TUESDAY, DECEMBER 5, 2023

TEXAS
The University of Texas at Austin

THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS...

University of Wisconsin Retirement Association
Madison, WI

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INTRO: WHAT *IS* THE "SHADOW DOCKET"?

"Democrats are fond of concocting ominous terms like 'dark money' and 'shadow docket.'"

— **Sen. Ted Cruz** (R-Tex.), Sept. 29, 2021

Work at the Supreme Court is divided into two main categories. One is deciding the cases it hears on the merits: the 70-some cases each year that the court selects for extensive briefing, oral argument and a substantial written opinion, sometimes with dissents. These are the cases we hear about in the news.

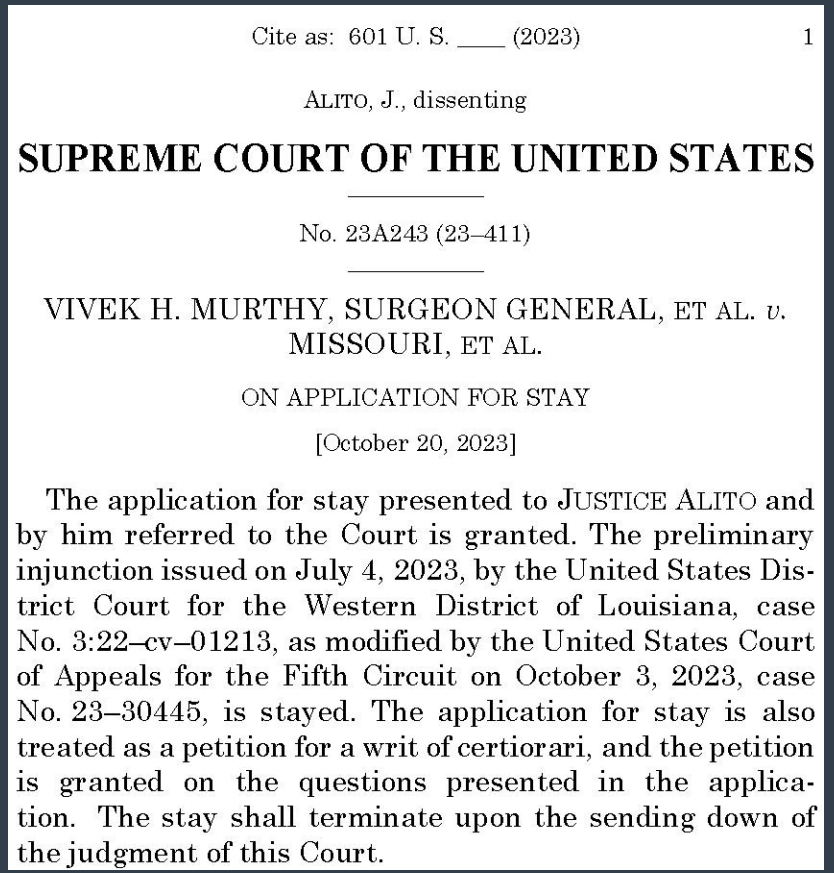
The orders docket includes nearly everything else the court must decide — which cases to hear, procedural matters in pending cases, and whether to grant a stay or injunction that pauses legal proceedings temporarily. There are no oral arguments in these cases and, as in Mr. Warner's situation, they are often decided with no explanation.

This docket operates in such obscurity that I call it the "shadow docket." (I was a law clerk for Chief Justice John G. Roberts Jr. in 2008-9, but these views are solely mine.)

— **Will Baude**, *The Supreme Court's Secret Decisions*, N.Y. Times, Feb. 3, 2015, at A23

INTRO: WHAT *IS* THE "SHADOW DOCKET"?

- Many (if not most) discussions about the Supreme Court tend to focus on the 60ish "merits" decisions the Court hands down each year—lengthy, signed opinions months after oral argument.
- But the overwhelming majority of the Supreme Court's decisions are unsigned and unexplained.
- And many of those can have pretty significant—and immediate—effects.



Cite as: 601 U. S. ____ (2023) 1

ALITO, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 23A243 (23–411)

VIVEK H. MURTHY, SURGEON GENERAL, ET AL. *v.* MISSOURI, ET AL.

ON APPLICATION FOR STAY

[October 20, 2023]

The application for stay presented to JUSTICE ALITO and by him referred to the Court is granted. The preliminary injunction issued on July 4, 2023, by the United States District Court for the Western District of Louisiana, case No. 3:22–cv–01213, as modified by the United States Court of Appeals for the Fifth Circuit on October 3, 2023, case No. 23–30445, is stayed. The application for stay is also treated as a petition for a writ of certiorari, and the petition is granted on the questions presented in the application. The stay shall terminate upon the sending down of the judgment of this Court.

INTRO: WHAT *IS* THE "SHADOW DOCKET"?

During OT2022, unsigned orders:

- Froze the Purdue Pharma bankruptcy reorganization plan;
- Cleared the way for construction of the Mountain Valley Pipeline;
- Preserved nationwide access to mifepristone after lower-court rulings would have curtailed it;
- Kept the "Title 42" immigration policy in effect at the request of 19 red states even though lower courts concluded it was unlawful and the Biden administration had tried to rescind it; and
- Vacated a lower-court stay of an Alabama execution.

INTRO: WHAT *IS* THE "SHADOW DOCKET"?

