The Rise and Fall of the Self-Regulatory Court

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The Supreme Court maintains a set of self-regulatory rules that have fluctuated over time, and each change affects the nature of the Court itself. Self-regulatory rules, as this Article calls them, are informal norms that reflect shared agreements among the Justices about how the Court should function, grounded in normative values and arising because Article III creates the judicial power without specifying how the Court should exercise it. The rules are a subset of "conventions" or "structural norms." Many are well known—the rule of four, stare decisis, secrecy of deliberations, and the practice of dissent—although they have not been understood this way. This Article catalogues the Court's major self-regulatory rules and shows that—apart from stare decisis, which promotes consistency and stability—these rules can be understood to collectively tip the Court toward taking close cases—those in which the outcome may hinge on one vote—and deciding cases under conditions that create space for the clash of views and expression of disagreement on the merits.

With the change in membership on the Court, the rules are shifting and breaking down. The Court has a new justification for overruling precedent rather than adhering to stare decisis, and it is also resetting the law through decisions on the "shadow docket" without waiting to decide a case on the merits. Many have noticed, but they have failed to appreciate the resulting transformation in the nature of the Court. This Article argues that we are moving away from our familiar form of common-law Court, predisposed to follow prior precedent, and toward a new form of code-law Court, obligated to follow the relevant law's text above all else. But the Justices are split on whether to treat their obligation to the text as superseding the other self-regulatory rules that govern how the Court functions. This Article contends that these rules are more important than ever to the legitimacy of the Court because they function to moderate the pace of change and promote stability when stare decisis no longer serves to do so. It suggests that the Justices have incentive to re-engage the rules, a modest sort of Court reform that has been underappreciated.

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Introduction

The Supreme Court maintains self-regulatory rules that have fluctuated over time, and each change affects the nature of the Court itself. Many of these rules are well-known: the rule of four, stare decisis, secrecy of deliberations, and the practice of dissent.[1] Some are newly uncovered, such

1. *See* Stefanie A. Lindquist, *Stare Decisis as Reciprocity Norm*, *in* WHAT'S LAW GOT TO DO WITH IT? 173, 173 (Charles Gardner Geyh ed., 2011) (including as examples of informal judicial

as the rule of summary reversals, which permits the Court to reverse a lower court decision without further briefing or oral argument in a per curiam opinion upon the vote of six Justices.[2] Self-regulatory rules, as this Article calls them, are informal norms that reflect shared agreements among the Justices about how the Court should function, grounded in moral or normative values that also supply a reason for the Justices to comply with them. These rules are a subset of "conventions" or "structural norms," arising because Article III of the Constitution creates the judicial power but does not determine how the Court should exercise it.[3] Without self-regulatory rules, the Justices could not do their jobs. The rules are necessary features of the judicial power, determining both the operation and the nature of the Court.[4]

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norms stare decisis, the "propensity to write dissenting or concurring opinions," "secrecy during deliberations, the Rule of Four, and opinion assignment procedures"); Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1021 (1996) (identifying respect for precedent as a norm that "can serve as a constraint on justices acting on their personal preferences"); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 118 (1998) (discussing the rule of four and opinion assignment); Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 802 (2015) (examining the costs and benefits of the practice of dissent).

2. Debra Cassens Weiss, *Breyer Explains Reason for Late-Night Opinions, Comments on Once-Secret Summary Reversal Custom*, ABA J. (Oct. 18, 2021, 3:16 PM), https://www.abajournal.com/news/article/breyer-explains-reason-for-late-night-opinions-comments-on-once-secret-summary-reversal-custom [https://perma.cc/T6P2-SVHD] (reporting that Justice Breyer confirmed Justice Samuel Alito's previous revelation that summary reversals require the votes of six Justices); Joan Biskupic, *The Secret Supreme Court: Late Nights, Courtesy Votes and the Unwritten 6-Vote Rule*, CNN (Oct. 17, 2021, 1:08 PM), https://www.cnn.com/2021/10/17/politics/supreme-court-conference-rules-breyer/index.html [https://perma.cc/C2AU-9D9S].

3. *See* Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 MICH. L. REV. 1361, 1365 (2022). (describing "constitutional norms" as "normative, contingent, and arbitrary practices that implement constitutional text and principle"); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 544 (2018) (identifying "conventions of judicial independence" established by political branch practice as necessary because judicial independence is not self-evident); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2197–98 (2018) (describing presidential norms as "structural norms"); Adrian Vermeule, *Conventions in Court* 6 (Harv. Pub. L. Working Paper, Paper No. 13-46, 2013), https://ssrn.com/abstract=2354491 [https://perma.cc/K622-N2H2] (defining conventions as "regularities of political behavior that are backed by a sense of obligation"); Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1860 (2013) (describing political norms as "constitutional conventions" that reflect "maxims, beliefs, and principles that guide officials in how they exercise political discretion"); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 257 (2017) (embracing Whittington's definition of "constitutional conventions"); Jonathan S. Gould, *Codifying Constitutional Norms*, 109 GEO. L.J. 703, 705 (2021) (defining "constitutional norms" as "nonlegal principles that govern the conduct of public officials, the structure and function of government, and the operation of campaigns and elections"); Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 179–81 (2018) (defining "political norms" as "norms of political morality" that "can be thought of as principles of right action that bind elected officials and serve to guide and control their conduct in office" and distinguishing them from "political conventions," which exist "when social facts regarding the past practices and beliefs of elected officials give rise to obligations").

4. *Cf.* Renan, *supra* note 3, at 2203 (describing structural norms as "obligatory at a systemic level").

Although political scientists and legal scholars have studied judicial norms, they have not understood them as self-regulatory rules.[5] This understanding, which draws on the work of legal scholars who study political norms, helps to reveal why such norms exist, how they are interconnected, and what is at stake when they change. Self-regulatory rules turn an unrefined judicial process into a predictable one, and general normative values into specific expectations about judicial behavior.[6] While they are not fixed parts of the constitutional structure, they work that way unless and until new agreements among the Justices arise. And when the rules change, the nature of the Court also changes.

This Article catalogues and describes the Court's major self-regulatory rules. The rules fall into two categories: (1) those that govern the exercise of the Court's discretionary power to take cases and grant other nonmerits requests, and (2) those that govern the exercise of the Court's decision-making power in the cases that it does take. These categories map the judicial functions that Article III leaves undefined. Briefly described, the rules that govern the exercise of the Court's discretionary jurisdiction are mainly "voting rules," invoked upon the votes of a certain number of Justices, from as few as three to as many as six. The rule of four is the main driver, requiring only four votes for the Court to grant a petition for certiorari (cert.), even though five votes are necessary to decide the case on the merits.[7] It can be understood to tip the Court toward taking close cases, those in which the outcome may hinge on one vote.[8] Of the rules governing the Court's

5. Legal scholars have referred to the Court's "rules governing adjudication" and "internal operating rules" without offering the full argument here. *See, e.g.*, Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 21 (2016) (stating that "Article III's grant of the 'the judicial Power' carries with it the inherent authority to adopt rules governing adjudication" (footnote omitted)); Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1067 (1988) (referring to "the Court's internal operating rules—the rules the Court uses in deciding whether, and how, to decide particular cases").

6. Regulation of judicial behavior can be self-imposed, as through judicial norms, or externally imposed, as through legislation or political practice. *See generally* Grove, *supra* note 3 (discussing norms of judicial independence established by political practice); Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L.J. F. 821 (2021) (distinguishing between "internal" Court restraints, "external" Court restraints, and "structural" Court reforms). *Cf.* Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 860–61 (2009) (defining agency "self-regulation" as rules that agencies voluntarily provide to guide and limit the exercise of their discretion).

7. Revesz & Karlan, *supra* note 5, at 1068–69.

8. There had been confusion whether three or four votes were required for a "call for the views of the Solicitor General" (CVSG). According to Thompson and Wachtell, Justice Breyer first confirmed the four-vote requirement in 2008, dissenting from denial of a stay application of execution, *Medellin v. Texas*, 554 U.S. 759, 765 (2008) (Breyer, J., dissenting), as did the Deputy Clerk of the Court at their request. *See* David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 273 (2009).

decision-making, stare decisis is the most foundational. It predisposes the Court to decide cases incrementally and with respect for prior precedent, in the common law tradition.[9] Stare decisis has been the single most defining feature of the Court, so deeply rooted in the country's history and collective consciousness that it is essential to properly describe, let alone justify, our legal system.[10] Other rules, notably secrecy of deliberations and the practice of dissent, are important for a different reason: they create space for the clashing of views and the expression of disagreement on the merits. They arose to replace the rule of unanimity, which required the Justices to suppress their differences and speak with one voice as a measure of judicial legitimacy.[11]

This Article shows that the Court's self-regulatory rules are shifting and breaking down. With the change in the membership on the Court, a supermajority of Justices has a new justification for overruling prior precedent rather than adhering to stare decisis—their shared interpretive methodologies, originalism and textualism.[12] To be sure, the Justices are still invoking the principle of stare decisis, but they have begun to demonstrate the vulnerability of long-settled decisions that were not premised on originalism or textualism when decided.[13] Furthermore, these Justices are making rulings that allow statutes that violate existing precedent to go into effect if they *intend* to overrule the relevant precedent in a pending case.[14] They also are giving these rulings precedential effect in other cases and expecting lower courts to do the same.[15] These rulings occur on the "shadow docket," a term that William Baude coined in 2015 to describe the orders docket on which the Court handles applications for injunctions and stays,

9. *See* Glen Staszewski, *Precedent and Disagreement*, 116 MICH. L. REV. 1019, 1019 (2018) (describing stare decisis as "one of the defining features of the American legal system" and as a practice that "promote[s] efficiency, stability, and the legitimacy of the judicial system").

10. *See* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015) (describing stare decisis as "a foundation stone of the rule of law") (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014)); Staszewski, *supra* note 9, at 1019 (stating that stare decisis is widely regarded as "one of the defining features of the American legal system"); *see generally* RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT (2017) (developing a theory of precedent aiming to increase stability and reduce ideological variance in rulings).

11. *See* Sunstein, *supra* note 1, at 786–88 (describing Chief Justice Marshall's insistence on unanimity as a means of furthering the Court's "institutional legitimacy and prestige").

12. *See infra* subpart II(A).

13. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), both of which recognized a constitutional right to abortion).

14. *See infra* subpart II(B).

15. *See infra* subpart II(B).

among other nonmerits requests.[16] Justice Elena Kagan has described shadow docket decision-making as allowing the Court to make "ruling[s] . . . of great consequence" in a way that "depart[s] from the usual principles of appellate process."[17]

The specific connection to the Court's self-regulatory rules brings into sharp focus the stakes of these shifts: self-regulatory rules can change, but when they do, the nature of the Court changes. In individual cases, the Court might apply stare decisis and find a recognized exception to the principle for decisions that were "egregiously wrong from the start."[18] But the exceptions are likely to swallow the rule. The Court cannot genuinely claim to start with a presumption of respect for precedent, overcome under exceptional circumstances, when their interpretive methodologies demand a thorough-going reevaluation of precedent—a demand so strong that the majority makes decisions about emergency relief based on it. What this means for the direction of the law is evident; what it means for the nature of the Court is less obvious yet just as profound. This Article contends that we are moving away from our familiar form of common-law Court, in which decisions are presumptively constrained by precedent, and toward a new form of code-law Court, in which constitutional and statutory text controls above all else.[19] This transformation is likely to last, given the number and relative youth of the originalist, textualist Justices.

However, the full nature of this new code-law Court is not based solely on originalism and textualism. It also depends on the other self-regulatory rules that the Justices choose to maintain. And we are seeing a battle among the originalist, textualist Justices over these rules. One group—Justice

16. *See generally* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015) (coining the term "shadow docket" to describe the Supreme Court's decisions that occur outside the Court's merits docket); *see also* Richard J. Pierce, Jr., *The Supreme Court Should Eliminate Its Lawless Shadow Docket*, 74 ADMIN. L. REV. 1, 1 (2022) (critiquing the Court's "regular practice" of using the shadow docket to grant or deny stays with major impacts, but providing no explanation for those decisions); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019) (analyzing how the Solicitor General has increasingly sought emergency and extraordinary relief on the Supreme Court's shadow docket). This Article uses the term *shadow docket* because it is the popular shorthand for this aspect of the orders docket. Others have referred to it as the "emergency docket." *See, e.g.*, Katie Barlow, *Alito Blasts Media for Portraying Shadow Docket in "Sinister" Terms*, SCOTUSBLOG (Sept. 30, 2021, 6:59 PM), https://www.scotusblog.com/2021/09/alito-blasts-media-for-portraying-shadow-docket-in-sinister-terms/ [https://perma.cc/WC4Y-9EZD] (reporting Justice Alito's criticism of the term *shadow docket* and use of the term *emergency docket* instead).

17. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting).

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

19. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 12–13 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Common-Law Courts*] (questioning whether the "mind-set" of a "common-law judge" is appropriate in an era dominated by statutory law).

Clarence Thomas, Justice Samuel Alito, and Justice Neil Gorsuch—treat their obligation to the text as superseding the entire collection of rules that govern how the Court functions. As a result, they are willing to forecast their intent to change the law on the shadow docket, even in a case the Court is unlikely to take under its standards for granting cert. These Justices may think that their rulings are by-products of originalism; applicants for emergency relief have asked the Court to determine whether a case is "likely to succeed on the merits," and originalists cannot deny what they see coming.[20] But the other group—Chief Justice John Roberts, Justice Brett Kavanaugh, and Justice Amy Coney Barrett—do not agree that applicants and originalism compel total disregard of the rules. They have joined the liberal Justices to prevent the Court from providing a "merits preview" in a case the Court is unlikely to take.[21] This choice of how to proceed exists separate from originalism and does not compromise originalism. Roberts, Kavanaugh, and Barrett make no exception to their obligation to the text in these instances. Rather, they agree to abide by the other rules that have long governed how the Court functions. Yet even these Justices are not in complete agreement on the extent of the rules. Only the Chief Justice would join the liberal Justices to prevent the Court from allowing a statute unconstitutional under existing precedent to go into effect while litigation is still pending.[22]

What seems to be emerging then are three different models of what might be called a "Code Court."[23] All endorse originalism and textualism as interpretive methodologies but diverge on their treatment of the Court's self-regulatory rules. Under one model, the obligation to the text justifies an obligation to reset the law in whatever posture the opportunity presents itself, without consideration of the Court's self-regulatory rules. Justices Thomas, Alito, and Gorsuch might be understood to adopt this "rule-disregarding" model. A second model adheres to the self-regulatory rules that govern the cert. process, which means that the Court is not free to reach out and reset the law when it is unlikely to ever take a case, or perhaps even when it might take a case but has not yet agreed to do so. Justices Kavanaugh and Barrett might be understood to embrace this "rule-respecting" model. A final model prevents the Court from resetting the law unless and until it does so by

20. *See infra* subpart II(B).

21. *See infra* subpart II(B).

22. *See infra* notes 295–296 and accompanying text.

23. *Cf.* Dahlia Lithwick, *The Biggest Thing Court Watchers Are Getting Wrong About SCOTUS*, SLATE (Oct. 13, 2021, 12:54 PM), https://slate.com/news-and-politics/2021/10/supreme-court-data-partisan-divides-unpredictable.html [https://perma.cc/JC4K-XHUE] (reporting Lee Epstein's comment that, based on data of political outcomes in Roberts Court decisions, "[i]t's almost like there's two courts operating"—on one hand, "the Trump court, aided and abetted by Alito and Thomas," and on the other, "a standard kind of moderate conservative institutionalist Roberts court").

deciding a case on the merits. Chief Justice Roberts might be understood to support this "rule-conforming" model.

This Article contends that for a Code Court with a weak principle of stare decisis, the other self-regulatory rules matter more than ever to the legitimacy of the Court because they tend to moderate the pace of change and promote stability—not in every case, not as to *Roe v. Wade*,[24] but in other cases.[25] As Justice Barrett recognized in her academic writing before she joined the Court, the "rules of adjudication" prevent originalists from acting as a roving commission to "ferret out and rectify constitutional error[s]."[26] For example, she noted that the Court can only overrule precedent in cases that meet its standards for granting cert.—and she can be understood to have taken this stand on the shadow docket.[27] The Court can only overrule precedent if the opportunity is presented in the case, and not by expanding the question in the case—and she noted that the rule of reargument, which permits the Court to order briefing and oral argument on an additional issue upon the vote of five Justices, is a controversial exception to that rule.[28] Even when presented with an opportunity to overrule precedent, then-Professor Barrett observed, the Court may decide a case on nonconstitutional grounds.[29] Recently, Justice Barrett has taken pains to note that unresolved debates over the proper application of originalism might affect the interpretation of the Constitution, if not the outcome of a particular case.[30] Although Barrett has not made the full connection offered here, the rules governing the merits process (stare decisis aside) are geared to the development of differences, which may exist even among originalists, if not on the interpretation of the Constitution then on the breadth of the ruling or

24. 410 U.S. 113 (1973).

25. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring) (stating his view that the Court's decision does not decide the fate of other precedents involving "contraception and marriage" or other "abortion-related" questions, including those involving the right to travel).

26. Barrett & Nagle, *supra* note 5, at 22.

27. *See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEXAS L. REV. 1711, 1730–31 (2013) (identifying the standards for granting cert. as "protect[ing] reliance interests by putting a challenge to precedent on the Court's agenda only when disagreement below signals to the Court that reconsideration of the precedent may be timely"); *infra* notes 303–304 and accompanying text.

28. Barrett, *supra* note 27, at 1732–33; Barrett & Nagle, *supra* note 5, at 18–19.

29. Barrett & Nagle, *supra* note 5, at 21; Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1942 (2017) [hereinafter Barrett, *Originalism*].

30. *See* New York State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2162–63 (2022) (Barrett, J., concurring) (highlighting "two methodological points that the Court does not resolve": "[f]irst, . . . the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution," and "[s]econd, . . . whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 or when the Bill of Rights was ratified in 1791") (internal quotation marks omitted).

the grounds for decision in a particular case.[31] The same might be said of textualists and statutory interpretation. Any assumption about whether or how the Court will change the law is premature until the Court has taken and decided a case on the merits.[32]

As it stands, the Court is facing a serious test of its continued legitimacy.[33] Even before the end of the 2021 October Term, in which the Court handed down a series of legally and socially transformative decisions, the public expressed outrage with its rulings and its lack of transparency.[34] Political officials pressed for large-scale legislative Court reform, including expanding the number of Justices and imposing term limits, and now have reason for renewed vigor.[35] Meanwhile, and difficult to disassociate from its judicial decision-making, the Court has been enmeshed in an increasing number of ethical issues, which have fueled demand for a formalized code of judicial ethics. Certain Justices are accepting lucrative book deals that bear on their public image, remaining on cases when perhaps they should recuse themselves,[36] and making direct public appeals on behalf of the Court's impartiality. Information about confidential deliberations among the Justices is leaking to the press in a regularized way, eroding the norm of secrecy, and changing the nature of the Court. The 2021 October Term saw the most

31. *Cf.* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9–10 (2004) (describing constitutional decision rules as rules that help the Court decide how to adjudicate a question).

32. *See* Vladeck, *supra* note 16, at 127 (explaining that there are many instances "in which the Justices' early intervention on the government's behalf turned out to have been premature thanks to subsequent developments that rendered grants of emergency or extraordinary relief unnecessary").

33. *See generally* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)). The "legitimacy" of the Court has many meanings, and here I primarily mean acceptability of its authority by the people.

34. *See* Dahlia Lithwick, *Most Americans Think the Supreme Court Is Politically Motivated*, SLATE (Nov. 22, 2021, 5:41 PM), https://slate.com/news-and-politics/2021/11/scotus-approval-ratings-what-now.html [https://perma.cc/4L3S-48AJ] (reporting that, as of November 2021, "only 32 percent of those polled believe the highest court in the land is motivated by the law"); Robert Barnes & Seung Min Kim, *Supreme Court Observers See Trouble Ahead as Public Approval of Justices Erodes*, WASH. POST (Sept. 26, 2021, 5:36 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-public-opinion/2021/09/25/379b51ec-1c6c-11ec-bcb8-0cb135811007_story.html [https://perma.cc/LE2N-ZJTM] (noting that the Court's "approval rating is plummeting" and "justices are feeling compelled to plead the case to the public that they are judicial philosophers, not politicians in robes").

35. *See* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 152 (2019) (proposing reforms that are implementable by statute).

36. *See* Aaron Blake, *Ginni Thomas's Texts Make Clarence Thomas's Non-Recusal Look Even Worse*, WASH. POST, https://www.washingtonpost.com/politics/2022/03/25/thomas-texts-recusal-worse/ [https://perma.cc/E2HZ-7K6T] (Mar. 25, 2022, 1:06 PM) (noting increased concern about Justice Clarence Thomas's failure to recuse himself from certain cases after reports emerged in March 2022 that his wife, Virginia Thomas, sent text messages to former White House Chief of Staff Mark Meadows in January 2021 suggesting that he challenge the results of the 2020 presidential election).

extreme example yet: the shocking leak of a full draft majority opinion in *Dobbs*, the decision that several months later would overrule *Roe v. Wade* and *Casey*.[37] But relatively benign changes, such as providing livestream audio of oral arguments, are also affecting the culture of the Court. The Justices are not solely responsible for all the changes impacting public approval of the Court. Yet, for the Court to secure its authority, something has to give.

The Court has a say about its future. This Article concludes by suggesting that Justices have incentive to engage in a revival of self-regulatory rules. This sort of modest Court reform has been underappreciated, though the Biden Administration's Presidential Commission on the Supreme Court expressed an interest in similar suggestions in its December 2021 Draft Final Report.[38] Chief Justice John Roberts also indicated in his 2021 year-end report on the federal judiciary that the Court would attend to its own ethics rules.[39] Self-regulatory rules will not prevent the Court from overruling progressive precedent or gutting such precedent to within an inch of its life. But they may moderate the pace of change and promote stability for a time on a Court generally inclined in that direction.

This Article proceeds in four parts. Part I introduces the Court's informal norms as self-regulatory rules that affect the operation and nature of the Court. It then catalogues the major rules, grouping them according to their function and identifying the shared normative commitments they can be understood to reflect. Part II pulls together the shifts and breakdowns in the rules that are occurring with the arrival of the new conservative supermajority on the Court. Part III describes the nature of the Court that is emerging as a result and evaluates its legitimacy. It contends that we are moving toward a new model of a code-law Court, in which the self-regulatory rules are simultaneously in flux and more important than before to moderate the pace of change and promote stability. Part IV offers suggestions for self-help through self-regulation.

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37. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). Adam Liptak, *A Supreme Court in Disarray After an Extraordinary Breach*, N.Y. TIMES, https://www.nytimes.com/2022/05/03/us/politics/supreme-court-leak-roe-v-wade-abortion.html [https://perma.cc/P23E-WLV5] (June 24, 2022).

38. *See* PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., DRAFT FINAL REPORT 209–19, 225–26 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf [https://perma.cc/P3J8-EZT5] (providing proposals for, among other things, giving reasoning in orders resolving application for emergency relief, clarity on precedential value of emergency orders, automatic or four votes to stay an execution, an ethical code of conduct, and continuation of livestream audio of oral arguments).

39. *See* Amy Howe, *Roberts to Congress on Court Reforms: We're on It*, SCOTUSBLOG (Dec. 31, 2021, 6:00 PM), https://www.scotusblog.com/2021/12/roberts-to-congress-on-court-reforms-were-on-it/ [https://perma.cc/M5QA-BDM8] (outlining Chief Justice Roberts's proposals to improve compliance with ethics policies).

I. The Court's Self-Regulatory Rules

This Part sets forth the most prominent self-regulatory rules that the Court has maintained over time. The rules themselves are not new. They are judicial norms that political scientists and legal scholars have defined and studied. What is new is connecting these norms to the work of legal scholars who study political conventions or structural norms to better explain why they arise and how they matter. They are essential features of the judicial power, contributing to the nature and legitimacy of the Court.

A. What Are Self-Regulatory Rules?

Self-regulatory rules are regular practices that reflect an agreement among the Justices about how they should and do behave when exercising the judicial power. They arise because Article III vests "the judicial Power . . . in one supreme Court" and restricts that power to "[c]ases" and "[c]ontroversies," but says nothing about how the Court should function.[40] Statutes have somewhat filled in by addressing matters such as the Court's discretionary jurisdiction to grant petitions for certiorari. For example, the Judiciary Act of 1925 shifted some of the Court's mandatory jurisdiction to discretionary jurisdiction in order to lighten the Court's caseload.[41] But neither it nor other statutes have provided rules necessary for the Court to determine *which* "cases" to take among the thousands of petitions for certiorari that it receives each term.[42] The Constitution also leaves open the rules governing the Court's decision-making. For example, should the Court decide cases incrementally and with respect for prior precedent, as common law courts have done, or use some other mode of decision-making? Should the Court produce a single opinion and suppress disagreement, or encourage the clashing of views and the expression of dissent? Although statutes and judicial decisions have provided some formal rules, they are insufficient to describe and determine how the Court should exercise its decision-making power. Given the dearth of external regulation, some set of internal structural norms is "obligatory at a systemic level"[43] for the Court to operate.

This description of self-regulatory rules combines the insights of political scientists who study judicial norms with those of legal scholars who study political norms. This work is varied and rich, and here I present only as much as is necessary to my discussion. Political scientists have identified

40. U.S. CONST. art. III, §§ 1–2.

41. Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936.

42. *See The Court and Constitutional Interpretation*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/constitutional.aspx [https://perma.cc/J8VY-DXTC] ("The Justices must exercise considerable discretion in deciding which cases to hear, since approximately 7,000–8,000 civil and criminal cases are filed in the Supreme Court each year from the various state and federal courts.").

43. Renan, *supra* note 3, at 2203.

the most significant judicial norms and described what they are: repeat practices that reflect the shared expectations of the Justices on how to work as a collegial body.[44] Judicial norms reflect normative values about how judicial decision-making should look, and the values themselves provide the reason for Justices to comply with the norms.[45] Political scientists observe that judicial norms may also serve other functions. They may serve a strategic coordination purpose, meaning each Justice is better off complying with the norm than not.[46] For example, stare decisis—the practice of following past precedent—can be viewed both ways. In the normative sense, it reflects a shared agreement among the Justices to exercise their power in a manner that promotes stability and predictability of the law, thereby furthering rule of law values and the legitimacy of the Court.[47] And the reasons that the Justices maintain stare decisis are also the reasons for them to comply with it.[48] In a strategic or game-theoretic sense, Justices commit to follow the precedent of other Justices to secure "reciprocity" for their own decisions.[49] Justices comply with the norm because they rationally believe they are better off following it than not. In other words, stare decisis reflects equilibrium among the Justices.[50] Although judicial norms are self-enforcing in these ways, political scientists note that such norms also have external enforcement mechanisms, both inside and outside the Court.[51] For example, the Chief Justice may sanction those who breach a judicial norm by withholding

44. *See* Lindquist, *supra* note 1, at 173 (describing informal judicial norms as "constrain[ing] judicial actors to the extent that they produce shared expectations about appropriate behavior" and noting that "the most important informal norms within collegial courts are those that involve consensual decision-making"); *id.* at 175 (describing consensual norms as "cooperative norms").

45. *See id.* at 173 (noting that consensual norms "may emerge because of a shared commitment to the rule of law or to institutional legitimacy" and "do not require governmental or other external enforcement to ensure cooperation because other mechanisms often exist that allow participants to monitor and sanction defectors and thus to maintain the norm at some level").

46. *See id.* at 173–75 ("Cooperative norms often play an important role in solving social dilemmas, which occur whenever individuals in interdependent situations face choices in which the maximization of short-term self interest yields outcomes leaving all participants worse off than feasible alternatives.") (internal quotation marks omitted).

47. *See id.* at 174 (noting that "stare decisis promotes private ordering of citizens' affairs by enabling them to plan . . . with confidence that they act in compliance with existing law," and "[t]hus, stare decisis serves important functions that bolster institutional legitimacy").

48. *See id.* ("Where judges frequently reject existing precedent, the potential adverse institutional and social consequences are great.").

49. *See id.* at 176–87 (describing reciprocity norms and evaluating stare decisis as one of those norms).

50. *See id.* at 173 (describing informal norms as self-enforcing and thus constituting "an equilibrium outcome among participants").

51. *See* EPSTEIN & KNIGHT, *supra* note 1, at 117 (acknowledging the existence of "several external rules that govern the relationship between the Court and the other branches of government . . . and . . . the relationship between the Court and the general public").

favorable opinion assignments from them.[52] The public may sanction the Court by losing faith in the institution, and political officials may respond by seeking to reform it.

