

# SECRET SHOALS OF THE SHADOW DOCKET

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*The Supreme Court has recently been utilizing the informal procedures of its shadow docket more extensively than before. Many have criticized this trend, arguing that it diminishes transparency and undercuts the Supreme Court's legitimacy. This Article asks whether by expanding its use of the shadow docket, the Supreme Court is squandering some of its institutional advantages, thereby compromising the quality of its rulings. Research in the fields of cognitive psychology and behavioral economics suggest that it is. The informality and pace of the shadow docket risks enabling intuition, cognitive illusions, and biases to secretly play a larger role than they do under the Supreme Court's more formal merits docket procedures. As a consequence, the shadow docket might be degrading not merely the appearance of justice but also its substance. Supreme Court Justices are talented and take their responsibilities seriously. Like most people, professionals, and judges, however, they might sincerely believe that they are immune to cognitive illusions and biases, yet remain susceptible to these hidden hazards nonetheless. Therefore, the Justices' performance likely would be improved by holding fast to the handrails and institutional advantages that regular merits docket procedures secure for them whenever possible.*

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*“They strike a rock; O, God! the shock!*

*They vanish in that surge!*

*Through mast and shroud the tempest loud*

*Howls forth a dismal dirge.”<sup>1</sup>*

*“Did no one dream of that drear night to be,*

*Wild with the wind, fierce with the stinging snow,*

*When, on yon granite point that frets the sea,*

*The ship met her death-blow?”<sup>2</sup>*

#### INTRODUCTION

The shadow docket<sup>3</sup> has become a hot topic.<sup>4</sup> The term is a “catchy”<sup>5</sup> name for the set of truncated procedures that the Supreme Court uses to simplify and expedite its decision making in some circumstances. Typically, the merits docket norms of full briefing, oral argument, and reasoned opinions are replaced by skeletal briefing on the merits, no oral argument, and unsigned orders containing little or no explanation.

Although the shadow docket has long been used by the Supreme Court to handle mundane matters, many believe that the Supreme Court is relying on it more frequently in making important and controversial rulings.<sup>6</sup> As a result, the

<sup>1</sup> JAMES KENNARD, JR., WRECK OF THE SEGUNTUM (1847), *reprinted in* SELECTIONS FROM THE WRITINGS OF JAMES KENNARD, JR.: WITH A SKETCH OF HIS LIFE AND CHARACTER 260 (1849). Both this and the following poem were inspired by the wreck of the Spanish frigate *Sagunto* on Cedar Ledge in the Isles of Shoals on January 14, 1813.

<sup>2</sup> CELIA THAXTER, THE SPANIARDS GRAVES (1865), *reprinted in* THE POEMS OF CELIA THAXTER 24 (1896).

<sup>3</sup> William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015) (coining the term). *See generally* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023) (describing the history and evolution of the Supreme Court’s shadow docket).

<sup>4</sup> During Justice Amy Coney Barrett’s confirmation hearing, Senator Richard Blumenthal asked her whether she was aware of the shadow docket, and she replied that it “has become a hot topic in the last couple of years.” James Romoser, *Symposium: Shining a Light on the Shadow Docket*, SCOTUSBLOG (Oct. 22, 2020, 12:15 PM), <https://www.scotusblog.com/2020/10/symposium-shining-a-light-on-the-shadow-docket/> [<https://perma.cc/P8PA-UR2Y>].

<sup>5</sup> *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (mem.) (Kavanaugh, J., concurring).

<sup>6</sup> Stephen I. Vladeck, *The Supreme Court Is Making New Law in the Shadows*, N.Y. TIMES (April 15, 2021), <https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html> [<https://perma.cc/5Q8T-7EWQ>] (“A majority of the justices are increasingly using procedural tools meant to help them control their docket to make significant substantive changes in the law, in defiance not only of their own standards for such relief, but of funda-

Supreme Court's use of the shadow docket has attracted widespread attention. Newspaper editors opine about it,<sup>7</sup> law professors analyze it,<sup>8</sup> and Congress holds hearings about it.<sup>9</sup> It has also drawn reproval from inside the Supreme Court.<sup>10</sup> Much of the criticism targets the fact that more frequent reliance on the shadow docket reduces the transparency of the Supreme Court's decision making and undermines the public's perception of its legitimacy.<sup>11</sup> These are serious concerns. The Court's role is to provide guidance for lower courts<sup>12</sup> and to educate the public,<sup>13</sup> and confidence in the courts is essential for maintaining the rule of law.<sup>14</sup> Such concerns also appear to be well-founded. The public ap-

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mental principles of judicial decision making."); Ben Johnson & Logan Strother, *Shedding Light on the Roberts Court Shadow Docket* 11 (Aug. 27, 2022), <https://ssrn.com/abstract=4202390> [<https://perma.cc/5KHA-MQNH>] ("We show that the Roberts Court is increasingly granting injunctions, motions, and stays and that a growing share of these orders are garnering dissents and other comments from Justices. This rising proportion of these orders that draw signed comments from Justices show that these orders are substantively divisive.").

<sup>7</sup> See e.g., David Leonhardt, *Rulings Without Explanations: Why Is the Supreme Court Using Its "Shadow Docket" So Often?*, N.Y. TIMES (Sept. 3, 2021), <https://www.nytimes.com/2021/09/03/briefing/scotus-shadow-docket-texas-abortion-law.html> [<https://perma.cc/KR23-MM2J>].

<sup>8</sup> See e.g., Richard J. Pierce, Jr., *The Supreme Court Should Eliminate Its Lawless Shadow Docket*, 74 ADMIN. L. REV. 1, 10 (2022) ("We now have a situation in which a high proportion of major judicial decisions are made by the Supreme Court without providing any reasons for decisions."); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019).

<sup>9</sup> *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 117th Cong. (Feb. 18, 2021).

<sup>10</sup> *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1349 (2022) (mem.) (Kagan, J., dissenting) (complaining that a shadow docket ruling "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"); *Merrill*, 142 S. Ct. at 889 (Kagan, J., dissenting) ("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 law, without anything approaching full briefing and argument."). Notably, the Chief Justice joined Justice Kagan's dissent in *American Rivers*.

<sup>11</sup> *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 117th Cong. (Feb. 18, 2021) (testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law) [hereinafter "Vladeck Testimony"]; Baude, *supra* note 3, at 10.

<sup>12</sup> Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 SUP. CT. REV. 205, 206 (2007) (stating that "one of the principal functions of the Court has always been to tell the lower courts what the law is, and thus to guide the decisions of lower courts").

<sup>13</sup> Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) ("The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar.").

<sup>14</sup> OTTO KIRCHHEIMER, *POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS* 175 (1961) ("To distrust the judiciary marks the beginning of the end of society." (quoting Honoré Balzac)); Anne Wallace & Jane Goodman-Delahunty, *Measuring Trust and Confidence in Courts*, 12 INT'L. J. CT. ADMIN., 2021, at 1, 2 ("An individual's level of trust

proval of the Supreme Court has declined significantly in recent years, with only 25 percent currently expressing confidence in it.<sup>15</sup> It has even been suggested that some of the Court's decisions may be ignored, especially if they are issued utilizing the shadow docket.<sup>16</sup>

As troubling as the erosion of the Supreme Court's perceived legitimacy may be, this Article will analyze the shadow docket from a different perspective. It will focus on the ways in which broader utilization of the shadow docket imperils the soundness of the Supreme Court's decisions. In doing so, this Article will identify hidden risks potentially degrading the quality of decision making that cut across all areas of law represented on the Supreme Court's docket.<sup>17</sup>

## I. A TALE OF TWO PROCEDURES

### A. *Situated Justices*

People do not form beliefs or make decisions in a vacuum.<sup>18</sup> The context in which they act or decide matters.<sup>19</sup> It affects both the process by which people choose and the content of their choices. All choice is situated choice, and the influence of situation on choice is powerful.<sup>20</sup> The impact of situation on actors

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or confidence in the courts will not only affect their willingness to turn to them for help, but also the likelihood that they will comply with court decisions.”) (footnote omitted).

<sup>15</sup> See *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RESEARCH CTR. (Sept. 1, 2022), <https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/> [<https://perma.cc/H3KS-HRK-B>]; see also Dante Chinni, *Supreme Court Ratings Plummet After Abortion Decision*, NBC NEWS (Aug. 28, 2022, 5:29 AM), <https://www.nbcnews.com/meet-the-press/supreme-court-ratings-plummet-after-abortion-decision-n1298388> [<https://perma.cc/W9Q8-LTMB>] (reporting that only 25 percent of registered voters view the Supreme Court positively and 44 percent view it negatively).

<sup>16</sup> Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 117–18 (2022) (“The Court ultimately exists on the credibility of its judgments, and if it damages that credibility enough, the federal or state governments may decide that they can simply ignore it.”).

<sup>17</sup> Although this Article focuses on the Supreme Court's use of its shadow docket, the analysis may shed light on other courts' uses of their shadow dockets. See Rebecca Frank Dallet & Matt Woelke, *State Shadow Dockets*, 2022 WIS. L. REV. 1063, 1074–77 (2022) (describing the use of shadow dockets in state supreme courts). See generally Faiza W. Sayed, *The Immigration Shadow Docket*, 117 NW. U. L. REV. 893 (2023) (discussing the Board of Immigration Appeals' review and disposition of immigration cases in nonprecedential, unpublished decisions).

<sup>18</sup> Richard H. Thaler et al., *Choice Architecture*, in THE BEHAVIORAL FOUNDATION OF PUBLIC POLICY 428, 428–29 (Eldar Shafir ed., 2012) (observing that “small and apparently insignificant details” of context or environment can influence choice and that “[a] good rule of thumb is to assume that ‘everything matters’”).

<sup>19</sup> GEORGE ELIOT, MIDDLEMARCH 673 (1872) (“[T]here is no creature whose inward being is so strong that it is not greatly determined by what lies outside it.”).

<sup>20</sup> SAM SOMMERS, SITUATIONS MATTER: UNDERSTANDING HOW CONTEXT TRANSFORMS YOUR WORLD 8 (2011) (“[T]he world around us is constantly pulling our strings, coloring how we think and guiding how we behave. And yet we rarely notice.”); Jon D. Hanson &

and decision makers, however, is frequently underestimated.<sup>21</sup> In fact, some psychologists have argued that humans are susceptible to a cognitive mistake—which they call the “fundamental attribution error”<sup>22</sup>—that consists of overlooking the importance of the situation in determining what actions are taken or what decisions are made.<sup>23</sup> So, even if judges are well-qualified and the tasks they undertake are within their capabilities, if their decision making environment is weak, then the quality of their decisions will be undermined.<sup>24</sup> As former California Supreme Court Justice Roger Traynor put it: “Good procedures tend to lift the standards of even the most ordinary judge.”<sup>25</sup>

The context in which judges make decisions is the court environment. It includes all of the structural features of the setting in which judges do their jobs that are external to the judge. It encompasses such disparate elements as workload, deadlines, staff, colleagues, accountability, compensation, tenure, role norms, information, rules, procedures, feedback, distractions, and so on.

Nothing suggests that judges are immune from the influence of situation.<sup>26</sup> For example, prior to 1799, England had several courts exercising overlapping jurisdiction and judges were compensated by fees they earned from each case.<sup>27</sup> Since the plaintiff selected the forum, judges competed to make their courts more attractive to plaintiffs by adopting more efficient procedures and more favorable substantive law.<sup>28</sup> The result was a pro-plaintiff bias in English common law.<sup>29</sup> Similarly, lower court judges award more mandatory victim restitution in criminal cases if the restitution office is located inside the courthouse

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David G. Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA L. REV. 129, 154 (2003–2004) (“[I]t is our situations—far more than we realize, and often far more than our dispositions—that move us.”).

<sup>21</sup> PHILIP G. ZIMBARDO & MICHAEL R. LEIPPE, *THE PSYCHOLOGY OF ATTITUDE CHANGE AND SOCIAL INFLUENCE* 93 (1991) (“We are too ready to read personality and character traits into the behavioral drama and too resistant to see stage settings as the basis for action.”).

<sup>22</sup> Cassandra Flick & Kimberly Schweitzer, *Influence of the Fundamental Attribution Error on Perceptions of Blame and Negligence*, 68 EXPERIMENTAL PSYCH. 175, 176 (2021).

<sup>23</sup> LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 53 (2011) (“[T]he tendency to make unwarranted leaps from acts to corresponding dispositions is perhaps the most fundamental and most common failing of social inference.”).

<sup>24</sup> See JAMES REASON, *HUMAN ERROR* 4 (1990) (identifying “the three major elements in the production of an error: the nature of the task and its environmental circumstances, the mechanisms governing performance and the nature of the individual”).

<sup>25</sup> Roger J. Traynor, *The Givers and Takers of Law*, 18 J. PUB. L. 247, 253 (1969).

<sup>26</sup> *People ex rel. Att’y Gen. v. News-Times Publ’g Co.*, 84 P. 912, 915 (Colo. 1906) (“Judges, as well as ordinary mortals, are largely the victims of their environments.”).

<sup>27</sup> Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1180, 1220 (2007).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1220.

rather than in a separate building.<sup>30</sup> Further, to avoid accumulating a backlog, federal appellate judges reversed lower court decisions less frequently during a caseload spike than they did before or after that spike because affirming is quicker and easier than reversing.<sup>31</sup>

Supreme Court Justices also seem affected by their situation. They, too, alter their decisions in response to caseload pressure. Constraints on judicial capacity and habits of accessibility in particular situations, coupled with deeply ingrained norms of judicial professionalism, push the Justices in some directions rather than others.<sup>32</sup> This causes the Supreme Court to prefer clear rules (that lower courts can easily and consistently follow) and to defer to constitutional decisions of other institutional actors (especially in situations in which lawsuits might be numerous), both in an effort to reduce the demand for Supreme Court review.<sup>33</sup> Therefore, to understand why the Justices decide as they do, we must not only understand them, but we must also understand their decision making environment.<sup>34</sup>

#### B. *The Merits Docket Versus the Shadow Docket*

The basic operation of the Supreme Court's merits docket is familiar. The overwhelming majority of cases the Court decides reach it through the certiorari process.<sup>35</sup> A small number of cases—typically about 3 percent<sup>36</sup>—are selected by the Justices from among thousands of petitions for certiorari. The petitions describe the ruling below and explain why they are worthy of review. The Justices have the opportunity to discuss those petitions that survive a screening process. Usually both vertical and horizontal percolation have occurred so that the Supreme Court can benefit from the analysis of lower courts. If review is granted, then the clerk obtains the record and sets a schedule that allows the parties ample time to brief the merits and also creates an opportunity for amicus curiae participation. The Justices then analyze the record and the briefs on the merits. Eventually, oral argument is held, during which the Justices interact with counsel and—indirectly—their colleagues. Subsequently, the Justices an-

<sup>30</sup> R. Barry Ruback & Jennifer N. Shaffer, *The Role of Victim-Related Factors in Victim Restitution: A Multi-Method Analysis of Restitution in Pennsylvania*, 29 L. & HUM. BEHAV. 657, 679 (2005).

<sup>31</sup> Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1137 (2011).

<sup>32</sup> See ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING 2–5 (2019).

<sup>33</sup> *Id.* at 3, 5.

<sup>34</sup> O. HOBART MOWRER, LEARNING THEORY AND BEHAVIOR 10 (1960) (“[T]o understand or predict what a rat will learn to do in a maze, one has to ‘know both the rat and the maze.’”).

<sup>35</sup> *The Supreme Court—The Statistics*, 136 HARV. L. REV. 500, 508 tbl.II (2022).

<sup>36</sup> *Success Rate of a Petition for Writ of Certiorari to the Supreme Court*, SUP. CT. PRESS, [https://supremecourtpress.com/chance\\_of\\_success.html](https://supremecourtpress.com/chance_of_success.html) [<https://perma.cc/2C6F-V34B>] (reporting that the percentage of certiorari petitions granted varied from 2.1 to 4.2 percent from 2014 to 2017).

nounce their post-argument votes in their private conference. During the ensuing months, draft opinions are prepared and circulated, which (unless the Justices are unanimous—an increasingly unlikely occurrence<sup>37</sup>) allows the Justices to confront and address arguments advanced by their colleagues. Finally, signed, reasoned opinions are issued.<sup>38</sup> The process unfolds at the pace preferred by the Justices and without deadlines (apart from the custom of beginning the summer recess around July 1). Even that deadline is flexible, of course. In sum, “[e]verything about the Court’s merits docket is carefully choreographed.”<sup>39</sup>

The operation of the Supreme Court’s shadow docket, by contrast, is obscure, rushed, and haphazard. Summarizing the procedures of the shadow docket is challenging because they vary more from case to case and because much of the process takes place away from public view. Some shadow docket matters have briefing on the merits or a non-rushed, final judgment below—but others do not. Most lack the benefit of oral argument, and few result in a reasoned opinion or disclosure of votes.<sup>40</sup> What is clear is that shadow docket cases differ markedly from merits docket cases in information, focus, and pace.

Even the term “shadow docket” is vague. William Baude, who coined the term, defines it broadly as “a range of orders and summary decisions that defy its normal procedural regularity.”<sup>41</sup> Encompassed by that definition are two types of matters. The first category is by far the largest, and contains over 99 percent of the matters resolved on the shadow docket.<sup>42</sup> Examples include housekeeping matters such as applications for extensions of time, applications to file overly long briefs, and so on. These are non-substantive, uncontroversial, and affect no one other than the parties and the Court. The same can be said of many GVRs<sup>43</sup> and rulings on certiorari petitions.<sup>44</sup> For the most part it makes

<sup>37</sup> Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 776–77, 780–81 (2015).

<sup>38</sup> See STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 701 (11th ed., 2019).

<sup>39</sup> VLADECK, *supra* note 3, at 11.

<sup>40</sup> *Id.* at 23.

<sup>41</sup> Baude, *supra* note 3, at 1; see also William Baude, *Reflections of a Supreme Court Commissioner*, 106 MINN. L. REV. 2631, 2649 (2022) [hereinafter Baude, *Reflections*] (“This catch-all category encompasses many things, but among them are two forms of quasi-merits adjudication: summary reversals and emergency orders.”); VLADECK, *supra* note 3, at xii (defining the shadow docket as consisting of everything other than the Court’s “merits docket”).

<sup>42</sup> VLADECK, *supra* note 3, at 12 (stating that the shadow docket comprised 99 percent of the Court’s October 2020 Term decisions).

<sup>43</sup> See Aaron-Andrew P. Bruhl, *The Supreme Court’s Controversial GVRs—and an Alternative*, 107 MICH. L. REV. 711, 712, 717 (2009) (explaining that a GVR—or grant certiorari, vacate, and remand—is “a summary disposition that, without purporting to find any error, returns the case to the court below for further consideration in light of some matter.”).

<sup>44</sup> Benjamin Johnson, *The Supreme Court’s Political Docket: How Ideology and the Chief Justice Control the Court’s Agenda and Shape Law*, 50 CONN. L. REV. 581, 585 (2018) (de-



sense for the Court to resolve such matters quickly and efficiently without following elaborate procedures or providing an explanation. This Article does not criticize these relatively unproblematic uses of the shadow docket. The second category includes matters that are related to the merits, and whose impact extends beyond the Court and the parties. These include: (1) summary reversals,<sup>45</sup> (2) emergency applications for stays of lower court rulings, (3) emergency applications for injunctions, and (4) death penalty stay applications.<sup>46</sup> It is this second category that is the focus of the concerns presented in this Article. The distinguishing feature is whether the Supreme Court elects to decide substantive issues without the benefit of its usual procedural advantages and protections: principally vertical percolation, oral argument, full briefing, reasoned opinion, or disclosure of Justices' individual votes. Non-merits related, non-dispositive interstitial rulings, such as requests for extensions of time to file a brief, are not included.

Exactly how many matters are decided on the shadow docket can be difficult to discern because published counts do not always agree. According to one summary of the October 2020 Term, the Supreme Court decided 72 cases on review; summarily decided 91 cases; and resolved 5,062 cases by denial, dismissal, or withdrawal of appeals or petitions for review.<sup>47</sup> The Supreme Court also ruled upon 77 applications for emergency relief, including 15 applications for injunctive relief, 41 applications for stays, 5 applications for stays or vacatur, and 12 applications to vacate.<sup>48</sup> Similarly, for the October 2021 term, the

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scribing certiorari petitions as the “largest part” of the shadow docket). *See generally* Barry P. McDonald, *SCOTUS's Shadiest Shadow Docket*, 56 WAKE FOREST L. REV. 1021 (2021) (describing the Justices' practice of issuing opinions related to orders (“ORTOs”) in the context of denials of certiorari).

<sup>45</sup> On the one hand, summary reversals are problematic because they are on the merits, lack the full panoply of procedural protections, and do not even allow the respondent an opportunity to brief the merits. Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 CARDOZO L. REV. 591, 591 (2016) (stating that the Supreme Court may “grant certiorari and decide the merits of the cases simultaneously, in one fell swoop”); Aaron L. Nielson & Paul Stancil, *Gaming Certiorari*, 170 U. PA. L. REV. 1129, 1181 (2022) (stating that in issuing summary reversals, or “sumrevs,” on its shadow docket, the Supreme Court “sometimes decides cases on the certiorari briefing alone”). On the other hand, they are subject to an informal super majority requirement and generally are accompanied by a per curiam opinion containing some explanation. Lisa Schultz Bressman, *The Rise and Fall of the Self-Regulatory Court*, 101 TEX. L. REV. 1, 2–3 (2022); SHAPIRO ET AL., *supra* note 38, at 5–46 (noting that “the Court employs summary reversal quite infrequently,” averaging about eight cases per term from 2005 to 2017). *But see* VLADECK, *supra* note 3, at 87–88 (stating that the Supreme Court no longer confines summary reversals to cases in which the lower court narrowly and clearly erred but has expanded its use to resolve significant issues over dissent).

<sup>46</sup> *See* Bressman, *supra* note 45, at 48.

<sup>47</sup> *The Supreme Court—The Statistics*, 135 HARV. L. REV. 491, 498–99, 499 tbl.II (2021).

<sup>48</sup> *Id.* at 505, tbl.IV.

Supreme Court issued more shadow docket rulings than merits docket decisions.<sup>49</sup>

One way of thinking about the shadow docket is in terms of the information constraints it imposes. The Supreme Court relies on four basic sources for information about cases: (1) parties' merits briefs, (2) amicus briefs, (3) oral argument, and (4) decisions of other courts.<sup>50</sup> In shadow docket cases, all may be lacking or compromised, creating an information-poor situation for the Court.

Consider the decisions of other courts, for example. There are two types of percolation—vertical and horizontal. Vertical percolation occurs in a particular case as that case is analyzed and decided first in the trial court and subsequently in the appellate court, a process that involves the collection and sifting of facts and the refinement of legal arguments from the perspectives of several judges. Horizontal percolation occurs in multiple different cases as they wend their way from various trial courts and up through various appellate courts.

In shadow docket cases, the benefits of both types of percolation might be absent. Horizontal percolation might be lacking if the issue is novel. Vertical percolation might be lacking if proceedings in the trial court or the appellate court have not concluded. The value of horizontal percolation is contested—most feel that it is useful<sup>51</sup> but others disagree.<sup>52</sup> Horizontal percolation helps to

<sup>49</sup> Kimberly Strawbridge Robinson, *Supreme Court Conservatives Want More Robust "Shadow Docket,"* BLOOMBERG L. (July 8, 2022, 9:51 AM), <https://news.bloomberglaw.com/us-law-week/supreme-courts-conservatives-want-more-robust-shadow-docket> [https://perma.cc/J6SV-ZVTE] (reporting that during the October 2021 term, the Supreme Court issued sixty-six emergency orders but merely sixty merits decisions); *The Supreme Court—The Statistics*, *supra* note 35, at 516 tbl.II (reporting sixty-nine such orders).

<sup>50</sup> Pamela C. Corley et al., *Lower Court Influence on U.S. Supreme Court Opinion Content*, 73 J. POL. 31, 32 (2011).

<sup>51</sup> Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 331 (2006) (“The ideal of percolation . . . is to allow several lower courts to consider a legal problem before the Supreme Court rules on it, thus giving the High Court the benefit of the considered judgment of a number of jurists.”); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716 (1984) (“The Supreme Court, when it decides a fully percolated issue, has the benefit of the experience of those lower courts.”); *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (stating that the Supreme Court “in many instances [has] recognized that when frontier legal problems are presented, periods of ‘percolation’ . . . may yield a better informed and more enduring final pronouncement by [the] Court”); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 163 (1985) (“[A] difficult question is more likely to be answered correctly if it is allowed to engage the attention of different sets of judges deciding factually different cases . . . .”); Rochelle C. Dreyfuss, *Percolation, Uniformity, and Coherent Adjudication: The Federal Circuit Experience*, 66 SMU L. REV. 505, 508 (2013) (“[T]he experience of the Federal Circuit suggests that in the absence of percolation, much can go awry.”).

<sup>52</sup> Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363, 432 (2021) (arguing that the Supreme Court can obtain sufficient non-case specific information more

mitigate the insularity of the Supreme Court, especially in the context of the shadow docket, where the Supreme Court's ability to substitute for the information lost due to the lack of horizontal percolation is diminished by the lack of oral argument and the reduction in amicus curiae participation. In contrast, there is no denying that vertical percolation is essential to sound decision making in a particular case.<sup>53</sup> According to the Supreme Court, “[o]urs is a ‘court of final review and not first view.’”<sup>54</sup> One of the advantages of common law adjudication is its concreteness and specificity.<sup>55</sup> Many shadow docket cases lack this feature because they are based on an incomplete record that may not even contain a judgment from the courts below.<sup>56</sup> There is reason to think that this departure from normal appellate practice matters.<sup>57</sup> Among other things, Su-

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efficiently by other means); Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 739 (2018) (“[C]ircuit courts have a tendency to herd: once one decides an issue, the next circuit to confront the same question is more likely to agree. That becomes more true as additional circuits join the herd. Given time, it is quite possible for the circuits to reach consensus around the wrong—or suboptimal—position on a legal issue.”); Scott Baker & Anup Malani, *Do Judges Actually Care About the Law? Evidence from Circuit Split Data* (July 2015) (unpublished manuscript) (available at <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=10e3a47903791073bc7590b5d6dfc79126b3f847> [<https://perma.cc/Q63Q-HR7Y>]) (finding that as each additional circuit reaches the same conclusion on a disputed legal issue the next circuit to confront it becomes increasingly likely to follow the herd).

<sup>53</sup> See *Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring) (remarking that “the experience of . . . thoughtful colleagues on the district and circuit benches [can] yield insights (or reveal pitfalls [that this Court] cannot muster guided only by [its] own lights”); William M. Landes & Richard A. Posner, *The Economics of Anticipatory Adjudication*, 23 J. LEGAL STUD. 683, 685 (1994) (“There is greater risk of deciding a case incorrectly when there is little or no factual record . . .”).

<sup>54</sup> *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam)).

<sup>55</sup> See Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 883–84 (2006) (describing the strong “belief in the virtue of a crystalized dispute between specific parties as the platform for creating legal rules” exhibited by among other things, the “case or controversy” requirement enshrined in Article III, Section 2 of the U.S. Constitution); Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of Law*, 5 AM. L. REV. 1, 1 (1870) (“It is the merit of the common law that it decides the cases first and determines the principle afterwards.”).

<sup>56</sup> Steve Vladeck, *The Supreme Court’s Most Partisan Decisions Are Flying Under the Radar*, SLATE (Aug. 11, 2020, 12:12 PM), <https://slate.com/news-and-politics/2020/08/supreme-court-shadow-docket.html> [<https://perma.cc/WM2L-CQXH>] (arguing that the shadow docket places “the justices in the position of deciding weighty legal issues at a very early stage of the litigation, in a context in which it is often unclear exactly what the relevant facts are and in which legal arguments have not been fully developed”).

<sup>57</sup> VLADECK, *supra* note 3, at 18 (“It [the shadow docket] inverts the ordinary appellate process, having the justices answer complicated . . . questions . . . at the outset of litigation, rather than after the issue has worked its way through the lower courts.”).

preme Court Justices rely heavily on the analysis of lower courts when it is available.<sup>58</sup>

Ordinarily, the Supreme Court environment should promote sound decision making. The elaborate merits docket procedures coupled with a high level of resources and partial caseload control offers many handrails—including time for deliberation, exposure to diverse perspectives, a reasoned decision, and accountability—even in difficult or uncertain cases.<sup>59</sup> But the situation is different on the shadow docket. Shadow docket matters often are decided more quickly, without thorough briefing (and sometimes without any briefing on the merits), without full lower court records (vertical percolation), without the views of other courts (horizontal percolation), without non-party participation, without much opportunity for collaboration among the Justices, and without reasoned opinions explaining how the ruling dovetails with precedent. This is an unkind setting for making decisions.<sup>60</sup>

The dangers of the shadow docket are illustrated by the decision in *Purcell v. Gonzales*, in which the Court held that courts generally should not change the rules governing an election close to the date of the election<sup>61</sup> but does so sloppily, plotting a misguided course for election law. That decision which was made on the shadow docket without oral argument, has been described as rigid, undertheorized, enabling partisan manipulation of election rules, facilitating selective voter disenfranchisement, careless, self-contradictory, and a charade.<sup>62</sup>

Increasing the number of substantive matters decided on the shadow docket also might distract the Justices from devoting appropriate attention to cases on the Supreme Court's merits docket. Assuming, as the Justices apparently believe, that they are hearing an optimal number of cases on their merits docket, every shadow docket matter disrupts their decision making process and reduces the time and attention available for consideration of cases on the merits dock-

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<sup>58</sup> Corley et al., *supra* note 50, at 31 (finding that “the Court systematically incorporates language from the lower federal courts into its majority opinions”).