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. I respectfully dissent.

— *Whole Women's Health* v. *Jackson*, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting)

"[T]he 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**."

INTRO: WHAT *IS* THE "SHADOW DOCKET"?

Today's decision is one more in a disconcertingly long line of cases in which this Court uses its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument. Here, the District Court applied established legal principles to an extensive evidentiary record. Its reasoning was careful—indeed, exhaustive—and justified in every respect. To reverse that decision requires upsetting the way Section 2 plaintiffs have for decades—and in line with our caselaw—proved vote-dilution claims. That is a serious matter, which cannot properly occur without thorough consideration. Yet today

— *Merrill* v. *Milligan*, 142 S. Ct. 879, 889 (2022) (Kagan, J., dissenting); *id.* at 879 (Kavanaugh, J. concurring) →

← Justice Kagan returned to this theme in February 2022 in the Alabama redistricting cases, provoking a rebuke from Justice Kavanaugh:

The principal dissent's catchy but worn-out rhetoric about the "shadow docket" is similarly off target. The stay will allow this Court to decide the merits in an orderly fashion—after full briefing, oral argument, and our usual extensive internal deliberations—and ensure that we do *not* have to decide the merits on the emergency docket. To reiterate: The Court's stay order is not a decision on the merits.

INTRO: WHAT *IS* THE "SHADOW DOCKET"?

"Recently, the catchy and sinister term 'shadow docket' has been used to portray the Court as having been captured by a dangerous cabal that resorts to sneaky and improper methods to get its ways. **This portrayal feeds unprecedented efforts to intimidate the Court or damage it as an independent institution**."

— **Justice Samuel Alito**, Sept. 30, 2021

INTRO: WHAT *IS* THE "SHADOW DOCKET"?

- Terminology aside (we can call it the "banana docket"!), the debate over the shadow docket has two distinct vectors:

1. Is the Supreme Court's recent (post-2017) behavior on the shadow docket **materially** different from its *prior* behavior on the shadow docket?

2. If so, is that behavior legally/normatively problematic?

- My goal this evening is to demonstrate that the answer to both questions is an unequivocal "**yes**."

I. IS THE COURT'S BEHAVIOR NEW?

"What [Democrats are] calling a 'shadow docket' is the ordinary operation of every court that's been in existence since the ratification of our Constitution, whether a District Court or court of appeals or the United States Supreme Court . . . ."

— **Sen. Ted Cruz** (R-Tex.), Sept. 29, 2021

"Why has what is formally known as the 'orders list' become a lightning rod? The short answer is that the Supreme Court has moved in a conservative direction, so Democrats and the legal establishment have ramped up the volume on their criticism."

— Editorial, ***The "Shadow Docket" Diversion***, Wall St. J., Oct. 2, 2021

I. IS THE COURT'S BEHAVIOR NEW?

- Pre-1980: Almost always handled by individual Justices acting "in chambers" as proxy for full Court, often with argument and a written opinion. Maybe 1-2 significant cases each Term.
- 1980s: After reinstitution of the death penalty (and emergency litigation provoked by the post-1976 rules), Court moved toward en banc resolutions of all divisive emergency applications, but with no argument and infrequent (at best) majority opinions.
- But: Most of the en banc Court's (limited) work was w/r/t the death penalty. It was rare, into the 2010s, for rulings on emergency applications to produce broader legal or practical impacts.

I. IS THE COURT'S BEHAVIOR NEW?

Grants of emergency relief:

- OT2005–OT2012:
  39 grants (4.9 per Term)
- OT2013–OT2017:
  51 grants (10.2 per Term)
- OT2018–OT2020:
  54 grants (18 per Term)

– Data from my written testimony to the Senate Judiciary Committee, Sept. 29, 2021

Table 1. Total Grants of Emergency Relief by Supreme Court Term (OT2005–Present)[16]

Term	Grant Stay	Vacate Stay	Grant Injunction	Vacate Injunction	Total
OT2020[17]	7	5	7	1	**20**
OT2019	15	4	0	1	**19**
OT2018	12	3	0	0	**15**
OT2017	9	0	0	0	**9**
OT2016	10	1	0	0	**11**
OT2015	11	1	1	0	**13**
OT2014	7	2	1	0	**10**
OT2013	4	2	2	0	**8**
OT2012	1	0	0	0	**1**
OT2011	6	0	0	0	**6**
OT2010	6	0	0	0	**6**
OT2009	3	1	0	0	**4**
OT2008	8	0	0	0	**8**
OT2007	7	0	0	0	**7**
OT2006	1	0	0	0	**1**
OT2005	6	0	0	0	**6**

I. IS THE COURT'S BEHAVIOR NEW?

The Trump-era uptick in DOJ requests for emergency relief:

- **Bush / Obama:**

8 applications for emergency relief;

