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Assessing the Influence of Supreme Court's Shadow Docket in the Judicial Hierarchy

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ABSTRACT

The Supreme Court's increased use of the "shadow docket" and the salience of the issues handled on the shadow docket have raised normative concerns over its use. Critics argue that the Supreme Court should not make law without following established procedures of a full briefing, oral arguments, and deliberation. Those seeking to defend the Court point out that decisions made on the shadow docket do not create binding precedent and only resolve the issue before the Court. We examine whether shadow docket decisions are used as precedent by lower courts. We come to two general conclusions. First, shadow docket cases are invoked as precedent much less frequently than merits docket cases. Second, shadow docket cases receive more engagement from the lower courts when the Supreme Court provides a justification for its shadow docket decision and when the Supreme Court grants relief and thereby changes the status quo. Our results help evaluate and provide responses to the normative criticisms of the Court's reliance on the shadow docket to create law.

KEYWORDS

Supreme Court; judicial behavior; shadow docket; judicial hierarchy

The shadow docket

On August 26, 2021, the United States Supreme Court issued a *per curiam* opinion on an emergency application to vacate stay, concluding that the moratorium on evictions imposed by the Center for Disease Control and Prevention (CDC) was unlawful (*Alabama Association of Realtors v. DHS* 594 U.S. _____ (2021)). The Court reasoned that the statute CDC invoked, the Public Health Service Act, did not grant it the authority that CDC claimed. Justice Stephen Breyer, along with Justices Sotomayor and Kagan, filed a dissenting opinion. Justice Breyer chastised the majority for making such a swift decision on an important public health policy without the full Court proceedings. He wrote that "[t]hese questions call for considered decision-making, informed by full briefing and argument. Their answers impact the health of millions. We should not set aside the CDC's eviction moratorium in this summary proceeding."

Such decisions that the Court makes in an emergency fashion fall under the term "shadow docket," which William Baude coined in his 2015 article to refer to "the thousands of other decisions the Justices hand down each Term—almost always as "orders" from either a single Justice (in their capacity as "Circuit Justice" for a particular U.S. Court of Appeals) or the entire Court." In contrast to the significantly smaller number of merits decisions the Court makes each term, these "shadow docket" decisions are often made with little briefing, certainly not the full briefing and oral arguments that merits cases receive (Vladeck 2021). In addition to the lack of full procedures, these decisions are arguably made "in the shadow" as the Court provides little to no

information as to the reasoning or how the individual Justices cast their votes. Indeed, the eviction moratorium decision with its *per curiam* and dissenting opinions was an exception to the rule (Leonhardt 2021).

Justice Breyer was not alone in raising concerns over the procedural appropriateness of the Court's rising "shadow docket." While orders and summary decisions are almost as old as the Court itself, what causes alarm is the rise of significant shadow docket decisions that have major legal and policy consequences. Via the shadow docket, the Court has made significant, status-quo changing policy pronouncements on issues such as executive authority, immigration, election administration, covid-19 restrictions, and abortion. Considering the increasing number of shadow docket decisions with sweeping policy implications, the House Subcommittee on Court, Intellectual Property and Internet held a hearing in February 2021 specifically on the issue and the Senate's Judiciary Committee held similar hearings in September of 2021.

The lack of procedural appropriateness and transparency of the shadow docket, coupled with its potential policy influence, raises concerns also for the Court's institutional standing and reputation. As Alexander Hamilton observed in *Federalist Papers* No. 78, "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." Social scientists have long recognized the importance of the perception of "procedural fairness" in underpinning the Court's public image and legitimacy (Gibson, Caldeira, and Spence 2005; Tyler 2006; Zink, Spriggs, and Scott 2009).¹

In response to the controversy surrounding the shadow docket, Justice Samuel Alito defended the Court's conduct and institutional legitimacy by blaming the news media for being unfairly sensational and inaccurate in describing the actual influence of the Court's shadow docket. An important point he made to mitigate external concerns was that these decisions do not carry precedential weight. However, this statement seems to contradict the Court's own ruling. In its *per curiam* opinion in *Tandon v. Newsome* regarding California's covid-19 restrictions, the Court criticized the Ninth Circuit for failing to follow the Supreme Court's earlier shadow docket decision over the covid-19 restrictions in New York (*Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. _____ (2020)). On October 8, 2021, the Fifth Circuit Court of Appeals overturned the emergency injunction instituted by a federal district court to leave the highly controversial Texas abortion law (also known as the S.B. 8) intact (*United States v. Texas*), citing the U.S. Supreme Court's earlier emergency order (*Whole Woman's Health v. Texas* (594 U.S. _____ (2021))) to the same effect of allowing the law to go into effect as a controlling precedent.

One question that may arise is why judges would cite cases from the shadow docket at all. shadow docket cases are supposed to have limited precedential value, and there are volumes of established, formal caselaw that may be referenced. We believe that there are two reasons why lower court judges might cite shadow docket decisions as precedent. First, the Supreme Court has put forth a doctrine that any new or amended rule should apply to both future cases and pending litigation. As Beske (2018) notes, this doctrine presents a quandary for lower court judges because rules can be established or amended by the Supreme Court, and to see those updates as having no application to other cases violates the Court's own doctrine. Second, shadow docket cases arise when litigants seek emergency relief. Seeking this relief arises, at least in part, from the fact the litigants face unique circumstances, such as enforced covid-19 measures or other novel questions of law like the private enforcement mechanism at issue in Texas' S.B. 8 abortion law. Given that lower court judges are more risk averse, they may seek precedents that more closely mirror the situation before them (Klein and Hume 2003). Doing so reduces the likelihood of being

¹Although it should be noted that scholars are increasing questioning whether perceptions of procedural fairness are independent from an individual's agreement or disagreement with specific outcomes (Armaly 2021; Badas 2016, 2022; Strother and Gadarian 2022).

overturned on appeal and seeks to establish continuity in the law (Klein and Hume 2003). Research has also demonstrated that lower court judges typically do not distinguish between precedents and dicta, instead opting to cite them each equally (Klein and Devins 2012). Thus, it is plausible lower court judges may turn to shadow docket cases that both address unique scenarios before them and adhere to the Supreme Court's doctrine related to future and pending litigation, especially if shadow docket cases are more recent than some formal precedents.