Legal scholars who study political conventions or structural norms furnish an account that describes why self-regulatory rules arise. Those rules are necessary for the Court to exercise the power that the Constitution confers.[53] In this sense, they are not optional features of judicial decision-making, but essential ones.[54] Without some set of rules, the Justices cannot do their jobs. The precise rules that the Court maintains reflect the normative values that define a morally acceptable system of judicial governance, and it is these values that supply a reason for Justices to comply with them.[55] This account of self-regulatory rules is important not only for completeness. It helps to explain how the rules can change. Self-regulatory rules may evolve as judicial morality about the proper exercise of the judicial power evolves. Furthermore, the structural account underscores the importance of the rules. They determine the nature of the Court and affect its legitimacy.

To better define self-regulatory rules, it is helpful to briefly distinguish other regular practices that do not make the list. Some regular practices are not "norms" because they do not have a moral justification and reason for compliance. They are traditions, customs, or administrative procedures—for example, the number of law clerks per chambers,[56] the ritual handshakes before oral argument,[57] the seating arrangement on the bench, and even

52. *See id.* (describing informal sanctions that may be imposed on Justices for violations of norms).

53. Legal scholars differ on the precise relationship of structural norms or conventions to the Constitution—for example, whether they constitute a gloss on the constitutional text, an inference from the constitutional structure, an inherent part of Article III's textual commitment of "judicial power," or an instantiation of an evolving constitutional "ethos." *See, e.g.*, Whittington, *supra* note 3, at 1850 (describing constitutional conventions as "practices that supplement the constitutional text"); Renan, *supra* note 3, at 2193 (describing structural norms as "constitutive of a constitutional 'ethos'"). For present purposes, the precise relationship is not important.

54. *See* Renan, *supra* note 3, at 2203 (noting "the existence of structural norms is obligatory at a systemic level"); Whittington, *supra* note 3, at 1862 ("One can only play the game after the rules for the game are fixed in place.").

55. *See* Renan, *supra* note 3, at 2196, 2203 (describing presidential norms as reflecting a "morally acceptable design of government power" and stating that which presidential norms exist depends on institutional morality); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1189, 1194 (2013) (noting that compliance is a matter of morality not a "counsel of prudence," and failure to comply generates "normative outrage").

56. *See generally* Artemus Ward, *Law Clerks*, *in* THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR 100 (Lee Epstein & Stefanie A. Lindquist eds., 2017) (providing a history of law clerk practice).

57. *See Traditions—United States Supreme Court*, GEO. WASH. U. L. SCH.: BURNS BRIEF LIBR. BLOG (Oct. 5, 2011), https://blogs.law.gwu.edu/gwlawlibrary/2011/10/05/traditions-united-states-supreme-court/#.YZUSqdDMKUk [https://perma.cc/LP82-3WCL] (describing the Justices' ritual handshake prior to going on the Bench).

which Justice opens the door and takes notes during conferences.[58] These practices may have collegiality or group-related functions. They may engender compliance out of personal respect or peer pressure. But they are not normatively grounded in the relevant sense.

More important and less obvious, some routine practices reflect normative values, but they are not "regulatory." For example, self-created interpretive doctrines like *Chevron*[59] reflect normative values about how the Court should interpret statutes—i.e., with respect for agency expertise, political accountability, and congressional delegation.[60] *Chevron* also provides a rule for interpreting statutes—i.e., defer to reasonable agency interpretations of ambiguous text.[61] In both these ways, *Chevron* resembles stare decisis, which promotes normative values and provides an interpretive rule, namely, follow prior precedent in deciding cases. But *Chevron* is one of many choices on the menu that the Court maintains for interpreting statutes rather than a rule that governs how the Court acts when deciding cases. To see the distinction, consider that stare decisis directs the Court to follow *Chevron*, like any other precedent, when deciding relevant cases.[62] Similarly, the principle of not deciding a case on a constitutional ground when a nonconstitutional ground is available is not a self-regulatory rule.[63] It serves normative values—for example, judicial restraint or minimalism—that stare

58. *See* Robert Barnes, *What Does the Junior Supreme Court Justice Do? Kagan Tells Gorsuch It Starts in the Kitchen*, WASH. POST (Apr. 9, 2017), https://www.washingtonpost.com/politics/courts_law/what-does-the-junior-supreme-court-Justice-do-kagan-tells-gorsuch-it-starts-in-the-kitchen/2017/04/09/9297ef4c-1bbd-11e7-9887-1a5314b56a08_story.html [https://perma.cc/865A-YEWL] (describing how seniority dictates which Justice opens the door and takes note in private conference).

59. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

60. *Id.* at 866; *see generally* Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611 (2009) (explaining the basic framework of the *Chevron* doctrine).

61. *See* 467 U.S. at 843–44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations [control] unless they are arbitrary, capricious, or manifestly contrary to the statute." Even where delegation is implicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

62. *Cf.* Staszewski, *supra* note 9, at 1037–39 ("[I]f the principle of reciprocity were used to exclude the application of foundational or comprehensive theories of constitutional interpretation from judicial review, deliberative democracy would lose its second-order status because the theory would no longer be compatible with a variety of more comprehensive political or legal theories.").

63. *See, e.g.*, Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 197 (2009) (noting the Court's "usual practice is to avoid the unnecessary resolution of constitutional questions"). The constitutional avoidance canon is similar. *See generally* Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513 (2019) (describing the constitutional avoidance canon and the Roberts Court's approach to it).

decisis also serves.[64] But it is a decisional principle in cases involving constitutional questions rather than a rule that tells the Court how to function. To see the distinction, consider that the Court could go maximalist in a given case—i.e., deciding that case on constitutional grounds when nonconstitutional grounds exist—without implicating stare decisis at all. At a more general level, the Court could function without any canons of construction but not without any self-regulatory rules.

Finally, justiciability or jurisdictional doctrines such as ripeness, mootness,[65] and the finality of state court action,[66] are not self-regulatory rules though, like some of the Court's rules for exercising its discretionary jurisdiction, they help to weed out cases that the Court should not take. They determine the boundaries of the judicial power but not the questions of whether or how the Court should exercise the judicial power. They interact with self-regulatory rules—for example, no group of four Justices would vote to grant a cert. petition that lacked a justiciable question.[67] But these doctrines are not self-regulatory rules themselves.

If some of these distinctions seem fine, it is because they are. One might dispute the characterization of one principle or another. In fact, I acknowledge in the next subpart that one rule I include as a self-regulatory rule, Rule 10 of the Supreme Court Rules, may not belong there for a different reason: it is not a "rule" for the Court but a form of guidance for lawyers and litigants. Nevertheless, distinctions do exist and are mostly easy to defend for purposes of identifying the major self-regulatory rules.

The remainder of this Part turns to the major self-regulatory rules. It does not claim to include every informal norm that might be understood as a self-regulatory rule, and in some instances, the discussion of one rule involves discussion of another that is not separately broken out. The rules discussed below are grouped into two categories based on their structural function: (1) those that govern the exercise of the Court's discretionary jurisdiction to take cases and (2) those that govern the Court's approach to decision-making in those cases. But, as the next sections demonstrate, the rules reflect shared normative commitments within and across these categories.

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64. *See* Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1289 (2016) (describing the constitutional avoidance canon as a "strategy of judicial restraint").

65. *See* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 297–99 (1979) (discussing the doctrine of ripeness and mootness).

66. *See* Bennett Boskey, *Finality of State Court Judgments Under the Federal Judicial Code*, 43 COLUM. L. REV. 1002, 1002 (1943) (describing the doctrine of finality of state court action).

67. *See* Brilmayer, *supra* note 65, at 297–99, 302–06 (discussing justiciability doctrines and distinguishing them from "policies of article III," such as judicial restraint).

B. Discretionary Jurisdiction

The rule of four is the main driver of how the Court determines which cases to take, with other voting rules playing a supporting role. When viewed together, these rules can be understood to reflect a common normative commitment. They incline the Court toward taking close cases—those in which five Justices would vote to deny cert. but four Justices believe that the merits process might make a difference to the decision in the case. Two other voting rules can be understood to separate out cases in which the merits process is either unnecessary or insufficient to the decision in the case. Finally, Rule 10, the only formalized rule of the group, can be understood as clearing out petitions that are easily denied.

1. The Rule of Four.—It takes five votes to decide a case, but only four votes to take the case.[68] The rule of four prevents the majority from denying a petition for cert. when four Justices wish to grant it.[69] The rule of four arose as early as 1891 to guide the exercise of the Court's discretionary jurisdiction.[70] Many scholars attribute the first public mention of the rule to Justice Willis Van Devanter, who in a hearing before the House Judiciary Committee in 1924, pointed to the rule as reassurance that an expansion of the Court's discretionary docket would not result in rejection of important cases.[71] Scholars also note the comments of Chief Justice Hughes in a speech around the time President Franklin D. Roosevelt threatened to pack the Court in 1937, citing the rule as reassurance that the Court would not deny review for arbitrary reasons.[72]

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68. *See* Barry Friedman, *The Politics of Judicial Review*, 84 TEXAS L. REV. 257, 292–95 (2005) (describing the cert. process and collecting relevant literature); *see also* Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 16 (2011) ("Under the 'Rule of Four,' a certiorari petition will be granted if at least four Justices vote to grant at conference.").

69. *See* Revesz & Karlan, *supra* note 5, at 1069 ("Broadly speaking, the Court will schedule full briefing and oral argument whenever four Justices agree that a case deserves plenary consideration.").

70. *See* Robert L. Knauss, Recent Decision, 56 MICH. L. REV. 118, 119–20 (1957) (observing the increase in the Court's discretion beginning in 1891, the year in which circuit courts of appeals were established).

71. *See, e.g.*, John Maisel Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 981 (1957) (attributing public knowledge of the rule of four to Justice Van Devanter's 1924 statements).

72. *See* Revesz & Karlan, *supra* note 5, at 1068, 1070 (noting the remarks by Chief Justice Hughes and describing the rule of four as a "nonmajority" rule); *see also* STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE 5-18 to 19 (11th ed. 2019) (noting that a "majority rule would dilute the historic power of a substantial minority of Justices to help determine the makeup of the Court's argument docket and would decrease 'the likelihood that an unpopular litigant, or an unpopular issue, will be heard in the country's court of last resort'") (quoting John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 21 (1983)).

Justice Brennan articulated the most common justification for the rule of four: "in the context of a preliminary five to four vote to deny, five give the four an opportunity to change at least one mind."[73] In other words, the rule of four is a rule of close cases. To work this way, four Justices must believe that the opportunity to garner a fifth vote is not a shot in the dark or that the benefits of the full merits process might make a difference.[74] In a sense, the rule of four anticipates how the merits process has developed over time. As explained below, that process has evolved to provide the space for the Justices to hash out differences, form a stable majority coalition, and express disagreement. Even if four Justices fail to garner a fifth vote through this process, they are able to try or at least make their views known in a formal dissenting opinion.[75]

The rule of four is not a guarantee that the Justices will hear the case or decide it on the merits. Reasons might emerge that prevent the Court from reaching the question in the case, such as mootness or standing, and the Court might decide the case on justiciability grounds or dismiss it as improvidently granted (DIG), depending on the obstacle.[76] DIGs have their own self-regulatory rule that supports the rule of four, although its contours have not always been clear.[77] Scholars once supposed that the majority could just turn

73. Revesz & Karlan, *supra* note 5, at 1100 (quoting Straight v. Wainwright, 476 U.S. 1132, 1134 (1986) (Brennan, J., dissenting)).

74. *See id.* at 1101 (noting that Justice Brennan was referring to the effect of the merits process and criticizing his view).

75. Empirical work has focused on whether the rule has affected the size of the Court's docket or protected important cases from denial of review. *See, e.g.*, David M. O'Brien, *Join-3 Votes, the Rule of Four, the* Cert. *Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779, 786 (1997) (finding that the rule of four resulted in grants of cert. in only 22% of the cases during the 1990 Term); R. Christopher Perry & John L. Carmichael, Jr., *Have Four Vote Certiorari Cases Been Unimportant? Qualitative and Quantitative Tests of Justice Stevens' Argument*, 16 CUMB. L. REV. 419, 437–38 (1986) (finding that the most important cases received five or more votes to grant cert.); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 16–17 (1983) (arguing that the rule of four was relevant in only about 25% of the cert. petitions).

76. Kevin Russell, *Practice Pointer: Digging into DIGs*, SCOTUSBLOG (Apr. 25, 2019, 1:21 PM), https://www.scotusblog.com/2019/04/practice-pointer-digging-into-digs/ [https://perma.cc/JL3B-P6K2] ("[C]ases are most commonly DIGed when the [C]ourt discovers something after granting certiorari that makes the case a poor vehicle for resolving the question it had taken the case to answer." A case may be DIGed, for example, when "the facts [do] not actually present the question, there [is] a jurisdictional problem," or the Court discovers "an argument wasn't properly preserved.").

77. *See* Revesz & Karlan, *supra* note 5, at 1082 (finding nothing in the rule of four that prevents the majority from immediately DIGing the case); Michael E. Solimine & Rafael Gely, *The Supreme Court and the Sophisticated Use of DIGs*, 18 SUP. CT. ECON. REV. 155, 158 (2010) (observing that although "the voting protocols for DIGs are less clear, it appears that the Court will usually only DIG a case when at least six Justices vote to do so, otherwise known as the Rule of Six").

around and DIG a case because they opposed the grant.[78] It is now generally understood that a DIG requires at least five votes, including the vote of at least one of the Justices who voted to grant the petition.[79] This rule prevents the majority from undermining the rule of four.[80]

2. Voting Rules in Support of the Rule of Four.—A variety of voting rules have emerged to assist the Court in handling cert. petitions that are governed by the rule of four. The hold rule concerns cert. petitions that raise a question that the Court has already agreed to hear. A call for the views of the Solicitor General (CVSG) permits the Court to seek the views of the Solicitor General on the disposition of a cert. petition. A stay of execution prevents a case from becoming moot when the Justices wish to grant cert. in the case. Each rule has its own voting requirement suited to the purpose it serves.

a. The Hold Rule (Rule of Three).—The hold rule arises when a petition for cert. presents the same issue as one in a petition that the Court has already granted.[81] The Court might grant the subsequent petition for the same reason it granted the previous one, or it might "hold" a petition until it decides the pending case.[82] The Court will hold a petition upon the votes of three Justices, not four as required to grant the initial case.[83] The hold rule is ancillary to the rule of four, or any grant of cert. for that matter.

The history of the hold rule is less well known than that of the rule of four. According to Richard Revesz and Pamela Karlan, Justices alluded to the rule in opinions as early as 1959 but it "was not explicitly discussed by the Court until the 1985 Term, and it was not until the 1986 Term that the Court indicated that [the hold] rule was in fact a Rule of Three."[84]

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78. Revesz & Karlan, *supra* note 5, at 1074 n.18; EPSTEIN & KNIGHT, *supra* note 1, at 119–21 (explaining the problem of a subset of Justices who vote to deny cert. "turn[ing] around and try[ing] a DIG," and reasoning such practice "would undermine the rule as a norm structuring the internal dynamics of the Court").

79. *See* Russell, *supra* note 76 (reporting the general understanding that a vote to DIG requires "at least one of the justices who originally voted to grant the petition" for cert.); SHAPIRO ET AL., *supra* note 72, at 5-16 ("Most members of the Court have felt that the five Justices who did not vote to grant are thereafter precluded from voting to dismiss the petition as improvidently granted in the absence of material intervening factors 'which were not known or fully appreciated at the time certiorari was granted.'").

80. *See* James F. Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 VAND. L. REV. 895, 930 (1973) ("If the rule of four is to effect minority control of the screening process . . . then dismissal of certiorari as improvidently granted is inappropriate and indefensible where four Justices dissent.").

81. Revesz & Karlan, *supra* note 5, at 1109.

82. *See id.* at 1109–11 (describing an example of the Court holding a petition in one case to await the decision of another).

83. See Watson v. Butler, 483 U.S. 1037, 1038 (1987) (Brennan & Marshall, JJ., dissenting) (noting that "[t]hree votes suffice to hold a case").

84. Revesz & Karlan, *supra* note 5, at 1068.

Looking at statements of the Justices in cases discussing the hold rule, Revesz and Karlan were able to identify two purposes behind it. First, the hold rule "avoids revealing the Court's internal processes with regard to granted cases."[85] A hold does not contain a signal about how the Court is likely to decide the first case, as a grant or denial of the second petition might.[86] If the Court has progressed along in deciding the first case and then grants or denies the subsequent petition, it would send a message about the likely outcome of the first case.

Revesz and Karlan note that the Court could maintain a poker face by denying all subsequent petitions, which is true; but then the Court could not achieve the second purpose of the hold rule that they identified: "promot[ing] equity among litigants."[87] If the Court denies all subsequent petitions, the litigants in those cases would not receive the benefit of a favorable decision in the first case. The hold rule ensures that a favorable outcome does not depend on the order in which petitions are filed.[88] If the Court decides the first case favorable to the petition on hold, the Court then grants that petition, vacates the lower court's decision, and remands the case to the lower court consistent with the first case (GVR).[89] If the Court decides the first case adverse to the petition on hold, it denies that petition.

The hold rule requires less judicial capital than the rule of four because it does less work. The only matter for the Court to consider when deciding whether to hold a petition is whether that petition raises a similar question to the first. A single vote might suffice for that determination, though three votes provide more assurance that subsequent petitions do not unnecessarily clog the orders list.

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85. *Id.* at 1111.

86. *See id.* at 1114 ("[A]ccording to Justice Powell, a decision to hold may not reflect any such opinion regarding the 'merit' of the petitioner's claims . . . .").

87. *Id.* at 1111.

88. Revesz and Karlan find these justifications unpersuasive. In addition to observing that a rule denying all petitions would work as well as a hold rule, they note that the hold rule does not treat all litigants alike because it disfavors any petition that the Court denied before finally granting a petition raising the same question. *See id.* at 1115, 1118–20 (noting the "judicial equal protection" problem that arises for litigants denied cert. when the Court later grants cert. in a case raising the same issue and holds similar subsequent cases). Note that such inequity might be explained by another rule discussed below, Rule 10, which provides reasons why the Court might not be ready to grant cert. in an early petition. *See* SUP. CT. R. 10 (providing nonexhaustive considerations governing review of a cert. petition). Revesz and Karlan offer their own justification for the hold rule. They argue that it encourages litigants to file petitions knowing that the Court is likely to hold them, which in turn benefits the Court by supplying a wider range of factual contexts for considering the question they have committed to resolve. Revesz & Karlan, *supra* note 5, at 1129. To the extent a wider range of contexts is particularly useful in deciding close cases, this justification ties the hold rule more closely to the rule of four.

89. *See, e.g.*, Revesz & Karlan, *supra* note 5, at 1111 n.175 (providing prominent past examples of GVRs). On the practice of GVRs, see generally Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 MICH. L. REV. 711 (2009).

*b. Call for the Views of the Solicitor General (Rule of Four**).*—For petitions to which the federal government is not a party, the Justices might wish to seek another opinion before granting or denying cert.—that of the United States Solicitor General (SG).[90] The Court may call for the views of the Solicitor General (CVSG) if four Justices vote to do so. The SG can collect information from federal agencies and other officials with relevant expertise about whether the Court's intervention is warranted.[91] The SG may have knowledge about the enforcement of the law that counsels for or against a grant. The SG also is a trusted source of advice. Often called "the Tenth Justice,"[92] the SG is a "repeat player" before the Court and, therefore, has insight into the kind of issues that properly come before it.[93] The SG is regarded as a respected officer of the law rather than a partisan advocate.[94] Although a CVSG is phrased as an "invitation" to the SG, the SG always accepts these requests, analyzes the petition and offers a recommendation—grant, deny, hold, GVR, or other—as well as often providing the government's view of the merits of the question presented.[95] The CVSG became a regular practice at the Court in the 1950s after the Court moved away from a previous practice of granting cert. and simultaneously asking the SG to submit an amicus brief when interested in the SG's views.[96]

There is confusion as to whether four votes are required for a CVSG or whether three votes trigger a fourth "courtesy" vote. According to David Thompson and Melanie Wachtell, Justice Breyer confirmed the four-vote requirement in 2008, dissenting from a denial of a stay application of

90. Stefanie A. Lepore, *The Development of the Supreme Court Practice of Calling for the Views of the Solicitor General*, 35 J. SUP. CT. HIST. 35, 35 (2010).

91. *See* Patricia A. Millett, *"We're Your Government and We're Here to Help": Obtaining Amicus Support from the Federal Government in Supreme Court Cases*, 10 J. APP. PRAC. & PROCESS 209, 212–14 (2009) (discussing the value of the Solicitor General's views when cases before the Court concern matters such as federal agency administration, regulatory amendments, and foreign relations).

92. *See, e.g.*, LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 3, 284 n.4 (1987) (noting various sources that have called the SG the "Tenth Justice").

93. Millett, *supra* note 91, at 209–10; *see also* CAPLAN, *supra* note 92, at 7 (identifying the roles the SG plays for the Court).

94. An empirical study by Thompson and Wachtell, now somewhat dated, suggests that the Court follows the SG's recommendation in a large majority of cases. Thompson & Wachtell, *supra* note 8, at 275. In most of those cases, the SG has recommended a denial; but sometimes the Court grants cert. despite the SG's recommendation. *Id.* Thompson and Wachtell found that the very request for the SG to participate increases the chance that the Court will grant cert. by 34% in all cases (from October Term 1998 through 2004) and forty-two percent in paid cases over the same period. *Id.* at 273–74.

95. *See id.* at 275, 277–78, 287 (discussing the various types of recommendations the SG made in response to CVSGs from October Term 1998 to 2004).

96. *See* Lepore, *supra* note 90, at 39 ("[D]uring the late 1950s, the Court began to gravitate away from its practice of requesting an amicus curiae brief from the Solicitor General as it was granting certiorari and towards the CVSG practice . . . .").

execution, but others are not so sure.[97] A CVSG requires four votes, or at least a "soft four," rather than fewer votes, so as to balance the Justices' need for advice with the SG's limited time and resources.[98] A rule requiring fewer votes could generate more invitations from the Court than the SG reasonably can handle. In addition, the rule requires four votes because it is "the logical extension to the Court's certiorari practices," which is governed by the rule of four.[99] Perhaps four Justices are on the fence about whether to grant a case, even though they could, or inclined to deny cert., but perhaps should not. Sometimes Justices just need more time to consider a petition. A CVSG covers all the bases.

The Court appears to exercise the CVSG sparingly and in a manner consistent with this account. In a typical term, the Court issues a CVSG in about a dozen cases, often those involving federal regulatory statutes.[100] If the SG recommends a denial, as is mainly the case, empirical evidence—now somewhat dated—suggests the Court follows suit.[101] At the same time, viewed in the context of all paid petitions for cert., there is a higher chance that the Court will grant a petition after a CVSG than a petition without a CVSG.[102]

c. Stays of Execution (Rule of Five).*—When a death row inmate files a petition for habeas corpus asking the Court to stay the inmate's execution and grant cert. on an issue in the case, four votes are sufficient to grant cert. but insufficient to grant a stay.[103] The practice on the Rehnquist Court was for a Justice to provide a "courtesy" fifth vote to grant a stay when there were

97. Thompson and Wachtell assert that Justice Breyer first confirmed the four-vote requirement in 2008, dissenting from a denial of a stay application of execution in *Medellin v. Texas*, 554 U.S. 759, 765 (2008), as did a former Chief Deputy Clerk of the Court. Thompson & Wachtell, *supra* note 8, at 273; *see also* SHAPIRO ET AL., *supra* note 72, at 6-163 n.177 (noting that CVSG may require a "soft four"). By contrast, any Justice may call for a response (CFR) from a private litigant who has waived the right to file a brief in opposition to a cert. petition without a formal vote but by asking the Clerk of the Court to issue an order. Thompson & Wachtell, *supra* note 8, at 242.

98. Thompson & Wachtell, *supra* note 8, at 273.

99. Lepore, *supra* note 90, at 38–39.

100. *See* Thompson & Wachtell, *supra* note 8, at 242, 245 (finding CVSG occurs "most often in intellectual property cases, antitrust cases, ERISA cases, and other matters involving complex regulatory regimes").

101. *See id.* at 275–76 (observing that the Court denied 80% of the petitions that the SG recommended be denied during the period from October Term 1998 through 2004).

102. *See id.* at 273–74 (reporting, based on data from October Term 1998 through 2004, a "petition in a paid case is over 46 times more likely to be granted following a CVSG").

103. *See* SHAPIRO ET AL., *supra* note 72, at 18-19, 18-21 to -22 (listing cases in which the Court denied a stay over four dissents); Adam Liptak, *Execution Case Highlights the Power of One Vote*, N.Y. TIMES (Jan. 25, 2015), https://www.nytimes.com/2015/01/26/us/in-taking-up-execution-drugs-case-justices-highlight-importance-of-a-single-vote.html [https://perma.cc/N9WB-KMS7] ("It takes four votes to hear a case, but it takes five to stay an execution.").

four votes to grant cert.[104] This practice brought the stay of execution rule in line with the rule of four; otherwise, the rule of four might have no effect in death penalty cases. The practice on the Roberts Court may remain the same, but there have been exceptions.[105] As with a denial of cert., the Court does not often explain its reasons for denying a stay, so it is impossible to determine why and, moreover, whether the courtesy fifth-vote practice still holds.[106]

The issue is further complicated by the posture in which applications for stays of executions arise. Four Justices might seek a stay because they need more time to consider a petition or are interested in the views of the SG.[107] An application for stay might arrive at the Court before a petition for cert., so none of the Justices would have a chance to evaluate its cert.-worthiness.[108] In these instances, a courtesy fifth would preserve the possibility that four Justices ultimately will decide to grant cert., which is more attenuated than a courtesy fifth when four Justices have already indicated that they would grant cert. Failure to treat an application for stay differently based on its procedural posture seems arbitrary, but it has happened.[109]

Stays of executions are a type of "extraordinary relief."[110] Outside the capital-case context, an application for a stay or injunction might seek a stay of a lower court decision or an injunction against government action in order to maintain the status quo while litigation is pending. Such applications may be pursued if irreparable harm would occur from allowing that lower court decision or government action to remain in effect or to go into effect, and the challenge to the action has a likelihood of success on the merits.[111] The general standard for extraordinary relief has been the subject of a larger discussion recently, as Part II describes, so it is considered there rather than here.[112]

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104. SHAPIRO ET AL., *supra* note 72, at 18-21.

105. *See id.* (describing the practice of a "courtesy" fifth vote and noting that it may remain in place on the Roberts Court because "there has not been a grant of certiorari coupled with a denial of a stay, nor an order denying a stay and reciting that four Justices would have granted certiorari," but also noting "numerous cases denying stays over four dissents").

106. *See* Eric M. Freedman, *No Execution if Four Justices Object*, 43 HOFSTRA L. REV. 639, 650–51 (2015) (arguing that there is no empirical evidence supporting that the courtesy fifth-vote practice still holds because "the Court has chosen to reveal neither whether it is governed by a rule nor what the contents of that rule might be").

107. *Id.* at 652–53, 652 n.55.

108. *See id.* at 658 n.74 (discussing capital cases as one example in which "the question at hand is the grant or vacatur of an interlocutory stay or injunction with no certiorari petition anywhere in sight").

109. *See id.* at 642; 644–48 (providing examples).

110. *See* SHAPIRO ET AL., *supra* note 72, at 17-40 (describing a stay as "extraordinary relief").

111. *Id.* at 17-32.

112. *See infra* subpart II(B).

3. Voting Rules for Adding or Eliminating Process.—The rule of four is the gatekeeper to the merits process, which includes full briefing, oral argument, initial vote at conference, opinion assignment, preparation of drafts, circulation of drafts, and final majority opinion together with any dissent or other separate statements. But some cases require more or less process than this. The rule of reargument handles situations in which the Court requires another iteration of briefing and oral argument to decide a case. The rule of summary reversals concerns cases in which the Court reverses a lower court decision simultaneously with a grant of cert. and without further briefing or oral argument.

a. Reargument (Rule of Five).—Reargument is a rarely invoked but significant rule of close cases. It comes into play when the Court hears oral argument in a case and, either after or before judgment in the case, schedules it for a second oral argument.[113] A version of reargument can be traced as far back as 1852.[114] It is a rule of five, applicable in two different circumstances.[115] The first is when a new Justice is seated who did not hear the first oral argument, and the Justices have split 4–4.[116] Five Justices must

113. *See* Valerie Hoekstra & Timothy Johnson, *Delaying Justice: The Supreme Court's Decision to Hear Rearguments*, 56 POL. RSCH. Q. 351, 353 (2003) (describing the practical constraints on the use of reargument, and when Justices might decide to invoke it); Kimberly Strawbridge Robinson, *Supreme Court Take Two: What's Behind SCOTUS Rearguments*, BLOOMBERG LAW (Oct. 4, 2017, 12:46 PM), https://news.bloomberglaw.com/us-law-week/supreme-court-take-two-whats-behind-scotus-reargruments [https://perma.cc/F3AX-CNHV] (describing reasons for granting reargument). Calling for reargument is different from granting a petition for rehearing, which is governed by Rule 44 of the Supreme Court Rules, although the voting rules appear to be the same. *See* SUP. CT. R. 44 ("A petition for rehearing is not subject to oral argument and will not be granted except by a majority of the Court, at the instance of a Justice who concurred in the judgment or decision."); SHAPIRO ET AL., *supra* note 72, at 15-2 to -6 (discussing the elements of Rule 44 in detail).