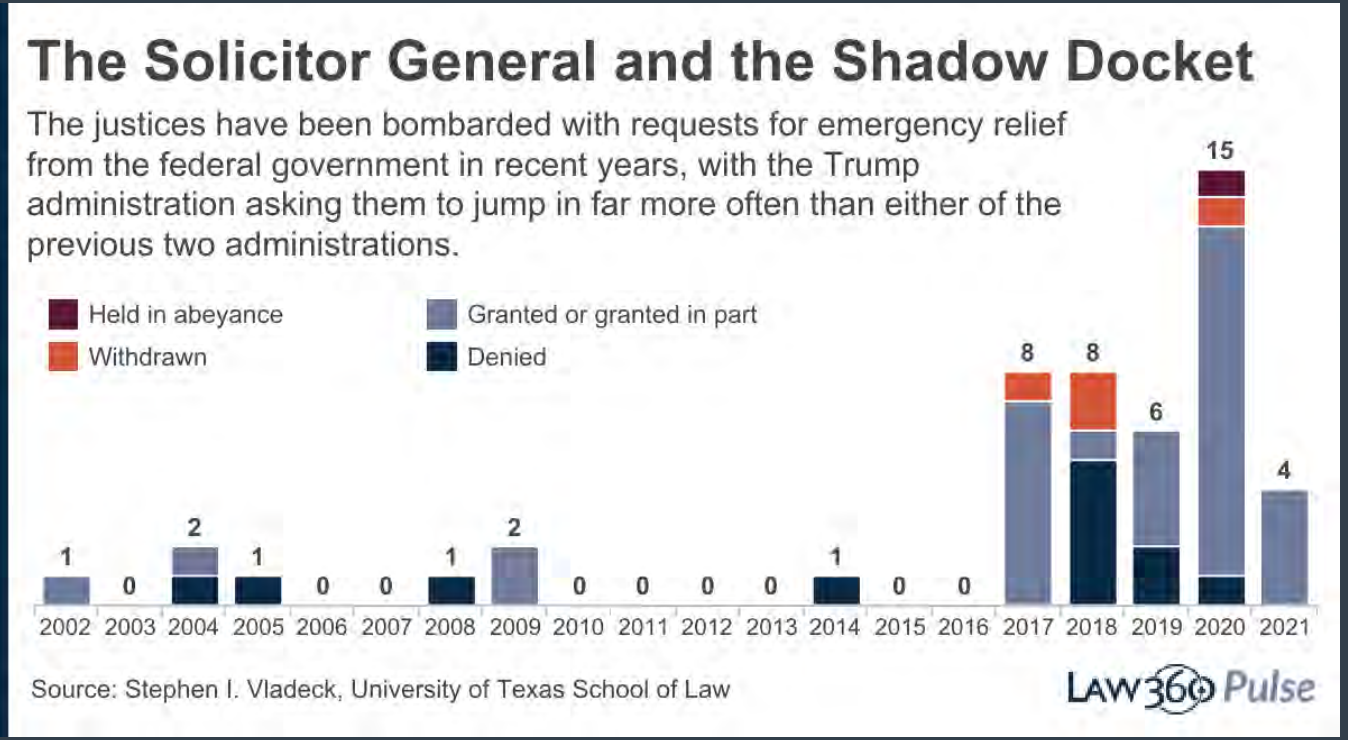
4 grants.

- **Trump:**

41 applications;

28 grants

- **Biden:** 6 for 11



I. IS THE COURT'S BEHAVIOR NEW?

Grants of emergency relief:

The point is not (solely) about the increased **total** of grants; there are three other important shifts **within** these grants:

1. More stays of district-court injunctions, specifically, which have allowed policies that both district courts **and** circuit courts had ruled to be **unlawful** to go back into effect
2. More emergency injunctions directly against state officers
3. More (and more homogenously ideological) public dissents

I. IS THE COURT'S BEHAVIOR NEW?

Staying district court injunctions, with no (or little) rationale:

SUPREME COURT OF THE UNITED STATES

No. 19A785

DEPARTMENT OF HOMELAND SECURITY, ET AL. *v.* NEW YORK, ET AL.

ON APPLICATION FOR STAY

[January 27, 2020]

The application for stay presented to JUSTICE GINSBURG and by her referred to the Court is granted, and the District Court's October 11, 2019 orders granting a preliminary injunction are stayed pending disposition of the Government's appeal in the United States Court of Appeals for the Second Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN would deny the application.

SUPREME COURT OF THE UNITED STATES

No. 19A230

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL. *v.* EAST BAY SANCTUARY COVENANT, ET AL.

ON APPLICATION FOR STAY

[September 11, 2019]

The application for stay presented to JUSTICE KAGAN and by her referred to the Court is granted. The district court's July 24, 2019 order granting a preliminary injunction and September 9, 2019 order restoring the nationwide scope of the injunction are stayed in full pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting from grant of stay.

I. IS THE COURT'S BEHAVIOR NEW?

What the applicant would require in order to achieve the substantive relief that it seeks is an original writ of injunction, pursuant to the All Writs Act, 28 U. S. C. § 1651(a), and this Court's Rule 44.1, against full-power operation of the powerplant. A Circuit Justice's issuance of such a writ—which, unlike a § 2101(f) stay, does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts—demands a significantly higher justification than that described in the § 2101(f) stay cases cited by the applicant, *e. g.*, *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (BRENNAN, J., in chambers). The Circuit Justice's injunctive power is to be used "'sparingly and only in the most critical and exigent circumstances,'" *Fishman* v. *Schaffer*, 429 U. S. 1325, 1326 (1976) (MARSHALL, J., in chambers) (quoting *Williams* v. *Rhodes*, 89 S. Ct. 1, 2, 21 L. Ed. 2d 69, 70 (1968) (Stewart, J., in chambers)), and only where the legal rights at issue are "indisputably clear," *Communist Party of Indiana* v. *Whitcomb*, 409 U. S. 1235 (1972) (REHNQUIST, J., in chambers).

