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Searching for Legal *Topoi* in the Shadow Docket

M. Kelly Carr

7.1 INTRODUCTION

On February 7, 2022, the US Supreme Court issued a stay of an Alabama district court's ruling blocking that state's redrawn congressional map. The district court had found that the redrawn map likely violated Section 2 of the Voting Rights Act, and it ordered the Alabama legislature to redraw the map before the state's 2022 midterm elections. In *Merrill v. Milligan* (2022), the Supreme Court sidelined that order until it could hold a full hearing, thus guaranteeing that the original map in question would represent the voting districts in 2022.

Justice Kagan dissented from granting that stay, and, in so doing, articulated her long-standing concerns about similar emergency actions that her colleagues had taken and their impact on the Court. "Today's decision is one more in a disconcertingly long line of cases in which this Court uses its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument," wrote Kagan (*Merrill v. Milligan*, 2022, p. 11). The Court's stay decision "does a disservice to our own appellate processes, which serve both to constrain and to legitimate the Court's authority" (p. 12).

William Baude argues that emergency orders and summary decisions – a series of judicial actions that Baude collectively dubbed the "shadow docket" – lack the transparency and consistency of cases granted and decided on their merits (Baude, 2015, p. 12). Cases such as these have increased over the past decade, however, and the stakes of the decisions have been more far-reaching. Moreover, they have increasingly attached rather lengthy and combative holding opinions, concurrences, and dissents. Even more significant: They have asked lower courts to treat these emergency declarations as precedent in deciding newer cases, vacating subsequent lower court decisions and remanding them for further consideration in light of emergency stay opinions.[1]

[1] The Supreme Court received a rare petition for writ of certiorari before judgment in *Harvest Rock Church, Inc. v. Newsom* (2020). Eight days after *Roman Catholic Diocese of Brooklyn NY*

This confluence of changes subverts the typical appellate court dialectical process, to the detriment of legal argumentation within a democracy. This is true for several reasons. First, emergency stays and injunctions rely solely on party briefs, denying third-party or public arguments before the Court. These cases sometimes do substantive doctrinal work or claim broader precedential power without the substantive merits-docket process of briefing, oral arguments, and circulating drafts of opinions, each of which holds important internal – between the Justices' chambers – and external – to legal, political, and lay audiences – rhetorical functions.

Second, their holdings turn the rhetorical audience of their discourse inward, toward other legal actors, ignoring the public(s) that they are obligated to engage with in the public sphere. The insulated and quick nature of emergency stays and injunctions leads to opinions that fail to engage fully with the important audiences and starting points of argument.

Third, the truncated review process and lack of established norms for the published opinions (since no opinions are required) means that Justices can shorthand or even skip elements of the rhetorical invention process that are crucial to both the reasoning and justification of their opinions. This means that lawyers are left to read the tea leaves when crafting new arguments, and Justices are making decisions without the full scope of the implications available to them.

Moreover, the constrained vision of the Supreme Court's rhetorical audience neglects public audiences and diminishes the characterological integrity of the Justices, who take pains to repair their image absent the full performance of instructional process that full merits opinions engage in.

In this chapter, I attend to the implications of shadow docket opinions for both public and legal argument by analyzing a COVID-restriction shadow docket case: *Roman Catholic Diocese of Brooklyn NY v. Cuomo* (2020) (hereinafter *Roman Catholic Diocese v. Cuomo*). First, I review the origins of the shadow docket and its significance in contemporary legal culture. Next, I outline how elements of classical and contemporary rhetorical theory form the foundation for contemporary Supreme Court opinion writing and reasoning, addressing in particular the implications for both public and legal argument more generally. I use this section as a roadmap for analyzing *Roman Catholic Diocese v. Cuomo*, highlighting the missing commonplaces – or *topoi* – of argument that stem from the expediency and lack of public access inherent in shadow docket decisions.

7.2 DEFINING THE SHADOW DOCKET

Typically, the Supreme Court cases that garner attention are those on the merits docket, wherein parties are granted a full hearing and consideration before the

v. Andrew Cuomo (2020), the Court issued a GVR: an order that grants the petition (G), vacates the district court's order denying injunctive relief (V), and remands the case for reconsideration in light of a recent development (R) (Vladeck, 2022; see also McFadden & Kapoor, 2021).

Supreme Court, a process that includes a full spate of briefings, oral arguments, and publicly issued decisions of the Justices' votes, including lengthy opinions explaining the reasoning and justifications for their conclusions (Black & Brannon, 2022; Vladeck, 2023, p. 3). The Court's merits docket is published and accessible, as are all the briefs filed in relation to the cases.