114. HEBER J. MAY, A TREATISE ON THE PRACTICE AND PROCEDURE OF THE UNITED STATES SUPREME COURT 411 (1899). May explains:

> In 1852 the Supreme Court announced the rule to be: that no reargument will be heard in any case after judgment is entered, unless some member of the court who concurred in the judgment afterwards doubts the correctness of his opinion, and desires a further argument on the subject; and when that happens, the court will, without waiting for the application of counsel, apprise counsel of its wishes, and designate the points on which it desires to hear them. And the circumstance that a decree or judgment is affirmed by a divided court is no reason for ordering a reargument before a full bench in any case.

Id.

115. *See* Stephen Wermiel, *SCOTUS for Law Students: Reargruments*, SCOTUSBLOG (Oct. 31, 2014, 8:00 AM), https://www.scotusblog.com/2014/10/scotus-for-law-students-reargruments/ [https://perma.cc/RAW2-YKB9] (explaining the scenarios in which the Court calls for reargument).

116. *Id.* For a discussion of the Court's practices for avoiding and breaking ties, see generally Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643 (2002).

agree to call for reargument, which means that no "side" has complete control, as a four-vote rule would allow.

The second circumstance is when the Justices all have heard the first argument and are divided 5–4 at conference. A study of cases during the first nine years of the Roberts Court and the period in which Justice William J. Brennan sat on the Court (1956–1990) identify two different purposes that reargument may serve in 5–4 cases.[117] First, the Justices may wish to have an additional issue argued or briefed because the decision in the case is closer than the votes indicate. The majority is unstable, and the decision could easily go the other way.[118] Second, the Justices may wish to have an additional issue briefed or argued because the majority cannot agree on a ground for decision.[119] The judgment in the case is not close, but the ground for decision is. The rule of reargument operates against the strong background rule "disfavoring issue creation," which ensures that the Court decides only the question(s) presented, briefed, and argued in a case.[120] This rule is so strong that, according to legal scholars and political scientists, "the practical norm governing reargument requires that a member of the conference majority request such a course of action, and that a majority of justices agree."[121]

Although the Court rarely calls for reargument, it has done so in some of the most high-profile cases—for example, *Brown v. Board of Education*,[122] *Roe v. Wade*,[123] and *Citizens United v. Federal Election Commission*.[124] Given the significance of the cases involved, the rule has generated controversy. For many, *Citizens United* is a cautionary tale about misuse of reargument to reach out for issues not fairly before the Court.[125] In

117. Wermiel, *supra* note 115. For more on the study of Justice Brennan's years on the Court with an emphasis on his First Amendment jurisprudence, see generally LEE LEVINE & STEPHEN WERMIEL, THE PROGENY: JUSTICE WILLIAM J. BRENNAN'S FIGHT TO PRESERVE THE LEGACY OF *NEW YORK TIMES V. SULLIVAN* (2014).

118. *See* Wermiel, *supra* note 115 (providing examples of reargument ordered to "reshape the focus of a case by asking the parties to address a new issue").

119. *Id.*

120. *See* EPSTEIN & KNIGHT, *supra* note 1, at 159–61 (describing the "*sua sponte* doctrine," which prevents the Court from creating issues "not raised in the record before the Court," and arguing that it is a "legitimacy norm"); Lee Epstein, Jeffrey A. Segal & Timothy Johnson, *The Claim of Issue Creation in the U.S. Supreme Court*, 90 AM. POL. SCI. REV. 845, 845 (1996) (describing the sua sponte doctrine as a norm). *See also* SUP. CT. R. 14 ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

121. Hoekstra & Johnson, *supra* note 113, at 353 (first citing Rosemary Krimbel, *Rehearing* Sua Sponte *in the U.S. Supreme Court: A Procedure for Judicial Policymaking*, 65 CHI.-KENT L. REV. 919, 931–32 (1989); and then citing DAVID M. O'BRIEN, STORM CENTER 9 (2000)).

122. 347 U.S. 483 (1954).

123. 410 U.S. 113 (1973).

124. 558 U.S. 310 (2010).

125. *See* Wermiel, *supra* note 115 (describing how the reargument of *Citizens United* was "significantly . . . controversial" and criticized for deciding "a question that was not asked by the

that case, the Court called for reargument and added a question whether to overrule two First Amendment precedents on campaign finance.[126] The case originally involved a statutory interpretation question of whether a documentary unfavorable to presidential candidate Hillary Clinton violated the McCain–Feingold campaign-finance law that prohibited television commercials opposing or supporting presidential candidates within thirty days of the election.[127] According to a 5–4 majority, the Court could not resolve the case on narrow, statutory interpretation grounds and needed reargument to add and address the question of whether the First Amendment protected the rights of corporations to make unlimited individual expenditures for or against political candidates, contrary to prior precedent.[128] It ultimately overturned its prior precedent and held that the First Amendment prohibits the government from barring corporations from making individual expenditures for or against political candidates.[129] According to Justice Stevens, who issued a ninety-page dissent, the conservative majority recast the issues not because of genuine disagreement on the ground for decision, but to reach out and overrule First Amendment precedent.[130]

b. Summary Reversals (Rule of Six).—The rule of summary reversals is an exception to the full process of review that a grant of cert. ordinarily triggers. A summary reversal overturns a lower court decision simultaneously with a grant of cert., in a per curiam opinion, without further briefing or oral argument.[131] The opinion may or may not come with

parties and that was not necessary for decision of the case"); Adam Liptak, *Justices Turn Minor Movie Case into a Blockbuster*, N.Y. TIMES (Jan. 22, 2010), https://www.nytimes.com/2010/01/23/us/politics/23scotus.html?scp=8&sq=Supreme+Court&st=nyt [https://perma.cc/C9N7-P9L6] (characterizing *Citizens United* as turning "a minor and quirky case . . . into a judicial blockbuster" and discussing Justice Stevens's scathing dissent that critiqued the majority for adding a broad campaign-finance question and not adhering to "judicial restraint").

126. Lyle Denniston, *Briefing Set on* Citizens United *Rehearing*, SCOTUSBLOG (June 29, 2009, 2:00 PM), https://www.scotusblog.com/2009/06/briefing-set-on-citizens-united-rehear/ [https://perma.cc/7CRN-3JSU].

127. *See* Adam Liptak, *Supreme Court to Revisit 'Hillary' Documentary*, N.Y. TIMES (Aug. 29, 2009), https://www.nytimes.com/2009/08/30/us/30scotus.html [https://perma.cc/724H-7ZRB] (explaining that the case was originally focused on a narrower question about the McCain–Feingold Act, but the "call for [reargument] may have been prompted by lingering questions about just how far campaign finance laws, including McCain–Feingold, may go").

128. *See* Citizens United v. FEC, 557 U.S. 932 (2009) (ordering reargument of *Citizens United* in Order No. 08-205 and providing the new question presented); *see also Citizens United*, 558 U.S. at 398 (Stevens, J., concurring in part and dissenting in part) (stating reargument was motivated by "five Justices [who] were unhappy with the limited nature of the case").

129. *Citizens United*, 558 U.S. at 365, 371–72 (2010).

130. *Id.* at 398 (Stevens, J., concurring in part and dissenting in part).

131. *See* Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 CARDOZO L. REV. 591, 609 (2016) (explaining the general functions of summary reversals).

reasoning explaining the decision.[132] The practice of summary reversals dates to the nineteenth century but came into more frequent use in the 1950s.[133] Although the rule is not new, what is new—or at least freshly disclosed—is that the practice is a rule of six. In a speech in September 2021 at the University of Notre Dame, Justice Alito revealed that when the Court issues a summary reversal of a lower court decision, it does so upon the vote of at least six Justices.[134] In an interview with *CNN* legal analyst Joan Biskupic, Justice Breyer confirmed this newly uncovered information.[135]

The rule of summary reversals is not a rule of close cases but almost the logical opposite—a rule for easy cases. The rule arises when a supermajority of the Court agrees that the lower court has made an error that is both "conspicuous" and outrageous.[136] For example, the Court has issued a summary reversal of a lower court opinion that reflected "a clear misapprehension of summary judgment standards in light of [the Court's] precedents."[137] The Court has issued summary reversals to "rebuke" lower courts for resisting its precedent,[138] and when those courts improperly grant federal habeas or "wrongly deny[] officers the protection of qualified

132. *See* Baude, *supra* note 16, at 21 (noting that although "the old practice had been of one-line opinions without reasoning . . . the Court now summarily reverses in written opinions that explain their reasoning").

133. Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691, 700–01 (2020).

134. *See* Weiss, *supra* note 2 (reporting that Justice Alito revealed that summary reversals require the votes of six Justices, and that Justice Breyer later commented on the practice in an interview with CNN); *see also* SHAPIRO ET AL., *supra* note 72, at 5-35 ("Preliminarily, it should be noted that [an unnamed] Justice interviewed as to how the Court determines to decide a case summarily at the certiorari stage once replied that 'it takes six to do that . . . rather than five.'"). For discussions of the practice, see generally Chen, *supra* note 133; Hartnett, *supra* note 131.

135. *See* Biskupic, *supra* note 2 (reporting Justice Breyer's statement calling the six-vote requirement a "custom"); Weiss, *supra* note 2 ("Breyer said the six-vote rule [revealed by Alito] is 'a custom.' Asked whether there was a reason to keep the rule a secret, Justice Breyer said there was no reason.").

136. *See* Salazar-Limon v. City of Houston, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in the denial of certiorari) ("We may grant review if the lower court conspicuously failed to apply a governing legal rule."); Baude, *supra* note 16, at 20 ("[T]he current edition of the treatise now concedes that 'there appears to be agreement that summary disposition is appropriate to correct clearly erroneous decisions of lower courts.'") (quoting STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE 352 (10th ed. 2013)); *id.* at 31, 35, 41–45, 47 (finding a trend on the Roberts Court of using summary reversals "as a [t]ool of [h]ierarchy" and collecting cases suggesting that "some judges may be treated by the Court in unusually summary fashion").

137. Hartnett, *supra* note 131, at 613 (quoting Tolan v. Cotton, 572 U.S. 650, 659 (2014) (per curiam)); Baude, *supra* note 16, at 2, 31–37 (cataloguing the summary reversals during the Roberts Courts and finding that "a majority . . . are designed to enforce the Court's supremacy over recalcitrant lower courts, and a minority . . . are more akin to ad hoc exercises of prerogative, or 'lightning bolts'").

138. Chen, *supra* note 133, at 696.

immunity in cases involving the use of force."[139] It has also issued summary reversals to discipline lower courts for failing to follow its instructions on remand after a GVR.[140]

Scholars have long criticized summary reversals as unconstrained, procedurally deficient, and inconsistent with Rule 10 of the Supreme Court Rules.[141] Rule 10, as explained in more detail below, sets forth the reasons that the Court considers when evaluating petitions for cert. and explicitly provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[142] Why is the Court granting the case at all then?

Now that the Justices have revealed the six-vote requirement, the rule of summary reversals seems less ad hoc and more consistent with Rule 10. Although summary reversals are not confined by selection criteria, they are subject to a voting requirement, as are most of the Court's cert. rules. That voting requirement is an especially high one because of the heightened need to limit arbitrariness and overuse. Furthermore, summary reversals seem to occur when the error is clear and pertains to lower court behavior.[143] Under these circumstances, requiring the full process of merits briefing, oral argument, and written decision would be an empty formality. Altogether, summary reversals are appropriate in the rare instance when (a) the Court typically would *not* grant cert. under Rule 10 because the case involves error correction, but (b) a supermajority feels compelled to grant cert. because the error constitutes blatant and egregious lower court misconduct.

In this sense, summary reversals also seem consistent with Rule 10's provision that a "compelling reason[]" for the Court to grant cert. is when "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."[144] These cases are important matters for the Court to consider because they implicate its supervisory power. Under the rule of summary reversals, they may be appropriate candidates for granting cert. if six Justices agree that they are blatant and egregious enough to warrant an exercise of judicial

139. *Id.* at 695 n.9 (quoting *Salazar-Limon*, 137 S. Ct. at 1282 (Sotomayor, J., dissenting from the denial of certiorari)).

140. *See* Hartnett, *supra* note 131, at 599 (noting an example of this practice).

141. *See* Baude, *supra* note 16, at 30 ("The Court does not tell us why it picks cases for summary reversal."); Chen, *supra* note 133, at 696, 712 (observing that scholars have criticized summary reversals for "the lack of stated criteria for when the Court will use this tool," inconsistency with Rule 10's statement that the Court does not engage in error correction, and as unfairly targeting habeas and qualified immunity cases).

142. SUP. CT. R. 10.

143. *See supra* text accompanying notes 136–140.

144. SUP. CT. R. 10.

"prerogative," as determined by supermajority vote.[145] The six-vote requirement ensures that summary reversals will be rare, only when the reasons for error correction are truly "compelling."[146]

4. Rule 10.—Rule 10 of the Supreme Court Rules is different from the other rules regulating the cert. process in that it is written and not a voting rule. Rather, it provides "Considerations Governing Review on Certiorari."[147] It states that "[a] petition for a writ of certiorari will be granted only for compelling reasons" and lists criteria that, though "neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers."[148] Specifically, the Court considers whether:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.[149]

Some version of the Rule of 10 has existed since 1925,[150] following the enactment of the Judiciary Act of 1925, which gave the Court control over its discretionary docket.[151] The version adopted in 1995 included for the first time that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of

145. *Cf.* Baude, *supra* note 16, at 35–37 (arguing that summary reversals may be a matter of the Court's "[a]d [h]oc [p]rerogative" to discipline a lower court).

146. *Cf. id.* at 30 (acknowledging that Rule 10 provides some criteria but stating that "it is not pellucid how those criteria shake out").

147. SUP. CT. R. 10.

148. *Id.*

149. *Id.*

150. *See* SUP. CT. R. 35(5), 266 U.S. 681 (1925) (repealed 1928) (containing substantially similar language to the modern Rule 10).

151. Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936; *see generally* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000) (tracing the history of certiorari in the Court).

a properly stated rule of law."[152] This version has been described to "rearrange, update, and simplify the generalizations long known to be relevant to the grant of certiorari," and "the restated generalizations are somewhat more precisely drawn and arranged, and perhaps more accurately reflect the Court's concerns in the recent past."[153]

At first glance, Rule 10 might not seem like a self-regulatory rule at all. Its publication in the Supreme Court Rules suggests that it is directed at litigants, like the other rules that contain specific instructions for those who interact with the Court on paper or in person. Furthermore, it leaves the Court with discretion to grant or deny a petition for whatever reasons it chooses.[154] Thus, Rule 10 appears to be an outward-facing guidance document.[155] Viewed in connection with the rule of four, however, Rule 10 *is* a self-regulatory rule. The rule of four positions the Court to take close cases, while Rule 10 demarcates petitions that are easily denied. The Court denies cert. in most cases, as most petitions seek fact-based error correction rather than resolution of an important legal question, or they fail to identify any lower court split or lower court misconduct.[156] Justices have confirmed that a large portion of petitions fail to assert any issue appropriate for Supreme Court review under Rule 10. Long ago, in discussing his process for screening petitions, Justice Brennan noted one critic's claim that 60% of petitions the Court receives each year are "utterly without merit."[157] Years later, Chief Justice Rehnquist observed that "several thousand" of the petitions filed each year were such that "no one of the nine would have the least interest in

152. SUP. CT. R. 10, 515 U.S. 1203 (1995) (repealed 1998) (containing substantially similar language to the modern Rule 10).

153. SHAPIRO ET AL., *supra* note 72, at 4-6 to -7.

154. *See id.* ("[N]o bright lines are drawn as to what the Justices deem relevant or decisive in reaching their subjective and collective judgments."); Adam Feldman & Alexander Kappner, *Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001–2015*, 61 VILL. L. REV. 795, 798, 832 (2016) (conducting an empirical study "comparing the relative success of individual attorneys, law firms, and parties . . . to determine the players that assist the Court in setting its agenda," and finding that the name of an experienced lawyer on the brief makes a difference); Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 969 (2022) (conducting empirical analysis of Court opinions describing the reasons for granting cert. in important cases and finding among the reasons responses to large sociological or economic events, significant political developments, and changes in the Court's membership).

155. *Cf.* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 399–401 (2007) (describing the characteristics and uses of administrative agencies' guidance documents).

156. *See* Feldman & Kappner, *supra* note 154, at 795 (reporting that the Supreme Court, in its 2013 term, only granted approximately 1% of writs of certiorari filed).

157. William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 476–77 (1973); *see also* John M. Harlan, *Manning the Dikes*, 13 REC. ASS'N BAR CITY N.Y. 541, 549 (1958) ("[A] great many petitions for certiorari reflect a fundamental misconception as to the role of the Supreme Court").

granting them."[158] As the number of petitions filed each year increases, one might imagine the number of nonstarters increases as well.[159]

Law clerks who participate in the "cert. pool" understand Rule 10 as a rule of clear-cut denials. Under Chief Justice Warren E. Burger, the Court created the cert. pool in the 1970s to reduce the workload of individual chambers in sorting through the massive number of cert. petitions.[160] Cert. petitions are divided among the law clerks of participating Justices, usually all Justices but one or two, and each law clerk writes a memo to these Justices with an analysis of the case and a recommendation whether to grant or deny cert.[161] Rule 10 is a formalized metric for "risk-averse" law clerks to use in evaluating the seemingly endless stream of cert. petitions they review.[162] Justices rely on Rule 10 when they rely on cert. pool memos to evaluate

158. WILLIAM H. REHNQUIST, THE SUPREME COURT 233 (2d ed. 2001).

159. Lawyers familiar with Supreme Court practice recognize that Rule 10 is the main predictor of judicial review, and they often invoke it at the outset of their petitions to prevent immediate denial. As lawyers from Sullivan & Cromwell state in a practical guide:

> First and foremost, the petition must focus on the Rule 10 considerations discussed above. Unlike in the lower courts, the merits of the case should no longer be the principal focus of a cert petition. For example, if the case presents a split of authority among the federal courts of appeals or the state supreme courts, counsel should state that in the first paragraph of the introduction and make it the first argument in the petition.

Diane L. McGimsey & Judson O. Littleton, *Expert Q&A on Seeking or Opposing* Certiorari *in the US Supreme Court*, PRAC. L.J., Feb./Mar. 2018, at 16, 17.

160. Ryan J. Owens & James Sieja, *Agenda-Setting on the U.S. Supreme Court*, *in* THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR 169, 172 (Lee Epstein & Stefanie A. Lindquist eds., 2017) (describing the origins and operation of the cert. pool). The cert. pool has generated debate, for example, about whether it exerts undue influence on the Court's docket. *See, e.g.*, Ryan C. Black, Christina L. Boyd & Amanda C. Bryan, *Revisiting the Influence of Law Clerks on the U.S. Supreme Court's Agenda-Setting Process*, 98 MARQ. L. REV. 75, 101–03 (2014) (examining clerks' influence on whether cert. is granted or denied); Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1235 (2012) (suggesting the cert. pool has affected the Court's docket size due to pressures on law clerks to recommend denial); William D. Blake, Hans J. Hacker & Shon R. Hopwood, *Seasonal Affective Disorder: Clerk Training and the Success of Supreme Court* Certiorari *Petitions*, 49 L. & SOC'Y REV. 973, 993 (2015) (finding likelihood of a cert. grant is influenced by seasonal law clerk behavior).

161. Blake et al., *supra* note 160, at 976. On the current Court, Justices Alito and Gorsuch have not joined the cert. pool. Adam Liptak, *A Second Justice Opts Out of a Longtime Custom: The 'Cert. Pool*,*'* N.Y. TIMES (Sept. 25, 2008), https://www.nytimes.com/2008/09/26/washington/26memo.html [https://perma.cc/8D32-F3ND]; Adam Liptak, *Gorsuch, in Sign of Independence, Is Out of Supreme Court's Clerical Pool*, N.Y. TIMES (May 1, 2017), https://www.nytimes.com/2017/05/01/us/politics/gorsuch-supreme-court-labor-pool-clerks.html [https://perma.cc/W2ZA-FQTM].

162. *See* John Paul Stevens, FIVE CHIEFS: A SUPREME COURT MEMOIR 209 (2011) (noting the attractiveness of a recommendation to deny to the "risk-averse clerk" in the cert. pool); Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 285 (2006) ("Most law clerks review petitions for certiorari with a presumption against granting coupled with a kind of checklist of reasons *not* to grant."); *id.* at 285 n.53 (describing law clerks' "predisposition against granting") (citing H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 64 (1991)).

whether to grant a petition for cert.[163] Chief Justice Rehnquist said that "with a large majority of the petitions" he does not "go any further than the pool memo."[164] Law clerks in nonparticipating chambers might also use Rule 10 similarly, even if they are less fearful to make a poor recommendation in front of their own boss than the entire Court.

Still, some may say that Rule 10 is not a self-regulatory rule because its categories for *granting* cert. are discretionary. Rule 10 does not indicate which circuit splits the Court will deem adequate, which legal questions the Court will deem important, which lower court misconduct the Court will find concerning, or whether there is some other "compelling reason" for granting cert. But this contention is not quite right. The discretionary nature of Rule 10 is surely a problem for litigants (and law clerks) trying to predict the petitions the Court will grant.[165] However, it is not a problem for the Court because Rule 10 operates in tandem with the rule of four. Four Justices must agree that a "conflict" is sufficiently developed, a legal question is sufficiently "important," a lower court's misconduct is sufficiently concerning, or that some other reason compels a grant of cert. Thus, Rule 10 indicates the sorts of cases the Court is likely to grant, and the rule of four decides. Whether understood as a rule of easy denials or a companion to the rule of four for grants, Rule 10 does seem to belong on the list of self-regulatory rules.

C. Decision-Making

The self-regulatory rules governing the Court's discretionary jurisdiction are gatekeepers to the Court's merits decision-making power, which is also governed by self-regulatory rules. The centerpiece of these rules is "one of the defining features of the American legal system"[166]—stare decisis—which obligates the Court to decide cases in the common law tradition incrementally and with respect for prior precedent. It reflects a commitment to consistency and stability. The other rules work together to create space for the Justices to hash out their differences, form a majority coalition, and freely express their disagreement.

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163. This is not to say that the cert. pool *must* be narrowly governed by the cert. standards in Rule 10. *See* Carolyn Shapiro, *Kagan and the Cert Pool*, CHI-KENT FACULTY BLOG (June 7, 2010), http://blogs.kentlaw.iit.edu/faculty/2010/06/07/kagan-and-the-cert-pool/ [https://perma.cc/A2K8-972W] (suggesting "perhaps law clerks should be encouraged to apply somewhat broader criteria, erring on the side of recommending that a case be granted or at least seriously considered").

164. WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 264–65 (1987).

165. In practice, lawyers regard Rule 10 as an important predictor, reflecting the "patterned kind of intuition" of the Court. Timothy S. Bishop, *Opposing Certiorari in the U.S. Supreme Court*, LITIGATION, Winter 1994, at 31, 31–32.

166. Staszewski, *supra* note 9, at 1019.

1. Stare Decisis.—Stare decisis has structured how the Court functions from its earliest days.[167] Political scientists trace its origin to the mid-eighteenth century and state that it was firmly entrenched by 1815.[168] Legal scholars place its development a bit later.[169] Nevertheless, it is fair to say that stare decisis built the Court and the federal judiciary. As Timothy Johnson, James Spriggs, and Paul Wahlbeck describe, drawing together the vast political science literature:

> [Stare decisis] is the defining feature of American courts, and lawyers, judges, and scholars recognize it represents the most critical piece of American judicial infrastructure . . . . Additionally, the transfer of the common law framework from England to the United States, and the role *stare decisis* plays within it, is the central theme of early American legal history . . . . Indeed, put into place in the mid-eighteenth and nineteenth centuries, the creation and development of this institutional structure represents a significant part of the American

167. *Id.* Although stare decisis is a foundational principle, there is an argument that it is not a self-regulatory rule. Unlike the other rules, stare decisis did not arise to govern the Court's judicial review function as a court of last resort. It arose to define the Court's mode of decision-making. Relatedly, stare decisis is not unique to the Court in our legal system: horizontal stare decisis is the Court's practice of following its own precedent, and vertical stare decisis obligates lower courts to follow Court precedent. Barrett, *supra* note 27, at 1712. This Article treats (horizontal) stare decisis as a self-regulatory rule because it satisfies the conditions: it is self-imposed, grounded in normative values, and determines how the Court exercises its decision-making power. At the same time, this Article acknowledges, and in some sense makes the very point, that stare decisis is a more distinctive constraint on the judicial power than the other rules. *Cf.* THE FEDERALIST No. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . ."); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 577 (2001) (contending that "Article III's grant of 'the judicial Power' authorizes the Supreme Court to elaborate and rely on a principle of stare decisis and, more generally, to treat precedent as a constituent element of constitutional adjudication"). In this regard, it is also worth noting that political scientists group stare decisis with the practice of dissent as collegial decision-making norms, and group secrecy of deliberations and opinion assignment together simply as informal norms that reflect shared expectations about appropriate behavior. *See* Lindquist, *supra* note 1, at 173 (making this distinction). This Article views them all as decision-making norms.

168. Timothy R. Johnson, James F. Spriggs, II & Paul J. Wahlbeck, *The Origin and Development of* Stare Decisis *at the U.S. Supreme Court*, *in* NEW DIRECTIONS IN JUDICIAL POLITICS 167, 168–69 (Kevin T. McGuire ed., 2012); *see generally* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999) (examining the history of stare decisis and the Court's increasing tendency to overrule prior precedent).

169. *See* Barrett, *supra* note 27, at 1712 (stating that stare decisis "originated in common law courts and worked its way into federal courts over the course of the nineteenth century"); Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279, 1283 (2008) ("[B]y 1900 the Supreme Court had settled into the practice of citing and relying upon its precedents as modalities of argumentation and sources of decision . . . .").

> nation-building experience and serves as the most important transformational change in U.S. legal history . . . .[170]

Stare decisis is "widely understood to promote efficiency, stability, and the legitimacy of the judicial system."[171] It relieves the Court of the need to reinvent the wheel for every issue, and spares parties the time and expense of rearguing every issue. It provides that like cases be treated alike[172]—for the sake of fairness among litigants and orderly planning among those seeking to avoid litigation.[173] It prevents the law from abruptly changing, so that judicial decisions do not upset settled expectations or reliance interests.[174] At the same time, the principle is not "an inexorable command" requiring absolute adherence to prior precedent.[175] Overturning precedent is justifiable when the decision was wrong when decided or "has become obsolete or inefficient in the light of changing societal or economic conditions."[176]

Stare decisis has always presented questions about how to reconcile its command to follow precedent with its permission to overrule precedent. Judge Easterbrook famously argued that the Court lacks a meaningful theory of precedent that constrains the Justices from overruling or distinguishing cases as they like.[177] Some scholars have tried to supply a theory.[178] Others have sought to define the sorts of precedent to which it applies, such as superprecedents on which reliance is extremely high or as to which no one

170. Johnson et al., *supra* note 168, at 167–68 (internal quotation marks and citations omitted).

171. Staszewski, *supra* note 9, at 1019; *see also* MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 18 (2008) (highlighting the importance of precedent in the judiciary); Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 790 (2018) (noting that precedent is important for reasons of consistency, predictability, efficiency, and integrity of the judiciary).

172. June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in judgment) ("The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike."); Collins v. Yellen, 141 S. Ct. 1761, 1800 (2021) (Kagan, J., concurring in part) (adopting the same language).

173. *See* Stefanie A. Lindquist & Frank C. Cross, Stability, Predictability and the Rule of Law: *Stare Decisis* as Reciprocity Norm 1 (Mar. 26, 2010) (unpublished manuscript), https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf [https://perma.cc/D525-P8FR] ("In the absence of stability and predictability in law, citizens have difficulty managing their affairs effectively.").