<sup>59</sup> Laurence Baum, *Supreme Court Justices Are Human Decision Makers*, 41 OHIO N. U. L. REV. 567, 581 (2015) (“It is true that, compared with most other people (including most other judges), Supreme Court justices do their work under conditions that are unusually conducive to effective decision making [.]”); Epps & Ortman, *supra* note 52, at 739–40 (summarizing the Supreme Court's many institutional advantages).

<sup>60</sup> Baude, *supra* note 3, at 56 (observing that shadow docket decisions seem to deviate from the Supreme Court's “otherwise high standards of transparency and legal craft”); see ROBIN M. HOGARTH, EDUCATING INTUITION 89 (2001) (distinguishing between kind and unkind decision-making environments).

<sup>61</sup> See *Purcell v. Gonzalez*, 549 U.S. 1, 4–6 (2006).

<sup>62</sup> VLADECK, *supra* note 3, at 203–17 (summarizing various criticisms of the *Purcell* Principle). See generally Harry B. Dodsworth, *The Positive and Negative Purcell Principle*, 2022 UTAH L. REV. 1081 (2022) (criticizing the *Purcell* principle and suggesting an alternative approach).

et.<sup>63</sup> The deleterious effect of distractions in increasing the incidence of errors in other contexts is well known.<sup>64</sup>

## II. PSYCHOLOGICAL SHOALS

In oceanography, a shoal is “a raised bank of sand or rocks under the surface of the water”<sup>65</sup> or “[a] mound or other structure raised above the sea bed in shallow water that is composed of, or covered by, unconsolidated material and may be exposed at low water.”<sup>66</sup> Shoals pose a hidden danger to mariners, and are a common cause of shipwreck.<sup>67</sup> Such misfortunes can be shocking and disastrous, frequently resulting in environmental pollution, damaged cargo, destruction of vessel, and loss of lives.<sup>68</sup> Often, they result from a combination of factors including failure to take precautions, keep situational awareness, consult charts, or maintain and use navigational instruments.<sup>69</sup> To take one famous example, the Exxon Valdez oil spill tragedy occurred in part because of the failure to ensure that the vessel’s radar was operable.<sup>70</sup> If the radar had been properly maintained, the vessel would not have struck the submerged rocks of Bligh Reef and the famous environmental catastrophe would have been avoided.<sup>71</sup>

<sup>63</sup> Vladeck, *supra* note 8, at 160 (“[T]he uptick in emergency applications from the government—often in the same case—necessarily comes at the expense of the Justices’ ability to consider other matters.”).

<sup>64</sup> See, e.g., Lily Thomas et al., *Impact of Interruptions, Distractions, and Cognitive Load on Procedure Failures and Medication Administration Errors*, 32 J. NURSING CARE QUALITY 309, 314 (2017); Michelle Feil, *Distractions and Their Impact on Patient Safety*, 10 PA. PATIENT SAFETY AUTH. 1, 3 (2013); Michael Darcy, *Error by Distraction*, 29 SEMINARS INTERVENTIONAL RADIOLOGY 337, 337 (2012).

<sup>65</sup> *Shoal*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/shoal> [<https://perma.cc/K4FG-FS8M>].

<sup>66</sup> *Shoal*, OXFORD REFERENCE, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100502665> [<https://perma.cc/7YDC-5SR2>].

<sup>67</sup> *Diamond Shoals*, OUTER BANKS, <https://www.outerbanks.com/diamond-shoals.html> [<https://perma.cc/X75C-AKZU>] (discussing multiple shipwrecks caused by the Diamond Shoals); Hauke L. Kite-Powell & Di Jin, *Investigation of Potential Risk Factors for Groundings of Commercial Vessels in U.S. Ports*, 9 INT’L J. OFFSHORE & POLAR ENG’G (1999) (“Groundings of commercial ships account for about one-third of all commercial maritime accidents, including some of the most expensive in the United States history, such as the Exxon Valdez.”).

<sup>68</sup> Stipe Galic et al, *A Chronological Overview of Scientific Research on Ship Grounding Frequency Estimation Models*, 10 J. MARINE SCI. & ENG’G. 207, 207 (2022).

<sup>69</sup> See Gregory Palast, *Ten Years After but Who Was to Blame?*, GUARDIAN (Mar. 21, 1999, 9:27 AM), <https://www.theguardian.com/business/1999/mar/21/observerbusiness.bp> [<https://perma.cc/6GPA-KVSE>]; *What Is Sonar?*, NAT’L OCEAN SERV., <https://oceanservice.noaa.gov/facts/sonar.html> [<https://perma.cc/U5SY-TSRV>].

<sup>70</sup> Palast, *supra* note 69.

<sup>71</sup> *Id.* (“The man left at the helm, the third mate, would never have hit Bligh Reef had he simply looked at his Raycas radar. But he could not. Why? Because the radar was not turned

The cognitive illusions and biases described in this Article are like the hidden hazards of submerged rocks or sand on which unsuspecting ships might come to grief if their pilots are not vigilant and neglect precautions. This list is not comprehensive. There might be other cognitive illusions that the shadow docket allows to thrive. Because of the insidious nature of implicit biases and other cognitive illusions, Justices “may never figure out that their first instinct regarding how to decide a case was flawed.”<sup>72</sup> Instead, they might forge ahead in the confident but misguided assumption that they are right and others are wrong.

#### A. *Imperious Intuition*

Broadly speaking, people make decisions in one of two ways: intuitively (System 1) or deliberately (System 2).<sup>73</sup> Most of the thousands of decisions people make daily are intuitive, quick, and effortless. Our intuition is remarkably good, and we could not survive without it.<sup>74</sup> But it is a double-edged blade. Intuition’s alacrity and efficiency enable it to preempt or pollute attempts to double-check it with deliberative second guessing, and the impressions it creates are compelling and sticky—even when they are wrong. People frequently rely too heavily on intuition in situations where it is inappropriate, resulting in severe and systematic errors.<sup>75</sup> As one team of researchers put it, “[P]eople are nearly-incorrigible ‘cognitive optimists.’ They take for granted that their spontaneous cognitive processes are highly reliable, and that the output of these processes does not need re-checking. Just as they trust their perceptions, they trust their spontaneous inferences and their intuitions of relevance.”<sup>76</sup>

Do judges also rely too heavily on intuition, or are they exceptionally deliberative? To answer this question, my coauthors and I asked judges to take a test designed to measure the ability to suppress an incorrect intuitive response

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on. The complex Raycas system costs a lot to operate, so a frugal Exxon management left it broken and useless for the entire year before the grounding.”)

<sup>72</sup> Ian Millhiser, *The Supreme Court’s Enigmatic “Shadow Docket,” Explained*, VOX (Aug. 11, 2020, 8:30 AM), <https://www.vox.com/2020/8/11/21356913/supreme-court-shadow-docket-jail-asylum-covid-immigrants-sonia-sotomayor-barnes-ahlman> [https://perma.cc/5N2K-4SUS].

<sup>73</sup> DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 20–25 (2011); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 6 (2007).

<sup>74</sup> See generally MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005).

<sup>75</sup> See Daniel T. Gilbert, *Inferential Correction*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 167 (Thomas Gilovich et al. eds., 2012).

<sup>76</sup> Dan Sperber et al., *Relevance Theory Explains the Selection Task*, 57 *COGNITION* 31, 90 (1995).

and to successfully override it with deliberation. The test is called the “Cognitive Reflection Test” (“CRT”).<sup>77</sup> It consists of the following three questions:

1. A bat and ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the ball cost? \_\_ cents.
2. If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets? \_\_minutes.
3. In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long will it take for the patch to cover half of the lake? \_\_ days.<sup>78</sup>

Each question contains a lure that immediately suggests an intuitive but incorrect answer: ten cents, one hundred minutes, and twenty-four days, respectively. The correct answers, however, are five cents, five minutes, and forty-seven days, respectively. The key to performing well on the CRT lies in suppressing the incorrect, intuitive answer that immediately suggests itself, engaging the deliberative process, and then overriding the incorrect answer suggested by intuition with the correct answer produced by deliberation.

This apparently simple test is surprisingly challenging. MIT undergraduates perform relatively well—getting an average of 2.18 out of three questions correct.<sup>79</sup> Undergraduates from various universities scored between .79 and 1.51 out of three correct.<sup>80</sup> We found that a large group of Florida trial judges scored 1.23 out of three correct,<sup>81</sup> while a sample of administrative law judges scored 1.33 out of three correct.<sup>82</sup> We also tested several groups of attorneys, who averaged 1.46 out of three correct.<sup>83</sup> Arbitrators that we tested averaged 1.51 out of three correct.<sup>84</sup> These results suggest that judges do not stand out as especially deliberative—they perform about as well as other well-educated people. The performance of the judges on the CRT indicates that like most people—including college students, lawyers, and arbitrators—judges tend to

<sup>77</sup> Shane Frederick, *Cognitive Reflection and Decision Making*, 19 J. ECON. PERSPS. 25, 35 (2005) (describing the test as measuring “the ability or disposition to resist reporting the response that first comes to mind”).

<sup>78</sup> Guthrie, Rachlinski & Wistrich, *supra* note 73, at 10 fig.1.

<sup>79</sup> Frederick, *supra* note 77, at 29 tbl.1.

<sup>80</sup> *Id.*

<sup>81</sup> Guthrie, Rachlinski & Wistrich, *supra* note 73, at 15 tbl.2.

<sup>82</sup> Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1495–1500, 1500 tbl.1 (2009) (reporting CRT results for administrative law judges). Recently, however, groups of judges have performed a bit better, perhaps because of increasing public familiarity with the CRT. Stefan Stieger & Ulf-Dietrich Reips, *A Limitation of the Cognitive Reflection Test: Familiarity*, PEER J. e2395 (2016).

<sup>83</sup> Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers’ Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571, 583–588, 586 tbl.3 (2013).

<sup>84</sup> Rebecca K. Helm, Andrew J. Wistrich & Jeffrey J. Rachlinski, *Are Arbitrators Human?*, 13 J. EMPIRICAL LEGAL STUD. 666, 672 (2016); *see* Susan D. Franck et al., *Inside the Arbitrator’s Mind*, 66 EMORY L. J. 1115, 1137 (reporting that a different group of arbitrators averaged 1.47 out of three correct).

rely too heavily on intuitive reactions rather than deliberative thinking. We know this is the explanation because incorrect answers are usually the intuitive (but wrong) response—88.4 percent on the first question, for example.<sup>85</sup> Moreover, the results of the CRT are consistent with the anecdotal accounts of the many judges who admit that intuition and hunches play a prominent role in their decision making.<sup>86</sup> This excessive reliance on System 1 mental processing likely makes them susceptible to misleading intuitions that can generate poor decision making and predictable errors.

Is this heavy reliance on intuition a problem? That depends. Intuition can produce excellent judgments, at least in some situations.<sup>87</sup> The difficulty, however, is that intuition is sometimes wrong, as the CRT results show. Therefore, although intuition is a necessary part of good judgment,<sup>88</sup> it often should be double-checked with deliberation, if possible.<sup>89</sup> Unchecked intuition leaves decision makers—including judges—vulnerable to cognitive errors. This may be especially true in some contexts, and law appears to be one of them. Judges are regularly placed in situations in which intuition is likely to mislead. Some judicial tasks are counterintuitive, and advocates attempt to nudge or persuade. For some tasks, slower, more effortful, and more systematic thinking is best. Judging is among those tasks.<sup>90</sup>

Ability and willingness to double-check intuition likely affects performance on tasks other than the CRT.<sup>91</sup> The literature demonstrates that the CRT

<sup>85</sup> Guthrie, Rachlinski & Wistrich, *supra* note 73, at 16.

<sup>86</sup> See, e.g., Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 285 (1929) (asserting that a judge "decides by feeling, and not by judgment; by 'hunching' and not by ratiocination"); Milton Heumann et al., *Going with Your Gut: "Hunches" and "Hunching" in Judicial Decision-Making*, 55 CRIM. L. BULL. 1 (2019) (reporting the results of interviews with nineteen judges, many of whom conceded that they rely on intuition and hunches in making rulings).

<sup>87</sup> See GLADWELL, *supra* note 74, at 8 ("[T]here can be as much value in the blink of an eye as in months of rational analysis."); Peter M. Todd & Gerd Gigerenzer, *Précis of Simple Heuristics that Make Us Smart*, 23 BEHAV. & BRAIN SCI. 727 (2000).

<sup>88</sup> See KAHNEMAN, *supra* note 73, at 28.

<sup>89</sup> See FRANK PARTNOY, WAIT: THE ART AND SCIENCE OF DELAY 246 (2012) ("A wise decision requires reflection, and reflection requires a pause.").

<sup>90</sup> HENRI-FRÉDÉRIC AMIEL, AMIEL'S JOURNAL: THE JOURNAL INTIME OF HENRI-FRÉDÉRIC AMIEL 76 (1905) ("Look twice, if what you want is a just conception; look once, if what you want is a sense of beauty."); PIERO CALAMANDREI, EULOGY OF JUDGES 27 (John Clarke Adams & C. Abbott Phillips, Jr. trans., 1942) ("I fear the judge who is too sure of himself, who reaches his decisions quickly, jumping immediately to conclusions without deliberation or repentance.").

<sup>91</sup> See generally Jordana Liberali et al., *Individual Differences in Numeracy and Cognitive Reflection, with Implications for Biases and Fallacies in Probability Judgment*, 25 J. BEHAV. DECISION MAKING 361 (2012); Andre Mata et al., *The Metacognitive Advantage of Deliberative Thinkers: A Dual-Process Perspective on Overconfidence*, 105 J. PERSONALITY & SOC. PSYCH. 353 (2013).



is a potent predictor of cognitive errors on a wide variety of tasks.<sup>92</sup> Our research suggests that judges tend to rely excessively on intuition even when performing simulated judicial tasks, such as assessing liability, sentencing, resolving pretrial motions, awarding damages, and so on.<sup>93</sup> As an example, we found that the amount of damages awarded by judges in a simulated personal injury case depended on whether they had been exposed to an arbitrary, irrelevant, or inadmissible number.<sup>94</sup> Judges exposed to a high number gave higher damage awards, while those exposed to a low number awarded less.<sup>95</sup> Similarly, we found that judges who were asked to sentence the same defendant for the same crime imposed sentences that were about 40 percent shorter when instructed to express their sentence in months, rather than in years.<sup>96</sup>

System 1 intuition relies on shortcuts and rules of thumb to achieve fast and easy processing in the interest of always having an answer immediately available. As an example, it assumes that “[w]hat you see is all there is (WYSIATI).”<sup>97</sup> People form impressions and make judgments based on available information. We are wired to think that the information we have is all the relevant information there is, so we quickly assess a person or situation as best we can based on what we know.<sup>98</sup> We tend not to ask whether there might be missing information that we should acquire.<sup>99</sup> In shadow docket matters, the information presented is likely to be incomplete or focused (in part) on a non-merits issue. That deficiency could exacerbate the WYSIATI tendency.

Of course, Supreme Court Justices, like other appellate judges, probably differ from the many trial court judges we have tested. Are they also likely to rely too heavily on intuition? The answer appears to be yes, if only because overreliance on intuition is an inherent feature of human cognition that influences nearly everyone.<sup>100</sup> As an example, Supreme Court Justices have dis-

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<sup>92</sup> Maggie E. Toplak et al., *The Cognitive Reflection Test as a Predictor of Performance on Heuristics-and-Biases Tasks*, 39 MEMORY COGNITION 1275 (2011).

<sup>93</sup> See, e.g., Guthrie, Rachlinski & Wistrich, *supra* note 73, at 19–29.

<sup>94</sup> See, e.g., Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 790–92 (2001) [hereinafter Guthrie, Rachlinski & Wistrich, *Inside the Judicial Mind*]; Guthrie, Rachlinski & Wistrich, *supra* note 73, at 19–21; Guthrie, Rachlinski & Wistrich, *supra* note 82, at 1501–06; Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 IND. L.J. 695 (2015) [hereinafter Rachlinski, Wistrich & Guthrie, *Can Judges Make Reliable Numeric Judgments?*] (discussing the cognitive illusions of anchoring, scaling, and numerosity).

<sup>95</sup> Rachlinski, Wistrich & Guthrie, *Can Judges Make Reliable Numeric Judgments?*, *supra* note 94, at 707.

<sup>96</sup> *Id.* at 716.

<sup>97</sup> KAHNEMAN, *supra* note 73, at 85–88.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Sperber et al., *supra* note 76, at 90.

played a susceptibility to the cognitive illusion known as “framing,”<sup>101</sup> not only on the shadow docket,<sup>102</sup> but even when employing the procedures of the merits docket.<sup>103</sup>

As a further example, consider the current Supreme Court’s pursuit of originalism or textualism as a philosophy for interpreting the Constitution.<sup>104</sup> There are, of course, both advantages<sup>105</sup> and disadvantages<sup>106</sup> to such judicial philosophies. Whatever their relative merits, it must be tempting to believe that when confronted by an intractable problem that requires resolution by a deadline, one can simply look up the answer in a narrowly defined set of materials, such as what the public believed a word meant in 1790 or what a dictionary of that era says a word means.<sup>107</sup> This is an example of what Daniel Kahneman

<sup>101</sup> Jeffrey J. Rachlinski & Andrew J. Wistrich, *Gains, Losses, and Judges: Framing and the Judiciary*, 94 NOTRE DAME L. REV. 521, 525–27 & n.26–28, 35 (2019) (providing a few examples of the Supreme Court—and other courts—committing this common error). Framing occurs when identical options are treated differently merely because of superficial differences in how the options are described. KAHNEMAN, *supra* note 73, at 88. As an example, people prefer economically identical outcomes described as gains rather than as losses, and meat described as 90 percent lean to the same meat described as 10 percent fat. *Id.*

<sup>102</sup> See, e.g., *S. Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (“Applicants seek to enjoin enforcement of the [Governor’s Executive] Order. ‘Such a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.’” (quoting *Respect Main PAC v. McKee*, 562 U.S. 996 (2010)); *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm’n*, 479 U.S. 1312, 1312 (1986) (Scalia, J.) (stating that an injunction “demands a significantly higher justification” than a stay). This divergence in standards is a cognitive error. EYAL ZAMIR, *LAW, PSYCHOLOGY, AND MORALITY: THE ROLE OF LOSS AVERSION* 163 (2015) (“Setting a higher standard of proof for mandatory injunctions was therefore characterized as ‘theoretically unsound,’ producing ‘decisions that turn on arbitrary and capricious considerations.’”).

<sup>103</sup> See, e.g., Rachlinski & Wistrich, *supra* note 101, at 527 & n.35.

<sup>104</sup> See generally Katie Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW 115 (2022); Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265 (2020); Frederick Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825 (2022).

<sup>105</sup> See JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 2 (2013); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777 (2022); Neil M. Gorsuch, *Justice Neil Gorsuch: Why Originalism Is the Best Approach to the Constitution*, TIME (Sept. 6, 2019, 8:00 AM), <https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/> [https://perma.cc/J4MW-4YCH].

<sup>106</sup> See ERWIN CHEREMINSKY, *WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM* (2022).

<sup>107</sup> See generally Mark A. Lemley, *Chief Justice Webster*, 106 IOWA L. REV. 299 (2020) (discussing, in the context of statutory interpretation, the Supreme Court’s tendency to substitute the complex question of Congressional intent with the simpler, “plain meaning” definition of a word instead); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013).

calls “substitution.”<sup>108</sup> Substitution is the act of replacing a difficult question that requires judgment, a complex balancing of attributes, or time-consuming analysis, with a different question that can be answered quickly and easily.<sup>109</sup> Sometimes this is an efficient strategy for problem-solving, but sometimes this can be an example of the streetlight effect; looking for your keys under a lamp-post where the light is better rather than where you dropped them.<sup>110</sup> This might also reflect the cognitive bias known as the law of instrument; that is, the over-reliance on an otherwise useful tool by using it in situations in which it is ill-suited or ineffective.<sup>111</sup>

The Supreme Court also appears to utilize mental shortcuts and heuristics to select the cases it will decide.<sup>112</sup> As an example, Supreme Court Justices appear to use a simple cue—the number of amicus curiae briefs filed in support of, or in opposition to, a petition for certiorari—in determining whether review should be granted.<sup>113</sup> They thus rely in part on a simple heuristic—the relative number of interest groups who believe that the case is worth the Justices’ time<sup>114</sup>—by substituting that for the more difficult assessment of whether the case actually is “cert-worthy.”<sup>115</sup> The Justices also seem to use the identity of a party—whether the petitioner is the plaintiff or the defendant<sup>116</sup>—and even

<sup>108</sup> See KAHNEMAN, *supra* note 73, at 97–99.

<sup>109</sup> *Id.* (defining substitution as a heuristic, that is, “a simple procedure that helps find adequate, though often imperfect, answers to difficult questions”).

<sup>110</sup> ROBERT F. BARSKY, NOAM CHOMSKY: A LIFE OF DISSENT 95 (1997) (“Science is a bit like the joke about the drunk who is looking under a lamppost for a key that he has lost on the other side of the street, because that’s where the light is.”).

<sup>111</sup> ABRAHAM H. MASLOW, THE PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE 15–16 (1966) (“I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail.”); ABRAHAM KAPLAN, THE CONDUCT OF INQUIRY: METHODOLOGY FOR BEHAVIORAL SCIENCE 28 (1964) (“[T]he law of the instrument . . . may be formulated as follows: Give a small boy a hammer, and he will find that everything he encounters needs pounding.” (cleaned up)).

<sup>112</sup> See Joseph Tanenhaus et al., *The Supreme Court’s Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISION MAKING 111, 127 (Glendon Schubert ed., 1963); Elizabeth A. Lane & Ryan C. Black, *Agenda Setting and Case Selection on the U.S. Supreme Court*, in OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS (2017).

<sup>113</sup> Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1122 (1988).

<sup>114</sup> Lee Epstein & Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 215, 215 (Cornell W. Clayton & Howard Gillman eds., 1999) (“[W]e argue that organized interests—participating as *amicus curiae*—play a role for justices similar to that lobbyists play for legislators: they provide information about the preferences of other actors, who are relevant to ability of the justices to attain their primary goal—to generate *efficacious* policy that is so close as possible to their ideal points.”).

<sup>115</sup> See KAHNEMAN, *supra* note 73, at 97–99.

<sup>116</sup> Alexander A. Reinert, *Asymmetric Review of Qualified Immunity Appeals*, 20 J. EMPIRICAL LEGAL STUD. 4, 43–44 (2023) (reporting that the Supreme Court was six times

whether a former law clerk is involved in a certiorari petition as a signal that review should be granted.<sup>117</sup> Perhaps the strongest signal is the Solicitor General's position. The Supreme Court follows the Solicitor General's recommendation about three-fourths of the time.<sup>118</sup> Some of these cues might be diagnostic, but others—such as the involvement of a former law clerk—likely are more noise than signal and could lead the Court astray. An even more troubling example of the Supreme Court's reliance on an intuitive rule of thumb is its mistaken endorsement of the negative effect fallacy—the erroneous proposition that it is more difficult to prove a negative proposition than a positive one—in the context of the exclusionary rule.<sup>119</sup> This “fundamental error in logic and statistical reason”<sup>120</sup> has infected subsequent decisions of the Supreme Court and lower courts in a variety of domains, partly because it enables courts to sidestep challenging analysis of empirical evidence in favor of easier and more intuitive value judgments.<sup>121</sup>

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more likely to grant certiorari when sought by defendant (18.1 percent) than when sought by plaintiff (3.1 percent) in qualified immunity cases).

<sup>117</sup> Huchen Liu & Jonathan P. Kastellec, *The Revolving Door in Judicial Politics: Former Clerks and Agenda Setting on the U.S. Supreme Court*, 51 AM. POL. RSCH. 3, 15–16 (2023) (documenting “a strong correlation between former clerks taking part in a request for the Court to review a case and an increased likelihood of the Court doing so” and reporting “fairly convincing evidence that the presence of a former clerk on an amicus brief is associated with a higher likelihood of cert being granted”); see 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 (2016) (finding that certiorari is more likely to be granted if the petitioner's lawyers have previously appeared in the Supreme Court).

<sup>118</sup> Paul R. Gugliuzza & Pory Koivula, *Stepping Out of the Solicitor General's Shadow: The Federal Circuit and the Supreme Court in a New Era of Patent Law*, 64 B.C.L. REV. (forthcoming 2023) (reporting that from 2002 to 2019, the Supreme Court followed the Solicitor General's recommendation on whether to grant certiorari 79 percent of the time); 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, 276 (2009) (from 1998 to 2004, the Supreme Court agreed with the Solicitor General's recommendation to deny certiorari between 75 and 83 percent of the time; from 2001 to 2004, the Supreme Court agreed with the Solicitor General's recommendation to grant certiorari 93 percent of the time, but merely 44 percent of the time from 1998 to 2000).

<sup>119</sup> *Elkins v. United States*, 364 U.S. 206, 218 (1960) (stating that it is difficult to assemble conclusive data on whether states that follow the exclusionary rule experience fewer “lawless searches and seizures” because “it is never easy to prove a negative”).

<sup>120</sup> Ryan D. Enos et al., *The Negative Effect Fallacy: A Case Study of Incorrect Statistical Reasoning by Federal Courts*, 14 J. EMPIRICAL LEGAL STUD. 618, 623 (2017).

<sup>121</sup> *Id.* at 625, 639.

### B. *Confirmation Bias*

Beliefs are sticky. They sometimes persist long after they ought to have been abandoned.<sup>122</sup> People frequently do not test their beliefs thoroughly, but instead seek out information consistent with what they already believe.<sup>123</sup> People who behave in this manner are exhibiting confirmation bias.

Confirmation bias is the tendency for people to receive and process information in ways that confirm their existing preconceptions, attitudes, and beliefs.<sup>124</sup> People look for, pay closer attention to, and better remember information consistent with their preferences and beliefs. By contrast, they tend to avoid, discount, and forget information that challenges those beliefs and preferences.<sup>125</sup> When information is ambiguous, people are adept at interpreting it in ways that concur with their preconceptions, attitudes, and beliefs. “These processes are an inherent and often unconscious part of our human cognition.”<sup>126</sup>

This observation about human nature is not new; Sir Francis Bacon described this tendency centuries ago:

The human understanding, once it has adopted opinions, either because they were already accepted and believed, or because it likes them, draws everything else to support and agree with them. And though it may meet a greater number and weight of contrary instances, it will, with great and harmful prejudice, ignore or condemn or exclude them by introducing some distinction, in order that the authority of those earlier assumptions may remain intact and unharmed.<sup>127</sup>

Modern psychology confirms that people commonly “interpret subsequent evidence so as to maintain their initial beliefs.”<sup>128</sup> Once a hypothesis is formed, people seek information that supports it and overlook the relevance and im-

<sup>122</sup> See Lee Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCH. 880, 880 (1975) (“[O]nce formed, impressions are remarkably perseverant and unresponsive to new input, even when such input logically negates the original basis for the impressions.”).

<sup>123</sup> See Anthony G. Greenwald, *The Totalitarian Ego: Fabrication and Revision of Personal History*, 35 AM. PSYCH. 603, 606 (1980) (“[P]eople manage knowledge in a variety of ways to promote the selective availability of information that confirms judgments already arrived at.”).

<sup>124</sup> Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175 (1998) (defining confirmation bias as “unwitting selectivity in the acquisition and use of evidence”).

<sup>125</sup> See Joshua Klayman & Young-Won Ha, *Confirmation, Disconfirmation, and Information in Hypothesis Testing*, 94 PSYCH. REV. 211, 211 (1987).

<sup>126</sup> Michael D. Schlosser et al., *Confirmation Bias: A Barrier to Community Policing*, 6 J. CMTY SAFETY & WELL-BEING 162, 162 (2021).

<sup>127</sup> FRANCIS BACON, NOVUM ORGANUM § 46 at 57 (Peter Urbach & John Gibson eds. & trans., Open Court Publ’g Co. 1998) (1620).

<sup>128</sup> Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCH. 2098, 2099 (1979).

portance of information that suggests it might be wrong.<sup>129</sup> Confirmation bias predisposes people “not merely to interpret evidence in a self-fulfilling manner, but to seek out evidence supporting only one side of a polarized issue.”<sup>130</sup> Even though a falsifying test strategy usually yields superior results, people are disinclined to adopt it.<sup>131</sup> Part of the reason for this bias is that testing a belief requires engaging in an effortful, System 2 process that involves assimilating contrary information.<sup>132</sup> It is far easier and faster to rely on intuition (which will seek out, remember, and emphasize consistent information) while ignoring, forgetting, or reinterpreting inconsistent information.<sup>133</sup>

The most influential demonstration of the confirmation bias in an empirical setting was conducted by psychologist Peter Wason.<sup>134</sup> In a typical version of this study, Wason showed people four cards, each bearing one of the following symbols: *E*, *K*, 4, and 7.<sup>135</sup> He informed the participants that each card displays a letter on one side and a number on the other side.<sup>136</sup> He then asked the participants which card or cards, if any, they would need to turn over to determine whether the statement—“If a card has a vowel on one side, then it has an even number on the other side.”—is accurate.<sup>137</sup> The correct answer to this question is *E* and 7. An odd number on the other side of the *E* card or a vowel on the other side of the 7 card would falsify the statement.<sup>138</sup> The statement, however, says nothing about what is on the other side of a card displaying an even number, so turning over the 4 card would accomplish nothing. Neither a vowel nor a consonant on its other side would falsify the statement. Similarly, the statement indicates nothing about what is on the other side of a card displaying a consonant, so turning over the *K* card is equally unnecessary. People perform

<sup>129</sup> See Barbara O’Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 PSYCH., PUB. POL’Y, & L. 315, 316–17 (2009).

