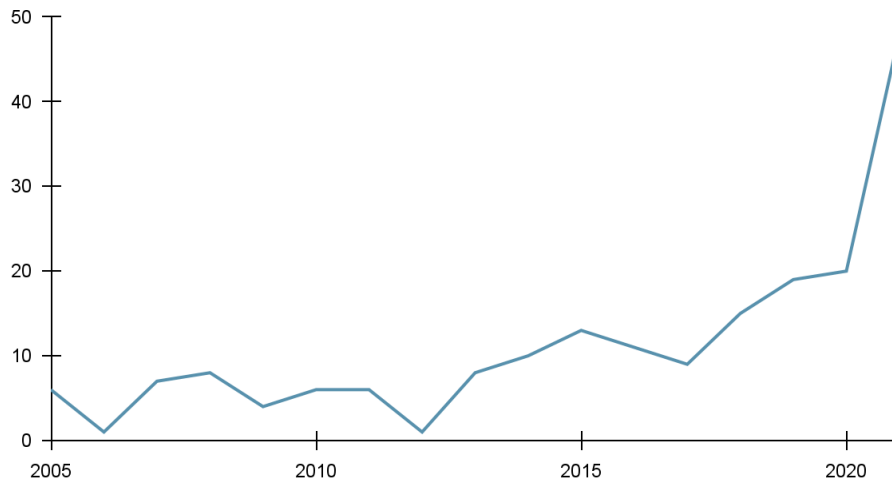
⁶¹ Steve Vladeck, *The Solicitor General and the Shadow Docket* (133 Harv. L. Rev. 123, 2019), 134.

⁶² Steve Vladeck, *The Solicitor General and the Shadow Docket* (133 Harv. L. Rev. 123, 2019), 125.

⁶³ *Maryland v King*, 567 U.S. 1301, pg. 3.

following chart, based on statistics curated by Vladeck from the WestLaw database⁶⁴ and from SCOTUSBlog⁶⁵ highlight this trend:

Figure 1: Number of Shadow Docket Cases Per Year



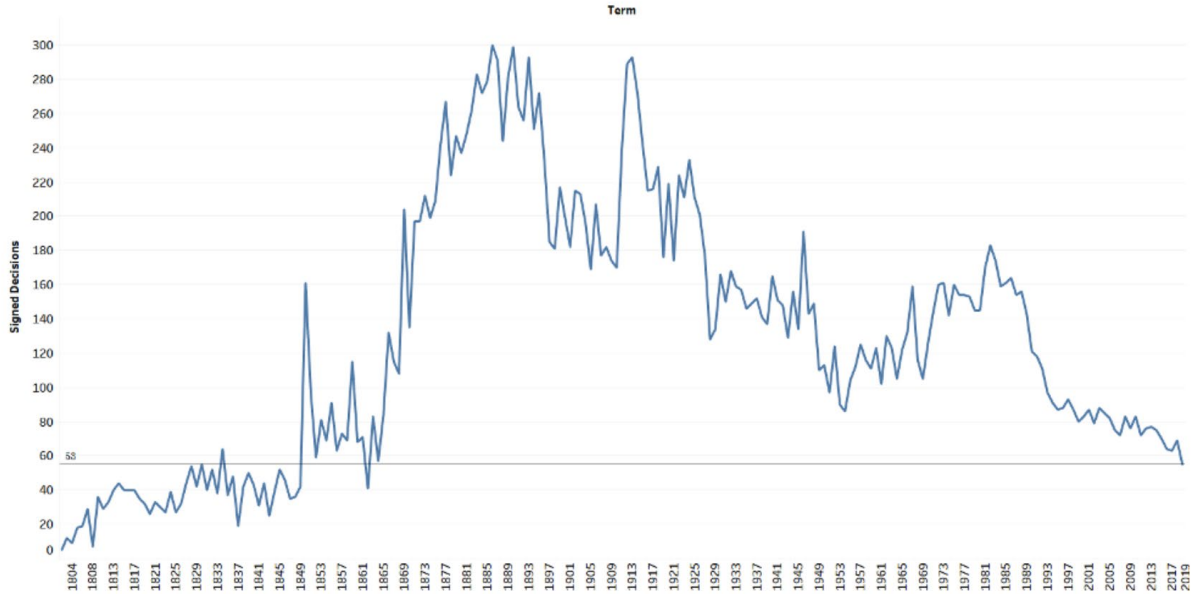
Source: Steve Vladeck, *Texas' Unconstitutional Abortion Ban and the Role of the Shadow Docket* (Hearing Before the Senate Committee on the Judiciary, 2021), 5.

This chart shows a dramatic uptick of shadow docket decisions in recent years, especially since the Trump administration came to power. Furthermore, when compared to the number of merits docket cases, the data points to a worrying trend. The data could indicate that the Court is increasingly shifting its decision-making away from the strict procedure of the merits docket onto the mysterious and opaque shadow docket. The following chart was created by Adam Feldman. Note, however, that it tracks cases from 1800 through 2019, so the horizontal axis is significantly larger than the previous chart.

⁶⁴ Steve Vladeck, *Texas' Unconstitutional Abortion Ban and the Role of the Shadow Docket* (Hearing Before the Senate Committee on the Judiciary, 2021), 5.

⁶⁵ Angie Gou, *STAT PACK for the Supreme Court's 2021-2022 Term* (SCOTUSBlog, 2022).

Table 1: Total Supreme Court Merits Decisions by Term (1800-Present)



Source: Steve Vladeck, *Texas' Unconstitutional Abortion Ban and the Role of the Shadow Docket* (Hearing Before the Senate Committee on the Judiciary, 2021), 20.

The Covid-19 pandemic likely also influenced these case numbers. The pandemic created novel and pressing questions about government regulation during crises. States were left scrambling to adapt to rapidly changing conditions, attempting to place new restrictions and guidelines to protect the safety of their citizens. This led to many of the Covid-19 shadow docket cases. For example, there were numerous cases involving election law, and what measures states could take while balancing popular sovereignty and safety. These cases were urgent, as states needed to overhaul their election infrastructure in just a few months. Furthermore, *Tandon v Newsom*, which will be discussed later, arose from the tension between lockdown restrictions and religious liberty. The nature of the chaotic, fast-moving situation likely created more grounds for the type of emergency applications that wind up on the shadow docket. Still, as will be discussed later, the Court continued to hold oral arguments, albeit remotely. The Justices

could have also expedited arguments and briefings in especially urgent cases. And, based on the statistics above, it is clear that the shadow docket was institutionalized much before the pandemic and remains a dominant part of the Court even as the threat of the virus has receded.

Personally, I believe the rise of the shadow docket is the result of a confluence of factors. The rising polarization and weakness of the other branches has allowed the Court to gain power and influence. The dominant narrative that the Court should remain above criticism and reform has emboldened it to undermine its own traditional norms. Meanwhile, the Trump administration, itself eager to undermine democratic norms, took advantage of the successful legal strategy of leapfrogging lower courts to find favor with the highest court. And finally, the Covid-19 pandemic provided the excuse and the cover to silently cement the shadow docket as a key practice of the Supreme Court. Either way, the shadow docket is clearly now a hallmark of the modern Court, which presents several key problems that will be untangled throughout this thesis using the case studies of *Tandon v Newsom* and *Whole Women's Health*.

Case Study 1: Tandon v Newsom

Historical Context

The freedom of religion is a fundamental, controversial, and often unclear part of the American Constitution. It is established in the First Amendment of the Bill of Rights, right next to the foundational freedom of speech and assembly, indicating its importance to the Framers and colonists at America's founding. This is likely because many colonists moved to the United States "to escape the bondage of laws which compelled them to support and attend government-favored churches."⁶⁶ The colonists also specifically cited the Quebec Act in the 1774 Declaration of Resolves, which allowed Catholics to practice their religion "subject to the King's authority."⁶⁷

Still, treatment of religion was controversial from the very beginning. Early colonies varied wildly on their policies for religion. Rhode Island's Charter declared that nobody could be "molested, punished, disquieted or called in question, for any differences in opinion in matters of religion" while the Virginia government "supported and required conformity to the established church, and church vestries exercised semi-civil political functions."⁶⁸ Gradually, the movement for religious freedom gained momentum, driven by deists like Jefferson and Madison. The Framers were influenced by Enlightenment philosophy in Europe, particularly John Locke. Toleration and separate spheres for religion and politics is one of the central tenets of Locke's philosophy, as he was worried about the state coercing citizens into denying their true beliefs.⁶⁹

⁶⁶ *Everson v Board of Education*, 330 U.S. 1, 8 (1947), pg. 9.

⁶⁷ Cong. Rsch. Serv., *First Amendment Fundamental Freedoms*, Constitution Annotated, <https://constitution.congress.gov/browse/amendment-1/>.

⁶⁸ Cong. Rsch. Serv., *First Amendment Fundamental Freedoms*, Constitution Annotated, <https://constitution.congress.gov/browse/amendment-1/>.

⁶⁹ Tuckness, Alex, "Locke's Political Philosophy", *The Stanford Encyclopedia of Philosophy* (Winter 2020 Edition).

Likewise, Montesquieu believed that laws should "require from the several religions, not only that they shall not embroil the state, but that they shall not raise disturbances among themselves."⁷⁰ These philosophers influenced the Framers, who eventually decided on the modern First Amendment after much debate on the proper phrasing.

The Religion Clauses of the First Amendment state "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."⁷¹ The first half is referred to as the Establishment Clause, while the second is the Free Exercise Clause. Together, they prohibit Congress from creating a state religion and from interfering in religious practice. As explained by Scalia, "the free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."⁷²

The foundation to modern Free Exercise jurisprudence was *Reynolds v United States* (1879). *Reynolds* drew a line between regulating beliefs and actions, holding that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."⁷³ One of the most influential lines from the decision, which would be referenced later by Scalia in the landmark *Employment Division v Smith* (1990) case, was that allowing people to disobey neutral laws would be "to make the professed doctrines of religious belief superior to the law of the land, and in effect, to permit every citizen to become a law unto himself."⁷⁴ That concept permitted the state to make reasonable regulations on actions, even if the impact of those regulations was to burden religious practice. The ruling in *Reynolds*

⁷⁰ Bok, Hilary, "Baron de Montesquieu, Charles-Louis de Secondat", *The Stanford Encyclopedia of Philosophy* (Winter 2018 Edition).

⁷¹ U.S. Const. Amend. 1

⁷² *Employment Division v Smith*, 494 U.S. 872 (1990), pg. 878.

⁷³ *Reynolds v United States*, 98 U.S. 145 (1879), pg. 167.

⁷⁴ *Reynolds v United States*, 98 U.S. 145 (1879), pg. 168.

would shape Free Exercise law for over a hundred years, but was challenged by recent shadow docket decisions.