To some extent, this situation is cyclical, which may partly account for an increase in shadow docket activity. As risk averse judges seek parallels, enterprising legal elites and litigants might see shadow docket rulings as a viable option to support their claims, where they may be dissatisfied with outcomes in lower courts, they turn to the Supreme Court even as they do not wholly shift their legal arguments. Under this scenario, it may be unsurprising that there could be an increase in cases throughout the judicial hierarchy that potentially cite shadow docket cases, including at the Supreme Court. Still more, given the increase in lower courts issuing nationwide injunctions, it is expected that the Supreme Court will see an increase in filings from petitioners related to those orders. As the Supreme Court dispenses with cases related to lower court orders, it creates and amends rules that result in additional lower court cases that will work their way along the hierarchy.

In this article, we examine how these shadow docket decisions are treated by the lower courts. To do this, we collect citation data from shadow docket decisions. Using this data, we present a descriptive view of how frequently these cases are cited and whether they are treated positively or negatively when cited. We then compare shadow docket citation rates to merits docket citation rates. We find that shadow docket cases are cited much less often compared to merits docket cases. We then use these data to determine which shadow docket decisions receive the most engagement from the lower courts. We find that cases with a written justification and cases that grant relief tend to receive the most engagement. These findings help us understand the influence of shadow docket decisions and aid in drawing normative conclusions as to the appropriateness of the Court's increased reliance shadow docket.

Data & analysis

To determine the influence of shadow docket decisions within the judicial hierarchy, we use data from two sources. First, we rely on Baum's shadow docket decisions database (Baum 2020). Baum's database on the shadow docket includes emergency petitions or requests for stays between 2006 and 2021 which includes cases where the Court or an individual Justice released at least one opinion.² This means that for a case to be included in the Baum database, it had to include at least one written opinion. These written opinions range from opinions of the Court, concurring opinions, opinions respecting the Court's opinion,³ to dissenting opinions or more general statements of dissent.

We then collect citation data for all cases in the Baum (2020) database from Shepard's Citations. Shepard's Citations is a citation index that provides information on the number of times a court opinion has been cited. Shepard's Citations includes further information on the context of a citation, categorizing a citation as positive (i.e., citing a precedent in a determinative

²In some context this may mean that the Court did not issue an opinion, but an individual Justice issued a statement on the outcome selected by the Court. In these situations it is difficult to determine whether the court citing the particular case is citing the Court's outcome or the Justice's statement on the case. It appears in most contexts, the citing court is citing the Court's outcome rather than the Justice's individual statement on the outcome. We came to this conclusion by reviewing every citation for a random sample comprising 10% of cases in our dataset. Of this sample, all but one case saw every citation focus on the case outcome rather than the Justice's individual statement. With that said, further research is needed on how citing courts make this distinction and the political dynamics that shape such decisions.

³Typically, an individual Justice will write an opinion respecting the Court's opinion to provide more detail on the Court's opinion. Essentially, such writings serve as concurring opinions.

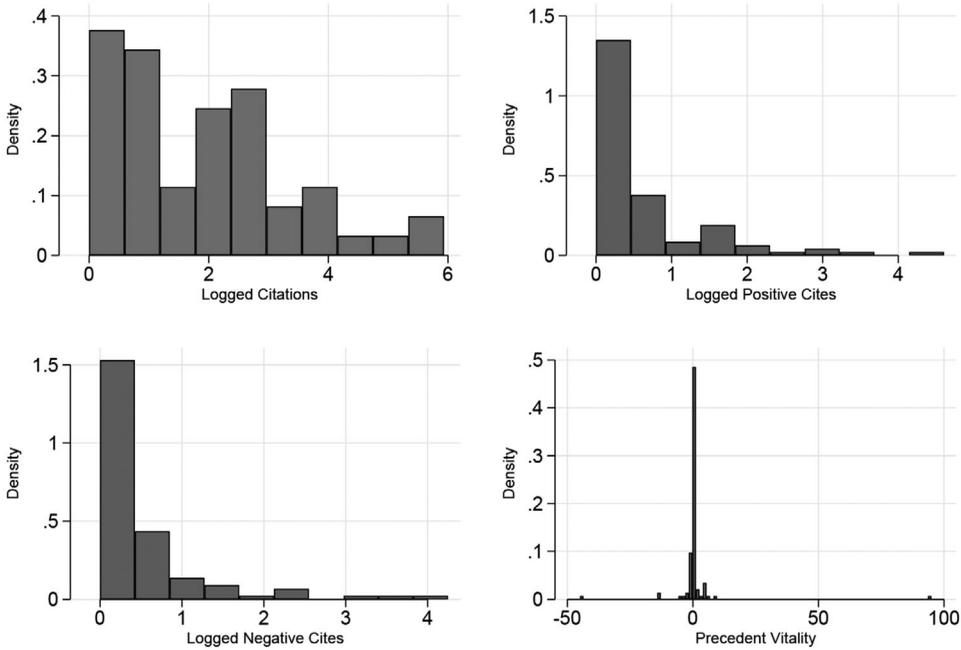


Figure 1. Distributions of precedent scores.

way) or negative (i.e., justifying why a precedent does not apply). On our own, we derive precedent vitality scores, which subtract the number of negative citations from the number of positive citations (Spriggs and Hansford 2002). Previous research has found that Shepard's Citations are reliable and valid measure of a precedent's influence in the judicial hierarchy (Spriggs and Hansford 2000).

