state. Unsigned and unexplained orders are now routinely used to determine whether state and federal policies affecting all of us, and perhaps even the exercise of our constitutional rights, will or will not be enforced for years to come.[30]

Although the beginning of this trend can be dated to early 2017, it accelerated precipitously after Justice Ruth Bader Ginsburg's death in September 2020 and the confirmation of Justice Amy Coney Barrett to replace her. Justice Barrett's impact was especially visible in the context of emergency orders directly blocking state policies that lower courts refused to freeze pending appeal. These orders, known as "injunctions pending appeal," are supposed to be a particularly rare form of emergency relief, because, by the time the matter reaches the Supreme Court, at least two different lower courts have already refused to provide them—and now the justices are being asked to reach out and directly restrain government actors. During Chief Justice Roberts's first fifteen years on the bench, for instance, the Court issued a total of four such orders. In Justice Barrett's first five *months* on the Supreme Court (from November 2020 to April 2021), the Court issued six of them—three in which we know her vote was decisive, and three more in which it easily could have been. A number of popular and scholarly assessments of the Court's October 2020 Term that focused only on the merits docket wondered if Justice Barrett had really made that much of a difference. On the shadow docket, though, the effects of her confirmation were both immediate and stark.[31]

For generations, law students have been taught that the typical case reaches the Supreme Court only at the end of what is often an arduous process, including detailed (and often lengthy) proceedings before a trial court and an appeal to intermediate courts of review, typically at the *end* of that litigation. Against that backdrop, the Supreme Court's intended (and self-described) role in our system of government is that it goes last. As Justice Robert Jackson put it in 1953, "We are not final because we are infallible, but we are infallible only because

we are final." Or, as the justices regularly describe matters today, the Supreme Court is "a court of final review and not first view." Having the last word not only cements the Court's role as the authoritative interpreter of federal law but also gives it a firm foundation on which to rest those interpretations. The rigors of litigation have a way of sharpening the record and crystallizing the legal dispute, ensuring that by the time a case makes its way to the Supreme Court's merits docket, it truly and fairly presents the legal question that the justices have been asked to resolve.[32]

The justices' recent use of the shadow docket is fundamentally inconsistent with this understanding. It inverts ordinary appellate process, having the justices answer complicated (and, in some cases, hypothetical) questions of statutory or constitutional law at the outset of litigation, rather than after the issue has worked its way through the lower courts. And it almost certainly diverts the Court's finite resources away from the merits docket. Indeed, as the shadow docket has grown, the merits docket has shrunk, giving the justices less time and fewer resources with which to conduct plenary review in cases not presenting real or conjured emergencies. The Court issued fifty-three signed decisions in cases argued during its October 2019 Term, which was the lowest total since 1862. And the fifty-six signed decisions handed down during the October 2020 Term were the fewest since 1864. The total increased to only fifty-eight during the October 2021 Term—even though, as recently as the mid-2000s, the annual total of merits decisions averaged in the eighties. It's hard to believe that these developments are unrelated.[33]

The shadow docket also invites behavior by the justices that makes the Court look even more sharply partisan in its shadow docket rulings than in its decisions on the merits docket. It is, by default, easier for a justice to join an unexplained order than to join a lengthy, reasoned opinion, where joining is tantamount to endorsing its reasoning. Moreover, it is much harder to

accuse a justice of taking inconsistent positions in a future case if he or she didn't take a position publicly in the prior one. Justice Barrett unintentionally acknowledged this point in an October 2021 concurring opinion, emphasizing that whether the Court intervenes on the shadow docket should turn not only on whether a party has made the requisite showing for emergency relief, but also on "a discretionary judgment about whether the Court should [one day] grant review in the case." No law, rule, or even norm dictates how the justices exercise that discretion. Instead, they are free to vote for or against relief for any reason (or no reason) whatsoever. And unlike in cases resolved on the merits docket, they're free in the shadow docket decisions to keep those reasons—and their votes—to themselves.[34]

In the context of emergency orders, the increased reliance on the shadow docket has produced unusually rigid ideological homogeneity. During the October 2019 Term, only twelve of the Court's fifty-three signed merits decisions divided the justices 5–4, including two with unusual and nonideological lineups. In contrast, there were eleven decisions on the shadow docket in the same time span from which four justices publicly dissented, and perhaps others in which some of the dissents were not public. (One of the other vexing features of the shadow docket is that the justices are under no obligation to publicly disclose how they voted—so that, unless four justices publicly note a dissent, it's always possible that there were "stealth" dissents even from rulings that outwardly appeared to be unanimous.)[35] In nine of the eleven shadow docket cases taking place during the Court's 2019–2020 session from which four justices publicly dissented, the dissenters were the four more liberal justices—Ginsburg, Breyer, Sotomayor, and Kagan. In the other two, those four were joined by the median justice, Chief Justice Roberts, to form a majority, and the dissents came from the four more conservative justices. Never in its history had the shadow docket produced so many, or so many *similar*, 5–4 splits in the same term. In other words, as the Court's shadow docket

behavior has increased in both quantity and impact both in absolute terms *and* relative to the merits docket, these rulings have sorted the justices into their usual camps to a far greater and more consistent degree than the merits docket.[36]

