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### Why Are These Justices Using the Shadow Docket More than Past Justices?

Benjamin H. Barton

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Benjamin H. Barton, *Why Are These Justices Using the Shadow Docket More than Past Justices?*, 23 NEV. L.J. 845 (2023).

ALWD 7th ed.

Benjamin H. Barton, *Why Are These Justices Using the Shadow Docket More than Past Justices?*, 23 Nev. L.J. 845 (2023).

APA 7th ed.

Barton, B. H. (2023). *Why are these justices using the shadow docket more than past justices?*. *Nevada Law Journal*, 23(3), 845-862.

Chicago 17th ed.

Benjamin H. Barton, "Why Are These Justices Using the Shadow Docket More than Past Justices?," *Nevada Law Journal* 23, no. 3 (2023): 845-862

McGill Guide 9th ed.

Benjamin H. Barton, "Why Are These Justices Using the Shadow Docket More than Past Justices?" (2023) 23:3 Nev LJ 845.

AGLC 4th ed.

Benjamin H. Barton, 'Why Are These Justices Using the Shadow Docket More than Past Justices?' (2023) 23(3) *Nevada Law Journal* 845

MLA 9th ed.

Barton, Benjamin H. "Why Are These Justices Using the Shadow Docket More than Past Justices?." *Nevada Law Journal*, vol. 23, no. 3, 2023, pp. 845-862. HeinOnline.

OSCOLA 4th ed.

Benjamin H. Barton, 'Why Are These Justices Using the Shadow Docket More than Past Justices?' (2023) 23 Nev LJ 845

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# WHY ARE THESE JUSTICES USING THE SHADOW DOCKET MORE THAN PAST JUSTICES?

Benjamin H. Barton\*

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## INTRODUCTION

The shadow docket has become a hot topic these days. William Baude created the term in 2015 just in time for an explosion in the use of these powers and the controversy they create.<sup>1</sup> But the various powers and procedures involved in the shadow docket have existed for a century or longer—some since the birth of the Supreme Court.<sup>2</sup> When you are dealing with a law called the “All Writs Act” that was first included as part of the very first Judiciary Act that established the Supreme Court and the rest of the first version of the federal judiciary, you can feel confident that you are dealing with very, very old powers indeed.<sup>3</sup> A second source of the powers involved in the shadow docket

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<sup>1</sup> For the creation of the term, see William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1–2 (2015). For the increased use of these powers, and the controversy that has followed, see, e.g., Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 124–28 (2019).

<sup>2</sup> See *infra* notes 36–37 and accompanying text.

<sup>3</sup> An Act to Establish the Judicial Courts of the United States §§ 13–14, 1 Stat. 73, 80–82 (1789); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on*

comes from 28 U.S.C. § 2101(f).<sup>4</sup> This section was first included in William Howard Taft's "Judges' Bill" of 1925.<sup>5</sup> In sum, the shadow docket itself is not new; it is the usage of these powers that is new.

This raises the question of why an institution as old as the Supreme Court with longstanding powers might change its behavior after at least a hundred years. Some might argue that the answer is obvious—a power-hungry, conservative majority has launched an all-out assault on American justice.<sup>6</sup> This was the basic point of a September 2021 Senate hearing on the issue.<sup>7</sup> And the point seems to have gained some salience. For example, *Teen Vogue* published an op-ed criticizing the conservatives on the Court and their use of the shadow docket.<sup>8</sup> When *Teen Vogue* is writing about Supreme Court procedures, a story has definitely blown up.

This explanation may or may not be true but note that over the last two hundred years there have been long stretches where one party or another held a relative stranglehold on the Court.<sup>9</sup> None of those Courts used the shadow docket as much as this Court;<sup>10</sup> so partisan dominance seems an unlikely expla-

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*Judicial Decisions*, 77 B.U. L. REV. 761, 777 n.66 (1997) ("Congress, too, has always recognized that the federal courts would inevitably encounter procedural gaps, and has in various ways empowered the courts to fill those voids. This is clearly the purpose of the famous All Writs Act, passed by the first Congress as part of the Judiciary Act of 1789.").

<sup>4</sup> 28 U.S.C. § 2101(f).

<sup>5</sup> Congress first expressly authorized individual Supreme Court Justices to grant stays of lower court judgments in the "Judges' Bill" of 1925. For the "Judges' Bill," see Act of Feb. 13, 1925, ch. 229, § 8(d), 43 Stat. 936, 940–41 (1925) (codified as amended in scattered sections of 28 U.S.C.). For a description of how Section 2101(f) was included, see Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159, 1190–93 (2008).

<sup>6</sup> See Jackie Adelsberg, *The Supreme Court's Shadow Docket Foreshadows Its Future Harmful Rulings*, ALL FOR JUST. BLOG (May 4, 2022), <https://www.afj.org/article/the-supreme-courts-shadow-docket-foreshadows-its-future-harmful-rulings/> [<https://perma.cc/FLR5-LJY5>].

<sup>7</sup> Debra Cassens Weiss, *Senate Democrats Criticize SCOTUS 'Shadow Docket' in Hearing; Republicans See Attempt at Justice Intimidation*, ABA J. (Sept. 30, 2021, 12:59 PM), <https://www.abajournal.com/news/article/senate-democrats-criticize-shadow-docket-in-hearing-republicans-see-attempt-at-justice-intimidation> [<https://perma.cc/5M2X-JKGT>].

<sup>8</sup> Tristin Brown & Daniel Wade, *The Shadow Docket: How Supreme Court Conservatives Are Manipulating Justice*, TEEN VOGUE (Oct. 20, 2021), <https://www.teenvogue.com/story/s-hadow-docket-supreme-court> [<https://perma.cc/Y9TX-UYHW>].

<sup>9</sup> See, e.g., Christopher E. Smith & Thomas R. Hensley, *Decision-Making Trends of the Rehnquist Court Era: Civil Rights and Liberties Cases*, 89 JUDICATURE 161, 184 (2005) (noting the "numerical dominance of Republican appointees during the Rehnquist era"); Marc Stein, *The Supreme Court Nomination and the Politics of Checks and Balances*, PERSP. ON HIST. (Feb. 29, 2016), <https://www.historians.org/publications-and-directories/perspectives-on-history/february-2016/the-supreme-court-nomination-and-the-politics-of-checks-and-balances> [<https://perma.cc/YY64-PXGU>] (stating "that the Supreme Court was dominated by justices appointed by Democrats through most of the 1940s, 1950s, and 1960s").

<sup>10</sup> See *supra* notes 2–9 and accompanying text; see *infra* notes 11–67 and accompanying text.

nation. This Article will argue that it is a change in the nature of the Justices themselves that explains the change.