Across each measure, we find that shadow docket cases have been cited a total of 4025 times since 2006. Figure 1 provides the distribution of each of the four citation measures. To better display the distributions of the data, citations, positive citations, and negative citations we present the natural log.⁴ Table 1 provides summary statistics.

The distributions highlight that shadow docket cases are rarely cited. In fact, the mean number of citations to a shadow docket case is about 25 and the median number of citations is just 5. When taking a more substantive view on how shadow docket cases are being cited, the average case earns 2.56 positive citations while the median case earns 0 positive citations and the average case receives 2.02 negative citations while the median case earns 0 negative citations. Overall, shadow docket cases have an average vitality score of 0.51 and a median score of 0. Thus, the summary measures demonstrate that the lower court judges are not frequently citing shadow docket cases as binding precedent.

Citations by court

To provide more insight into how courts are relying on shadow docket cases as precedent, we plot the total number of times a court has cited shadow docket cases in Figure 2.

⁴Of the shadow docket cases in the dataset, 23.53% have zero citations. There are also outliers at the upper end with citations in excess of 300. To facilitate the presentation of the distributions, we present the natural log of the observed value +1. We add one to account for the zeros observed in the dataset. An additional figure of the distributions using the observed values is provided in an appendix (Figure A1).

Table 1. Summary statistics shadow docket cases.

Variable	Mean	Std. Dev.	Min.	Max.	Median
Citations	24.96	64.38	0	376	5
Positive citations	2.563	10.514	0	99	0
Negative citations	2.029	8.097	0	69	0
Case vitality	0.533	10.708	-45	95	0

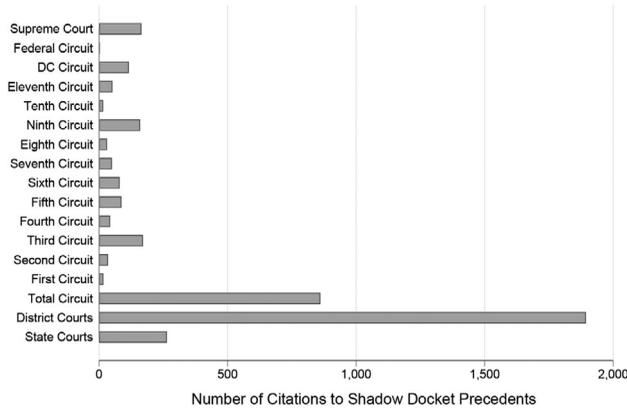


Figure 2. Citations to shadow docket precedents by court.

The district courts have cited shadow docket cases as precedent 1894 times. Circuit courts have cited shadow docket cases a total of 861 times. There is some variation within the Circuit Courts. For example, the First Circuit has cited shadow docket cases just seventeen times,⁵ while the Third Circuit has cited shadow docket precedents 171 times and the Ninth Circuit has 160 times. Future research may examine how individual circuit courts have responded to the emergence of the shadow docket and have updated their procedures in light of its development.

We find that the Supreme Court frequently cite their own shadow docket decisions as precedent. Our search reveals the Supreme Court has cited shadow docket decisions a total of 165 times. The Supreme Court’s reliance on its own shadow docket decisions as precedent, while the Justices simultaneously claim shadow docket decisions are not binding decisions, likely only adds to the confusion of lower court judges face when deciding whether or not to treat shadow docket cases as binding.

We also find that state courts engage with shadow docket cases. In total, state courts cited shadow docket cases as precedent 264 times. Thus, while much of the media and scholarly attention has explored how shadow docket cases influence the federal judiciary, it appears this conversation should be expanded to consider the role of state judiciaries and how state judiciaries interact with shadow docket cases (Fix, Kingsland, and Montgomery 2017).

Citations by year

To better understand the dynamics of how the lower courts rely on and cite shadow docket decisions, we analyze the number of citations shadow docket cases have received yearly. Yearly citation numbers are presented in Figure 3. The left panel presents the total number of citations per year, while the right panel presents the average number of citations per citable case in a given

⁵The Federal Circuit has cited shadow docket cases just three times but this is probably more of a reflection of their specialized docket rather than any procedural norms within the Circuit.