In contrast, Baude, a law professor and former law clerk to Chief Justice Roberts, defined the Court's shadow docket as "a range of orders and summary decisions that defy its normal procedural regularity," including summary decisions, emergency stays (of a lower court's ruling), and injunctions (wherein the Court restrains a party instead of a court) (Baude, 2015, p. 1). The shadow docket encompasses the large amount of Supreme Court work that issues a ruling without full briefings or oral arguments (Vladeck, 2019, p. 123). Such decisions are often unsigned and without reasoning attached. These non-merits judicial acts are not new, but the frequency, scope, and significance of their orders has grown exponentially over the past decade, as well as the frequency of publicly issued dissents from Justices regarding the decisions made. The American Bar Association reports that while only eight emergency relief applications were filed during the Bush and Obama administrations combined (2001–2017), averaging about one every other year, thirty-six applications were filed during the four years of the Trump administration (O'Connell, 2021).

The potential harms of non-merits Supreme Court decisions have been criticized for decades (Hartnett, 2016). Legal scholars have warned about the "managerial or executive character" of summary decisions, rather than the dialectical character of judicial tribunals, since at least the 1950s (Brown, 1958, p. 94). Steve Vladeck makes it clear that recent concerns over the shadow docket are not so much about their procedural illegitimacy – the Supreme Court has broad authority to intervene without having to await any rulings. Rather, the concern lies with the increasing frequency with which Justices use it for constitutionally significant questions; the Court's disregard for restraint, a primary source of this non-elected institution's credibility; the lack of respect for lower courts, which are more in touch with local goings on; and the abandonment of the legal reasoning that provides decision-making tools for lower courts, policymakers, and future merits cases (Vladeck, 2019, pp. 127–128). Emergency applications provide a way for litigants to bypass the sometimes years-long process of gaining a full merits hearing before the Supreme Court, or to freeze a lower court's ruling, either skipping stages of appeal or running out the clock on time-sensitive issues such as elections and death penalty cases. Finally, and most importantly to this chapter, the trust and legitimacy of the Supreme Court is undermined when controversial or far-reaching cases are decided in private and without full briefing. McFadden and Kapoor (2021, p. 828) argue that we are in a "new era of litigation, in which securing emergency interim relief can sometimes be as important as, if not more important than, an eventual victory on the merits." The lack of transparency innate in these cases, as well as the capacity to drastically change the trajectory of public policy or even electoral processes without

hearings or deliberations, led the House Judiciary Committee to hold a hearing on shadow docket practices in February 2021.

Shadow docket decisions have the potential to alter existing doctrine and the scope of the Constitution without the substantive reasoning that normalizes doctrinal change through acceptable legal reasons. This is true even when Justices attach reasoning to their decisions in a *per curiam* opinion – meaning the unsigned, collective ruling of an appellate court. A brief review of an important shadow docket case shows how. This analysis will foreground the truncated or missing topoi of legal argumentation, as well as impoverished or missing artifacts that merits-based Supreme Court opinions offer. Perhaps because the norms of legal opinion writing are not binding on these cases, Justices writing the per curiam holding are liberated from the constraints that bind them in signed, merits-based decisions. Yet the liminal space created between a summary judgment without opinion and a full merits decision raises several rhetorical problems, especially in cases of controversy: a lack of transparency on why it was granted, raising the specter of political motivations; a notable and contentious lack of agreement between Justices on both the holding and the interpretations; and the pseudo-precedential treatment of the resulting shadow docket decisions, both by lower courts and the Justices themselves.

7.3 CLASSICAL ROOTS OF CONTEMPORARY LEGAL WRITING

The art of finding all the available means of persuasion in order to fruitfully choose the best tools to craft the best messages to suit the particular moment, audience, and context is broadly known as the rhetorical invention process. Accomplished rhetors consider the knowledge levels and existing beliefs of key audience members, useful analogues to the present situation, expectations of institutions and culture, and existing starting places of similar arguments, or topoi, before crafting messages that best appeal to audience and moment.

Rhetorical invention has formed the basis of legal decision-making for centuries. Justices examine the inventional topoi, or rhetorical starting places of argument (*topoi* literally translating into "places"), both as the bases for original solutions to unique problems and for their value as legal precedent. In doing so, they blend utilitarian and creative qualities of rhetoric into their written opinions. Those opinions include both the legal conclusion itself "so ordered" and the corresponding reasoning that supports it (Scallen, 1995, p. 1722). Justices "showing their work" can also be seen as an act of deliberative fidelity – both voluntary and important to our belief in democratic processes, wherein political actors are guided by "good reasons" and beholden to their publics, at least rhetorically (Fisher, 1987; Perelman & Olbrechts-Tyteca, 1969). Judicial opinions are more than just holdings: They are "claims of meaning," constitutive documents that characterize both speaker and auditor (White, 1995, p. 1363). Judicial opinions are part of a centuries-long tradition of legal decisions, and contemporary legal discourse builds on classical traditions for

inventional topoi, self-deliberation and dialectic reasoning, and reliance on input from non-technical audiences.