We have a very different group of justices on this Court than previous Courts. With the obvious caveat that every justice has been a lawyer, Supreme Court justices used to come from a variety of backgrounds.<sup>11</sup> The Court used to include former politicians and high-level political appointees.<sup>12</sup> The Court used to feature justices whose sole qualification was being an exceptionally good lawyer.<sup>13</sup> The Court used to feature entrepreneurs and decorated veterans.<sup>14</sup> This mix of experiences naturally brought different skills and predilections to the Court.

Today's Justices are cut from a different cloth. Before we consider the similarities between the current Justices, it is critical to note that with the addition of Justice Jackson, the current Court is the most diverse Supreme Court ever in terms of race and gender.<sup>15</sup> Given that the Court had no racial or gender diversity for its first 178 years, and that 108 of the first 115 justices were white men, this is welcome and overdue news indeed!<sup>16</sup> Nevertheless, outside of gender and race, these Justices are remarkably similar and have been selected for a single trait—technical legal excellence<sup>17</sup>:

Seven Justices were born east of the Mississippi.<sup>18</sup>

Seven Justices spent all or some of their childhoods on the east coast.<sup>19</sup>

Seven Justices grew up in a major metropolitan area.<sup>20</sup>

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<sup>11</sup> See BENJAMIN H. BARTON, *THE CREDENTIALLED COURT: INSIDE THE CLOISTERED ELITE WORLD OF AMERICAN JUSTICE* 4 (2022).

<sup>12</sup> *Id.* at 129–31. The obvious example is William Howard Taft himself, former President of the United States, but there are a ton of examples. Forty different justices had experience as state legislators before joining the Supreme Court—roughly a third of all justices. *Id.* at 139. Sandra Day O'Connor is the last justice with any experience as a politician. *See id.* at 138.

<sup>13</sup> *Id.* at 105–28. Louis Brandeis is a fantastic example of the lawyer's lawyer who used to people the Court. *Id.* at 105–12.

<sup>14</sup> *Id.* at 223–42. The most famous veteran on the Supreme Court is Oliver Wendell Holmes, who saw brutal combat that nearly killed him several times during the Civil War. *See* STEPHEN BUDIANSKY, *OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW, AND IDEAS* 72–126 (2019). For entrepreneurship, consider Joseph P. Bradley, who worked as an actuary and started his own insurance company before joining the Court. BARTON, *supra* note 11, at 223–29.

<sup>15</sup> Associated Press, *Jackson Will Join More Diverse and Conservative Supreme Court*, WAVE3 (Apr. 8, 2022, 9:13 AM), <https://www.wave3.com/2022/04/08/jackson-will-join-more-diverse-conservative-high-court/> [<https://perma.cc/4ZC4-CGXA>].

<sup>16</sup> Jessica Campisi & Brandon Griggs, *Of the 115 Supreme Court Justices in US History, All but Seven Have Been White Men*, CNN (Mar. 24, 2022, 8:23 AM), <https://www.cnn.com/2022/03/24/politics/supreme-court-justices-minorities-ccc/index.html> [<https://perma.cc/TM95-MJ5Y>].

<sup>17</sup> You can find this information by looking here: *About the Court*, SUP. CT U.S., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/2QF8-R4GN>]; *Justices*, OYEZ, <https://www.oyez.org/justices> [<https://perma.cc/26EU-4M9P>].

<sup>18</sup> Roberts, Thomas, Alito, Sotomayor, Kagan, Kavanaugh, and Jackson.

<sup>19</sup> Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, and Jackson.

<sup>20</sup> Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, and Jackson.

Six Justices spent all or some of their childhoods in the mid-Atlantic megalopolis spanning from New York City through Philadelphia to Washington, D.C.<sup>21</sup>

Five Justices had at least one lawyer parent.<sup>22</sup>

Six Justices attended a private Catholic high school.<sup>23</sup>

Seven Justices have an Ivy League undergrad degree.<sup>24</sup>

Eight Justices went to Yale or Harvard Law School.<sup>25</sup>

Six Justices clerked on the Supreme Court and three *replaced* the Justice they clerked for.<sup>26</sup>

Six Justices practiced law at large corporate law firms in Washington, D.C., often focused on appellate/Supreme Court matters.<sup>27</sup>

Eight Justices were elevated from a federal circuit court judgeship, including four from the D.C. Circuit.<sup>28</sup>

Eight Justices spent the majority of their legal careers in the Acela corridor (Boston to Washington, D.C.) and five in Washington, D.C.<sup>29</sup> The radical similarities between these Justices are a historical anomaly of the first degree.<sup>30</sup> Our current Supreme Court is made up of the same type of person: hyper-elite, former appellate-court judges who have succeeded at the highest possible level in our current version of legal meritocracy.<sup>31</sup> They have also been experts in the workings and nature of the Court for the bulk of their careers. John Roberts has spent his entire career as a Supreme Court practitioner or a federal appellate judge.<sup>32</sup> Elena Kagan was a constitutional law professor and the Solicitor Gen-

<sup>21</sup> Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, and Jackson.

<sup>22</sup> Kagan, Gorsuch, Kavanaugh, Barrett, and Jackson; Caroline Linton, *Who is Martha Kavanaugh, Brett Kavanaugh's Mother?*, CBS NEWS (July 9, 2018, 11:57 PM), <https://www.cbsnews.com/news/martha-kavanaugh-mother-brett-kavanaughs-supreme-court-nominee/> [<https://perma.cc/4QV3-T9PM>].

<sup>23</sup> For support for this claim see Alia Wong, *The Private-School Persuasion of the Supreme Court*, ATLANTIC (July 17, 2018), <https://www.theatlantic.com/education/archive/2018/07/supreme-court-private-school/565211/> [<https://perma.cc/3NCP-DMNZ>] (noting that Roberts, Thomas, Gorsuch, Kavanaugh, and Sotomayor all attended Catholic schools). Barrett also attended Catholic high school; see Lisa M. O'Neill, *Amy Coney Barrett Went to My All-Girls High School. I Hope She's Not Confirmed*, GUARDIAN (Oct. 12, 2020, 8:38 AM), <https://www.theguardian.com/commentisfree/2020/oct/12/amy-coney-barrett-bad-choice-women> [<https://perma.cc/6PXF-FU4M>].

<sup>24</sup> Roberts, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, and Jackson.

<sup>25</sup> Roberts, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, and Jackson.

<sup>26</sup> Roberts, Kagan, Gorsuch, Kavanaugh, Barrett, and Jackson clerked on the Supreme Court. Roberts, Kavanaugh, and Jackson replaced the Justice they clerked for.