"Emergency" writs of injunction:

Rarest form of relief because of both their source and their effect; from OT2005–OT2019, the Court issued a **total** of 4.

In OT2020 alone, there were 7. Four were 5-4; three were 6-3.

– *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (Circuit Justice Scalia 1986)

I. IS THE COURT'S BEHAVIOR NEW?

More (and more homogenously ideological) dissents:

Total orders per term with (public) dissents from 3+ Justices:

- OT2014: 10 (6 re: Missouri executions)
- OT2015: 8 (5 re: Clean Power Plan)
- OT2016: 8
- OT2017: 5
- OT2018: 11
- OT2019: 14
- OT2020: 29 (not a typo)

I. IS THE COURT'S BEHAVIOR NEW?

More (and more homogenously ideological) dissents:

- Of 68 total orders during OT2020 from which at least one Justice publicly dissented, there wasn't **one** in which a Justice to the left of Chief Justice Roberts joined a Justice to his right.
- In Justice Kennedy's last Term (OT2017), there were 2 shadow docket rulings with four public dissents. In OT2018 and OT2019, there were 20. And even in OT2020, the first without Justice Ginsburg, there were 6 such shadow docket rulings (versus 8 5-4 splits, incl. strange bedfellows, on merits docket).

I. IS THE COURT'S BEHAVIOR NEW?

We've also started to see new **forms** of emergency relief, such as treating applications for injunctions as summary "GVRs" – **before** courts of appeals have had a chance to rule. OT2020 saw the first **4** of these rulings ... ever.

– *Gish* v. *Newsom*, 141 S. Ct. 1290 (2021) (mem.)

(ORDER LIST: 592 U.S.)

MONDAY, FEBRUARY 8, 2021

ORDER IN PENDING CASE

20A120 GISH, WENDY, ET AL. V. NEWSOM, GOV. OF CA, ET AL.

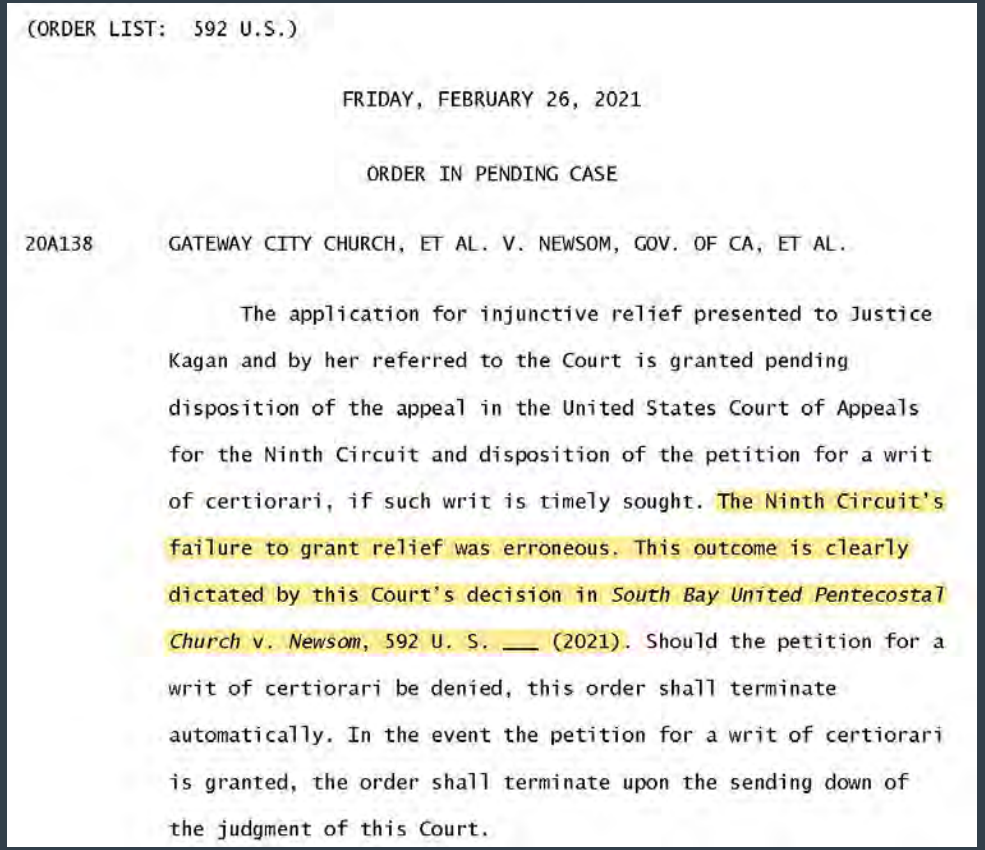
The application for injunctive relief, presented to Justice Kagan and by her referred to the Court, is treated as a petition for a writ of certiorari before judgment, and the petition is granted. The December 11, 2020 order of the United States District Court for the Central District of California is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit with instructions to remand to the District Court for further consideration in light of *South Bay United Pentecostal Church* v. *Newsom*, 592 U. S. ___ (2021).

I. IS THE COURT'S BEHAVIOR NEW?

And the Court's treating some of these orders as precedents:

It used to be axiomatic that summary rulings, **especially** those with no opinion of the Court, had no precedential effect. Now, the Court is saying exactly the opposite:

— *See, e.g.*, *Gateway City Church* v. *Newsom*, 141 S. Ct. 1460 (2021) (mem.)