<sup>130</sup> Scott O. Lilienfeld et al., *Giving Debiasing Away: Can Psychological Research on Correcting Cognitive Errors Promote Human Welfare?*, 4 PERSPS. ON PSYCH. SCI. 390, 392 (2009).

<sup>131</sup> See Nickerson, *supra* note 124, at 211 (“In the aggregate, the evidence seems to me fairly compelling that people do not naturally adopt a falsifying strategy of hypothesis testing.”); JONATHAN ST. B. T. EVANS, *BIAS IN HUMAN REASONING* 41 (1989) (describing confirmation bias as “the best known and most widely accepted notion of inferential error”).

<sup>132</sup> See KAHNEMAN, *supra* note 73, at 81 (“The operations of associative memory contribute to a general *confirmation bias*.”).

<sup>133</sup> See Nickerson, *supra* note 124, at 201–02.

<sup>134</sup> See Peter C. Wason, *Reasoning About a Rule*, 20 Q.J. EXPERIMENTAL PSYCH. 273 (1968); Marco Ragni et al., *Selecting Evidence to Test Hypotheses: A Theory of Selection Tasks*, 144 PSYCH. BULL. 779, 780 (2018) (describing Peter Wason’s research as “seminal”); SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 231–33 (1993) (reviewing Peter Wason’s work).

<sup>135</sup> PLOUS, *supra* note 134, at 231.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 232.

poorly on this task. The most common response is *E* and 4, followed by only *E*.<sup>139</sup> The majority of respondents thus choose to turn over cards that are capable of confirming the statement, but fewer than 5 percent correctly answer *E* and 7, thereby displaying an inherent tendency to try to confirm rather than to disconfirm the statement, i.e., confirmation bias.<sup>140</sup>

Some have raised the concern that confirmation bias might influence judges who are not assiduous in placing their presuppositions aside.<sup>141</sup> To test judges' susceptibility to confirmation bias, my coauthors and I asked some judges to respond to the Wason card selection task. When we assigned the task to Ohio judges and New York judges, only 8.1 percent answered correctly.<sup>142</sup> By way of comparison, a group of thirty-seven Canadian judges performed even worse; they failed to produce a single correct response.<sup>143</sup> Similarly, none of a group of forty-four arbitrators correctly answered the Wason card selection task.<sup>144</sup> These results suggest that judges are vulnerable to confirmation bias.

The abstractness of the Wason card selection task arguably limits the generalizability of the finding that most people are subject to confirmation bias when making day-to-day decisions.<sup>145</sup> It lacks the kinds of contextual cues that can facilitate sound reasoning in more realistic settings.<sup>146</sup> Some researchers have found that converting the Wason card selection task into more natural or familiar scenarios sometimes improves performance.<sup>147</sup> But even in more natural settings, confirmation bias persists.<sup>148</sup> In fact, some natural settings encourage confirmation bias because people are highly motivated to identify information that is consistent with beliefs that are important to them.<sup>149</sup>

To determine whether judges are also susceptible to confirmation bias in a more natural setting, we also administered a variation of the Wason card selection task involving a context that judges might confront when presiding over

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<sup>139</sup> *Id.* at 231–32.

<sup>140</sup> *Id.* at 232.

<sup>141</sup> *E.g.*, Eyal Peer & Eyal Gamliel, *Heuristics and Biases in Judicial Decisions*, 49 CT. REV. 114, 115 (2013) (“Confirmation bias can also affect judges when they hear and evaluate evidence brought before them in court. Specifically, judges might be biased in favor of evidence that confirms their prior hypotheses and might disregard evidence that does not correspond with their previous assumptions.”).

<sup>142</sup> Wistrich & Rachlinski, *supra* note 83, at 598.

<sup>143</sup> Helm, Wistrich & Rachlinski, *supra* note 84, at 683.

<sup>144</sup> *Id.* at 670, 683.

<sup>145</sup> *See* Leda Cosmides & John Tooby, *Cognitive Adaptations for Social Exchange*, in *THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE* 163, 183 (Jerome H. Barkow et al. eds., 1992).

<sup>146</sup> Peter C. Wason & Diana Shapiro, *Natural and Contrived Experience in a Reasoning Problem*, 23 Q.J. EXPERIMENTAL PSYCH. 63, 69 (1971).

<sup>147</sup> *See* Nickerson, *supra* note 124, at 184.

<sup>148</sup> *See* Erica Dawson et al., *Motivated Reasoning and Performance on the Wason Selection Task*, 28 PERSONALITY & SOC. PSYCH. BULL. 1379, 1380 (2002).

<sup>149</sup> *Id.* at 1385.

cases. We asked them to imagine that they were assigned to resolve a dispute in which a woman was alleging gender discrimination in employment.<sup>150</sup> The judges were told that the complaint alleged that “male managers never promote female employees to the position of software engineer,”<sup>151</sup> and that the employer had withheld from discovery the personnel files of four employees with qualifications similar to the complainant’s who had been promoted to the position of software engineer.<sup>152</sup> Those files were described as follows:

- A. The personnel file of employee whose gender is unknown, who was recently promoted by a male supervisor to the position of software engineer;
- B. The personnel file of employee whose gender is unknown, who was recently promoted by a female supervisor to the position of software engineer;
- C. The personnel file of male employee, who was recently promoted to the position of software engineer by a supervisor whose gender is unknown; or
- D. The personnel file of female employee, who was recently promoted to the position of software engineer by a supervisor whose gender is unknown.<sup>153</sup>

We asked the judges to identify “the file or files that must be examined to determine if the plaintiff’s allegation that ‘male managers never promote female employees to the position of software engineer’ is likely to be true or false.”<sup>154</sup> We also admonished them to “not select any more files than are absolutely necessary.”<sup>155</sup>

The correct answer is that files A and D should be examined. File A is necessary as it would falsify the hypothesis if the employee was a female. File D is necessary because it would falsify the hypothesis if the supervisor was male. Files B and C are not necessary because they do not apply to a situation involving a female employee *and* a male manager.

Judges reviewing the contextualized litigation version of the selection task performed better. Of the 141 Ohio judges to whom we assigned the file selection task, 14.2 percent answered correctly.<sup>156</sup> A group of forty-three arbitrators and a group of Oregon lawyers also performed better on this more natural task: 19 percent of the arbitrators and 25.2 percent of the lawyers responded correctly.<sup>157</sup> The improved performance of the judges on the more realistic task relative to the abstract task was not statistically significant. The results suggest that the confirmation bias could distort judges’ decision making.<sup>158</sup>

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<sup>150</sup> Helm, Wistrich & Rachlinski, *supra* note 84, at 683.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 683–84.

<sup>154</sup> *Id.* at 684.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*; Wistrich & Rachlinski, *supra* note 83, at 598.

<sup>158</sup> See Wistrich & Rachlinski, *supra* note 83, at 598–601.



Confidence consistency is a related phenomenon. “It is based on a simple, but reasonable intuition: when updating in the face of information that conflicts with prior beliefs, *retain* as far as possible those conditional beliefs in which you are *more* confident, and relinquish only those in which you have less confidence.”<sup>159</sup> This might exacerbate the impact of confirmation bias, especially on judges who must rush to meet a deadline, who are confronted by an intractable decision, or who are overwhelmed by a backlog of submitted cases.

Countermeasures to limit confirmation bias include reducing ambiguity and considering alternatives. Unfortunately, the shadow docket undercuts the efficacy of both countermeasures. The cases the Supreme Court selects tend to be cases in which the correct result is unclear or disputed, such as those involving open-ended constitutional language applied to matters never contemplated by the framers or ratifiers, or those as to which various courts of appeals disagree.<sup>160</sup> More information—including detailed, focused presentations by lower courts, adversaries, or amicus curiae—could help to clarify ambiguity. By truncating briefing by the parties, participation by amicus curiae, and input from lower courts, the shadow docket inhibits the potential for clarification. Considering alternatives can also be effective in reducing confirmation bias. But, again, in contrast to the robust adversarial process and broad amicus curiae participation that characterizes the Supreme Court’s merits docket, the shadow docket reduces the opportunity for Justices to be confronted by divergent views.

Might Supreme Court Justices be less vulnerable to confirmation bias than lower court judges, lawyers, arbitrators, and many others? Because we have not tested them, we cannot be certain. But the bias is ubiquitous;<sup>161</sup> the typical recorded performance on the Wason selection task is poor;<sup>162</sup> and the hundreds of lawyers, arbitrators, and judges we have tested are quite vulnerable to it. So even if the Justices might perform better than most legal professionals, it is unlikely that they are wholly immune.

The danger posed by confirmation bias when judges make preliminary assessments of the merits—as Supreme Court Justices often do on the shadow docket<sup>163</sup>—has been recognized in other settings. As an example, some have argued that *inter partes* patent review violates due process, in part because the

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<sup>159</sup> Brian Hill, *Updating Confidence in Beliefs*, 199 J. ECON. THEORY, 105209, 2022, at 1, 27–28.

<sup>160</sup> Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 805 (1982) (“[T]he Court does not decide many easy cases.”).

<sup>161</sup> Matthias Michel & Megan A. K. Peters, *Confirmation Bias Without Rhyme or Reason*, 199 SYNTHESE 2757, 2757 (2021) (“This bias is widespread, even among those who are (supposed to be) searching for objective truths such as judges, scientists, and physicians.”).

<sup>162</sup> PLOUS, *supra* note 134, at 232.

<sup>163</sup> See *Nken v. Holder*, 556 U.S. 418, 434 (2009) (explaining the standard for granting a stay, of which “whether the stay applicant has made a strong showing that he is likely to succeed on the merits” is the first and a “critical” factor).

same panel of administrative patent judges that decides the threshold issue of whether there is a “reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition” also subsequently makes the final decision on the petition, thereby raising the danger that confirmation bias might taint the final decision.<sup>164</sup> Similarly, in the context of preliminary injunctions, where likelihood of success on the merits is a factor, one scholar has argued that “confirmation bias would likely arise in this situation because the judge will have a tendency to seek out evidence supporting the earlier decision on the merits and discounting or failing to give sufficient weight to any contradictory evidence.”<sup>165</sup>

Susceptibility to confirmation bias is especially dangerous since it subverts the essence of adjudication—a reasoned decision based on the submissions of the parties.<sup>166</sup> It suggests that the mind of the adjudicator is closed (or at least less than fully open) when proofs or arguments are being presented. In addition, research indicates that obtaining what looks like confirmatory evidence can bolster the decision maker’s confidence, even though the additional information might not be relevant.<sup>167</sup> Therefore, susceptibility to confirmation bias should be a concern for any judge.<sup>168</sup>

### C. Availability Heuristic

“The *attention* which we lend to an experience is proportional to its vivid or interesting character; and it is a notorious fact that what interests us most vividly at the time is, other things equal, what we remember best.”<sup>169</sup> This characteristic of the human species explains our susceptibility to the availability heuristic, which is “the process of judging frequency by the ease with which instances come to mind.”<sup>170</sup> As an example of how availability can affect judgment, most people will state that there are more words in the English language that start with the letter *r* than have the letter *r* in the third position.<sup>171</sup> “Because it is much easier to search for words by their first letter than by their third letter, most people judge words that begin with a given consonant to be

<sup>164</sup> Nicholas J. Doyle, *Confirmation Bias and the Due Process of Inter Partes Review*, 57 IDEA 29, 36, 55–60 (2016) (internal quotation omitted).

<sup>165</sup> Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779, 806 (2015).

<sup>166</sup> See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978) (“[T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.”).

<sup>167</sup> See Lord et al., *supra* note 128, at 2105; Nickerson, *supra* note 124, at 186.

<sup>168</sup> See Fuller, *supra* note 166, at 382–83.

<sup>169</sup> 1 WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY 670 (1890).

<sup>170</sup> KAHNEMAN, *supra* note 73, at 129 (internal quotations omitted).

<sup>171</sup> See Amos Tversky & Daniel Kahneman, *Judgement Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1127 (1974) (describing this example of the availability heuristic).

more numerous than words in which the same consonant appears in the third position.”<sup>172</sup> It therefore appears that there are more words that start with the letter *r*, even though there actually are more words with *r* in the third position.<sup>173</sup>

Availability has a powerful effect on the assessment of accident rates and the likelihood of disasters.<sup>174</sup> Dramatic events, such as the crash of a commercial airliner or a devastating earthquake, tend to be memorable and widely reported; the individual death from a heart attack tends not to be (unless the victim is a celebrity or riding a Peloton bike).<sup>175</sup> Hence, people overestimate the risk of the former and underestimate the risk of the latter.

The availability heuristic can produce bizarre consequences. As physicist Freeman Dyson recounted, on average, every death attributed to a shark attack actually saves the lives of ten swimmers.<sup>176</sup> “Every time a swimmer is killed, the number of deaths by drowning declines for a few years and then rebounds to the normal level. The effect occurs because reports of death by shark attack are remembered more vividly than reports of drownings.”<sup>177</sup> A similar phenomenon was observed in automobile accident deaths after the September 11, 2001, attacks. In an attempt to avoid newly salient airline crashes, many people chose to drive rather than fly whenever feasible.<sup>178</sup> The result was that travel-related deaths increased as more people chose driving—a riskier form of travel than flying.<sup>179</sup>

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> See Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 463, 467–68 (Daniel Kahneman et al. eds., 1982) (“In keeping with availability considerations, overestimated causes of death were dramatic and sensational, whereas underestimated causes tended to be unspectacular events . . .”).

<sup>175</sup> KAHNEMAN, *supra* note 73, at 8 (“People tend to assess the relative importance of issues by the ease with which they are retrieved from memory . . .”); Justin Gallagher, *Learning About an Infrequent Event: Evidence from Flood Insurance Take-Up in the United States*, 6 AM. ECON. J.: APPLIED ECONS. 206, 230 (2014) (finding that because of availability bias, “the take-up of insurance is completely flat in the years before a flood, spikes immediately following a flood, and then steadily declines back to baseline.”); see Susan McDonald, *After Peloton-Related Heart Attack on ‘Billions,’ Some Real-World Advice for Newbie Exercisers*, HARTFORD HEALTHCARE (Jan. 31, 2022), <https://healthnewshub.org/after-peloton-related-heart-attack-on-billions-some-real-world-advice-for-newbie-exercisers/> [<https://perma.cc/8D5J-KCF7>] (addressing the myth that people are likely to suffer a heart attack while exercising on a Peloton bike, due to recent television portrayals).

<sup>176</sup> Freeman Dyson, *How to Dispel Your Illusions*, THE NEW YORK REV. OF BOOKS (Dec. 22, 2011), <https://www.nybooks.com/articles/2011/12/22/how-dispel-your-illusions/> [<https://perma.cc/38S6-926D>].

<sup>177</sup> *Id.*

<sup>178</sup> Raywat Deonandan & Amber Backwell, *Driving Deaths and Injuries Post-9/11*, 4 INT’L J. GEN. MED. 803, 803 (2011).

<sup>179</sup> *Id.*

The availability heuristic plagues even expert decision makers.<sup>180</sup> Three facts suggest that the Justices might be especially vulnerable. First, the Supreme Court decides case-by-case. Although common law style decision making possesses the strengths of concreteness and incrementalism,<sup>181</sup> there is an inherent structural weakness in the law-articulating function of the judiciary, namely the unavoidable preoccupation with the facts of the case before the court. “Judges are human, and the facts of the particular case will occupy the foreground of their phenomenology. This may at times provide useful contextualization, but it may at times provide distortion . . . [C]ase-based rulemaking brings as many disadvantages as advantages.”<sup>182</sup> This deficiency is aggravated in the Supreme Court because of its insularity<sup>183</sup> and because it selects for itself the cases it will hear and creates the issues it will resolve.<sup>184</sup>

Second, resource constraints encourage the Supreme Court to overgeneralize. The Supreme Court is a special type of court with a distinctive role.<sup>185</sup> Ordinarily, “[d]ecisions are not primarily made that they may serve the future in the form of precedents, but rather to settle issues between the litigants. Their use in after cases is an incidental aftermath.”<sup>186</sup> This is not true of Supreme Court decisions however. The Supreme Court takes cases for the purpose of re-

<sup>180</sup> Dan P. Ly, *The Influence of the Availability Heuristic on Physicians in the Emergency Department*, 78 ANNALS EMERGENCY MED. 650, 656 (2021) (“In conclusion, we found that emergency physicians, after having a recent patient visit with a pulmonary embolism diagnosis, immediately increased their rates of pulmonary embolism testing for subsequent patients. However, we did not find that this increase persisted. These results are consistent with the availability heuristic influencing physician decision-making in relation to pulmonary embolism diagnoses.”).

<sup>181</sup> See Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L. J. 65, 98 (1983) (arguing that incremental changes in legal rules are most conducive to optimizing the precision and soundness of such rules).

<sup>182</sup> Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L. J. 765, 779 (2004); RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 80 (2003) (“What the judge has before him is the facts of the particular case, not the facts of future cases. He can try to imagine what those cases will be like, but the likelihood of error in such imaginative projection is great.”); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 141 (1960) (alluding to the power of the particular); Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 934 (2006) (“Adjudication thus builds law from the bottom up, one dispute at a time.”).

<sup>183</sup> Rachlinski, *supra* note 182, at 953 (“Owing to the insulation of the Court from other perspectives, the common law of the Constitution is more vulnerable to the influence of cognitive error than the ordinary common law.”).

<sup>184</sup> Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 864 (2022) (“[T]he Court no longer decides cases: It asks and answers questions. This is an awesome power that gives the Court the ability to choose what law to declare on its own timetable.”); *id.* (“Is a cherry-picked question a case or controversy? Is it just for the Court to treat parties and their litigation as means rather than ends?”).

<sup>185</sup> Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 684 (2012) (“The Court’s current place in our constitutional order distinguishes it in kind, not in degree, from other courts.”).

<sup>186</sup> JESSE FRANKLIN BRUMBAUGH, LEGAL REASONING AND BRIEFING 171–72 (1917).

fining law for the future. “The Court and its members have long insisted that the Court ‘is not, and has never been, primarily concerned with the correction of errors in lower court decisions.’”<sup>187</sup> Instead, it decides only questions “whose resolution will have immediate importance far beyond the particular facts and parties involved.”<sup>188</sup> Therefore, the consequences of any mismatch between the case before it and the mine run of cases could be severe.

Third, in selecting its cases, the Court is exposed to an unrepresentative sample of the universe of cases. The selection effect indicates that the cases presented to the Supreme Court are likely to be disproportionately uncertain and idiosyncratic.<sup>189</sup> In addition, that subset of cases is systematically skewed. Cases in which a lower court erred or an existing rule functioned poorly are likely to be oversampled.<sup>190</sup> Therefore, the Court might incorrectly perceive an error to be more pervasive or serious than it actually is.

The Supreme Court’s review of decisions granting federal habeas corpus relief to state prisoners and decisions denying qualified immunity to police officers might be examples of the availability heuristic at work. Such decisions are statistically rare<sup>191</sup> and lower courts likely resolve these issues correctly most of the time, so from both an error-correction and a law-shaping perspective, repeated supervision seems unnecessary. Yet the Supreme Court returns to them again and again.<sup>192</sup> The lesson the Supreme Court seems consistently to

<sup>187</sup> Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 278 (2006).

<sup>188</sup> *Appellate Jurisdiction*, CORNELL LAW SCHOOL, <https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-2/appellate-jurisdiction> [<https://perma.cc/QKB3-FKD7>] (quoting Chief Justice Vinson).

<sup>189</sup> See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984) (explaining that “the disputes selected for litigation (as opposed to settlement) will constitute neither a random nor a representative sample of the set of all disputes”).

<sup>190</sup> See Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583, 585 (1992) (“The cases before the court, however, will constitute a biased sample of all possible cases because they excluded those who choose (perhaps inefficiently) to either comply with the existing precedent (itself developed on the basis of a biased sample) or to alter their behavior so as to avoid disputes (essentially to drop out). As a consequence of this *activity selection bias*, courts will not usually see a random sample of possible activities, and therefore cannot learn enough, no matter how statistically and economically sophisticated and motivated, to develop the efficient rule for the full set of cases.”).

<sup>191</sup> Nancy J. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 FED. SENT’G. REP. 308, 309 tbl. 2 (2012) (reporting that the petitions granted relief in merely 0.82 percent of 2,188 randomly selected state habeas corpus petitions filed in U.S. District Courts during 2003–2004); cf. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9–10 (2017) (finding that qualified immunity is rarely raised in litigation).

<sup>192</sup> Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691, 707 (2020) (reporting that of the eighty-eight summary reversals by the Supreme Court between 2005 and 2018, forty-one were in federal habeas corpus cases (of which thirty-four were reversed in favor of the state) and eleven were in qualified immunity cases (of which nine were reversed in favor of the state or local official)); William Baude, *Is Qualified Im-*

take from such cases is that it is evidence of persistent lower court recalcitrance or incompetence.<sup>193</sup> Therefore, if the Supreme Court decides a case in which an error was made in a lower court, it may be induced to believe that such errors are more frequent and important than they actually are.<sup>194</sup> Thus, the availability heuristic might distort not only how the Supreme Court resolves cases but also which ones it chooses to decide.

Fortunately, the kind decision making environment of the merits docket provides the Supreme Court with tools for combatting the availability heuristic. One of those tools is the participation of non-parties as *amicus curiae*.

*Amicus* briefs are influential.<sup>195</sup> According to a recent study of the 386 cases decided by the Supreme Court after oral argument during the October 2013 to October 2018 Terms, *amicus* briefs were filed in nearly all merits docket cases and were relied on heavily by the Supreme Court.<sup>196</sup> The researchers found that *amicus* briefs were filed in 96.6 percent of cases, were mentioned during oral argument in 36.0 percent of cases, were cited in 52.8 percent of cases, and sources provided by *amicus* briefs were cited in 78.4 percent of cases.<sup>197</sup> Indeed, “about one in eight of all the citations in opinions appear uniquely in the filings of amici.”<sup>198</sup> The researchers concluded that “the Court commonly uses amici as authorities for empirical information absent from the factual record developed in the lower courts.”<sup>199</sup> Accordingly, *amicus* briefs should improve decision making by exposing Justices to a greater diversity of viewpoints and the perspectives of non-litigants, thereby countering the availability heuris-

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*munity Unlawful?*, 106 CAL. L. REV. 45, 82–88 (2018) (describing and criticizing the especially favorable treatment of qualified immunity in the contexts of certiorari petitions, the merits docket, and the shadow docket); Robert M. Yablon, *Justice Sotomayor and the Supreme Court's Certiorari Process*, 123 YALE L.J.F. 551, 562 (2014) (arguing that “the current [Supreme] Court’s disdain for error correction is selective” and focuses primarily on overturning grants of habeas corpus petitions, denials of qualified immunity, etc.).

<sup>193</sup> *Glebe v. Frost*, 135 S. Ct. 429, 431 (2014) (noting that although the Ninth Circuit had acknowledged controlling law, it had “tried to get past it”); *White v. Woodall*, 134 S. Ct. 1697, 1701 (2014) (stating that the Sixth Circuit had “disregarded the limitations of 28 U.S.C. § 2254(d)—a provision of law that some federal judges find too confining, but that all federal judges must obey”).

<sup>194</sup> Schauer, *supra* note 55, at 894 (decision makers “often believe that the most proximate member of a class is representative of the class”); Rachlinski, *supra* note 182, at 942 (“Because the case before the judge is vivid, salient, and therefore memorable, judges might overstate the frequency with which similar facts occur.”).

<sup>195</sup> Paul M. Collins, Jr., *The Consistency of Judicial Choice*, 70 J. POL. 861, 868 (2008) (reporting “strong support for the role of *amicus curiae* briefs in shaping the justices’ decision making”).

<sup>196</sup> Ronald Mann & Michael Fronk, *Assessing the Influence of Amici on Supreme Court Decision Making*, 18 J. EMPIRICAL LEGAL STUD. 700, 712, tbl.2 (2021).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 726.

<sup>199</sup> *Id.* at 725.

tic that haunts all courts.<sup>200</sup> This risk is exacerbated if, as is true of the Supreme Court, the cases that will be heard are selected by the Justices themselves.<sup>201</sup> But the shadow docket reduces the opportunity for non-party participation, thereby diminishing the value of this institutional feature.

#### D. Political Ideology

“Today, the dominant view among social scientists is that ideology is indeed a key component predicting judicial rulings and judicial behavior.”<sup>202</sup> This principle applies in all jurisdictions and at all levels of the judiciary.<sup>203</sup> Although political ideology influences the choices of lower court judges,<sup>204</sup> it evidently does so to a relatively modest degree.<sup>205</sup> By contrast, as the hierarchy postulate indicates,<sup>206</sup> numerous studies demonstrate that political ideology in-

<sup>200</sup> Schauer, *supra* note 55, at 883–84 (expressing concern that common law judges focus on the “this-ness” of each case, and if a case is not representative of the full array of events that a rule or principle will cover, then the judge’s ruling may distort the common law); *id.* at 899 (“It is therefore fair to conclude that the effects of a particular case are likely, on balance, and not just as one potentially outweighed flaw, to distort the case-based rulemaker’s ability to accurately assess the field of future events that any prospective rule would encompass.”); Schauer, *supra* note 182, at 778 (explaining why “the cases that wind up on appeal turn out to be an unrepresentative sample of the issues or controversies that exist at the prelitigation stage”).

<sup>201</sup> See Epps & Ortman, *supra* note 52, at 732 (“We propose supplementing the Supreme Court’s certiorari docket by giving the Court appellate jurisdiction over a new set of cases . . . selected from the final decisions of the circuit courts and entered into the lottery. At regular intervals . . . a small number of cases would be chosen as ‘winners.’ Once chosen, the losing party in the lower court would be granted the right to appeal [to the Supreme Court].”).

<sup>202</sup> Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. ECON. PERSPS. 97, 97 (2021); see also Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Judicial Politics and Decisionmaking: A New Approach*, 70 VAND. L. REV. 2051, 2052–53 (2017) (stating that “judicial politics matters. . . . [S]tudy after study finds that the political orientation of judges influences their decisions.”).

<sup>203</sup> See Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 221 (1999); Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420, 438–43 (2007).

<sup>204</sup> See, e.g., Alma Cohen & Crystal S. Yang, *Judicial Politics and Sentencing Decisions*, 11 AM. ECON. J.: ECON. POL’Y. 160, 160 (2019) (finding that Republican district judges impose longer sentences); Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Class Certification on the U.S. Courts of Appeals*, 119 MICH. L. REV. 231, 254–57 (2020) (finding that all-Republican appellate panels were less likely to uphold class certification).

<sup>205</sup> See, e.g., Rachlinski, Wistrich & Guthrie, *supra* note 202, at 2056, 2097 (reporting that 2,200 lower court judges exhibited the influence of political ideology in two dozen hypothetical cases, but that the overall effect was rather small and that some hypothetical cases showed no statistically significant impact).

<sup>206</sup> See Christopher Zorn & Jennifer Barnes Bowie, *Ideological Influences on Decision Making in the Federal Judicial Hierarchy: An Empirical Assessment*, 72 J. POL. 1212, 1212 (2010) (demonstrating the truth of the “hierarchy postulate,” specifically, that judges’ political ideology affects judicial decisions more strongly in the Supreme Court than it does at lower levels of the federal judiciary).

fluences the decisions of Supreme Court Justices consistently and powerfully.<sup>207</sup>

As an example, Geoffrey Stone analyzed the eighteen arguably most significant cases decided by the Supreme Court from 2000 to 2013 and found that the eleven Justices who served during that period voted in a manner that tracked the presumed policy preferences of liberal and conservative legislators nearly all of the time.<sup>208</sup> The six liberal Justices voted for the liberal policy position 97 percent of the time and the five conservative Justices voted for the conservative policy position 98 percent of the time.<sup>209</sup> Stone's study confirms that "the Supreme Court is not an ordinary court but a political court, or more precisely a politized court, which is strongly influenced in making its decisions by the political beliefs of the judges."<sup>210</sup> Moreover, "several studies suggest that a Justice's attitudes operate particularly strongly in salient cases, as compared to relatively trivial disputes."<sup>211</sup>

Interpretive methodologies, even those whose purpose is to constrain judges, such as originalism and textualism, appear to exert scant restraint on this tendency. For example, a study of Supreme Court Justices showed that

<sup>207</sup> See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86, 110 (2002) ("The attitudinal . . . model . . . holds that the Supreme Court decides disputes before it in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal."); Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2041–43, 2043 fig.2 (2016) (demonstrating that during the Roberts Court era, Republican appointees were significantly more pro-business, anti-civil rights claimant, and pro-prosecution than their Democratic appointee colleagues); see also LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 113 (2013) (reporting that from 1937 to 2009, "As a group, Justices appointed by Republican Presidents vote liberally more than they vote conservatively in only two of the subject-matter categories (federalism and federal taxation), while as a group Justices appointed by a Democratic President vote conservatively more than they vote liberally in only one category (judicial power)").

<sup>208</sup> Geoffrey R. Stone, *The Supreme Court in the 21<sup>st</sup> Century*, 142 DAEDALUS 36, 38–39 (2013).