Prior Precedent

The modern interpretation of the Free Exercise Clause largely stems from the Court’s ruling in *Cantwell v Connecticut* (1940). In addition to incorporating free exercise to the states, *Cantwell* held that religious actions are “subject to regulation for the protection of society.”⁷⁵ Under this standard, “a law that burdens but does not directly regulate religious belief is not categorically prohibited but will likely still be subject to constitutional scrutiny.”⁷⁶ Like other First Amendment rights, the Court argued that a “state may, by general and nondiscriminatory legislation, regulate the times, the places, and the manner” of religious activity.⁷⁷

This ruling was slightly modified by *Wisconsin v Yoder* (1972), which held that the state “may not enforce even a religiously-neutral law that applies generally to all or most of society unless the public interest in enforcement is “compelling.””⁷⁸ The “compelling interest” test created by this case would later prove controversial and important in many shadow docket cases surrounding religious practice in the Covid-19 pandemic.

The rulings in *Cantwell* and *Yoder* were followed by the influential *Employment Division v Smith* (1990) case. *Smith* concerned Oregon’s “refusal to provide unemployment benefits to an individual who was fired for using peyote in violation of state law, even though it was

⁷⁵ *Cantwell v Connecticut*, 310 U.S. 296, 303 (1940), pg. 297.

⁷⁶ Cong. Rsch. Serv., *First Amendment Fundamental Freedoms*, Constitution Annotated, <https://constitution.congress.gov/browse/amendment-1/>.

⁷⁷ *Cantwell v Connecticut*, 310 U.S. 296, 303 (1940), pg. 305.

⁷⁸ Frederick Gedicks, *The Free Exercise Clause Common Interpretation*, (National Constitution Center).

undisputed that his use of the drug was part of a religious ritual.⁷⁹ Both *Cantwell* and *Smith* cited *Reynolds* specifically, connecting those modern decisions to historical precedent.

Once again, the Court held that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”⁸⁰ Scalia, who authored the majority opinion, found that it was functionally impossible to create policy carve outs for every possible religious practice. He argued that being forced to create exceptions “would open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind,” specifically citing tax payment, compulsory vaccinations, and child-neglect laws.⁸¹ Furthermore, Scalia wrote that “to make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is ‘compelling’-- permitting him, by virtue of his beliefs, ‘to become law unto himself’-- contradicts both constitutional tradition and common sense.”⁸²

Hence, *Smith* created the modern standard for Free Exercise. Professor Vladeck noted that “*Smith* was understood to establish that the Free Exercise Clause is not offended merely because a law impacts religious practice. Rather, the Constitution is violated only if that was the law’s purpose.”⁸³

Smith was, and remains, a controversial decision. For some on the left, the ruling jeopardized minority religions, which even Scalia acknowledged in his opinion when he wrote “it may fairly be said that leaving accommodation to the political process will place at a relative

⁷⁹ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 166.

⁸⁰ *Employment Division v Smith*, 494 U.S. 872 (1990), pg. 880.

⁸¹ *Employment Division v Smith*, 494 U.S. 872 (1990), pg. 889.

⁸² *Employment Division v Smith*, 494 U.S. 872 (1990), pg. 886.

⁸³ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 166.

disadvantage those religious practices that are not widely engaged in.”⁸⁴ This is complicated by the fact that the two men at the center of this case practiced traditional Klamath beliefs, even though one was not a member of the tribe.⁸⁵ For some liberals, this ruling “suggests that all religious minorities are second-class citizens under the First Amendment” and Scalia’s opinion represents “Christian supremacy and ethnocentrism.”⁸⁶

It was also offensive to some conservatives because the ruling allowed some burdens on religious practice. This allowed states to enact policy that burdened Christians, and therefore angered the religious right.⁸⁷ *Smith* was especially explosive to many on the right because Antonin Scalia, a stalwart of conservative jurisprudence, authored the majority opinion. And even though “Justice Scalia was known as the nation’s most influential advocate of originalism, the *Smith* opinion is wholly devoid of originalist analysis.”⁸⁸ Needless to say, *Smith* generated significant backlash on both sides of the aisle.

Congress stepped in in 1993 to undermine *Smith* with the Religious Freedom Restoration Act (RFRA). This law prevents the government “from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability,” except if the law “(1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”⁸⁹ This attempted to amend the *Smith* standard

⁸⁴ *Employment Division v Smith*, 494 U.S. 872 (1990), pg. 891.

⁸⁵ Andrew Seidel, *American Crusade: How the Supreme Court is Weaponizing Religious Freedom* (Union Square & co., LLC, 2022), 124.

⁸⁶ Andrew Seidel, *American Crusade: How the Supreme Court is Weaponizing Religious Freedom* (Union Square & co., LLC, 2022), 124.

⁸⁷ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 167.

⁸⁸ James Oleske Jr., *Free Exercise (Dis)Honesty* (Wisconsin Law Review, 2019), 720.

⁸⁹ H.R.1308 — 103rd Congress (1993-1994): Religious Freedom Restoration Act of 1993 Bill Summary, <https://www.congress.gov/bill/103rd-congress/house-bill/1308>.

from needing a “rational basis” to burden religion to needing to apply strict scrutiny.⁹⁰ Congress essentially attempted to return to a pre-*Smith* world, where “ governments would need both special justifications and precisely calibrated rules for any laws that imposed even incidental burdens on religious practice.”⁹¹

However, this law’s enforcement at the state level was struck down in *City of Boerne v Flores* (1997). This left a patchwork where some states decided to pass their own free exercise bills modeled after RFRA, but around half of states (predominantly left leaning) chose to remain with the *Smith* standard.⁹²

Free Exercise was further complicated by *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark* (1999). The case was about a police department that prohibited officers from having beards. There was no exception for religion, but there were explicit policy exceptions for medical necessity or when going undercover. The Third Circuit found, in a decision authored by Alito, that “the Department’s decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny.”⁹³ This outlook has been named the “most-favored-nation” theory. Justices who subscribe to this theory, like Alito, argue that “neutral laws that burden religious practice will still be constitutionally suspect if they include any secular exceptions without exceptions for “comparable” religious activities.”⁹⁴ There is strong evidence from recent shadow docket decisions, which will be discussed later, that this ideology has become a dominant force on the

⁹⁰ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 167.

⁹¹ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 167.

⁹² Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 168.

⁹³ *Fraternal Order of Police Newark Lodge v City of Newark*, 170 F. 3d 359 (3d Cir. 1999).

⁹⁴ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 169.

Court and has begun to influence several justices' decisions. Some segments of the conservative bench may have begun to seriously consider overturning *Smith* in recent years.

In fact, the Supreme Court agreed to grant cert in 2020 to *Fulton v City of Philadelphia*. This case, which would have been on the merits docket, was set to analyze whether *Smith* should be wholesale overturned. However, the pandemic struck before the case could be heard.⁹⁵

Despite the criticism and this new case, however, *Smith* remained the law of the land and binding precedent into the pandemic. This thesis will therefore not focus on the merits (or lack thereof) of *Smith* and free exercise more generally. Irrespective of personal opinion, the Court decided to rewrite and undermine significant precedent over the pandemic, with little explanation and procedural regularity. This phenomenon should concern those on both sides of the issue.

Covid and Religion

As anyone who lived through it is fully aware, the pandemic dramatically changed daily life in America and around the world. The Court, like everyone else, was forced to adapt to the rapidly changing health hazards that the virus presented. Many states moved to enact stay-at-home orders and restrict building capacity to slow the spread of the disease. California was one such state.

In May 2020, Governor Newsom signed an executive order to “limit attendance at indoor services in areas with widespread or substantial virus spread to 25% of a building’s capacity.”⁹⁶ The goal of this policy, like other restrictions, was to protect the public health. Experts were particularly worried “because the virus is more easily transmitted indoors and singing releases

⁹⁵ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 170.

⁹⁶ Daisy Nguyen, *California Revises Indoor Church Guidelines After Ruling* (The Associated Press, 2021).

tiny droplets that can carry the disease.⁹⁷” Places of worship, upset that they were still under capacity restrictions when some secular small businesses were under less stringent regulations, filed suit in what would become *South Bay United Pentecostal Church v Newsom* (2021), or simply *South Bay I*. The church asked the Court for certiorari before judgment and an emergency writ of injunction, which was summarily denied because the plaintiffs lacked an “indisputably clear” right to relief.⁹⁸ This may have been a shadow docket decision, handed down with a one sentence explanation, but the Court followed its traditionally high standard for providing emergency writs of injunction.

The Court did not follow its procedures with the other Free Exercise cases. What changed? Amy Coney Barrett, a publicly devout Christian, replaced Ruth Bader Ginsberg on the Court. Her impact was immediately felt with *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020), yet another shadow docket decision. In this case, the Court chose not to follow the traditional, well established “indisputably clear” standard. Instead, for no apparent reason, “the analysis focused entirely on the traditional (and far weaker) standard that *trial* courts use to decide whether to issue a preliminary injunction at the outset of a new lawsuit.”⁹⁹ Justice Kavanaugh argued under most-favored-nation theory that “in a red zone, for example, a church or synagogue must adhere to a 10-person attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction.”¹⁰⁰ Hence, they decided to use strict scrutiny to issue an injunction. The Court dropped the decision on November 25, just four

⁹⁷ Daisy Nguyen, *California Revises Indoor Church Guidelines After Ruling* (The Associated Press, 2021).

⁹⁸ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 172.

⁹⁹ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 177.

¹⁰⁰ *Roman Catholic Diocese of Brooklyn v Cuomo*, 592 U. S. ____ (2020), pg. 2.

minutes before midnight, with no public warning.¹⁰¹ The term “shadow docket” seems especially fitting for such a case.

The Court chose to grant this injunction despite the fact that none of the plaintiffs were subject to the restrictions they had sued to escape. As conservative Justice Roberts stated in his dissent against issuing an injunction, “there is simply no need to do so.”¹⁰² Normally, this rather mundane fact would have made the entire case moot. That did not stop the Court from issuing an injunction against a policy that was not even in effect anymore. How the Court interpreted that “irreparable harm” would occur from an outdated policy is frankly mystifying.

A similarly unclear ruling was dropped on a Friday in February 2021 at 10:44 pm. It was *South Bay II* (2021), another injunction issued to block California Covid-19 restrictions. Once again, the Court’s rationale did “apply the four-factor test the Court traditionally follows when considering when to grant an injunction.”¹⁰³ That may seem like a minor technicality. It is not. It is the Court, subtly and without warning or justification, quietly rewriting its rules to advance a religious agenda.

The Court even formalized a dramatic change to Free Exercise jurisprudence in a shadow docket case, *Tandon v Newsom* (2021).

Procedural History

Tandon v Newsom began as a motion for a preliminary injunction in the District Court for the Northern District of California. The Plaintiffs took issue with the state’s “Blueprint,” a

¹⁰¹ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 177.

¹⁰² *Roman Catholic Diocese of Brooklyn v Cuomo*, 592 U. S. ____ (2020), pg. 1.

¹⁰³ Steve Vladeck, *Texas’s Unconstitutional Abortion Ban and the Role of the Shadow Docket* (Hearing Before the Senate Committee on the Judiciary, 2021) 14.