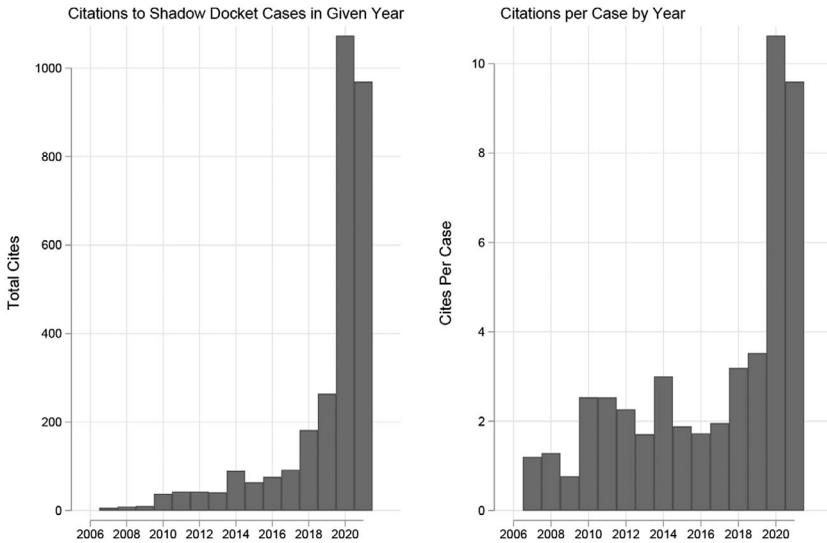


Figure 3. Citations to shadow docket precedents by year 2006–2021.

year.⁶ We observe that between 2006 and 2016, the average citations to shadow docket case remained relatively stable, fluctuating between one to three citations per case and averaging about two citations per year. However, since 2016, the number of citations to shadow docket cases has seen a large increase, and in 2020 and 2021 the average citations per citable case was roughly ten. These data suggest that, with time, lower court judges are becoming more comfortable citing shadow docket cases as precedent. This further suggests that the Supreme Court’s reliance on the shadow docket is becoming more institutionalized and accepted as a general method of making legal rules.

Comparing the influence of shadow docket cases to fully briefed merit cases

Thus far, we have analyzed the citations to shadow docket cases. However, to put these findings in a broader context, we now compare them to citations to fully brief merit cases. To accomplish this we shepardize all merit decisions between 2006 and 2021. We plot the distributions of logged citations, logged positive citations, logged negative citations, and vitality in Figure 4. We provide the summary statistics in Table 2. We observe that merits cases are cited much more frequently than shadow docket cases. For example, the average number of citations to a merit docket case is 1382.87 and the median is 254.5. This suggests that while judges do rely on shadow docket cases as precedent, and that judges are increasingly doing so, such cases are not given weight similar to those decided on the merits docket. The differential citation rates between shadow docket and merits docket cases suggest a hesitancy of lower court judges to rely on shadow docket cases as precedent.

Randomized inference and shadow docket cases

While the descriptive statistics demonstrated large differences in the citation between merits cases and shadow docket cases, that analysis is limited to some extent. Ideally, the analysis would be

⁶This creates a standardized measure that allows for better over-time comparisons. For example, if in 2006 there was 1 case decided and in 2007 there was 1 more case decided. The total number citable cases in 2007 is 2. In 2008 5 more cases were decided, meaning there is a total of 7 citable case in 2008.

Distribution of Citations Merit Docket Cases

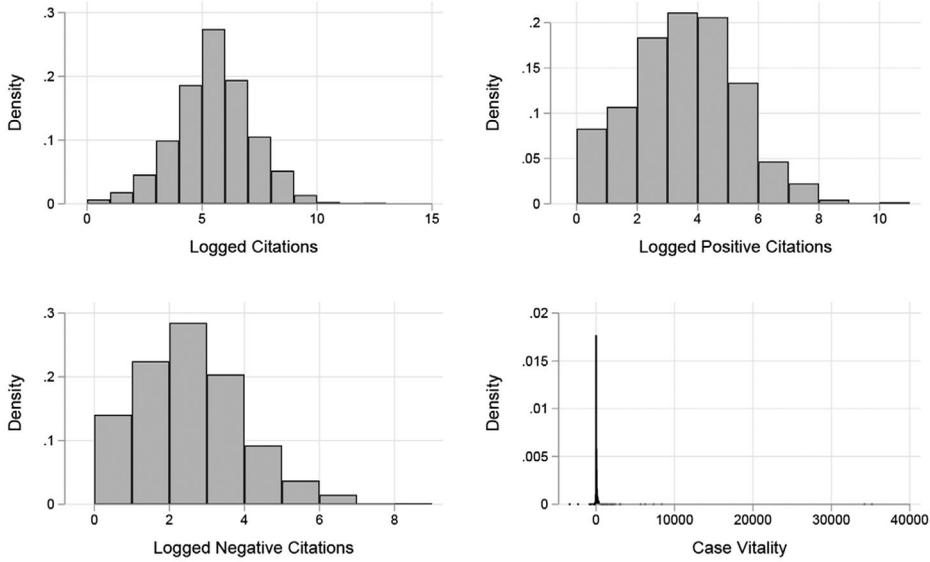


Figure 4. Distribution of logged citations and vitality.

Table 2. Summary statistics merit decisions.

Variable	Mean	Std. Dev.	Min.	Max.	Median
Number of citations	1382.871	10570.22	0	25,7928	254.5
Positive citations	222.527	1548.992	0	35,721	35
Negative citations	48.41	221.857	0	5181	11
Vitality	190.54	1593.57	-3382	35170	22

able to account for the different issues and case characteristics involved in both the shadow docket and merits docket cases. For example, it may be that issues arising on the shadow docket are less likely to receive citations than those arising on the merits docket. Thus, the differences are not due to how lower court judges view the shadow docket, but due to the types of cases that appear on the shadow docket. Unfortunately, in this context, that specific analysis is not feasible. Accounting for potential confounders is not possible due to the relatively small number of shadow docket cases. In this context, accounting for confounders could introduce biases and further increase the uncertainty surrounding estimates of effects of shadow docket cases (Heß 2017).