<sup>209</sup> *Id.* at 39.

<sup>210</sup> Richard A. Posner, *The Supreme Court Is a Political Court. Republicans' Actions Are Proof*, WASH. POST. (Mar. 9, 2016), [https://www.washingtonpost.com/opinions/the-supreme-court-is-a-political-court-republicans-actions-are-proof/2016/03/09/4c851860-e142-11e5-8d98-4b3d9215ade1\\_story.html](https://www.washingtonpost.com/opinions/the-supreme-court-is-a-political-court-republicans-actions-are-proof/2016/03/09/4c851860-e142-11e5-8d98-4b3d9215ade1_story.html) [https://perma.cc/4W9H-TMHU].

<sup>211</sup> Collins, *supra* note 195, at 863; Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 L. & SOC'Y. REV. 259, 260 (2007) (finding that "legal advocacy carries no empirical weight" in salient cases but in non-salient cases the Justices "are more amenable to legal persuasion").



originalism had little effect on outcomes, largely leaving Justices free to pursue their ideological preferences.<sup>212</sup> Other scholars have made similar findings.<sup>213</sup>

This is equally true of decisions on the Supreme Court's shadow docket.<sup>214</sup> In fact, the Supreme Court uses the shadow docket to promote its political or policy agenda beyond its decisions on the merits by shaping the scope of the cases it accepts for review<sup>215</sup> and the level and direction of non-party participation.<sup>216</sup> Political ideology also appears to influence the Justices' choices about

<sup>212</sup> See John B. Gates & Glenn A. Phelps, *Intentionalism in Constitutional Opinions*, 49 POL. RSCH. Q. 245, 245, 257 (1996) (reporting of Justices Brennan and Rehnquist that "each justice used intentionalism to support outcomes consistent with his political predispositions"; defining "intentionalism" as reliance on the intent of the framers of the constitution); *id.* at 255 ("The interpretive evidence suggests that the justices' use of history or intentionalism is driven in large part by their competing visions of a constitutional order. This strongly suggests that the justices may systematically use the intent of the framers to support their ideological positions.").

<sup>213</sup> FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* 114–15 (2013) (showing a low correlation between the use of historical sources and justices' departing from their expected votes based on policy preferences); Victoria Nourse, *The Paradoxes of a Unified Judicial Philosophy*, 38 CONST. COMM. 1, 5–6 (2023) (reporting that in non-unanimous cases decided during the October Terms 2020 and 2021, "Self-described textualist Justices divided among themselves about the meaning of the text, the proper text to pick, or its application, 67% of the time (61/91) when facing an interpretive issue."; and further reporting that "When the Justices agreed, text ended the analysis. When they disagreed about the choice-of-text or meaning of the text, they turned to consequentialism 3/4 of the time (75%)."); see *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) ("The current Court is textualist only when being so suits it. When the method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards."); cf. Anthony Niblett & Albert H. Yoon, *Friendly Precedent*, 57 WM. & MARY L. REV. 1789, 1811 (2016) ("We find that judges consistently gravitate toward precedent that is friendly in terms of political alignment.").

<sup>214</sup> Johnson & Strother, *supra* note 6, at 7 (finding that "the justices[] ideological preferences are strongly predictive of their observable outcomes on the shadow docket"); *id.* at 11 (concluding that "the Court's shadow docket decisionmaking is strikingly similar to its merits decision making—by all appearances driven in substantial part by justices' ideological preferences"); Pablo Das et al., *Deep in the Shadows: The Facts About the Emergency Docket*, 109 U. VA. L. REV. ONLINE 73, 98 (2023) (reporting that with respect to the impact of political ideology, decision making on the shadow docket is similar to decision making on the merits docket); see VLADECK, *supra* note 3, at 246 (finding that except in death penalty cases, shadow docket orders used to rarely divide Justices along ideological lines but now they do).

<sup>215</sup> Johnson & Strother, *supra* note 6, at 8 (stating that "the shadow docket activity of question-targeting," in which the Supreme Court "uses its certiorari order to remove a question brought by the parties, to add a question not raised by any party, or to rewrite and reframe an issue the parties did present," "is a powerful and subtle form of agenda control" that "the Roberts Court uses in 10–25% of its merits cases").

<sup>216</sup> *Id.* at 11–12. The Roberts Court has shaped amicus participation by using its certiorari orders to remove, add, or rewrite the questions for review. "The evidence suggests that the Roberts Court uses its shadow powers in ways that increase the salience of and elite engagement with individual cases as well as increasing the probability of narrow majorities." *Id.*

whether to grant certiorari.<sup>217</sup> Finally, the Court's use of the device of granting certiorari before judgment in an apparent attempt to expedite federal executions sought by President Trump before President Biden would have an opportunity to commute those sentences is suggestive of political bias.<sup>218</sup>

Further evidence of political bias is revealed by an analysis of the Justices' behavior during oral argument, a context in which lack of time for reflection might (like the shadow docket) reveal unfiltered attitudes. These studies show that the Justices exhibit political bias during oral argument. Not only were conservative Justices allowed more opportunities to speak than liberal Justices, but they also interrupted their liberal colleagues more frequently.<sup>219</sup>

Non-party participation by intervenors or amicus curiae can usefully alert Justices to perspectives that would not have naturally occurred to them, or that the parties might not recognize or choose to present. They also might help for another reason. Amicus briefs attenuate the role of ideology in the Justices' voting behavior.<sup>220</sup> As the number of amicus curiae briefs increases, so too does the variability in the Justices' decision making. "By presenting information that might otherwise be unavailable to the Justices, interest groups are able to expand the scope of the conflict, making the Justices more variant than in cases with no (or less) amicus participation."<sup>221</sup> That suggests that the Justices are responding more to a contextualized version of the case and relying less on their preexisting attitudes and inferences.

A cynic might say that none of this matters because the Supreme Court consists entirely of "partisan hacks"<sup>222</sup> who merely vote their policy preferences in line with known proclivities or pre-commitments evident in their speeches, articles, private interviews, and confirmation hearings. Most judges (including

<sup>217</sup> Johnson, *supra* note 44, at 634 (reporting that "[o]ver two-thirds of the Justices' votes [about whether to grant certiorari] are attributable to ideology").

<sup>218</sup> VLADECK, *supra* note 3, at 122–26.

<sup>219</sup> Tonja Jacobi et al., *Oral Argument in the Time of COVID: The Chief Plays Calvinball*, 30 S. CAL. INTERDISC. L.J. 399 (2021) [hereinafter Jacobi et al., *Oral Argument in the Time of COVID*] (revealing that when the Supreme Court temporarily switched to telephonic oral argument, Chief Justice Roberts exercised his discretion in ways that resulted in conservative Justices being allowed more opportunities to speak); Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379, 1493 (2017) [hereinafter Jacobi & Schweers, *Justice, Interrupted*] (finding that conservative Justices interrupt their liberal colleagues more frequently during oral argument than vice versa).

<sup>220</sup> Collins, *supra* note 195, at 864, 872 (citing Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 743–855 (2000)).

<sup>221</sup> *Id.* at 869.

<sup>222</sup> Adam Serwer, *The Lie About the Supreme Court Everyone Pretends to Believe*, ATLANTIC (Sept. 28, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/lie-about-supreme-court-everyone-pretends-believe/620198/> [https://perma.cc/FTF9-MH9H] (quoting Amy Coney Barrett, who denied the charge, and asserted that the Supreme Court "is not comprised of a bunch of partisan hacks").

the Justices of the Supreme Court), however, take their role seriously, and sincerely (though perhaps inaccurately) believe that their decisions are not based largely on their political ideology.<sup>223</sup> Thus, the influence of ideology and policy—though sometimes explicit—is often unconscious.<sup>224</sup>

#### E. *Affect Heuristic*

Affect, or the way people feel about something, such as liking or disliking it, exerts a strong impact on human choice and behavior. It can cause people to make instinctive judgments based on emotional reactions without thoroughly evaluating evidence and options.<sup>225</sup> “The affect heuristic is an instance of substitution in which the answer to an easy question (How do I feel about it?) serves as an answer to a much harder question (What do I think about it?).”<sup>226</sup>

The power of affect inevitably extends into the justice system. It is widely believed that—even though they are instructed not to do so—juries sometimes render verdicts influenced by their feelings about the litigants and witnesses, at least in close or difficult cases. As famous American trial lawyer Clarence Darrow observed: “Jurymen seldom convict a person they like, or acquit one that they dislike. The main work of the trial lawyer is to make the jury like his client, or, at least to feel sympathy for him; facts regarding the crime are relatively unimportant.”<sup>227</sup> Judges largely agree with Darrow’s assessment about the susceptibility of jurors to emotion. As federal appellate judge Jerome Frank put it: “Mr. Prejudice and Miss Sympathy are the names of witnesses whose testimony is never recorded, but must nevertheless be reckoned with in trials by jury.”<sup>228</sup>

Are judges also influenced by emotion? It seems somewhat less likely. The judicial role, which most judges take seriously and try their best to respect, for-

<sup>223</sup> New England Law Boston, *Dean O’Brien’s Conversation with Chief Justice Roberts*, YOUTUBE, (February 3, 2016), <https://www.youtube.com/watch?v=5cDfWC2aVSY> [<https://perma.cc/6EM6-WLP4>] (“We don’t work as Democrats or Republicans.”); Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap over Judges*, ASSOCIATED PRESS (Nov. 21, 2018), <https://apnews.com/article/north-america-donald-trump-us-news-ap-top-news-immigration-c4b34f9639e141069c08cf1e3deb6b84> [<https://perma.cc/JZ5R-3ZYJ>] (“We do not have Obama judges or Trump judges, Bush judges or Clinton judges” (quoting Chief Justice Roberts)).

<sup>224</sup> Baum, *supra* note 59, at 583 (“Justices who proclaim that their policy preferences do not affect their votes and opinions are not necessarily dissembling; they simply may not recognize how those values come into play.”); Rachlinski, Wistrich & Guthrie, *supra* note 202, at 2097; Guthrie, *supra* note 203, at 438–44.

<sup>225</sup> Paul Slovic et al, *The Affect Heuristic*, 177 EUR. J. OF OPERATIONAL RSCH. 1333, 1346 (2007).

<sup>226</sup> KAHNEMAN, *supra* note 73, at 139.

<sup>227</sup> EDWIN H. SUTHERLAND ET AL., PRINCIPLES OF CRIMINOLOGY 411 (11th ed. 1992).

<sup>228</sup> *Skidmore v. Baltimore & Ohio R.R. Co.*, 167 F.2d 54, 62 (2d Cir. 1948) (citing ALBERT S. OSBORN, *THE PROBLEM OF PROOF* 112 (1926)).

bids susceptibility to emotional reactions to litigants.<sup>229</sup> And most judges deny that emotion influences their rulings. As Connecticut trial court judge Robert Satter stated, “Clearly I do not decide a case on the basis of my liking one party more than the other.”<sup>230</sup> This is also true of Supreme Court Justices, who insist that “[g]ood judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions.”<sup>231</sup> On the other hand, “judges are human”<sup>232</sup> and for that reason seem likely to respond to evidence in some of the same ways that jurors do.

In an attempt to resolve this debate, my coauthors and I conducted a series of experiments with the cooperation of 1,800 judges over a period of six years. We found that in six different scenarios—including a motion to dismiss a criminal prosecution, a sentencing, a summary judgment motion, a motion to suppress the fruits of a search, a request to discharge debt in a bankruptcy proceeding, and an award of punitive damages—the judges treated the more sympathetic litigant more favorably.<sup>233</sup> For example, one experiment asked judges to resolve a motion to dismiss on a close question of law in a case involving an illegal immigrant charged with entering the United States using a false visa.<sup>234</sup> On otherwise identical facts, one-half of the judges were presented with an unsympathetic defendant (a cartel assassin), while the other half were presented with a sympathetic defendant (a father looking for a better job to afford treatment for his critically-ill daughter).<sup>235</sup> Only 44 percent of the judges presented with the unsympathetic defendant dismissed the case, but 60 percent of the judges presented with the sympathetic defendant did so.<sup>236</sup> Similarly, in a different experiment based on a related scenario, judges sentenced the unsym-

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<sup>229</sup> Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CAL. L. REV. 629, 630 (2011) (“Insistence on emotionless judging—that is on judicial dispassion—is a cultural script of unusual longevity and potency.”).

<sup>230</sup> ROBERT SATTER, *DOING JUSTICE: A TRIAL JUDGE AT WORK* 78 (1990); see also Denny Chin, Essay, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1563–64 (2012) (“We do not determine the law or decide cases based on ‘feelings’ or emotions or whether we empathize with one side or the other.”).

<sup>231</sup> ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 32 (2008). But see *United States v. Ballard*, 322 U.S. 78, 94 (1944) (Jackson, J., dissenting) (likening dispassionate judges to fantasies such as “Santa Claus or Uncle Sam or Easter bunnies”).

<sup>232</sup> JEROME FRANK, *LAW AND THE MODERN MIND* 167 (1930).

<sup>233</sup> Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 898–99 (2015).

<sup>234</sup> *Id.* at 877.

<sup>235</sup> *Id.* at 877–78.

<sup>236</sup> *Id.* at 878.

pathetic assassin more harshly (5.3 or 7.9 months) than the sympathetic father (2.9 or 5.2 months), despite the fact that their relevant conduct was identical.<sup>237</sup>

Because most of our experiments involved questions of law and were presented on paper rather than live in a courtroom, the litigants were portrayed in the way appellate judges typically would learn about them; that is, based on a “cold” written record rather than seeing them in person. This suggests that appellate judges (including justices on apex courts) are likely vulnerable to the affect heuristic as well.<sup>238</sup> Of course, this is even more likely if the appellate court has adopted truncated procedures akin to the shadow docket, thereby forgoing some of its institutional bulwarks against intuition, bias, and error.

Observation of the Justices’ behavior suggests that emotion plays a role in the Supreme Court’s decisions. One study analyzed over three thousand cases and found that the Justices sometimes express anger during oral argument and that such expressions correlate with their votes.<sup>239</sup> Another study found that the Justices’ votes and overall decisions could be predicted using emotional responses measured by pitch differences in the Justices’ speech during oral argument.<sup>240</sup> Perhaps this is unsurprising. Some Justices admit that emotion influences their rulings.<sup>241</sup>

The Justices also display awareness of the affect heuristic and employ it when they attempt to write a convincing opinion.<sup>242</sup> As an example, when affirming the denial of a habeas corpus petition, a Justice will often emphasize

<sup>237</sup> *Id.* The first number in parentheses represents the average sentence imposed by the judges who found that the conduct was not a forgery, and the second number represents the average sentence among the judges who found that it was a forgery.

<sup>238</sup> *Id.* at 906–09 (arguing that like trial judges, appellate judges are also susceptible to the affect heuristic).

<sup>239</sup> Ryan C. Black et al., *Emotions, Oral Arguments, and Supreme Court Decision Making*, 73 J. POL. 572, 579 (2011) (arguing that “the emotions justices display as they grapple with the nation’s most difficult legal issues may affect the manner in which they decide these issues or, alternatively, how they respond to the institutional constraints standing between them and their policy goals”).

<sup>240</sup> See Bryce J. Dietrich et al., *Emotional Arousal Predicts Voting on the U.S. Supreme Court*, 27 POL. ANALYSIS 237, 240 (2019) (finding that ability to predict how Supreme Court Justices will vote is enhanced by examining their emotional responses during oral argument as reflected in their vocal pitch; reporting that they were able to predict 57.5 percent of the Justices’ votes accurately and 66.55 percent of case outcomes correctly using only vocal pitch difference).

<sup>241</sup> William O. Douglas, *THE COURT YEARS 1939–1975* 8 (1980) (“At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections.”) (statement of Justice Charles Hughes); William J. Brennan, Jr., *Reason, Passion, and “The Process of the Law”*, 10 CARDOZO L. REV. 3, 10 (1988) (“Sensitivity to one’s intuitive and passionate responses . . . is . . . not only an inevitable but a desirable part of the judicial process. . . .”); *id.* at 19–20 (attributing his opinion in *Goldberg v. Kelly*, 397 U.S. 254 (1970) to his empathy for the plight of welfare recipients).

<sup>242</sup> Christopher N. Krewson, *Strategic Sensationalism: Why Justices Use Emotional Appeals in Supreme Court Opinions*, 40 JUST. SYS. J. 319, 320–21 (2019).

the heinousness of the offense; on other occasions, a Justice will express sympathy for a party.<sup>243</sup> This reveals that the Justices recognize that their audiences, including their colleagues, are likely susceptible to the impact of affect.

#### F. *Ingroup Bias*

The tendency to favor ingroup members and to disfavor outgroup members is widespread and familiar. As sociologist William Graham Sumner observed long ago, “Ethnocentrism is . . . the view of things in which one’s own group is the center of everything and all others are scaled and rated with reference to it. . . . Each group nourishes its own pride and vanity, boasts itself superior, and looks with contempt on outsiders.”<sup>244</sup> The effect is so strong that even trivial or arbitrary distinctions among people is enough to trigger it. As two researchers explained: “[T]he mere perception of belonging to two distinct groups—that is, social categorization per se—is sufficient to trigger intergroup discrimination favoring the in-group.”<sup>245</sup>

People belong to many groups based on their race, gender, religion, nationality, alma mater, occupation, parental status, favorite baseball team, and so on. Some group memberships are incidental while others are integral to an individual’s self-concept.<sup>246</sup> Overall, however, group membership exerts a powerful influence on behavior. Humans instinctively like and trust ingroup members more than outgroup members, and we share resources with them and treat them with leniency even if there is no rational basis for reacting that way, simply because of our evolutionary preference for those who are similar to us.<sup>247</sup>

It appears that judges are vulnerable to ingroup favoritism. In an experiment my coauthors and I conducted, we described to judges a scenario in which a defendant small-business owner had dumped toxic chemicals into a lake ra-

<sup>243</sup> See, e.g., *Schiro v. Farley*, 510 U.S. 222, 224–25 (1994); *DeShaney v. Winnebago Cnty. Dep’t Soc. Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) (“Poor Joshua!”).

<sup>244</sup> WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS* 13 (1906).

<sup>245</sup> Henri Tajfel & John C. Turner, *An Integrative Theory of Intergroup Conflict*, in *PSYCHOLOGY OF INTERGROUP RELATIONS* 33, 38 (Stephen Worchel & William Austin eds., 2d ed. 1986).

<sup>246</sup> Yan Chen & Sherry Xin Li, *Group Identity and Preferences*, 99 *AM. ECON. REV.* 431, 431 (2009) (“When we belong to a group, we are likely to derive our sense of identity, at least in part, from that group.”).

<sup>247</sup> See Jim A. C. Everett et al., *Preferences and Beliefs in Ingroup Favoritism*, 9 *FRONTIERS BEHAV. NEUROSCIENCE*, Feb. 2015, at 1; Mark Van Vugt & Tatsuya Kameda, *Evolution and Groups*, in *GROUP PROCESSES* 297, 316 (John M. Levine ed., 2013); Richard Clark Grove, *Examining Perceived In-Group Similarity and Out-Group Dissimilarity as Predictors of Religious Intergroup Bias* 34 (Jan. 2020) (Ph.D. dissertation, University of North Dakota) (UND Scholarly Commons) (finding that “people higher in religious belief demonstrate a preference for religious people (i.e., Christians) relative to nonreligious people (i.e. atheists)”).

ther than disposing of them safely.<sup>248</sup> When the plaintiff subsequently swam in the now-polluted lake, he was severely poisoned and maimed.<sup>249</sup> One-half of the judges were told that the defendant was a citizen of their state while the other half were told that the defendant was a citizen of a neighboring state.<sup>250</sup> We found that the judges awarded a smaller amount of punitive damages against an in-state defendant than against an out-of-state defendant even though his conduct and the resulting harm were identical.<sup>251</sup>

We are not the only researchers to observe ingroup bias in judges. A recent study of Kenyan judges found that they were three to five percentage points more likely to grant co-ethnic defense criminal appeals (that is, appeals in which the judges' tribal ethnicity—such as Kikuyu, Kalenjin, or Luo—matched that of the defendant) than non-co-ethnic defense criminal appeals.<sup>252</sup> A second study of Kenyan judges revealed the presence of ingroup bias in civil cases. It concluded that defendants were about four percentage points more likely to prevail if they shared the judge's gender and about five percentage points more likely to prevail if they shared the judge's ethnicity.<sup>253</sup>

Similar findings have been made in Israeli courts where cases are randomly assigned to either Jewish or Arab judges.<sup>254</sup> Researchers found that co-ethnicity led to better outcomes in this context as well. In civil small claims courts, Jewish plaintiffs were more likely to win and recovered more when their cases were decided by Jewish judges than by Arab judges.<sup>255</sup> Arab plaintiffs were also more likely to win and recovered more when their cases were decided by Arab judges than by Jewish judges.<sup>256</sup> The effect of co-ethnicity was stronger if intergroup rivalry had resulted in fatalities during the year preceding the decision, thereby increasing the salience of ethnic identification.<sup>257</sup> Another Israeli study found that, with respect to pretrial detention, "Arab suspects are 6.3 percent more likely than Jewish suspects to be released by an Arab judge, while

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<sup>248</sup> Wistrich et al., *supra* note 233, at 893–96.

<sup>249</sup> *Id.* at 895.

<sup>250</sup> *Id.* at 896.

<sup>251</sup> *Id.* at 897.

<sup>252</sup> Donghyun Danny Choi et al., *Ethnic Bias in Judicial Decision Making: Evidence from Criminal Appeals in Kenya*, 116 AM. POL. SCI. REV. 1067, 1076 (2022).

<sup>253</sup> Daniel Chen et al., *Do Judges Favor Their Own Ethnicity and Gender? Evidence from Kenya* 25 (World Bank Grp., Pol'y Rsch. Working Paper No. 9956, 2022).

<sup>254</sup> Moses Shayo & Asaf Zussman, *Judicial Ingroup Bias in the Shadow of Terrorism*, 126 Q.J. ECON. 1447, 1448 (2011).

<sup>255</sup> *Id.* at 1463–70.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 1474–79.

Jewish suspects are 10.4 percent more likely than Arab suspects to be released by a Jewish judge.”<sup>258</sup>

There is some evidence of ingroup favoritism among federal appellate judges. One study found that federal district judges who had sat by designation on the Federal Circuit Court of Appeals were subsequently reversed less often than judges who had not. Their subsequent reversal rate in patent cases by the Federal Circuit was merely 15.2 percent, lower than that of all district judges (32.2 percent); district judges who had not, and never would, sit by designation on the Federal Circuit (33.2 percent); and district judges who had not, but later would, sit by designation on the Federal Circuit (36.0 percent).<sup>259</sup> The authors concluded that: “All available evidence suggests that the most likely explanation is not a learning effect, but a consequence of the personal relationships district judges develop with appellate judges while sitting at the court.”<sup>260</sup>

Even the Supreme Court seems to exhibit ingroup preferences in decision making. Studies have found that the Justices exhibit a “home court” bias, in which they vote to reverse the appellate court on which they served prior to their elevation to the Supreme Court less frequently than other appellate courts.<sup>261</sup> Another study concluded that Supreme Court Justices applying the First Amendment are more protective of speech if they agree with the message than if they do not.<sup>262</sup>

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<sup>258</sup> Oren Gazal-Ayal & Raanan Sulitzeanu-Kenan, *Let My People Go: Ethnic In-Group Bias in Judicial Decisions—Evidence from a Randomized Natural Experiment*, 7 J. EMPIRICAL LEGAL STUD. 403, 417 (2010).

<sup>259</sup> Mark A. Lemley & Shawn P. Miller, *If You Can't Beat 'Em, Join 'Em? How Sitting by Designation Affects Judicial Behavior*, 94 TEX. L. REV. 451, 461 (2016).

<sup>260</sup> *Id.* at 477.

<sup>261</sup> Richard Holden et al., *Peer Effects on the United States Supreme Court*, 12 QUANTITATIVE ECON. 981, 995 (2021) (finding “a consistent pattern of *home court bias*,” in which “justices who had previously served on a Circuit Court of Appeals (a justice’s *home court*) are less likely to overturn the lower court’s decision in a case sourced from that court”); Bethany Blackstone, *The Home Court Advantage: Circuit Effects, Social Identity and Supreme Court Decision Making*, 43 J. POL. SCI. 7, 17 fig.1 (2015) (reporting that of 16 Justices who previously had served as circuit judges and who started their service on the Supreme Court between 1955 and 2009, 12 were more likely to affirm decisions appealed from their previous circuit than from other circuits); Lee A. Epstein et al., *Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court*, 157 U. PA. L. REV. 833 (2009) (discussing the same phenomenon).

<sup>262</sup> Lee Epstein et al., *Do Justices Defend the Speech They Hate? An Analysis of In-Group Bias on the US Supreme Court*, 6 J.L. & CTS. 237, 239 (2018) (finding that although liberal Justices are more protective of speech than conservative Justices overall, the votes of both groups of Justices reflect their respective ideological preferences and concluding that Supreme Court Justices are vulnerable to in-group bias that skews their decisions in First Amendment cases).



### G. *Implicit Ethnic and Gender Bias*

Unfortunately, explicit and implicit biases remain a pervasive characteristic of American life. As examples, women earn less than men for performing the same job,<sup>263</sup> and racial minorities attract disproportionate attention from police.<sup>264</sup> One would hope that such disparate treatment would not occur in courts and that judges—who are usually selected with care and are typically intelligent and dedicated to fairness—would not exhibit implicit bias. Regrettably, that is not always the case.<sup>265</sup> Studies show that Black defendants are required to post higher bail than White defendants to obtain pretrial release;<sup>266</sup> receive longer sentences than White defendants (because they are more likely to be detained prior to trial and less likely to receive substantial assistance departures);<sup>267</sup> and if they look more stereotypically Black, are more likely to receive the death penalty.<sup>268</sup> Empirical research further demonstrates that men are sentenced more harshly than women and that women are more likely to obtain custody of their children in divorce proceedings.<sup>269</sup>

<sup>263</sup> Greg Iacurci, *Women Are Still Paid 83 Cents for Every Dollar Men Earn. Here's Why*, CNBC (May 19, 2022, 8:52 AM), <https://www.cnbc.com/2022/05/19/women-are-still-paid-83-cents-for-every-dollar-men-earn-heres-why.html> [<https://perma.cc/46HD-STV6>].

<sup>264</sup> Colleen Walsh, *Solving Racial Disparities in Policing*, HARV. GAZETTE (Feb. 23, 2021), <https://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing/> [<https://perma.cc/YH55-YQF6>]; Lynne Peeples, *Brutality and Racial Bias: What the Data Say*, 583 NATURE 22, 22 (2020) (“Black men are 2.5 times more likely than white men to be killed by police during their lifetime. . . . Black people who were fatally shot by police seemed to be twice as likely as white people to be unarmed.”).

<sup>265</sup> David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 300 (2001) (finding that federal judges imposed sentences that were 12 percent longer on Black defendants than on comparable White defendants).

<sup>266</sup> Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994) (finding that Black defendants were required to post 35 percent higher bail amounts than White defendants after controlling for a variety of factors).

<sup>267</sup> Cassia Spohn, *The Effects of the Offender's Race, Ethnicity, and Sex on Federal Sentencing Outcomes in the Guidelines Era*, 76 L. & CONTEMP. PROBS. 75, 80–81, 102 (2013) (finding that detaining a defendant prior to trial had a cascading impact on substantial assistance departures and ultimate sentence because the early decision made quickly in an information-starved setting infected the later stages with bias).

<sup>268</sup> Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383, 384 (2006) (“[D]efendants whose appearance was perceived as more stereotypically Black were more likely to receive a death sentence than defendants whose appearance was perceived as less stereotypically Black . . . . In fact, 24.4% of those Black defendants who fell in the lower half of the stereotypicality distribution received a death sentence, whereas 57.5% of those Black defendants who fell in the upper half received a death sentence.”).

<sup>269</sup> Jeffrey J. Rachlinski & Andrew J. Wistrich, *Benevolent Sexism in Judges*, 58 SAN DIEGO L. REV. 101, 104 (2021).

Implicit bias is defined as the “unconscious effects of social category cues (e.g., cues related to race, gender, etc.) on behavioral responses.”<sup>270</sup> It can be based on a wide variety of characteristics, not merely race or gender.<sup>271</sup> My co-authors and I gave the Implicit Association Test (“IAT”), a widely accepted diagnostic tool of implicit bias, to several groups of judges.<sup>272</sup> The IAT measures the strength of associations between concepts by calculating how quickly people sort concepts into categories in a computer task, such as White or Black faces with positive or negative words. We found that the performance of the judges was similar to that of hundreds of thousands of adults.<sup>273</sup> Specifically, about 87.1 percent of the White judges sorted the White-positive/Black-negative pairings faster than the White-negative/Black-positive pairings, while merely 44.2 percent of Black judges did so.<sup>274</sup> We further found that judges exhibit bias when deciding simulated cases, but only when race is implicit rather than explicit. When a litigant’s race was explicit, the judges seemed to exert extra effort to suppress any unconscious bias they might possess.<sup>275</sup> But when race was implicit because it was subliminally primed rather than stated, judges who exhibited strong White-positive/Black-negative associations on the IAT treated defendants more harshly after having been primed with African American-related words than after being primed with neutral words, while judges who exhibited strong White-negative/Black-positive associations on the IAT treated defendants more leniently.<sup>276</sup> Other researchers have reached similar conclusions, also detecting the presence of implicit biases in judges.<sup>277</sup> It seems that judicial expertise and experience do not cure the tendency for most people to express implicit biases.<sup>278</sup>

<sup>270</sup> Bertram Gawronski et al., *Implicit Bias ≠ Bias on Implicit Measures*, 33 PSYCH. INQUIRY 139, 139–40 (2022).