Covid-19 response plan that incorporated tiered restrictions based on the level of risk in each county and the level of risk of different activities.¹⁰⁴ The Blueprint was facially neutral, outlining restrictions that applied equally to secular and religious gatherings. For example, the government allowed “unlimited attendance at outdoor worship services, outdoor political events, and outdoor cultural ceremonies” but limited all indoor gatherings when the county was at “substantial” risk.¹⁰⁵ The key section of Blueprint that was challenged in court was the ban on indoor gatherings, which the plaintiffs alleged violated their First Amendment rights to assemble and practice their religion.¹⁰⁶

The plaintiffs filed a motion for a preliminary injunction on October 22, 2020, arguing “that they are likely to succeed on the merits of their...claims, they are likely to face irreparable harm absent an injunction, and the public interest favors an injunction.”¹⁰⁷ It is worth remembering that an injunction is an “extraordinary and drastic remedy,” and should only be granted when relief is indisputably clear.¹⁰⁸ Hence, the District Court refused to grant an injunction, finding that the case was unlikely to succeed on the merits, the restrictions were in furtherance of legitimate public health interest, and the restrictions are “not a plain, palpable invasion of rights secured by fundamental law” since they were content neutral.¹⁰⁹ The district court even found that if required to apply strict scrutiny, the restrictions would survive.¹¹⁰

After this ruling, the plaintiffs appealed to the Ninth Circuit, which duly upheld the District Court and declined to offer an emergency injunction. Importantly, the plaintiffs cited *South Bay* and *Roman Catholic Diocese v Brooklyn* in their argument. They attempted to argue

¹⁰⁴ Tandon v Newsom, 517 F.Supp.3d 922.

¹⁰⁵ Tandon v Newsom, 517 F.Supp.3d 922, pg. 947.

¹⁰⁶ Tandon v Newsom, 517 F.Supp.3d 922.

¹⁰⁷ Tandon v Newsom, 517 F.Supp.3d 922, pg. 932.

¹⁰⁸ Lopez v. Brewer, 680 F.3d 1068, pg. 1072.

¹⁰⁹ Tandon v Newsom, 517 F.Supp.3d 922, pg. 952.

¹¹⁰ Tandon v. Newsom, No. 21-15228 (9th Cir. 2021).

that these cases, which were on the shadow docket, should be treated as relevant precedent like any other Supreme Court decision. This flies directly in the face of the long-standing tradition to treat emergency docket decisions do *not* “have the same precedential value...as does an opinion of this Court after briefing and oral argument on the merits.”¹¹¹ The Ninth Circuit decided that even if those cases should be considered, they did not apply as precedent due to key factual differences on the nature of the restrictions.¹¹²

The Ninth Circuit had very similar reasoning as the lower court, finding that the appellants “have not satisfied the requirements for the extraordinary remedy of an injunction pending appeal.”¹¹³ The court argued that “we conclude that Appellants are making the wrong comparison because the record does not support that private religious gatherings in homes are comparable—in terms of risk to public health or reasonable safety measures to address that risk—to commercial activities, or even to religious activities, in public buildings.”¹¹⁴ Put another way, just because California made some exceptions for activities with lower risk does not make the restrictions fail a strict scrutiny test.

Note that both the District Court and Ninth Circuit wrote full, detailed opinions that outlined their rationale. When the case reaches the Supreme Court, that thorough procedure would disappear.

The Supreme Court ruled on *Tandon* in a brisk 3-page opinion, granting an injunction to the appellants and stalling California’s restrictions. The Court argued that “government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than

¹¹¹ *Lunding v N.Y. Tax Appeals Tribunal*, 522 U.S. 287 (1998), pg. 307.

¹¹² *Tandon v. Newsom*, No. 21-15228 (9th Cir. 2021).

¹¹³ *Tandon v. Newsom*, No. 21-15228 (9th Cir. 2021), pg. 6.

¹¹⁴ *Tandon v. Newsom*, No. 21-15228 (9th Cir. 2021), pg. 3.

religious exercise.¹¹⁵ That one line might seem nondescript, but it is a sea-change in Free Exercise jurisprudence that functionally altered *Smith*. The Court continued: “It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.¹¹⁶” This effectively created a new standard that forces the courts to apply strict scrutiny, and even preference religious interests. The opinion further stated, “where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied.¹¹⁷” The true impact of this ruling will be discussed further in the “Implications” section of this case study. Throughout the short opinion, the Court referenced *South Bay* and *Roman Catholic Diocese* often, once again treating these unreasoned and unargued orders as fully equal precedent. In fact, the Court admonished the lower courts for not having followed these prior rulings as binding precedent.¹¹⁸

The liberal justices and Justice Roberts dissented. Justice Kagan wrote a particularly spicy dissent, calling out “the per curiam’s reliance on separate opinions and unreasoned orders signals” and noting that “the law does not require that the State equally treat apples and watermelons.¹¹⁹” She ended by commenting that “because the majority continues to disregard law and facts alike, I respectfully dissent.¹²⁰” Justice Kagan’s willingness to condemn her colleagues for their treatment of shadow docket cases once again underlines how egregious these procedures have become.

¹¹⁵ Tandon v Newsom, 593 U. S. ____ (2021), pg. 1.

¹¹⁶ Tandon v Newsom, 593 U. S. ____ (2021), pg. 1.

¹¹⁷ Tandon v Newsom, 593 U. S. ____ (2021), pg. 2.

¹¹⁸ Tandon v Newsom, 593 U. S. ____ (2021).

¹¹⁹ Tandon v Newsom, 593 U. S. ____ (2021), pg. 5.

¹²⁰ Tandon v Newsom, 593 U. S. ____ (2021), pg. 6.

Implications

Tandon flew under the radar in the national news, but created dramatic effects on Free Exercise law. That is what makes *Tandon* and the other Covid religion cases so significant. They reveal how the Court is significantly changing longstanding legal procedures, standards of review, and precedent without significant public attention. It is incredibly difficult to parse out exactly what the Court is doing when it decides these cases, how they're choosing to decide them, and why. The Court has become even more opaque and inaccessible. Without being able to understand how the Court is functioning, it removes the most important check on the Court's power: the people. These cases indicate a new era in Supreme Court jurisprudence, one that is marked by ambiguousness, inconsistency, and arbitrariness.

Tandon, a shadow docket decision, fundamentally altered Free Exercise law. That previous sentence should not be possible. Shadow docket decisions for injunctive relief should only be granted when the case is "indisputably clear."¹²¹ That standard does not allow the Court to find new interpretations of constitutional law. Even the Court itself has recognized that the merits docket procedures of full briefings, oral arguments, and conferencing is necessary to allow the Justices to fully explore a legal question before coming to a final, nuanced decision. Because of this, the Court has long recognized that emergency docket decisions do *not* "have the same precedential value...as does an opinion of this Court after briefing and oral argument on the merits."¹²² Hence, as explained by the Solicitor General of DC, "when the Court confronts

¹²¹ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 189.

¹²² *Lunding v N.Y. Tax Appeals Tribunal*, 522 U.S. 287 (1998), pg. 307.

novel, controversial issues through the shadow docket, it does so with diminished deliberative tools and far fewer viewpoints than a traditional merits case.”¹²³

Therefore, shadow docket “opinions are difficult for lower courts to apply and poorly suited for new articulations of the law or alterations of longstanding doctrine.”¹²⁴ This is because cases like this “introduce an unnecessary level of uncertainty, confusion, and complexity into the legal system.”¹²⁵ When decisions are accompanied by limited to no reasoning, it can be incredibly difficult for lower courts to parse out new rules and standards. Put another way, “it is difficult for lower courts to follow the Supreme Court’s lead without an explanation of where they are being led.”¹²⁶ Despite this conclusion, there is strong empirical evidence that suggests that the shadow docket is becoming more institutionalized. A study in the *Justice System Journal* found that lower court citations of shadow docket cases has been dramatically increasing in recent years. Below is a figure created to document this change:¹²⁷

¹²³ Loren AliKhan, Hearing Before the United States House Subcommittee on Courts, Intellectual Property, and the Internet (Government of the District of Columbia Office of the Attorney General, 2021), 10.

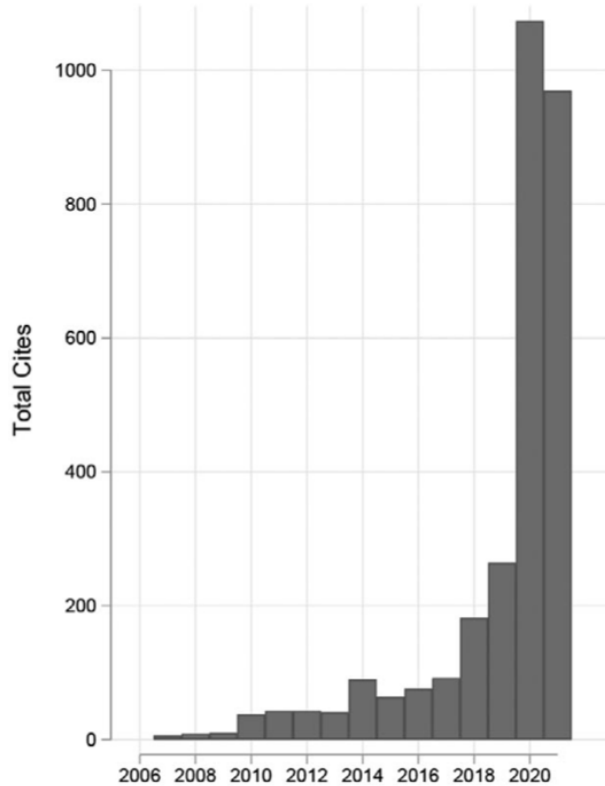
¹²⁴ Gouzoules, Alexander, *Clouded Precedent: Tandon V. Newsom and Its Implications for the Shadow Docket* (*Buffalo Law Review*, vol. 70, no. 1, 2022), 92.

¹²⁵ Gouzoules, Alexander, *Clouded Precedent: Tandon V. Newsom and Its Implications for the Shadow Docket* (*Buffalo Law Review*, vol. 70, no. 1, 2022), 93.

¹²⁶ William Baude, *The Supreme Court’s Shadow Docket* (*New York University Journal of Law & Liberty* vol. 9.1, 2015), 18.

¹²⁷ Alex Badas, *Assessing the Influence of Supreme Court’s Shadow Docket in the Judicial Hierarchy*, (*Justice System Journal*, Volume 43, 2022), 614.

Figure 2: Citations to Shadow Docket Cases in Given Year



Source: Alex Badas, Assessing the Influence of Supreme Court’s Shadow Docket in the Judicial Hierarchy, (Justice System Journal, Volume 43, 2022), 614.

This chart indicates a worrying trend. Shadow docket decisions appear to be increasingly seen as a legitimate source of precedent, especially as “cases that grant relief and therefore change the status quo are more likely to receive engagement from the lower courts than those that deny relief and uphold the status quo.”¹²⁸ This creates even more confusion for lower courts, since shadow docket citations continue to increase even as the Supreme Court continues to insist that shadow docket cases do not have precedential value publicly.¹²⁹ Despite these claims the Court issued a contradictory statement in *Tandon* admonishing the Ninth Circuit for not

¹²⁸ Alex Badas, Assessing the Influence of Supreme Court’s Shadow Docket in the Judicial Hierarchy, (Justice System Journal, Volume 43, 2022), 614.