<sup>27</sup> Roberts, Kagan, Gorsuch, Kavanaugh, Barrett, and Jackson.

<sup>28</sup> Roberts, Thomas, Alito, Sotomayor, Gorsuch, Kavanaugh, Barrett, and Jackson were all elevated from a circuit court. Roberts, Thomas, Kavanaugh, and Jackson all came from the D.C. Circuit.

<sup>29</sup> Roberts, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, and Jackson all spent the majority of their legal careers in the Acela corridor. Roberts, Thomas, Gorsuch, Kavanaugh and Jackson spent the majority of their legal careers in Washington, D.C.

<sup>30</sup> BARTON, *supra* note 11, at 1–24.

<sup>31</sup> *Id.* at 18.

<sup>32</sup> *Chief Justice John G. Roberts, Jr.*, WHITE HOUSE, <https://georgewbush-whitehouse.archiv>

eral of the United States.<sup>33</sup> Amy Coney Barrett taught Constitutional Law, Constitutional Theory Seminar, and Federal Courts at Notre Dame.<sup>34</sup> Brett Kavanaugh served as the Williston Lecturer on Law at Harvard before joining the Court, teaching classes in separation of powers and the Supreme Court.<sup>35</sup>

As a result, we have perhaps the most “qualified” group of justices ever, if the sole qualification we are seeking is technical legal excellence. Given these backgrounds, is it surprising that these Justices would find new and clever ways to exercise the Court’s powers? This is exactly what they have been trained to do their entire careers.

This Article will argue that the uptick in the usage of the shadow docket tools is directly attributable to the change in the Court’s membership, and that we should prepare for more such “clever” lawyering. Part I will describe the shadow docket and the age and provenance of the various underlying procedures to demonstrate that these tools have existed for a long time. Part II will argue that the current group of Supreme Court Justices have been selected for their technical legal excellence and that this was not always the primary skill represented on the Court. Part III will posit that the change in the Court’s membership led to their increased use of heretofore obscure procedural powers, and then will discuss a few other ramifications.

#### I. THE POWERS INVOLVED IN THE “SHADOW DOCKET” HAVE EXISTED FOR A LONG TIME

The term “shadow docket” is new, but the powers it encompasses are most certainly not. William Baude coined the term to encompass “a range of orders and summary [Supreme Court] decisions that defy its normal procedural regularity.”<sup>36</sup> Baude compared the shadow docket with the “procedural regularity” of the merits cases:

The Court’s procedural regularity is at its high point when it deals with the merits cases. Observers know in advance what cases the Supreme Court will decide, and they know how and when the parties and others can be heard. We know what the voting rule is; we know that the results of the voting rule will be

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es.gov/infocus/judicialnominees/roberts.html [https://perma.cc/KS42-X7RQ] (“Including his tenure as a government lawyer, Chief Justice Roberts argued 39 cases before the United States Supreme Court, placing him among the country’s most experienced Supreme Court litigators.”).

<sup>33</sup> See *The Current Court: Justice Elena Kagan*, SUP. CT. HIST. SOC’Y, <https://supremecourthistory.org/supreme-court-justices/associate-justice-elena-kagan/> [https://perma.cc/33U5-8B6J].

<sup>34</sup> Amy Coney Barrett, NOTRE DAME L. SCH., <https://law.nd.edu/assets/71337/original/> [https://perma.cc/HRN6-UQCG].

<sup>35</sup> *Judge Brett Kavanaugh, HLS Williston Lecturer on Law, Nominated to Supreme Court*, HARV. L. TODAY (July 9, 2018), <https://today.law.harvard.edu/judge-brett-kavanaugh-hls-williston-lecturer-on-law-nominated-to-supreme-court/> [https://perma.cc/8KCK-T54R].

<sup>36</sup> Baude, *supra* note 1, at 1.

explained in a reasoned written opinion; and we know that each Justice will either agree with it or explain his or her disagreement.<sup>37</sup>

Baude's article is a terrific piece of scholarship, but an even better work of rebranding. If he had written about the Court's "emergency powers" or the "orders docket," there would have been much, much less excitement about this entire area. Baude also had the good luck to spot a trend just as it was getting launched. From Baude's 2015 article forward, the Court has utilized its shadow docket powers more frequently than ever.<sup>38</sup>

Stephen Vladeck followed Baude with an excellent article noting the connection between increased solicitor general requests for emergency relief and the Court's more regular granting of emergency relief.<sup>39</sup> At the same time, the Court just kept flexing its emergency powers, offering emergency relief in areas as diverse as immigration policy, the census, capital punishment, COVID-19 regulations, and abortion rights.<sup>40</sup>

There have also been some notable dissents from the Justices themselves calling attention to what the dissenters considered to be especially aggressive uses of the shadow docket. At first it was just a collection of the liberal Justices who objected. The best example is the dissent in *Wheaton College v. Burwell*, where Justices Sotomayor, Ginsburg, and Kagan dissented to the Court's decision to enjoin the Department of Health and Human Services from enforcing challenged provisions of the Patient Protection and Affordable Care Act against Wheaton College, pending final disposition of appellate review of the petitioner's First Amendment and Religious Freedom Restoration Act ("RFRA") complaint.<sup>41</sup> Sotomayor argued the merits but also criticized the Court for the procedural posture of the case:

The Court grants Wheaton a form of relief as rare as it is extreme: an interlocutory injunction under the All Writs Act, 28 U.S.C. § 1651, blocking the operation of a duly enacted law and regulations, in a case in which the courts below have not yet adjudicated the merits of the applicant's claims and in which those courts have declined requests for similar injunctive relief.<sup>42</sup>

In *Louisiana v. American Rivers*, the three liberal dissenters picked up a notable fourth in Chief Justice John Roberts.<sup>43</sup> Here the Supreme Court stayed a district court from enforcing its decision pending review on appeal.<sup>44</sup> The end of Justice Kagan's dissent is especially sharp:

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<sup>37</sup> *Id.* at 12.

<sup>38</sup> Vladeck, *supra* note 1, at 123–30.

<sup>39</sup> *Id.* at 124–26.

<sup>40</sup> Alexis Denny, *Clarity in Light: Rejecting the Opacity of the Supreme Court's Shadow Docket*, 90 UMKC L. REV. 675, 676–77 & nn.19–23 (2022).

<sup>41</sup> *Wheaton Coll. v. Burwell*, 573 U.S. 958, 959–60 (2014) (Sotomayor, J., dissenting).

<sup>42</sup> *Id.* at 961.