174. *Id.* at 4–5.

175. Payne v. Tennessee, 501 U.S. 808, 828 (1991).

176. Lindquist & Cross, *supra* note 173, at 10.

177. *See* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 422 (1988) ("To have a theory of precedent is to have a theory of the extent to which judges' acts are law. Yet we do not have such a theory.").

178. *See, e.g.*, Staszewski, *supra* note 9, at 1020–21 (understanding stare decisis as "grounded in deliberative democratic theory," requiring the Court to "consider[] and respond[] in a reasoned fashion to prior decisions, regardless of whether the Court follows or overrules its precedent").

could dispute their correctness,[179] and the sorts of precedent to which it does not, such as Court-made principles of statutory construction.[180] Still others have tried to identify unacceptable reasons for overruling precedent, such as a change in membership of the Court, or more pointedly, a change in the political affiliation of the majority. The version that dominates recent discussion is whether a change in "judicial philosophy" or "interpretive methodology" is an acceptable reason.[181]

Despite persistent questions, stare decisis has remained a defining feature of the Court. It would be impossible to describe how the Court operates or what kind of Court we have without saying it is bound to follow precedent. To say the Court is bound (or at least predisposed) to follow precedent has not been to deny that it has overruled prior precedent with considerable effect over time.[182]

2. Secrecy of Deliberations.—Secrecy of deliberations and the practice of dissent together implement the Justices' commitment to hash out their differences and express their disagreement rather than suppress their differences and speak with a single, unified voice.[183] These self-regulatory rules arose to replace the rule of unanimity that Chief Justice John Marshall long ago imposed on the Court.[184] The rule of unanimity, or "norm of consensus," aimed to make the Court appear authoritative and the law seem

179. *See* Barrett & Nagle, *supra* note 5, at 13–14 (describing superprecedents as a "hard-to-dispute reality" and noting that "regardless of whether they are right or wrong, some cases are so firmly entrenched that the Court would not consider overruling them"); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205–06 (2006) (describing superprecedents as "constitutional decisions in which public institutions have heavily invested, repeatedly relied, and consistently supported over a significant period of time," and noting that they are "deeply embedded into our law and lives through the subsequent activities of the other branches . . . [and] seep into the public consciousness, and become a fixture of the legal framework"); *see also* Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1116 (2008) ("[T]he claim that there are superprecedents immune from judicial overruling seems basically correct."); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1180–82 (2006) (endorsing the proposition that some precedents are so entrenched they cannot be overruled).

180. *See generally* Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573 (2014) (arguing that stare decisis should not apply to statutory interpretation methodology).

181. *See* Kozel, *supra* note 171, at 803, 826 (discussing whether a change in judicial philosophy or interpretive methodology is a sufficient reason to overturn precedent).

182. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483, 494–95 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)); West Coast Hotel v. Parrish, 300 U.S. 379, 400 (1937) (overruling Adkins v. Children's Hospital, 261 U.S. 525 (1923), and putting an end to the *Lochner* era, Lochner v. New York, 198 U.S. 45 (1905)).

183. This is true of the cert. process as well. The Court addresses the discuss list in conferences and only publishes final dispositions, mostly without written opinion.

184. *See generally* Donald M. Roper, *Judicial Unanimity and the Marshall Court—A Road to Reappraisal*, 9 AM. J. LEGAL HIST. 118 (1965) (discussing the Marshall Court's adherence to unanimity).

clear.[185] Compliance with this norm meant that "the Court should not express disagreement unless they were justified in doing so in light of the intensity of their disagreement and the magnitude of the stakes."[186] Although Justices issued periodic dissents, those statements were the aberration—not the rule. The rule of unanimity prevailed until 1941, when Chief Justice Harlan Stone introduced a new vision.[187] He encouraged the Justices to have longer discussions of cases in conference and afforded them longer periods to provide comments on draft opinions to allow for the development of different views. He also encouraged the Justices to issue written dissents to express those views.[188] Chief Justice Stone "linked dissent with the development of sound principles, which, he contended, 'are the ultimate resultant of the abrasive force of the clash of competing and sometimes conflicting ideas.'"[189] The new Justices joining the Court during this period of "extraordinarily rapid turnover" agreed with the Chief Justice's approach and underlying values.[190] They refused to "smother" competing views which "in the interests of candor and of the best interest of the Court ought to be express[ed]."[191]

Secrecy of deliberations is the rule that arose to let the Justices openly interrogate their differences and candidly speak their minds. As Justice Breyer recently explained in an interview with legal analyst Joan Biskupic, "[t]he reason not to have the transparency [of deliberations] is that it [is] very important for people to say what they think."[192] It avoids "somehow bringing the public into the conference."[193] Secrecy of deliberations is so strong that it applies not only to protect deliberations while cases are pending, but long after the cases are decided. Justices make their papers, which often reveal

185. *See* Sunstein, *supra* note 1, at 785–86 (discussing Chief Justice Marshall's desire to promote institutional legitimacy through unanimity); Lee Epstein, Jeffrey A. Segal & Harold J. Spaeth, *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362, 376 (2001) (discussing the existence of a consensus norm among Justices in the nineteenth century); Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010) ("In civil-law systems, the nameless, stylized judgment, and the disallowance of dissent are thought to foster the public's perception of the law as dependably stable and secure.").

186. Sunstein, *supra* note 1, at 780 (emphasis omitted).

187. *See id.* at 772–73 (describing and supporting empirically the "transformation of 1941").

188. *Id.* at 790–91.

189. *Id.* at 790.

190. *Id.* at 792.

191. *Id.* at 793 (quoting Justice Frankfurter).

192. Joan Biskupic, *Stephen Breyer Says Now Isn't the Time to Lose Faith in the Supreme Court*, CNN, https://www.cnn.com/2021/10/14/politics/stephen-breyer-cnn-interview-supreme-court-georgetown-law/index.html [https://perma.cc/6PW5-HYEQ] (Jan. 26, 2022, 1:32 PM) (quoting Justice Breyer).

193. *Id.*

deliberations, available to the public only after their retirement and sometimes well beyond their death.[194]

3. The Practice of Dissent.—The practice of dissent is the rule that allows the Justices to express their disagreement. The practice includes a variety of separate statements, not all of which disagree with the majority's reasoning or judgment: a dissent from the Court's decision, a concurrence that agrees with the Court's opinion but adds further reasoning, or a concurrence in the judgment but not the reasoning of the Court.[195] A Justice may issue a separate statement that includes more than one of these, reflecting disagreement and agreement with different parts of the Court's opinion. Other Justices may join separate statements, just as they may join the majority opinion.[196] When five Justices agree with the judgment but not the reasoning, the opinion that commands the most of their votes is the plurality opinion.[197]

The practice of dissent, like secrecy of deliberations, arose and took hold as a replacement for the rule of unanimity. Once the Justices agreed to fight out their differences, they naturally gravitated toward expressing their

194. *See* Stephen Wermiel, *Using the Papers of U.S. Supreme Court Justices: A Reflection*, 57 N.Y.L. SCH. L. REV. 499, 500–03, 500 n.1 (2012–2013) (discussing the release of Justices' papers and noting that those papers may include conference notes, draft opinions, and letters between Justices requesting or approving of changes to drafts). By contrast, a statute requires Presidents to save all papers. *See* 44 U.S.C. § 2203 ("[T]he President shall take all such steps as may be necessary to assure that . . . records are preserved and maintained."). There is no norm among the Justices as to which papers to save and whether or when to make their papers available after retirement or death. Justices have donated their papers to the Library of Congress and various colleges and universities, some requiring that the papers remain closed until a date hence, such as fifty years after their death. Stephen Wermiel, *SCOTUS for Law Students: Supreme Court Mysteries and the Justices' Papers (Corrected)*, SCOTUSBLOG (July 2, 2018, 1:19 PM), https://www.scotusblog.com/2018/07/scotus-for-law-students-supreme-court-mysteries-and-the-justices-papers/ [https://perma.cc/D96G-VFJ7].

195. *See* Nancy Maveety, Charles C. Turner & Lori Beth Way, *The Rise of the Choral Court: Use of Concurrence in the Burger and Rehnquist Courts*, 63 POL. RSCH. Q. 627, 628 (2010) (describing different types of concurring opinions); Antonin Scalia, *Dissents*, ORG. AM. HISTORIANS MAG. HIST., Fall 1998, at 18, 18, (defining dissenting opinions); *see generally* Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267 (2001) (discussing the role of dissent during and after Chief Justice Taft's tenure).

196. *See* Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CALIF. L. REV. 1445, 1464 (2012) (discussing Judge Wood's own experience joining separate statements on the Seventh Circuit).

197. *See* Pamela C. Corley, Udi Sommer, Amy Steigerwalt & Artemus Ward, *Extreme Dissensus: Explaining Plurality Decisions on the United States Supreme Court*, 31 JUST. SYS. J. 180, 180 (2010) (defining plurality opinions). Despite the proliferation of separate statements, the Court still issues unanimous opinions written by one Justice, or per curiam opinions without attribution to any author or authors. Josh Blackman, *Invisible Majorities: Counting to Nine Votes in Per Curiam Cases*, SCOTUSBLOG (July 23, 2020, 3:23 PM), https://www.scotusblog.com/2020/07/invisible-majorities-counting-to-nine-votes-in-per-curiam-cases/ [https://perma.cc/R8HE-WDZ5].

disagreement in written statements.[198] The practice of dissent is understood as reinforcing deliberation and as the very evidence of deliberation.[199] In addition, it facilitates the transparency of judicial decision-making, which also promotes the legitimacy of the Court, particularly in controversial cases.[200]

Increasingly, the Justices have come to regard the practice of dissent as an intensely personal prerogative. As Justice Kagan has said, "Sometimes I feel that when I sit down at my computer and I'm writing the dissent and you just have this feeling like 'now I'm being myself' in a way that maybe you're not when you're writing for the Court."[201] Furthermore, Justices often seem as if they feel an obligation to provide a separate statement. They issue concurrences when they have only a small bit to add.[202] And it does not seem unusual in contentious cases to see almost every Justice say something whether dissenting or concurring.[203] The practice of dissent is more than a norm of deliberation and reason-giving. It is also a norm of vindication, allowing the Justices to reveal directly and precisely the views that make close cases close.[204]

198. *See* Post, *supra* note 195, at 1274–75, 1287 (describing the shift from the Justices' silent acquiescence to the unanimous opinions of the Taft Court to the common dissent of modern Justices); Sunstein, *supra* note 1, at 790 (discussing Chief Justice Stone's role in breaking down previous norms of unanimity).

199. *See* Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235, 2244 (1996) (noting that the practice of dissent plays "an important role in bringing . . . disagreement to light").

200. *See id.* at 2246–47 (explaining that "dissent is necessary to expose the deliberative character of the Court's decisionmaking" and that "the Court's political legitimacy depends on . . . dissent"); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 144 (1990) (noting the importance of dissents when "fundamental constitutional questions are at stake").

201. Artemus Ward, *Junior Varsity Judges? Law Clerks in the Decisional Process of the U.S. Supreme Court*, *in* CONSTITUTIONAL COURTS IN COMPARISON 165, 177 (Ralf Rogowski & Thomas Gawron eds., 2d ed. 2016).

202. *See* Maveety et al., *supra* note 195, at 627 (explaining Justices' goals when writing concurrences); Adam Feldman, *Empirical SCOTUS: The Recent Role of Separate Opinions*, SCOTUSBLOG (Nov. 13, 2019, 9:58 AM), https://www.scotusblog.com/2019/11/empirical-scotus-the-recent-role-of-separate-opinions/ [https://perma.cc/53H8-WU5Z] (noting that Justices use "separate opinions to generate and refine arguments").

203. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010) (deciding case with one majority opinion, two concurrences, and two opinions concurring in part and dissenting in part).

204. As the practice of dissent has evolved as a companion to the majority rule in the merits process, dissenting from denial of cert. has evolved as a companion to the rule of four. Jeff Bleich and Deborah Pearlstein trace the evolution of the practice of dissenting from denial. Jeff Bleich & Deborah Pearlstein, *Dissenting from Not Deciding: Clues About What the Law Might Become—And How It Will Get There*, OR. STATE BAR BULL., Dec. 2002, at 13, 13. Initially, dissents from denial addressed "whether the case raised the sort of issue that the Court as an institution should be deciding at that point in time." *Id.* They often still do, but they also are written to "address the wisdom of the lower court's decision head on" and to "send a message not only to the lower courts

4. The Duty of Opinion Assignment.—Opinion assignment is connected to secrecy of deliberations and the practice of dissent. Like those rules, it arose when the rule of unanimity fell and influences how the Justices develop and express their views.[205] Early on, Chief Justice Marshall developed the practice of writing unanimous "opinions of the Court," often assigning them to himself and not even circulating drafts to the other Justices.[206] During this period, other Justices often viewed an opinion assignment as one of workload (sometimes "forced labor"), not authorship or authority.[207] When the rule of unanimity began to break down and Justices began writing opinions for themselves, there was no formal opinion assignment mechanism.[208] Chief Justice Stone began to assume the duty of opinion assignment if voting with the majority, and by 1947, under Chief Justice Fred Vinson, all the Justices endorsed this practice.[209]

It is well understood that "author[s] of . . . opinion[s] . . . can significantly affect the policy the Court produces because the opinion writer's first draft establishes the initial position over which [J]ustices bargain."[210] Given the power of authorship, the power of opinion assignment is considered among the most "significant prerogatives" of the Chief Justice.[211] It enables the Chief Justice to exhibit leadership, signaling the importance of decisions by assigning opinions to himself and using assignment to other Justices as a means of building majority coalitions.[212] At

about the hazards of following a particular decision but also to attorneys and litigants who might try to get the same issue before the Court the next time." *Id.* Justices also write dissents from denial to express how they would change the law. *Id.* In this respect, dissents from denial are personal, more so even than dissents in merits cases. *Id.* at 15. For a history of "advicegiving," including in dissents from denial, see Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1787–91 (1998).

205. *See* G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy*, 154 U. PA. L. REV. 1463, 1506 (2006) (noting that opinion assignment invites concurring and dissenting opinions); Elliot E. Slotnick, *Who Speaks for the Court? Majority Opinion Assignment from Taft to Burger*, 23 AM. J. POL. SCI. 60, 72–75 (1979) (discussing the considerations involved in opinion assignment).

206. White, *supra* note 205, at 1470–73.

207. *See id.* at 1473–74, 1506 (describing the ambiguity and burden of authorship in the early years of the Marshall Court).

208. *Id.* at 1473.

209. *See id.* at 1503–04. Also, 1947 was the year in which the Court began the "current practice of listing the votes of all the Justices who participated in a case in the headnote to that case in the *United States Reports* . . . ." *Id.* The Justices also began circulating draft opinions to one another. *Id.* at 1504. This practice also had the effect of encouraging dissents and concurrences, which demonstrates how interrelated the practices of dissent and opinion writing are. *Id.* at 1506.

210. EPSTEIN & KNIGHT, *supra* note 1, at 126.

211. Linda Greenhouse, *Chief Justice Roberts in His Own Voice: The Chief Justice's Self-Assignment of Majority Opinions*, 97 JUDICATURE 90, 90 (2013).

212. *See id.* at 91 (considering the "task" and "social" leadership components of the Chief Justice's assignment of opinions); White, *supra* note 205, at 1506 ("The expectation that 'opinions

the same time, Chief Justices are mindful of equitable distribution of the "dogs" and opinions generally among the Justices.[213] Chief Justices also have used assignment authority in part to reflect their own preferences or institutional objectives for the Court; Chief Justice Rehnquist was said to prioritize the efficient operation of the Court, while Chief Justice Roberts has been understood to promote the "institutional stature" of the Court.[214]

The practice of assigning dissents arose much later than the practice of assigning majority opinions. It was introduced by Justice Brennan when dissenters began to write as a bloc rather than individually, and it was first mentioned in a 1987 book by Chief Justice Rehnquist.[215] The duty of assigning the principal dissent falls to the senior-most member of the dissent (or to the Chief Justice when voting with the dissent, in which case the duty of assigning the majority opinion falls to the senior-most member of the majority).[216] Unlike the assignment of majority opinions, the assignment of the dissent has never risen to the level of a "work order" and remains a collegial "invitation" to write.[217] The duty to assign the dissent affords the senior-most member the leadership role of forging coalitions and shaping the writing of the opinion—especially in close cases when the dissent may hope to flip a vote and become the majority.[218]

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of the Court' would be circulated has meant that Chiefs, on assigning them, invariably need to consider the ability of the writer to retain that majority."). There is extensive political science literature on opinion assignment. *See, e.g.*, Richard J. Lazarus, *Back to "Business" at the Supreme Court: The "Administrative Side" of Chief Justice Roberts*, 129 HARV. L. REV. F. 33, 40 n.51 (2015) (collecting scholarship).

213. Greenhouse*, supra* note 211, at 91.

214. *See* Forrest Maltzman & Paul J. Wahlbeck, *Opinion Assignment on the Rehnquist Court*, 89 JUDICATURE 121, 121–22, 126, 181 (2005) (analyzing the motivations of Chief Justice Rehnquist in assigning opinions and finding high among them achieving efficiency); Lazarus, *supra* note 212, at 42–44, 47, 64–70 (discussing opinion assignment practices of Chief Justices, including Chief Justice Roberts and his desire to promote "institutional stature" through opinion assignment).

215. Beverly Blair Cook, *Justice Brennan and the Institutionalization of Dissent Assignment*, 79 JUDICATURE 17, 17–18 (1995).

216. *See Supreme Court Procedure*, SCOTUSBLOG, https://www.scotusblog.com/supreme-court-procedure/ [https://perma.cc/6FTA-9TZR] ("The senior justice in the majority . . . decides who will write the majority opinion; if there is a dissent . . . then the senior dissenting justice assigns one of the dissenting justices to write the dissenting opinion."); Charles F. Jacobs & Christopher E. Smith, *The Influence of Justice John Paul Stevens: Opinion Assignments by the Senior Associate Justice*, 51 SANTA CLARA L. REV. 743, 773–74 (2011) (arguing that Justice Stevens, "the longest-serving Associate Justice for the final sixteen terms of his career at a historical moment when he regularly disagreed with the Chief Justices with whom he served," used opinion assignment in the same way as the Chief Justices).

217. Cook, *supra* note 215, at 23; *see also* Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 103 (2011) ("Judges are assigned majority opinions to write and must do so in order to remain in good standing, but there is no requirement of dissenting.").

218. *See* Cook, *supra* note 215, at 23 (discussing the power of assigning dissents to "retain or to expand the coalition supporting their positions").

This Part has offered a description of the major self-regulatory rules that govern the exercise of the judicial power. These rules have fluctuated over time, some in significant ways, such as the shift from the rule of unanimity to the decision-making rules that characterize the modern merits process.[219] Shared agreements among the Justices about how the Court should function can evolve and change; they can also splinter and crack. The next Part turns to the movement we are now seeing in the Court's self-regulatory rules.

II. Shifts and Breakdowns in the Rules

With the emergence of the Court's conservative supermajority, its self-regulatory rules are fluctuating in new ways. Stare decisis is in peril. Shadow docket decision-making pushes aside the cluster of rules that govern the Court's cert. process and decision-making process. Furthermore, Justices who share the same interpretive methodologies seem to be divided among themselves as to what the rules should be.

Meanwhile, another sort of change is occurring, this one to the culture of the Court. Justices are receiving multimillion-dollar book deals to talk about their lives or views, which inevitably seem to generate bestsellers. Justices are taking their business out in public—in regular leaks to the media about internal deliberations, public appeals in defense of the Court's independence, and livestream audio of oral argument. The most flagrant and shocking breach of norms was the leak in May 2022 of an entire draft majority opinion in *Dobbs v. Jackson Women's Health Organization*.[220] Not all of this conduct is new, and some is even beneficial. But there is a broader picture: the revelations outside the Court form the context for evaluating the decision-making within.

A. Stare Decisis

Stare decisis is a mutual agreement among the Justices to follow prior precedent, and it fits uncomfortably with originalism and textualism, the interpretive methodologies of a supermajority of Justices. Justice Scalia was frank on this subject long ago. He said that stare decisis "is not part" of originalism.[221] Originalism entails an obligation to the relevant law's text not only first, but above all else, including prior precedent. It is inconsistent with an obligation—or even a predisposition—to follow prior precedent. When Justice Scalia gave in to the pressures of stare decisis to preserve what he

219. *See supra* subpart I(C).

220. 142 S. Ct. 2228 (2022). *See* Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO, https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/GEN9-YLTE] (May 3, 2022, 2:14 PM) (discussing the unprecedented leak of the *Dobbs* draft opinion).

221. Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 140 (Amy Gutmann ed., 1997) (emphasis omitted).

viewed as an erroneous precedent, he did so as a "pragmatic *exception*" to his theory and labeled himself a "faint-hearted" originalist as a result.[222]

Justice Scalia wrote when originalists were in the minority, looking to defend his theory as a workable interpretive methodology. Now a majority, the originalists approach the issue differently. The conservative Justices do not treat stare decisis and originalism as incompatible, despite the apparent tension. They emphasize that stare decisis has never stood in the way of overruling precedent that was wrong when decided. And some precedent—including landmark precedent—*was* wrong when decided, as they interpret the Constitution. Thus, they find space for originalism in the exception to the rule. The effect is to create a weak form of stare decisis in the cases where it likely matters the most.

The leading example of this maneuver is *Dobbs v. Jackson Women's Health Organization*, in which the Court overruled *Roe* and *Casey*.[223] In *Dobbs*, the Court approached the relationship between stare decisis and originalism issue as follows: It began with originalism, demonstrating in full force that *Roe* and *Casey* were never correct as a matter of constitutional text and history.[224] The Court then turned to the separate question of whether to preserve the decisions as a matter of stare decisis.[225] After briefly describing the purposes of stare decisis, the Court pivoted to the reasons for overruling precedent. Stressing that stare decisis has never been "an inexorable command," the Court identified numerous factors in past cases that counseled in favor of overruling precedent and found that, "[i]n this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error [i.e., whether the decision was 'egregiously wrong and deeply damaging'], the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[226] After analyzing those factors extensively, it paused to consider whether "[t]here is a special danger that the public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial 'watershed' decision."[227] But the Court refused to allow its "decisions to be affected by any extraneous influences such as concern about the public's reaction to [its] work," and it overruled the decisions accordingly.[228]

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222. *See id.* ("[S]tare decisis is not *part of* my originalist philosophy; it is a pragmatic *exception* to it."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("I . . . confess that in a crunch, I may prove a faint-hearted originalist.").

223. *Dobbs*, 142 S. Ct. at 2242.

224. *Id.* at 2242, 2249.

225. *Id.* at 2261.

226. *Id.* at 2265.

227. *Id.* at 2278.

228. *Id.* at 2278–79.

The dissent, co-authored by Justices Breyer, Sotomayor, and Kagan, found the majority's analysis preposterous—from the majority's "pinched" reading of the Constitution to its purported respect for stare decisis to its reading of previous cases overruling precedent to its assessment of *Roe* and *Casey*.[229] They stated: "Neither law nor facts nor attitudes have provided any new reasons to reach a different result than *Roe* and *Casey* did. All that has changed is this Court."[230] Quoting *Casey*, they wrote, "The American public[] . . . should never conclude that its constitutional protections hung by a thread—that a new majority, adhering to a new 'doctrinal school,' could 'by dint of numbers' alone expunge their rights."[231]

Despite the back-and-forth of the majority and dissent, it may be that the fate of *Roe* and *Casey* really came down to just one factor: judicial restraint. Once the majority went full throttle to declare the decisions wrong as a matter of originalism, how likely were they to apply the stare decisis brakes? Chief Justice Roberts, who concurred in the judgment, was getting at this point. He said that the Court "should adhere closely to principles of judicial restraint here, where the broader path the Court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of *stare decisis*."[232] The Chief was focusing on the regulation of judicial behavior, not the dictates of originalism. Whether that focus comes from "fundamental principle[s] of judicial restraint," as the Chief said,[233] or is implicit in the principle of stare decisis itself,[234] he was acknowledging that the Court has agreed to a braking mechanism and should use it under the circumstances of the case. He would have upheld Mississippi's abortion ban but stopped short of overruling *Roe* and *Casey*.[235]

But he was alone among his originalist colleagues. From the start of its stare decisis discussion, the majority showed no intention of yielding to prior precedent: "[W]hen it comes to the interpretation of the Constitution—the 'great charter of our liberties,' which was meant 'to endure through a long

229. *Id.* at 2317–50, 2325 (Breyer, Sotomayor & Kagan, JJ., dissenting).

230. *Id.* at 2349.

231. *Id.* at 2350 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992)).

232. *Id.* at 2311 (Roberts, C.J., concurring in the judgment).

233. *Id.*

234. *See* Brilmayer, *supra* note 65, at 304–06 (describing the "concept of judicial restraint" as related to the "clear need for some mechanism to allocate decisionmaking responsibility among successive courts," and specifically to stare decisis, which serves to preserve "continuity" through the "common law method" of "assigning to each court only the legal issues that arise during that court's term").

235. *See Dobbs*, 142 S. Ct. at 2310–11 ("The Court's opinion is thoughtful and thorough, but those virtues cannot compensate for the fact that its dramatic and consequential ruling is unnecessary to decide the case before us.").

lapse of ages,'—we place a high value on having the matter 'settled right.'"[236] The stronger the originalist case, the weaker the stare decisis constraint.

Dobbs may be too exceptional a case from which to draw general conclusions about the future framing or application of stare decisis. But there are prior indications of how weak the principle is likely to become in the hands of the originalist, textualist supermajority. Furthermore, these indications suggest that the originalist Justices disagree on the exact status of the principle in the law more than *Dobbs* might suggest.

Before *Dobbs*, the weakness of stare decisis was often revealed in starkest terms by the Justices who hold a robust view of the principle. Justice Kagan has been the most vocal proponent of that view. In her words, stare decisis requires "adhering to a wrong decision," absent special circumstances, which do not include a shift in "the Court's personnel":

> But the "doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike"—even when that means adhering to a wrong decision.
>
> . . . .
>
> In thus departing from *Seila Law*, the majority strays from its own obligation to respect precedent. To ensure that our decisions reflect the "evenhanded" and "consistent development of legal principles," not just shifts in the Court's personnel, *stare decisis* demands something of Justices previously on the losing side. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). They (meaning here, I) must fairly apply decisions with which they disagree. But fidelity to precedent also places demands on the winners. They must apply the Court's precedents—limits and all—wherever they can, rather than widen them unnecessarily at the first opportunity. Because today's majority does not conform to that command, I concur in the judgment only.[237]

Stare decisis requires more than a change in interpretive methodology to justify overruling precedent.[238]

In contrast, the originalist Justices have offered considerably weaker versions of stare decisis. Sometimes the existence of the originalist case *does* supply the reason for overruling precedent. Justice Thomas has expressed this view most forcefully, though often lacking the votes to implement it.

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236. *Id.* at 2262 (quoting Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816)).

237. Collins v. Yellen, 141 S. Ct. 1761, 1800–01 (2021) (Kagan, J., concurring in part) (quoting June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in judgment)).

238. Many scholars have agreed. *See generally* KOZEL, *supra* note 10 (arguing that respect for precedent must be evaluated independently from interpretive methodology).

Justice Thomas, joined by Justice Gorsuch, concurring in part and dissenting in part in *Seila Law LLC v. Consumer Financial Protection Bureau*[239] stated:

> The decision in *Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people. The Court concludes that it is not strictly necessary for us to overrule that decision . . . . But with today's decision, the Court has repudiated almost every aspect of *Humphrey's Executor*. In a future case, I would repudiate what is left of this erroneous precedent.[240]

Justice Thomas dissenting in *United States v. Arthrex, Inc.*[241] provided: "At some point, we should take stock of our precedent to see if it aligns with the Appointments Clause's original meaning. But, for now, we must apply the test we have."[242]

And on abortion pre-*Dobbs*, Justice Thomas dissenting in *June Medical Services LLC v. Russo*[243] said:

> The plurality and [the Chief Justice] ultimately cast aside this jurisdictional barrier to conclude that Louisiana's law is unconstitutional under our precedents. But those decisions created the right to abortion out of whole cloth, without a shred of support from the Constitution's text. Our abortion precedents are grievously wrong and should be overruled. Because we have neither jurisdiction nor constitutional authority to declare Louisiana's duly enacted law unconstitutional, I respectfully dissent.
>
> . . . .
>
> *Roe* is grievously wrong for many reasons, but the most fundamental is that its core holding—that the Constitution protects a woman's right to abort her unborn child—finds no support in the text of the Fourteenth Amendment.[244]

Even more pointedly, Justice Thomas has argued that the principle of stare decisis itself should be rejected as inconsistent with the judicial role. Emphasizing that the Court owes an obligation to the text, not prior precedent, he remarked:

> The Court's current formulation of the *stare decisis* standard does not comport with our judicial duty under Article III, which requires us to faithfully interpret the Constitution. Rather, when our prior decisions clearly conflict with the text of the Constitution, we are required to

239. 140 S. Ct. 2183 (2020).
240. *Id.* at 2211–12 (Thomas, J., concurring in part and dissenting in part).
241. 141 S. Ct. 1970 (2021).
242. *Id.* at 2011 (Thomas, J., dissenting).
243. 140 S. Ct. 2103 (2020).
244. *Id.* at 2142, 2150 (Thomas, J., dissenting).