¹²⁹ Alex Badas, Assessing the Influence of Supreme Court’s Shadow Docket in the Judicial Hierarchy, (Justice System Journal, Volume 43, 2022), 610.

following *South Bay* and *Roman Catholic Diocese* in their decisions.¹³⁰ So, the Court publicly defends itself by arguing that the shadow docket has little precedential value, but then encourages lower courts to treat its shadow docket decisions as such. Naturally, “this leaves lower court judges in a position to make judgment calls over whether or not the Court indicates any particular shadow docket decision to have precedential value.”¹³¹ Overall, this creates a snowball effect where inconsistency at the highest court trickles down and produces inconsistency and unintelligibility at the lower courts.

Yet despite this confusion, *Tandon* did in fact cause a shockwave. The *Smith* decision created a standard where “public-health regulations that imposed similar or identical limits on both secular meetings and religious gatherings (with limited exceptions for necessities like hospitals and grocery stores) did not trigger heightened scrutiny.”¹³² *Tandon* altered this precedent, as “for the first time...a majority of justices struck down under the Free Exercise Clause a facially neutral government regulation entirely because it made no exception for—and therefore burdened— religious practice.”¹³³ Hence, *Tandon* “articulated a dramatic reinterpretation of the longstanding *Smith* standard.”¹³⁴ The words “dramatic reinterpretation” are stunning and truly disturbing when used in reference to a shadow docket decision.

Worse, the Court did not have to make this “dramatic reinterpretation” over the shadow docket. Once again, they had granted cert to *Fulton v City of Philadelphia*, a merits docket case where they could’ve reinvestigated the *Smith* standard. The petitioners in that case specifically

¹³⁰ *Tandon v Newsom*, 593 U. S. ____ (2021).

¹³¹ Alex Badas, Assessing the Influence of Supreme Court’s Shadow Docket in the Judicial Hierarchy, (Justice System Journal, Volume 43, 2022), 621.

¹³² Gouzoules, Alexander, Clouded Precedent: *Tandon V. Newsom* and Its Implications for the Shadow Docket (Buffalo Law Review, vol. 70, no. 1, 2022), 90.

¹³³ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 187.

¹³⁴ Gouzoules, Alexander, Clouded Precedent: *Tandon V. Newsom* and Its Implications for the Shadow Docket (Buffalo Law Review, vol. 70, no. 1, 2022), 91.

asked the Court to reexamine *Smith* on the second page of their cert petition, explicitly posing the question “whether *Employment Division v. Smith* should be revisited?”¹³⁵ Ultimately, the Court decided not to answer that question in *Fulton* and make their decision on narrower grounds.¹³⁶ Still, the Court heard oral arguments for this case on November 4, 2020 and decided it on June 17, 2021. *Tandon*, meanwhile, was decided on April 9, 2021. This means that the Court ruled on *Tandon* after it had the opportunity to hear oral arguments on a similar case. The Court could have very easily made the reinterpretation of *Smith* on this merits docket case, and intentionally chose not to. The Court chose to make its “dramatic reinterpretation” of longstanding law on a shadow docket case without the benefit of oral arguments and full procedure. The Court also refused another opportunity to revisit *Smith* when they denied cert to *Calvary Chapel Dayton Valley v. Sisolak*, another religious liberty case, in January. This reveals willful intent from the Court to make this “dramatic reinterpretation” on the shadow docket, “even though the very statutory constraint that they ignored in *Tandon*—that they could issue an injunction only to protect a right that was “indisputably clear”—didn’t apply to cases on the merits docket.”¹³⁷ Essentially, the Court felt comfortable breaking their traditional standards of review and changing the law, even when it was completely unnecessary to do so.

Meanwhile, the country remained crippled by the pandemic. While it is nearly impossible to determine the exact amount of harm caused by the Court’s decision in these cases, California was dramatically impacted. On the economic side, the state had to adapt to a “revised budget proposal for 2020-21 projecting a revenue decline of 22.3% and a \$54.3 billion shortfall.”¹³⁸

¹³⁵ *Fulton v City of Philadelphia* Petition for a Writ of Certiorari, 593 U.S. ____ (2021), pg. 2.

¹³⁶ *Fulton v City of Philadelphia*, 593 U.S. ____ (2021).

¹³⁷ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 191.

¹³⁸ Sarah Hinkley, *Fiscal Impacts of Covid-19 and California’s Economy* (University of California Berkeley Labor Center, 2020).

More importantly, the state also suffered 103,091 deaths from Covid-19.¹³⁹ These decisions, by striking down science-based safety measures, may have caused some of these deaths or prolonged the pandemic. The Supreme Court is able to weigh the irreparable harm of the virus versus the harm of being temporarily deprived of religious exercise, but the problem is that the Court reached this determination in an illegitimate, inconsistent, and unreasoned way.

The media coverage of *Tandon* was sparse: usually connected to other Covid religion cases and focusing primarily on the ideological makeup of the court. For example, a CNN article on the case noted that “the unsigned order for the high court majority also revealed the deep ideological fissure, with conservatives (including the three appointees of former President Donald Trump) in control and liberals dissenting bitterly.”¹⁴⁰ The article highlighted a few salacious quotes from the dissent, and mentioned that the decision was dropped right before midnight.¹⁴¹ However, as the case was targeted towards a general audience, it did not mention *Smith* or the impact that the case had on Free Exercise Law in general. Fox News, in contrast, did not have an article on *Tandon*. The outlet had released an article on *Roman Catholic Diocese* entitled “Supreme Court rejection of Cuomo’s COVID restrictions on worship upholds religious liberty.”¹⁴² The article suggested that readers should “welcome” the “important victory for religious liberty” and credited Amy Coney Barrett with casting the tie breaking vote.¹⁴³ The author argued that “with Justice Barrett now on the high court, conservatives need not rely on the inconstant Roberts to protect religious freedom.”¹⁴⁴ Notably, the article did not mention the

¹³⁹ Tracking Coronavirus in California: Latest Map and Case Count (The New York Times, 2023).

¹⁴⁰ Joan Biskupic, Supreme Court Again Blocks California Covid Restriction on Religious Activities (CNN, 2021).

¹⁴¹ Joan Biskupic, Supreme Court Again Blocks California Covid Restriction on Religious Activities (CNN, 2021).

¹⁴² John Yoo, Supreme Court rejection of Cuomo’s COVID restrictions on worship upholds religious liberty (Fox News, 2020).

¹⁴³ John Yoo, Supreme Court rejection of Cuomo’s COVID restrictions on worship upholds religious liberty (Fox News, 2020).

¹⁴⁴ John Yoo, Supreme Court rejection of Cuomo’s COVID restrictions on worship upholds religious liberty (Fox News, 2020).

shadow docket one time, nor criticize the Court's procedures in reaching its decision. Both of these articles, while written from different ideological standpoints, indicate some worrying trends. Both articles credited Amy Coney Barrett for the decision, indicating that there appears to be some acceptance on both sides of the aisle that the Justices' personal beliefs may be influencing their decision making. Both articles also noted the partisan and controversial nature of the case, again underscoring the notion that the shadow docket has proliferated to include high profile, contentious issues where traditionally procedure was strictly adhered to in order to protect the legitimacy of decisions. Furthermore, neither article was able to dissect the true legal impact of the decisions. This means that regardless of which side of the aisle, many Americans likely have no idea how dramatically the Court has changed its practices and the impact that is having on the entire court system.

Tandon had real impacts on the law and on the everyday lives of Californians. The problem is that the case never should have. The Court could have made that decision after legitimate, consistent processes but chose not to do so. Unfortunately, that trend of decision-making did not end with *Tandon*, but has become an increasingly normal part of the Court's practice. Still, *Tandon* itself did not receive much public attention, and the media coverage it did receive was unable to fully capture the problematic nature of the decision. Without diving into the minutiae of the precedent, other cases, or the decision, it would've been nearly impossible to discern the true impact the case had and how the Court has begun renege on its traditional practices.

Case Study 2: Whole Women's Health v Jackson

Historical Context

The history of abortion rights in the US is inextricably linked with the feminist movement of the 1960s and 70s. Abortion and sexual freedom had the potential to invert traditional power structures, increase participation in the labor force, and empower women in both the public and private sphere. Hence, the abortion movement was an important part of the broader women's movement, as "the logic of freedom of abortion provided a foundation for rethinking women's relations to men, to power, and to their own experience."¹⁴⁵ However, abortion is not just political, it is personal. Countless women have died from unassisted abortions or been forced to carry a child to term that they were unable to care for. Behind all the legal technicalities to follow, it is important to remember the women whose lives are forever impacted by the decisions of the courts.

The right to abortion in the US was first formally enshrined with *Roe v Wade*, but the decision followed significant precedent expanding the right to privacy. These cases carved out a clear right to bodily autonomy and sexual privacy that built upon one another to culminate with *Roe*. The precedents to *Roe* help contextualize the importance of the right to abortion in American jurisprudence, and therefore underline just how damaging *Whole Women's Health* was to the legal and social landscape in the US.

The decision in *Griswold v Connecticut* (1965) was the first landmark step towards establishing the right to bodily autonomy and privacy. This case is important since it not only allowed married couples access to contraceptives but grounded this access in a broader right to

¹⁴⁵ Hull and Hoffer, *Roe v Wade: The Abortion Rights Controversy in American History*, Third Updated Edition (University Press of Kansas, 2021), 109.

privacy. Justice Douglas found that there are “penumbras” in the Constitution that “create zones of privacy.”¹⁴⁶ Justice Goldberg concurred, arguing that “the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights.”¹⁴⁷ The foundation of future civil rights litigation was laid when Justice Byron White explicitly used the 14th Amendment to carve out a realm of private family life that should be safe from “arbitrary or capricious denials” of freedom.¹⁴⁸ This decision was eventually expanded in *Eisenstadt v Baird* (1972) to unmarried couples as well. The legal logic of these two cases laid the foundation for the decision in *Roe*. This connection is not a stretch that is evident with the benefit of hindsight. Lower courts in the pre-*Roe* era interpreted Supreme Court decisions to apply to abortion as well. Justice Douglas wrote in a dissent in *United States v Vuitch* (1972) two years before *Roe* that there is a “compelling personal interest in marital privacy and in the limitation of family size” and right to privacy originating in *Griswold*.¹⁴⁹

The right to sexual privacy was further expanded with the rulings in *Loving v Virginia* (1967), *Skinner v Oklahoma* (1942), and *Stanley v Georgia* (1969). *Loving* was a landmark ruling allowing interracial marriage, and *Skinner* established the right to procreate.¹⁵⁰ The unanimous ruling in *Stanley* that it was beyond the state’s purview to prosecute a person for possessing pornographic materials in the privacy of their own home.¹⁵¹ The justices found clear support for a robust right to privacy that supersedes other considerations, arguing that “we think that mere categorization of these films as ‘obscene’ is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments.”¹⁵²

¹⁴⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965), pg. 484.

¹⁴⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965), pg. 486.

¹⁴⁸ *Griswold v. Connecticut*, 381 U.S. 479 (1965), pg. 502.

¹⁴⁹ *United States v. Vuitch*, 402 U.S. 62 (1971), pg. 79.

¹⁵⁰ *Roe v Wade*, 410 U.S. 113 (1973).