When the Court issues unsigned orders with dramatic real-world effects, it's one thing if, at least publicly, the justices appear to be speaking with one voice. It's something else altogether when these orders appear to reflect entirely partisan, or at least ideological, divisions. And the lack of substantive analysis to support most of these decisions does nothing to contradict the perception that the Court is becoming more partisan. It's difficult to dismiss as coincidence that the Court's interventions in immigration cases, for example, generally allowed President Donald Trump's policies to go into effect and generally blocked President Joe Biden's policies. Ditto the Court's willingness to block COVID restrictions from New York and California, but not from Texas. Perhaps there are substantive explanations for why one administration's interpretations of immigration law were more valid than another's, or why one state's emergency public health measures were more dubious than another's—but if the justices have such explanations, they're not providing them.

All the while, this story has flown under the radar. In response to public perception of the Supreme Court as always dividing along ideological lines, numerous media accounts claiming to take stock of the Court's October 2020 Term, for instance, emphasized that only seven of the fifty-six argued cases produced 6–3 ideological splits, with all of the conservatives in the majority and all of the more liberal justices in dissent. As these stories explained, the Court was unanimous far more often than readers might expect, and even when it wasn't, the divisions often produced "strange bedfellows." All of that is factually correct, but it's an assessment of an increasingly distorted subset of the Court's workload. Including the shadow docket, there were twice as many unsigned rulings (fourteen) during

the same term from which Justices Breyer, Sotomayor, and Kagan all publicly dissented, and no conservative publicly joined them—bringing the total across all rulings to twenty-one. Accounting for both the number of those rulings and their substance yields a very different—and more ominous—story about the Court. On the shadow docket, the public perception of justices who are regularly divided into their partisan camps looks far more accurate.[37]

Regardless of whether one believes that the justices are acting in good faith, these developments raise increasingly troubling questions about the Supreme Court's legitimacy. The justices themselves have long insisted that "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation." The point is not that we are all supposed to agree with what the Supreme Court is doing, but that we are at least supposed to be convinced that the justices are acting as judges rather than as politicians vindicating a partisan political agenda. That doesn't just mean wearing robes to oral arguments; it means giving parties a meaningful opportunity to be heard and resolving their claims through principled decision-making in which those principles are publicly accessible.[38]

That understanding cannot be reconciled with the shadow docket, on which there's usually no opinion to read. The absence of legal reasoning for public consumption makes it impossible to know why the justices ruled the way that they did, or even how they voted. And it also provides no guidance to the parties or anyone else about how they can or should adjust their behavior to comply with the Court's ruling and avoid further judicial scrutiny. If the Supreme Court issues a merits decision adopting a new rule to govern traffic stops, for instance, the analysis in that decision quickly makes its way into police department training manuals nationwide, and not just in the jurisdiction in which that case arose. But the same can't

be said of most shadow docket orders. In those cases, no one can truly know what the new rule is, or how it does or should apply to other cases. The lack of reasoning may not be a problem when the justices are simply managing the Court's docket. The problem arises when there is little to no reasoning in support of orders that produce massive real-world practical—and legal—effects.

While all of this has happened, Congress and the executive branch, which had historically taken an active role in shaping the Supreme Court's docket, have sat on the sidelines. Indeed, Congress hasn't so much as tweaked the Supreme Court's jurisdiction since 1988, making the ensuing decades the longest period without such legislation in the nation's history. The increasing prevalence and public significance of unsigned and unexplained rulings from unelected and democratically unaccountable judges would be problematic enough if the political branches had demanded it. But one of the most remarkable features of the rise of the shadow docket in recent years is that it has been entirely of the Court's own making, reflecting a series of formal rule and informal procedural and doctrinal changes quietly adopted by the Court with no external catalyst. In that respect, the rise of the shadow docket reflects a power grab by a Court that has, for better or worse, been insulated from any kind of legislative response.

The more one understands the shadow docket, the more troubling the Court's behavior appears to be. In a few short years, the moniker has gone from a clever name for an obscure academic subject to an unintentionally apt metaphor that captures both the problem itself and the reason why it has been so difficult for even legal experts to see.

Making matters worse, unlike merits decisions, many orders on the shadow docket can come anytime and from anywhere. Depending upon what form they take, they can even be posted to any one of five different pages on the Supreme Court's own website, a technical but telling hindrance.[39] In July 2020, for