> privilege the text over our own precedents. Because *Roe* and its progeny are premised on a demonstrably erroneous interpretation of the Constitution, we should not apply them here.
>
> . . . .
>
> . . . [W]e exceed our constitutional authority whenever we apply demonstrably erroneous precedent instead of the relevant law's text.[245]

On Justice Thomas's view, when a Justice applies precedent in determining the law, it is only because that precedent correctly relies on and interprets "the relevant law's text."

Justices Alito and Gorsuch have not been as emphatic as Justice Thomas, though in some instances, they do not sound as if they are far off. Concurring in the judgment in *Gundy v. United States*,[246] Justice Alito stated:

> If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.[247]

Justice Gorsuch dissenting, joined by Chief Justice Roberts and Justice Thomas, in *Gundy* remarked:

> Justice A[lito] supplies the fifth vote for today's judgment and he does not join either the plurality's constitutional or statutory analysis, indicating instead that he remains willing, in a future case with a full Court, to revisit these matters. Respectfully, I would not wait.[248]

The other originalist Justices have not taken such a firm stand. Concurring in the judgment in *June Medical Services LLC v. Russo*, Chief Justice Roberts said:

> *Stare decisis* instructs us to treat like cases alike. The result in this case is controlled by our decision four years ago invalidating a nearly identical Texas law. The Louisiana law burdens women seeking previability abortions to the same extent as the Texas law, according to factual findings that are not clearly erroneous. For that reason, I concur in the judgment of the Court that the Louisiana law is unconstitutional.[249]

Justice Kavanaugh, concurring in *Ramos v. Louisiana*,[250] wrote at length about stare decisis:

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245. *Id.* at 2151–52 (internal quotation marks and citations omitted).
246. 139 S. Ct. 2116 (2019).
247. *Id.* at 2131 (Alito, J., concurring in judgment).
248. *Id.* (Gorsuch, J., dissenting).
249. 140 S. Ct. at 2141–42 (Roberts, C.J., concurring in judgment).
250. 140 S. Ct. 1390 (2020).

> In constitutional as in statutory cases, adherence to precedent is the norm. To overrule a constitutional decision, the Court's precedents on precedent still require a "special justification," or otherwise stated, "strong grounds."
>
> In particular, to overrule a constitutional precedent, the Court requires something "over and above the belief that the precedent was wrongly decided." As Justice Scalia put it, the doctrine of *stare decisis* always requires "reasons that go beyond mere demonstration that the overruled opinion was wrong," for "otherwise the doctrine would be no doctrine at all." To overrule, the Court demands a special justification or strong grounds.[251]

Writing for the Court, Justice Kavanaugh, joined by Chief Justice Roberts, and Justices Alito, Gorsuch, and Barrett in *Jones v. Mississippi*,[252] also affirmed a role for stare decisis and the usual business of distinguishing cases:

> The Court's decision today carefully follows both *Miller* and *Montgomery*. The dissent nonetheless claims that we are somehow implicitly overruling those decisions. We respectfully but firmly disagree: Today's decision does not overrule *Miller* or *Montgomery*. *Miller* held that a State may not impose a mandatory life-without-parole sentence on a murderer under 18. Today's decision does not disturb that holding. *Montgomery* later held that *Miller* applies retroactively on collateral review. Today's decision likewise does not disturb that holding.
>
> We simply have a good-faith disagreement with the dissent over how to interpret *Miller* and *Montgomery*. That kind of debate over how to interpret relevant precedents is commonplace. Here, the dissent thinks that we are unduly narrowing *Miller* and *Montgomery*. And we, by contrast, think that the dissent would unduly broaden those decisions.[253]

If this small snapshot is an indication, the conservative Justices are not in complete agreement on the state of stare decisis. It may be that Justice Thomas is the only originalist on the Court who might be inclined to stop invoking stare decisis entirely. In Justice Thomas's view, stare decisis is a makeweight.[254] The country's written law takes priority over the Court's

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251. *Id.* at 1413–14 (Kavanaugh, J., concurring in part) (citations omitted).

252. 141 S. Ct. 1307 (2021).

253. *Id.* at 1321.

254. *See* Adam Liptak, *Justice Thomas Says Leaked Opinion Destroyed Trust at the Supreme Court*, N.Y. TIMES (May 14, 2022), https://www.nytimes.com/2022/05/14/us/politics/supreme-court-clarence-thomas.html [https://perma.cc/3GTQ-24FD] (reporting that, at a conference in Dallas on May 13, 2022, Justice Thomas "suggested that . . . stare decisis . . . was no reason to retain

norm. And the originalist or textualist case against a precedent generally supplies the justification for overruling that precedent. Justice Thomas might still rely on precedent in future decisions, but when he does, it is because that precedent correctly interprets "the relevant law's text."[255] Although Justices Alito and Gorsuch are not quite with him, they lean heavily in that direction.

The other originalist Justices are inclined to consider, or gesture toward considering, whether a decision "treat[s] like cases alike"[256] and whether a decision "disturb[s] [a prior] holding."[257] They seem amenable to some version (however weak) of stare decisis. And they feel an obligation to offer reasons (however persuasive) for departing from prior precedent. When push comes to shove, it is difficult to envision what sort of difference this might make in preserving nonoriginalist precedent. It made none in *Dobbs* (Chief Justice Roberts's effort notwithstanding). Time will have to tell.

But one thing appears likely: stare decisis will be at its weakest when originalism is at its strongest. That does not mean the Court will always overrule "erroneous" precedent. Judicial restraint may sometimes play a role. But originalism has flipped the norm. The exception is the rule, and the rule is the exception. Stare decisis is far less of a command and more of a consideration. And by the same token, there are suggestions that textualism—a commitment to statutory text over precedent—may have a similar effect on stare decisis, even though the compulsion to right statutory wrongs may be less strong because, unlike constitutional wrongs, Congress is available to correct the errors.[258]

Stare decisis has never been absolute, nor would anyone want it to be. Furthermore, stare decisis has always been manipulable. The Court has been

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an incorrect interpretation of the Constitution. 'I always say that when someone uses stare decisis that means they're out of arguments,' he said. 'Now they're just waving the white flag. And I just keep going.'").

255. Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring). When Chief Judge Diane Sykes of the United States Court of Appeals for the Seventh Circuit asked Justice Thomas at a Federalist Society dinner in 2013, "Stare decisis doesn't hold much force for you?," he responded, "Oh, it sure does . . . [b]ut not enough to keep me from going to the Constitution." Adam Liptak, *Precedent, Meet Clarence Thomas. You May Not Get Along.*, N.Y. TIMES (Mar. 4, 2019), https://www.nytimes.com/2019/03/04/us/politics/clarence-thomas-supreme-court-precedent.html [https://perma.cc/EXN3-PMGS].

256. June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in judgment).

257. *Jones*, 141 S. Ct. at 1321.

258. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2262 (2022) (noting the "high value" in ensuring that the Constitution is "settled right"); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) ("[*S*]*tare decisis* in respect to statutory interpretation has special force, for Congress remains free to alter what we have done." (internal quotation marks omitted)).

accused of applying it in an arbitrary and disingenuous fashion.[259] And it has been criticized as internally contradictory (follow precedent, except when it is distinguishable).[260] Nevertheless, the Court has seen itself and has been identified as a common law adjudicatory body that decides cases incrementally and with respect for precedent; the American legal system is founded historically and normatively on the principle of stare decisis. Some might say that principle is inherent in the judicial power, but so strict a claim is unnecessary. Stare decisis has defined the nature of the Court whatever its precise relationship to the constitutional structure. Now a supermajority of the Court has a new reason to overrule precedent, one that also reflects a conception of constitutional authority and judicial responsibility. A self-regulatory norm, even one as fundamental as stare decisis, is only as strong as the commitment among the sitting Justices to honor it.

B. The Shadow Docket

While stare decisis is in peril, the shadow docket pushes aside the entire collection of *other* rules that can be broadly understood to direct changes in the law to the cert. and merits processes. The shadow docket refers to the orders docket that contains petitions and applications from litigants for the Court to exercise its discretion, the disposition of which appear on the orders list and other miscellaneous lists.[261] For example, the orders docket includes orders denying cert. and granting summary reversals. It includes orders that grant or deny applications asking the Court to stay a lower court ruling that permits or prohibits specified government action, such as the enforcement of a statute or the execution of a death-row inmate, or to issue an injunction against specified government action, until the litigation over the underlying merits issue has come to an end.[262] It contains miscellaneous orders, such as applications for leave to file an amicus brief in a case or reapportion the time for oral argument. Orders typically are issued in a per curiam opinion that is

259. *See, e.g.*, Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1202 (2008) ("The application of the Court's doctrine of stare decisis shows results that are inconsistent, unpredictable, and unprincipled.").

260. *See id.* ("The rule . . . is that Courts follow precedent, except when they don't.").

261. *See* JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10637, THE "SHADOW DOCKET": THE SUPREME COURT'S NON-MERITS ORDERS 1–2 (2021) (noting the nonmerits docket's informal name and explaining its role for disposing of the "many orders outside the context of merits decisions").

262. *See* Pierce, *supra* note 16, at 3–4 (explaining the process of how the Supreme Court may grant or deny a stay).

a sentence long with no reasoning and may be accompanied by lengthier dissents or concurrences that Justices choose to issue.[263]

William Baude coined the term *shadow docket* in a 2015 article as the orders docket began to gain new notoriety.[264] The Court was granting applications for injunctions or stays of lower court decisions and blocking federal or state officials from implementing programs and enforcing statutes until the courts fully considered the constitutionality of those programs and statutes, which could take months, maybe years.[265] Baude argued that such decisions raise a concern for "procedural regularity—i.e., the consistency and transparency of the Court's processes."[266] The Court is supposed to grant an application for a stay or injunction only if the applicant demonstrates that it is "likely to succeed on the merits, that it will be irreparably injured absent a stay, that the balance of the equities favors it, and that a stay is consistent with the public interest."[267] But who can tell if the Court does not explain the reasons for its decisions? Nor does the Court explain how it selects orders to grant. Thus, it chose a small number of amicus briefs for discussion at oral argument but provided no indication of why it picked these particular briefs.[268] It granted stays when not interested in granting cert. on the question underlying that action.[269] It granted a stay in one case and denied a stay in another raising a similar claim, which was unfair to litigants and left lower courts uncertain whether to stay their own orders pending resolution of a case.[270] In all of these instances, it was operating far from the transparency and consistency of the merits process:

> 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

263. *See Case Documents*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/case_documents.aspx [https://perma.cc/NQ36-FA8B] ("The Court regularly issues orders in connection with cases. In contrast with opinions, orders are short rulings, usually resolving motions or petitions in a summary fashion."). An application is made to the circuit Justice in which the case arises, who can dispose of it in chambers or refer it to the Court for consideration. If referred, the Court will rule one way or another on the application, and the order appears on the orders list. SUP. CT. R. 22.

264. *See generally* Baude, *supra* note 16 (coining the term *shadow docket* to describe the Court's nonmerits decisions).

265. *See generally id.* (explaining how the shadow docket functions).

266. *See id.* at 9 (explaining that, in contrast to shadow docket decisions, "[t]he Court's procedural regularity is at its high point when it deals with the merits cases").

267. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021) (internal quotation marks omitted).

268. *See* Baude, *supra* note 16, at 11–12, 14 (noting "ad hoc" quality of "the device of singling out an amicus brief for specific discussion at oral argument").

269. *See id.* at 6–7, 12 (describing cases in which the Court granted a stay of a lower court order and then later denied cert. on the question in the case and calling this combination a "mystery").

270. *See id.* at 6–7, 13 (describing an episode in which the court granted a temporary injunction in one case but not a later case with similar procedural claims and noting lower court confusion).

> and others can be heard. 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.[271]

As Baude suggested, what he saw happening could be understood as decision-making outside the confines of the rules that have long regulated the exercise of the judicial power. From the rule of four to the practice of dissent, the rules ensure "procedural regularity." Those rules also describe the Court we thought we had—committed to taking close cases (in which one vote might change the law), hashing out differences on the merits, and expressing disagreement in a predictable way.

Despite what Baude saw coming, he was able to say when he wrote his article that "[t]he orders list is not the hottest topic in Supreme Court scholarship."[272] The following year, Richard Pierce was able to write that lower court decisions to issue a preliminary injunction against agency action were "rare[]."[273]

All that changed, and very quickly. In 2020, the American Bar Journal reported:

> The shadow docket has attracted growing scrutiny recently as President Donald Trump's administration has repeatedly filed applications with the high court seeking emergency relief on a range of matters. The trend intensified during this past term. Meanwhile, the coronavirus pandemic, election issues and other matters have prompted a steady flow of emergency applications to the court.[274]

Stephen Vladeck, focusing specifically on the behavior of the United States Solicitor General in seeking stays of lower court decisions that blocked implementation of Trump Administration policies, put numbers behind the observations. In just the first three years of the Trump Administration, Vladeck determined that:

> [T]he Solicitor General has filed at least twenty-one applications for stays in the Supreme Court (including ten during the October 2018 Term alone). During the sixteen years of the George W. Bush and Obama Administrations, the Solicitor General filed a total of eight such applications—averaging one every *other* Term.[275]

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271. *Id.* at 9–10.

272. *Id.* at 5.

273. Pierce, *supra* note 16, at 3 (internal quotation marks omitted).

274. Mark Walsh, *The Supreme Court's 'Shadow Docket' Is Drawing Increasing Scrutiny*, A.B.A. J. (Aug. 20, 2020, 9:20 AM), https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny [https://perma.cc/FCX8-LLMV].

275. Vladeck, *supra* note 16, at 125 (footnote omitted); *Case Selection and Review at the Supreme Court: Hearing Before the Presidential Commission on the Supreme Court of the United*

The total number rose to a whopping forty-one applications, and Vladeck found that the Court generally responded favorably to those applications.[276] The breadth of the issues that the Court handled on the shadow docket was also expanding. The Court issued an order allowing the first federal execution in almost two decades.[277] It addressed the travel ban, immigration, and elections.[278]

Although Vladeck attributed the growth of the shadow docket in large part to the SG's aggressive conduct in seeking emergency relief that benefited the Trump Administration, he observed that the Court was changing its approach, too. Specifically, the Court was accommodating the growth of the shadow docket through two "doctrinal shifts" in the standard for emergency relief.[279] First, Vladeck observed:

> [A] majority of the Justices now appear to believe that the government suffers an irreparable injury militating in favor of emergency relief *whenever* a statute or policy is enjoined by a lower court, regardless of the actual impact of the lower court's ruling—or the harm the statute or policy would cause if allowed to go into effect.[280]

This shift means that the Court's only consideration for issuing emergency relief is "the government's likelihood of succe[eding] on the merits."[281] Second, as to that consideration, "the Justices appear to be calibrating their

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States 6–7 (June 30, 2021) (written testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law), https://www.whitehouse.gov/wp-content/uploads/2021/06/Vladeck-SCOTUS-Commission-Testimony-06-30-2021.pdf [https://perma.cc/NFE3-6EPF] [hereinafter Vladeck, *Testimony*] (noting that the total number of applications during the Trump Administration was forty-one). Vladeck's testimony provides an excellent, updated, and expanded discussion of the shadow docket.

276. Vladeck, *Testimony*, *supra* note 275, at 6–7 ("Not counting one application that was held in abeyance and four that were withdrawn, the Justices granted 24 of the 36 remaining applications in full, and another four in part. Even among the eight applications that were denied in full, only a few were denied with prejudice.").

277. *See* Barr v. Lee, 140 S. Ct. 2590, 2590–92 (2020) (vacating lower court's preliminary injunction and permitting execution of federal prisoner to proceed).

278. *See* Shoba Sivaprasad Wadhia, *Symposium: From the Travel Ban to the Border Wall, Restrictive Immigration Policies Thrive on the Shadow Docket*, SCOTUSBLOG (Oct. 27, 2020, 3:51 PM), https://www.scotusblog.com/2020/10/symposium-from-the-travel-ban-to-the-border-wall-restrictive-immigration-policies-thrive-on-the-shadow-docket/ [https://perma.cc/ZHF2-FKCN] (addressing shadow docket's impact on travel bans and immigration); Ngozi Ndulue, *Symposium: The Shadow Docket Is Shaping the Future of Death Penalty Litigation*, SCOTUSBLOG (Oct. 26, 2020, 10:42 AM), https://www.scotusblog.com/2020/10/symposium-the-shadow-docket-is-shaping-the-future-of-death-penalty-litigation [https://perma.cc/8VQ9-YDYL] (addressing shadow docket's impact on the death penalty); Edward Foley, *Symposium: The Particular Perils of Emergency Election Cases*, SCOTUSBLOG (Oct. 23, 2020, 5:28 PM), https://www.scotusblog.com/2020/10/symposium-the-particular-perils-of-emergency-election-cases/ [https://perma.cc/4BP3-EZL5] (addressing shadow docket's effect on elections).

279. Vladeck, *supra* note 16, at 125–26.

280. *Id.* at 126.

281. *Id.* at 155.

threshold decisions so that the status quo pending the rest of the litigation reflects what they *expect* the outcome to be if and when the merits reach the Court and the Court reaches the merits."[282]

As shadow docket decision-making has continued into the Biden Administration, the issues continue to broaden and attract media attention. Only months into the new administration, the Court had addressed and granted an application from religious worshippers for a stay of COVID restrictions on religious gatherings.[283] By the fall, it had addressed and denied an application from Whole Woman's Health for an injunction blocking enforcement of a highly restrictive Texas abortion statute.[284] Although the public discourse remains focused on whether the decisions are politically motivated, the Justices dissenting in these decisions have begun to talk forthrightly about the process. Furthermore, the Justices are extending to private applicants one of the doctrinal shifts in the standard for emergency relief that Vladeck observed with respect to the SG.[285] Under that new rule, the Court grants emergency relief when five (or more) Justices believe the case is likely to succeed on the merits as they interpret the constitutional text, and it denies relief when the case is unlikely to succeed by that measure.

The Texas abortion case is illustrative. The case is unusual because it involved a statute that raised a complicated question as to who can bring a legal challenge[286] (and because it involves abortion, which many believe is exceptional—not illustrative). Yet the Justices' disposition of the applications for emergency relief raises the same sort of process concerns as other cases. The Texas statute bans abortion after about six weeks of pregnancy with no exception for rape or incest[287]—then in violation of *Roe v. Wade*.[288] In addition, the Texas statute contains a novel procedural provision that bars state officials from enforcing it and authorizes private individuals to sue those who perform abortion and those who aid and abet

282. *Id.* at 126.

283. *See* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam) (granting injunctive relief against a California regulation that had the effect of restricting at-home Bible studies and prayer meetings, pending the disposition of an appeal in the Ninth Circuit).

284. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021) (denying applicants' request to enjoin a Texas law prohibiting abortions after six weeks and delegating enforcement to the general public).

285. *See* Vladeck, *supra* note 16, at 126 (explaining "the Court's acquiescence is most likely a reflection of . . . doctrinal shifts," including the "belie[f] that the government suffers an irreparable injury militating in favor of emergency relief *whenever* a statute or policy is enjoined by a lower court").

286. *See Whole Woman's Health*, 141 S. Ct. at 2495 ("[I]t is unclear whether the named defendants in this lawsuit can or will seek to enforce the Texas law against the applicants in a manner that might permit our intervention.").

287. Texas Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, 2021 Tex. Sess. Law Serv. 125 (codified at TEX. HEALTH & SAFETY CODE §§ 171.201–.212).

288. 410 U.S. 113, 164 (1973).

abortion, entitling would-be plaintiffs to $10,000, plus legal fees.[289] The Court denied the application from private applicant Whole Woman's Health to stay a lower court decision allowing enforcement of the statute, [290] even though the Court was scheduled to hear argument the next month in a case involving the constitutionality of a Mississippi statute that banned abortion after fifteen weeks and a challenge to *Roe*.[291] The Acting United States Solicitor General then filed an application for an injunction against enforcement of the statute and asked the Court to grant "certiorari before judgment" on his application to decide the complicated question whether the federal government has the power to prevent state officials or private parties from enforcing the statute.[292] The Court obliged in part, setting the case for expedited briefing and argument on the question, but deferred the Acting SG's request to block enforcement of the statute in the meantime.[293]

The Court's denial of the application to stay drew a series of fiery dissents. Justice Sotomayor expressed outrage at the outcome. She criticized the Court for allowing a statute designed to thwart the process of judicial review to succeed.[294] In so doing, she said, the Court failed to discharge its "constitutional obligation" to protect women's rights and to protect "the sanctity of its precedents and of the rule of law."[295] Chief Justice Roberts wrote to underscore that the Court's decision should not be understood to reflect a decision on the merits and express his concerns about irregular decision-making on the shadow docket: "We are at this point asked to resolve these novel questions—at least preliminarily . . . without the benefit of consideration by the District Court or Court of Appeals. We are also asked to do so without ordinary merits briefing and without oral argument."[296]

Justice Kagan echoed the concerns of Chief Justice Roberts, and expressly called out the Court's unconstrained use of the shadow docket:

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289. Texas Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, 2021 Tex. Sess. Law Serv. 125 (codified at TEX. HEALTH & SAFETY CODE §§ 171.208(a)–(b)).

290. *Whole Woman's Health*, 141 S. Ct. at 2494–95.

291. Amy Howe, *Court Won't Block Texas Abortion Ban but Fast-Tracks Cases for Argument on Nov. 1*, SCOTUSBLOG (Oct. 22, 2021, 3:22 PM), https://www.scotusblog.com/2021/10/court-wont-block-texas-abortion-ban-but-fast-tracks-cases-for-argument-on-nov-1/ [https://perma.cc/5B6U-D68P].

292. *See* United States v. Texas, 142 S. Ct. 14, 14 (2021) (noting that "the application is treated as a petition for a writ of certiorari before judgment").

293. *Id.* About two months later, the Court dismissed the case as improvidently granted and denied the application to vacate the stay in a one paragraph per curiam opinion. United States v. Texas, 142 S. Ct. 522, 522 (2021) (per curiam).

294. *See Whole Woman's Health*, 141 S. Ct. at 2498–99 (Sotomayor, J., dissenting) ("By prohibiting state officers from enforcing the Act directly and relying instead on citizen bounty hunters, the Legislature sought to make it more complicated for federal courts to enjoin the Act on a statewide basis.").

295. *Id.* at 2499.

296. *Id.* at 2496 (Roberts, C.J., dissenting).

> Today's ruling illustrates just how far the Court's "shadow-docket" decisions may depart from the usual principles of appellate process. That ruling, as everyone must agree, is of great consequence. Yet the majority has acted without any guidance from the Court of Appeals—which is right now considering the same issues. It has reviewed only the most cursory party submissions, and then only hastily. And it barely bothers to explain its conclusion—that a challenge to an obviously unconstitutional abortion regulation backed by a wholly unprecedented enforcement scheme is unlikely to prevail. In all these ways, the majority's decision is emblematic of too much of this Court's shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend.[297]

Justice Kagan said that the shadow-docket decision departed from the "usual principles of the appellate process," pointing to the lack of lower court opinion, merits briefing, consideration, and explanation on the question why the challenge to the "obviously unconstitutional" statute was unlikely to succeed on the merits.[298] In addition, she called the decision "emblematic" of shadow-docket decision-making on the whole, which was becoming increasingly "unreasoned" and "inconsistent."[299]

Although Justice Kagan and Chief Justice Roberts emphasized what Baude called lack of "procedural regularity,"[300] the concerns they raised can be understood specifically in terms of the Court's self-regulatory rules. The idea that the Court can change the law, at least preliminarily, based on a grant of cert. rather than a merits decision pushes aside its own rules or, in a sense, turns the rules on their head. The rules permit an exception to the full process—a summary reversal simultaneously with a grant of cert.—only on the rare occasion when a supermajority is inclined to correct a clear, fact-bound, egregious lower court error. The rules also recognize the importance of not signaling the outcome of a decision, making it relatively easy for the Court to hold petitions raising the same question rather than risk signaling the result of the pending case. The rules favor the full process when a minority of Justices believe that the process might make a difference to the outcome. Moreover, the entire collection of decision-making rules, stare decisis aside, commit the Court to change the law through the full merits process, which is designed to promote the clashing of views and the expression of disagreement. It was not always this way; the rule of unanimity, which prevailed until 1941, suppressed disagreement over the reasoning and result in a case.[301] To permit a law that is plainly unconstitutional under

297. *Id.* at 2500 (Kagan, J., dissenting).

298. *Id.*

299. *Id.*

300. *See* Baude, *supra* note 16, at 1, 9–10 (discussing procedural regularity).

301. *See supra* section I(C)(3).

existing precedent to go into effect, even preliminarily, based on an expected outcome discounts or disregards the possibility of disagreement on the merits that the Court's rules arose to facilitate.

Justices Barrett and Kavanaugh have helped to put a stop to some of this. Reflecting similar concerns about process, they joined Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan to clamp down on one type of shadow-docket decision-making. The Court denied an application for an injunction against the enforcement of a COVID-19 vaccine requirement that lacked an exemption for religious reasons—a requirement that likely does not comport with an originalist understanding of the constitutional text.[302] Concurring in the denial of the application, Justice Barrett, joined by Justice Kavanaugh, said that when the Court considers an application for emergency relief, it must consider not only whether the case is likely to succeed on the merits, but also whether the Court is likely to take the case under its cert. standards.[303] In particular, Justice Barrett stated:

> When this Court is asked to grant extraordinary relief, it considers, among other things, whether the applicant "'is likely to succeed on the merits.'" *Nken* v. *Holder*, 556 U. S. 418, 434 (2009). I understand this factor to encompass not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case. See, *e.g.*, *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (*per curiam*); cf. Supreme Court Rule 10. Were the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument. In my view, this discretionary consideration counsels against a grant of extraordinary relief in this case, which is the first to address the questions presented.[304]

Justice Barrett clarified that she voted to deny the injunction because the case was the first to address the questions; in other words, the petition failed to allege a circuit split and was the type that Rule 10 easily weeds out. Justice Barrett made a connection between the shadow docket and the Court's self-regulatory rules. She "understood" the standard for emergency relief to work with Rule 10 rather than set it aside. If the Court is unlikely to grant cert. in a case, then even considering whether a challenge is likely to succeed on the merits would convert the orders docket into a source of advisory opinions—not unconstitutional sua sponte ones, but ones based on an application for emergency relief, hence merits previews. Furthermore, if the Court were to grant emergency relief and block the enforcement of a statute

302. *See* Does v. Mills, 142 S. Ct. 17, 17 (2021) (denying injunctive relief).
303. *Id.* at 18 (Barrett, J., concurring).
304. *Id.*

that is constitutional under existing law, then the orders docket would allow the Court to reach out and reset the law when it does not even have a case in the pipeline challenging it.