As a solution to this problem, we conduct randomized inference simulations (Heß 2017). Randomized inference simulations allow us to randomly assign the shadow docket “treatment” to cases in the data set and estimate models a specified number of times. This allows us to compare the observed effect to that of numerous potential counterfactual worlds where other cases in the data set were assigned the shadow docket treatment. The results then allow researchers to evaluate how extreme the observed effect is compared to the simulated counterfactual effects.

We reassign the shadow docket “treatment” within the strata of term for 5000 simulations.⁷ So, for example, in the 2016 term the Court decided 10 cases on the shadow docket. Thus, all our randomizations will reassign 10 cases from the 2016 term the shadow docket “treatment.” We do this for two reasons. First, this allows us to account for the Court’s increased reliance on

⁷The findings to our randomized inference simulations are substantively similar whether or not we include the term strata.

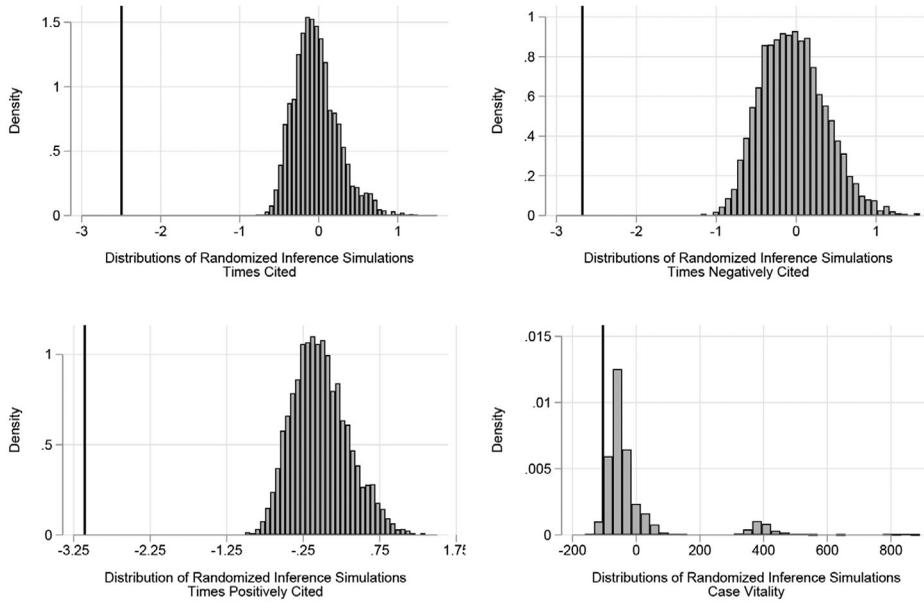


Figure 5. Randomized inference simulations black vertical line highlights observed effect.

the shadow docket over time and second this allows us to account for the fact that older cases have more opportunity to be cited.

Figure 5 provides the distributions of our simulated effect sizes across our reassignment models. Because the citations, positive treatments, and negative treatments are each counts that include zeros, our observed models and simulated models are zero inflated negative binomial regressions for these metrics. Since vitality is a continuous measure, our observed model and simulated models are ordinary least squares linear regressions. All observed and simulated models include a term fixed-effect to account for the fact that older cases have had more opportunities to be cited. The vertical line represents our results from the observed data.

The results to our randomize inference simulations demonstrate just how infrequently shadow docket cases are cited relative to merits docket cases. In the 5000 simulations for the case citations, none of the simulations were more extreme than the observed value. In terms of positive citations, no simulations were more extreme than our observed value, and none of our simulations produced more extreme results when examining negative citations. In terms of vitality, just 2.88% of the simulations took a more extreme value than what we observed. The general conclusion of the simulations further demonstrates that, compared to merit docket cases, shadow docket cases receive much less engagement. This finding implies that lower court judges are not giving shadow docket cases full acceptance as standing precedent.

Influence within shadow docket cases

While the average and median shadow docket case receives relatively little engagement compared to cases decided on the merits, there is considerable variation in the level of engagement shadow docket cases receive. By examining which shadow docket cases receive engagement from the lower courts, the normative implications of the Supreme Court's increased reliance on the shadow docket can be further understood.

To accomplish this, we conduct regression analyses predicting the number of citations, the positive number of citations, the negative number of citations, and vitality of each shadow docket case as a function of case characteristics.

Table 3. Summary statistics.

Issue	Percent
Death penalty appeals	44%
Voting issues	18%
Other issues	18%
Sexuality	8%
Immigration	7%
Covid-19	5%
Two issues	25%

One case characteristic we account for is whether the Court provided a substantive opinion for their decision. This variable is a binary which takes the value 1 if the Court provided any sort of justification for the decision it made and 0 if the Court did not provide any justification for the decision it made. A second variable we examine is whether the Court granted relief or not. When petitioners were granted relief or partial relief this is coded as 1 and if no relief was granted this variable is coded 0. We also account for the issue involved in the case. We categorize cases into six different issue areas: death penalty appeals,⁸ issues involving sexuality, voting rights, covid-19 related cases, immigration, and finally an other category for miscellaneous cases. These issue categories were selected primarily for two reasons. First, from examining cases, these are the issues that appeared most commonly. Second, for some issues there is perhaps more reason to anticipate that lower courts would rely on shadow docket decisions as precedent. Consider cases involving covid-19 restrictions. Here, there is relatively few precedents for lower court judges to rely on, and these cases need to be decided quickly. Some cases in our dataset included multiple issues. To account for such cases, we include a binary variable that takes the value 1 if more than one issue was present in the case and 0 if only one issue was present. A summary of the issues involved in each shadow docket case is presented in Table 3. Finally, we account for the logged number of days since the case was decided because cases decided earlier have more opportunity to be cited.