<sup>271</sup> See generally Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137 (2013).

<sup>272</sup> Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It*, in ENHANCING JUSTICE: REDUCING BIAS 87, 100 (Sarah Redfield ed., 2018).

<sup>273</sup> Rachlinski, Johnson, Wistrich & Guthrie, *supra* note 272, at 1210–11.

<sup>274</sup> *Id.* at 1210 tbl.2.

<sup>275</sup> *Id.* at 1221.

<sup>276</sup> *Id.* at 1217.

<sup>277</sup> Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 104–10 (2017) (finding that state and federal judges exhibited implicit bias against Asians and Jews on the IAT and in hypothetical rulings).

<sup>278</sup> Andrea L. Miller, *Expertise Fails to Attenuate Biases in Judicial Decision-Making*, 10 SOC. PSYCH. & PERSONALITY SCI. 227, 228, 232–33 (2019) (finding that 619 state trial court judges exhibited gender bias in hypothetical child custody and employment discrimination cases and concluding that “expertise is not the panacea for reducing bias in professional settings that we might hope it to be”).

Time pressure, such as might be encountered on the shadow docket, encourages System 1 processing, thereby heightening the risk of implicit bias.<sup>279</sup> So does a shortage of information. “Individuating” a person by learning about that person’s unique characteristics helps to diminish the force of disadvantageous stereotypes.<sup>280</sup> By contrast, when information is scarce, stereotypes can flourish because—regardless of how unreliable or misleading they may be—there simply may be little else on which to base a decision. Using the shadow docket lessens the information available about the litigants or similarly situated others, thus inhibiting individuating and encouraging reliance on stereotypes.

Historically, some Supreme Court decisions have exhibited disturbing ethnic, racial, and gender bias.<sup>281</sup> Obviously, society has come a long way since then, as has the Supreme Court, even though both still have a long way to go before the justice system is free of bias. But these appalling examples do suggest that because apex courts are not inevitably free of bias, they need to be cautious. Outside of the United States, apex court justices willingly admit the hidden hazard posed by unconscious bias.<sup>282</sup>

The Supreme Court, however, seems unaware of, or unreceptive to, the existence of implicit or unconscious bias. Its rejection of disparate impact theory in criminal justice is one example. In *McClesky v. Kemp*<sup>283</sup> the Supreme Court

<sup>279</sup> Jordan R. Axt et al., *The Judgment Bias Task: A Flexible Method for Assessing Individual Differences in Social Judgment Biases*, 76 J. EXPERIMENTAL SOC. PSYCH. 337, 350 (2018) (finding that subjects deciding whether hypothetical students should be admitted to an honor society made more errors and exhibited more bias favoring unqualified attractive students when deciding under time pressure).

<sup>280</sup> Anthony G. Greenwald & Thomas F. Pettigrew, *With Malice Toward None and Charity for Some: Ingroup Favoritism Enables Discrimination*, 69 AM. PSYCH. 669, 675 (2014).

<sup>281</sup> See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring) (“The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother.”) (explaining his vote to uphold lower court ruling denying petitioner admission to the bar because she was a woman); *Dred Scott v. Sanford*, 60 U.S. 393 (1857) (enslaved party) (holding that Black people of African descent, whether free or enslaved, were not citizens of the United States and were not eligible for the rights and privileges the Constitution conferred on American citizens); *Korematsu v. United States*, 323 U.S. 214, 220, 223–24 (1944) (affirming a conviction for failure to comply with a military order excluding “all persons of Japanese ancestry” from proximity to the West Coast and requiring their detention in internment camps). *But see id.* at 233–41 (Murphy, J., dissenting) (stating that “I dissent . . . from this legalization of racism” which “falls into ugly abyss of racism” and resembles “the abhorrent and despicable . . . tyrannies which this nation is now pledged to destroy”).

<sup>282</sup> Lord Neuberger, President of the Supreme Court, *Fairness in the Courts: The Best We Can Do*, Address to the Criminal Justice Alliance 7 (Apr. 10, 2015), <https://www.supremecourt.uk/docs/speech-150410.pdf> [<https://perma.cc/49MJ-J8R7>] (“The big problem, as it is everywhere, is with unconscious bias. I dare say that we all suffer from a degree of unconscious bias, and it can occur in all sorts of manifestations. It is almost by definition an unknown unknown, and therefore extraordinarily difficult to get rid of, or even allow for.”).

<sup>283</sup> *McClesky v. Kemp*, 481 U.S. 279 (1987).

held that statistical evidence of racially discriminatory impact is insufficient to show that capital punishment violates the Equal Protection Clause.<sup>284</sup> Even though Georgia prosecutors sought the death penalty nearly four times as often in Black defendant-White-victim crimes (70%) compared to White defendant-Black victim crimes (19%), the Court held that only evidence of purposeful discrimination would suffice.<sup>285</sup> This suggests a lack of understanding of how implicit bias works, which might cause the Justices to underestimate the danger that implicit bias may unwittingly pose for their own decisions, especially when utilizing the shadow docket.

The decisions of appellate judges sometimes appear to be influenced by implicit biases. As an example, federal and state appellate judges are more likely to reverse plaintiffs' trial victories than defendants' trial victories, and are also more likely to overturn jury verdicts than bench trials.<sup>286</sup> The researchers concluded that "appellate court misperceptions about jurors' bias toward plaintiffs is more plausible than trial court bias."<sup>287</sup> Whether Supreme Court Justices exhibit similar anti-plaintiff or anti-jury bias is unclear. However, it is noteworthy that in recent times most Supreme Court nominees have been elevated from the U.S. Courts of Appeals.<sup>288</sup>

Another study revealed evidence of implicit racial bias among federal appellate court judges. Professor Maya Sen examined all published and unpublished federal appellate decisions from 2000 to 2012 and discovered that, even while controlling for possible proxies for judicial qualifications, Black federal district court judges were about 10 percent more likely to be reversed on appeal than their White counterparts.<sup>289</sup> Whether Supreme Court Justices are equally as susceptible to implicit racial bias as their former colleagues is unknown.

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<sup>284</sup> *Id.* at 292.

<sup>285</sup> *Id.* at 287.

<sup>286</sup> Federal appellate judges reverse 32.5 percent of plaintiffs' trial victories but only 12 percent of defendant victories, whereas state appellate judges reverse 41.1 percent of the former and only 21.5 percent of the latter. Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts Redux? An Empirical Study of State Court Trials on Appeal*, 12 J. EMPIRICAL LEGAL STUD. 100, 110 tbl.1 (2015). In terms of verdicts, federal appellate judges overturn 20.4 percent of jury verdicts but only 16.5 percent of bench trials, and state appellate judges overturn 33.37 percent of the former but only 27.5 percent of the latter. *Id.*

<sup>287</sup> *Id.* at 122.

<sup>288</sup> Kristen Bialik, *What Backgrounds Do U.S. Supreme Court Justices Have?*, PEW RSCH. CTR. (Mar. 20, 2017), <https://www.pewresearch.org/fact-tank/2017/03/20/what-backgrounds-do-u-s-supreme-court-justices-have/> [https://perma.cc/UF4R-D54G].

<sup>289</sup> Maya Sen, *Is Justice Really Blind? Race and Reversal in U.S. Courts*, 44 J. LEGAL STUD. S187, S220 (2015).

The Supreme Court does sometimes seem to rest some of its decisions on myths or stereotypes, even on its merits docket.<sup>290</sup> It has relied on unsubstantiated suppositions such as that passengers questioned by police who had stopped and boarded a bus would feel free to refuse to cooperate and leave,<sup>291</sup> or that women need to be paternalistically protected by men against post-abortion regret.<sup>292</sup> Both were later shown to be erroneous.<sup>293</sup>

Implicit gender bias also manifests at the Supreme Court in a different way, outside of the Court's substantive rulings. Specifically, during the rapid give-and-take of oral argument, female Justices are interrupted more often and allowed fewer opportunities to question attorneys than their male colleagues.<sup>294</sup> It is unlikely that the male Justices are doing this intentionally; rather, they probably are unaware of how unconscious bias is shaping their behavior. Nevertheless, this pattern suggests the need for caution insofar as implicit bias is concerned.

#### H. Consistency Bias

“The pursuit of consistency is arguably the driving force behind all decision making.”<sup>295</sup> “Once we have made a choice or taken a stand, we will en-

<sup>290</sup> Edward A. Purcell, Jr., *Exploring the Interpretation and Application of Procedural Rules: The Problem of Implicit and Institutional Racial Bias*, 23 J. CONST. L. 2528, 2531 (2021).

<sup>291</sup> *United States v. Drayton*, 536 U.S. 194, 203–04 (2002).

<sup>292</sup> *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007).

<sup>293</sup> See David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 74–75 (2009) (reporting survey results indicating that people would not feel free to leave a police encounter such as that presented in *Drayton* despite the Supreme Court's assertion that they would); Chris Guthrie, *Carhart, Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877, 877 (2008) (discussing how the Supreme Court “used the prospect of regret to justify limiting choice” in *Carhart*); Corrine H. Rocca et al., *Emotions and Decision Rightness over Five Years Following an Abortion: An Examination of Decision Difficulty and Abortion Stigma*, 248 SOC. SCI. & MED. 112704, 2020, at 1, 7 (finding “no support for claims that abortion causes negative emotions or that women typically come to regret their abortion”).

<sup>294</sup> Jacobi & Schweers, *Justice, Interrupted*, *supra* note 219, at 1457–62 (finding that female Justices are interrupted more frequently by their male colleagues during oral argument); Leah M. Litman, *Muted Justice*, 169 U. PA. L. REV. ONLINE 134, 139–43 (2020) (finding that male Justices were allowed more opportunity to speak than female Justices during the Supreme Court's telephonic oral arguments); Jacobi et al., *Oral Argument in the Time of COVID*, *supra* note 219, at 410–17 (finding that when the Supreme Court switched from live to telephonic oral argument during the pandemic, Chief Justice Roberts disproportionately interrupted female Justices during their dialogue with attorneys and allowed male Justices more opportunity to pursue their questioning to fruition); Adam Feldman & Rebecca D. Gill, *Power Dynamics in Supreme Court Oral Arguments: The Relationship Between Gender and Justice-to-Justice Interruptions*, 40 JUST. SYS. J. 173 (2019) (finding that female Justices are interrupted more frequently than male Justices).

<sup>295</sup> Collins, *supra* note 195, at 861, 872 (citing Fritz Heider, *Attitudes and Cognitive Organization*, 21 J. PSYCH. 107–12 (1946)); see also ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND*

counter personal and interpersonal pressures to behave consistently with that commitment. Those pressures will cause us to respond in ways that justify our earlier decision.”<sup>296</sup> As two scholars explained:

Individuals have a need for consistency that arises from an “inborn preference for things that are predictable, familiar, stable and uncertainty reducing.” In Western Society, people who are perceived as holding consistent opinions are evaluated positively. Those who unwaveringly uphold their beliefs and resist external and social pressures to change are often idealized, while those who vacillate are given negative trait ascriptions, such as immaturity and passivity, and are referred to as “waffler” or “two-faced.” Thus, in order to preserve a positive self-image, individuals in Western cultures are motivated to exhibit stability in their preferences and/or in their expressions of preferences.<sup>297</sup>

All commitments, however, are not created equal. Those that are freely chosen, recorded, and effortful are likely to be the most powerful.<sup>298</sup> “Public commitments tend to be lasting commitments. . . . [T]he more public a stand, the more reluctant we will be to change it.”<sup>299</sup> Recording the vote of a Justice, and especially publication of a written reasoned opinion signed by a Justice, satisfy these conditions.

Experiments illustrate the power of consistency. In one, researchers attempted to reduce the no-call-no-show cancel rate at a restaurant by instructing the employee taking phone reservations to ask the customer to call if they have a change of plans, and then to pause to allow and encourage the customer to agree.<sup>300</sup> This simple intervention decreased the no-call-no-show cancel rate from 30 percent to 10 percent.<sup>301</sup> In another study, researchers were able to ma-

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PRACTICE 95 (4<sup>th</sup> ed. 2001) (“Psychologists have long recognized a desire in most people to be and look consistent with their words, beliefs, attitudes and deeds.”).

<sup>296</sup> CIALDINI, *supra* note 295, at 53–54. (“Indeed, we all fool ourselves from time to time in order to keep our thoughts and beliefs consistent with what we have already done or decided.”); *see also* Therese Fessenden, *The Principle of Commitment and Behavioral Consistency*, NIELSON NORMAN GRP. (Mar. 4, 2018), <https://www.nngroup.com/articles/commitment-consistency-ux/> [<https://perma.cc/TL77-AYHL>] (“Inconsistency is seen as an undesirable trait and is associated with irrationality, deceit, and even incompetence; it can generate reactions of disappointment, anger, and confusion. These risks create tremendous social pressure to remain consistent.”).

<sup>297</sup> Mahesh Gopinath & Prashanth U. Nyer, *The Effect of Public Commitment on Resistance to Persuasion: The Influence of Attitude Certainty, Issue Importance, Susceptibility to Normative Influence, Preference for Consistency and Source Proximity*, 26 INT’L J. RSCH. MKTG. 60, 61, 65 (2009) (citations omitted) (summarizing several studies); *see* Armin Falk & Florian Zimmermann, *Preferences for Consistency 2* (IZA, Discussion Paper No. 5840, 2011), <https://dx.doi.org/10.2139/ssrn.1887526> [<https://perma.cc/X925-SW44>] (“Evidence from social psychology suggests that while consistency signals positive personality traits, inconsistent behavior is generally associated with undesirable personality characteristics. Inconsistent beliefs, words, or deeds are often indicative of confusion or mental illness.”).

<sup>298</sup> CIALDINI, *supra* note 295, at 67.

<sup>299</sup> *Id.* at 72.

<sup>300</sup> *Id.* at 74.

<sup>301</sup> *Id.*

nipulate the respondents' answer regarding their views on life imprisonment simply by adding an additional question to prompt consistency.<sup>302</sup> In the control group, after reading a short paragraph about a heinous murder, the respondents were asked whether the murderer should be imprisoned for life.<sup>303</sup> 91.7 percent agreed.<sup>304</sup> In the experimental group, respondents read the same paragraph about the murder but were first asked whether they agreed that “[e]verybody deserves a second chance in life . . . [e]ven dangerous criminals.”<sup>305</sup> 55.3 percent agreed with that statement.<sup>306</sup> They were then asked whether the murderer should be imprisoned for life.<sup>307</sup> This time only 68.0 percent said life imprisonment was warranted.<sup>308</sup>

Not surprisingly, “[c]onsistency plays a central role in the administration of justice.”<sup>309</sup> Much of the pervasive influence of consistency on decision making is positive, especially in legal contexts. It promotes predictability and respects reliance.<sup>310</sup> It also minimizes the inefficiency of constantly reinventing the wheel.<sup>311</sup> And consistency ensures that like cases are treated alike, an important process value central to most evaluations of fairness.<sup>312</sup> Indeed, Supreme Court Justices are frequently criticized for inconsistency.<sup>313</sup>

But consistency is not always laudable. As Ralph Waldo Emerson famously observed, “A foolish consistency is the hobgoblin of little minds adored by little statesmen and philosophers and divines.”<sup>314</sup> Sometimes people are well-

<sup>302</sup> Armin Falk & Florian Zimmermann, *A Taste for Consistency and Survey Response Behavior*, 59 CESIFO ECON. STUD. 181, 188–91 (2012).

<sup>303</sup> *Id.* at 186.

<sup>304</sup> *Id.* at 189.

<sup>305</sup> *Id.* at 186.

<sup>306</sup> *Id.* at 189.

<sup>307</sup> *Id.* at 186.

<sup>308</sup> *Id.* at 189.

<sup>309</sup> Collins, *supra* note 195, at 870.

<sup>310</sup> *See, e.g.*, *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“[I]n most matters it is more important that the applicable rule be settled than that it be settled right.”).

<sup>311</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921) (“[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case . . . .”); *see* CIALDINI, *supra* note 295, at 55 (consistency enables people to make decisions quickly while avoiding effortful thinking).

<sup>312</sup> RUPERT CROSS & JAMES WILLIAM HARRIS, *PRECEDENT IN ENGLISH LAW* 3 (4th ed. 1991) (“It is a basic principle of the administration of justice that like cases should be decided alike.”); *see* John E. Coons, *Consistency*, 75 CAL. L. REV. 59, 60 (1987).

<sup>313</sup> Erwin Chemerinsky, *Seeing the Emperor’s Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1073 (2006) (criticizing Justices Scalia and Thomas for applying their preferred interpretive methodology inconsistently); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 832 (1982) (suggesting that it is reasonable to expect “each Justice to develop a principled jurisprudence and to adhere to it consistently”).

<sup>314</sup> RALPH WALDO EMERSON, *Self-Reliance*, in *ESSAYS: FIRST SERIES* 8 (1841).

advised to rethink or change their beliefs or commitments, especially when confronted by new information.<sup>315</sup> Accordingly, there are limits to the force of consistency. People do admit mistakes and repudiate previous choices and behaviors. Even Supreme Court Justices occasionally admit mistakes<sup>316</sup> or abandon their previous positions.<sup>317</sup> And Supreme Court Justices sometimes disappoint the presidents who appointed them, or at least the constituencies that lobbied for their appointment, by failing to remain consistent with perceived pre-appointment ideological commitments.<sup>318</sup> As an example, President Dwight D. Eisenhower reportedly said that nominating Justices Earl Warren and William Brennan to the Supreme Court were the two biggest mistakes of his presidency.<sup>319</sup> Similarly, President George H.W. Bush found Justice David Souter unexpectedly liberal.<sup>320</sup>

Statements in speeches, interviews with nominating or appointing authorities, books, law review articles, and post-argument conferences all may lock Justices into a position prematurely.<sup>321</sup> As an example, invitations for Justices to speak to conservative or liberal audiences might be manipulative. The audience expects the Justice to express views consistent with the Justice's prior policy commitments; and the Justice, desiring the approval of the audience, does so—thereby locking herself even more deeply into those commitments for

<sup>315</sup> JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 268 (1950) (“‘Equality before the law’ is a properly cherished principle. Yet it ought not to be pushed to ridiculous limits. Merely because a court was outrageously unfair to Mr. Simple in 1900 is a poor reason for being equally unfair to Mr. Timid in 1947. Thus to perpetuate a markedly unjust rule seems a queer way of doing justice.”).

<sup>316</sup> See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”).

<sup>317</sup> See *Henslee v. Union Planters Nat’l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting) (“Wisdom too often never comes, and so one ought not to reject it merely because it comes late.”).

<sup>318</sup> Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 *Nw. U. L. Rev.* 127, 129–30 (2007) (finding that ideological drift is pervasive).

<sup>319</sup> William Fassuliotis, *Ike’s Mistake: The Accidental Creation of the Warren Court*, *VA. L. WEEKLY* (Oct. 17, 2018), <https://www.lawweekly.org/col/2018/10/17/ikes-mistake-the-accidental-creation-of-the-warren-court> [<https://perma.cc/XHK5-8PH8>] (“I have made two mistakes, and they are both sitting on the Supreme Court.” (quoting Eisenhower)).

<sup>320</sup> See *David H. Souter*, *OYEZ*, [https://www.oyez.org/justices/david\\_h\\_souter](https://www.oyez.org/justices/david_h_souter) [<https://perma.cc/B8LB-LDTP>] (describing Souter as “[r]egarded by Republicans as a ‘home run’ nomination to support [conservative] ideologies” who then went on to “vote reliably with the court’s liberal members”).

<sup>321</sup> The “Ginsburg Rule” regarding the nominees’ expressions of their views during confirmation hearings acknowledges this risk but affords limited protection against it. Elena Kagan, *Confirmation Messes, Old and New*, 62 *U. CHI. L. Rev.* 919, 925 (1995) (describing Justice Ginsburg’s sidestepping of questions during the Senate hearing on her Supreme Court nomination).



which she is rewarded by the audience and subsequent invitations to speak.<sup>322</sup> Hence, in an unhealthy cycle that reinforces previously expressed views, conservative Justices speak at gatherings of the Federalist Society, and liberal Justices speak at meetings of the American Constitution Society. Justices either do not receive, or do not accept, invitations to speak in “unfriendly” settings.<sup>323</sup>

There is evidence that Supreme Court Justices are motivated by a desire to be—and to be perceived as—consistent. First, the mere fact that most people strive to be consistent, and punish or ridicule those who are not, suggests that the Justices will share these traits.<sup>324</sup> Second, Supreme Court Justices admit that they actively avoid appearing to be inconsistent.<sup>325</sup> Third, empirical research shows that Justices adhere to their own previously expressed views and pursue “perpetual dissents” despite the majority’s persistent rejection of their position.<sup>326</sup> For example, one study of selected cases decided by the Warren, Burger, and Rehnquist Courts demonstrated that Supreme Court Justices cling to their previously expressed dissenting views rather than knuckling under and accepting a new precedent whose creation they had opposed 90.8 percent of the time in landmark cases and 95.3 percent of the time in nonlandmark cases.<sup>327</sup> Consistency bias may partly explain the stickiness of the Justices’ “personal precedent”; that is, their “presumptive adherence to their own previously expressed legal views.”<sup>328</sup> As Richard Re put it, “no authority is quite as persuasive as a justice’s own past self.”<sup>329</sup>

Consistency bias poses special dangers in the context of preliminary or interim rulings that are predicated on tentative views of the merits. Such preliminary rulings may commit a Justice to a final vote in the same direction. When

<sup>322</sup> See LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 63–72 (2006) (arguing that judicial decisions are influenced by judges’ expectations about how the public and other relevant audiences might react to them); Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L. J. 1515, 1534–36 (2010) (arguing that Justices desire to be liked, and value the approbation of their reference groups most). If subsequent invitations to speak are welcome, and perhaps even if they are not, they might also trigger an inclination to reciprocate. See CIALDINI, *supra* note 295, at 20–21.

<sup>323</sup> See Baum & Devins, *supra* note 322, at 1541–42.

<sup>324</sup> Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 839 (2023).

<sup>325</sup> STEPHEN G. BREYER, THE AUTHORITY OF THE COURT AND THE PERILS OF POLITICS 83 (2021) (“[A] judge who has previously expressed a view, even on a fairly minor technical matter, may hesitate to join fully a majority opinion expressing a contrary view on the minor matter, lest the legal public think that the judge is being inconsistent (or has changed his mind).”).

<sup>326</sup> Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 449 (2008); Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 248 (1985).

<sup>327</sup> Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of Supreme Court Justices*, 40 AM. J. POL. SCI. 971, 983, 986 (1996).

<sup>328</sup> Re, *supra* note 324, at 826.

<sup>329</sup> *Id.* at 860; see Larsen, *supra* note 326, at 469–70 (criticizing “self stare decisis”).

new or more relevant evidence or arguments are presented at stage two, will the Justice be influenced by his or her previous ruling at stage one? Will the Justice be able to rule at stage two as if he or she had not ruled at stage one? Justices who predicted that a party would prevail on the merits in the context of an emergency application might find it uncomfortable to subsequently rule against that party on the merits, thereby becoming locked into their previous decision.<sup>330</sup> Similarly, it has been argued that the Justices should refrain from voting when the Court is equally divided for this same reason.<sup>331</sup>

Consistency bias seems to influence the Supreme Court in shadow docket cases. According to one study, “once the Supreme Court decides a movant is likely to succeed on the merits, the movant typically ends up being the prevailing party when a merits decision is issued.”<sup>332</sup> In fact, of approximately 250 non-administrative stay decisions made from 2015 to 2020 in non-death penalty cases, the Court’s grant of a stay “forecasted the eventual merits decision in *every instance* that the Court went on to rule on the merits.”<sup>333</sup> Either the Supreme Court is superb at predicting future outcomes and its own future preferences or its preliminary view of the merits is predetermining its final decision. Shadow docket decisions seem to be self-fulfilling prophecies.

Even grants of certiorari might produce a bias toward consistency,<sup>334</sup> despite the “non-merits myth” that they do not necessarily express a view of the merits.<sup>335</sup> The Supreme Court reverses the decision below nearly three-fourths of the time when it grants certiorari.<sup>336</sup> Moreover, in a study of the behavior of

<sup>330</sup> Lynch, *supra* note 165, at 804–09.

<sup>331</sup> Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 264 (1960) (per curiam) (Brennan J.) (noting that the “practice of not expressing opinions upon an equal division has the salutary force of preventing the identification of the Justices holding the differing views as to the issue, and this may well enable the next case presenting it to the approached with less commitment”); Benjamin Gilad et al., *Cognitive Dissonance and Utility Maximization: A General Framework*, 8 J. ECON. BEHAV. & ORG. 61, 67 (1987) (“Under cognitive dissonance, commitments already made are harder to reverse than they were to make.”).

<sup>332</sup> Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court’s Emergency Stays*, 44 HARV. J.L. & PUB. POL’Y 827, 871 (2021).

<sup>333</sup> *Id.*

<sup>334</sup> S. Sidney Ulmer, *The Decision to Grant Certiorari as an Indicator to Decision “On the Merits”*, 4 POLITY 429, 446 (1972) (noting the possibility “that decisions on full review are influenced, psychologically, by the response to the certiorari application made earlier”). *But see* Robert W. Gibbs, *Certiorari: Its Diagnosis and Cure*, 6 HASTINGS L.J. 131, 160 (1955) (“If certiorari is granted, bias in the later hearing would be unlikely, since the Court would realize that their prior views were only tentative.”).

<sup>335</sup> United States v. Carver, 260 U.S. 482, 490 (1923) (Holmes, J.) (“The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.”).

<sup>336</sup> *SCOTUS Case Reversal Rates (2007–Present)*, BALLOTPEDIA (2022), [https://ballotpedia.org/SCOTUS\\_case\\_reversal\\_rates\\_\(2007\\_-\\_Present\)](https://ballotpedia.org/SCOTUS_case_reversal_rates_(2007_-_Present)) [<https://perma.cc/4Q8E-Y7BY>] (reporting that from 2007 to 2021 the Supreme Court reversed the lower court in 71.4 percent

individual Justices after voting for certiorari, a researcher found that of the eleven Justices studied, there was a statistically significant positive correlation between the Justices' vote in support of certiorari and their subsequent vote on the merits.<sup>337</sup>

### I. Illusory Superiority

In the fictional town Lake Wobegon, “all of the children are above average.”<sup>338</sup> This bizarre phenomenon, however, is also widespread beyond these fictional city limits. “When people are asked to rate themselves on desirable traits and skills, most people rate themselves as above average.”<sup>339</sup> Studies show that, relative to others, people believe that they are healthier; drivers believe that they are safer and more skilled; professors believe that they are superior teachers and researchers; couples believe that they have better and more durable marriages; college students believe that they are better leaders, athletes, and friends; and so on.<sup>340</sup> Researchers call this phenomenon the better-than-average effect (“BTAE”).

The Better than Average Effect is a widespread and powerful phenomenon.<sup>341</sup> Not surprisingly, lawyers are not immune. When Bryan Garner surveyed lawyers about the quality of the legal documents they read, they reported that merely 5 percent were well-drafted.<sup>342</sup> When asked about the quality of their own legal documents, however, they asserted that 95 percent of theirs were well drafted.<sup>343</sup>

Judges also suffer from a belief in illusory self-superiority. My coauthors and I have found that generalist judges evaluate themselves in self-serving or egocentric ways. In one study, we asked about one-third of then-serving US magistrate judges to rank themselves relative to their peers on their ability to

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of the cases in which it granted certiorari, and that the rate for the October 2021 Term was 81.8 percent).

<sup>337</sup> Ulmer, *supra* note 334, at 440.

<sup>338</sup> Garrison Keillor, *The Origins of Lake Wobegon*, YOUTUBE (MAY. 14, 2014), [https://www.youtube.com/watch?v=V\\_ysNTNoyZ8](https://www.youtube.com/watch?v=V_ysNTNoyZ8) [<https://perma.cc/2WZK-H4CU>].

<sup>339</sup> Linda Koppel et al., *We Are All Less Risky and More Skillful than Our Fellow Drivers: Successful Replication and Extension of Svenson (1981)*, META-PSYCH. (forthcoming 2023).

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* (replicating a prior study and confirming that the better than average effect is a common and powerful phenomenon); Ethan Zell et al., *The Better-Than-Average Effect in Comparative Self-Evaluation: A Comprehensive Review and Meta-Analysis*, 146 PSYCH. BULL. 118, 134 (2020) (“Our work supports the view that the BTAE is a highly robust and replicable phenomenon.”); Ignazio Ziano et al., *Replication and Extension of Alicke (1985) Better-Than-Average Effect for Desirable and Controllable Traits*, 12 SOC. PSYCHOL. & PERSONALITY SCI. 1005 (2021) (a recent meta-analysis of 124 studies finding that the better-than-average effect was large and robust).

<sup>342</sup> Bryan A. Garner, *President’s Letter*, THE SCRIVENER, Winter 1998, at 3.