Meanwhile, two other significant issues have cropped up on the shadow docket that have attracted less attention, at least so far. The first concerns the precedential value of orders for emergency relief. Historically, such orders and summary reversals were not accorded the same precedential value as a decision on the merits,[305] and Justice Alito has reaffirmed this practice on the modern orders docket.[306] However, for the first time, in April 2021, in a pair of COVID-19 restriction cases, the Court gave precedential effect to an order when disposing of another order and reprimanded the lower court for having failed to do so.[307] The Court in a per curiam order of an application for injunction cited the order in *South Bay United Pentecostal Church v. Newsom*[308] as controlling.[309] *South Bay United Pentecostal Church* is an order that the Court issued in February 2021 partially denying an injunction.[310] Treating shadow docket orders as precedential, and expecting lower courts to do so as well, compounds the effect of circumventing the merits process and the Court's rules governing it. It also makes no sense. The notion of treating like cases alike (as distinct from the principle of stare decisis) requires an understanding of why two (or more) cases are alike. But the Court is not in the habit of explaining the reasons for its orders or for

305. *See* Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 307 (1998) (explaining that even though the Court had previously "noted that '[o]ur summary dismissals are . . . to be taken as rulings on the merits in the sense that they rejected the specific challenges presented . . . and left undisturbed the judgment appealed from,'" the Court has also emphasized that "they do not 'have the same precedential value . . . as does an opinion of this Court after briefing and oral argument on the merits'") (quoting Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463, 477 n.20 (1979)). Scholars have considered whether different types of orders should have precedential value. *See* Trevor McFadden & Vetan Kapoor, *Symposium: The Precedential Effects of Shadow Docket Stays*, SCOTUSBLOG (Oct. 28, 2020, 9:18 AM), https://www.scotusblog.com/2020/10/symposium-the-precedential-effects-of-shadow-docket-stays/ [https://perma.cc/YS7P-JWJ8] (arguing that denials of stay applications should have no precedential value, dissents or concurrences from a grant or denial of a stay should have persuasive value, and any stay decision made by the full Court should have precedential value).

306. *See* Adam Liptak, *Alito Responds to Critics of the Supreme Court's 'Shadow Docket'*, N.Y. TIMES (Oct. 4, 2021), https://www.nytimes.com/2021/09/30/us/politics/alito-shadow-docket-scotus.html [https://perma.cc/E77A-4HYB] (noting that Justice Alito, in a speech at Notre Dame University in September 2021, remarked that orders on the emergency docket have no precedential value).

307. *See* Gateway City Church v. Newsom, 141 S. Ct. 1460, 1460 (2021) ("This outcome is clearly dictated by this Court's decision in *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021)."); *see also* Liptak, *supra* note 306 (remarking that "the Supreme Court chastised the federal appeals court in California for failing to follow its earlier rulings on emergency applications concerning restrictions on religious gatherings during the pandemic").

308. 141 S. Ct. 716 (2021).

309. *See* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (citing *South Bay United Pentecostal Church*, 141 S. Ct. at 718, 209).

310. 141 S. Ct. at 716.

applying them as precedent in a subsequent case. The Court's rules do permit the Court to treat like cases alike without written explanation when it holds a petition for cert. pending the decision in a case raising the same question, upon the vote of three Justices. But a hold is not a decision with legal effect, and when the Court ultimately denies or GVRs a held petition, it does so with the benefit of a fully reasoned opinion in that first case. When the Court (or a lower court) gives precedential effect to an emergency relief order, it relies on a superficial assessment or the applicant's assertion that the two cases are alike.

The second issue concerns the status of the Solicitor General in relation to the shadow docket. As Vladeck demonstrates, the SG during the Trump Administration played a pivotal role in making the shadow docket what it has become.[311] During the Trump Administration:

> The Office of the Solicitor General . . . filed an unprecedented number of requests for emergency or extraordinary relief from the Justices, asking the Court (1) to hear certain appeals before the lower courts have finished ruling; (2) to halt the effect of lower court rulings pending the Supreme Court's review; or (3) to jump over the courts of appeal and directly issue writs of mandamus to rein in perceived abuses by different district courts.[312]

He notes that commentators excoriated the SG for this "newfound aggressiveness," as well as for misleading the Justices in important merits cases and for "astounding conduct in changing its litigating position in a dizzying array of high-profile cases (changes that the Solicitor General would, by tradition, have been involved in approving)."[313] Nevertheless, the Court gave "the Solicitor General . . . most of what he has asked for, generally leaving the specific federal policy under challenge in place . . . pending the full course of appellate litigation."[314] Nor did the SG suffer reputational damage for his conduct. Even when the SG did not get what he requested, Vladeck writes, "the Court's denial of relief has come summarily and with no public opprobrium—no suggestion from the Court that the Solicitor General is abusing his unique position, taking advantage of his special relationship with the Court, or otherwise acting in a manner unbecoming of the office he holds."[315]

If the Texas case is an example, the SG's office in the Biden Administration is willing to embrace a version of the aggressive shadow-docket mechanism, but the Court's attitude seems to have changed. The

311. *See* Vladeck, *supra* note 16, at 152 (summarizing the Trump Administration's impact on the shadow docket).

312. *Id.* at 124.

313. *Id.* at 124, 127 (internal quotation marks omitted).

314. *Id.* at 126.

315. *Id.*

Court did not stay the enforcement of the statute and give the Acting SG what he really sought—the status quo pending the rest of the litigation.[316] Furthermore, the SG seems to be losing more generally in her capacity as the Tenth Justice. There has been an uptick in denials of the SG's request for a GVR.[317] And there has been an increase in orders denying leave for the SG to participate as an amicus curiae in merits cases.[318] Will the Court also stop calling for the views of the SG in deciding whether to grant cert. petitions in cases to which the government is not a party? It is one thing for the Court to deny the SG's request to hear a case—so few petitions for cert. are granted, and the Trump Administration did not fare well on this front, either.[319] And it is not as if the GVR or CVSG have evaporated. But the norms may be slipping on the shadow docket as to the Biden Administration. Does the SG still hold a "unique position" and enjoy a "special relationship with the Court?"[320] Are the norms dissolving or dependent on the political party that holds the White House?

C. The Culture of the Court

The changes in the Court's decision-making are occurring amidst changes in the culture of the Court. In April 2022, an insider at the Court shocked the nation by leaking a draft majority opinion in *Dobbs*, the case that

316. *See* United States v. Texas, 142 S. Ct. 14, 15 (2021) (Sotomayor, J., concurring in part and dissenting in part) ("[T]he Court's failure to issue an administrative stay of the Fifth Circuit's order pending its decision on this application will have profound and immediate consequences.").

317. *See, e.g.*, Grzegorczyk v. United States, 142 S. Ct. 2580, 2581 (2022) ("Today marks the second instance this Term in which this Court has refused to issue a GVR order, notwithstanding the Solicitor General's confession of error, in a criminal case with great stakes for the individual petitioner . . . . Through these cases, the Court appears to be quietly constricting its GVR practice." (citation omitted)); *see also* Am. Axle & Mfg., Inc. v. Neapco Holdings LLC, 142 S. Ct. 2902, 2902 (2022) (denying the petition for certiorari despite inviting the Acting Solicitor General to file a brief, in which the Acting Solicitor General recommended granting the petition for certiorari).

318. Kimberly Strawbridge Robinson, *U.S. Solicitor General Snubbed Again by Supreme Court*, BLOOMBERG LAW (Apr. 5, 2021, 7:11 PM), https://news.bloomberglaw.com/us-law-week/u-s-solicitor-general-snubbed-again-by-supreme-court [https://perma.cc/WTC9-R83U]; *see also* Martina Barash & Kimberly Strawbridge Robinson, *In Rare Rebuff, Justices Say U.S. Can't Argue in Ford Dispute*, BLOOMBERG LAW, https://www.bloomberglaw.com/bloomberglawnews/us-law-week/BNA%200000017197d8df5aa9f1dfdb816b0000?bna_news_filter=us-law-week/ [https://perma.cc/YB7A-QB62] (April 20, 2020, 4:59 PM) (giving an example of the Court's denial of the SG's request to participate at argument); Steve Vladeck, *The Supreme Court's 'Shadow Docket' Helped Trump 28 Times. Biden Is 0 for 1.*, WASH. POST (Aug. 26, 2021, 12:24 PM), https://www.washingtonpost.com/outlook/2021/08/26/shadow-docket-supreme-court-biden-mexico/ [https://perma.cc/VB5U-T46E] (chronicling the Court's denial of the Biden Administration's first application for emergency relief).

319. Adam Feldman, *Empirical SCOTUS: Comparing Cert-Stage OSG Efforts Under Obama and Trump*, SCOTUSBLOG (June 6, 2019, 12:54 PM), https://www.scotusblog.com/2019/06/empirical-scotus-comparing-cert-stage-osg-efforts-under-obama-and-trump/ [https://perma.cc/ZEJ3-MLEK].

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

would shortly thereafter overturn *Roe* and *Casey*. Less stunning but also damaging, an insider has been regularly leaking secret deliberations in high-profile cases to a certain legal analyst. These leaks, particularly the unprecedented leak of the *Dobbs* draft, are direct affronts to the norm of secrecy that has long prevailed at the Court.

The Justices have sought public attention in other ways that point toward new generally accepted behavior. Justice Barrett has followed in the footsteps of Justice Thomas and Justice Sotomayor to turn her status as a "first" on the Court into a multimillion-dollar book deal. Nearly all the Justices have made direct public appeals for the independence of the Court. And the Court has decided to maintain a practice it adopted during the pandemic of livestreaming audio of oral arguments. Suzanna Sherry had documented the rise of "judicial celebrity" on the Court, and in that she included the fame of Justice Ruth Bader Ginsburg as well as the less notorious conduct of other Justices through book deals, speeches, interviews, and more.[321] This behavior is relevant to describing the sort of Court we have. It forms the backdrop against which the Court makes decisions and affects its legitimacy.

1. Regularized Leaks.—Secrecy of deliberations has taken devastating hits during the Roberts Court. Most shocking was the leak of a full draft majority opinion in *Dobbs*. The draft opinion was written by Justice Alito in February 2022 and given to *Politico*, which broke the story on May 2, 2022.[322] Nor did the leaks stop at the draft opinion. On May 7, the *Washington Post* reported that the Chief Justice was pressing for a middle ground that would uphold Mississippi's abortion ban without overruling *Roe* and *Casey*.[323] On May 11, *Politico* reported that no other opinion besides the Alito draft had circulated at the Court.[324] Leaks also occurred before the draft opinion. On April 26, the editorial board of the *Wall Street Journal* suggested that Alito was the author of the majority opinion.[325]

321. Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 186 (2020).

322. Gerstein & Ward, *supra* note 220.

323. Robert Barnes, Carol D. Leonnig & Ann E. Marimow, *How the Future of Roe Is Testing Roberts on the Supreme Court*, WASH. POST (May 7, 2022, 7:27 PM), https://www.washingtonpost.com/politics/2022/05/07/supreme-court-abortion-roe-roberts-alito/ [https://perma.cc/MKE2-YPQ4].

324. Josh Gerstein, Alexander Ward & Ryan Lizza, *Alito's Draft Opinion Overturning Roe Is Still the Only One Circulated Inside Supreme Court*, POLITICO (May 11, 2022, 4:31 AM), https://www.politico.com/news/2022/05/11/alito-abortion-draft-opinion-roe-00031648 [https://perma.cc/8NXA-PLX9].

325. The Editorial Board, *Abortion and the Supreme Court*, WALL ST. J. (Apr. 26, 2022, 6:39 PM), https://www.wsj.com/articles/abortion-and-the-supreme-court-dobbs-v-jackson-mississippi-john-roberts-11651009292 [https://perma.cc/5QMJ-V7RJ].

Leaks are not new—in fact, the holding in *Roe v. Wade* was leaked to the press before the decision came down—but they have become increasingly invasive and undermining of the Court's integrity.[326] As *NPR*'s Nina Totenberg stated:

> No fully-formed draft opinion has been leaked to the press or outside the court . . . . Once or twice there may have been leaks that say how is something going to turn out, or after-the-fact that somebody may have changed his or her mind. But this is a full-flown, Pentagon Papers-type compromise of the court's work.[327]

The day after the draft opinion was leaked, Chief Justice Roberts issued a statement—which in and of itself was "highly unusual," as Amy Howe of *SCOTUSblog* noted.[328] He ordered an investigation into the leak, acknowledging the "exemplary and important tradition of respecting the confidentiality of the judicial process and upholding the trust of the Court."[329] The leak, Roberts said, was a "singular and egregious breach of that trust."[330] The investigation itself also took an unprecedented turn. The Court ordered the Justices' law clerks to turn over their cell phone records and sign affidavits that could be used against them.[331] Protecting the norm of secrecy was so important to the integrity of the Court that the Chief put the reputation of the law clerks publicly on the line.

Justice Thomas defended the norm of secrecy as essential to the functioning of the Court. He remarked at a conference on May 14, 2022, that the leak was "like . . . infidelity," destroying trust at the Court.[332] He warned about use of leaks and other "tactics" (which he attributed to the liberal side)

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326. Rachel Treisman, *The Original Roe v. Wade Ruling Was Leaked, Too*, NPR, https://www.npr.org/2022/05/03/1096097236/roe-wade-original-ruling-leak [https://perma.cc/YT7C-83R4] (May 3, 2022, 11:53 AM); Jonathan Peters, *The Supreme Court Leaks*, SLATE (July 6, 2012, 2:25 PM), https://slate.com/news-and-politics/2012/07/the-supreme-court-leaking-john-roberts-decision-to-change-his-mind-on-health-care-should-not-come-as-such-a-surprise.html [https://perma.cc/8PYW-AHVG].

327. *Id.*

328. Amy Howe, *Roberts Orders Leak Investigation as Court Confirms Authenticity of Draft Opinion*, SCOTUSBLOG (May 3, 2022, 2:18 PM), https://www.scotusblog.com/2022/05/roberts-orders-leak-investigation-as-court-confirms-authenticity-of-draft-opinion/ [https://perma.cc/MQN2-NKPY].

329. *Id.*

330. *Id.*

331. Joan Biskupic, *Exclusive: Supreme Court Leak Investigation Heats Up as Clerks Are Asked for Phone Records in Unprecedented Move*, CNN (June 1, 2022, 9:20 AM), https://www.cnn.com/2022/05/31/politics/supreme-court-roe-v-wade-leak-phone-records/index.html [https://perma.cc/2N2T-6TV7].

332. Liptak, *supra* note 254.

intended to change internal deliberations and decision-making.[333] As Dahlia Lithwick wrote, without pointing a finger, "[t]hese [leaks] are warning shots, ransom notes, and public tantrums being used by insiders at the court to cudgel other members of this allegedly warm fraternal collective into changing their behavior. So, you can call them leaks, sure. Or you can just call them judicial obedience school."[334] Leaks of this nature might be seen as a kind of sanction for internal disagreement. They affect collegiality inside the Court as well as external public perception of the Court.

What might now be described ironically as "ordinary" leaks of internal deliberations are also on the rise. Such leaks arguably began in 2012 when Jan Crawford, legal analyst for *CBS News*, reported that:

> Chief Justice John Roberts initially sided with the Supreme Court's four conservative Justices to strike down the heart of President Obama's health care reform law, the Affordable Care Act, but later changed his position and formed an alliance with liberals to uphold the bulk of the law, according to two sources with specific knowledge of the deliberations.[335]

Crawford's report might have seemed like an isolated breach of secrecy of deliberations until 2019, when *CNN* legal analyst Joan Biskupic began a series of reports based on leaks from inside the Court. Biskupic's first report revealed that "Chief Justice John Roberts cast the deciding vote against President Donald Trump's attempt to add a citizenship question to the 2020 census, but only after changing his position behind the scenes."[336] This leak came from "sources familiar with the private Supreme Court deliberations."[337]

In July 2020, Biskupic reported a four-part *CNN* series that "offers a rare glimpse behind the scenes at how [J]ustices on the Roberts court asserted their interests, forged coalitions and navigated political pressure and the

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333. See *id.* (quoting Justice Thomas as saying that conservatives don't "throw temper . . . when things d[on't] go their way" and would never "trash[] a Supreme Court nominee"). Court watchers have speculated on why and how the leak might have occurred. Some blame conservatives, others liberals; some blame Justices, others law clerks. *See, e.g.*, Tom Goldstein, *How the Leak Might Have Happened*, SCOTUSBLOG (May 5, 2022, 1:20 PM), https://www.scotusblog.com/2022/05/how-the-leak-might-have-happened/ [https://perma.cc/DRJ6-6XG7].

334. Dahlia Lithwick, *The Biggest Mystery of the SCOTUS Leak Isn't "Who Did It?"*, SLATE (May 20, 2022, 3:40 PM), https://slate.com/news-and-politics/2022/05/what-if-the-scotus-leak-is-not-a-leak-at-all.html [https://perma.cc/6EKP-2P36].

335. Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012, 9:43 PM), https://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/ [https://perma.cc/MWT4-7PCY].

336. Joan Biskupic, *Exclusive: How John Roberts Killed the Census Citizenship Question*, CNN, https://www.cnn.com/2019/09/12/politics/john-roberts-census-citizenship-supreme-court/index.html [https://perma.cc/NQ3A-K9XM] (Sept. 12, 2019, 1:33 PM).

337. *Id.*

coronavirus pandemic."[338] The series covered cases involving LGBTQ rights, abortion, the Deferred Action for Childhood Arrivals program, and President Trump's taxes.[339]

After this *CNN* series appeared, Noah Feldman remarked that "[s]omething appears to be changing in the culture of the [C]ourt."[340] Josh Blackman, writing for the legal blog *The Volokh Conspiracy*, commented that "[t]his report has become something of an annual tradition for Biskupic."[341] The inside source(s) evidently trust Biskupic to report the leaks in a way that serves their purposes and might be expected to continue leaking with regularity until detected. Furthermore, as Feldman noted, these leaks are different from the leaks of the past because they "don't depict any of the justices negatively" and "are all about court business, not personalities."[342]

Blackman has speculated about the identity of the leaker(s):

> There are at least two source[s] (plural). They could be a mix of (1) Justice(s), (2) clerk(s), (3) non-Court personnel in contact with a Justice, or (4) non-Court personnel in contact with a clerk. I am skeptical Biskupic would run a story of this magnitude based solely on information from people in category 3 or 4. There is likely someone in category 1 or 2.[343]

For now, only the source(s) and Biskupic know.

Leaks have taken on a significance that they have not had for decades or perhaps ever before. If "ordinary" leaks become a pattern and practice, as recent events suggest they might, secrecy of deliberations has a gaping hole. If leaks like the *Dobbs* debacle recur, far more than that norm is broken. The Court is a different Court if full draft opinions in high-stakes cases can circulate to the public. And perhaps just this once was enough. The trust among the Justices and the legitimacy of the Court already may have suffered irreparable damage.

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338. Joan Biskupic, *Behind Closed Doors During One of John Roberts' Most Surprising Years on the Supreme Court*, CNN, https://www.cnn.com/2020/07/27/politics/john-roberts-supreme-court-liberals-daca-second-amendment/index.html [https://perma.cc/6NTX-ZZTT] (July 27, 2020, 4:28 PM).

339. *Id.*

340. Noah Feldman, *Supreme Court Leaks Don't Lead Anywhere Good*, AMES TRIB. (Aug. 4, 2020, 2:14 PM), https://www.amestrib.com/story/opinion/columns/2020/08/04/noah-feldman-supreme-court-leaks-don8217t-lead-anywhere-good/112795996/ [https://perma.cc/8RWE-XGKS].

341. Josh Blackman, *More Leaks from the Supreme Court, All of Which Make Roberts Look Powerful*, THE VOLOKH CONSPIRACY (July 27, 2020, 7:15 PM), https://reason.com/volokh/2020/07/27/more-leaks-from-the-supreme-court-all-of-which-make-roberts-look-powerful/ [https://perma.cc/AZ8F-Z64B].

342. Feldman, *supra* note 340.

343. Josh Blackman, *Why Did "Sources Familiar With the Private Supreme Court Deliberations" Talk to CNN About the Census Case?*, THE VOLOKH CONSPIRACY (Sept.12, 2019, 4:18 PM), https://reason.com/volokh/2019/09/12/why-did-sources-familiar-with-the-private-supreme-court-deliberations-talk-to-cnn-about-the-census-case/ [https://perma.cc/DY4V-CBTM].

2. Book Deals.—Much has been written about how Justice Ruth Bader Ginsburg became a pop culture icon and relished the publicity.[344] Reverence for her ran deep; the *Today* show anchor Katie Couric even kept from the public regrettable comments the Justice made in an interview.[345] But Justice Ginsburg's persona was only part of the story of judicial celebrity. As Suzanna Sherry recounts in detail, many Justices have made themselves public figures through a variety of public appearances and activities, including writing bestselling books about their life journeys to the Court.[346]

Shortly after each joined the Court, Justices Thomas and Sotomayor accepted multimillion-dollar book deals to write autobiographies that became instant bestsellers. Their books debuted at the top of the *New York Times* Best Sellers list, selling thousands of copies the very first day.[347] Justice Sotomayor's *My Beloved World* looks to become the best-selling book written by any Justice.[348] Justice Thomas's *My Grandfather's Son* has also made a strong showing among the hundreds of books that Justices have written.[349] In their autobiographies, the Justices tell the story of their upbringings to contextualize their lives as Justices. Their experiences are particularly book-worthy because they are firsts on the Court—Justice Thomas, the first conservative African–American on the Court; Justice Sotomayor, the first Latinx. They were not however firsts on the Court to

344. *E.g.*, Sara Aridi, *How Ruth Bader Ginsburg Lives on in Popular Culture*, N.Y. TIMES, https://www.nytimes.com/2020/09/26/at-home/ruth-bader-ginsburg-pop-culture-rbg.html [https://perma.cc/67FP-9PTK] (Oct. 15, 2020); Andrew Limbong, *From 'SNL' to Workout Videos, How RBG Became a Pop Culture Icon*, NPR (Sept. 22, 2020, 11:56 AM), https://www.npr.org/2020/09/22/915610210/from-snl-to-workout-videos-how-rbg-became-a-pop-culture-icon [https://perma.cc/23K8-9S7R]; Patrick Ryan, *'RBG': How Ruth Bader Ginsburg Became a Legit Pop-Culture Icon*, USA TODAY, https://www.usatoday.com/story/life/movies/2018/05/01/rbg-documentary-shows-how-ruth-bader-ginsburg-became-pop-icon/562930002/ [https://perma.cc/6ZYA-5VC3] (Dec. 22, 2018, 4:28 PM); Eileen Reynolds, *How an 81-Year-Old Supreme Court Justice Became an Unlikely Pop Culture Icon*, BUSINESS INSIDER (July 30, 2018, 12:59 PM), https://www.businessinsider.com/ruth-bader-ginsburg-is-unlikely-pop-culture-icon-2014-7 [https://perma.cc/WBZ4-3CS4].

345. Erik Wemple, Opinion, *Katie Couric Admits She Was Wrong to 'Protect' Ruth Bader Ginsburg*, WASH. POST (Oct. 19, 2021, 2:46 PM), https://www.washingtonpost.com/opinions/2021/10/19/katie-couric-ruth-bader-ginsburg-interview/ [https://perma.cc/9FYN-4Z88].

346. *See* Sherry, *supra* note 321, at 185–87 (noting that "Justices have become celebrities who bask in their fame and market their brands").

347. *See* Nina Totenberg, *Sotomayor's Memoir Already a Best-Seller*, NPR (Jan. 30, 2013, 3:51 PM), https://www.npr.org/2013/01/30/170675945/sotomayors-memoir-already-a-bestseller [https://perma.cc/LTR4-AZVW] (reporting that Justice Sotomayor's memoir sold 38,000 copies in the first week of sales).

348. *See id.* (comparing Justice Sotomayor's sales in the first week to other Justices' sales); Peter Osnos, *How Sonia Sotomayor's Memoir Outsold Clarence Thomas's*, ATLANTIC (Feb. 12, 2013), https://www.theatlantic.com/national/archive/2013/02/how-sonia-sotomayors-memoir-outsold-clarence-thomass/273064/ [https://perma.cc/J34B-L42R] (noting that Justice Sotomayor's sales outpaced Justice Thomas's).

349. *See* Totenberg, *supra* note 347 (reporting in 2013 that Justice Thomas's book sold 187,000 copies in total).

sign a lucrative book deal to write an autobiography. Justice Sandra Day O'Connor's 2002 memoir *Lazy B.* reflects on how her experiences shaped the Justice she would become, and it sold tens of thousands of copies.[350] She later collaborated on a popular biography aptly titled *First*.[351]

Justice Barrett has joined their ranks. Shortly after she joined the Court, she received a $2 million advance to write a book.[352] As reported, her book deal "is likely the highest advance paid to a Justice since major book deals scored by Clarence Thomas and Sandra Day O'Connor. (Sonia Sotomayor was paid a $1.175 million advance for her autobiography . . . . At that time, Sotomayor was arguably the most prominent person of Latinx heritage in America.)."[353] Justice Barrett, the first avowedly conservative woman on the Court, plans to write about how judges are not supposed to bring their personal feelings into their decision-making[354]—a position somewhat at odds with her colleagues' message that lived experience matters. But the book deal alone shows that "firsts" are good bets to become bestsellers.

Book deals are not all bad. They might help the Justices compensate for a lifetime commitment to a relatively low judicial salary, particularly if they do not have preexisting wealth. And readers enjoy the end products. However, book deals have raised specific and general concerns about the Court's ethics rules. Book deals produce potential conflict-of-interest issues with publishers, which may be involved in First Amendment and other cases that come before the Court.[355] More generally, books deals are a visible reminder that the Court lacks a formal ethics code. Lower federal court judges are subject to a written code of ethics, but the Justices are not.[356] The

350. *See* Totenberg, *supra* note 347 (reporting in 2013 that Justice O'Connor's book sold 53,000 hardback copies and 38,000 paperback copies); SANDRA DAY O'CONNOR & H. ALAN DAY, LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST (2003) (chronicling Justice O'Conner's early life).

351. *See* EVAN THOMAS, FIRST: SANDRA DAY O'CONNOR (2019) (offering a portrait of Justice O'Conner's life and career).

352. *See* Daniel Lippman, *William Barr, Amy Coney Barrett Land Book Deals*, POLITICO (Apr. 19, 2021, 4:30 AM), https://www.politico.com/news/2021/04/19/bill-barr-amy-coney-barrett-book-deals-483028 [https://perma.cc/UQ5S-D9X9] (calling the advance an "'eye-raising amount' for a Supreme Court justice").

353. Dahlia Lithwick, *Amy Coney Barrett Should Just Judge Without Bias Before Writing a Book on Judging Without Bias*, SLATE (Apr. 20, 2021, 3:15 PM), https://slate.com/news-and-politics/2021/04/amy-coney-barrett-book-deal.html [https://perma.cc/EK46-GEPK].

354. *See id.* (explaining the topic of Justice Barrett's book).

355. *See* Timothy L. O'Brien, *Supreme Court's Ethics Problems Are Bigger than Coney Barrett*, BLOOMBERG (May 2, 2021, 12:00 PM), https://www.bloomberg.com/opinion/articles/2021-05-02/supreme-court-s-ethics-problems-are-bigger-than-coney-barrett [https://perma.cc/EB3S-F3P4] (pointing out that publishers could be connected to free speech cases and other issues that appear before the Court).

356. *See* Veronica Root Martinez, *A Weakened Supreme Court Needs a Code of Ethics*, BLOOMBERG LAW (Nov. 5, 2020, 3:00 AM), https://www.bloomberglaw.com/bloomberglawnews/

Court does maintain self-regulatory rules—such as recusal rules—governing their professional conduct.[357] The Court's ethics rules, like other informal norms, are not that clear or current.[358]

3. Public Appeals.—With the dominance of Republican-appointed Justices on the Court, the two Democrat-appointed Justices of retirement age were drawn into the public eye. Justice Ginsburg faced public and political pressure to retire from the Court and allow President Obama to appoint her replacement.[359] She fought back in interviews.[360] Before she died, she expressed to the public, through her granddaughter, her "most fervent wish" that she "not be replaced until a new president is installed."[361] Justice Breyer confronted similar public pressure to retire while a Democratic president was in office.[362] In media interviews, he offered general responses to the question of when, placing personal considerations first and the Court's interests second.[363] Although other Justices have openly discussed their retirements

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us-law-week/XB1DTV0000000?bna_news_filter=us-law-week#jcite [https://perma.cc/ESM6-NP3A] (emphasizing that all other federal judges must abide by a code of ethics).

357. *See* Robert Barnes, *Roberts Says Federal Judiciary Has Some Issues but Doesn't Need Congressional Intervention*, WASH. POST (Dec. 31, 2021, 6:02 PM), https://www.washingtonpost.com/politics/courts_law/chief-justice-roberts-report-federal-judiciary/2021/12/31/9c1f5c30-6a64-11ec-96f3-b8d3be309b6e_story.html [https://perma.cc/6X4C-SBR3] (reporting that Chief Justice Roberts wrote that "[t]he Judiciary's power to manage its internal affairs insulates courts from inappropriate political influence and is crucial to preserving public trust in its work as a separate and co-equal branch of government").

358. *See* O'Brien, *supra* note 355 (discussing the lack of clarity for the Court's ethics rules regarding accepting outside pay, conflicts of interest, and financial disclosures).