<sup>43</sup> *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1348 (2022).

<sup>44</sup> *Id.* at 1347.



The applicants have given us no good reason to think that in the remaining time needed to decide the appeal, they will suffer irreparable harm.

By nonetheless granting relief, the Court goes astray. It provides a stay pending appeal, and thus signals its view of the merits, even though the applicants have failed to make the irreparable harm showing we have traditionally required. That renders the Court's emergency docket not for emergencies at all. The docket becomes only another place for merits determinations—except made without full briefing and argument.<sup>45</sup>

To have Roberts join this opinion signaled that the conservative majority was willing to face increased scrutiny for its use of the Court's emergency powers.<sup>46</sup>

Despite the sense of a sea change in the Court's procedures, the various procedures that make up the shadow docket have existed for a long time. Many of the shadow docket cases involve the powers found in the All Writs Act.<sup>47</sup> Stephen Vladeck explains how the All Writs Act operates in this space:

Usually, the All Writs Act is invoked in the Supreme Court in support of a writ of mandamus or prohibition—an order directed to a lower court requiring that the judge take, or refrain from taking, a specific action. But the All Writs Act has also been identified as the only source of the Court's power to issue writs of injunction—in cases in which “the harm that a party faces does not come from threatened enforcement of a lower court judgment, but instead from the failure of a lower court to block threatened (or require desired) action by his adversary.” And as the Supreme Court established in *Ex parte United States*, the All Writs Act permits the Court to issue extraordinary writs even before a case makes its way through a court of appeals—including directly to district courts.

The Court's power to fashion emergency relief, most often in the form of stays of lower court decisions, is similarly grounded in statutes—to wit, the All Writs Act and 28 U.S.C. § 2101(f).<sup>48</sup>

The current version of the All Writs Act is found at 28 U.S.C. § 1651. It states that “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”<sup>49</sup> The current version is a compressed rewrite of Sections 13 and 14 of the First Judiciary Act of 1789.<sup>50</sup> Section 13 authorized the Supreme Court to “issue writs of prohibition” and “writs of mandamus, in cases warranted by the principles and usages of

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<sup>45</sup> *Id.* at 1349 (Kagan, J., dissenting).

<sup>46</sup> See, e.g., Hassan Kanu, *Justice Roberts' Criticism of 'Shadow Docket' Underscores the Problem*, REUTERS (Apr. 8, 2022, 10:20 AM), <https://www.reuters.com/legal/government/justice-roberts-criticism-shadow-docket-underscores-problem-2022-04-08/> [<https://perma.cc/H2EW-75HX>].

<sup>47</sup> Vladeck, *supra* note 1, at 129–30.

<sup>48</sup> *Id.* at 129.

<sup>49</sup> 28 U.S.C. § 1651(a).

<sup>50</sup> Daniel B. Bogart, *Resisting the Expansion of Bankruptcy Court Power Under Section 105 of the Bankruptcy Code: The All Writs Act and an Admonition from Chief Justice Marshall*, 35 ARIZ. ST. L.J. 793, 799 & n.25 (2003).

law.”<sup>51</sup> Section 14 applied to all federal courts and granted the “power to issue writs of scire facias, habeus corpus, and all other writs not specifically provided for [when] necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.”<sup>52</sup> The powers listed in the First Judiciary Act, in turn, were just the typical powers of a common law court in America, making these powers of ancient vintage indeed.<sup>53</sup>

A second source of the Court’s emergency powers comes from 28 U.S.C. § 2101(f), which allows the Supreme Court to grant an emergency stay of a lower court decision.<sup>54</sup> That section states:

In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court.<sup>55</sup>

28 U.S.C. § 2101(f) is not as old as the All Writs Act, but still has existed for a considerable amount of time. Congress first granted these powers in the “Judges’ Bill” of 1925, which “got its nickname from the fact that a committee of Supreme Court Justices had drafted it under the initiative of Chief Justice William H. Taft.”<sup>56</sup>

Historically, these emergency remedies have been considered “drastic and extraordinary remedies” that are to be utilized “only where appeal is a clearly inadequate remedy.”<sup>57</sup> The Supreme Court Rules also suggest extreme caution in acting outside of the ordinary appellate process. For example, Rule 11 governs granting certiorari before the United States Court of Appeals has reached its own judgment.<sup>58</sup> Rule 11 states that this deviation from the typical process should only occur “upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.”<sup>59</sup> Rule 20 is even clearer on this score:

Issuance by the Court of an extraordinary writ authorized by 28 U. S. C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. [Only

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<sup>51</sup> An Act to Establish the Judicial Courts of the United States, § 13, 1 Stat. 80–81 (1789).

<sup>52</sup> An Act to Establish the Judicial Courts of the United States, § 14, 1 Stat. 81–82 (1789).

<sup>53</sup> For a full history of the All Writs Act, see Daniel J. Wacker, *The “Unreviewable” Court-Martial Conviction: Supervisory Relief under the All Writs Act from the United States Court of Military Appeals*, 10 HARV. C.R.-C.L. L. REV. 33, 57–58 n.113 (1975).

<sup>54</sup> 28 U.S.C. § 2101(f).

<sup>55</sup> *Id.*

<sup>56</sup> Gonen, *supra* note 5, at 1190 & nn.202–03; Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (otherwise known as the “Judges’ Bill”) (codified as amended in scattered sections of 28 U.S.C.). For a history of the Judges’ Bill, see Edward A. Hartnett, *Deciding What to Decide: The Judges’ Bill at 75*, 84 JUDICATURE 120, 120 (2000).

<sup>57</sup> *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947).

<sup>58</sup> SUP. CT. R. 11.

<sup>59</sup> *Id.*

upon a showing that] exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

....

.... [A] writ of prohibition, a writ of mandamus, or both in the alternative shall [be granted only when petitioner describes] with particularity why the relief sought is not available in any other court.

.... To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted.<sup>60</sup>

The first set of Supreme Court Rules to address the issuance of “extraordinary writs” came in 1954.<sup>61</sup> Like the current version of the Rules, the 1954 amended rules cautioned that the granting of these writs “is not a matter of right but of sound discretion sparingly exercised.”<sup>62</sup> Nevertheless, the first version of these Rules is more permissive than the current version.<sup>63</sup>

The test for the granting or lifting of a stay by the Court is also relatively old. By 1980, the principles were “well established.”<sup>64</sup> Three factors must be established: (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 conclude that the decision below was erroneous”[;] and (3) a likelihood that “irreparable harm [will] result from the denial of a stay.”<sup>65</sup> In a “close case, it may be appropriate to ‘balance the equities’ — to explore the relative harms to applicant and respondent, as well as the interests of the public at large.”<sup>66</sup> Each of these factors are cited back to cases from the early 1970s.<sup>67</sup>

As such, the powers our current Supreme Court are exercising are not new, but quite old, even ancient in respect to the existence of the various extraordinary writs, some of which predate the existence of this country. These extraordinary remedies have historically been rare, even before there were explicit rules and case law enforcing that rarity.<sup>68</sup> The remaining question, then, is why are these remedies being exercised more forcefully and cleverly now, despite

<sup>60</sup> SUP. CT. R. 20.

