

THE SHADOW DOCKET: A SYMPOSIUM

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Everyone is talking about the Supreme Court's shadow docket. Professor William Baude gave us the name of it in 2015.¹ Professor Stephen Vladeck has written about it extensively. We enjoy his new book on the subject.² The Justices keep us busy as they debate the docket among themselves.

This intense and ongoing debate convinced us to ask scholars to comment on the shadow docket. Our Symposium authors show its strengths and weaknesses in these Articles—and there seem to be more weaknesses than strengths.

Social scientists Nicholas D. Conway and Yana Gagloeva bring the shadow docket “out of the shadows.”³ They provide a careful introductory analysis of what the docket is. Then, they provide a detailed social scientific explanation of what the cases show. By updating Dr. Larry Baum's initial research, Conway and Gagloeva reaffirm that both conservatives and liberals are increasingly using full dissenting opinions in stay cases. They also find that, on the whole, preliminary evidence suggests more ideologically extreme Justices behave differently on the shadow docket than in merits cases. And by extending Dr. Larry Baum's initial research, they discover that in cases involving the federal government, the Justices appear to retreat to their respective wings a bit more.

Conway and Gagloeva then address the shadow docket's potential impact on the Court's institutional legitimacy. Historically, “to know the Court is to love the Court.”⁴ But their extensive work suggests a shift: “[t]he Court's shadow docket work is highly ideological and has the potential to reduce the Court's public stature.”⁵ As ideological divergence increases, confidence in the Court falls. The Court's status can decrease both theoretically and practically as it no longer plays its role supporting democracy because of its emphasis on the shadow docket.

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¹ William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015).

² STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023).

³ Nicholas D. Conway & Yana Gagloeva, *Out of the Shadows: What Social Science Tells Us About the Shadow Docket*, 23 NEV. L.J. 673 (2023).

⁴ *Id.* at 712.

⁵ *Id.* at 724.

Law professor Caroline Fredrickson is certain that the shadow docket has undermined American democracy, as “a symptom but not the malady itself.”⁶ She describes in particular how the Court’s lead election law cases have undermined democracy and the right to vote. There, the shadow cases just reflect the general law. “[T]he shadow docket is not an aberration; because on both the emergency and the certiorari dockets, the current majority has embarked on a radical revisioning of what American democracy should look like. This tendency is just more hidden on the shadow docket.”⁷

Fredrickson ends with proposals to reform the system that the Court has so destroyed. A former member of the Presidential Commission on the Supreme Court, she strongly recommends expanding the Court to ensure a more accurate representation of the American public. But, for Fredrickson, that is only the beginning of what must be done to redirect the Court’s “antidemocratic” jurisprudence and remedy the institution’s waning legitimacy.⁸

Political science professor Rachael Houston is also concerned with the disenfranchisement of voting rights, focusing her entire Article on the “*Purcell* principle.”⁹ *Purcell* is a 2006 shadow docket case that received a second wave of attention in 2020. Over time, the *Purcell* principle, first identified by Professor Rick Hasen, emphasized the number of days between an election and a court’s ruling about that election. Houston’s research highlights how the Justices’ interpretations of “close to an election” have shaped election law.¹⁰

Houston notes: “The conservative Justices . . . use the *Purcell* principle to argue that there should be no federal interference in state elections before an election because of the proximity of the upcoming election of interest[,]” while “[t]he liberal Justices . . . read *Purcell* as placing more of an emphasis on the goal of reducing voter confusion and preserving voting rights[.]”¹¹ So, a justice’s thoughts on the principle determine the result. And since *Purcell*, the Justices have restricted voting access in seventy-seven percent of the decisions.¹² But the *Purcell* principle is only one example of how the Court—specifically the shadow docket—can chill American civil rights.

Law professor Jenny-Brooke Condon contributes *The Capital Shadow Docket and the Death of Judicial Restraint*.¹³ Her title captures her strong argument that the Court pretends to exercise judicial restraint when reviewing the

⁶ Caroline Fredrickson, *Will American Democracy Last in Light of the Shadow Docket?*, 23 NEV. L.J. 727, 762 (2023).

⁷ *Id.* at 729.

⁸ *Id.* at 744.