¹⁵¹ *Stanley v Georgia*, 394 U.S. 557 (1969).

¹⁵² *Stanley v Georgia*, 394 U.S. 557 (1969), pg. 566.

Taken together, these cases establish a clear right to sexual privacy and bodily autonomy, even if it is not explicitly referenced in the Constitution. Instead, “penumbras” within the 1st, 3rd, 4th, 5th, and 14th Amendments create an implied right to privacy that is sufficiently clear to enforce. These cases are important for linking the right to abortion established in *Roe v Wade* to the right to privacy. As such, these cases can be used to condemn *Whole Women’s Health* for taking a radical step to repeal *Roe* and threaten precedent stretching back to 1965. The case is also therefore not just an attack on abortion rights, but privacy rights as a whole.

However, this thesis will focus on the legal procedure behind *Whole Women’s Health*. A common weapon against Court critics is that they simply disagree with the substance of the decision. This thesis will therefore focus on the procedural and legal flaws of *Whole Women’s Health* to demonstrate that regardless of one’s personal politics, the Court’s use of the shadow docket in this case reflects a flawed decision-making process that poses real threats to our judicial system and democracy in ways that should concern that Americans across the political spectrum should be concerned with.

Prior Precedent: *Roe v Wade* and *Casey*

Roe v Wade is arguably one of the most famous (or infamous, depending on your politics) Supreme Court decisions. In short, *Roe* held that “a person may choose to have an abortion until a fetus becomes viable, based on the right to privacy contained in the Due Process Clause of the Fourteenth Amendment.”¹⁵³ This is because while “the detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent,” “the Court’s decisions

¹⁵³ Skelton and Kemp, *Justia Law Opinion Summary and Annotations: Roe v Wade*.

recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate.”¹⁵⁴

Hence, the Court established the viability standard to determine exactly when during a pregnancy the state’s “compelling interest” in protecting fetal life began. While the Court deliberately attempted not to define when life begins, it did establish that “with respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester.”¹⁵⁵ Importantly, the Court decided that before that “compelling point,” the decision on whether or not to have an abortion should be solely between a woman and her doctors, “free of interference by the State.”¹⁵⁶ The Court specifically detailed that this decision must be “without regulation by the State.”¹⁵⁷

That clause established an absolute right to abortion before fetal viability, grounded in the modern interpretation that the 9th and 14th Amendments create a fundamental right to privacy. The decision in *Roe* has been criticized as overreach from an activist Court, but the Justices tied their argument to the prior precedents discussed above. Justice Stewart’s concurrence noted that Eisenstadt had created "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Justice Stewart’s argument logically followed that “that right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.”¹⁵⁸

¹⁵⁴ *Roe v Wade*, 410 U.S. 113 (1973), pg. 155.

¹⁵⁵ *Roe v Wade*, 410 U.S. 113 (1973), pg. 164.

¹⁵⁶ *Roe v Wade*, 410 U.S. 113 (1973), pg. 164.

¹⁵⁷ *Roe v Wade*, 410 U.S. 113 (1973), pg. 164.

¹⁵⁸ *Roe v Wade*, 410 U.S. 113 (1973), pg. 164.

However, the ruling in *Roe v Wade* was marginally rolled back around twenty years later in *Planned Parenthood of Southeastern Pennsylvania v Casey*. This decision, while upholding the basic principles of *Roe*, created a new standard in abortion law: undue burden. The Court ruled that “a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”¹⁵⁹ This new provision opened the door to government regulation of pre-viability abortion, something that had been explicitly forbidden under *Roe*. A variety of methods to dissuade women from choosing to have an abortion, from informed consent to waiting periods, were deemed constitutional under the state’s “compelling interest” in protecting fetal life. Justice Blackmun, who had written the majority opinion in *Roe* and remained on the Court for *Casey*, wrote in his dissent that the decision left *Roe* as remaining “only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality.”¹⁶⁰ He recognized that *Casey* fatally undermined *Roe*, even if it did not technically overrule it.

Much of the litigation post *Casey* has focused on defining what exactly constitutes an “undue burden” on women seeking to have an abortion. Gradually, the Court began to approve more and more restrictions on abortion under this standard. Those decisions, however, were merit docket decisions. While one might personally disagree with *Casey* and some of the more recent restrictions, they took place with full briefings, oral arguments, and conferencing. *Whole Women’s Health* would be different.

¹⁵⁹ *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 U.S. 833 (1992), pg. 879.

¹⁶⁰ *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 U.S. 833 (1992), pg. 955.

Texas Senate Bill 8

The road to *Whole Women's Health* began on May 19, 2021, when Texas passed SB8. Also known as the “Heartbeat Bill,” the law proclaimed that “a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child.”¹⁶¹ For most people, cardiac activity can be detected at around 6 weeks, and in Texas “85 to 90 percent of the procedures...performed were after the six-week mark.”¹⁶² That represented a sharp departure from previous law. The “viability standard” adopted by *Roe* had been at the start of the third trimester, around 27 weeks. The six-week standard was the harshest restriction in the nation, cutting off access at a point where many women do not yet even know that they are pregnant.¹⁶³

SB8 did provide a technical exception for medical emergencies. Under Section 171.205, a physician could terminate a pregnancy if they determine there is a medical emergency, but under Section 171.008 the physician must provide written documentation recording the women’s medical condition and why they deemed it necessary to grant an abortion.¹⁶⁴ Despite this, the doctor could still be sued if someone disagreed with their determination, forcing physicians to assume significant personal, financial, and professional risk.

What makes SB8 unique and truly disruptive is its enforcement mechanism. Under Section 171.208, any non-government agent may bring civil suit against anyone who provides abortion care or “aids and abets” someone in accessing that care.¹⁶⁵ Additionally, the law outlines very harsh rules governing a civil suit in these situations. If the plaintiff wins, they are

¹⁶¹ 87 (R) SB 8, Section 171.203 (2021).

¹⁶² Maggie Astor, *Here's What the Texas Abortion Law Says* (The New York Times, 2021).

¹⁶³ Maggie Astor, *Here's What the Texas Abortion Law Says* (The New York Times, 2021).

¹⁶⁴ 87 (R) SB 8, Section 171.205 and 171.008 (2021).

¹⁶⁵ 87 (R) SB 8, Section 171.208 (2021).

entitled to a minimum of \$10,000 and the cost of their attorneys fees, while the person seeking an abortion is deprived care.¹⁶⁶ Note that under no circumstances, even in the case of victory, can the defense receive compensation or attorneys fees.¹⁶⁷ This creates an incentive structure that highly favors those seeking to stop abortion providers from providing care. Such action could be highly profitable, and the risk is minimal, especially given the civil standard of preponderance of the evidence. A plaintiff need only show that it was more likely than not that someone intended to aid someone in accessing an abortion, and they'd be entitled to a neat 10,000 dollars and full coverage of their attorney's fees. The person seeking an abortion themselves cannot be sued, but if a suit is brought against someone aiding them, their abortion care will be denied.¹⁶⁸

SB8 was also designed to be resilient against legal challenge. The law makes aiding an abortion a civil offense to prevent state officers from enforcing the law.¹⁶⁹ Since private citizens themselves will be suing, an abortion provider cannot sue state officials to prevent them from enforcing this law. Furthermore, under Section 171.211, the State provided its officers with sovereign immunity, protecting government agents from lawsuits unless they directly enforce the legislation.¹⁷⁰ The legislature constructed other provisions to aid in potential legal battles. Rather ingeniously, and a clear indication that the legislators anticipated rather strenuous litigation, SB8 provides that even if one section is ruled unconstitutional, the rest of the law will stand.¹⁷¹ The Texas legislature went as far as attempting to dictate exactly what attorneys could challenge in the law. They wrote in Section 171.209 that an affirmative defense under *Roe* or *Casey* is not available, and that the financial penalties in the bill do not constitute an "undue burden."¹⁷²

¹⁶⁶ 87 (R) SB 8, Section 171.208 (2021).

¹⁶⁷ 87 (R) SB 8, Section 171.208 (2021).

¹⁶⁸ 87 (R) SB 8, Section 171.206 (2021).

¹⁶⁹ 87 (R) SB 8, Section 171.207 (2021).

¹⁷⁰ 87 (R) SB 8, Section 171.211 (2021).

¹⁷¹ 87 (R) SB 8, Section 171.212 (2021).

¹⁷² 87 (R) SB 8, Section 171.209 (2021).

These provisions work together to attempt to insulate the law from legal challenge, and they had mixed success. The exact impact of these provisions will be discussed further during the breakdown of the procedural history in *Whole Women's Health*.

Procedural History

Whole Women's Health v Jackson was a shadow docket case that ruled on whether SB8 could be legally challenged. The Court's final decision in the case has received significant attention from the press and scholarly community alike. However, in order to truly understand what made *Whole Women's Health* so unprecedented, the granular procedural history must be understood. The numerous lawsuits, emergency stays, and skipped procedural steps are illustrative of how ad-hoc and chaotic shadow docket cases can be.

The long fight to defeat SB8 began on July 13th, 2021, when the ACLU of Texas filed a suit on behalf of a broad coalition of abortion providers and interest groups. The original lawsuit named "every state court trial judge and county clerk in Texas, the Texas Medical Board, the Texas Board of Nursing, the Texas Board of Pharmacy, the attorney general, and the director of Right to Life East Texas."¹⁷³ The legal strategy was to prevent these entities from enforcing the law or hearing any lawsuits stemming from SB8. Since the ACLU couldn't sue every citizen in Texas who could attempt to prevent abortion access, the organization asked for an injunction against government agents that would be involved in such efforts. The complaint asked the District Court for the Western District of Texas to stop "Texas's brazen defiance of the rule of law and the federal constitutional rights to which Texans are entitled" and prevent SB8 from going into effect.¹⁷⁴

¹⁷³ ACLU Texas, Lawsuit Filed to Stop Texas' Radical New Abortion Ban (American Civil Liberties Union, 2021).

¹⁷⁴ W.D. Tex. - *Whole Woman's Health v. Jackson* - Complaint, 7/13/2021, pg. 8.

Specifically, the ACLU argued that SB8 would cause immediate and irreparable harm. Claiming that 85-90% of people who obtained abortions in Texas are at least 6 weeks into pregnancy, the plaintiffs argued that “many Texans will be forced to carry their pregnancies to term, to attempt to scrape together funds to obtain an abortion out of state, or possibly to attempt to self-manage their own abortions without access to accurate medical information.”¹⁷⁵ This harm would be compounded by existing inequalities in healthcare access, disproportionately affecting black and rural Texans.¹⁷⁶ The complaint alleged that even if abortion providers won every suit brought against them, the high cost of litigation and inability to recoup legal expenses in the case of a victory would make it cost prohibitive to provide abortion services in the state.¹⁷⁷ Plaintiff Alexis McGill Johnson, president of Planned Parenthood, said SB8 would “open the floodgates to frivolous lawsuits designed to bankrupt health centers, harass providers, and isolate patients from anyone who would treat them with compassion.”¹⁷⁸ The ACLU urged the District Court to block the law under the precedent of *Roe v Wade* and “nearly fifty years of unbroken precedent, a patient has a constitutionally protected right to end a pregnancy before viability.”¹⁷⁹ Essentially, the plaintiffs argued that there is an indisputably clear legal standard that SB8 would violate, resulting in irreparable harm. By anchoring their argument in the traditional standards necessary for preliminary injunctive relief, the plaintiffs had compelling argument for the District Court to prevent the law from coming into effect until the merits of the new legislation could be fully litigated.