(ORDER LIST: 592 U.S.)

FRIDAY, FEBRUARY 26, 2021

ORDER IN PENDING CASE

20A138 GATEWAY CITY CHURCH, ET AL. V. NEWSOM, GOV. OF CA, ET AL.

The application for injunctive relief presented to Justice Kagan and by her referred to the Court is granted pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought. The Ninth Circuit's failure to grant relief was erroneous. This outcome is clearly dictated by this Court's decision in *South Bay United Pentecostal Church* v. *Newsom*, 592 U. S. ___ (2021). Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

I. IS THE COURT'S BEHAVIOR NEW?

SUPREME COURT OF THE UNITED STATES

No. 20A151

RITESH TANDON, ET AL. *v.* GAVIN NEWSOM, GOVERNOR OF CALIFORNIA, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[April 9, 2021]

PER CURIAM.

The application for injunctive relief presented to JUSTICE KAGAN and by her referred to the Court is granted pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

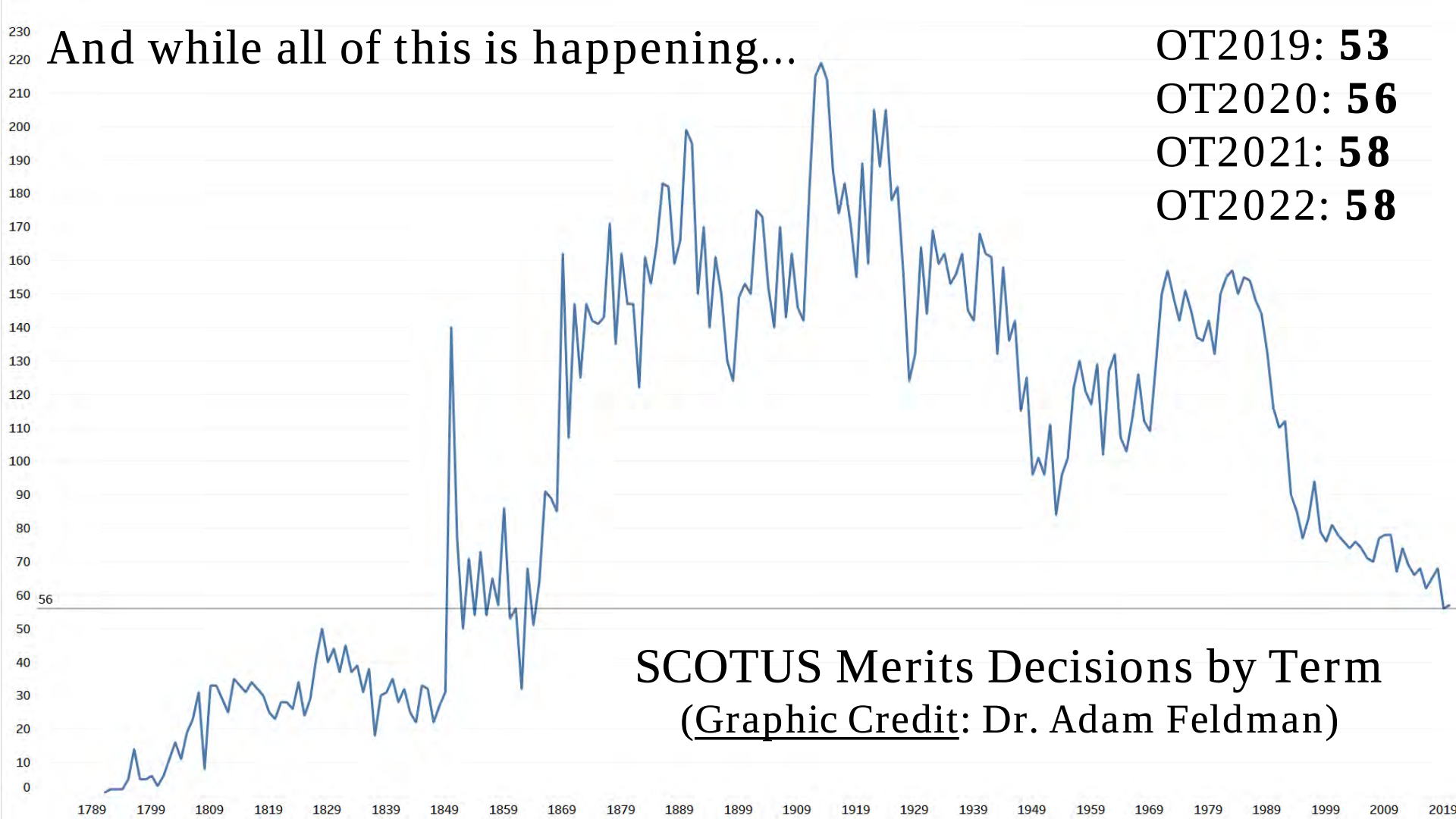
* * *

The Ninth Circuit's failure to grant an injunction pending appeal was erroneous. This Court's decisions have made the following points clear.

Nor is this a one-off. In *Tandon*, the 5-4 majority relied on prior shadow docket "decisions" (including **concurrences**) to grant relief – and again reprimanded the Ninth Circuit for **not** treating prior unexplained orders as precedential.