Our regression models are presented in Figure 4. Models 1–3 are zero inflated negative bimodal regressions. These models are appropriate because the quantity we are modeling is a count of outcomes and contains a significant number of zeros (Long 1997). Model 4 is a linear regression model because vitality is a continuous measure (Table 4).

One of the key results from our analysis is that when the Supreme Court provides a written justification for its decision, these decisions are cited more frequently. These findings are presented in Figure 6. For example, a case that does not have a substantive opinion is predicted to be cited 13.40 times, while a case with an opinion justifying the outcome is predicted to be cited 69.09 times. The difference in citations is present when specifically analyzing both positive citations and negative citations. A decision with a justification is expected to receive 10.47 positive citations and when a justification is not present is expected to just receive 1.11 positive citations. While a case with a substantive opinion is expected to receive 5.61 negative citations and a decision with no justification is predicted to receive 1.05 negative citations. In terms of vitality, the effect of a case having an opinion was not statistically disguisable from zero ($p=.13$). However, the results trend in a similar direction. Cases with an opinion are estimated to have a vitality score of 3.89 and a case without an opinion has a negative predicted vitality score of -0.32 .

These results suggest that when the Supreme Court provides a justification for its shadow docket decisions, other actors in the judiciary perceive them to be authoritative statements of the Supreme Court's preferences. However, scholars may need to do additional work on lower court

⁸Death penalty cases will serve as the omitted reference category in our models. Thus, each issue's coefficient represents its effect relative to death penalty cases. This is justifiable because death penalty cases are the most common shadow docket case.

Table 4. Regression results: predicting engagement with shadow docket cases.

	(1) Cites	(2) Positive	(3) Negative	(4) Vitality
Opinion	1.640*** (0.353)	2.244*** (0.372)	1.668*** (0.461)	4.217 (2.822)
Relief granted	1.005** (0.329)	0.501 (0.413)	1.675*** (0.491)	-0.490 (2.396)
Any dissenting votes	0.282 (0.402)	-0.801 (0.578)	0.492 (0.760)	0.0890 (3.127)
Sexuality	-0.183 (0.529)	0.316 (0.757)	-1.683 (1.222)	-0.181 (4.387)
Voting issues	0.475 (0.377)	0.937 (0.500)	0.470 (0.647)	0.798 (3.100)
Covid-19	2.132* (0.833)	3.399*** (0.968)	2.604* (1.117)	-2.191 (6.224)
Immigration	1.364* (0.576)	1.090 (0.637)	1.147 (0.774)	0.314 (4.777)
Other	-0.153 (0.643)	1.435 (0.866)	0.778 (0.892)	0.328 (3.818)
Two issues	1.447* (0.621)	0.940 (0.729)	1.219 (0.829)	4.530 (3.896)
Days since logged	0.230 (0.130)	0.447*** (0.132)	0.0322 (0.243)	2.531* (1.042)
Constant	-1.916 (1.071)	-4.422*** (1.264)	-4.734* (2.182)	-18.18* (8.368)
Observations	103	103	103	103

Models 1–3 are zero inflated negative bimodal regressions; Model 4 is a linear regression (OLS). Standard errors in parentheses.

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$ two-tailed test.

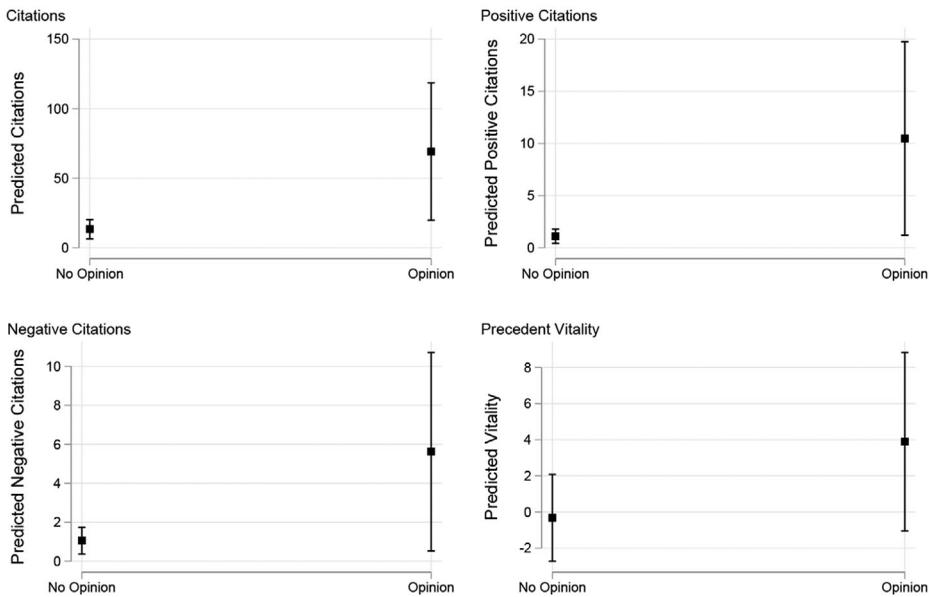


Figure 6. Results by opinion type.

attitudes on what precisely leads lower courts to view a Supreme Court action as authoritative. Normatively, we would expect a written opinion to signal the need for a meaningful debate over the interpretation of law or legal rules and how they would apply in future cases. Scholars may find lower court judges are primed to give shadow docket decisions the same treatment.