Aristotle's *Rhetoric* (1991), and subsequently Cicero's *On Invention* (1949), mapped a complex relationship between philosophical dialectic and situation-specific rhetoric that held heavy implications for legal rhetoric then, and now. Aristotle defined rhetoric not merely by its persuasive effect but also by its inventional tools to aid in discovery and judgment. Abstract principles of justice established by laws may, in their abstraction, become incapable of speaking to the nuance of specific situations if one does not allow for the situation-specific argumentative forms of rhetoric, which bring equity to the justice of laws. Topoi were at the situational center of rhetorical reasoning: The rhetorical commonplaces both reflected cultural habits of knowing, reasoning, and believing and motivated new forms of knowing through their combinations and application to novel situations.

As common laws became codified and the principles behind them came into question, Roman legal arguments focused on the dialectical features of argument (Scallen, 1995, pp. 1728–1729). With the changes in the law courts came early judicial writing, which divided between a *praetor*, who would craft the pleadings into a formula similar to jury instructions; a *iudex*, a lay arbitrator who would decide questions of both law and fact; and jurists, who rendered advice to both litigants and praetors and published treatise-like commentaries describing the resolution of real and hypothetical problems (Wald, 1995, p. 1371).

The contemporary US analogue is more symbiotic; temporally, between past and present opinions of a longstanding magistrate body (the Supreme Court), where current Justices turn to earlier opinions (precedents) and doctrinal principles established over time and multiple cases; hierarchically, between the Supreme Court and lower appellate courts, where the former offers rules and advice on how to interpret and apply existing laws; and finally, between spheres of argument, through dialectic engagement between Supreme Court Justices, the parties to the case, interested third parties who may also file briefs (called amicus briefs), and public arguments that serve as the cultural and linguistic tapestry from which legal discourse draws its threads.

7.4 INVENTIONAL TOPOI IN SUPREME COURT ARGUMENTS

When the Supreme Court grants certiorari to review a case, it proceeds through an inventional process that mirrors classical rhetorical invention in many ways. Individually and collectively, Justices search for appropriate starting places – or topoi – on which to build an acceptable justification for the final opinions. The topoi will vary in significance and applicability depending on the specifics of the case, and successful topoi will generally reflect the audiences' values and beliefs, the institutional parameters for argument, and the particulars of the situation

surrounding the controversy.[2] These topoi include facts of the case (as asserted by parties, amici, and external sources); constitutional principles and doctrines, both previously used and newly interpreted; important precedents based on previous decisions of the Court; and legislative and regulatory histories (Alexy, 1989, pp. 18–19; Carr, 2018, pp. 113–119).

Before the written decisions are published, Justices' chambers also consider the contemporaneous arguments of fellow Justices and various publics as essential topoi, providing important context, meritorious counter-arguments, and pathways to acceptable arguments both inside and outside the Court. They do so because, for all of its jurisprudential-specific topoi, Supreme Court decisions lose their rhetorical power and moral force when they fail to take in, and address, *public arguments*. Perelman (1963) posits that all successful argument – legal and non-legal alike – proceeds from "that which is accepted, that which is acknowledged as true, as normal and probable, as valid agreement"; and because of that, it thereby "*anchors itself in the social*, the characterization of which will depend on the nature of the audience" (Perelman, 1963, p. 156). Studies on judicial reasoning indicate that "Supreme Court inventional strategies both reflect and help create cultural norms, particularly those that govern institutional ethics and the ostensible grounds for institutional decision making" (Makau & Lawrence, 1994, p. 191). Public audiences expect more than merely legally valid decisions; they expect the Court to speak to urgent social needs and questions, and to protect nonlegal interests (Makau, 1984, p. 382).

For all of the particularities and field-specific topoi of legal argumentation, then, these features do not separate the practice entirely from general practices of argument; nor does the focus on legal audiences negate the need to consider more general audiences. Even given the constraining features of legal justification, "the actual process of justification or deliberation should proceed (and in ideal cases does indeed proceed) according to the criteria of general practical discourse, and that legal justification only serves as a secondary legitimation of any conclusions arrived at in this way" (Alexy, 1989, p. 19).