<sup>343</sup> *Id.*

avoid reversal on appeal.<sup>344</sup> We asked the judges to place themselves into one of four quartiles: the top 25 percent, the next best 25 percent, the second to worst 25 percent, or the bottom 25 percent.<sup>345</sup> 87.7 percent of the judges placed themselves in the top 50 percent (i.e., the least often reversed) of their peers, indicating that nearly 90 percent of the judges believed that they were better than average.<sup>346</sup> The magnitude of this result is comparable to the strength of the effect observed in non-judges, such as professors.<sup>347</sup>

In a second study, we asked a group of administrative law judges (“ALJs”) to compare “their ability to assess the credibility of a witness, their ability to avoid bias, and their ability to facilitate settlements.”<sup>348</sup> They, too, provided self-serving evaluations of their skills. With regard to assessing the credibility of witnesses, 83.3 percent of the ALJs placed themselves in the top half.<sup>349</sup> Similarly confident in their ability to facilitate settlements, 86.2 percent of the ALJs placed themselves in the top half of that category as well.<sup>350</sup> Even more ALJs—97.2 percent—believed they were in the top half with regard to their capacity for avoiding racial bias in judging.<sup>351</sup>

In sum, over 80 percent of the judges we tested rated themselves as belonging in the top 50 percent of judges in four important skills, thereby offering an impossibly optimistic assessment of their abilities. Other researchers have reported similar results.<sup>352</sup>

The BTAE is related to the bias blind spot.<sup>353</sup> The bias blind spot “is the phenomenon that people tend to perceive themselves as less susceptible to biases than others.”<sup>354</sup> People also rate themselves as more objective than their

<sup>344</sup> Guthrie, Rachlinski & Wistrich, *Inside the Judicial Mind*, *supra* note 95, at 813–14.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at 814.

<sup>347</sup> K. Patricia Cross, *Not Can, but Will College Teaching Be Improved?*, 17 NEW DIRECTIONS FOR HIGHER EDUC. 1, 9–10 (1977).

<sup>348</sup> Guthrie, Rachlinski & Wistrich, *supra* note 82, at 1518–20.

<sup>349</sup> *Id.* at 1519.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> See Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J. F. 391, 397 (2017) (reporting that 87 percent of active federal district judges and 92 percent of senior federal district judges reported that they were in the top 25 percent of their colleagues in “their ability to make decisions free of racial bias”).

<sup>353</sup> Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCH. BULL. 369, 370 (2002) (stating that “the ‘bias blind spot’ can be seen as a particular instance of the so-called better-than-average-effect”).

<sup>354</sup> Subramanya Prasad Chandrashekar et al., *Agency and Self-Other Asymmetries in Perceived Bias and Shortcomings: Replications of the Bias Blind Spot and Link to Free Will Beliefs*, 16 JUDGMENT & DECISION MAKING 1392, 1392 (2021) (successfully replicating the study by Pronin et al., *supra* note 353).

peers.<sup>355</sup> Judges who—like those in our experiments—believe that they are in the top 50 percent at avoiding bias may be exhibiting the bias blind spot. This could interfere with any efforts they might make to detect or overcome any actual implicit bias.<sup>356</sup>

We know, then, that just like ordinary people, judges below the level of the Supreme Court possess a sense of illusory superiority. What does this suggest about Supreme Court Justices? Without testing them, it is impossible to know for certain. Unless they are unusually self-aware, however, the prestige and sense of self-importance naturally flowing from their exalted position likely reinforces the sense of superiority that most people (and judges) inherently possess. Thus, they are likely to feel even more superior, and to be even more overconfident about their skills, than judges serving on lower courts. It seems unlikely that they would feel less superior to others than do their institutional inferiors.

Of course, many Supreme Court Justices likely are more able than the average judge. Expertise is one of the prerequisites for appointment; but it is not the only criterion.<sup>357</sup> Political ideology and a host of factors unrelated to competence are also relevant.<sup>358</sup> Moreover, presidents sometimes nominate personal friends or allies for positions on the Supreme Court, regardless of whether they

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<sup>355</sup> See D. A. Armor, *The Illusion of Objectivity: A Bias in the Perception of Freedom from Bias* (1999) (Ph.D. dissertation, UCLA) (ProQuest).

<sup>356</sup> See Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCH. SCI. 474 (2005) (finding that participants' self-perceptions of objectivity were associated with greater, rather than lesser, bias in hiring decisions); Jerry Kang, *What Judges Can Do About Implicit Bias*, 57 CT. REV. 78, 81 (2021) (“When we confidently assume that we already get things right, we pay less attention and take less care in decision making.”); Gawronski et al., *supra* note 270, at 148 (stating that naïve realism can undermine attempts to correct for implicit bias).

<sup>357</sup> Stephen J. Choi et al., *The Role of Competence in Promotions from the Lower Federal Courts*, 44 J. LEGAL STUD. S107, S129–30 (2015) (explaining that presidents do not take much account of competence when nominating district judges to the courts of appeals because there is no political reward for doing so).

<sup>358</sup> Elisha Carol Savcheck et al., *Taking It to the Next Level: The Elevation of District Court Judges to the U.S. Courts of Appeals*, 50 AM. J. POL. SCI. 478, 488 (2006) (concluding that consistent adherence to policy preferences of the president is one of the strongest predictors of elevation); Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069, 1092 (1999) (explaining that presidents make Supreme Court nominations strategically, considering both whether a nominee will bring the Supreme Court closer to the president's policy preferences and whether the nominee can readily secure swift Senate confirmation); Lee Epstein et al., *The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices*, 56 DRAKE L. REV. 609, 610, 620 (2008) (finding that “the ideology of the Presidents and their nominees is rather closely associated” and that the importance of ideology in nominations “seems to be increasing with time”); see also BARRY J. MCMILLION, CONG. RSCH. SERV., R44235, SUPREME COURT APPOINTMENT PROCESS: PRESIDENT'S SELECTION OF A NOMINEE 8–14 (2008).

are well-qualified.<sup>359</sup> President George W. Bush's stillborn nomination of his loyal advisor Harriet Miers is merely one prominent recent example.<sup>360</sup> In any event, intelligence does not appear to immunize people against the bias blind spot.<sup>361</sup>

Supreme Court Justices appear to exhibit a sense of illusory superiority when they sarcastically denigrate each other and past Justices of the Supreme Court. As a recent example, the majority opinion in *Dobbs* described *Roe* as “egregiously wrong” (multiple times), “deeply damaging,” and based on a “constitutional analysis . . . far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed.”<sup>362</sup> The dissent was equally bitter and sarcastic.<sup>363</sup> Only Justice Brett Kavanaugh expressed respect for “[a]ll of the Justices, past and present, who . . . grappled with the divisive issue of abortion” in “sincer[ity]” and “good faith.”<sup>364</sup> Of course, *Dobbs* is not the only example of this sort of behavior.<sup>365</sup>

The level of vitriol is also suggestive of naïve realism.<sup>366</sup> Those influenced by this bias believe that they are directly perceiving the world as it actually is, and that if someone perceives the world differently, they are uninformed, stupid, biased, or irrational.<sup>367</sup> It seems to them that the world can only be seen in one way, and they are flabbergasted if someone claims to see it differently than they do, concluding that such a person is unpersuadable. Thus, naïve realism can lead to deliberative bias, that is, “the tendency to (a) see oneself as capable of engaging in deliberation because the self is perceived to be well-informed,

<sup>359</sup> Lee Epstein & Eric A. Posner, *Supreme Court Justices' Loyalty to the President*, 45 J. LEGAL STUD. 401, 402, 407 (2016).

<sup>360</sup> George F. Will, *Can This Nomination Be Justified?*, WASH. POST (Oct. 5, 2005), <https://www.washingtonpost.com/archive/opinions/2005/10/05/can-this-nomination-be-justified/f3dbdacd-734d-4625-abe0-500ced761b89/> [https://perma.cc/4BAE-R2KD].

<sup>361</sup> Richard F. West et al., *Cognitive Sophistication Does Not Attenuate Bias Blind Spot*, 103 J. PERSONALITY & SOC. PSYCH. 506, 515 (2012) (concluding that the bias blind spot is “unmitigated by increases in intelligence” because the mechanism that causes it is “evolutionary and computationally basic”).

<sup>362</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2237, 2243, 2265 (2022).

<sup>363</sup> *Id.* at 2317–50 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting).

<sup>364</sup> *Id.* at 2310 (Kavanaugh, J., concurring); *see also id.* at 2317 (Roberts, C.J., concurring in judgment) (opining that both the majority opinion and the dissent display “a relentless freedom from doubt on the legal issue”).

<sup>365</sup> *See, e.g., Obergefell v. Hodges*, 576 U.S. 644, 719 & n.22 (2015) (Scalia, J., dissenting) (criticizing Justice Kennedy's majority opinion for being “often profoundly incoherent,” likening it to “the mystical aphorisms of the fortune cookie,” and declaring that its style is “as pretentious as its content is egotistic”); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 538–47 (1989) (Blackmun, J., dissenting) (accusing the majority's opinion of being a “[b]ald assertion masquerad[ing] as reasoning,” “deceptive,” and “disingenuous”).

<sup>366</sup> Lee Ross & Andrew Ward, *Naive Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, in *VALUES AND KNOWLEDGE*, 103, 103–35 (Edward S. Reed, et al. eds., 1st ed. 2016).

<sup>367</sup> *Id.* at 110–11, 116–17.

rational, open-minded, and civil, while (b) seeing others as unlikely to adhere to the ideals of deliberation because they are uninformed, irrational, close-minded, and uncivil.”<sup>368</sup> Accordingly, a person affected by deliberative bias will assume that they are correct and that continued discussion with their ignorant or irrational opponent would be futile and unpleasant.<sup>369</sup> Remarkably, some have recommended that appellate judges should embrace this bias by discussing issues only with those who already agree with them.<sup>370</sup>

If the Justices are susceptible to deliberative bias, then they might conclude that it is easier to resolve issues by expeditious means, such as summary reversal or emergency applications, without employing the elaborate procedures of the merits docket because dialogue, thorough examination, or efforts at persuasion would be pointless as they are obviously right—at least on controversial constitutional issues—and opposing Justices are plainly wrong. This could result in a self-reinforcing downward spiral in which the possibility of intra-court collaboration is confined to only pallid technical matters. Reducing the potential for collaboration among the Justices in this way could damage the quality of Supreme Court decisions in some instances.<sup>371</sup>

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Empirical research concerning behavioral economics and cognitive psychology suggests that decisions made utilizing the shadow docket are likely to be of lower quality than those made using the Supreme Court’s more robust, regular merits docket procedures. This is because the characteristics of the shadow docket encourage a more intuitive and less deliberative style of decision making, reinforcing the unfortunate tendency of judges to rely on cognitive shortcuts and rules of thumb when questions are challenging, information is scarce, or time is short.<sup>372</sup> Therefore, utilization of the shadow docket expos-

<sup>368</sup> Bryan McLaughlin et al., *Deliberating Alone: Deliberative Bias and Giving Up on Political Talk*, 48 HUM. COMM’N RSCH. 579, 586 (2022).

<sup>369</sup> *Id.* at 379, 382 (“[S]elf-serving biases and phenomenological experiences also lead to the biased perception that the self is far more capable of adhering to the ideals of rational deliberation than others, a process . . . refer[red] to as *deliberative bias*,” which can reduce the likelihood that an individual is willing to engage in political talk, especially with those who hold opposing opinions.).

<sup>370</sup> William Baude & Ryan D. Doerfler, *Arguing with Friends*, 117 MICH. L. REV. 319, 322, 334 (2018) (arguing that only judges who share a common judicial outlook or methodology are rational epistemic peers for purposes of judicial collaboration, and that “there is little reason to give much weight to judges with very different approaches”).

<sup>371</sup> See Dan Bang & Chris D. Frith, *Making Better Decisions in Groups*, 4 ROYAL SOC’Y OPEN SCI., 170193, 2017, at 1, 8 (stating that collaboration can enable groups to outperform individuals in logical reasoning and assessing probability).

<sup>372</sup> Like the heightened standard of pleading adopted in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), employing the shadow docket to make important decisions on the merits encourages Justices to rely on their first impressions of cases. See Jeffrey J. Rachlinski, *Processing Pleadings and the Psychology of Prejudgment*, 60 DEPAUL L. REV. 413 (2011). This is a temptation that they would be better off resisting. See *id.*

es the Supreme Court to the risk that it might be misled by undetected cognitive illusions, like ships that run aground on invisible shoals. These hidden hazards threaten the quality of the Supreme Court's decisions because in utilizing the shadow docket, the Supreme Court abandons some of its formidable institutional advantages and simultaneously exacerbates some of its institutional weaknesses. Even apart from the criticisms advanced by others, the Supreme Court would make better decisions if it renounced its misuse of the shadow docket.

No one could seriously argue that, given comparable case difficulty, the Supreme Court is likely to perform better when using the procedures of the shadow docket than those of the merits docket. One might argue that the matters on the shadow docket are so easy that it simply does not matter which set of procedures are used, as they would be resolved the same way regardless. But this seems unlikely. If the outcome of a case is clear, then litigants have little incentive to pursue it, so it is unlikely to reach the Supreme Court. Moreover, the Supreme Court, in deciding which handful of cases it will review, primarily takes cases involving issues on which courts of appeals conflict or where "the legal subculture cupboard is bare."<sup>373</sup> Finally, although the Supreme Court typically decides a large proportion (about one-half) of its cases unanimously or eight-to-one, that proportion is declining.<sup>374</sup> In the October 2020 Term, the number of concurrences (forty-two) and dissents (thirty-nine) together (eighty-one) outnumbered the number of cases in which an opinion was issued (sixty-two).<sup>375</sup> These facts suggest that the cases that reach the Supreme Court are likely to be uncertain and controversial. Therefore, in quickly trying to decide or predict the outcome of such cases on the merits utilizing the shadow docket, the Justices might—due to a partial record, no lower court decision, doctrinal uncertainty, a tight deadline, etc.—be unconsciously tempted to rely too heavily on intuition and cognitive shortcuts, such as positions taken by like-minded individuals or groups, implicit biases, sympathetic reactions to litigants, and so on.

### III. LIMITATIONS

#### A. *Incomplete Information*

To begin with, a dose of caution and humility is in order. The recent leak of the draft *Dobbs* majority opinion notwithstanding, the Supreme Court is notoriously secretive.<sup>376</sup> There is much that is unknown about how the Justices

<sup>373</sup> ROBERT A. CARP & RONALD STIDHAM, *THE FEDERAL COURTS* 116 (3d ed. 1998).

<sup>374</sup> Sunstein, *supra* note 37, at 781.

<sup>375</sup> *The Supreme Court—The Statistics*, *supra* note 47, at 491 tbl.I.

<sup>376</sup> Peter G. Fish, *Secrecy and the Supreme Court: Judicial Indiscretion and Reconstruction Politics*, 8 WM. & MARY L. REV. 225, 225 (1967) ("Of America's political institutions, the United States Supreme Court is the most remote and insulated.").



actually decide cases, including the process by which shadow docket decisions are made. For example, we know little about the extent to which Justices consult and collaborate with one another with respect to cases on the merits docket. Much of what we do know is based on material dating from decades ago. The available evidence suggests that scant conversation amongst the Justices typically occurs.<sup>377</sup> Although nothing suggests that the Justices are equally or more likely to collaborate on shadow docket matters as on merits docket matters, it is difficult to know for sure.

### B. *Collaboration and Wisdom of the Crowd*

“[T]he Supreme Court is a ‘they,’ not an ‘it.’”<sup>378</sup> Nearly all of its work is done by a group, rather than individually. Even substantive applications initially received by a single Justice are now typically referred to the entire Court.<sup>379</sup> Therefore, there is a possibility that cognitive illusions or biases that endanger the quality of individual judge’s decision making might not apply to the Supreme Court or other appellate court panels.

Appellate courts, however, do make mistakes. For example, they (like the prominent judges, lawyers, and law professors who comprise the American Law Institute) were fooled by the representativeness heuristic<sup>380</sup> and the Supreme Court mistakenly adopted the negative effect fallacy.<sup>381</sup> They also make

<sup>377</sup> James F. Spriggs II et al., *Bargaining on the U.S. Supreme Court: Justices’ Responses to Majority Opinion Drafts*, 61 J. POL. 485, 503 (1999) (describing the process by which Justices respond in writing to draft majority opinions, and finding that 80.5 percent of all initial responses are simple “joins”).

<sup>378</sup> RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW AND PRACTICE* 28 (2nd ed. 2013).

<sup>379</sup> See Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159 (2008); McFadden & Kapoor, *supra* note 332, at 835–37 (stating that although the practice of granting stays was once common and is still authorized, it has become less frequent); 28 U.S.C. § 2101(f) (2018); SUP. CT. R. 22; SUP. CT. R. 23(1). This might be a positive development, if one believes that groups can outperform their strongest individual members. But maybe an individual Justice who writes and publishes his or her reasoning after oral argument in chambers would outperform a group of Justices who do not hear argument, take responsibility by name, or explain their rationale. See Vladeck Testimony, *supra* note 11 (suggesting a return to former practice).

<sup>380</sup> Guthrie, Rachlinski & Wistrich, *Inside the Judicial Mind*, *supra* note 94, at 808–11; *Byrne v. Boadle*, 159 Eng. Rep. 299, 301 (1863) (stating that a barrel falling while being lowered from a window is prima facie evidence of negligence); see also RESTATEMENT (SECOND) OF TORTS § 328D(1)(a) (AM. L. INST. 1965) (“It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when . . . the event is of a kind which ordinarily does not occur in the absence of negligence . . .”).

<sup>381</sup> See *supra* notes 119–21 and accompanying text; see also Andrew J. McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist’s Decisions in Criminal Procedure Cases*, 59 U. COLO. L. REV. 741, 843 (1988) (cataloging numerous logical errors contained in opinions authored by Chief Justice Rehnquist and stating that “[a] similar article could be written about other Justices, past and present.”).

factual errors.<sup>382</sup> Thus, although this is not the place for a comprehensive analysis of decisions made by groups of judges, it is worth considering whether the Supreme Court is leveraging its number of judges to avail itself of the advantage of many minds, whether by means of collective decision making or the wisdom of the crowd.<sup>383</sup>

There is a distinction between the “wisdom of the crowd” and “collective decision-making.” The wisdom of the crowd is a phenomenon in which the aggregation of many independent estimates often surpasses any individual’s estimate.<sup>384</sup> “Collective decision-making is a process whereby the members of a group decide on a course of action based on consensus. It has the potential to exceed the capacity of individual decision-making or simple aggregation of individual actions or competencies through social interactions that facilitate the emergence of collective choices.”<sup>385</sup> Collective decision making, not wisdom of the crowd, is the type of group decision making that American judges and juries presently perform because jurors and judges on multimember courts do not vote in isolation.<sup>386</sup> It is generally believed that both collective decision making and the wisdom of crowd technique allow the group to outperform its individual members.<sup>387</sup>

Judges extoll the decision-making benefits of collegiality and collaboration.<sup>388</sup> The available evidence, however, suggests that although votes some-

<sup>382</sup> See *supra* notes 290–93 and accompanying text; see also Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012).

<sup>383</sup> See Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1 (2009).

<sup>384</sup> See generally JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004); Francis Galton, *Vox Populi*, 75 NATURE 450 (1907).

<sup>385</sup> Daisuke Hamada et al., *Wisdom of Crowds and Collective Decision-Making in a Survival Situation with Complex Information Integration*, 5 COGNITIVE RSCH.: PRINCIPLES & IMPLICATIONS, no. 48, 2020, at 1, 48, 49 (internal citations omitted).

<sup>386</sup> See generally Mathilde Cohen, *Ex Ante Versus Ex Post Deliberations: Two Models of Judicial Deliberations in Courts of Last Resort*, 62 AM J. COMPAR. L. 951 (2014); Saul Levmore, *Appellate Panels of One* (U. Chi. Pub. L., Working Paper No. 788, 2022), <https://ssrn.com/abstract=4036778> [<https://perma.cc/6SXG-CDYU>].

<sup>387</sup> Ans Vercammen et al., *The Collective Intelligence of Small Crowds: A Partial Replication of Kosinski et al. (2012)*, 14 JUDGMENT & DECISION MAKING 91, 91 (2019) (“[H]uman groups, when properly managed, tend to outperform the average (and frequently the best) individual, both in terms of the quality and quantity of solutions in a wide range of tasks, including judgment and prediction, creative thinking, concept attainment and brainstorming.”); Hamada et al., *supra* note 385, at 58 (“This study found that not only group decision-making but also the wisdom of crowds . . . showed better performance than individual decision-making. However, group decision-making was not better than the wisdom of crowds . . .”). *But see* PLOUS, *supra* note 134, at 214 (“Many individual-level heuristics and biases appear to operate with equal force in groups.”).

<sup>388</sup> See generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 177 (1921) (arguing that the diverse perspectives of members of an appellate court “balance one another” and that “out of the attrition of diverse minds there is beaten something that has a consistency and uniformity and average value greater than its component elements”); Harry T.

times change during or after the Justices' post-argument conference, little substantive discussion occurs during the conference.<sup>389</sup> Some scholars believe that little or no meaningful collaboration routinely occurs among the Justices in any setting,<sup>390</sup> and that the conditions for meaningful collaboration are lacking.<sup>391</sup>

Groups can outperform individuals but only under specific circumstances.<sup>392</sup> Successful groups tend to possess certain characteristics.<sup>393</sup> First, they are typically large in size. Increasing group size improves performance, especially if the group is smaller than twenty.<sup>394</sup> As presently constituted, the Supreme Court might not be large enough to satisfy this condition. Moreover, the relatively small size of the Supreme Court combined with majority rule and polarized partisan political membership effectively reduces the size of the Court further—that is, to the current controlling subgroup of five or six, at least in controversial constitutional cases. In a group that has a determined, stable majority and operates under majority rule, the majority need not consider minority views. The majority becomes a smaller, less diverse subgroup, the dynamics of which must be analyzed separately.

Second, well-functioning groups are diverse.<sup>395</sup> There are essentially two types of diversity: identity diversity (differences in personal characteristics such as race, gender, or age) and functional diversity (differences in representing and solving cognitive problems).<sup>396</sup> The former encourages individual group members to reconsider their personal viewpoints based on the private information or varying perspectives of other group members, while the latter helps the group search more thoroughly for better models and solutions.<sup>397</sup> Ho-

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Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003) (arguing that collegiality is how judges achieve the value of collaboration).

<sup>389</sup> SEGAL & SPAETH, *supra* note 207, at 282–83; BREYER, *supra* note 325, at 70 (conceding that at the Justices' conference, “[t]he discussion is rarely completely open or far-ranging”).

<sup>390</sup> Sunstein, *supra* note 37, at 776–80 (referring to the Supreme Court from 1941 to the present as the “Era of Independent Law Offices” during which the Justices have abandoned the previous “Era of Consensus”).

<sup>391</sup> Maya Sen, *Courting Deliberation: An Essay on Deliberative Democracy in the American Judicial System*, 27 NOTRE DAME J.L. ETHICS & PUB. POL’Y. 303, 316–18, 323 (2013) (arguing that the Justices are not capable of democratic deliberation because many of them have rigid enduring viewpoints and are not open to persuasion, and because their collaboration largely consists of memoranda presenting “zero-sum, *quid pro quo* bargaining” rather than nuanced weighing of principles and consequences).

<sup>392</sup> PLOUS, *supra* note 134, at 211 (“Group judgments tend to be somewhat more accurate than individual judgments, though this is not always the case.”).

<sup>393</sup> See Harri Oinas-Kukkonen, *Network Analysis and Crowds of People as Sources of New Organisational Knowledge*, in KNOWLEDGE MANAGEMENT: THEORETICAL FOUNDATIONS 173, 173–89 (Alex Koohang et al. eds., 2008); SUROWIECKI, *supra* note 384, at 10.

<sup>394</sup> Volker Walter et al., *Measuring the Wisdom of the Crowd: How Many Is Enough*, 90 J. PHOTOGRAMMETRY, REMOTE SENSING & GEOINFO. SCI. 269, 284 (2022).

<sup>395</sup> Bang & Frith, *supra* note 371, at 11.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

mogeneity degrades group performance by failing to ensure sufficient variance in method, thought process, and private information to maximize the group's advantage over individuals.<sup>398</sup>

Supreme Court Justices are not a very diverse group. Although they differ in some respects, they are quite similar in others.<sup>399</sup> From an identity perspective, of the nine Supreme Court Justices, three are racial minorities, and four are women.<sup>400</sup> Eight are Christian (of which six are Catholic), one is Jewish, and none are agnostic or atheist.<sup>401</sup> All are aged between fifty and seventy-four.<sup>402</sup> From a functional perspective, eight justices received their undergraduate degrees from Ivy League universities, eight attended Harvard Law School or Yale Law School, eight have experience as an appellate court judge, only two have trial court experience, and none have served in elective office.<sup>403</sup> This lack of experiential diversity makes a difference. As an example, federal appellate panels containing a district court judge sitting by designation are more likely to affirm the district court decisions they review than are panels comprised of three appellate judges.<sup>404</sup>

Given the degree of overlap in their characteristics, backgrounds, training and experience, Supreme Court Justices may have little private or uncorrelated information to share. And, their lack of functional diversity narrows the advantage of the Court as a group over the performance of a similarly talented and experienced individual. This is especially concerning because the value of diversity is greatest when solving novel, complex problems, and these are exactly the sort of cases the Supreme Court is likely to encounter.<sup>405</sup> And then

<sup>398</sup> *Id.* at 8.

<sup>399</sup> Melissa Quinn, *Supreme Court Search Highlights Calls for Educational Diversity on the Bench*, CBS NEWS (Feb. 8, 2022, 1:01 PM), <https://www.cbsnews.com/news/supreme-court-biden-educational-diversity-michelle-childs/> [<https://perma.cc/UNB6-ZFN6>]; Michele Zipkin, *Former Jobs of Every Supreme Court Justice*, STACKER (Apr. 7, 2022), <https://stacker.com/stories/3550/former-jobs-every-supreme-court-justice> [<https://perma.cc/MAC7-CRZJ>].

<sup>400</sup> *Current Members*, U.S. SUP. CT., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/8WSB-CYME>].

<sup>401</sup> Frank Newport, *The Religion of the Supreme Court Justices*, GALLUP (Apr. 8, 2022), <https://news.gallup.com/opinion/polling-matters/391649/religion-supreme-court-justices.aspx?version=print> [<https://perma.cc/J426-WXPF>].

<sup>402</sup> D. Hunter Schwarz, *Two-thirds of Americans Support Term Limits for Supreme Court Justices*, DESERET NEWS (July 26, 2022), <https://www.deseret.com/2022/7/26/23278925/two-thirds-of-americans-support-term-limits-for-supreme-court-justices-court-packing-age> [<https://perma.cc/2TZ6-V8GQ>].

<sup>403</sup> *Current Members*, *supra* note 400; Benjamin H. Barton & Emily Moran, *Measuring Diversity on the Supreme Court with Biodiversity Statistics*, 10 J. EMPIRICAL LEGAL STUD. 1, 20 (2013) (concluding that the recent trend is toward a less diverse overall Supreme Court).

<sup>404</sup> Andrew Sayer et al., *Affirming the District Judge: An Empirical Analysis of the Effect of District Judges Sitting by Designation on Circuit Court Panels*, 18 J. EMPIRICAL LEGAL STUD. 461, 483 (2021).

<sup>405</sup> See Justin Sulik et al., *The Diversity Gap: When Diversity Matters for Knowledge*, 17 PERSPS. PSYCH. SCI. 752, 758 (2021).

there is the question of whether a Justice's personal, anecdotal information should play a role in the Supreme Court's—or even a Justice's—decision making. The wisdom of crowds and perhaps group decision making suggests that it should, but the obligation of courts to base decisions solely on the record suggests that it should not.

Diversity also might be useful in another way. Panel effects are differences in judges' voting patterns in a subset of cases (e.g., sex discrimination or affirmative action) depending upon the characteristics (e.g., race or gender) of the other judges comprising the decision-making group. As an example, male judges are more likely to vote in favor of a female plaintiff in a sex harassment case if there is a female judge on the panel.<sup>406</sup> Why panel effects occur is unclear. They might result (as an example) from a male judge being taught a new perspective by a female judge, from a male judge deferring to the perceived experience of a female judge, or from a male judge being shamed into supporting a female claimant simply because of the presence of the female judge.<sup>407</sup> If there is less collaboration on shadow docket cases than there is on merits docket cases, then any potentially beneficial panel effects will be muted and some of the value of the collaborative decision making will be surrendered.

Law clerks could potentially add diversity to the Supreme Court, but probably do not reliably do so. To begin with, their youth inevitably limits experiences. Further, law clerks are predominately White males who attended a handful of elite law schools.<sup>408</sup> Some Justices even limit their selections to those

<sup>406</sup> Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Class Certification on the U.S. Courts of Appeals*, 119 MICH. L. REV. 231, 242 n.27 (2020); Robert S. Erikson, *Appellate Court Assignments as a Natural Experiment: Gender Panel Effects in Sex Discrimination Cases*, 19 J. EMPIRICAL LEGAL STUD. 423, 425 (2022); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1765 (2005).

<sup>407</sup> Peresie, *supra* note 406, at 1779–86.