359. Susan Dominus & Charlie Savage, *The Quiet 2013 Lunch that Could Have Altered Supreme Court History*, N.Y. TIMES (Sept. 25, 2020), https://www.nytimes.com/2020/09/25/us/politics/rbg-retirement-obama.html [https://perma.cc/T38Q-3QDE].

360. *See* Joan Biskupic, *U.S. Justice Ginsburg Hits Back at Liberals Who Want Her to Retire*, REUTERS (Aug. 1, 2014, 12:29 AM), https://www.reuters.com/article/us-usa-court-ginsburg/u-s-Justice-ginsburg-hits-back-at-liberals-who-want-her-to-retire-idUSKBN0G12V020140801 [https://perma.cc/R6UQ-A5RU] (reporting Justice Ginsburg's "message for liberals" who encouraged her to retire during President Obama's term: "Who are you going to get who will be better than me?").

361. Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020, 7:28 PM), https://www.npr.org/2020/09/18/100306972/Justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87 [https://perma.cc/VM83-855G].

362. *See* Susan Davis, *Progressives Are Hoping that Justice Stephen Breyer Steps Down at the End of the Term*, NPR (June 30, 2021, 5:00 AM), https://www.npr.org/2021/06/30/1011273434/progressives-are-hoping-that-Justice-stephen-breyer-steps-down-at-the-end-of-the-term [https://perma.cc/WBL8-JC4P] (discussing public pressure for Justice Breyer to retire during President Biden's term).

363. *See* Joan Biskupic, *Exclusive: Stephen Breyer Says He Hasn't Decided His Retirement Plans and Is Happy as the Supreme Court's Top Liberal*, CNN, https://www.cnn.com/2021/07/15/politics/stephen-breyer-retirement-plans/index.html [https://perma.cc/7PKX-S3UZ] (July 15, 2021, 12:01 PM) (reporting that, when asked about what factors would influence his retirement decision, Justice Breyer said the primary factor would be his health and the second would be the Court); Chris Cillizza, *Stephen Breyer Just Made Democrats' Friday*, CNN, https://www.

before, these Justices could not distance themselves from the politicized context in which they made their remarks.

But getting pulled into the public spotlight is quite different from the Justices putting themselves at the center of the discussions about the Court's legitimacy. Over the course of 2021, almost every sitting Justice—all but Chief Justice Roberts and Justice Kagan—made direct public appeals in response to political threats of Court reform.[364] From a public and political perspective, the changes regarding the Court discussed above have produced a perfect storm: a supermajority of conservative Justices overruling progressive precedent and using the secret orders docket to treat that precedent as gone before the Court even decides a case. Well before the Court was in the eye of this storm, the changes in its membership incited public outrage and generated calls for legislative Court reform. In response, the Justices embarked on "a legitimacy tour"[365] to defend the independence of the Court and deflect legislative reform. As Dahlia Lithwick wrote in April 2021, "Breyer, Sotomayor, and Gorsuch have all frantically made the rounds in recent weeks to assure ordinary people that [J]ustices are not partisan political actors."[366] Although exaggerating their behavior, she was not wrong in capturing the Justices' motivation and mood: their claims were "directly in response to a growing public furor over court reform," as to which they obviously were "freaking out."[367]

By September 2021, the Justices were in the eye of the storm. Early in the month, Justice Breyer appeared on *The Late Show with Stephen Colbert* presumably to discuss his new book defending the authority of the Court; he never got that far, instead arguing against cameras in the courtroom and reaffirming the collegiality of the Court.[368] Later in the month, he appeared

cnn.com/2021/08/27/politics/stephen-breyer-supreme-court-retirement/index.html [https://perma.cc/2BRD-LTU3] (Aug. 27, 2021, 1:46 PM) (noting that Justice Breyer has "made clear that he relished his new role as the senior most liberal on the court"); Mark Sherman, *Breyer Mum as Some Liberals Urge Him to Quit Supreme Court*, AP NEWS (Mar. 17, 2021), https://apnews.com/article/donald-trump-ruth-bader-ginsburg-amy-coney-barrett-us-supreme-court-courts-0cd3d0f19759077a13264a1f09ea6244 [https://perma.cc/AP3L-X85N] (emphasizing that Justice Breyer remained "mum about his plans" for retirement).

364. Chief Justice Roberts did deliver his 2021 Year-End Report on the Federal Judiciary, in which he stressed that Congress, during the era in which the Judicial Conference of the United States was established, recognized the "need for independence" of the Court, and that Chief Justice William Taft "took vital steps to ensure that the Judicial Branch itself could take the lead in fulfilling that duty," meaning the duty to address criticism of the Court. *See* JOHN ROBERTS, 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1, 5 (2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf [https://perma.cc/PXP7-B3V9].

365. I thank one of my colleagues for this phrase.

366. Lithwick, *supra* note 353.

367. *Id.*

368. *The Late Show with Stephen Colbert: Justice Stephen Breyer Addresses Speculation About His Retirement Plans* (CBS television broadcast Sept. 14, 2021); *see also* Matt Ford, *Breyer v.*

on *Good Morning America* and was asked specific questions about the Court's use of the shadow docket in the Texas-abortion-statute case, responding that the decision to allow the statute to go into effect was "'very bad' but not political[]."[369] In October, he gave a live interview to Joan Biskupic, in which he tried to defend the integrity of the Court by demystifying its rules. That was when he explained the need for secrecy of deliberations—saying "it's important not to have transparency"—and confirmed what Justice Alito had revealed about summary reversals on the order docket, that they are a rule of six.[370]

Meanwhile, a succession of conservative Justices were defending the independence of the Court from their vantage. In September 2021, Justice Barrett gave brief remarks introducing Senator Mitch McConnell at the University of Louisville's McConnell Center, in which she commented that "judicial philosophies are not the same as political parties."[371] In October 2021, Justice Thomas delivered a large named lecture at the University of Notre Dame, in which he spoke directly to the independence of the Court.[372] He said that "we should be careful destroying our institutions because they don't give us what we want when we want it."[373] Later that month, Justice Alito gave a large lecture at the University of Notre Dame, and his remarks

Colbert, ATLANTIC (Sept. 15, 2015), https://www.theatlantic.com/politics/archive/2015/09/breyer-colbert/405346/ [https://perma.cc/V4YA-QDKZ] (noting that, while Justice Breyer did not get a chance to discuss his new book, he did argue against cameras in the courtroom and "emphatically defended the Court's collegiality"); STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS 2 (2021) (discussing how political efforts to reform the Court might cause the public to lose faith in the Court and ultimately jeopardize its authority).

369. Devin Dwyer, *SCOTUS Allowing Texas to Mostly Ban Abortions 'Very Bad' But Not Political: Justice Breyer*, ABC NEWS (Sept. 14, 2021), https://www.goodmorningamerica.com/news/story/scotus-allowing-texas-ban-abortions-bad-political-Justice-79973845 [https://perma.cc/VXU5-2XEE] (quoting Justice Breyer).

370. Biskupic, *supra* note 2.

371. Adam Liptak, *Justice Barrett Says the Supreme Court's Work Is Not Affected by Politics*, N.Y. TIMES, https://www.nytimes.com/2021/09/13/us/politics/amy-coney-barrett-politics-supreme-court.html [https://perma.cc/68TN-WZBY] (Sept. 30, 2021).

372. Justice Clarence Thomas, 2021 Tocqueville Lecture at the University of Notre Dame (Sept. 16, 2021); *see also* Ariane de Vogue, *Justice Clarence Thomas Says Judges Are 'Asking for Trouble' When They Wade into Politics*, CNN, https://www.cnn.com/2021/09/16/politics/clarence-thomas-supreme-court/index.html [https://perma.cc/JZ5E-3863] (Sept. 16, 2021, 11:12 PM) (reporting that Justice Thomas "warned against judges weighing in on controversial issues that he said are better left to other areas of government"); Mike Berardino & Ann E. Marimow, *Justice Thomas Defends the Supreme Court's Independence and Warns of 'Destroying Our Institutions*,*'* WASH. POST (Sept. 16, 2021, 7:16 PM), https://www.washingtonpost.com/politics/courts_law/justice-clarence-thomas/2021/09/16/d2ddc1ba-1714-11ec-a5e5-ceecb895922f_story.html [https://perma.cc/4PLK-BVZD] (reporting that Justice Thomas "defended the independence of the Supreme Court").

373. de Vogue, *supra* note 372.

were the most direct of all.[374] He denied that the Court was "dangerous" and "sneaky" or that the "emergency docket" was unusual, and he spoke about specific issues that the Court had addressed on the order docket, including the order that allowed the Texas statute to go into effect.[375] Justice Alito's remarks tread very close to the line between general remarks about the Court's norms and talking about the specifics of a pending case.

A bipartisan coalition of Justices mounted a unified front to reassure the public that the Court's decisions were not political. Their unprecedented campaign may have backfired, making them seem more like political actors and not less. But regardless of the motivation or effect, the larger point is that it happened and contributed to a change in the culture of the Court.

4. Audio in the Courtroom.—In March 2020, as COVID-19 spread across the country, the Justices canceled oral arguments for March and April, and in May, they took "the unprecedented step of holding arguments by phone and changing its format to give each [J]ustice an allotted amount of time to ask questions."[376] The Justices also agreed to livestream audio of the arguments.[377] The Justices returned to the courtroom at the start of October Term 2021, but the Court did not reopen it to the public.[378] Only Court staff, participating lawyers, and reporters were allowed in person. The Justices agreed, however, to continue live audio of oral arguments for the first three months of the term.[379] They also returned to their normal practice of asking questions when they wanted rather than taking turns, which they needed when they could not see each other.[380]

Although these changes initially were not by choice, the Justices agreed to continue livestreaming audio of oral arguments provisionally and may do so indefinitely. That decision would convert live audio from a necessity into

374. *See* Liptak, *supra* note 306 (describing how Justice Alito defended the Court's use of emergency applications); Nina Totenberg, *Justice Alito Calls Criticism of the Shadow Docket 'Silly' and 'Misleading,'* NPR (Sept. 30, 2021, 7:12 PM), https://www.npr.org/2021/09/30/1042051134/Justice-alito-calls-criticism-of-the-shadow-docket-silly-and-misleading [https://perma.cc/TDB7-XJVB] (relaying Justice Alito's sentiment that the term "shadow docket" damages the court as an independent institution).

375. Liptak, *supra* note 306.

376. Ariane de Vogue, *Supreme Court Will Return to the Courtroom and Hold Oral Arguments in Person*, CNN, https://www.cnn.com/2021/09/08/politics/supreme-court-oral-arguments-in-person/index.html [https://perma.cc/QF6M-PG6B] (Sept. 8, 2021, 10:49 AM).

377. *See id.* (noting public praise of the decision to livestream oral arguments during the COVID-19 pandemic).

378. *See id.* (describing the Supreme Court's reopening procedures for the 2021 October Term).

379. *Id.*

380. *See* Amy Howe, *Justices to Hold In-Person Arguments in the Fall*, SCOTUSBLOG (Sept. 8, 2021, 1:10 PM), https://www.scotusblog.com/2021/09/Justices-to-hold-in-person-arguments-in-the-fall/ [https://perma.cc/WZU2-E8EL] (describing the return to "unstructured" questions during Supreme Court oral arguments).

a sort of self-regulatory rule. Live audio enhances the transparency of the judicial process, a modest version of cameras in the courtroom, which never took hold among the Justices.[381] Perhaps the Justices are more comfortable with voices than visuals or they appreciate that the experiment with audio did not distort oral argument (any more than the pandemic already did). Whatever the reason, livestreaming audio of oral argument marks a change in the culture of the Court.

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The Court's self-regulatory rules are changing again. Stare decisis is in peril, and the other rules have been pushed aside by decisions on the shadow docket. Meanwhile, the culture of the Court is changing. The next Part takes up the discussion of how the movement we see affects the nature and legitimacy of the Court we have.

III. The Code Court

The public and the Justices have set up competing narratives. Either the Court is a political institution or originalism has arrived in full force.[382] Either view can account for decisions like overruling *Roe v. Wade*—the former to align the law with conservative values, the latter to align the law with the text of the Constitution. But even if we take the Justices (both conservative and liberal) at their word that the Court's controversial decisions are driven by originalism, not politics, interpretive methodologies alone do not determine the nature of the Court. This Part asks two questions: what sort of Court is emerging based on the changes we see, and how do we evaluate its legitimacy?[383]

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381. *See* Ryan C. Black, Timothy R. Johnson, Ryan J. Owens & Justin Wedeking, Opinion, *Livestreaming Arguments? The Supreme Court Made the Right Decision*, THE HILL (May 8, 2020, 11:00 AM), https://thehill.com/opinion/judiciary/496247-livestreaming-arguments-the-supreme-court-made-the-right-decision [https://perma.cc/T4FN-UKR8] (praising the Supreme Court for livestreaming its oral arguments when it had previously eschewed video broadcasts in the courtroom).

382. *Compare* Liptak, *supra* note 371 (reporting Justice Barrett's statement that "judicial philosophies are not the same as political parties"), *and* Joan Biskupic, *Justice Breyer's Rosy View of an Apolitical Supreme Court*, WASH. POST (Sept. 17, 2021, 8:00 AM), https://www.washingtonpost.com/outlook/justice-breyers-rosy-view-of-an-apolitical-supreme-court/2021/09/16/948482b8-012b-11ec-ba7e-2cf966e88e93_story.html [https://perma.cc/H7HN-QPFR] (noting Justice Breyer's view that the Court is not political and quoting Justice Breyer's book, where he wrote that "once appointed a judge naturally decides a case in the way that he or she believes the law demands"), *with* Lithwick, *supra* note 34 (reporting results from a Quinnipiac University opinion poll showing 60% of the public "believes the [C]ourt to be motivated principally by politics").

383. In this respect, this Part makes no claim about the other forces that may have driven the changes that we see. For example, the Court's shift and breakdowns may be attributable to some combination of (1) a change in dominant interpretive methodologies on the Court (as the Justices contend); (2) the number of conservative appointees, with different normative views of the law (as

A. The Demise of Stare Decisis and the Rise of the Code Court

The Court has an outsized majority of originalist Justices determined to follow constitutional text. Originalism, we can appreciate, is at odds with the one rule that has defined the Court from the beginning—stare decisis and the obligation to follow prior precedent. Without stare decisis or with only a nominal version, the Court is different—it no longer operates as the distinctive form of a common-law Court that we have always known, in which precedent constrains its decision-making, but as a new form of a code-law Court, in which text comes first and above all else.[384] The result is that the nature of the Court is changing, as abruptly and significantly as when it shifted from a rule of unanimity to a rule of disagreement in 1941. Arguably this movement in the nature of the Court is more profound because stare decisis has been *the* quintessential feature of the judicial power. It has been impossible to describe the Court and account for its legitimacy without stating that it follows prior precedent as a constraint on its decision-making. It is not impossible to *imagine* a Court without stare decisis.[385] It is just a different Court.

What is the nature of the Court that is now emerging? The originalist Justices are obligated to follow the relevant law's text and disregard prior precedent that interpreted the same text erroneously using a different interpretive methodology or a different set of interpretive tools. That interpretive error is enough to make prior precedent wrong and, in theory, to compel its overruling. But the Court that is emerging is not just an originalist,

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many progressives believe), *see, e.g.*, Alice Miranda Ollstein & Rachel Roubein, *Here Come the Roe v. Wade Challenges*, POLITICO (Nov. 8, 2018, 5:06 AM), https://www.politico.com/story/2018/11/08/abortion-roe-v-wade-abortion-court-cases-supreme-court-944166 [https://perma.cc/4DE2-RLSP] (describing the view that "the tide may have turned" for abortion rights with Justice Kavanaugh's confirmation); (3) conservative legal movement actions outside of the Court, including: (a) the innovative and aggressive action of the SG during the Trump Administration in facilitating the shadow docket (as Vladeck shows), and (b) the aggressive state laws that forced reconsideration of *Roe v. Wade*, *see, e.g.*, *id.* (detailing Alabama and West Virginia's anti-abortion laws); (4) the changing media landscape—the rise of the 24-hour news cycle, then Fox, then social media (as Sherry shows); and (5) any number of other causes.

384. Justice Scalia long ago made the argument that common law judging is anachronistic in "an age of legislation," and he questioned "the *attitude* of the common-law judge—the mind-set that asks, 'What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?'" Scalia, *supra* note 19, at 13. But Justice Scalia was "content to leave the common law, and the process of developing the common law, where it is" because "[i]t has proven to be a good method of developing the law in many fields." *Id.* at 12. This view of the common law is consistent with his view that originalism can and should make a "pragmatic exception" for stare decisis. Scalia, *supra* note 221, at 140 (emphasis omitted).

385. Some have argued that without stare decisis, the Court would not only be different but not "a legal body in the way that scholars, attorney, and jurists—not to mention Article III of the U.S. Constitution—contemplate such fora." EPSTEIN & KNIGHT, *supra* note 1, at 161, 163 (making this point about the norm disfavoring issue creation and stating that stare decisis "operates in much the same way"). This Article does not make the stronger claim that stare decisis is requisite for the Court to be the Court in our legal system.

textualist Court; it is an originalist, textualist Court with remaining choices about how to exercise the judicial power. Stare decisis is not the only rule that has defined the nature of the Court. Viewed collectively, the *other* rules derive from a shared agreement to change the law through the merits process, which is rooted in a sense of judicial morality about how the Court should function. Yet, when combined with originalism, the Justices' choices on the shadow docket have enabled the Court to change the law in advance of a decision on the merits. When an application for emergency relief seeks to block enforcement of a law that is plainly unconstitutional under existing precedent (so plain that the defenders admit it), the disposition turns on whether the originalist Justices intend at some future date to overrule the precedent that makes the law so. Justices Kavanaugh and Barrett have ensured that a decision on the merits must be within reach by preventing the Court from providing a "merits preview" in a case it is unlikely to take. But only Chief Justice Roberts would hold out for a decision on the merits.

What seems to be emerging, then, as a descriptive matter, are three different models of a Code Court.[386] All subscribe to originalism and textualism as interpretive methodologies but diverge on their treatment of the Court's self-regulatory rules. Under one model, the obligation to the text justifies an obligation to reset the law in whatever posture the opportunity presents itself, without consideration of the Court's self-regulatory rules. Justices Thomas, Alito, and Gorsuch might be understood to endorse this "rule-disregarding" model. A second model adheres to the self-regulatory rules of the cert. process, including Rule 10, which means that the Court is not free to reach out and reset the law when it is unlikely to take a case, or perhaps even when it has not yet agreed to take a case. Justices Kavanaugh and Barrett might be understood to embrace this "rule-respecting" model. A final model prevents the Court from resetting the law unless and until it does so by changing the law on the merits. Chief Justice Roberts might be understood to support this "rule-conforming" model.

The "rule-disregarding" Justices might object to describing their actions in relation to the rules. They are not making choices about the rules but following the standard for emergency relief and originalism where they lead. When applicants for emergency relief ask the Court to determine whether a case is likely to succeed on the merits, the originalist Justices are just answering honestly. Justice Alito has made remarks to this effect.[387] But an

386. *Cf.* Lithwick, *supra* note 23 (reporting Lee Epstein's comment that based on data of political outcomes in Roberts Court decisions, "[i]t's almost like there's two courts operating . . . [the] Trump court, aided and abetted by Alito and Thomas" and "[a] standard kind of moderate conservative institutionalist Roberts court").

387. *See* Liptak, *supra* note 306 (noting that Justice Alito, in a speech at the University of Notre Dame in September 2021, attributed the growth of the emergency docket to the increase in applications from the Trump Administration).

equal number of originalist Justices have found nothing in the standard for emergency relief or originalism that *compels* the Court to approach the question as it has. The "rule-respecting" Justices have understood Rule 10 as a threshold requirement for answering this question. The "rule-conforming" Chief Justice has understood the full merits process as a precondition for changing the status quo when the law underlying the application for emergency relief is invalid under existing precedent. Whether defensible or not, these choices exist independent of originalism.

Nor does originalism *prevent* the rule-respecting and rule-conforming Justices from understanding the standard for emergency relief as they do. As mentioned earlier, Justice Scalia made a "pragmatic exception" to originalism to preserve precedent when reliance was high, and he famously labeled himself a "faint-hearted originalist" as a result.[388] He believed that this exception was necessary to ensure that originalism could furnish a "workable prescription for judicial governance."[389] Neither the rule-respecting nor the rule-conforming Justices make an exception to originalism. Their choices, whether to insist on a cert.-worthy case or a decision on the merits before changing the law, exist independently of originalism. And that is so even if their motivation to vote with the liberal Justices is not regard for the process and instead, as many might think, a "pragmatic" desire to preserve the legitimacy of the Court.

Finally, the standard for emergency relief itself does not require the Court to disregard the other rules or prohibit the Court from taking account of them. The standard for emergency relief asks the Court to assess the likelihood of success on the merits. How the Court "understands" these words is within its control. In the past, the Justices have understood the Court's rules not as they *could*, but how they *should*. Five Justices could DIG a case that four Justices had just voted to take under the rule of four—but it has been understood that they should not. Five Justices could refuse to grant a stay of execution when four Justices are inclined to take the case—but it has been understood that they should not. Five Justices could vote for reargument in a case to reach out and overrule precedent—but it has been understood that they should not. The Justices have recognized that self-regulatory rules require moral understandings. It is no different for the five votes necessary to grant emergency relief.

B. The Significance of the Rules

The choices the Justices make about the rules affect the legitimacy of the Court. The rules can shift in ways that track evolving notions of judicial morality—such as the shift from the rule of unanimity to the rules that

388. Scalia, *supra* note 222, at 864; Scalia, *supra* note 221, at 140 (emphasis omitted).

389. Scalia, *supra* note 221, at 139.

promote the clashing of views and expression of disagreement. And they can evolve in ways that cause normative outrage—as have the departures from stare decisis and the "usual principles of appellate process."[390] Much of the public is angered by the loss of progressive precedent and the stealth decisions that allow blatantly unconstitutional statutes to take effect months before the Court has decided the pending case.[391] If Justices Barrett and Kavanaugh had not joined with Chief Justice Roberts and the liberal Justices to block the Court from changing the law when it lacked a cert.-worthy petition, months could have been years.

On a code-driven Court with a weak notion of stare decisis, the other rules matter more than ever because they might serve to moderate change. As we have seen, respect for Rule 10 can prevent a majority from using an application for emergency relief to change the law in a case it is unlikely to take—and might never take, depending on how the issue works its way through the lower courts and whether it ever becomes cert.-worthy.[392] The rules of the merits process might constrain the Court even if it has agreed to take a case. Not only would the Court have to wait to change the law, but it might not end up changing the law as expected after full briefing on the merits. The Court might decide the case on a narrow or alternative ground.[393] The Justices might even disagree about the interpretation of the relevant law's text. As Justice Scalia has said, originalists do not "always agree upon their answer. There is plenty of room for disagreement as to what original meaning was, and even more as to how that original meaning applies to the situation before the court."[394] There is also room for disagreement on the

390. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) ("Today's ruling illustrates just how far the Court's 'shadow-docket' decisions may depart from the usual principles of appellate process.").

391. Dahlia Lithwick described the public reaction:

> In September, polls showed that public approval of the Supreme Court was at around 37 percent—the lowest number since some of this polling had begun. That was perhaps not surprising for a court that—within months of having been fully stacked with Republican ideologues—had gutted both the Voting Rights Act and union power, had reversed position on COVID lockdown orders while changing religious liberty law in a way that could only be explained by Republican stacking, and then issued a string of unreasoned ideological orders on its emergency docket. Maybe the straw that broke the pollsters back was the unsigned brief decision that allowed Texas to ban abortions at six weeks, despite the law's lack of popularity.

Lithwick, *supra* note 34.

392. *See* Vladeck, *supra* note 16, at 158 (noting the value of awaiting percolation on an issue and observing "what has become almost an article of faith among all of the Justices in recent years—that the Court does not reach out to decide important questions, even on an interim basis, before the lower courts have had the full opportunity to do so").

393. *See* Barrett, *Originalism*, *supra* note 29, at 1942 ("The Court also decides how much precedent to unsettle when it decides how broadly to write an opinion: there are sometimes disputes about whether the Court should overrule a precedent outright or merely narrow it and leave the question whether it should be overruled for another day (or never).").

394. Scalia, *supra* note 221, at 45.

appropriate tools of originalism and especially textualism, as legal scholars too numerous to mention have demonstrated.[395] That room may make a difference to whether the Court overrules precedent—not in every case, not as to *Roe v. Wade*, but in some.

Recent cases have demonstrated the room for disagreement among the originalist Justices. The Justices might decide a case on a nonconstitutional ground—or even a narrower constitutional ground, when available. For example, in *Seila Law LLC v. Consumer Financial Protection Bureau*, Chief Justice Roberts, writing for the Court, invalidated a statutory provision that prevented the President from removing the head of a single-head agency except for cause.[396] He distinguished *Humphrey's Executor v. United States*,[397] which was the 1930s case upholding the constitutionality of for-cause removal restrictions,[398] as applying only to multimember commissions.[399] He then went on to decide the case on alternative constitutional grounds. The President must be able to remove the head of single-head agencies because the Constitution makes very limited exceptions to the concentration of power in a single official.[400] Justice Thomas, who concurred in the judgment joined by Justice Gorsuch, would have overruled *Humphrey's Executor* and put an end to independent agencies altogether.[401] Even though the originalist Justices agreed on the outcome of the case, their disagreement was large enough to save a significant portion of the administrative state.

A disagreement over original meaning might split the Justices not just in reasoning but in result. In *TransUnion LLC v. Ramirez*,[402] the Court, with Justice Kavanaugh writing for the majority, held that to obtain standing under Article III, a plaintiff must allege a concrete harm, which does not arise when a credit reporting agency maintains in its files misleading credit alerts about the plaintiff that were never disseminated to third-party potential creditors.[403] On this basis, the Court denied standing to 6,332 class members who sued TransUnion under the Fair Credit Reporting Act, and found that only the 1,853 class members whose credit information was released to potential creditors suffered a concrete harm.[404] Justice Thomas dissented, joined by

395. For the general point about the junctures in originalism, see Harry Litman, *Originalism, Divided*, ATLANTIC (May 25, 2021), https://www.theatlantic.com/ideas/archive/2021/05/originalism-meaning/618953/ [https://perma.cc/A7YM-UB6Z].

396. 140 S. Ct. 2183, 2192 (2020).

397. 295 U.S. 602 (1935).

398. *Id.* at 629.

399. *Seila Law*, 140 S. Ct. at 2200.

400. *Id.* at 2203–04.

401. *Id.* at 2211–12, 2218–19 (Thomas, J., concurring in part and dissenting in part).

402. 141 S. Ct. 2190 (2021).

403. *Id.* at 2200.

404. *Id.* at 2207–10.

Justices Breyer, Sotomayor, and Kagan, rejecting the majority's determination that "TransUnion's actions are so insignificant that the Constitution prohibits consumers from vindicating their rights in federal court."[405] On his interpretation, "[t]he Constitution does no such thing."[406] Justice Thomas said that Article III requires plaintiffs to assert "a violation of his or her private rights" under the statute, which the class members in question did.[407]

The Justices might also disagree on the application or even the validity of the Court's interpretive and decisional doctrines. Consider *Seila Law* again and the question of whether the unconstitutional provision was severable from the statute.[408] Chief Justice Roberts, Justice Alito, and Justice Kavanaugh concluded that it was severable from the statute, whereas Justices Thomas and Gorsuch would not have so concluded. In fact, the latter two Justices would have gone so far, in Chief Justice's words, as to "junk our settled severability doctrine and start afresh, even though no party has asked us to do so."[409] The Justices disagreed on whether the provision was severable, which is a matter of great significance for the agency and Congress, as well as their willingness to reach and overrule settled doctrine when no party had asked, which is a matter of disregard for the Court's self-regulatory rules and the stability of the law.

Finally, the Justices might split on textualist statutory interpretation. A surprising example is *Bostock v. Clayton County*.[410] In *Bostock*, Justice Gorsuch wrote a textualist opinion, in which Chief Justice Roberts and three liberal Justices joined, holding that the word "sex" in Title VII's prohibition on employment discrimination "because of . . . sex" extends to sexual orientation and gender identity, affording protection to LGBTQ+ workers.[411]

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405. *Id.* at 2214 (Thomas, J., dissenting).

406. *Id.*

407. *Id.* at 2218.

408. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2207 (2020) ("We directed the parties to brief and argue whether the Director's removal protection was severable from the other provisions of the Dodd-Frank Act that establish the CFPB.").