Even as they write their final opinions, Justices do more than answer the question (s) before them; they also construct the rhetorical resources necessary to form an acceptable legal judgment. These include the building and maintenance of the Court's authority; specific constructions of history that support and even naturalize the outcomes that the opinion argues for; and maintaining and building upon certain features of legal culture that confer institutional legitimacy and legal decision-making (Carr, 2018). This is where the increasing number of, and more substantive, cases taken up in the shadow docket are particularly damaging to legal discourse. Shadow docket decisions fail both to show their work – demonstrating for audiences which

[2] Portions of this section are paraphrased from my book on the Supreme Court's rhetorical invention (Carr, 2018).

topoi most significantly shaped the decision, and *why* – and fail to build and affirm legal topoi for future Supreme Court decisions and for lower courts.

An important consideration of all Supreme Court decisions – merits cases and shadow docket alike – is what, exactly, the Court is trying to produce. Producing a cogent written decision about a particular case is not the only goal of Supreme Court invention. Of the same inventional tools, the Supreme Court uses written opinions to construct and maintain its own authority and to maintain the forms, authority, and logic of the broader legal culture. These constructions are necessary to the internal logic of the opinions, and they form the basis for public acceptance of the Court's decisions in particular cases as well as the Court's legitimacy on the whole. Justices construct these artifacts through both showing and doing. That is, they construct these resources both through their particular arguments and through the performative display of their roles through the form, structure, and institutional expectations of written opinions.

7.4.1 *Authority and Credibility*

Because the Supreme Court has no enforcement body, a key rhetorical feature for the Court is its need to motivate support for its decisions in lieu of forcibly imposing them. Thus, written opinions must continuously invest time explaining or constructing the sphere of authority within which Justices can make legitimate their decisions. Perelman (1980, p. 121) notes that, in democratic societies, "the role of the judge, servant of existing laws, is to contribute to the acceptance of the system. He shows that the decisions which he is led to take are not only legal, but are acceptable because they are reasonable." Although Justices serve appointed life terms as of this writing, the Supreme Court is nonetheless constrained by broader social conditions, including matters of public opinion (Rosenberg, 1991). In cases of public interest, the need to sound reasonable extends beyond legal practitioners involved with the case to a wider audience that may not know the legal precedents or doctrinal habits relating to the subject area. In cases such as this, "the authority of the court opinion is not a given – it must be earned; and the audiences from which assent must be won are often multiple" (Brooks, 1996, p. 21).

Audiences' perception of the Justices' character cannot be separated from the message they send. This is particularly true in the highly secretive, unelected branch of federal government that is the Supreme Court. Drawing from the Constitution's concern for the characters of individuals who hold office and characterologically embodying the Constitution as its primary interpreters, Justices are scrutinized by the public from their nominations through their retirements (Parry-Giles, 1996, pp. 367–369). Especially when public audiences are largely unfamiliar with legal vocabulary and doctrine, the character of political actors is rightfully scrutinized as "the only 'issue' upon which a voter is competent to judge" (McGee, 1978, p. 153).

7.4.2 *Legal Culture*

Another inventional artifact of legal discourse is American legal culture itself. The field of law is more than just a place where disputes are resolved. It is an institutional culture, crafted through formal and informal rules, organizational hierarchies, traditions, vocabularies, and habits of mind. Valued precedents and doctrine will structure the Court's reasoning and provide support for decisions. Dissents provide the foundations for future arguments. Both explicitly, through its opinions, and performatively, through its modeling, the Supreme Court provides guidance to lower courts, defining acceptable standards of evidence, levels of scrutiny, treatments of groups and categories, the pace and structure of lawsuits and decisions, and the relative value of established doctrines and conflicting precedents.

Similarly, legal discourse is more than a discipline and a vocabulary; it also constructs social norms, characters, standards of judgment, and particular worldviews. One characteristic of the constructed legal culture, then, is the composition of particular characters within the framework, language, and logic of the legal culture. Justices construct the Supreme Court's own character through their performative enactment of legal norms such as the form and structure of legal opinions; their tone toward each other, the appellants, and the other institutions they engage with; and the performance of their responsibility to guide lower courts in consistent and sound decision-making. Opinions also constitute the publics and actors evoked within the legal drama, thus serving "to create – and rank – communities of competing voices" (Conway, 2003, p. 489). Judicial constructions of themselves, each other, the parties, and the publics that the decision impacts are inevitable byproducts of Supreme Court opinions.

In summary, Supreme Court Justices make their final opinions consonant with accepted forms of legal decision-making, but that does not mean that the reasons given in the opinions were the only factors considered when deciding how to vote in the first place. The process of writing is in itself an inventional tool, because it requires engagement among author, topoi, and audiences in ways that alter the direction of the result. Decades before the rising frequency of Supreme Court shadow docket stays and injunctions on decisions of constitutional import, Judge Patricia Wald (1995) lamented the move of some appellate judges away from written opinions.[3] The process of opinion writing brings to the surface potential problems with the decision, asserts Wald. The process of writing,

> more than the vote at conference or the courtroom dialogue, puts the writer on the line, reminds her with each tap of the key that she will be held responsible for the logic and persuasiveness of the reasoning and its implications

[3] Wald asserts that "there is indeed a worrisome 'lost horizon' aspect to no-opinion dispositions. Even when judges agree on a proposed result after reading briefs and hearing argument, the true test comes when the writing judge reasons it out on paper (or on computer)" (Wald, 1995, pp. 1374–1375).