¹⁷⁵ W.D. Tex. - Whole Woman's Health v. Jackson - Complaint, 7/13/2021, pg. 30.

¹⁷⁶ W.D. Tex. - Whole Woman's Health v. Jackson - Complaint, 7/13/2021.

¹⁷⁷ W.D. Tex. - Whole Woman's Health v. Jackson - Complaint, 7/13/2021.

¹⁷⁸ ACLU Texas, *Lawsuit Filed to Stop Texas' Radical New Abortion Ban* (American Civil Liberties Union, 2021).

¹⁷⁹ W.D. Tex. - Whole Woman's Health v. Jackson - Complaint, 7/13/2021, pg. 39.

In order to determine whether or not to block SB8 from coming into effect, the district court scheduled a preliminary injunction hearing for August 30.¹⁸⁰ This hearing would have allowed both sides to argue whether an injunction was an appropriate remedy, but the hearing never happened. After the same district court denied a defendant's petition on August 25 to dismiss the case, the defendants filed a notice of appeal and an emergency motion with the Fifth Circuit to stop all proceedings at the district level.¹⁸¹ Just two days later, on August 27, the Fifth Circuit agreed to cancel all district court proceedings. This prevented the district court from even holding a hearing on whether or not to issue an injunction and refused to expedite the appeals process.¹⁸² This ruling allowed SB8 to come into effect and stay in effect for months as further litigation proceeded. The Fifth Circuit's decision included no justification but had a devastating effect on women across Texas. Below is the full text of the Fifth Circuit's decision:

“IT IS ORDERED that a temporary administrative stay of the district court proceedings, including the upcoming preliminary injunction hearing, is GRANTED until further order of this court. Appellant Mark Lee Dickson is ORDERED to file a combined response and reply of no more than 7,500 words to Appellees' Combined Motion to Dismiss Defendant Appellant Mark Lee Dickson's Appeal and Opposition to Emergency Stay Motion, by 9 a.m. central time on Tuesday, August 31, 2021. IT IS FURTHER ORDERED that Appellees' joint opposed motion to expedite the appeal is DENIED”.¹⁸³

This decision exemplifies the difficulty of parsing out shadow docket cases, especially when lower courts release decisions without written decisions. The Fifth Circuit's one paragraph, unsigned opinion makes it incredibly difficult to parse out the true effect of its decision. Without

¹⁸⁰ ACLU Texas, *Lawsuit Filed to Stop Texas' Radical New Abortion Ban* (American Civil Liberties Union, 2021).

¹⁸¹ ACLU Texas, *Lawsuit Filed to Stop Texas' Radical New Abortion Ban* (American Civil Liberties Union, 2021).

¹⁸² ACLU Texas, *Lawsuit Filed to Stop Texas' Radical New Abortion Ban* (American Civil Liberties Union, 2021).

¹⁸³ Appeal from the United States District Court for the Western District of Texas USDC No. 1:21-cv-616.

the full context of the lower court’s decision, it is nearly impossible to understand that the Fifth Circuit leapfrogged over the lower court in a break of traditional procedure and allowed irreparable harm to thousands of women across Texas to proceed. Unfortunately, this Fifth Circuit ruling is just the beginning in a tangle of highly opaque, procedural rulings that further perpetuate this harm.

Since the Fifth Circuit denied emergency relief to the plaintiffs, the abortion providers, the ACLU filed an emergency petition with the Supreme Court to block SB8 before it came into effect. This was a last-ditch effort to stop abortion access from being essentially cut off the next day. The plaintiffs argued that since the Fifth Circuit halted all lower court hearings and proceedings, “applicants here have not even had their full day in court and yet will be irreparably deprived of their recognized constitutional rights without this Court’s intervention.”¹⁸⁴ The ACLU argued this in an attempt to justify the need for the Supreme Court’s emergency intervention, explaining that they had sought all necessary relief from the lower courts and that irreparable harm would occur without the Supreme Court’s intervention.

Importantly, the plaintiffs also argued that the Court had granted emergency relief before to prevent “constitutional injury.”¹⁸⁵ The plaintiffs specifically cited the Court’s decision in *Roman Catholic Diocese of Brooklyn v Cuomo* as precedent for such emergency relief. That case was another shadow docket decision. The implications of this will be discussed further at a later point, but this argument is an important clue that indicates that shadow docket decisions are being considered by some as Supreme Court binding precedent, even though, as discussed earlier, emergency relief was traditionally not supposed to have any precedential effect.

¹⁸⁴ Supreme Court of the United States, Emergency Application in *Whole Women’s Health v Jackson*, 8/30/2021, pg. 23.

¹⁸⁵ Supreme Court of the United States, Emergency Application in *Whole Women’s Health v Jackson*, 8/30/2021, pg. 18.

In *Whole Women's Health*, the Court chose not to immediately act. The Justices allowed SB8 to come into effect on September 1, 2021. The Court had quietly dealt a severe blow to *Roe v Wade* and other precedent stretching back almost 50 years by allowing a de facto abortion ban to take effect.

The next day, September 2nd, the Court formally denied emergency relief and remanded the case back to the Fifth Circuit for further proceedings.¹⁸⁶ Note that in this case, the emergency relief sought was simply to vacate the Fifth Circuit's previous stay, not issue an emergency injunction. The legal standard for vacating a stay is significantly lower than issuing an injunction, but "the majority never separately considered...the lower standard that it should have applied in assessing it."¹⁸⁷ That is a subtle distinction, but a vital one. The Court had previously agreed to grant much more extreme emergency relief for much less clear cases, but deliberately chose not to act in to uphold the constitutional rights of Texans.

In a dissent of the denial, Justices Roberts, Kagan, and Breyer argued that "the statutory scheme before the Court is not only unusual, but unprecedented."¹⁸⁸ Justice Sotomayor took her dissent even further, arguing that

"The Court's order is stunning. Presented with an application to enjoin a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny, a majority of Justices have opted to bury their heads in the sand. Last night, the Court silently acquiesced in a State's enactment of a law that flouts nearly 50 years of federal precedents."¹⁸⁹

The liberal Justices unleashed blistering dissents. Justice Sotomayor wrote that "the Court should not be so content to ignore its constitutional obligations to protect not only the rights of

¹⁸⁶ ACLU Texas, Lawsuit Filed to Stop Texas' Radical New Abortion Ban (American Civil Liberties Union, 2021).

¹⁸⁷ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 239.

¹⁸⁸ *Whole Women's Health v Jackson*, 594 U. S. ____ (2021), pg. 2.

¹⁸⁹ *Whole Women's Health v Jackson*, 594 U. S. ____ (2021), pg. 1.

women, but also the sanctity of its precedents and of the rule of law.”¹⁹⁰ Justice Kagan agreed, writing that “today’s ruling illustrates just how far the Court’s ‘shadow-docket’ decisions may depart from the usual principles of appellate process.”¹⁹¹ It is stunning that even some of the Justices themselves openly recognize and condemn the harm of the shadow docket. Kagan continued that “in all these ways, the majority’s decision is emblematic of too much of this Court’s shadow docket decision-making—which every day becomes more unreasoned, inconsistent, and impossible to defend.”¹⁹²

These dissents reveal deep divisions within the Court. It appears that some of the liberal Justices recognize the harm of the shadow docket that leapfrogs over lower courts and allows the Supreme Court to selectively and inconsistently choose when and how it grants relief. Yet, in a Court dominated by an overwhelming conservative majority, the liberal justices and Justice Roberts can be continually outvoted.

The saga of *Whole Women’s Health* was further complicated on September 9th, when the Department of Justice filed its own suit against SB8 in the District Court for the Western District of Texas.¹⁹³ The new suit was called *United States v Texas*, but its fate was closely tied to *Whole Women’s Health*. The district court “granted a preliminary injunction against SB 8 which will remain in effect while the case continues unless the ruling is overturned or paused on appeal.”¹⁹⁴ That ruling was handed down on October 6, 2021. Just two days later, on October 8, the ban was once again in effect. The Fifth Circuit stayed the preliminary injunction, leaving the Department of Justice no other option except appealing to the Supreme Court. Once again, women across

¹⁹⁰ *Whole Women’s Health v Jackson*, 594 U. S. ____ (2021), pg. 4.

¹⁹¹ *Whole Women’s Health v Jackson*, 594 U. S. ____ (2021), pg. 1.

¹⁹² *Whole Women’s Health v Jackson*, 594 U. S. ____ (2021) pg. 2.

¹⁹³ Department of Justice Office of Public Affairs, *Justice Department Sues Texas Over Senate Bill 8*, (U.S. Department of Justice, 2021.)

¹⁹⁴ ACLU of Texas, *Texas Abortion Ban Blocked for Now*, (American Civil Liberties Union, 2021.)

Texas were left in legal limbo, their ability to access abortion care granted and denied from one day to the next. The seemingly arbitrary nature of these rulings created confusion on the ground as providers and patients scrambled to adapt to the legal whiplash. Amy Hagstrom Miller, president of Whole Women’s Health, called the legal limbo “excruciating for both patients and our clinic staff” as the organization had been forced to turn away “hundreds of patients” in the confusion.¹⁹⁵ Note that the Supreme Court could have prevented all of that confusion when it first heard the case back on September 2nd. Instead, it deliberately chose not to issue relief and not to release a definitive decision.

The next time the Supreme Court heard the case was on October 22, when the Court ruled that it would hear both *United States v Texas* and *Whole Women’s Health* on November 1. In *United States v Texas*, the Court would consider “whether to block the law again and whether the DOJ has the authority to bring this case.”¹⁹⁶ In *Whole Women’s Health*, the Court would investigate whether “federal courts have the power to block Texas’ abortion ban.”¹⁹⁷ In the meantime, it would allow the law to remain in effect, a decision deemed “catastrophic” by Justice Sotomayor.¹⁹⁸

November 1st was the first time that the Court heard oral arguments in this case. Again, they could have agreed to expedite this case much earlier, sparing months of litigation and confusing emergency orders. Instead, the Court ruled to dismiss the majority of the case and remand the rest to the Texas Supreme Court where it was thrown out.¹⁹⁹ That final decision was released on March 11, 2022. Initial litigation had begun nine months earlier, in July 2021.

¹⁹⁵ ACLU of Texas, *Supreme Court Will Hear Texas Abortion Ban Cases*, (American Civil Liberties Union, 2021).

¹⁹⁶ ACLU of Texas, *Supreme Court Will Hear Texas Abortion Ban Cases*, (American Civil Liberties Union, 2021).

¹⁹⁷ ACLU of Texas, *Supreme Court Will Hear Texas Abortion Ban Cases*, (American Civil Liberties Union, 2021).

¹⁹⁸ ACLU of Texas, *Supreme Court Will Hear Texas Abortion Ban Cases*, (American Civil Liberties Union, 2021).