<sup>61</sup> You can determine this by going to the Supreme Court's compilation of all of its Rules, found here: *Historical Rules of the Supreme Court*, SUP. CT. U.S., <https://www.supremecourt.gov/ctrules/scannedrules.aspx> [<https://perma.cc/H3EP-R9XL>]. If you compare the Rules from 1954 with the earlier 1941 edition, you can see the new Rules on extraordinary writs. Compare SUP. CT. R. (1941), with SUP. CT. R. (1954).

<sup>62</sup> SUP. CT. R. 30 (1954).

<sup>63</sup> Compare SUP. CT. R. 30 (1954), and SUP. CT. R. 31 (1954), with SUP. CT. R. 11, and SUP. CT. R. 20.

<sup>64</sup> *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See e.g., *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947).

sitting on the books for a century or more? The answer lies in changes to the makeup of the Court.

## II. CLEVER IS AS CLEVER DOES—THE POWERS OF THE COURT DID NOT CHANGE, BUT ITS MAKEUP DID

When you read the list of common experiences for these Justices, I hope you are convinced that these nine people have *a lot* in common in terms of life experiences. Pause for a moment to reflect on the oddity of this seeming bipartisan agreement on justice backgrounds. We live in a time where partisan rancor over the Court has never been fiercer.<sup>69</sup> President Trump ran in 2016 and 2020 as a fierce critic of Washington elites, and yet outside of race and politics, his appointees looked very much like both President Obama's and President Biden's.<sup>70</sup>

Who is the new model Supreme Court justice? Type A, overachievers who have triumphed in the ever-narrowing series of hoops that make up our modern legal meritocracy. Start with admission to an Ivy League college for an undergraduate degree. The ingredients to admission to an Ivy League undergraduate institution are well known: an exceptional GPA earned in the hardest classes possible, sky-high SAT or ACT scores, and a bevy of extracurricular activities.<sup>71</sup> Our "meritocracy" starts in 9th grade. It is not an exaggeration to say that a fourteen-year-old's grade in ninth-grade algebra can have a significant effect on his or her later career prospects.<sup>72</sup> Moreover, consider what the Ivy League is sorting for in this ever-more-important series of competitions: a particular type of intelligence and a specific type of type A overachiever.<sup>73</sup> In 2018, *Education Week* published a roundup of the high school resumes of the Justices.<sup>74</sup> It

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<sup>69</sup> Amelia Thomson-DeVeaux & Laura Bronner, *The Supreme Court's Partisan Divide Hasn't Been This Sharp in Generations*, FIVETHIRTYEIGHT (July 5, 2022, 1:08 PM), <https://fivethirtyeight.com/features/the-supreme-courts-partisan-divide-hasnt-been-this-sharp-in-generations/> [https://perma.cc/6W5A-K5QU].

<sup>70</sup> On Trump running against elites, see, e.g., Doug Bandow, *Donald Trump Criticizes Washington's Policy Elite—With Cause*, CATO INST. (May 17, 2016 9:52 AM), <https://www.cato.org/blog/donald-trump-criticizes-washingtons-policy-elite-cause> [https://perma.cc/N55K-E27R]. On Trump's appointing Washington elites, consider Justice Kavanaugh, who spent more time living in Washington, D.C. before he joined the Court than any previous justice. See BARTON, *supra* note 11, at 194.

<sup>71</sup> If you do a Google search for "getting into an Ivy" you will see innumerable services and websites repeating this basic information. See, e.g., *How to Get into Harvard*, GOING IVY <https://goingivy.com/colleges/how-to-get-into-harvard/> [https://perma.cc/C7F5-N5MU].

<sup>72</sup> See BARTON, *supra* note 11, at 219–20.

<sup>73</sup> Peter Sims, *Elite Universities Are Breeding Grounds for Insecure Overachievers*, MEDIUM (Nov. 23, 2019), <https://forge.medium.com/what-is-success-43f9402ca3f2> [https://perma.cc/ZX2A-G7YG].

<sup>74</sup> Corey Mitchell, *The Supreme Court Justices Are All Ivy Law Grads, but What About High School?*, EDUC. WEEK (July 12, 2018), <https://www.edweek.org/ew/articles/2018/07/12/the-supreme-court-justices-are-all-ivy.html> [https://perma.cc/562B-22HX].

reads as you would expect: class presidents, valedictorians, amazing grades and test scores earned at top high schools, public and private.<sup>75</sup>

The Justices continued to triumph in college. It is hard enough to distinguish yourself as the smartest and hardest working student in high school, but our meritocracy asks the best of the best to do it all again, except this time competing only with their type A peers. If there is anything harder than gaining admission to an Ivy League college, it is doing well enough there to attend Yale or Harvard Law School.<sup>76</sup> Once again, the Justices needed high GPAs and exceptional test scores on the LSAT.<sup>77</sup> Here the sorting is even more clearly aimed at analytical reasoning and sheer intelligence. The LSAT itself has a special analytical-reasoning section.<sup>78</sup>

The LSAT and undergraduate grades are correlated with first-year grades, continuing the sorting process of selection based upon a very specific criterion—notably, legal analytical reasoning.<sup>79</sup> This is despite the fact that legal reasoning is just *one* of many skills that measure success as a lawyer, and not necessarily the most important one.<sup>80</sup> Again the Justices triumphed. How do we know? The hardest job for an American law school graduate to procure is a clerkship on the Supreme Court.<sup>81</sup>

From these hyper-elite beginnings, the Justices went on to further jobs aimed at establishing their technical legal excellence. All of the Justices except for Alito spent some time working at corporate law firms in Washington, D.C. or New York City, working on particularly complicated and technical issues.<sup>82</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> Yale is the most selective law school in America, and Harvard is either second or third most selective, depending on the year. See Josh Moody, *10 Law Schools That Are Hardest to Get Into*, U.S. NEWS EDUC. (June 15, 2021), <https://www.usnews.com/education/best-graduate-schools/the-short-list-grad-school/articles/law-schools-that-are-hardest-to-get-into> [https://perma.cc/3H7K-J8FN].