> for the larger body of circuit or national law. Most judges feel that responsibility keenly; they literally agonize over their published opinions, which sometimes take weeks or even months to bring to term. It is not so unusual to modulate, transfer, or even switch an originally intended rationale or result in midstream because "it just won't write." (Wald, 1995, p. 1375)

Judicial writing choices are complicated by the fact that audiences to which the Supreme Court must appeal are multiple, including other present and future Justices, lower courts, legal administrators, legislators, litigants, legal scholars, and the nonlegal public (Makau, 1984, pp. 379–396). The possibility of disagreement by some of these audiences can have varying impacts, from constitutional or structural changes to law, to confusion when applying the decision with the lower courts, to general dissatisfaction with the Supreme Court among the general public (Christie, 2000, p. 19).

As we will see in *Roman Catholic Diocese v. Cuomo* (2020), opinions unmoored from these constraints, if only for the proclaimed sake of expediency, render the judgments problematic. Previous research had pointed out the harms of truncated shadow docket decisions on legal culture: namely the lack of precedent, with the result of throwing lower courts into disarray. This chapter complicates that concern. The Court has begun mirroring the form and structure of a full Supreme Court opinion within some of these decisions – long opinions and multiple concurrences and dissents – while depriving the record of any substantive public argument: no oral arguments, no amicus briefs, and no time for Justices and law clerks to gather additional public resources. The resulting "opinions" do substantive doctrinal work without full consideration of its audience's premises of argumentation.

7.5 ANALYSIS OF *ROMAN CATHOLIC DIOCESE OF BROOKLYN V. CUOMO* (2020)

Roman Catholic Diocese of Brooklyn v. Cuomo (2020) challenged COVID-related restrictions on gatherings based on the prevalence of cases in neighborhoods, which included limitations on houses of worship. The applicants posited the constitutional harm in question as the Free Exercise Clause of the First Amendment. The Court had previously rejected a COVID-restriction injunction application from California – *South Bay United Pentecostal Church v. Newsom* (2020) – on similar grounds. In *South Bay*, plaintiffs asked the Supreme Court to stop an executive order that temporarily placed restrictions on public gatherings, including limiting places of worship to 25 percent building capacity or 100 attendees, whichever was less. In a 5–4 vote, the majority of the Court declined to intervene in *South Bay*. Chief Justice Roberts penned a two-page concurrence with the denial order, finding that the executive order treated places of worship similarly to other secular gatherings that held similar risk, that local governments need flexibility to rapidly address the (still very new) pandemic which had no cure or vaccine, and finally that the application did not meet the very high standards for injunctive relief, including

"indisputably clear" unconstitutionality. Three of the four Justices who would have granted the injunction (Kavanaugh, Thomas, and Gorsuch) joined for a three-page dissent from the Court's denial of relief, asserting that because some secular businesses, less constitutionally protected than places of worship were, were subject to looser restrictions, then the executive order clearly violated the Constitution and was furthermore irreparably harmful to worshippers.

Months later – after Justice Ruth Bader Ginsburg died and was replaced by Justice Amy Coney Barrett – the Court granted the emergency injunction application regarding a COVID-restriction executive order in New York. The New York order established rules based on prevalence of COVID cases in neighborhoods. In high-infection "red" zones, houses of worship were limited to 25 percent or ten people, whichever was fewer. Other "non-essential" secular businesses were closed altogether, treating religious gatherings more leniently than other non-essential organizations, but more strictly than "essential" secular businesses. The Roman Catholic Diocese of Brooklyn and the Agudath Israel Synagogue filed separate suits, asking for an emergency injunction against the order, and arguing that the order violated the Free Exercise Clause by singling out religious gatherings. Both the district court and the Second Court of Appeals declined, citing Roberts' reasoning in *South Bay* for declining injunctions of this sort amid COVID – except for lower court dissenters, who argued that the executive order violated the Free Exercise Clause because it was more restrictive on houses of worship than on essential secular businesses. The Supreme Court dissenters from *South Bay* maintained their same positions in *Roman Catholic Diocese v. Cuomo*, and this time Justice Barrett joined them to form a majority.

The following analysis will explore the fault lines that appear in rhetorical output when Justices attempt to mirror the form and structure of a merits opinion without the full inventional process that supports it.