¹⁹⁹ ACLU of Texas, *Texas Supreme Court Decision Means Abortion Challenge Will be Thrown Out*, (American Civil Liberties Union, 2022).

Impact

The impact on women in Texas cannot be understated. For months, people seeking abortion care were left in legal limbo, their constitutional rights granted one day and seemingly arbitrarily denied the next. It left patients and providers scrambling to adjust to the new legal landscape. Women's entire lives were changed by emergency decisions that lacked the full briefing, oral arguments, and written opinions that would've legitimized such drastic changes in policy.

For women deprived of care in these circumstances, it is no exaggeration to say that their lives were likely permanently altered. Dr. Diana Foster, a professor at UCSF, conducted the "Turnaway Study" to empirically track outcomes for women denied abortions. Her findings are equally important and sobering. She found long term differences between women who were granted and denied abortions across all areas of life, from "an increase in poverty; a decrease in employment that lasts for years; a scaling back of aspirational plans" as well as worsened physical health.²⁰⁰ For women forced to carry unwanted pregnancy, they became exposed to all of the risks that go along with giving birth. This can often mean literally risking a woman's life, as "maternal mortality is now twice as high as it was in 1987, with 17 deaths for every 100,000 live births in the United States."²⁰¹ For women who participated in the study specifically, "6.3% of women who gave birth reported potentially life-threatening conditions, compared to... .5% of women receiving a first trimester abortion."²⁰² Being forced to give birth results in serious, long term damage to a woman's health and life outcomes.

²⁰⁰ Dr. Diana Greene Foster, *The Turnaway Study* (Simon and Schuster Inc, 2020), 165.

²⁰¹ Dr. Diana Greene Foster, *The Turnaway Study* (Simon and Schuster Inc, 2020), 151.

²⁰² Dr. Diana Greene Foster, *The Turnaway Study* (Simon and Schuster Inc, 2020), 146.

This issue is compounded by existing inequalities, as “Black and Native American women have an over three times greater chance of dying from pregnancy and childbirth than white women” and “Half of all women seeking abortion in the U.S. live below the federal poverty level.”²⁰³ Women living below the poverty line face the most difficulty in traveling long distances to access abortion care and have the most difficult experience affording prenatal healthcare and providing for a child.

The Court’s ruling had immediate effects in Texas. Unfortunately, “over 40% of people seeking abortion care do not contact a Texas facility until after 6 weeks of pregnancy,” meaning that many were denied care by default.²⁰⁴ This led the total number of abortions provided in Texas to plummet over 50% from September 2020 to after the law came into effect in September 2021.²⁰⁵ In response, clinics in border states were inundated with patients. Data released by Planned Parenthood showed that clinics in nearby states like New Mexico and Kansas saw an 800% increase in patients from Texas-- even 2,500% in Oklahoma-- causing wait times to jump sharply.²⁰⁶ Increased wait times have real consequences, as they “may push pregnant people past the limit for medication abortion or into the second trimester of pregnancy, when procedures have a somewhat higher risk of complications.”²⁰⁷ Many of the states neighboring Texas are also conservative, requiring mandatory waiting periods and counseling, further delaying treatment and increasing travel costs. A study by Georgetown found that the bill will “increase the average

²⁰³ Dr. Diana Greene Foster, *The Turnaway Study* (Simon and Schuster Inc, 2020), 66.

²⁰⁴ Kari White, Initial Impacts of Texas’ Senate Bill 8 on Abortions in Texas and at Out-Of-State Facilities, (Texas Policy Evaluation Project, University of Texas at Austin, 2021), 2.

²⁰⁵ Kari White, Initial Impacts of Texas’ Senate Bill 8 on Abortions in Texas and at Out-Of-State Facilities, (Texas Policy Evaluation Project, University of Texas at Austin, 2021), 2.

²⁰⁶ Mary Tuma, “A Grave Warning:” Six Months of Texas Abortion Ban Sow Fear and Anguish, (The Guardian, 2022).

²⁰⁷ Kari White, Initial Impacts of Texas’ Senate Bill 8 on Abortions in Texas and at Out-Of-State Facilities, (Texas Policy Evaluation Project, University of Texas at Austin, 2021), 3.

one-way driving distance to an abortion clinic by fourteen-fold, from 17 miles to 247 miles.”²⁰⁸

Based on the totality of these circumstances, the author concluded that “it is clear the new law will increase and strengthen pre-existing obstacles to abortion for low-income women, women of color, and women living in rural areas of the state.”²⁰⁹

These implications beg the question as to what the court considers “irreparable harm.” That is one of the key factors the Court supposedly considers when hearing emergency petitions for injunctions, but in this case, they found that “we cannot say the applicants have met their burden to prevail in an injunction or stay application.”²¹⁰ Their reasoning was based in the unique structure of the bill, which the justices felt that created new procedural questions. In doing so, the Court essentially decided that the bill would not produce sufficient irreparable harm to be blocked while those questions were decided. Note, however, that simply because a law has a new structure does not prevent an injunction from being issued. The Court could have granted an injunction to give lower courts, and itself, time to decide on those questions. This was recognized by Chief Justice Roberts, who wrote in his dissent that he “would accordingly preclude enforcement of S. B. 8 by the respondents to afford the District Court and the Court of Appeals the opportunity to consider the propriety of judicial action and preliminary relief pending consideration of the plaintiffs’ claims.”²¹¹ This is because, as Justices Breyer, Sotomayor, and Kagan recognized, if SB8 “may well threaten the applicants with imminent and serious harm.”²¹² And, as shown above, it had profound impact on Texans.

²⁰⁸ Lindsay Johnson, *The Disparate Impact of Texas’ Abortion Ban on Low-Income and Rural Women* (The Georgetown Journal on Poverty Law and Policy, 2022).

²⁰⁹ Lindsay Johnson, *The Disparate Impact of Texas’ Abortion Ban on Low-Income and Rural Women* (The Georgetown Journal on Poverty Law and Policy, 2022).

²¹⁰ *Whole Women’s Health v Jackson*, 594 U. S. ____ (2021), pg. 2.

²¹¹ *Whole Women’s Health v Jackson*, 594 U. S. ____ (2021), pg. 3.

²¹² *Whole Women’s Health v Jackson*, 594 U. S. ____ (2021), pg. 1.

In this case, the Court dealt a death-knell to *Roe*. While *Whole Women's Health* may not have technically overturned the abortion precedent, the restrictions that it sanctioned flew in the face of the rules created by *Roe* and *Casey*. The Court walked back decades of precedent on abortion and privacy rights without an oral argument, full briefing, or the regular procedures the Supreme Court claims to rely upon. The formal end of *Roe* was just a matter of time after *Whole Women's Health*, because the case created such a glaring contradiction with existing precedent. The Court knowingly chose this course of action over other, more legally respected avenues, because they could. Perhaps the Justices became comfortable with their judicial monopoly and felt emboldened, as “a court that embraces a philosophy of judicial supremacy and claims to be the Constitution’s sole authoritative expositor will reach farther and do more than a court that does not.”²¹³

Furthermore, *Whole Women's Health* stands in contrast to other shadow docket decisions, such as *Tandon*. In *Tandon*, the Court chose to block government emergency action in a pandemic. In *Whole Women's Health*, the Court fell back on the presumption of constitutionality, essentially arguing that because the legislature passed SB8, it must be legal. In doing so, the Court disregarded 50 years of precedent that clearly stated the bill was blatantly unconstitutional. Put another way, the Court chose to ignore the presumption of constitutionality when it benefitted their partisan beliefs, and hid behind it when it suited them to.

Furthermore, unlike *Tandon*, “in which the Court jumped through procedural hoops to issue an emergency injunction based upon a *new* interpretation of the Constitution, the same justices refused to do so in *Whole Woman's Health* to protect a right that—at that point,

²¹³ Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2005), 231.

anyway—was not just clearly established, but that SB8 unquestionably violated.”²¹⁴ That is the main problem with *Whole Women’s Health*. The Court could have easily intervened and had in fact intervened in other cases that were much less clear, but chose not to. In his testimony before the Senate Committee on the Judiciary, Professor Vladeck argued that “the relief the providers were seeking was clearly within both the Court’s formal power and what had increasingly become the norms of the Court’s recent practice.”²¹⁵ The comparison of these cases reveals something damning: the Court chose to apply its standards of review inconsistently, precisely so they could favor a conservative cause over a liberal one. They broke procedure to expand religious liberty but refused to act to protect a clear constitutional standard on abortion. Worse, they did this all with no clear explanation.

The nature of the shadow docket means that it is often impossible to determine who voted for the majority, and who authored the per curiam opinion. Therefore, it is hard to keep individual justices accountable for dramatic changes in decision-making and judicial norms. That being said, the skyrocketing number of cases on the shadow docket in recent years follows the trend of the conservative appointments in recent years. Justices Gorsuch, Kavanaugh, and Coney Barrett were appointed in 2017, 2018, and 2020 respectively.²¹⁶ The following chart details this rise in emergency relief, as compiled by Professor Vladeck using the WestLaw Database:²¹⁷

Table 2: Total Grants of Emergency Relief by Supreme Court Term (OT2005-Present)

²¹⁴ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 238.

²¹⁵ Steve Vladeck, *Texas’ Unconstitutional Abortion Ban and the Role of the Shadow Docket* (Hearing Before the Senate Committee on the Judiciary, 2021), 29.

²¹⁶ *Justices 1789 to Present* (The Supreme Court, 2022).

²¹⁷ Steve Vladeck, *Texas’ Unconstitutional Abortion Ban and the Role of the Shadow Docket* (Hearing Before the Senate Committee on the Judiciary, 2021), 5.

<u>Term</u>	<u>Grant Stay</u>	<u>Vacate Stay</u>	<u>Grant Injunction</u>	<u>Vacate Injunction</u>	<u>Total</u>
OT2020¹⁷	7	5	7	1	20
OT2019	15	4	0	1	19
OT2018	12	3	0	0	15
OT2017	9	0	0	0	9
OT2016	10	1	0	0	11
OT2015	11	1	1	0	13
OT2014	7	2	1	0	10
OT2013	4	2	2	0	8
OT2012	1	0	0	0	1
OT2011	6	0	0	0	6
OT2010	6	0	0	0	6
OT2009	3	1	0	0	4
OT2008	8	0	0	0	8
OT2007	7	0	0	0	7
OT2006	1	0	0	0	1
OT2005	6	0	0	0	6

Source: Steve Vladeck, *Texas' Unconstitutional Abortion Ban and the Role of the Shadow Docket* (Hearing Before the Senate Committee on the Judiciary, 2021), 5.

Even if, hypothetically speaking, the justices' decision in this case was completely unmarred by personal beliefs, the public image of the Court is still irreparably damaged. Irrepressible rumors of the Court's partisan decision making, exacerbated by the new Court appointment procedures, fundamentally undermine the Court's legitimacy and ability to make respected decisions. The inconsistency and lack of procedural regularity of the shadow docket only provide ammunition for Court critics and further damage the institution's reputation.

Therefore, the Court's refusal to block SB8 raises important questions about the Court's decision-making. It appears publicly as though the Court has been captured by partisan interests, with radical new conservative justices fundamentally shifting the Court's behavior.