<sup>77</sup> L. Darnell Weeden, *Raising the Bar in the Affirmative Action Debate: A Pragmatic Comment on Professor Richard H. Sander's Systemic Analysis of Affirmative Action in American Law Schools Article*, 15 S. CAL. REV. L. & SOC. JUST. 195, 221 (2006) (noting that “many law schools are involved in an LSAT and GPA rankings race”).

<sup>78</sup> LSAC, *Analytical Reasoning*, <https://www.lsac.org/lSAT/taking-lsat/test-format/analytical-reasoning> [https://perma.cc/SHM7-GNA4].

<sup>79</sup> On the correlation between the LSAT and first-year grades, see Lily Knezevich & Wayne Camara, *The LSAT is Still the Most Accurate Predictor of Law School Success*, LSAC, <https://www.lsac.org/data-research/research/lSAT-still-most-accurate-predictor-law-school-success> [https://perma.cc/DBU4-LLV5]. On testing for analytical reasoning, see LANI GUINIER ET AL., *BECOMING GENTLEMEN* 158 n.232 (1997).

<sup>80</sup> See, e.g., Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 L. & SOC. INQUIRY 620, 622 (2011).

<sup>81</sup> See, e.g., Stephanie Francis Ward, *Lucky 36: What It Takes to Land a Supreme Court Clerkship*, AM. BAR ASS'N J. (Oct. 1, 2012, 1:29 PM), [https://www.abajournal.com/news/article/podcast\\_monthly\\_episode\\_31](https://www.abajournal.com/news/article/podcast_monthly_episode_31) [https://perma.cc/3F92-D4UK].

<sup>82</sup> Matt Spiegel, *8 Benefits (And 5 Drawbacks!) of Working in a Large Law Firm*, NAT'L L. REV. (Apr. 26, 2022), <https://www.natlawreview.com/article/8-benefits-and-5-drawbacks->

Eight of the current Justices held high-level government posts.<sup>83</sup> Four worked in the Solicitor General's office, the single legal setting most likely to brief and argue cases before the Supreme Court.<sup>84</sup> Then eight of the Justices served as federal court of appeals judges.<sup>85</sup> The only Justice not to serve in this capacity was Justice Kagan, who was slacking off as the dean of Harvard Law School.<sup>86</sup>

In sum, this group of justices have been tested and trained to be exceptionally gifted and clever legal technocrats. At every step of their illustrious careers, they have displayed an aptitude for technical legal excellence. It should thus not be any surprise that these Justices should find new procedural paths. This is exactly what they have been trained to do and involves the skills that they have been selected for mastering. Along with longer opinions written in fancier language, we should expect our super-lawyers to do what super-lawyers do: find clever new ways around problems.<sup>87</sup> This explains why powers that have lain dormant for as long as two centuries are now being pressed into use—we have a different type of justice these days.

### III. THREE RAMIFICATIONS

The first and most obvious ramification is that as long as the Supreme Court is staffed by legal technicians of the first order, we should expect more such clever rethinking of the Court's procedures and powers. This is what they have been trained and selected to do, so we should not be surprised. Hammers like nails. Wolves eat sheep. These Justices are going to pursue their ends through technical legal excellence. It is just in their natures. What shape or form these new steps will take, whether a further expansion of shadow docket

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working-large-law-firm [<https://perma.cc/VSY5-2W8D>] (“Large law firms are known for winning some of the most elite cases and can result in high-profile representation on sophisticated, complex matters. Complex legal issues can provide an intellectually challenging environment for associates.”).

<sup>83</sup> Thomas worked for Senator John C. Danforth and ran the EEOC. Roberts worked in the Department of Justice, the White House Counsel's Office, and the Solicitor General's Office. Alito also worked in the Department of Justice and the Solicitor General's Office, as well as serving as the US Attorney for the District of New Jersey. Sotomayor worked in the New York County District Attorney's Office under the legendary Robert Morgenthau. Kagan worked for Congress and the White House and was the Solicitor General of the United States. Gorsuch worked in the Department of Justice. Brett Kavanaugh worked in the Solicitor General's Office, the Whitewater Investigation, and the White House. Jackson worked as a Federal Public Defender and as a Commissioner/Vice Chair of the US Sentencing Commission. See *About the Court*, *supra* note 17; *Justices*, *supra* note 17; U.S. S. COMM. ON THE JUDICIARY QUESTIONNAIRE FOR NON-JUD. NOMINEES: ELENA KAGAN 2 (2009), <https://www.wsj.com/public/resources/documents/kagan0509.pdf> [<https://perma.cc/8LFM-ZVRC>].

<sup>84</sup> *About the Court*, *supra* note 17.

<sup>85</sup> BARTON, *supra* note 11, at 160; *About the Court*, *supra* note 17.

<sup>86</sup> BARTON, *supra* note 11, at 160; *About the Court*, *supra* note 17.

<sup>87</sup> Cf. Griffen Klema, *The Creative, Solution-Oriented Lawyer*, IP VAULT (Aug. 1, 2017), <https://klemalaw.com/blog/2017/08/01/creative-solution-oriented-lawyer/> [<https://perma.cc/65KC-T69G>] (extolling the virtues of creative and solution-oriented lawyers).

decisions or some other move, is difficult to predict, but the continuation of the behavior is easy to see.

The second ramification is subtler and trickier. The current version of legal “meritocracy” that has given us this group of hyper-elite justices is not unique in the American legal profession. Here the Justices are just the tip of the iceberg or the very peak of a large pyramid. The same series of hoops that led these Justices to the Supreme Court also leads to the top in other critical legal institutions: notably law schools, BigLaw, and the higher reaches of the American judiciary (other federal judgeships and state supreme court positions). This means that the same basic group of people, who have been sorted for the same specific skill set, are now running all of these critical institutions.

It is easiest to see in law school hiring, where law schools hire first and foremost based upon “scholarly promise.”<sup>88</sup> How do they predict this promise? The same way we apparently do for the Supreme Court: based upon where the applicants went to law school (Yale is especially preferred), whether they were on law review, whether they had a prestigious clerkship, and whether they have a record of law review publications.<sup>89</sup> Teaching or practice experience is rarely considered, and in some cases, can even be a negative.<sup>90</sup>

BigLaw hiring is similar. As Eli Wald has described, large law firms hire “based on law school rank, class rank, and law review membership.”<sup>91</sup> The same is true for other elite lawyer jobs, like federal prosecutors or working in the Department of Justice.<sup>92</sup> Then these same lawyers are moved up into the federal judiciary or state supreme courts.<sup>93</sup>

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<sup>88</sup> William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 491 (2013) (describing “scholarly promise” as law schools’ “primary hiring criteria” and suggesting different criteria).