<sup>408</sup> Tony Mauro, *Mostly White and Male: Diversity Still Lags Among SCOTUS Law Clerks*, LAW.COM (Dec. 11, 2017), <https://www.law.com/nationallawjournal/2017/12/11/mostly-white-and-male-diversity-still-lags-among-scotus-law-clerks/> [<https://perma.cc/ZG3K-T2CP>]

(reporting that of 487 law clerks hired by Justices of the Roberts Court from 2005 to 2017, two-thirds were male, 85 percent were White, 9 percent were Asian, 4 percent were African American, and 1.5 percent were Hispanic); Tony Mauro, *Diversity and Supreme Court Law Clerks*, 98 MARQ. L. REV. 361, 362, 364–365 (2014) (reporting that, historically, the percentage of women and minorities selected as Supreme Court law clerks has been disproportionately low); Kimberly Strawbridge Robinson, *Harvard-Yale Duopoly on Clerks Doesn't Fit Barrett's Background*, BLOOMBERG L. (Oct. 27, 2020) (reporting that from the 2017 to 2020 terms, 85 percent of Supreme Court law clerks graduated from a top ten law school, and 51 percent graduated from either Harvard or Yale); Tracey E. George et al., *Some Are More Equal than Others: U.S. Supreme Court Clerkships* 11, 21 (Va. Pub. L. & Legal Theory Rsch. Paper No. 2023-10, 2023), <https://ssrn.com/abstract=4338222> [<https://perma.cc/WQ7T-ANCX>] (finding that during the period from 1980 to 2020 more than two-thirds of Supreme Court law clerks obtained their law degree from Harvard, Yale, Stanford, Columbia or Chicago and that more than one-fifth of Supreme Court law clerks obtained their undergraduate degree from Princeton, Harvard, or Yale).

who appear to share their political ideology (often because they clerked for an appellate judge who shares the Justice's political ideology)<sup>409</sup> or who were recommended by friends or mentors.<sup>410</sup> This could result in the creation of echo chambers in which the only views expressed by law clerks are those with which their Justice already agrees. However, Justice Antonin Scalia reportedly hired liberal counter-clerks, apparently because he believed that the presence of a devil's advocate in chambers would help him and his largely conservative law clerks broaden their perspectives on cases.<sup>411</sup>

Third, the technique for aggregating the views of the group must be sound. "There is probably no universal answer to the question of whether to choose independence or consultation, and especially so when the group is small."<sup>412</sup> The small size and lack of diversity of the Supreme Court, especially when combined with the extent of the Justices' pre-commitments on salient issues, suggests that in this context, the benefits of collaboration might be small in relation to its drawbacks.

One worry about group deliberation is that the group members might be overly influenced by others, resulting in herding, information cascades, or groupthink.<sup>413</sup> Of course, it might be argued that this is unlikely because Su-

<sup>409</sup> Lawrence Baum, *Hiring Supreme Court Law Clerks: Probing the Ideological Linkage Between Judges and Justices*, 98 MARQ. L. REV. 333, 359 (2014) ("The tendency for Supreme Court Justices to draw their law clerks from ideologically compatible lower court judges became considerably stronger by the 1990s, and that tendency has remained very strong since then."); *id.* at 338–39 & tbl.1 (reporting that the percentage of each Justice's law clerks who had previously clerked for a judge appointed by a Democratic president ranged from 70 percent (Justices Sotomayor and Kagan) to zero (Justices Alito and Scalia)); Lawrence Baum & Corey Ditslear, *Supreme Court Clerkships and "Feeder" Judges*, 31 JUST. SYS. J. 26, 34 (2010); George et al., *supra* note 408, at 15 (reporting that 54 percent of Supreme Court law clerks had previously clerked for just 10 percent of "feeder judges"); Adam Bonica et al., *Legal Rasputins? Law Clerk Influence on Voting at the US Supreme Court*, 35 J.L., ECON., & ORG. 1, 5 n.4 (2019) (reporting that Justice Kennedy entrusted the screening of law clerk applicants to a group of conservative lawyers).

<sup>410</sup> Baum & Ditslear, *supra* note 409, at 27.

<sup>411</sup> Ian Samuel, *The Counter-Clerks of Justice Scalia*, 10 N.Y.U. J.L. & LIBERTY 1, 2–3 (2016); Michael Dorf, *Two Cheers for Counterclerks*, DORF ON LAW (Apr. 15, 2016) <http://www.dorfonlaw.org/2016/04/two-cheers-for-counterclerks.html> [<https://perma.cc/F6KK-D4KP>].

<sup>412</sup> Levmore *supra* note 386, at 13 (arguing that it might be best to isolate group members from one another and to eschew consultation because "when votes are taken one-by-one around a room, . . . later votes are inclined to be influenced—and logically so—by their predecessors").

<sup>413</sup> Irving L. Janis, *Groupthink*, PSYCH. TODAY MAG., Nov. 1971, at 84 ("I use the term groupthink as a quick and easy way to refer to the mode of thinking that persons engage in when *concurrency-seeking* becomes so dominate in a cohesive ingroup that it tends to override realistic appraisal of alternative courses of action. . . . The main principle of groupthink . . . is this: *The more amiability and esprit de corps there is among the members of a policy-making ingroup, the greater the danger that independent critical thinking will be replaced by groupthink, which is likely to result in irrational and dehumanizing actions directed against outgroups.*"); Ramsey M. Raafat et al., *Herding in Humans*, 13 TRENDS IN

preme Court Justices are strong, independent-minded jurists who (unlike most people) will not be influenced by a colleague's approval or disagreement and will hold fast to their own views. That might be true, however doubtful it seems in light of pervasive evidence of conformity.<sup>414</sup> But if that is right, then it is unclear whether collaboration strengthens their decisions or insulates them from the cognitive illusions that seem to plague judges when deciding alone.

Another potential problem that can distort group decisions is group polarization or the severity shift in which a deliberating group migrates toward the views of its most extreme members.<sup>415</sup> Although most research has focused on juries, judges seem susceptible to group polarization as well. As an example, one study found that federal district court judges deciding alone invalidate statutes as unconstitutional 45.0 percent of the time, but those deciding as members of a three-judge court invalidate such statutes 66.5 percent of the time.<sup>416</sup>

Strongly-held *ex ante* views can cause a different problem for groups.<sup>417</sup> Justices seem likely to commit to their own ideas before the Court reaches a joint decision, at least in politically salient cases.<sup>418</sup> This could make them unreceptive to contrary views expressed by their colleagues. Indeed, in an extensive study, researchers consistently found that “offering one’s own estimate prior to evaluating peer input . . . led individuals to derogate the judgments and decisions of others . . . .”<sup>419</sup> The participants interpreted disagreement in a self-serving manner, as signaling that their estimate was right and their peer was

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COGNITIVE SCI. 420, 420 (2009) (“Herding can be broadly defined as the alignment of thoughts or behaviors of individuals in a group (herd) through local (interactions rather than centralized coordination”); *id.* at 425 (“A cascade is a process by which people influence one another, such that participants ignore their private knowledge and follow instead the publicly stated judgments of others.”).

<sup>414</sup> See KENNETH S. BORDENS & IRWIN A. HOROWITZ, *SOCIAL PSYCHOLOGY* 238–250 (2d ed. 2002); CIALDINI, *supra* note 295, at 98–104, 140; EPSTEIN ET AL., *supra* note 207, at 255 (discussing dissent aversion, the phenomenon of judges not dissenting even when they disagree with a decision); RICHARD A. POSNER, *HOW JUDGES THINK* 31–34 (2008); Timothy M. Hagle, “*Freshman Effects*” for *Supreme Court Justices*, 37 *AM. J. POL. SCI.* 1142, 1142, 1153 (1993) (discussing the “freshman effect” and stating that “[a]cclimation effects do exist”); Rachael Houston et al., *Learning to Speak Up: Acclimation Effects and Supreme Court Oral Argument*, 42 *JUST. SYS. J.* 115, 116, 127 (2021) (finding that new Justices are less inclined to speak or interrupt their more senior colleagues).

<sup>415</sup> Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 *YALE L.J.* 71, 110 (2000).

<sup>416</sup> Eleanor C. Main & Thomas G. Walker, *Choice Shifts and Extreme Behavior: Judicial Review in the Federal Courts*, 91 *J. SOC. PSYCH.* 215, 215, 220 tbl.1 (1973).

<sup>417</sup> Zorn & Bowie, *supra* note 206, at 1213, 1215 (describing the nomination process for Supreme Court Justices as “the appointment of single-minded policy seekers”).

<sup>418</sup> Bradley R. DeWees & Julia A. Minson, “I Was First and I Was Right”: The Effects of Order on Evaluation of Peer Judgments (2020).

<sup>419</sup> *Id.* at 3.

wrong, and that their peer was incompetent.<sup>420</sup> These findings suggest a potential barrier to effective collaboration among the Justices.

Groups, then, are not a panacea. Not only do they make some of the same mistakes that individuals do, but they can inject fresh pathogens into the decision-making process.

### C. *Triaging Is Inevitable*

Although its name is pejorative, and although it possesses drawbacks, there is nothing inherently nefarious about the shadow docket. No court, not even one as well-resourced as the Supreme Court, possesses unlimited capacity.<sup>421</sup> In medical parlance, triaging is rationing attention or care toward those with the most acute need or those who will most benefit from attention or care.<sup>422</sup> All courts triage their dockets in some ways, assigning higher priority to some cases and investing less effort in others. Busy trial courts do this constantly, often under the guise of what is sometimes euphemistically called “case management.”<sup>423</sup> Appellate courts do it as well, such as by adopting rules dispensing with oral argument and written opinions, thereby diluting the value of an appeal.<sup>424</sup> As an example, in 2021, 87 percent of all federal appeals were decided without oral argument.<sup>425</sup> And if courts do not triage explicitly, they do it implicitly, such as when an overly busy appellate court scrutinizes lower court rulings more deferentially, reversing fewer judgments than one that is less busy.<sup>426</sup>

The Supreme Court is no exception.<sup>427</sup> It triages too. It does not explain its rulings on applications for extensions of time or its grants or denials of certiora-

<sup>420</sup> *Id.* at 26, 35.

<sup>421</sup> See COAN, *supra* note 32, at 2.

<sup>422</sup> Kenneth V. Iserson & John C. Moskop, *Triage in Medicine, Part 1: Concept, History, and Types*, 49 ANNALS EMERGENCY MED. 275, 275 (2007).

<sup>423</sup> Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 376–78 (1982); see also FED. R. CIV. P. 26(b)(1) (restricting discovery to information and materials that are “proportional to the needs of the case”); FED. R. CIV. P. 16 (authorizing pretrial case management).

<sup>424</sup> Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L. J. 2386, 2391 (2014) (“[T]he vast majority of appellate litigants currently receive no oral argument, have their cases worked up primarily by staff attorneys, and then have their cases disposed of via unpublished order or summary judgment.”); Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L. J. 62, 63 (1985).

<sup>425</sup> *Judicial Business 2021 Tables*, US COURTS (Sept. 30, 2021), <https://www.uscourts.gov/statistics-reports/judicial-business-2021-tables> [https://perma.cc/HR6Q-8A8Y] (according to tbl.B-1).

<sup>426</sup> Huang, *supra* note 31, at 1137.

<sup>427</sup> See Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 924 (2022) (“The Supreme Court has nearly unrestrained discretion to set its own agenda.”); Andrew Pardue, *Make SCOTUS Judge Again: A Proposal to Revive Mandatory Appellate Jurisdiction Over Constitutionally Significant Questions 4* (Nov. 17, 2020) (unpublished manuscript) ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3702693](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3702693) [https://perma.cc/7RB



ri. Most of these measures are unproblematic concessions to practicality. The cert pool, in which some Justices (other than Justices Alito and Gorsuch) rely in part on the assessments of other Justices and their law clerks in determining whether a petition is “cert-worthy,” is another—albeit somewhat more controversial—example of such triaging.<sup>428</sup>

The mere existence of the shadow docket, then, is not the problem. Eliminating it entirely would be both impractical and undesirable. If a case is truly urgent, as one occasionally is, then there may be little that can be done.<sup>429</sup> But its dangers should be acknowledged and its use kept to a minimum.<sup>430</sup>

Justice Alito has commented that criticism of reliance on the shadow docket for handling emergencies is sometimes misguided, stating, “It’s like complaining about the emergency room for treating too many accident victims who come in.”<sup>431</sup> Although his comment contains a grain of truth, it is inapposite. The Justices almost never confront an immediate life or death decision as emergency room physicians do. Even in death penalty cases, the Supreme Court can pause the clock with an administrative stay to enable it to decide the case properly without rushing. There are only a few of these each year anyway. More fundamentally, since the Supreme Court is a law-making or policy-making court rather than an error-correcting court, the urgency of any one case rarely matters to the performance of its principal function.

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9-SQMP]) (discussing mandatory jurisdiction).

<sup>428</sup> Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1237 (2012); Epps & Ortman, *supra* note 52, at 712–14; see William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 477 (1973) (stating that the power to select which cases the Supreme Court will hear is “second to none in importance”).

<sup>429</sup> Vladeck Testimony, *supra* note 11; Baude, *Reflections*, *supra* note 41, at 2649 (“The core problem with the Court’s emergency docket is that everybody agrees that the Supreme Court should have the power to act in a very quick . . . fashion in certain cases. And it is hard to lay down a clear rule defining that class of cases, so it is likely that the Court must be vested with substantial discretion over emergency rulings.”); *id.* (“Rules that would really cut back on emergency cases would be too likely to apply to real emergencies where we are unwilling to forego Supreme Court action.”).

<sup>430</sup> Adam Liptak, *Justice Breyer on Retirement and the Role of Politics at the Supreme Court*, N.Y. TIMES (Aug. 27, 2021), <https://www.nytimes.com/2021/08/27/us/politics/justice-breyer-supreme-court-retirement.html> [<https://perma.cc/Y533-UUQ7>] (“I can’t say never decide a shadow docket thing. Not never. But be careful.” (quoting Justice Breyer)).

<sup>431</sup> Josh Gerstein, *Alito Speaks Out on Texas Abortion Case and ‘Shadow Docket’*, POLITICO (Sept. 30, 2021, 3:33 PM), <https://www.politico.com/news/2021/09/30/alito-on-texas-abortion-case-shadow-docket-514828> [<https://perma.cc/HH65-GNV5>]; Adam Liptak, *Alito Responds to Critics of the Supreme Court’s ‘Shadow Docket’*, N.Y. TIMES, <https://www.nytimes.com/2021/09/30/us/politics/alito-shadow-docket-scotus.html> [<https://perma.cc/2AQS-ZTD2>] (Oct. 4, 2021) (“You can’t expect the E.M.T.s and the emergency rooms to do the same thing that a team of physicians and nurses will do when they are handling a matter when time is not of the essence in the same way.” (quoting Justice Alito, describing the Shadow Docket as an “emergency” docket)).

Perhaps some shadow docket style triaging in matters of substance—such as affirming without opinion—is acceptable for under-resourced lower courts. But the Supreme Court is not just any appellate court. It plays a uniquely important role in the American polity. It is setting policy and establishing rules, not correcting mistakes in narrow disputes.<sup>432</sup> Therefore, it should—especially given its resources and other institutional advantages—utilize optimal procedures and make decisions of the highest quality nearly all of the time in matters that involve the merits or are otherwise consequential.<sup>433</sup> Something that threatens the quality of its rulings should be addressed rather than ignored.

Preparing reasoned opinions and disclosing the Justices' votes after receipt of the record, full briefing, oral argument, and so on are not necessary components of the judicial process. The Supreme Court could issue only orders or per curiam opinions without noted concurrences or dissents, and rulings could be announced orally with little or no explanation. But that is not how the Supreme Court routinely handles the cases it feels are important during the modern era. Cutting corners and taking shortcuts in significant cases is simply too risky. It is like the captain of an oil tanker or a cruise ship skipping the step of checking his charts and navigational instruments because he is behind schedule and the channel looks familiar. Of course, if the Justices are determined to rely on their intuitions, then they have already struck the shoals and perhaps none of this matters. They are already sunk.

#### IV. POTENTIAL REFORMS

After identifying a problem, it is incumbent on the critic to attempt to solve it. The following are a few suggestions that the Justices or Congress might consider to avoid or minimize the risk that by utilizing the shadow docket to the extent that they presently are, they might be unwittingly sabotaging the quality of their decisions.

##### A. *Increase Resources or Reduce Demands*

Given that the Supreme Court is already extremely well-resourced relative to most other courts (e.g., four law clerks per Justice, light caseload, lengthy vacation),<sup>434</sup> it might seem odd to suggest that it needs even more. But, if the Justices must use the shadow docket to complete their work, as some sug-

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<sup>432</sup> See SUP. CT. R. 10.

<sup>433</sup> Gonen, *supra* note 379, at 1231 (“Granting interim relief, like other exercises of judicial power, can have important and substantial effects on both litigants and the nation as a whole. Because of this, it should be subject to the ordinary judicial safeguards.”).

<sup>434</sup> Trial courts, which cannot regulate their caseloads to match their capacity, likely could benefit even more from, as an example, an additional law clerk per judge—but that is a different issue.

gest,<sup>435</sup> then perhaps the Court needs more resources. It also might seem odd to suggest—given that the Supreme Court has been accepting fewer cases on its merits docket, and is widely viewed as unproductive<sup>436</sup>—that the Court should take even fewer merits cases, but if the Court insists on handling so many substantive matters on the shadow docket, maybe that would enable it to perform its shadow docket work appropriately.<sup>437</sup> Arguably, that is what it is already doing without saying so.<sup>438</sup>

If reducing the size of the merits docket is deemed undesirable, then the number of Justices could be increased. There is nothing magical or inevitable about nine Justices. The size of the Supreme Court has varied from five to ten, although it has remained at nine since 1869.<sup>439</sup> This is controversial, of course,<sup>440</sup> even assuming that its aim would be to improve quality, rather than to change outcomes in a political sense. Nevertheless, it might improve the Supreme Court's ability to fulfill its institutional role and facilitate beneficial reorganization of its structure to better suit modern demands.<sup>441</sup> Even if the number of Justices remains at nine, the Supreme Court could decide most of its cases in panels of three or five.<sup>442</sup> This would essentially double its capacity, even assuming that some cases are heard en banc. Since nearly one-half of the

<sup>435</sup> William H. Rehnquist, *Sunshine in the Third Branch*, 16 WASHBURN L.J. 559, 561 (1977) (arguing that “there simply is not the time available to formulate statements of reasons why review is denied or appeals are affirmed or dismissed without argument”).

<sup>436</sup> SHAPIRO ET AL., *supra* note 38, at 37–40 (noting that since 1989 the Supreme Court has been “deciding fewer cases per term”); Meg Penrose, *Overwriting and Under-Deciding: Addressing the Roberts Court’s Shrinking Docket*, 72 S.M.U. L. REV. F. 8, 8–9 (2019).

<sup>437</sup> Or maybe the Justices should write shorter opinions and fewer separate opinions. See Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 183 (2020) (pointing out that though the Supreme Court is deciding fewer cases than before, its issuing longer opinions).

<sup>438</sup> See Robinson, *supra* note 49 (reporting that the Supreme Court issued more emergency orders (sixty-six) than merits opinions (sixty) during the October 2021 Term); *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1349 (2022) (mem.) (Kagan, J. dissenting) (stating that the shadow docket is becoming “only another place for merits determinations”).

<sup>439</sup> *Why Does the Supreme Court Have Nine Justices?*, NAT’L CONST. CTR. (July 6, 2018), <https://constitutioncenter.org/blog/why-does-the-supreme-court-have-nine-justices> [<https://perma.cc/HB3U-UN88>].

<sup>440</sup> See, e.g., THE PRESIDENTIAL COMM’N ON THE SUPREME COURT OF THE UNITED STATES, DRAFT FINAL REPORT 1 (December 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/E9JM-MJ5L>]; John Q. Barrett, *Attribution Time: Cal Tinney’s 1937 Quip, “A Switch in Time’ll Save Nine,”* 73 OKLA. L. REV. 229 (2021).

<sup>441</sup> Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts’ of Appeals Image*, 58 DUKE L.J. 1439, 1442 (2009) (advocating for increasing the number of Justices, and that they decide cases in panels—and only occasionally en banc—thereby increasing the Supreme Court’s diversity and capacity to supervise lower courts).

<sup>442</sup> *Id.*

Court's cases have recently been decided unanimously or eight-to-one,<sup>443</sup> using panels would not affect many outcomes.

Alternatively, the number of law clerks or staff attorneys could be increased.<sup>444</sup> Adding resources can be costly, and not merely in terms of money. More law clerks means more help, but also more demand on Justices' time because even the finest law clerks require some attention and supervision. At some point, say five or six law clerks, the time required to manage additional law clerks could become a distraction for Justices.

Another possibility would be to create a rotating motions panel of experienced appellate judges to hear shadow docket matters.<sup>445</sup> This would reduce the burden on the Supreme Court without forcing it (or individual Justices) to express views on issues prematurely. Petitions for review of motions panel rulings could be forbidden or granted sparingly. Something similar could be accomplished more simply if the Supreme Court simply refused to entertain most challenges to interim rulings made in courts below, placing more trust in the courts of appeals, as it probably should (at least absent truly extraordinary circumstances), especially if the lower courts have benefited from full briefing, oral argument, and preparation of a reasoned opinion.

#### B. *Transfer More Cases to Merits Docket*

The Supreme Court should transfer as many non-trivial shadow docket matters to its merits docket as possible so that its resort to substandard procedures in significant cases is kept to a minimum.<sup>446</sup> Over the past decade or so, however, the Supreme Court has been doing the opposite. "Simply put, as the shadow docket has grown, the merits docket has shrunk."<sup>447</sup>

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<sup>443</sup> See Angie Gou, *As Unanimity Declines, Conservative Majority's Power Runs Deeper than the Blockbuster Cases*, SCOTUSBLOG (July 3, 2022, 8:21 PM), <https://www.scotusblog.com/2022/07/as-unanimity-declines-conservative-majoritys-power-runs-deeper-than-the-blockbuster-cases/> [https://perma.cc/A54E-3484].

<sup>444</sup> Cf. Written Statement of Richard Lazarus, Howard J. & Katherine W. Aibel, Professor of Law, Harv. L. Sch., Presidential Commission on the Supreme Court of the United States (Aug. 15, 2021) (suggesting the addition of experienced lawyers to the Supreme Court's staff to assist in case selection).

<sup>445</sup> Cf. Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 630–36 (2009) (advocating creation of a "certiorari division" of non-Supreme Court Article III judges to select cases for Supreme Court review); Amanda L. Tyler, *Setting the Supreme Court's Agenda; Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310, 1319–26 (2010) (advocating for allowing federal courts of appeals to certify legal questions to the Supreme Court). *But see* J. Harvie Wilkinson III, *If It Ain't Broke . . .*, 119 YALE L.J. ONLINE 67, 72–73 (2010) (criticizing such a proposal).

<sup>446</sup> Edward L. Pickup & Hannah L. Templin, *Emergency-Docket Experiments*, 98 NOTRE DAME L. REV. REFLECTION 1, 4 (2022) (suggesting that the Court "continue to argue emergency cases or transfer them to its merits docket").

<sup>447</sup> Vladeck Testimony, *supra* note 11, at 20.

Reducing use of the shadow docket in politically salient cases is especially important. These are the types of matters that research shows are most likely to incline the Justices toward undue reliance on their political ideology or policy preferences.<sup>448</sup> To avoid that risk, the Supreme Court should wholly confine the use of the shadow docket to matters that concern solely internal case management, are unrelated to the merits or substantive procedural issues such as standing, or are unavoidable, true emergencies.

Some of the responsibility for the size and composition of the shadow docket likely rests with the Solicitor General, or other litigants, rather than with the Supreme Court itself.<sup>449</sup> The Court, however, has done too little to discourage abuse of the device.<sup>450</sup> At a minimum, the Supreme Court should now do what it can to discourage the filing of emergency applications.

### C. *Strengthen Shadow Docket Procedures*

There might be circumstances when recourse to the shadow docket is truly unavoidable.<sup>451</sup> In such circumstances, the question becomes: How can the risks posed by overreliance on System 1 and cognitive illusions best be minimized?

One issue is whether the Justices should be trusted to do as they think best when it comes to designing their decision making procedures and environment. It is tempting to answer affirmatively. Given the process by which they are selected and their qualifications, it seems like they deserve trust in this respect. Conversely, we often prescribe procedural and evidentiary rules for courts. We mandate the exclusion of evidence we believe would be misleading,<sup>452</sup> as well as evidence that we simply do not want judges or juries to consider for extrinsic

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<sup>448</sup> Richard Holden et al., *Peer Effects on the United States Supreme Court*, 12 QUANTITATIVE ECON. 981, 1008 (2021) (suggesting that “on ‘hot button’ cases Justices decide ideologically, and on other cases they are more persuadable by their colleagues”); Bonica & Sen, *supra* note 202, at 112 (“When the Supreme Court considers cases that have major implications for setting public policy, it tends to behave more like their partisan counter parts in Congress.”).

<sup>449</sup> President Trump’s Solicitors General sought extraordinary relief more than twice as often as the solicitors general under Presidents Bush and Obama combined. Vladeck, *supra* note 8, at 133–34; 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/TUR3-L94A>].

<sup>450</sup> Baude, *Reflections*, *supra* note 41, at 2650 (“[T]he Court also faces a bigger problem: It appears to have triggered a cycle of increasing requests for emergency relief.”); Vladeck, *supra* note 8, at 124, 152 (noting that the Solicitor General has recently been accused of too often asking the Supreme Court to hear appeals before the lower courts have finished ruling, to halt lower court proceedings pending Supreme Court review, or to intervene in litigation in district courts without waiting for courts of appeals to act).

<sup>451</sup> See Pickup & Templin, *supra* note 446, at 25–28 (discussing the use of the shadow docket in OSHA’s vaccine mandate and a death penalty execution).

<sup>452</sup> FED. R. EVID. 403.

policy reasons, regardless of its relevance or probity.<sup>453</sup> There are occasions in which the instincts and competence of judges cannot be trusted and where the design of procedures should yield to the realities of human cognitive limitations.<sup>454</sup> These are times when we second-guess the methods of even the finest judges and are wise to do so.

Constraining how people or institutions make decisions imposes costs.<sup>455</sup> For example, if it were limited to taking just two habeas corpus cases per year, the Supreme Court might be starved of context or rule more broadly than optimal. Yet, we do regulate decision making by others in the interest of helping them avoid error or by forcing them to base decisions on normative criteria. Balancing tests and forcing functions serve this purpose.<sup>456</sup> The Supreme Court itself uses this technique when it insists that lower courts or agencies consider specified factors in a particular order and requires them to exclude consideration of other factors.<sup>457</sup> Perhaps the Supreme Court should be exempted from all such constraints, but maybe that would be unwise given how much we care about the quality of its decisions.

Of course, if the Justices are determined to shirk or thwart reforms, it will be difficult to coerce compliance. Their failure to pay attention during an oral argument they are required to hold, or their issuance of boilerplate opinions devoid of meaningful explanation, cannot be effectively policed. The Supreme Court's summary treatment of the few cases it is required to hear suggests that the risk is real.<sup>458</sup> Nevertheless, we should assume that they will comply in good faith, propelled by their sense of duty. Most judges view their job as a

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<sup>453</sup> FED. R. EVID. 408.

<sup>454</sup> Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1293 (2005) (demonstrating that judges cannot reliably disregard evidence they have ruled inadmissible, even if they sincerely believe that they are capable of doing so).

<sup>455</sup> Huang, *supra* note 31, at 1145–46 (arguing that requiring a court to do something that it lacks the resources to do creates a dilemma for that court and suggesting that a triaging procedure might be adaptive and sensible).

<sup>456</sup> See Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581 (2006); Scott Rempell, *Factors*, 70 BUFF. L. REV. 1755 (2022).

<sup>457</sup> U.S. v. Lopez, 514 U.S. 549, 549 (1995) (providing a test for whether a given action may be regulated by Congress under the Commerce Clause); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977) (enumerating the factors for evaluating Equal Protection questions); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 923–24 (1992).

<sup>458</sup> See VLADECK, *supra* note 3, at 49–50 (opining Supreme Court treats mandatory appeals like certiorari petitions); see M. Todd Henderson & William H. J. Hubbard, *Judicial Non-compliance with Mandatory Procedural Rules Under the Private Securities Reform Act*, 44 J. LEGAL STUD. S87 (2015) (demonstrating that federal trial court judges sometimes ignore explicit statutory mandates).

calling and take their responsibilities and role seriously.<sup>459</sup> Supreme Court justices are no different.

### 1. Time

The Supreme Court should allow itself adequate time to decide the merits.<sup>460</sup> As an example, the filing of each request to stay the imposition of the death penalty could trigger an automatic stay, until the Supreme Court rules—to avoid an infinite regress of stalling—that “no further petition may be filed” by a particular litigant relying upon a particular argument.<sup>461</sup> Courts—including the Supreme Court—often grant a brief administrative stay to allow themselves a short period to consider a matter.<sup>462</sup> Perhaps the process should be governed by rules in most instances, to avoid haste and premature peeks at or attempts to predict the eventual outcome on the merits.

The Supreme Court might sometimes be placing itself under more time pressure than it needs to, and time pressure seldom improves quality. In particular, the Supreme Court appears to be placing unnecessary time pressure on itself by assuming that every restraint on federal, state, or local government action causes immediate irreparable injury that triggers an emergency.<sup>463</sup> Perhaps the Court is defining “irreparable injury” too generously, resulting in too many cases being treated as emergencies deserving expedited—but lower-quality—adjudication.

The Supreme Court also appears to be acting more hastily than it used to. The increased use of the shadow docket to make substantive rulings is itself evidence of this. Another measure of the Supreme Court’s new impulsiveness is the increase in the number of cases in which it grants certiorari before a final

<sup>459</sup> KENNETH M. DOLBEARE, *TRIAL COURTS IN URBAN POLITICS* 69 (1976) (“[T]he way in which the judge conceives of his judicial role is probably the most significant single factor in the whole decisional process.”).