> This is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise. See *Harvest Rock Church* v. *Newsom*, 592 U. S. ___ (2020); *South Bay*, 592 U. S. ___; *Gish* v. *Newsom*, 592 U. S. ___ (2021); *Gateway City*, 592 U. S. ___. It is unsurprising that such litigants are entitled to relief. California's Blueprint System contains myriad ex-

– *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296, 1297–98 (2021) (per curiam)


And while all of this is happening...
OT2019: 53
OT2020: 56
OT2021: 58
OT2022: 58
56
SCOTUS Merits Decisions by Term
(Graphic Credit: Dr. Adam Feldman)

I. IS THE COURT'S BEHAVIOR NEW?

"What [Democrats are] calling a 'shadow docket' is the ordinary operation of every court that's been in existence since the ratification of our Constitution, whether a District Court or court of appeals or the United States Supreme Court . . . ."

— **Sen. Ted Cruz** (R-Tex.), Sept. 29, 2021

"Why has what is formally known as the 'orders list' become a lightning rod? The short answer is that the Supreme Court has moved in a conservative direction, so Democrats and the legal establishment have ramped up the volume on their criticism."

— Editorial, ***The "Shadow Docket" Diversion***, Wall St. J., Oct. 2, 2021

II. IS THE COURT'S BEHAVIOR BAD?

Okay, but what's the problem? I believe there are **four**:

1. We've already seen that, even when the Court changes the status quo, it's usually not explaining **why**; and
2. We've also seen how it's insisting that **unexplained** orders can be precedents lower courts must "follow."
3. Also, many grants have been in (unacknowledged) defiance of procedural / jurisdictional constraints; and
4. This new behavior has been materially **inconsistent**.

II. INJUNCTIONS IN DEFIANCE…

1. In *Roman Catholic Diocese*, five Justices voted to grant an emergency writ of injunction ("right to relief must be indisputably clear") to block New York COVID restrictions that were not **even in effect** at that time.
2. In *Tandon*, those same five Justices voted to grant an emergency writ of injunction based upon a **new** understanding of the Free Exercise Clause (the "most-favored nation" theory).

- Even Chief Justice Roberts dissented from both rulings.

II. STAYS IN DEFIANCE…

1. In *Louisiana* v. *American Rivers* (2022), five Justices voted to grant a stay of an injunction that had been in effect for five months even though the applicants had shown **no** irreparable harm during that period (a necessary predicate for a stay under 28 U.S.C. § 2101(f)).

Kagan, J., dissenting: "That renders the Court's emergency docket not for emergencies at all. The docket becomes only another place for merits determinations—except made without full briefing and argument."

II. STAYS IN DEFIANCE…

2. *NFIB v. Dep't of Labor*: "We are told by the States and the employers that OSHA's mandate will force them to incur billions of dollars in unrecoverable compliance costs and will cause hundreds of thousands of employees to leave their jobs. For its part, the Federal Government says that the mandate will save over 6,500 lives and prevent hundreds of thousands of hospitalizations. **It is not our role to weigh such tradeoffs**. In our system of government, that is the responsibility of those chosen by the people through democratic processes."

II. INCONSISTENCY

Professor Baude's (new) descriptive claim:

"The Court is now much more committed to law at the expense of politics than [at] any time in our memory. . . . [That] makes them more willing to . . . **disregard procedural rules** because [they] have a lower status than the fundamental law that the Court feels obliged to uphold." (HLS, 9/19/2022)

II. INCONSISTENCY

It would be one (deeply problematic) thing if the Justices were *consistently* disregarding "lower status" procedural rules. But:

1. The same Justices defying those constraints to grant relief in the COVID cases have defended their *refusal* to grant relief in some cases (like last September's ruling in the SB8 case) by invoking the *same* procedural constraints.
2. And there's the (hitherto unexplained) different treatment of nationwide injunctions against Trump policies (which were regularly stayed) vs. Biden policies (so far, **not**).

II. INCONSISTENCY

- It's not just the Trump/Biden distinction; the majority's inconsistent fealty to procedural/jurisdictional constraints just so happens to regularly cash out in favor of Republican state policies (or Republican objections to Democratic ones)—and against Democratic state policies (or Democratic objections to Republican one). Simply put, the Justices aren't **changing** the rules; they're just applying them **selectively**.
- This has been an especial problem, as Professor Wilfred Codrington (and others) has pointed out, in election cases.

III. TYING THINGS TOGETHER

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. I respectfully dissent.

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"[T]he 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**."

III. TYING THINGS TOGETHER

- In other words, what makes the dramatic uptick in the Court's use of the shadow docket in recent years so problematic—"impossible to defend," in Justice Kagan's words—is **that** it is both unreasoned **and** inconsistent.
- And that's where the legitimacy concerns come in. It's not that the Court has an obligation to explain **every** decision it makes; it's that principled justifications are the best **defense** against growing charges of partisanship.

III. TYING THINGS TOGETHER

The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.

The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite

"[S]uch a decision without principled justification would be **no judicial act at all**."

— *Planned Parenthood of S.E. Pa.* v. *Casey*, 505 U.S. 833, 865 (1992)

- This was Justice Barrett's precise point in her 4/4/22 speech at the Ronald Reagan Presidential Library: "Read the opinion."
- Two days later, she cast the decisive vote in the Court's ruling in *Louisiana v. American Rivers*—where there was no opinion to read.