<sup>89</sup> Lawrence Friedman & Louis Schulze, *Not Everyone Works for Biglaw: A Response to Neil J. Dilloff*, 71 MD. L. REV. ENDNOTES 41, 45 (2012).

<sup>90</sup> *Id.* at 45–46.

<sup>91</sup> Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1097 (2011).

<sup>92</sup> William D. Henderson & Rachel M. Zahorsky, *The Pedigree Problem: Are Law School Ties Choking the Profession?*, 98 AM. BAR ASS’N J. 36, 37 (2012) (“Prestige drives a huge proportion of law firm hiring, judicial clerkships, and coveted positions at the U.S. Department of Justice and within the legal academy.”).

<sup>93</sup> *Broadening the Bench: Professional Diversity and Judicial Nominations*, ALL. FOR JUST. (Feb. 6, 2014), <https://www.afj.org/wp-content/uploads/2021/03/AFJ-2014-Professional-Diversity-Report.pdf> [<https://perma.cc/F7AY-BYTB>] (noting that most of the federal judiciary practiced in BigLaw or as prosecutors); Tracey E. George & Albert H. Yoon, *The Gavel Gap: Who Sits in Judgment on State Courts*, AM. CONST. SOC’Y., <http://gavelgap.org/pdf/gavel-gap-report.pdf> [<https://perma.cc/6TDH-G42V>] (noting the same for state judiciaries); Amanda Powers & Alicia Bannon, *State Supreme Court Diversity—May 2022 Update*, BRENNAN CTR. FOR JUST. (May 25, 2022), <https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-may-2022-update> [<https://perma.cc/7EX2-684H>] (same).

The upshot is that the same group of people dominate all of our major American legal institutions. This creates a substantial risk of what psychologists call “groupthink.”<sup>94</sup> When a group of humans have very similar work and educational experiences, the group tends to drift towards similar decision-making processes, biases, and viewpoints.<sup>95</sup> This leads to cohesion but also substantively poorer decisions, as hard questions are not asked, and preexisting solutions are assumed to be appropriate.<sup>96</sup> It also means that criticism is less likely to occur when the behavior is in line with the established group views.<sup>97</sup> This makes it less likely that the current Justices will face significant pushback from their peers for their longer and more complicated opinions or other examples of technical legal excellence (although the shadow docket may prove the opposite, as it has, in fact, raised significant controversy).

The third ramification builds upon the second. The legal elites who run law firms and law schools, like other nonlegal elites, have been engaged in the process of “selling short” on their institutional capital.<sup>98</sup> The classic example is the mortgage-backed securities crisis of the last decade.<sup>99</sup> A large reason that the crisis occurred was because rating agencies and purchasers of these securities trusted the banks and investment banks involved, based on longstanding institutional capital.<sup>100</sup> These banks traded on that faith to make extra money, regardless of the eventual cost to the institutional capital,<sup>101</sup> thus my use of the phrase “selling short” on that reputational capital.

The same thing is happening in major American legal institutions. You can see it in BigLaw with the devolution of a lock-step compensation model into more of an “eat-what-you-kill” model.<sup>102</sup> This has resulted in more lateral movement, a decline in mentoring and training, and the adoption of different

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<sup>94</sup> Kimberly D. Krawiec et al., *Diversity and Talent at the Top: Lessons from the Boardroom*, in *DIVERSITY IN PRACTICE: RACE, GENDER, AND CLASS IN LEGAL AND PROFESSIONAL CAREERS* 81, 92 (Spencer Headworth et al. eds., 2016).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> BENJAMIN H. BARTON, *GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION* 13 (2015) (“Law schools, Big Law, and the plaintiff’s-side law firms have all been operated for short-term gain and maximum profit, to the detriment of these institutions’ reputations and their future.”).

<sup>99</sup> See Kimberly Amadeo, *The Causes of the Subprime Mortgage Crisis*, *BALANCE* (Jan. 29, 2022), <https://www.thebalance.com/what-caused-the-subprime-mortgage-crisis-3305696> [https://perma.cc/45BK-MNT8].

<sup>100</sup> See generally MICHAEL LEWIS, *THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE* (2010).

<sup>101</sup> *Id.*

<sup>102</sup> Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 *GEO. J. LEGAL ETHICS* 601, 633 (2016) (describing the rise of “atomism” in large law firms, as reflected in the “adoption of the billable hour as the predominant measure of assessing productivity and the subsequent increase in billable targets, [and] the demise of lock-step compensation and rise of eat-what-you-kill schemes.”).



tiers of partnership.<sup>103</sup> Each of these changes trades current profits and lessens future stability and are made possible by trading on the existing institutional capital. Clients trust a name-brand law firm because of decades of experience, stability, and excellence. But eroding training and encouraging lateral movement is antithetical to how that reputational capital was built in the first place.<sup>104</sup>

Law schools have been operated similarly. Brian Tamanaha's *Failing Law Schools* tells the story quite nicely. Law schools are largely regulated by state supreme courts and the American Bar Association (and to a lesser extent by the voluntary membership organization the American Association of Law Schools).<sup>105</sup> In turn, these regulatory bodies have allowed law schools to be largely self-regulated, meaning that law school faculties have the most power in setting up the regulation and thus the nature of American law schools.<sup>106</sup> This has resulted, unsurprisingly, in regulation that is quite self-serving, at a cost to the public at large.<sup>107</sup>

If you squint, you can see that law firms and law schools are engaged in very similar behavior. The institutional capital they are spending was built up over decades. Many large law firms are longstanding and have significant "name value."<sup>108</sup> These reputations were built up over time and are now being paid out in increased profits to the partners who run the firms, often at a detriment to building future institutional capital. The same is true at law schools, where increases in tuition have outpaced inflation for decades,<sup>109</sup> making law school an iffier investment, especially at lower ranked, high-debt schools. These schools are likewise trading on institutional capital: law students (and their parents) think that law school is a good deal and will lead to a middle-class or upper-middle-class life, because that was absolutely true in the past.<sup>110</sup> With current debt loads and tuition skyrocketing, it may well be less true now, and yet, the cost rises, unabated as life grows cushier for the law professors who run these schools.<sup>111</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1871 (2008).

<sup>105</sup> BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 11 (2012).

<sup>106</sup> *Id.* at 13.

<sup>107</sup> *See id.* at 12, 18.