<sup>460</sup> Kang, *supra* note 356, at 84 (stating that “time pressures are correlated with less accurate decisions”); see Guthrie, Rachlinski & Wistrich, *supra* note 73, at 35–36.

<sup>461</sup> Applications for stays of execution are rather infrequent—only twelve were decided during the October 2020 Term and only ten were decided during the October 2021 Term. *The Supreme Court—The Statistics*, *supra* note 47, at 505; *The Supreme Court—The Statistics*, *supra* note 35, at 516.

<sup>462</sup> Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 NOTRE DAME L. REV. 1941, 1973 (2022) (“[F]or certain categories of cases, it makes sense for court rules to provide for, imposition of an automatic administrative stay, with no need for judges to consider each case individually.”).

<sup>463</sup> Vladeck, *supra* note 8, at 126; *e.g.*, *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, Circuit Justice) (“Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, Circuit Justice)) (cleaned up)); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

judgment is entered in a lower court. Between 1988 and February 2019, the Supreme Court granted certiorari before judgment in three cases.<sup>464</sup> Since February 2019, it has done so in eighteen cases.<sup>465</sup>

We have seen what happens when the Supreme Court acts hastily and the results were not pretty, even though some of the procedures of the merits docket were deployed. In *Bush v. Gore*,<sup>466</sup> for example, although the Supreme Court needed to act quickly, it acted *too* quickly, and did so knowingly by sweeping aside its own precedents and attempting to limit future use of its ruling.<sup>467</sup> Sometimes it is necessary to act quickly. And, as the Supreme Court has relatively little to do compared to most other courts, the Justices are in a good position—typically neither fatigued nor rushed by other deadlines—to do so relatively safely. Still, a slower pace is preferable, when feasible, to ensure adequate deliberation.<sup>468</sup> Or, as Shakespeare teaches: “Wisely and slow. They stumble that run fast.”<sup>469</sup>

## 2. Briefing

The Supreme Court should not decide the merits—even provisionally—without briefing on the merits. Briefing has at least two aspects. The first dimension is the focus of briefing. Cases on the merits docket typically benefit from two rounds of briefing: an initial round devoted to the issue of whether the Court should take the case, and a second round devoted to the merits. Although certiorari petitions unavoidably address the merits to some extent, that is not their focus.<sup>470</sup> Briefs devoted to issues other than the merits obviously do not help the Supreme Court decide the merits correctly because they address something else instead.

<sup>464</sup> Steve Vladeck, *A Court of Review, Not First View*, SUBSTACK; ONE FIRST (Dec. 5, 2022) <https://stevevladeck.substack.com/p/4-a-court-of-review-not-first-view#:~:text=Every%20year%2C%20the%20Court's%20opinions,which%20they've%20granted%20review> [https://perma.cc/CU9B-JLJJ] (observing that “this is a Court that’s far more willing to intervene *in general* at earlier stages of disputes, whether through orders granting applications for emergency relief, or through expedited merits review of non-final lower court orders” and speculating that “the Justices today are less committed to the preferences of their predecessors when it comes to having litigation fully fleshed out in the lower courts, or perhaps they have a lower bar when it comes to the kind of ‘emergency’ that justifies such early-stage intervention”).

<sup>465</sup> *Id.*

<sup>466</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>467</sup> *Id.* at 109 (stating that the decision “is limited to the present circumstances”).

<sup>468</sup> Even Justice Alito has complained (in a merits docket dissent) about the Court’s resolution of “difficult . . . questions on which . . . we have received only hurried briefing and no argument.” VLADECK, *supra* note 3, at 249 (quoting Justice Alito). This suggests that the Justices are aware of the problem, but choose to ignore it when it suits them.

<sup>469</sup> WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 3, l. 101 (1597) (Friar Laurence).

<sup>470</sup> See Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1251–55 (1979).



The second dimension is the quality of the briefing. If advocates are unduly rushed, they cannot perform at their best.<sup>471</sup> This means that the adversary system, which depends heavily on the quality of adversary presentation, cannot function as intended.<sup>472</sup> Inadequate opportunity for litigant briefing also hinders non-party participation, further impoverishing the Supreme Court's information base and failing to correct the myopia and self-centeredness of the parties.

### 3. Oral Argument

The value of oral argument in promoting decision quality, given adequate briefing, is debatable. Generally, litigants and lawyers like it.<sup>473</sup> It enhances party participation, a key aspect of adjudication in our adversary system.<sup>474</sup> Some appellate judges believe it is valuable.<sup>475</sup> Some Justices have said that it is important and occasionally influences their vote.<sup>476</sup> However, despite what judges say, courts seem skeptical. Trial courts are submitting more motions for decision on the papers.<sup>477</sup> Appellate courts have long restricted oral argument to cases that are challenging or significant.<sup>478</sup> Even when oral argument is permitted, most courts, including the Supreme Court, severely restrict its duration. The Supreme Court typically limits the duration of oral argument to thirty minutes per side, though recent post-pandemic arguments have run longer.<sup>479</sup> If

<sup>471</sup> See *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) (criticizing the decision of cases based on only "cursory party submissions").

<sup>472</sup> Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 470 (1916) ("[A] judge rarely performs his function adequately unless the case before him is adequately presented.").

<sup>473</sup> See Steven S. Gensler & Lee H. Rosenthal, *Managing Summary Judgment*, 43 LOY. U. CHI. L.J. 517, 555 (2012) ("Lawyers frequently bemoan the lack of oral argument in district courts.").

<sup>474</sup> See Fuller, *supra* note 166, at 363.

<sup>475</sup> Gilbert S. Merritt, *Judges on Judging: The Decision Making Process in Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385, 1386–87 (1990) ("The presence of live human beings in verbal combat engages the attention of judges and makes them think, question, discuss, and reconsider a case as can nothing else . . . It focuses thought and reflection more than discussion and debate with law clerks in chambers . . .").

<sup>476</sup> DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 241 (7th ed. 2005) ("I have had too many occasions when my judgment of a decision has turned on what happened in oral argument."; "Often my idea of how a case shapes up is changed by oral argument . . ." (quoting Justice Brennan)); *id.* at 247 ("Things can be put in perspective in oral argument in a way that they can't in a written brief." (quoting Justice Scalia)); John G. Roberts Jr., *Oral Advocacy and the Re-Emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 69 (2005) ("[O]ral argument is terribly, terribly important."); William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015, 1019–21, 1027–28 (1984) (arguing that oral argument is especially valuable in the Supreme Court because of the predominance of "genuinely doubtful" cases on its docket).

<sup>477</sup> Mark A. Neubauer, *The Disappearing Oral Argument*, 48 LITIG. 40 (2022).

<sup>478</sup> FED. R. APP. P. 34(a)(2).

<sup>479</sup> SEGAL & SPAETH, *supra* note 207, at 280; Kimberly Strawbridge Robinson, *Supreme Court Arguments Get Longer to the Delight of Advocates*, BLOOMBERG L. (Oct. 17, 2022,

briefing is rushed, however, and therefore more likely substandard, the value of oral argument increases.

Moreover, oral argument does help judges to slow down, which promotes deliberation. It also permits advocates to provide judges with some feedback on the judges' tentative thinking. Feedback is essential for learning.<sup>480</sup> Oral argument can be a form of feedback because it allows judges to explore their tentative views aloud and receive pushback from advocates. Oral argument is also a mechanism for judges to express their divergent views in each other's presence,<sup>481</sup> something that apparently does not happen in conference.<sup>482</sup> Why they choose to use oral argument in part to communicate with one another indirectly, something they could do directly during the post-argument conference, rather than to maximize the input they obtain from counsel, is unclear. Regardless, the lack of oral argument deprives the Justices of one mechanism for collaborating; that is, the indirect communication among the Justices that occurs when they are questioning counsel.<sup>483</sup>

Evidence suggests, however, that even when they permit it, the Justices might not be using oral argument effectively.<sup>484</sup> Indeed, the justices' use of oral

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01:45 AM), <https://news.bloomberglaw.com/us-law-week/supreme-court-arguments-get-longer-to-the-delight-of-advocates> [<https://perma.cc/BAS8-BJ9D>].

<sup>480</sup> See generally DOUGLAS STONE & SHEILA HEEN, THANKS FOR THE FEEDBACK: THE SCIENCE AND ART OF RECEIVING FEEDBACK WELL (2014).

<sup>481</sup> Timothy R. Johnson et al., *Oral Advocacy Before the United States Supreme Court: Does It Affect the Justices' Decisions?*, 85 WASH. U. L. REV. 457, 462 (2007) (describing two types of information gleaned from oral argument: (1) information from advocates about facts, law, and policy options; and (2) information about how other Justices view the case); Joan Biskupic, *Why It Matters that Supreme Court Justices Can Look Each Other in the Eye Again*, CNN (Oct. 8, 2021, 12:00 PM), <https://www.cnn.com/2021/10/08/politics/supreme-court-in-person-oral-arguments> [<https://perma.cc/732S-WS94>] ("Oral argument sessions . . . give the justices their first opportunity to persuade each other on the merits of a dispute. They make points through their questions or interjections . . ."); Adam Liptak, *Appellate Argument: An Artist's View*, N.Y. TIMES (April 22, 2008), <https://www.nytimes.com/2008/04/22/us/22bar.html> [<https://perma.cc/D7M3-9P2D>] ("Quite often the judges are debating among themselves and just using the lawyers as a backboard." (quoting Chief Justice Roberts)); WILLIAM H. REHNQUIST, THE SUPREME COURT 244 (2001) ("The judges questions, although nominally directed to the attorney arguing the case, may in fact be for the benefit of their colleagues.").

<sup>482</sup> See Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. 1161, 1208 (2019); Jeffrey Rosen, *Rehnquist the Great?*, ATL. (Apr. 2005), <https://www.theatlantic.com/magazine/archive/2005/04/rehnquist-the-great/303820/> [<https://perma.cc/T445-JW3W>] (reporting Justice Rehnquist's practice of limiting active debate regarding the cases during the Justices' weekly conference).

<sup>483</sup> Jacobi & Sag, *supra* note 482, at 1208. The fact that Justices resort to this indirect communication with one another, akin to bidding in contract bridge, suggests that their direct communication with one another may be more limited, infrequent, and constrained than many assume.

<sup>484</sup> See Timothy R. Johnson, *Information, Oral Arguments, and Supreme Court Decision Making* 29 AM. POL. RSCH. 331, 341-42 (2001) (noting over 40 percent of the Justices' questions involve policy while less than 10 percent involve constitutional issues or precedent).

argument appears to be evolving in an unproductive and even disturbing direction.<sup>485</sup> Nevertheless, the Supreme Court should hold oral arguments on substantive shadow docket matters.<sup>486</sup>

#### 4. *Written Explanation*

The debate over whether appellate courts should explain their decisions in written opinions has a long history, extending at least as far back as the crisis of volume of the 1960s and 1970s.<sup>487</sup> Although the Supreme Court emphasizes that a reasoned decision is an essential aspect of due process when it reviews the decisions of lower courts or agencies,<sup>488</sup> it sometimes claims that it is infeasible or unnecessary for it to comply with such requirements. For example, Justice Frankfurter once opined, in regard to denials of certiorari petitions, that “[i]f the Court is to do its work it would not be feasible to give reasons, however brief, for refusing to take these cases. The time that would be required is prohibitive.”<sup>489</sup> He may have been correct about denials of certiorari petitions but perhaps not about emergency applications or summary reversals.

Adding a brief explanation for each ruling might help ensure that the Supreme Court’s quality does not slip. Research suggests that increasing accountability and inducing deliberation by requiring a written explanation for a decision can mitigate some biases and cognitive errors.<sup>490</sup> Given its unique role in

<sup>485</sup> See Jacobi & Sag *supra* note 482, at 1246 (finding that Justices participate more actively in oral argument than before but that judicial advocacy—such as comments, conclusions, and rebutting colleagues views—has displaced judicial inquiry directed to counsel); Michael C. Dorf, *So Much Wasted Time in the Independent State Legislature Oral Argument*, DORF ON LAW (Dec. 8, 2022), <http://www.dorfonlaw.org/2022/12/so-much-wasted-time-in-independent.html> [<https://perma.cc/4727-HRX5>] (observing that during a recent oral argument “at various points, both Justice Alito and Justice Gorsuch asked questions and then cut off the answer before the advocate got out even a few words, presumably because they didn’t like the answers they were getting. . . . [t]hey then declared themselves unsatisfied but moved on before giving the advocate a chance to address the particular source of dissatisfaction”).

<sup>486</sup> Vladeck Testimony, *supra* note 11, at 31–34; Pickup & Templin, *supra* note 446, at 12.

<sup>487</sup> See David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate Over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1668, 1708 (2005).

<sup>488</sup> Dep’t of Com., v. New York, 139 S. Ct. 2551, 2575–76 (2019); Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2048–49 (2020) (mem.) (Alito, J., dissenting).

<sup>489</sup> Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950) (Frankfurter, J.).

<sup>490</sup> Guthrie, Rachlinski & Wistrich, *supra* note 73, at 36–38; Anna S. P. Wong, *What Is in a Name? The Judicial “Duty” to Give Reasons*, 69 CRIM L.Q. 237, 249–51 (2021) (stating that providing reasons improves the quality of judicial decisions); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657 (1995) (noting the “decision-disciplining function of giving reasons” and observing that “decisionmakers themselves are unlikely to fully apprehend and appreciate this function for most decisionmakers underestimate the need for external quality control of their own decisions”); *id.* (“[W]hen institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decisionmakers to give reasons may counteract some of these tendencies.”). *But see* Mathilde Cohen, *When Judges Have Reasons*

the justice system, for the Supreme Court, quality might include providing clear and sound guidance to lower courts. Shadow docket rulings frequently lack this characteristic.<sup>491</sup>

In a 2022 speech at the Ronald Reagan Presidential Library, Justice Amy Coney Barrett urged Americans to “read the opinion” in high profile cases before assuming that the Supreme Court was merely imposing its preferred “policy result.”<sup>492</sup> In other words, “judge me by what I say, not what I do.” Some shadow docket cases do generate written opinions and reveal the reasons of at least some of the Justices.<sup>493</sup> When no non-political explanation is provided, the suspicion that politics influenced the decision may arise, rendering Justice Barrett’s suggestion meaningless and eroding the Supreme Court’s legitimacy.<sup>494</sup> The Supreme Court should issue reasoned opinions on substantive shadow docket matters.<sup>495</sup>

### 5. *Disclose Votes*

Another potential reform would be to disclose the vote of each Justice on each shadow docket matter. This would be simple to accomplish and might

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*Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 518–22 (2015) (explaining why requiring judges to give reasons might not improve the quality of decisions); Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1344 (2008) (questioning whether editing a law clerk’s draft opinion imposes the same disciplined deliberation on a judge as does writing the opinion from scratch).

<sup>491</sup> See Vladeck, *supra* note 8, at 149 (arguing that instead of issuing an unexplained shadow docket ruling, “the proper recourse should be to take one of these cases on the merits and clarify what the courts of appeals are getting wrong”).

<sup>492</sup> Michael R. Blood, *With Divisive Cases Coming, Barrett Says ‘Read the Opinion,’* AP NEWS (April 5, 2022), <https://apnews.com/article/ketanji-brown-jackson-us-supreme-court-amy-coney-barrett-7aa20b34d9a3e133bf1e2e2a899476f2> [<https://perma.cc/G777-GWZN>]

(“Does (the decision) read like something that was purely results driven and designed to impose the policy preferences of the majority, or does this read like it actually is an honest effort and a persuasive effort, even if one you ultimately don’t agree with, to determine what the Constitution and precedent requires? . . . Is its reasoning that of a political or legislative body, or is its reasoning judicial?”).

<sup>493</sup> See, e.g., *Does 1-3 v. Mills*, 142 S. Ct. 17 (2021) (mem.) (including opinions concurring in and dissenting from the Supreme Court’s denial of an application for injunctive relief sought by healthcare workers forced to choose between their jobs and their religious opposition to covid vaccines).

<sup>494</sup> Harvard Law School, *Scalia Lecture Justice Stephen G. Breyer, “The Authority of the Court and the Peril of Politics”*, YOUTUBE (Apr. 6, 2021), <https://www.youtube.com/watch?v=bHxTQxDVTdU> [<https://perma.cc/A68Q-LMYH>] (“If the public sees judges as politicians in robes, its confidence in the courts—and in the rule of law itself—can only diminish, diminishing the court’s power, including its power to act as a check on the other branches.”); Transcript of Oral Argument at 15, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2021) (No. 19-1392) (“Will this institution survive the stench that this creates in the public perception that the Constitution and its reading are just political acts? I don’t see how that is possible.” (quoting Justice Sotomayor)).

<sup>495</sup> Pickup & Templin, *supra* note 446, at 31–32.

promote deliberation by making the Justices feel more personally accountable for their choices.<sup>496</sup> However, proliferation of separate opinions and disclosure of votes has been targeted as a problem in need of correction.<sup>497</sup> Further, disclosing the Justices' votes might increase their commitment to a tentative position due to their desire to maintain consistency. Accordingly, what is best might depend on the context. A technique that enhances the quality of a preliminary assessment might not improve the quality of a subsequent final assessment. As an example, if the merits must be examined provisionally, then paradoxically it might be better to leave the analysis unarticulated, and the Justices supporting it unnamed, in order to avoid further committing them to their tentative view.<sup>498</sup>

### 6. Training

A more thorough grounding in cognitive psychology and behavioral economics might help to impress upon the Justices why it is important for them to slow down, challenge their intuitive reactions, search for and seriously entertain alternative viewpoints, and seek relevant empirical data and statistics.<sup>499</sup> It also might help them avoid or mitigate specific cognitive biases.<sup>500</sup> Of course, the Justices, like other judges, might already try to do these things. But they likely do not do them enough, at least under the unfavorable conditions of the shadow docket. If nothing else, training could alert the Justices to hazards to which they are vulnerable, and to the risks that they run when they abandon their institu-

<sup>496</sup> Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 140 (1990) (arguing that “disclosure of votes and opinion authors” serves to hold the individual judge accountable and “puts the judge’s conscience and reputation on the line”); see PLOUS, *supra* note 134, at 257 (stating that accountability reduces overconfidence).

<sup>497</sup> Sherry, *supra* note 437, at 197 (advocating a statutory prohibition on separate opinions, attribution of opinion authorship, and disclosures of Justices’ votes); James Markham, *Against Individually Signed Judicial Opinions*, 56 DUKE L.J. 923, 942–48 (2006) (questioning the wisdom of the norm of individually signed opinions).

<sup>498</sup> Schauer, *supra* note 490, at 656–57 (stating that “giving reasons is committing”); see CIALDINI, *supra* note 295, at 96.

<sup>499</sup> Guthrie, Rachlinski & Wistrich, *supra* note 73, at 38–40; Avani Mehta Sood, *Applying Empirical Psychology to Inform Courtroom Adjudication—Potential Contributions and Challenges*, 130 HARV. L. REV. F. 301, 315 (2017) (“The law is replete with potentially erroneous assumptions about how the human mind works, many of which have been around for centuries and continue to operate unchecked in the legal system.”).

<sup>500</sup> Lucia Lopez-Rodriguez et al., *Awareness of the Psychological Bias of Naïve Realism Can Increase Acceptance of Cultural Differences*, 48 PERSONALITY & SOC. PSYCH. BULL. 888, 898 (2022) (finding that merely making subjects aware of naïve realism bias made them more accepting of the cultural differences of Moroccan immigrants); Esther Boissin et al., *Debiasing System 1: Training Favours Logical over Stereotypical Intuiting*, 17 JUDGMENT & DECISION MAKING 646, 680 (2022) (finding that a brief training session explaining the underlying logic of the problem helped participants avoid base rate neglect and the conjunction fallacy intuitively without requiring deliberation by choosing the correct response rather than a cued stereotypical response).

tional advantages and safeguards in their quest for speed and efficiency. If they are like many judges, they might not adequately grasp the danger.

### 7. *Improve Standards*

The principal problem with the standards presently governing some shadow docket matters is that they require the Justices to predict the likely outcome on the merits. The prominence of the likelihood of success on the merits factor in the tests for stays or preliminary injunctions is impractical.<sup>501</sup> It also risks exerting undue influence on the eventual final decision. As one scholar observed:

[T]ying emergency or extraordinary relief almost entirely to predictive judgments about the merits also raises a cause-and-effect concern—that the same Justices may feel pressure to abide by the consequences of their original votes (and opinions respecting those votes), even if the subsequent litigation unfolds in a manner that calls that vote into question.<sup>502</sup>

Perhaps the risk of premature lock-in could be mitigated by reducing the importance of the likelihood of success factor.<sup>503</sup>

In her concurrence in *Does v. Mills*,<sup>504</sup> Justice Barrett linked the “discretionary judgment” about whether to grant certiorari contained in Supreme Court Rule 10 with the first factor to be considered in deciding whether to grant a stay; that is, the likelihood of success on the merits.<sup>505</sup> “Were the standard otherwise,” she noted, “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 the benefit of full briefing and oral argu-

<sup>501</sup> Jill Wieber Lens, *Stays of Injunctive Relief Pending Appeal: Why the Merits Should Not Matter*, 43 FLA. ST. U. L. REV. 1319, 1358 (2016) (arguing that in determining whether to stay an injunction pending appeal, “emphasis on the merits is not supported historically, theoretically, or practically. Really, the merits just get in the way of the factors that should govern stays”); *id.* (noting the oddity that the Supreme Court’s solution to the problem that exigency denies it sufficient time to decide the merits is to nevertheless decide the merits, albeit provisionally, within that insufficient time, and allowing the decision made under such unsatisfactory conditions to remain in place, often for years); Fatma Marouf et al., *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 337, 403 (2014) (questioning “the practicality of a legal standard that requires judges to predict under time pressure how a case will ultimately be decided”).

<sup>502</sup> Vladeck, *supra* note 8, at 159; *id.* at 138 (describing as an example a shadow docket case in which the Supreme Court’s “final predictive judgment ultimately came to pass; but only as applied to a different version of the challenged policy . . . and after a significant amount of time and resources had been wasted on the ultimately mooted cases”); *see also* Lens, *supra* note 501, at 1341 (“[A]ll courts may have the natural tendency to determine the merits consistent with the initial prediction, even though the initial prediction was not made under circumstances conducive to accurate decisionmaking.”).

<sup>503</sup> Lynch, *supra* note 165, at 810 (suggesting, in the analogous preliminary injunction context, that “lock-in can be largely avoided if the standard for likelihood of success on the merits is set appropriately, at a low level”).

<sup>504</sup> *Does 1-3 v. Mills*, 142 S. Ct. 17 (2021).

<sup>505</sup> *Id.* at 18 (Barrett, J., concurring).

ment.”<sup>506</sup> The concurrence exhibits a sensible desire to protect the Supreme Court’s quality control by discouraging “off the cuff” answers to unsettled or novel questions without following regular procedures designed to promote deliberation.

Prediction is always hazardous.<sup>507</sup> First, predicting the future is notoriously difficult.<sup>508</sup> Second, courts generally,<sup>509</sup> and the Supreme Court itself,<sup>510</sup> are not good at predicting consequences of its rulings or the future course of litigation. Third, because shadow docket rulings occur so early in the life cycle of cases, it is especially difficult to predict what might happen in those cases. As an example, a change in president can result in the government abandoning its previous position or revising a challenged regulation to sidestep a challenge.<sup>511</sup> Fourth, the membership of the Supreme Court may change between the shadow docket ruling and the decision on the merits, if any. Thus, a case that initially appears promising may be much less so a few months later. Fifth, people are poor at predicting their own future preferences.<sup>512</sup> So even if the composition of the Supreme Court remains the same, the preferences or votes of the Justices might shift between the preliminary ruling and a final ruling.<sup>513</sup> All of this suggests that likelihood of success on the merits should not be an important or determinative factor upon which rulings concerning emergency applications should be based.

Avoiding such predictions or pre-commitments is part of the rationale for the “Ginsburg rule”—that Supreme Court nominees (who frequently invoke that rule) should not answer during confirmation hearings questions about legal issues that might reach the Supreme Court lest they publicly prejudice an issue in a way that might compromise their impartiality by opening the door to con-

<sup>506</sup> *Id.*

<sup>507</sup> Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44. CONN L. REV. 737, 802–04 (2012).

<sup>508</sup> ARTHUR C. CLARKE, PROFILES OF THE FUTURE xi (1962) (“It is impossible to predict the future, and all attempts to do so in any detail appear ludicrous within a very few years.”).

<sup>509</sup> DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 264 (1977) (“[C]ourts are better equipped with machinery to discover the past than to forecast the future.”).

<sup>510</sup> *See, e.g.*, Clinton v. Jones, 520 U.S. 681, 702 (1997) (writing that it is unlikely that a future, sitting US president would be engulfed in private litigation); Mark Joseph Stern, *Black Robes and Crystal Balls*, SLATE (Sept. 19, 2017, 7:45 AM), <https://slate.com/technology/2017/09/supreme-court-justices-try-to-predict-the-future.html> [<https://perma.cc/FHT4-TL6F>] (giving examples of incorrect predictions by Supreme Court Justices regarding the consequences of the Court’s rulings).

<sup>511</sup> *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587 (2022).

<sup>512</sup> Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 162 (2005) (“[P]eople are . . . unable to accurately predict their own or others’ emotional states.”).

<sup>513</sup> Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1502 (2007).

sistency bias.<sup>514</sup> This suggests that if the likelihood of success on the merits is retained as a criterion for interim or emergency relief, then someone other than Supreme Court Justices ought to be assigned the task of making that prediction so as not to pollute or predetermine the ultimate decision.

#### 8. *Make Shadow Docket Decisions Non-Precedential*

At present, the precedential effect of shadow docket decisions is uncertain. Some contend that they should be treated as binding on lower courts, while others disagree.<sup>515</sup> Perhaps unsurprisingly, the Supreme Court appears to take the former view. The Supreme Court seems to be treating shadow docket rulings made without full briefing, oral argument, or vote disclosure—but containing some explanation—as precedential.<sup>516</sup> Lower courts appear to be following a similar approach, albeit citing shadow docket decisions less frequently than merits docket decisions.<sup>517</sup> Maybe it would be better if courts did not rely on them at all. Shadow docket decisions are more likely to be distorted by biases or cognitive illusions than merits docket decisions. Limiting their force to the case at hand would at least narrow the range of potential harm from erroneous rulings.<sup>518</sup>

### CONCLUSION

There are many reasons why the Supreme Court's broader and more frequent use of the shadow docket is unwise. Among other things, it undercuts the

<sup>514</sup> See McDonald, *supra* note 44, at 1086.

<sup>515</sup> Compare McFadden & Kapoor, *supra* note 332, at 883 (arguing that where the Supreme Court expresses its belief that a stay applicant has shown a strong possibility of prevailing on the merits, lower courts should treat the ruling as precedent), with Mike Fox, *Supreme Court Shadow Docket Leaves Reasoning in the Dark, Professors Say*, U. VA. SCHOOL OF L. (Sept. 22, 2021), <https://www.law.virginia.edu/news/202109/supreme-court-shadow-docket-leaves-reasoning-dark-professors-say> [https://perma.cc/7GWR-C6RF] (citing Lawrence B. Solum's argument that "shadow docket" rulings should only control the cases in which they were issued).

<sup>516</sup> See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022) (first citing *Alabama Ass'n of Realtors v. Dept. Health & Human Services*, 141 S. Ct. 2485 (2021) (per curiam); and then citing *NFIB v. OSHA*, 142 S. Ct. 661 (2022) (per curiam)); *Gateway City Church v. Newsom*, 141 S. Ct. 1460, 1460 (2021) (mem.) (insisting that unsigned emergency orders must be given precedential effect); McFadden & Kapoor, *supra* note 332, at 882–86. See generally Josh Blackman, *The Precedential Value of Shadow Docket Cases*, REASON: VOLOKH CONSPIRACY (July 6, 2022, 2:47 AM), <https://reason.com/volokh/2022/07/06/the-precedential-value-of-shadow-docket-cases> [https://perma.cc/CL5E-ARL3].

<sup>517</sup> Alex Badas et al., *Assessing the Influence of Supreme Court's Shadow Docket in the Judicial Hierarchy*, 43 JUST. SYS. J. 609, 613, 615, 621 (2022) (reporting that shadow docket rulings are cited less frequently (a median of five citations) than merits docket rulings (a median of 254.5 citations)).

<sup>518</sup> Alexander Gouzoules, *Clouded Precedent: Tandon v. Newsom and Its Implications for the Shadow Docket*, 70 BUFF. L. REV. 87, 93 (2022) (arguing that shadow docket rulings are of poorer quality than merits docket opinions and thus provide dubious precedents).



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Supreme Court's perceived legitimacy and reduces the stability and predictability of constitutional law. But the shadow docket also has a more pernicious consequence that should not be ignored: it undermines the quality of the Supreme Court's decisions. It accomplishes this by encouraging Justices to react to cases intuitively, oversimplify their analysis, resort to cognitive shortcuts, and rely too heavily upon their pre-existing beliefs and biases. This would be unfortunate in any court, but the Supreme Court's rulings affect not merely the litigants before it but the entire country as well. Because the stakes are so high, the Supreme Court should reduce its reliance on the shadow docket and decide its cases utilizing its more robust, traditional merits docket procedures. Otherwise, the quality of its decisions will be compromised, and we will all suffer the consequences.

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