7.5.1 *Diminishing Legal Culture in* Roman Catholic Diocese v. Cuomo

As previously noted, Justices pursuing the merits docket engage in topoi that include arguments from many different origins: past arguments from the same Court, via precedents, important dissents, and established doctrine; from legislative histories as they search for the intentions of the laws in question; from the lower courts, part of their own system of decision-making; from the parties; from the public, via amicus briefs; and from each other. They engage these arguments at several stages. First, in granting or denying certiorari; next, through a system of party and amicus briefs; substantively and live via oral arguments; privately, through memos and draft opinions circulating between the chambers; and finally, during the majority, concurrence, and dissenting opinions that are released to the public. At each of these argumentative touchpoints, Justices' own arguments have the chance to be molded and tempered through their engagements; at the very least, they remind the Justices of the myriad

audiences and artifacts to which they must tailor their decisions. In shadow docket decisions, Justices are liberated by expediency from these high demands.

Shadow docket opinions, when released at all, do not carry the same institutional expectations for form, structure, length, and scope of argument that full Court opinions do. This is true in part because of the "emergency" nature of these cases, and in part because of the limited temporal orientation. That is, there is an expectation that emergency stays and injunctions will only hold until a fuller review occurs. Justice Barrett, the author of the Court's per curiam holding, expressed the limited nature of *Roman Catholic Diocese v. Cuomo*'s holding granting injunctive relief to its applicants: "Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court" (*Roman Catholic Diocese of Brooklyn, NY v. Cuomo*, 2020, p. 15).

At first blush, this holding seems to perform the conservative ethos of Supreme Court jurisprudence – and a common starting place of argument – by articulating its limited scope and circumstances for its termination. Yet considering this application in its historical moment, together with two similar applications for emergency injunctions that had been declined mere months before, the decision to grant injunctive relief itself represented a significant departure from the coveted status quo upon which the Supreme Court builds it character and authority.

The reasons offered to grant relief are incommensurate with careful inventional discovery and selection as well. Long-standing precedent and attendant legal culture set the threshold for granting an injunction incredibly high, and for good reason: Through injunctions, Justices substitute their judgments for the judgments of lower courts, and intervene directly upon the parties themselves, rather than merely delaying a court's ruling from taking place. For these reasons, the settled Supreme Court standard, established in the All Writs Act of 1789, holds that in order for the Court to intervene, the party's claim to relief needs to be "indisputably clear."

Former Justice Antonin Scalia believed that "an emergency injunction 'demands a significantly higher justification' than stay; appellate courts need a stronger case for restraining the *parties* than for restraining the *courts* from which those parties are appealing" (Vladeck, 2022, p. 712). In addition to the direct intervention at the party level, injunctions also supersede their usual supervisory role on the lower courts. For this reason, the Court held in 2010 that an injunction 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" (*South Bay United Pentecostal Church v. Newsom*, 2020, 1; Roberts, CJ, quoting *Respect Maine PAC v. McKee*, 2010).

In the per curiam decision, however, the majority applied a much less aggressive standard, designed for use by trial courts (rather than appellate courts) deciding to issue a preliminary injunction at the beginning of a new lawsuit: whether there is a

reasonable expectation that the party will succeed on the merits, and whether they would suffer irreparable harm if restrictions remained. Vladeck (2022, p. 719) argues that such a move re-envisions the All Writs Act in ways that vastly expand the reach of Supreme Court injunctions.

In such high-stakes cases, ones departing from long-standing precedent, or on controversial issues where Supreme Court interference could be construed as overreaching, institutional expectations require that great care be taken to craft a justification that aligns the proposed change to the status quo with a strong performance of juridical neutrality. In a merits opinion, the decision to ignore or alter the application of an important legal standard would motivate Justices to call on applicable topoi to justify their move – to balance the change with the appearance of consistency, for credibility's sake, by painstakingly laying out existing precedents, doctrine, or past opinions that justified the current deviance from legal norms, or perhaps facts that make this case wholly unique. In the shadow docket, however, expediency reins, leading Barrett to pen: "Because of the need to issue an order promptly, we provide only a brief summary of the reasons why immediate relief is essential" (*Roman Catholic Diocese of Brooklyn, NY v. Cuomo*, 2020, p. 16).

Further eroding the standard of "indisputably clear" relief, the red zone restrictions in question had been lifted on the neighborhoods that the applicants' houses of worship resided in, making the alleged harm moot at the time that the Court issued its injunction. By the time the Supreme Court issued a decision, the parties to the case were no longer in high infection zones, and so were not suffering the harms that the Court granted as urgent and irreparable, calling into question their standing. Nevertheless, the majority and concurrent opinions argued, this was a preemptive injunction meant to preclude any irreparable harm that would arise if the zone levels rose again.