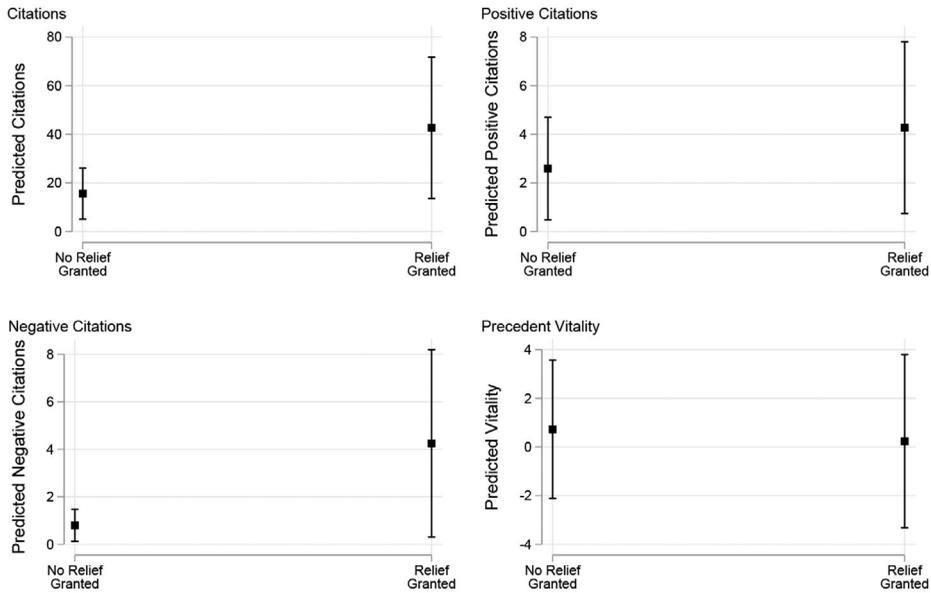


Figure 7. Results by whether court granted relief.

We also find that shadow docket cases that grant relief are more likely to receive engagement from the lower courts. These results are presented in Figure 7. Cases where the Court grants relief are more likely to be cited and negatively cited. The effect of granting relief on positive citations and vitality was not statistically distinguishable from zero but trended in the general direction of greater receiving rather engagement than cases that do not grant relief. The effect of granting relief on positive citations and vitality was not statistically distinguishable from zero, but trended in the general direction of receiving greater engagement than cases that do not grant relief.

A case that granted relief is expected to receive 42.63 citations while a case that does not provide relief is expected to receive only 15.60 citations. When relief is granted a case is expected to receive 4.25 negative citations and a case is expected to receive just 0.79 negative citations when relief is denied.

While the results for positive citations are not statistically distinguishable from zero, they do support the general idea that relief leads to more engagement. For positive citations, a case that grants relief is expected to receive 4.27 positive citations and a case that does not grant relief is anticipated to receive 2.58 positive citations ($p=.22$). For vitality, there is no apparent relationship between granting relief and more or less precedent vitality. A case that grants relief is predicted to have a vitality score of .238, and a case that does not grant relief is predicted to have a somewhat higher vitality score of .729 ($p=.83$).

Thus, when the Supreme Court grants relief, it means that lower court judges feel the need to engage in that decision. This applies both in the context of using these grants authoritatively and in the context of trying to demonstrate why the case before them is unique and that shadow docket case precedent does not apply.

Implications and conclusions

As the Supreme Court's reliance on the shadow docket to decide many important substantive issues has increased, many normative questions have been raised about the appropriateness of making such decisions without full briefing. Critics of the shadow docket claim that it is

inappropriate for the Supreme Court to make law without following full procedures—including full briefings, oral arguments, and a detailed opinion justifying the Court’s decision. These critics argue that this is normatively problematic for many reasons. First, by not following established procedures the Court may risk looking unfair and this could potentially cost the Court’s legitimacy and its decisions may not gain full acceptance. Second, critics argue that decisions made on the shadow docket may represent bad law. This is because the Court does not receive a fully briefing and therefore may be unaware of many important legal arguments. Further, because decisions made on the shadow docket must be made quickly, this takes away from the deliberative process that produces better outcomes (Fox 2021). Those who try to defend the Court’s use of the shadow docket—including members of the Court themselves—argue that the decisions made on the shadow docket do not contain precedential value and therefore are not expected to be full followed by lower court judges. Instead, decisions on the shadow docket are narrow and only have implications for the particular issue before the Court (Liptak 2021).

Our research has sought to inform the normative debate surrounding the use of the shadow docket to create law. We accomplish this by investigating how often cases decided on the shadow docket are cited by lower courts. As a general conclusion, we found that decisions made on the shadow docket are cited infrequently. Indeed, the median shadow docket case has just 5 citations. To put this finding in context, we compared the citations to shadow docket cases to citations to decision on the merits docket. The median merits docket case received 254.5 citations. When conducting further analysis specifically on positive and negative citation, this finding holds. The number of positive or negative citations shadow docket cases receive pale in comparison to those received by merits docket cases. Across our 5000 simulations, none of the simulated reassignments of shadow docket “treatment” were more negative and extreme than our observed value for total citations, positive citations, or negative citations. In the context of precedent vitality, just 2.88% of simulations produced results that were negative and more extreme than our observed value. These results imply that lower court judges do not view shadow docket cases as precedent in the same way they view fully-briefed merits cases. If they did, we would anticipate the citation numbers would be closer to that observed in merits cases. Considering the relatively limited engagement of shadow docket cases as precedent this may quell some of the normative criticisms of the use of the shadow docket.