409. *Id.* at 2210; *see also id.* at 2211 (concluding that the "Director's removal protection [are] severable from the other provisions of Dodd-Frank that establish the CFPB"); *id.* (Thomas, J., concurring in part and dissenting in part) (criticizing the majority for "tak[ing] an aggressive approach on severability by severing a provision when it is not necessary to do so" and dissenting "from the Court's severability analysis").

410. 140 S. Ct. 1731 (2020).

411. *Id.* at 1743. Justice Gorsuch has been abundantly clear about his strict commitment to textualism. *See* NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 132 (2019) ("Textualism honors only what's survived bicameralism and presentment—and not what hasn't. The text of the statute and only the text becomes law. Not a legislator's unexpressed intentions, not nuggets buried in the legislative history, and certainly not a judge's policy preferences."). He has also conceded there is some truth to the criticism "that textualism does not yield determinate answers . . . and that

Both Justice Alito, joined by Justice Thomas, and Justice Kavanaugh dissented, also writing textualist opinions that obviously came out the opposite way.[412] Tara Grove has begun to explore the space that textualism leaves for textualists, which she notes has not been a focus of scholarly attention but should be.[413]

The room for disagreement among originalists and textualists exists in the law only if a case is decided through the cert. and merits process. The normative premise of the self-regulatory rules that create and govern the process is for the Court to take close cases and decide them under conditions that promote the clashing of views and the expression of disagreement. It was not always this way—the rule of unanimity once asked Justices with diverse views to suppress them. Although the modern rules arose to accommodate interpretive pluralism among the Justices, these rules are not irrelevant on a methodologically unified Court. No interpretive methodology is free from differences, if not as to the appropriate tools of interpretation, then as to application. Even accepting the disputed proposition that originalism constrains judicial discretion more than its competitors, it still is not absolute. And, even if there is full agreement on the methodology and its application in a case, independent grounds for decision may arise. Finally—and a main point of this Article—on a code-driven Court, the rules serve an additional legitimating function. They may moderate the pace of change and promote stability.

When she was a law professor, Justice Barrett recognized the importance of constitutional and self-imposed constraints in the face of

meaning is always and ultimately controlled by the interpreter, not the text itself." *Id.* at 135. A different but related point is that textualism cannot provide a "definitive guide" for determining whether a statutory word or phrase is ambiguous, as Justice Kavanaugh has recognized. Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1910 (2017) ("The simple and troubling truth is that there is no definitive guide for determining whether statutory language is clear or ambiguous."). Moreover, Justice Kavanaugh has acknowledged that such determinations pervade the law "[i]n a way that few people realize" and matter "in a huge way in many cases of critical importance to the Nation." *Id.* at 1910, 1913.

412. *See Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting) ("The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous. Even as understood today, the concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity.'"); *id.* at 1824–25 (Kavanaugh, J., dissenting) (arguing that the word "sex" does not plainly mean "sexual orientation," and reasoning that "ordinary meaning, not literal meaning" should guide the Court).

413. *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266–70 (2020) (recognizing "important tensions *within* textualism," teasing out "competing strands" of "flexible" and "formalistic" textualism, and arguing that formalistic textualism best reconciles the tension between the Justices' independence and the political appointment process, which also preserves the Court's legitimacy). *See also* Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 126 (2020) (arguing that *Bostock* demonstrates that textualism contains "outcome-determinative choices about how to interpret statutory text that are framed as methodological but that are typically fueled by substantive extratextual concerns").

originalism and a weak notion of stare decisis. Among them, she highlighted the prohibition on advisory opinions, the standards for granting cert., and the ability to address only the question that the litigants present.[414] The sum of these rules meant that an originalist Court could overrule precedent only through the full process: when a case arose presenting the precise issue, a petition for cert. arrived, the Court granted the petition under its regular standards, and it decided the case on the merits. Then-Professor Barrett and co-author John Nagle also recognized that the Court's "rules of adjudication" kept originalism from presenting a roving threat to superprecedents, such as *Brown v. Board of Education*, which were so incontrovertible that they would never reach the Court for overruling because no one would ever think to challenge them, and the Court would never accept that challenge.[415] They wrote:

> Article III's grant of "the judicial Power" carries with it the inherent authority to adopt rules governing adjudication. This authority empowers the Court to make myriad other, less visible decisions like how certiorari petitions make a "discuss" list, how many votes are necessary for a grant of certiorari, and whether to resolve a case on a constitutional or nonconstitutional ground. The Court could not function without some ability to set ground rules to channel its decision-making process. Again, it would be quite something, and contrary to centuries of history, to insist that a duty to ferret out and rectify constitutional error overrides the doctrines and internal practices that otherwise regulate the Court's decision-making process.[416]

Without making the full connection, the authors are describing self-regulatory rules and then some.[417] The power to adopt the "rules governing adjudication" derives from Article III. The need for them arises because "[t]he Court could not function without some ability to set ground rules to channel its decision-making process."[418] And the obligation to follow the rules that "regulate the Court's decision-making process" does not yield to a "duty to ferret out and rectify constitutional error"—indeed, "it would be

414. Barrett, *supra* note 27, at 1730–33.

415. *See* Barrett & Nagle, *supra* note 5, at 1–3 ("The rules of adjudication, moreover—including the Court's practice of answering only the questions presented in the petition for certiorari—relieve the Court of any obligation to identify and correct any error that may lurk in a case.").

416. *Id.* at 21–22 (footnotes omitted).

417. The authors include among the "rules governing adjudication" what might be understood as a non-normative administrative rule (the operation of the discuss list), a self-regulatory rule (the rule of four), and a decisional rule (choosing a nonconstitutional ground for decision). For distinctions among different types of rules, see *supra* subpart I(A).

418. Barrett & Nagle, *supra* note 5, at 21–22.

quite something, and contrary to centuries of history" if it were the other way around.[419]

Now on the Court, Justice Barrett can be understood to have underscored the rules in a new context, on the shadow docket. Specifically, she said, joined by Justice Kavanaugh, that applicants for emergency relief should not force the Court to provide a "merits preview" in a case that the Court is unlikely to take, citing Rule 10.[420] The Court is not free to convert applications for emergency relief into opportunities to signal their intent to overrule cases, when the Court's own cert. standards would prevent it from reaching the case at this time—or even at all. When a case is the first to present an issue to the Court, there is value in awaiting percolation among the lower courts. The issue might resolve itself without any need for Court intervention. Under such circumstances, a merits preview would amount to an advisory opinion. Just as the prohibition on advisory opinions is a constitutional constraint on roving constitutional error correction, the Court's cert. standards furnish a self-regulatory analogue.

Neither Barrett nor Kavanaugh has understood the rules as equally important in preventing the Court from reaching out to change the law after the Court has granted cert. but before it has decided the case, while the Chief Justice would understand the rules this way. Perhaps they view a grant of cert. as a step closer to changing the law and therefore not a total grab at the issue. But assumptions about how the law will change are premature until, as Vladeck has said, "the merits reach the Court and the Court reaches the merits."[421] Predictions pending litigation are no less of a reach, maybe only shorter lived.

Sometimes respect for the rules is more important than getting it right or getting it right now. On a Code Court, the pace of change and the space for disagreement on the merits matter more than ever. Adherence to the rules will not prevent the Court from overruling progressive precedent. Nor does it mean that Justice Kavanaugh and Justice Barrett—and particularly Chief Justice Roberts—are motivated by consistency and stability rather than an impulse to preserve legitimacy of the Court by joining the liberal Justices when not too damaging to their conservative credibility.[422] In this climate, all

419. *Id.*

420. *See* Does v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring) (noting that consideration of whether an applicant for extraordinary relief is likely to succeed on the merits should be "underst[ood] . . . to encompass not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review," because "[w]ere the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take" without full briefing and oral argument).

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

422. *Cf.* Aaron Blake, *The Conservative Knives Come Out for Brett Kavanaugh*, WASH. POST (Jan. 14, 2021, 4:41 PM), https://www.washingtonpost.com/politics/2022/01/14/conservative-

Justices might appreciate that even if originalism is a legitimate way to interpret the law, the rules help to make the Court a legitimate institution.

Critics of the Court might contend that moderating change is not a worthy goal if it means inviting the majority to gut precedent to within an inch of its life rather than overrule it. Such behavior allows the Court to reach its desired result but avoid the heat of overruling, and deprives political officials of their best evidence in support of legislative Court reform. It is true. Nothing in the rules prevents the Justices from saying one thing and doing another. Perhaps on a Code Court expected to overrule high-stakes precedent, false moderation might be especially obvious and less likely to fool anyone. Attention to that possibility is warranted in every case, no matter the rules.

IV. The End of the Era of Self-Regulation?

If we are seeing the demise of self-regulation, how do we address it? In one sense, the breakdown of the rules might be understood as symptomatic of the overall problem with the Court. The conservative supermajority is inclined to overturn settled precedent through means that are nearly as pernicious as the decisions themselves. Thus, we might address the breakdown of the rules however we address the general problem with the Court—perhaps through large-scale legislative Court reform, such as expanding the number of Justices or imposing term limits on them.

Another approach is to view the breakdown of the rules separately from the Court's substantive decision-making, which opens up the possibility of legislative Court reform that is much more modest than the proposals that have been on the table. Put simply, Congress could engage in Court *regulation* rather than restructuring. There appears to be no real political interest in this sort of modest reform, although the Biden Administration's Presidential Commission on the Supreme Court has offered similar recommendations.[423] Stashed in the back of the 200-plus page December 2021 report, the recommendations received little praise or even attention.[424]

knives-come-out-brett-kavanaugh/ [https://perma.cc/B898-QPNS] (noting conservative attacks on Justice Kavanaugh for joining Chief Justice Roberts and the liberal justices to allow President Biden's vaccine mandate for health-care workers to go forward).

423. *See* PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 38, at 202–26, (including proposals for reason-giving in orders resolving application for emergency relief, clarity on precedential value of emergency orders, automatic or four votes to stay an execution, an ethical code of conduct, and continuation of livestream audio of oral argument).

424. *See* Madeleine Carlisle, *Behind the Scenes of President Biden's Supreme Court Reform Commission*, TIME (Dec. 10, 2021, 4:51 PM), https://time.com/6127632/supreme-court-reform-commission/ [https://perma.cc/C936-WVSG] (noting that "the report, it turned out, made news mostly for its lack of news: the commissioners did not take a position on imposing term limits on [J]ustice[s] or expanding the size of the bench" and noting only parenthetically that "[t]he report does more openly endorse smaller reforms such as a judicial code of ethics").

But Court regulation, this Article suggests, is underappreciated. It might go further toward restoring the Court's legitimacy than we may have thought, and depending on the particulars, it is likely easier for Congress to accomplish. Its time may well come in political circles.

Yet the danger of external Court regulation, from the Justices' perspective, is a scaled-down version of what they fear: the potential for overregulation and politicization of the Court. Perhaps then, we might address the breakdown of the rules by looking to the Justices themselves. Specifically, the Justices might improve their rules to produce some of the transparency, clarity, and consistency that has been lost. They have incentive to do so, or Congress may do it for them one way or another. And if they fail to do so, they will have only themselves to blame for whatever consequences follow. This Part addresses self-help through self-regulation.

A. Transparency, Clarity, and Consistency

At the forefront, the Justices might fortify the self-regulatory rules that protect the need for deliberation and disagreement whenever their interpretive methodologies predict or require a change in the law. They might carefully evaluate the rules for emergency relief to address the pathologies that they have allowed those rules to create. If Rule 10 can be understood as a threshold for the standard of emergency relief, so too is respect for the merits process when an application for emergency relief seeks to block a law that is clearly valid or invalid under existing precedent. The Court should not base decisions about emergency relief on predictions; rather, they must judge these applications based on existing law. The use of emergency orders as precedential also should stop unless the Court is prepared to explain its reasons for issuing or refusing to issue emergency relief in the precedential case and for treating the subsequent case the same. The Court cannot lay claim to treating like cases alike, and certainly cannot expect lower courts to do so, based only on a litigant's assertion that the two cases are alike.

Beyond the specifics of emergency relief, the Justices might take this moment to address more fully the self-regulatory rules governing the Court's discretionary jurisdiction and orders practice. To start, the Justices might agree to write down the voting rules. Publication of these rules will eliminate some mysteries and inconsistencies. Many were misunderstood before a Justice made an off-hand remark in a dissent, book, speech, or interview. In addition to formalizing voting requirements, the Court might clarify ambiguities in these rules by producing more detail, as it has done with Rule 10. For example, the Court appears to understand the rule of four as precluding the five Justices who did not vote to grant from voting to DIG "in the absence of material intervening factors which were not known or fully

appreciated at the time certiorari was granted."[425] The Court might confirm the majority has an obligation to refrain from DIGing a case because it disagreed with the grant. In addition, the Court might clarify the relationship between the rule of four and Rule 10. Rule 10 seems to operate as a rule of easy denials, and the rule of four chooses which among the petitions that have made the discuss list present a question sufficiently compelling to grant. The Justices have an interest in establishing standards that inhibit and quickly dispense with the thousands of petitions that present no issue suitable for the Court's review. Experienced lawyers understand that they must identify a Rule 10 reason for granting cert. and, moreover, lack of a Rule 10 reason to oppose a grant of cert.—all lawyers should understand the same.[426] Identifying the "character of the reasons" for granting cert. together with an unwritten rule of four is not as helpful as a more direct statement might be about how the Court's central rules operate.[427]

Stays of execution raise special concerns. The Rehnquist Court adopted the practice of supplying a courtesy fifth vote to stay an execution when four Justices wished to grant cert, but the Roberts Court may or may not maintain this practice.[428] The Justices might bring this rule in line with the rule of four and clarify issues related to the procedural posture of the case. The Court has no rule regarding the order in which an application for stay and a cert. petition in a capital case are filed, or when four Justices wish for more time to consider whether to grant a cert. petition under the rule of four. The habeas context is unique for many reasons beyond discussion of self-regulation. Nevertheless, clarity and transparency might help to deflect some concerns for arbitrariness that overshadow the Court.

With respect to all the rules, the Justices might publish them not only for clarity and transparency, but for general legitimacy reasons, to confirm that the rules remain a vital source of self-regulation on a methodologically or politically unified Court. This is particularly important for the rules originally oriented around a pluralistic Court. As this Article has argued, these rules continue to serve an important normative purpose, albeit a different one than before. They might moderate the pace of change and protect precedent, at least for a while. Once the rule of four brought more cases to the Court than the majority desired; now the conservative majority

425. SHAPIRO ET AL., *supra* note 72, at 5-16 (internal quotation marks omitted); *see also supra* section I(B)(1).

426. *See, e.g.*, Bishop, *supra* note 165 at 31–32 (advising counsel to recognize Rule 10's "well-established categories"). Perhaps as a result, the Court has been more likely to grant a petition for cert. when the name of an experienced lawyer or the United States Solicitor General is on the brief. *Cf.* Feldman & Kappner, *supra* note 154, at 797 & n.14 (collecting sources showing that experienced lawyers, including the U.S. Solicitor General, make a difference to whether cert. is granted).

427. *See* SUP. CT. R. 10 (outlining what factors the Court may consider when granting cert.).

428. *See supra* notes 103–106 and accompanying text.

can do what it wants in politically charged cases, take them or leave them, and no predictable four-member minority exists to change that result. But the rule still has important restraining and legitimating effect in those cases when it can be seen that not even four Justices are willing to take a case, at least not yet. And, of course, the rule functions as it always has for the large number of routine cases that dominate the docket, as to which the alignment of the Justices does not always fall along political lines. Reinforcing the rules signals an intent to abide by them.

Some rules that remain vitally important cannot be sufficiently reinforced only by clarification and publication. The voting rule for reargument is not well-adapted for an originalist supermajority. The rule allows the Court to add an issue to a case upon the vote of five Justices, including one vote from the conference majority. As we have seen, the structure of this rule does not prevent the Court from using reargument to reach out for and overrule precedent.[429] This is one of the rules that will determine whether we have a Code Court worth respecting or not. A Court without a strong rule against adding issues sua sponte risks the perception that it is not a Court at all but a straight-up political institution.[430] We must rely on the Justices' good-faith cooperation as to this norm.

The rule of summary reversals is another rule that depends upon the Justices' good-faith cooperation. That rule requires six votes, and we lack assurance that the Court will not use it to avoid the full merits process. The rule has been understood to arise when lower courts have clearly and willfully misapplied the Court's decisions or disregarded the Court's instructions. Formalizing limitations may help with clarity and transparency, but it will not prevent the Court from singling out certain judges, litigants (e.g., death row inmates), or issues for summary treatment.

Although this Article has focused on the major self-regulatory rules, the Court might also speak up about largely unknown rules. For example, Daniel Epps and Ganesh Sitaraman have noted that the Court has not articulated a rule for how it selects amicus curiae to handle "orphaned arguments."[431] These assignments, which provide valuable experience for young lawyers, have typically gone to former law clerks, who start with a natural advantage in their legal careers.[432] Another example concerns the status of slip opinions

429. *See supra* subsection I(B)(3)(a).

430. EPSTEIN & KNIGHT, *supra* note 1, at 161.

431. Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398, 411 & n.67 (2021) (citing Katherine Shaw, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 CORNELL L. REV. 1533, 1556–57 (2016)).

432. Epps & Sitaraman, *supra* note 431, at 411. Furthermore, law clerks have tended to come from only a few elite law schools. Kimberly Strawbridge Robinson, *Harvard–Yale Duopoly on Clerks Doesn't Fit Barrett's Background*, BLOOMBERG LAW (Oct. 27, 2020, 11:03 AM),

and the correction of errors in written opinions. Richard Lazarus has argued that the Court should consider issuing rules regarding the (un)official status of slip opinions and procedures for addressing errors of its own making in opinions.[433] These rules may not raise issues of the magnitude of the major ones, but maintaining secret rules is no way to operate a Court.

Finally, the Justices might be forthcoming about the Court's relationship with the Solicitor General. Although there is no rule for the relationship, the CVSG reflects the Court's historical regard for the SG as the Tenth Justice. But the Court has been inconsistent in treatment of the SG across the orders docket. It bent the rules for the SG who drove the shadow docket to its present state and has showed disdain for the SG from the opposite political party when she attempted a similar strategy.[434] It has not only denied the Biden Administration's applications for emergency relief but, more telling of the SG's declining status as the Tenth Justice, there has been an uptick in denials of the SG's requests for leave to file a brief and argue as amicus in merits cases.[435] The Court is free to treat the SG as an ordinary litigant rather than an officer of the law. The reality is that the SG may be less helpful to the Justices unless sharing their interpretive methodologies. Of course, the SG's own behavior is relevant, too.[436] But the

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https://news.bloomberglaw.com/us-law-week/harvard-yale-duopoly-on-clerks-doesnt-fit-barretts-background [https://perma.cc/KZ96-NEAB] (noting dominance of Harvard and Yale and speculating that Justice Barrett will join Justice Thomas in hiring from a broader range of law schools). Even if Justice Barrett succeeds in expanding the number of "feeder" law schools, there is concern that conservative Justices might rely on a narrow network of "feeder judges" and other connections. *See* Adam Liptak, *A Conservative Group's Closed-Door 'Training' of Judicial Clerks Draws Concern*, N.Y. TIMES (Oct. 18, 2018), https://www.nytimes.com/2018/10/18/us/politics/heritage-foundation-clerks-judges-training.html [https://perma.cc/H4EB-8BAM] (describing the Heritage Foundation's legal bootcamp that sought to prepare participants for Supreme Court clerkships); Lawrence Baum, *Hiring Supreme Court Law Clerks: Probing the Ideological Linkage Between Judges and Justices*, 98 MARQ. L. REV. 333, 335 (2014) (examining whether Justices choose law clerks based on the ideology of the lower court judge for whom the applicant previously clerked).

433. *See* Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 618–22 (2014) (proposing possible reforms to address how the Court can "improve its existing procedures for revising its opinions following their initial publication").

434. *See supra* subsection II(B)(2)(b).

435. *See supra* note 318; *see also* Darcy Covert & Annie J. Wang, *The Loudest Voice at the Supreme Court: The Solicitor General's Dominance of Amicus Oral Argument*, 74 VAND. L. REV. 681, 684–86 (2021) (arguing that allowing the SG to frequently participate in oral argument systematically skews the range of perspectives before the Court).

436. At the beginning of President Biden's term, the SG "confessed error" in a case that the Trump Administration had fully briefed and took the other side or refused to defend a federal law. The SG lost 9–0 in *Terry v. United States*, 141 S. Ct. 1858 (2021). The SG went on to flip-flop four more times and lost all of them. *See* Kimberly Strawbridge Robinson, *'Tenth Justice' Nominee Prelogar Defends High Court Flip Flops*, BLOOMBERG LAW (Sept. 14, 2021, 12:44 PM), https://news.bloomberglaw.com/us-law-week/tenth-Justice-nominee-prelogar-defends-high-court-flip-flops [https://perma.cc/46ZU-S6UX] (noting that the Solicitor General under President Biden

Court should be prepared to accept any norm shift with respect to the SG regardless of which party holds the White House.

B. Professionalism

The changes in the culture of the Court are additional issues affecting the legitimacy of the Court that the Justices might handle for themselves through new formal rules or express understandings. For instance, the Justices might take the opportunity to address their professional conduct by promulgating ethics rules comparable to the ones that apply to lower court judges and formalizing the rules that it already holds itself to, like recusal rules, which have been a source of controversy.[437] The Court does not need external rules to resist multimillion-dollar book deals and high speaking fees that might create conflicts of interest, much as those fees might compensate for a lifetime commitment to a judicial salary.

As for the other behaviors, there is good news and bad news. Live audio of oral argument is a step toward transparency that has worked for Justices on an emergency basis without chilling their participation or devolving into performance theatre, as many worried cameras in the courtroom would.[438] Live audio offers the public a window on the process that few otherwise

switched positions on five pending cases within two months); Kimberly Strawbridge Robinson, *Biden on Pace to Flip Positions at Supreme Court More Than Trump*, BLOOMBERG LAW (March 18, 2021, 3:45 AM), https://news.bloomberglaw.com/us-law-week/biden-on-pace-to-flip-positions-at-supreme-court-more-than-trump [https://perma.cc/V5H2-4JNK] (noting that the Biden Administration is on pace to reverse more Government positions before the Court than the Trump Administration).

437. *See* Timothy L. O'Brien, Opinion, *Supreme Court's Ethics Problems Are Bigger than Amy Coney Barrett*, CHI. TRIB. (May 4, 2021, 4:28 PM), https://www.chicagotribune.com/opinion/commentary/ct-opinion-supreme-court-ethics-book-deal-obrien-20210504-ulzr7azb3zc5bddv6mrf3xcjzy-story.html [https://perma.cc/EXE8-GWVG] (noting that justices have faced criticism and questions for partisan conduct and other potential conflicts of interest). The range of ethical issues might be far reaching. For example, Epps and Sitaraman have argued that self-generated ethical rules might encompass "the independent powers of the Chief Justice," such as "the power to designate federal judges to serve on the Foreign Intelligence Surveillance Court," which Chief Justice Roberts had exercised to pick almost exclusively Republican-appointed judges. Epps & Sitaraman, *supra* note 431, at 410–11.

438. *See* Jordan S. Rubin & Kimberly Strawbridge Robinson, *Supreme Court Faces Transparency Test After Livestream Success*, BLOOMBERG LAW (June 5, 2020, 3:50 AM), https://news.bloomberglaw.com/us-law-week/supreme-court-faces-transparency-test-after-livestream-success [https://perma.cc/E6NS-9ZP2] (emphasizing that concerns about livestreaming oral argument were ultimately not an issue); Edith Roberts, *Courtroom Access: Legislative Efforts to Allow Cameras in Supreme Court Chamber*, SCOTUSBLOG (Apr. 27, 2020, 10:52 AM), https://www.scotusblog.com/2020/04/courtroom-access-legislative-efforts-to-allow-cameras-in-supreme-court-chamber/ [https://perma.cc/WN63-F78D] (discussing history of the debate and legislative efforts concerning cameras in the courtroom).

would have, and the Court might make it a permanent feature.[439] But internal leaks about the current business of the Court tends to undermine its legitimacy, even if some of the information portrays certain Justices, especially Chief Justice Roberts, in a positive light rather than a mainly negative one. Although some might argue that selective leaks promote transparency, regularized breaches, particularly in high-profile cases, are more likely to distort the decision-making process and the perception of the Court. Serious leaks did not occur for almost twenty years after *The Brethren*, an investigative book that purportedly relied on anonymous interviews with five Justices, was published.[440] In this climate, leakers have an obligation to carefully consider whether the information they reveal to reporters, for whatever salutary purpose they might intend, will jeopardize the very authority of the Court to which they have pledged their loyalty.[441]

Speeches and interviews defending the independence of the Court have made the Justices visible but have not improved transparency of decision-making beyond the selective rule-reveals about the orders docket. Moreover, they have reinforced the view of the Justices as politically motived or hopelessly naïve. Talk has not built public trust, which offers another reason why the Justices might seek other ways to do so.

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The upshot is that the Court has within its control a modest means of self-help through its self-regulatory rules. Efforts to strengthen, clarify, and expand its rules may help to promote stability, establish regularity, and improve judicial conduct. The Court is not solely responsible for how it got to this place in which its structure and authority are on the line—nor can it fix the problem simply by adjusting its rules. But the Justices are responsible for the lapse in regulation, and that they can address and see how much it accomplishes.

Conclusion

The Court's self-regulatory rules are shared agreements among the Justices about how to exercise the judicial power. They pick up where Article III leaves off, determining the operation and nature of the Court. They

439. *See Poll: 83% of Americans Support SCOTUS's Decision to Livestream; 70% Want to Keep Live Audio Post-Pandemic*, FIX THE CT. (May 20, 2020), https://fixthecourt.com/2020/05/83-americans-support-recent-scotus-livestreaming-70-want-keep/ [https://perma.cc/EMQ8-S545] (noting that 83% of Americans support the Court providing live audio of oral arguments to the public).

440. *See* Feldman, *supra* note 340 (discussing the cultural norm against leaking that followed the publication of *The Brethren* and noting "[t]hat book was the low point for the court's leaking").

441. *Cf.* David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosure of Information*, 172 HARV. L. REV. 512, 515–18 (2013) (examining the practice of executive branch leaks and arguing for an accommodative understanding).

can change, and they have in the past. Each time they change, the nature of the Court changes, too.

With the new conservative supermajority, the Court's self-regulatory rules are shifting and breaking down. Stare decisis is at its weakest because originalist Justices perceive their obligation to follow constitutional and statutory text as taking priority over their obligation to follow prior precedent. As a result, we are moving away from our familiar form of a common-law Court, in which precedent constrains decision-making, to a new form of a Code Court, in which the text of the relevant law controls. But a significant question has arisen whether the Justices' obligation to the text will supersede their commitment to the *other* self-regulatory rules that can be understood collectively to direct changes in the law to the merits process. The originalist Justices have discharged their obligation to the text hastily and prematurely, changing the law, at least preliminary, in response to applications for emergency relief on the shadow docket before they have decided a case on the merits. Three Justices would speculate about changes in the law in response to an application for emergency relief even if the Court is unlikely to take the case, though the rest of the Court halted that practice.

The Justices have choices about how to exercise the judicial power that exist separate from their interpretive methodologies (and their political parties). They can abide by the Court's self-regulatory rules in whole (a rule-conforming model), as Chief Justice Roberts seems inclined to do; in part (a rule-respecting model), as Justice Kavanaugh and Justice Barrett seem to favor; or only when not interfering with their dedication to swiftly reset the law outside the full merits process (a rule-disregarding model), as Justice Thomas, Justice Alito, and Justice Gorsuch seem to prefer. Which model ultimately prevails will affect the nature of the Court and its legitimacy. The rules are more important than ever to moderate the pace of change and promote legal stability.

If the Justices continue to make choices that the public rejects, they might expect to see external legislative Court reform. Such reform does not have to come in the form of large-scale restructuring. It might take the shape of more modest regulation that has been underappreciated. The Justices have incentive to be proactive, whether to avoid overregulation or the appearance of politicization. They might engage in a revival of self-regulation that starts with the rules for emergency relief, continues through the other rules that are vulnerable in the face of originalism, textualism, and a weak notion of stare decisis, and extends to new rules addressing professional issues of their own making. This time, the Justices should formalize their shared agreements to the extent possible in the Supreme Court Rules, so there can be no question or confusion about where they stand.

Modest steps may only produce modest differences. These self-regulatory efforts will not prevent the Court from undoing or gutting progressive precedent. But they may help to balance out some decisions. As Justice Scalia observed long ago, and as we have seen in recent days, there is room within originalism and textualism for the Justices to disagree with each other and produce surprising results.