⁹ Rachael Houston, *Does Anybody Really Know What Time It Is?: How the US Supreme Court Defines “Time” Using the Purcell Principle*, 23 NEV. L.J. 769, 769 (2023).

¹⁰ *Id.* at 773.

¹¹ *Id.* at 784.

¹² *Id.* at 805.

¹³ Jenny-Brooke Condon, *The Capital Shadow Docket and the Death of Judicial Restraint*, 23 NEV. L.J. 809 (2023).

death penalty but instead is aggressively reviewing state execution cases. The Court has become more willing to eliminate stays of execution and to order the states to go ahead with their executions. And the shadow docket allows them to do it “with less restraint, transparency, and accountability than ever before.”¹⁴ This unrestrained docket has more cases where the “Court denied or vacated stays in summary fashion, and . . . thereby shifted the standards that govern stay requests but without explicating the nature or basis for the shift.”¹⁵

Condon explains the new judicial maximalism of the death penalty that undermines the Court’s reputation and jurisprudence; she concludes that such “bald judicial overreaching” is not good for the law.¹⁶ So, will the Court’s approach support and strengthen the states’ law of capital punishment? Or will it “disrobe capital punishment of its shell of judicially regulated legitimacy?”¹⁷ The shadow docket has left us with that doubt.

Law professor Benjamin Barton answers a question underlying much of the recent discourse, including our Symposium: *Why Are These Justices Using the Shadow Docket More than Past Justices?*¹⁸ He starts by explaining that the Court’s shadow docket is not new; “it is the usage of these powers that is new.”¹⁹ Why? Because of new justices. In contrast to the past, Barton argues, our current Justices “are remarkably similar and have been selected for a single trait—technical legal excellence.”²⁰ He suggests that the Justices reflect what the legal profession has come to reward: “hyper-elite,” “type A overachiever[s].”²¹ And if these are the most qualified lawyers we have ever had on the Court, we should expect them to do new and novel things.

Still, Barton worries that combining such similar people leads to group-think. They go for current day profit instead of long-term institutional reputation. They write lengthy and complicated opinions instead of simply explaining to the rest of us what they are deciding. That said, Barton believes that because “the people on the Court are radically different, you can see how and why the shadow docket has come into favor.”²² Yet he remains unsettled with the new “disturbing questions of what other uses these Justices may find for the Supreme Court’s existing institutional capital.”²³

¹⁴ *Id.* at 812.

¹⁵ *Id.* at 836.

¹⁶ *Id.* at 842.

¹⁷ *Id.* at 843.

¹⁸ Benjamin Barton, *Why Are These Justices Using the Shadow Docket More than Past Justices?*, 23 NEV. L.J. 845 (2023).

¹⁹ *Id.* at 846.

²⁰ *Id.* at 847.

²¹ *Id.* at 848, 854.

²² *Id.* at 861.

²³ *Id.* at 862.

Retired magistrate judge and law professor Andrew J. Wistrich identifies the psychological shoals that the shadow docket poses to the Court.²⁴ “[A] shoal is ‘a raised bank of sand or rocks under the surface of the water[,]’ . . . a common cause of shipwrecks.”²⁵ The shadow docket brings shipwrecks to the Court.

Wistrich offers many reasons to accept that the shadow docket will sink the Court. It makes the justices use quick intuition, instead of deliberative judgment, enabling their confirmation biases. It encourages an availability heuristic, making them choose prominent cases over more important ones. Justices’ political biases remain dominant, and their choices reflect their implicit biases. They suffer an affect heuristic, meaning the way they *feel* about a subject influences them more than the way they *think* about it. Justices recognize their own illusory superiority over others who may be just as qualified or more qualified than they are. They are encouraged to be as consistent as possible, meaning their first judgments, good or bad, will influence all their future ones. Put differently, the shadow docket degrades the justices’ quality of decision making and thus imperils the soundness of the Court’s decisions.

Our Symposium authors isolate significant problems—present and predicted—with the Supreme Court’s shadow docket. I have not found a good word about the shadow docket in these Articles. Can you?

²⁴ Andrew J. Wistrich, *Secret Shoals of the Shadow Docket*, 23 NEV. L.J. 863 (2023).

²⁵ *Id.* at 875 (quoting *Shoal*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/shoal> [<https://perma.cc/K4FG-FS8M>]).