While cases decided on the shadow docket receive much less engagement than merits decisions, we did find variation in the treatment of shadow docket cases. To further explore the normative implications of the shadow docket and the shadow docket’s influence on the development of law we analyzed the case characteristics that led some shadow docket cases to receive more or less engagement than others. We observe two important trends. First, shadow docket decisions in which the Court provides an explanation for its decision receive more engagement than those in which the Court does not provide justification. Second, shadow docket cases that grant relief and therefore change the status quo are more likely to receive engagement from the lower courts than those that deny relief and uphold the status quo. These results imply that when the Supreme Court gives lower court judges a signal of their preferences or reason to expect the Court believes itself to be altering the law in meaningful ways that the lower court judges will take note and treat those decisions as binding precedent. This may validate some of the normative criticisms of the shadow docket. In these cases, the Court signals its preferences without the benefits of a full briefing which may make for bad law, or at least a context in which lower court judges are unsure which precedent is most relevant: the status quo precedent or the outcome established on the shadow docket? This problem is compounded by the Court’s own behavior. The Court has advised that shadow docket decisions are not binding precedent, yet the Court has also admonished lower court judges who deviate from shadow docket outcomes (*Tandon v. Newsome*) and the Justices frequently cite their own shadow docket precedents. This leaves lower court judges in a position to make judgment calls over whether or not the Court indicates any particular shadow

docket decision to have precedential value. Our results suggest that when making these judgment calls, lower court judges specifically look to whether the Court has provided a rationale for its decision and whether the Court has changed the status quo.

In summary, our results present somewhat mixed implications for the larger normative debate on appropriateness of the Supreme Court's increased reliance on the shadow docket to make decisions on substantively important issues. On one hand, we find that shadow docket cases receive relatively little engagement from the lower courts, especially when compared to cases decided on the traditional merits docket. To an extent, this diminishes the arguments of critics who are concerned the Supreme Court is changing law and policy through the shadows. However, this may begin to change as the shadow docket becomes further institutionalized and accepted. Our results lend some support to this notion since shadow docket cases have received more engagement as precedent in recent years. Thus, we believe the situation is dynamic and it will be important to observe how lower court judges update their willingness to use shadow docket decisions as precedent in future cases. On the other hand, we find that when the Court takes steps to make clear its preferences either by providing an opinion justifying its decision or by upsetting the status quo, lower court judges take notice and give these cases more engagement. In these circumstances, such important changes are occurring without the benefit of full briefing and full argumentation is normatively problematic and may lead to negative consequences such as bad law or a loss of confidence in the Court.

We believe there are plenty of avenues for potential research that will further help resolve the normative issues concerning the Court's usage of the shadow docket. One fruitful line of research would be to examine the role of ideology in a lower court judge's decision of whether or not to cite shadow docket decisions. If a strong effect of ideology is observed, this may raise normative concerns as it demonstrates that the use of shadow docket cases as precedent is just strategic pursuit of policy preferences rather than need bore out of emergency or novel legal situations. Another line of research that would help speak to the normative appropriateness of the shadow docket is research that examines the depths to which lower court judges rely on shadow docket precedents when citing them. Our research only analyzes times cases are cited but does not go further to see whether these are simply citations in passing grouped in with other citations to more established precedents or whether lower court judges are substantively engaging with the content of shadow docket decisions.

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Appendix

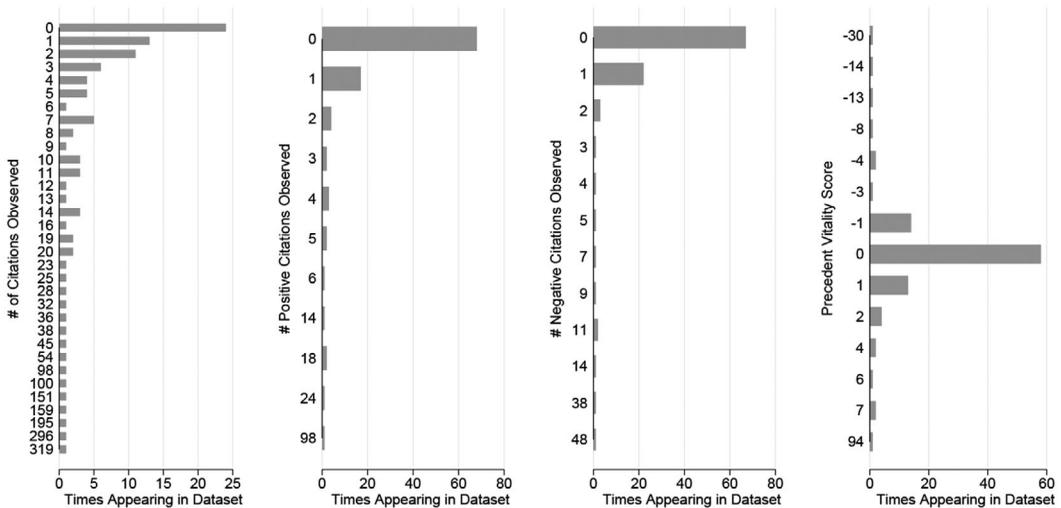


Figure A1. Citation Distributions for Shadow Dockets Cases.