<sup>108</sup> John S. Dzienkowski, *The Future of Big Law: Alternative Legal Service Providers to Corporate Clients*, 82 FORDHAM L. REV. 2995, 3022 (2014) (noting that many large firms trade on name recognition and reputation, because "[c]lients, the judiciary, and other members of the profession immediately recognize lawyers who work at these Big Law firms as having strong credentials and an excellent practice.").

<sup>109</sup> *See* BENJAMIN H. BARTON, FIXING LAW SCHOOLS: FROM COLLAPSE TO THE TRUMP BUMP AND BEYOND 5–7 (2019).

<sup>110</sup> *Id.* at 6.

<sup>111</sup> TAMANAHA, *supra* note 105, at 108.

We may be seeing the rise of similar behavior by this group of justices. The use of the shadow docket is a good example of a behavior that disregards future costs in institutional reputation for current day profit (although here the “profit” is better thought of as the immediate pursuit of justice case preferences, these actions are unlikely to raise or lower a justice’s salary). A similar example is the decision to briskly overturn longstanding precedents like *Roe v. Wade* rather than slow playing the changes. Chief Justice Roberts’s concurrence in *Dobbs* suggests his discomfort with the Court’s brazenness and haste.<sup>112</sup>

Likewise, the trends toward longer, more complex decisions and more split decisions with lengthy concurrences and dissents also reflects a Court enjoying their technical legal excellence at the cost of gaining public understanding or acceptance of what the Court is doing. Consider the *Dobbs* opinion here again. The majority opinion was drafted by Justice Alito, who is known for strident rhetoric and lengthy opinions.<sup>113</sup> Including a lengthy appendix, the draft opinion clocks in at 98 pages and 119 footnotes.<sup>114</sup> Compare the opinion in *Dobbs* to some earlier high-profile opinions like *Brown v. Board of Education*<sup>115</sup> or *Gideon v. Wainwright*.<sup>116</sup> Supreme Court opinions, especially in controversial and ground-breaking areas like segregation, criminal procedure or abortion, used to be shorter, less footnoted, less technically legal and much, much more persuasive.

The opinion in *Dobbs* is the opposite of *Brown*: long, highly-technical, and strident to the point of vituperation. The opinion reads as if winning the scholarly legal argument, rather than plainly explaining the decision to the American public, is what matters. The bulk of the opinion is a seemingly line-by-line refutation of the reasoning in *Roe*<sup>117</sup> and later precedents, including a long discussion of history. This majority cares more about settling scores and demonstrating legal brilliance than persuading the people who will live under the decision. All of this erodes public trust in the institution. Even the dissent has been criticized for avoiding a possible compromise<sup>118</sup> and for failing to offer a fuller throated, and less technical and precedent-based, defense of the right to an abortion.<sup>119</sup>

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<sup>112</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2316 (2022) (Roberts, J., concurring).

<sup>113</sup> David S. Cohen, *A Tale of Two Vote Switches*, 100 TEX. L. REV. ONLINE 39, 57 (2021) (“Justice Alito also has his own peccadillos about religion, anti-discrimination law, and conservative persecution about which he repeatedly writes lengthy separate opinions.”).

<sup>114</sup> *See generally Dobbs*, 142 S. Ct. at 2240–300.

<sup>115</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>116</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>117</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>118</sup> Clive Crook, *The Supreme Court Agrees on the Need to Divide the Country*, BLOOMBERG (June 29, 2022, 6:00 AM), <https://www.bloomberg.com/opinion/articles/2022-06-29/dobbs-abortion-ruling-supreme-court-agrees-on-need-to-divide-us> [<https://perma.cc/8YHL-GQDV>].

<sup>119</sup> Kody Cooper, *The Dobbs Dissent*, AM. MIND (July 8, 2022), <https://americanmind.org/f>

The Supreme Court as an institution has spent centuries building up institutional capital and in recent years, the capital has, indeed, been accruing. As late as 2019, the SCOTUSBlog reported that “[p]ublic faith in government has fallen to historic lows. The Supreme Court, however, appears to have bucked the trend.”<sup>120</sup> More recent survey results show a remarkably different story. Pew Research found that “[f]avorable ratings of [the] Supreme Court have declined sharply” in 2021–22.<sup>121</sup> Gallup found that “[a]pproval of U.S. Supreme Court” fell to 40%, “a new low.”<sup>122</sup>

This collapse in reputational capital started occurring before the *Dobbs* decision reversing *Roe* and other recent controversial decisions and is a predictable reaction to the behavior of the current Justices. The Court has been quite explicit in explaining that they are not a political body and that they are not moved by public opinion.<sup>123</sup> Nevertheless, their recent behavior has placed that rosy concept into serious doubt. Seen in context of the behavior of other legal elites, you can see that here the Court is following the trend of short selling institutional capital won over long, hard years, for immediate gains, (i.e. short selling the Court’s reputation).

#### CONCLUSION

The rise of the regular use of the shadow docket after a long history of more modest use seems at first to present a puzzle: why have these powers remained dormant, some since the founding of the Supreme Court? The answer cannot be partisan dominance; there have been earlier periods where one party or another dominated the Court, and those Courts did not see a sudden uptick in the use of the shadow docket. The answer is not in politics, but rather in the nature of the Justices. Once you understand that although the powers and nature of the Court itself are relatively unchanged, the people on the Court are radically different, you can see how and why the shadow docket has come into favor.

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eatures/a-human-event/the-dobbs-dissent/ [https://perma.cc/GSG4-9H9V].

<sup>120</sup> Kalvis Golde, *Recent Polls Show Confidence in Supreme Court, with Caveats*, SCOTUSBLOG (Oct. 22, 2019, 10:03 AM), <https://www.scotusblog.com/2019/10/recent-polls-show-confidence-in-supreme-court-with-caveats/> [https://perma.cc/L4H4-3L94].

<sup>121</sup> *Public’s Views of Supreme Court Turned More Negative Before News of Breyer’s Retirement*, PEW RSCH. CTR. (Feb. 2, 2022), <https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/> [https://perma.cc/37EE-JC2V].

<sup>122</sup> Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, GALLUP (Sept. 23, 2021), <https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx> [https://perma.cc/EUU9-X9VF].

<sup>123</sup> *Cf. Dobbs v. Jackson Women’s Health Org.*, 597 U.S. \_\_\_, 6 (2022) (arguing that *Roe* should be overruled so that the controversial question of abortion can be returned “to the people’s elected representatives” rather than the Justices); STEPHEN BREYER, *THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS* 51 (2021) (arguing that justices are not politicians and should not be seen as such).

It also raises disturbing questions of what other uses these Justices may find for the Supreme Court's existing institutional capital.