IV. WHERE DO WE GO FROM HERE?

Instead of rebutting any of these analytical observations (which people like me have been making for several years now), the fallback response is that we just "don't like the **results**" that the Court is reaching in these cases.

- This criticism implies bad faith despite the absence of any evidence of such
- It ignores that a core objection is **insufficient reasoning**. If I don't like the results, why would I **want** the Court to provide a more persuasive (and precedential) rationale, as it did w/r/t the CDC's eviction moratorium?
- And it ignores the Court's **own** insistence that principled and consistent **legal** justifications for its decisions are central to its legitimacy. That the Court has **not** offered such rationales for most of its shadow docket rulings therefore raises legitimacy concerns even **if** it's getting the results "right."

IV. WHERE DO WE GO FROM HERE?

- Justice Alito's comments notwithstanding, there's some sign that the Court is moderating its behavior:

1. The Barrett/Kavanaugh concurrence in *Does 1–3* v. *Mills* (2021)—reiterating that emergency relief is **not** a right;
2. Moving some emergency applications to the merits docket (*e.g.*, *Ramirez* v. *Collier* (2021); the student loan cases; etc.);
3. Hearing arguments in the OSHA/CMS vaccine cases; and
4. Rule changes to standardize *some* shadow docket practices.

IV. WHERE DO WE GO FROM HERE?

- But the problematic behavior continued throughout OT2021—as typified in the Alabama redistricting cases.
- The shadow docket was somewhat less active in OT2022, but with big exceptions (*e.g.*, Title 42). And OT2023 is busy.
- And if the Court isn't going to alleviate these concerns on its own, we ought to talk about how **Congress** could step in—whether to take pressure off of the shadow docket or, more aggressively, to regulate what the Court can do **on** it.
- What, then, could Congress do?

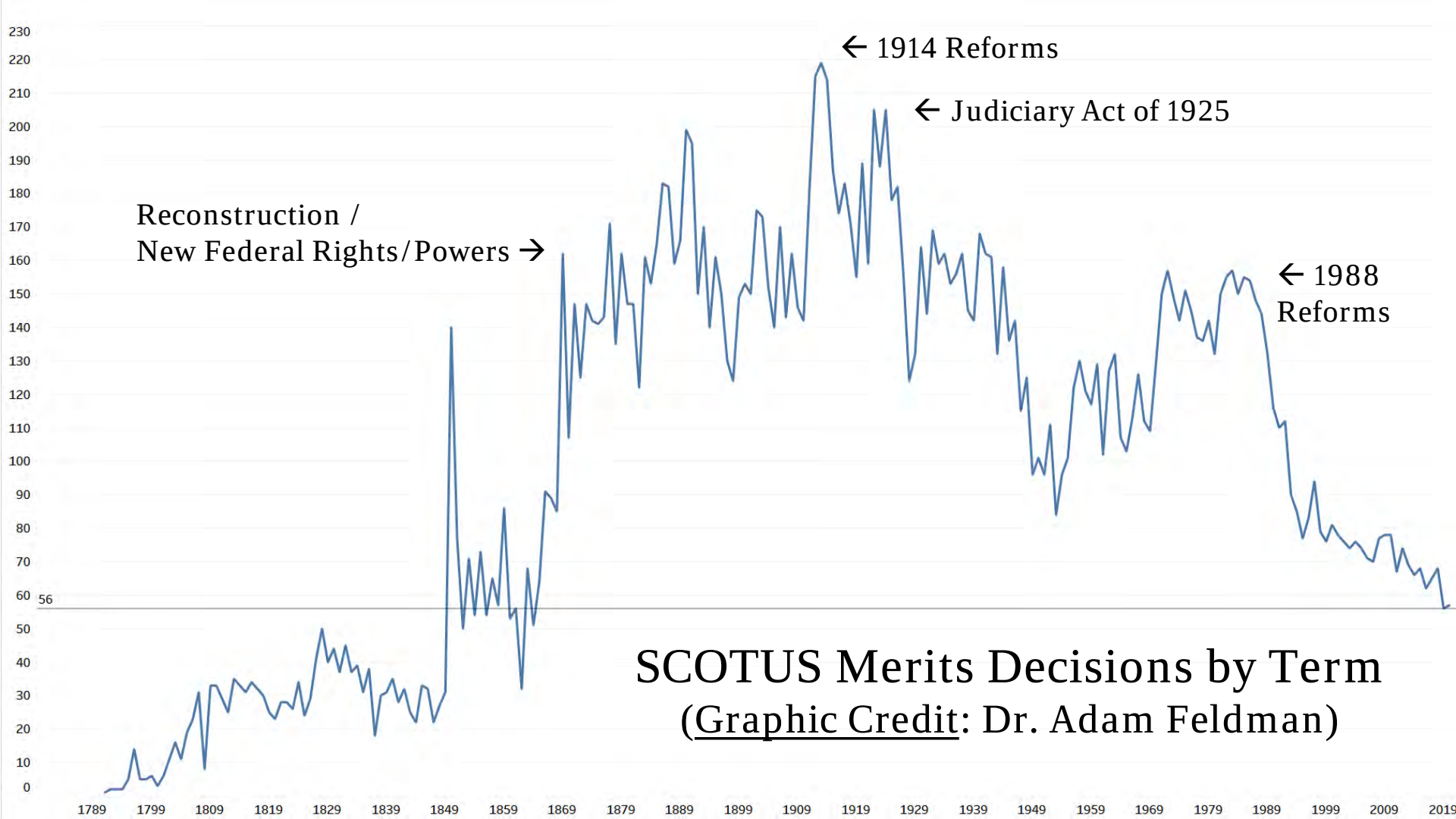
IV. WHERE DO WE GO FROM HERE?