Next, *Roman Catholic Diocese v. Cuomo*'s (2020, p. 19; Barrett, J) per curiam holding asserts that "There can be no question that the challenged restrictions, if enforced, will cause irreparable harm." To justify this assertion, Barrett's opinion offers a brief analysis of disparate treatment based on religion, an established standard for violating the Free Exercise Clause. Here, Barrett walks the reader through the restrictions that the red and orange zones would impose on places of worship and how they differ from designated essential, and some non-essential, businesses. Barrett evokes the precedent of *Elrod v. Burns* to support this interpretation: "The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury" (*Elrod v. Burns*, 1976, p. 5, full internal citation omitted). Again, precedent is a hallmark building block for Supreme Court opinions, mirroring the logic and legitimacy of a full merits opinion. The cited case, however, is not the most recent binding precedent – 1990's *Employment Division, Department of Human Resources of Oregon v. Smith* (hereinafter *Employment Division v. Smith*) – but a 1976 case from which current Free Exercise Clause doctrine has long since evolved.

A review of the missing topoi evidenced in the holding opens a window into the radical doctrinal move that this decision made. In 1990, Justice Scalia wrote the majority opinion for the Court in *Employment Division v. Smith* (1990). In it, Scalia argued that laws burdening religious practice are not immediately or inherently unconstitutional; rather, it is only if they are singled out. Vladeck (2022, p. 705) summarizes the thrust of the holding in *Smith*: "The Free Exercise Clause is not offended merely because a law impacts religious practice. Rather, the Constitution is violated only *if that was the point*" (emphasis added). In the merits docket, the Supreme Court continued to uphold *Smith* whilst chipping away at its edges, and Thomas, Alito, Gorsuch, and Kavanaugh hinted that *Smith* was ripe for revisit in 2019 (Vladeck, 2022, p. 709). The Court had yet to revisit it on the merits docket, however, when *Roman Catholic Diocese v. Cuomo* was taken up.

If *Roman Catholic Diocese v. Cuomo* had been a full merits opinion, then the norms of opinion writing (and of its precedential affects) would have forced the majority to engage with the full doctrinal history. Law clerks and Justices alike would have centered on the ways in which *Smith* supersedes *Elrod* as precedent and, through the draft opinion circulation process between chambers, Barrett would have been forced to expound on why her chambers found an older case, a predecessor in the since evolved standard of Free Exercise Clause interpretation, to be the appropriate case to rest her decision upon.

Under the guise of emergency and the shadow of per curiam anonymity, however, shadow docket opinions can truncate the full argumentation process that produces essential artifacts of legal and public culture. In this case, Barrett's per curiam opinion shifted the Court's approach to the Free Exercise Clause without the constraints of a typical Supreme Court opinion.[4] Absent a detailed building of legislative and jurisprudential histories that bring the Court to this moment, any reference to public concerns via amicus briefs, or broader constitutional questions put before it (parties to this injunction ask only about the immediate question at hand), the majority holding in *Roman Catholic Diocese v. Cuomo* rejected the long-standing precedent established in *Employment Division v. Smith* (1990) regarding the application of the Free Exercise Clause.

Some may argue that the expediency and limited scope of shadow docket decisions mediates against the harms of these truncated arguments and justifications. After all, these cases are meant to be temporary and party-specific, holding no precedential value. This is untrue for several reasons. First, shadow docket opinions such *Roman Catholic Diocese v. Cuomo* deprive lower courts of reliable guidance on how to decide related cases. The increased frequency and reliance upon shadow docket summary judgments and sparse opinions halts a meaningful appellate

[4] In his chapter, Stephen I. Vladeck (2022) makes this argument brilliantly and in more detail than I do. The goal of this chapter is to focus on the missing inventional topoi and artifacts that make this shadow docket constitutional shift particularly problematic.

process that produces merits-based opinion writing. By truncating the usual multiple layers of review by law courts, the Supreme Court, other legal actors, and public audiences do not receive the benefit of the multiple rounds of briefing, arguments, and rulings that result from a full appeals process (Vladeck, 2019, p. 127).

Secondly, increasing numbers and import of shadow docket decisions have left appellate lawyers attempting to extrapolate which topoi might be successful, even as they ponder the precedential value of shadow docket cases. McFadden and Kapoor (2021) attempted to craft a structure by which lower courts could sort the precedential value of various types of emergency stays, in order to better weigh the significance of those stays as guiding decisions for lower courts. Arguing that the Supreme Court has no set standards of review, thus "complicating the question of the precedential weight of stay rulings," the authors suggest that attorneys and judges consider the similarities of their underlying merits disputes, as well as the length and detail of any attached opinions (McFadden & Kapoor, 2021, p. 838). Even on the shadow docket, the authors recommend proceeding with deference to the emergency holdings if it seems clear that the Court's majority expressed its views on the merits of the case, or else lower courts should explain why they do not defer. The main reason McFadden and Kapoor offer: the fact that the Supreme Court itself has taken to referring in other cases to their summary judgment in *Roman Catholic Diocese v. Cuomo*.