Conservatives currently have a 6-3 majority, created by the Trump presidency and the removal

of the judicial filibuster. Trump publicly bragged about his intention to appoint justices to specifically overturn *Roe v Wade*, commenting on Fox News that “they will be pro-life, and we will see what about overturning.”²¹⁸ His appointment of Amy Coney Barrett, who is openly Catholic, accomplished this goal. At the same time, it opened the Court up to criticism that it has become a puppet of the Christian right.

Whole Women’s Health also sent shockwaves through the public media. President Biden condemned the ruling, stating “the court has done what it’s never done before — expressly taking away a constitutional right that is so fundamental to so many Americans.”²¹⁹ Protests began nationwide, and the Justice Department announced that “we stand ready to work with other arms of the federal government that seek to use their lawful authorities to protect and preserve access to reproductive care.”²²⁰ The backlash was not just directed at the substantive effects of the ruling, however, but also how the ruling had come about. An article in the New York Times commented that “the majority opinion was unsigned and consisted of a single long paragraph.”²²¹ The article explicitly called out the shadow docket and its ability to break procedural regularity, noting that “the Texas case, which was on the court’s “shadow docket” without a full briefing or oral arguments, leapfrogged the one from Mississippi [*Dobbs v Jackson*].”²²² *Dobbs* would go on to formally overturn *Roe v Wade* and *Planned Parenthood v Mississippi* on the merits docket. But by leapfrogging over the lower courts and other merit docket decisions, the Supreme Court chose to substantively overturn *Roe* on the shadow docket

²¹⁸ Peter Sullivan, Trump Promises to Appoint Anti-Abortion Supreme Court Justices (The Hill, 2016).

²¹⁹ Chris Megerian and Zeke Miller, Biden Vows Abortion Fight, Assails “Extreme” Court Ruling (The Associated Press, 2022).

²²⁰ Chris Megerian and Zeke Miller, Biden Vows Abortion Fight, Assails “Extreme” Court Ruling (The Associated Press, 2022).

²²¹ Adam Liptak, Supreme Court, Breaking Silence, Won’t Block Texas Abortion Law (The New York Times, 2021).

²²² Adam Liptak, Supreme Court, Breaking Silence, Won’t Block Texas Abortion Law (The New York Times, 2021).

without briefings or oral argument. In total, according to a study by the *Chicago Policy Review*, “the term “shadow docket” ... appear[ed] in more than twenty pieces in the *New York Times*, the *Washington Post*, the *Chicago Tribune*, and the *Wall Street Journal* in the six weeks between September 2 and October 15.”²²³ The proliferation of articles specifically calling out the shadow docket took aim at the Court itself, not just its decision, and underscored the potential threat that the practice could have on the institution’s legitimacy.

This is supported by recent public opinion polling on the Court. A Gallup poll from September 2022 found that 58% of Americans disapprove of the Court, a record high in the 21st century.²²⁴ Similarly, just “twenty-five percent of U.S. adults say they have “a great deal” or “quite a lot” of confidence in the U.S. Supreme Court, down from 36% a year ago and five percentage points lower than the previous low recorded in 2014.”²²⁵ And, while many institutions in the US government also experienced a decline in confidence, “the 11-point drop in confidence in the Supreme Court is roughly double what it is for most institutions that experienced a decline.”²²⁶ Worse, these opinions seem to split along partisan lines, as an August 2022 poll found “about half of Democrats (51%) now say the justices on the court are doing a poor job of keeping their own political views out of their judgments on major cases, nearly double the share who said this in January (26%).”²²⁷ Meanwhile, “about eight-in-ten conservative Republicans (83%) view the court positively today, compared with a narrower majority of moderate and liberal Republicans (58%).”²²⁸ Specifically concerning religion, “the vast majority of Americans (83%) say Supreme Court justices should *not* bring their own

²²³ Steve Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023), 239.

²²⁴ *In Depth Topics A to Z: Supreme Court*, (Gallup, 2022).

²²⁵ Jeffrey Jones, *Confidence in the U.S. Supreme Court Sinks to Historic Low* (Gallup, 2022).

²²⁶ Jeffrey Jones, *Confidence in the U.S. Supreme Court Sinks to Historic Low* (Gallup, 2022).

²²⁷ *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling* (The Pew Research Center, 2022).

²²⁸ *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling* (The Pew Research Center, 2022).

religious views into how they decide cases, and 44% say the justices have been doing this too much in recent decisions.”²²⁹ While the poll did not track exactly why the respondents felt this way, it is not hard to imagine that the Covid religion cases and recent abortion rulings may have had some impact on those numbers.

These statistics should be deeply worrying to the Court, who rely on public legitimacy to enforce their decisions. The Court has made numerous controversial decisions in its history, but have predominantly been merits docket decisions. This allows the Court to defend itself as an institution, claiming that they carefully thought out the legal reasoning after briefing, public oral argument, and conferences. The shadow docket strips all of these defenses, leaving the Court vulnerable to attacks from both sides of the aisle. No longer do their decisions appear well-reasoned, consistent, or reasonable. The Court cannot continue to change its standards of review from case to case, with just an abridged majority opinion at best, and expect their decisions to carry any sense of legitimacy.

²²⁹ Patricia Tevington, Growing Share of Americans See the Supreme Court as “Friendly” to Religion (The Pew Research Center, 2022).

Conclusion

The shadow docket presents a dire threat to the Supreme Court's legitimacy, the balance of power, and the judicial system as a whole. These impacts are epitomized in the rulings of *Tandon v Newsom* and *Whole Women's Health*. Both of these cases illustrate the importance of procedural minutia, which shed light on the real damage of the shadow docket. Hidden in the one paragraph, unsigned orders are substantive impacts that shape the law. These orders reveal that shadow docket cases, contrary to what the Court claims and has traditionally practiced, are being used to undermine precedent, create new interpretations, and are themselves being used as precedent for other cases.

In *Tandon*, the Court took the opportunity to seriously undermine the established precedent of *Employment Division v Smith*. That decision, written by Antonin Scalia, created the standard for free exercise where as long as regulations applied equally to secular and religious activities, it did not trigger increased scrutiny.²³⁰ The Court chose to undermine this ruling in *Tandon*, even though they had the opportunity to review the ruling on merits docket cases that were being argued concurrently. The *Tandon* ruling found that if any comparable secular activity was less burdened than religious practice, strict scrutiny must be applied.²³¹ The brief majority opinion even chided the Ninth Circuit for not considering previous shadow docket rulings as full precedent.²³² *Tandon* therefore demonstrates the dangers of the shadow docket. The case flew under the radar, but fundamentally altered existing law and flew in the face of established norms of precedent.

²³⁰ *Employment Division v Smith*, 494 U.S. 872 (1990).

²³¹ *Tandon v Newsom*, 593 U. S. ____ (2021).

²³² *Tandon v Newsom*, 593 U. S. ____ (2021).

Whole Women's Health did not fly under the radar, but had similar consequences as *Tandon*. The ruling fatally undermined *Roe v Wade*, which was to be formally overturned shortly after. The case had a similarly devastating impact on pregnant people in Texas, functionally depriving them of the care they were entitled to. Justice Sotomayor said it best, declaring that SB8 was “flagrantly unconstitutional” and that “a majority of Justices have opted to bury their heads in the sand.”²³³ The ruling in *Whole Women's Health* provides a powerful contrast to *Tandon*. In the former, the Court found that the government would face irreparable harm if it was not able to enforce its new policy. In doing so, they trampled on the women in Texas who would in fact face irreparable harm from benign deprived their rights. In a case that should have been incredibly clear, the Court refused to act to uphold 50 years of precedent. In *Tandon*, however, the justices took extraordinary measures to rule that the restrictions were unconstitutional. Suddenly, their interpretation that blocking government policy constituted irreparable harm was thrown out the window. Instead, the Court decided to overturn longstanding precedent and rewrite the interpretation of the First Amendment. The comparison of these two cases reveals a shocking level of audacity, inconsistency, and disrespect for the rule of law.

This is why the shadow docket presents such a threat to our democratic system. The Court has incredible power, but it must also therefore exercise suitable responsibility. The Justices have a duty to be fair, balanced, and reasoned in their decisions. The shadow docket flies in the face of each of those responsibilities, depriving Americans of the ability to trust the judicial process and understand the Court's decision making through oral arguments or written opinions. Despite these challenges, the Court is not immune from accountability. It depends on legitimacy to enforce its decisions. If the American people decide they can no longer trust a

²³³ *Whole Women's Health v Jackson*, 594 U. S. ____ (2021).

Court captured by partisan interests and imperial in nature, they can push for Court reforms. Such reforms are firmly within Congress' right under Article 3, and have been enacted before. Congress could choose to set term limits, adjust the Court's jurisdiction, or codify uniform standards of review. The Court is also sensitive to its public image. Even enough popular criticism of the Court could convince the Justices to act more responsibly.

However, since it appears that the shadow docket has become an established institutional tool, there are several opportunities for continuing research on this topic. For example, an empirical study on public perceptions of the shadow docket could prove fruitful. This thesis used public opinion on the Court and religion on the Court to argue that the shadow docket could provide a threat to the Court's legitimacy. And while recent polls have indicated that confidence in the Court has plummeted in recent years, I have not seen a study specifically investigate why confidence is so low. Given the procedural complexity of the shadow docket, I would be curious to know whether the American public at large has identified this as a significant problem and to what degree opinions on the shadow docket vary across demographic and socioeconomic groups.

Furthermore, the vast majority of scholarship on this topic has focused on the shadow docket at the Supreme Court level. However, during my analysis of *Whole Women's Health*, I noticed that the Fifth Circuit released an equally concise and opaque ruling before it had even reached the Supreme Court for the first time. In that case, the Fifth Circuit decided in one short paragraph to suspend District Court proceedings and prevent even as much as a hearing on SB8. I speculated at the time whether this indicated a larger trend of shadow-docket style decisions trickling down to lower courts. A comprehensive analysis of decisions, perhaps comparing the different, could be incredibly valuable to determine if there is any truth behind my anecdotal speculation from that one case. The results of such a study could even help reveal the trends

behind the Supreme Court’s shadow docket. For example, if such decisions are more prevalent in Circuits traditionally considered “conservative,” it might indicate that the private political motivations of justices are a significant cause of this phenomenon. During my study of *Tandon*, for example, the Ninth Circuit released a loquacious 50-page decision explaining their justification. *Tandon* and *Whole Women’s Health* are just two cases, so comparing the Ninth Circuit and Fifth Circuit solely based on those rulings is unfair. Still, it does raise an interesting question about to what extent the Supreme Court’s practices have trickled down to the lower courts, and what the potential impact of that might be.

Above all, it will remain important to track exactly how the shadow docket evolves and becomes institutionalized over time. This thesis could only cover two case studies, but there were a number of other incredibly impactful shadow docket cases in the last few years on topics ranging from election law to executive power. More key cases will undoubtedly find themselves at the Supreme Court. And, like *Whole Women’s Health*, they will be incredibly complicated and difficult to untangle. Still, without papers that delve into the true impact of the shadow docket cases and call attention to their abuses, the practice will only become more normalized.

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