"I know this is a controversial view, but I'm willing to say it. . . . No provision in the Constitution gives [Congress] the authority to regulate the Supreme Court—period."

— Justice Samuel Alito
Wall Street Journal, July 28, 2023

IV. WHERE DO WE GO FROM HERE?

- The **number** of justices (Justice Alito, for instance, holds a seat that Congress created in 1837);
- **Where** the Court sits (from 1810–1935, the Court literally sat **in** the Capitol, including in the basement from 1810–1860);
- **When** the Court sits (including not **at all** in 1802);
- The Court's **budget** (including the justices' salaries and pensions, only the former of which is protected against diminution);
- The justices' **travel** (including, until 1911, "circuit riding"); and
- The Court's **appellate docket**—and at least some of its original JX.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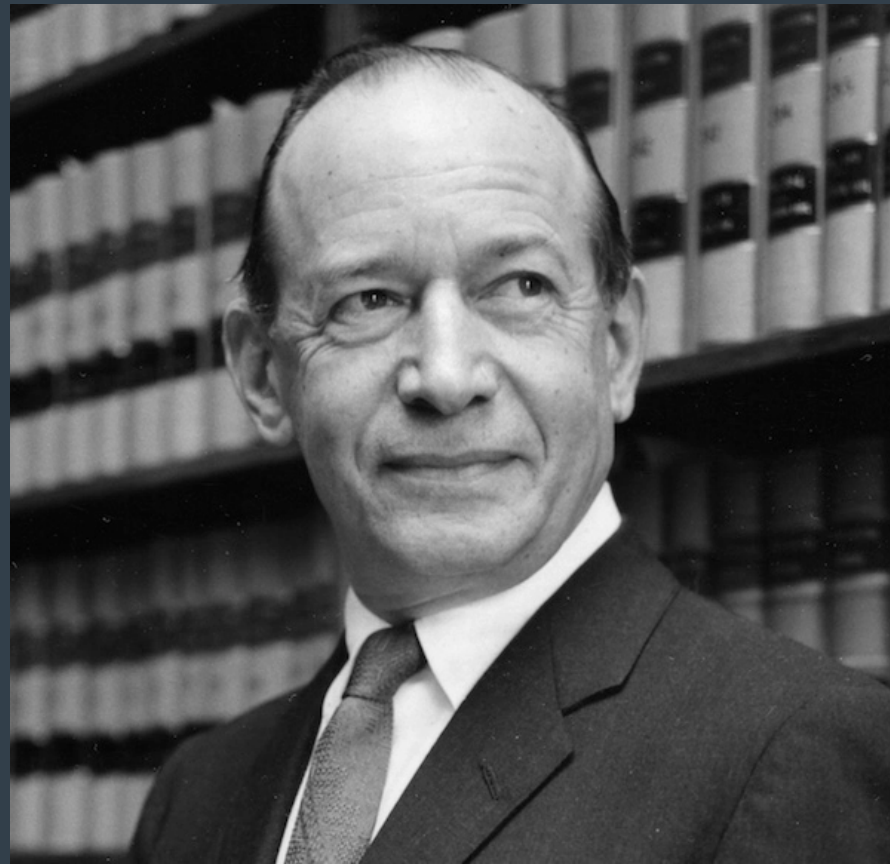
← Judiciary Act of 1925
Reconstruction /
New Federal Rights/Powers →
← 1988
Reforms
56
SCOTUS Merits Decisions by Term
(Graphic Credit: Dr. Adam Feldman)

IV: WHERE DO WE GO FROM HERE?

When Justice Abe Fortas resigned in 1969, it was at the behest of Chief Justice Warren—who feared the consequences for the Court of congressional retribution, whether via impeachment or other types of pushback.



IV. WHERE DO WE GO FROM HERE?

- There are a series of **specific** reforms we can and should discuss:
  - Force the Court to decide **more** cases (especially ones it doesn't want);
  - A meaningful ethics enforcement mechanism (*e.g.*, an "Inspector General");
  - Take pressure off of the shadow docket (*e.g.*, automatic stays of certain rulings).
- But the larger point is to change how we **think and talk** about the Court—and what is (and isn't) wrong with it.
  - The problem is **not** that the Court is sharply divided ideologically.
  - Nor is it that the Court is handing down merits decisions with which many of us disagree—even when those disagreements are profound and fundamental.
  - What's unique about this moment is the Court's lack of **accountability**. And that's something that isn't **ideological**; it's **institutional**.

IV. WHERE DO WE GO FROM HERE?

- Such reforms may seem elusive—if not downright illusory.
- But we already have examples of rapid shifts in the relationship between the political branches and the Court at prior moments in American history—*e.g.*, 1801–02; Reconstruction; 1937; etc.
- And unlike a debate cast entirely in ideological terms, a debate about the Court's proper **institutional** one is and ought to be a debate that unites folks from across the political spectrum.
- That's why I wrote the book; it's why I write a weekly newsletter about the Court ("One First"); and it's why it's such a privilege to get to speak with you today.

ONE FIRST

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