7.6 CONCLUSION

At first read, *Roman Catholic Diocese v. Cuomo* (2020) offers substantive engagement between Justices about matters of public import, referencing judicial topoi of facts of the case, precedents, and established doctrine. The structure of the injunctive holding allows for both concurrences and dissents, allowing engagement between the Justices. The proclaimed temporal orientation is temporary in nature, to be negated after a full-court merits review, should that come to be. So what's missing, and what are the consequences for the artifacts of legal invention?

First, we miss public arguments. Shadow docket cases do not solicit amicus briefs, do not hold oral arguments, and rarely even have time for meaningful conferencing and rounds of draft opinion between the Justices and their clerks. The public is invited take the Court's word for it, because it isn't required to consider or answer to public arguments. In cases like *Roman Catholic Diocese v. Cuomo*, where regional contexts make the appellate court the appropriate body to hear the case, granting emergency injunctions and stays usurp local voices in favor of federal dictate. Because of the proclaimed need for expediency, Justices can wave off the need to fully articulate the arguments of the parties – as Justice Sotomayor critiqued Justice Gorsuch for, when he chose not to engage with what makes houses of worship different, based on scientific evidence provided in the party record – namely that shouting and singing while gathered together for lengths of time was a leading cause of group COVID spread.

The Supreme Court always has greater responsibilities than the case at hand, even when those cases are urgent and time specific. It must consider the impact of its decisions on future similar cases and provide a roadmap for lower courts and policymakers. And it needs to show that it fully considered them, especially if it is altering its approach to future similar cases in any way. Here, the new majority of the Court used a non-live emergency injunction to move the doctrine of the Free Exercise Clause in ways that it refused to do on the merits docket. And in the immediately following shadow docket cases, the Court has also demanded that lower courts treat its per curiam decision as the same level of precedent as a merits case. Vladeck traces the sequence of shadow docket cases to conclude that the Justices seem to have "*preferred* to make significant new constitutional law on the shadow docket rather than through the regular – if laborious – procedure of a merit case" (Vladeck, 2022, p. 737, emphasis in original). Regardless of the Court's intent, the impact lowers the inventional burden of the Justices and impoverishes its results for legal and public audiences alike.

Such a system also loses several important artifacts of legal opinions, with grave implications. The first, and probably the most important, is authority. Lawyers and lower appellate court judges could not evoke the past as authority, an act which "seems to require the existence of a judicial opinion, or something like it" (White, 1995, p. 1366). One might intuit the Court's thinking, but one cannot explicitly model it on the Court's reasoning. Opinions "invite lawyers and judges in the future to think and speak as it does" (White, 1995, p. 1366). Opinions characterize. Through their characterizations, audiences (legal and public alike) can judge those characterizations, can trace the contours of the reasoning and decide whether the reasons are generous, dubious, well-supported, or contrary. They engage in a conversation with a reader, and invite the reader to follow them. Future auditors can cite moments of characterization as reasons that they, too, characterize the law in particular ways, and they are evoking a foundational premise of legal argumentation when they do so: an appeal to authority.

The lack of opinion also silences critique in ways that impoverish legal reasoning. White argues, "the criticism of opinions, on all grounds – rational, political, moral – is an essential part of law" because it is the only way that others can "argue for or against the continued authority of a particular opinion or line of opinions" (White, 1995, p. 1368). Of course, the goal of a judicial opinion is to issue a result. But White emphasizes the importance of having both, for it matters that both the reasoning and result be sound: "There is a profound relation between them, because the right 'style' or the right mode of reasoning will over time lead to the best results" (White, 1995, p. 1368).

Herein lies the concern with contemporary shadow docket cases that engage substantively with constitutional decision-making, without the expectation of oral argument, conference meetings, draft opinions wherein Justices wrestle with complexities, and a full-throated opinion of the Court sturdy enough to build doctrine

upon. White used the Greek legal system as an example of what the law would look like if it were something that judges just performed, and did not explain: as in Athens, with no judges, juries of hundreds, no deliberation, no reliable way of evoking precedent, and no appeal. What the Greek legal system had lacked in material law, it compensated for with the "cheerful simplicity of the infant state" (Greenidge, 1971, pp. 3–4). Supreme Court shadow docket opinions behave similarly, assuming a "because I said so" model of jurisprudence that does nothing to further legal reasoning, instead asking lower courts to behave as Greek citizens did before juries – adopting arguments that seem to work, without knowing or concerning themselves with the reasons.

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