THE APPLICATIONS DOCKET

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The Supreme Court's applications docket, often misleadingly called the "shadow docket" or "emergency docket," is controversial, complex, and poorly understood. Using original data spanning nearly two decades, I unravel the docket's empirical foundations. Applications practice changed fundamentally in recent years. Contrary to conventional wisdom, dispositions declined on average, but this conceals divergent trends: among applications involving stays and injunctions, capital dispositions decreased while noncapital dispositions increased. Moreover, noncapital applications now comprise a larger share of the docket than capital applications. This shift enhances docket salience because, as I show, most capital applications are denied simultaneous to denying plenary review, while most noncapital applications are disposed of without a linked merits petition on file. Thus, whereas applications were once mostly subsumed by agenda setting decisions, they are now increasingly impactful in their own right. Among noncapital applications, other important changes include more initial referrals, grants, reason giving, and written dissents. Among capital applications, requests to vacate stays of execution are increasingly common and typically granted. The results have important implications for debates about procedural legitimacy, institutional transparency, and the broader shadow docket's conceptual core.

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I. INTRODUCTION

Supreme Court applications are increasingly controversial. Decisions concerning stays and injunctions involving issues such as abortion,[1] election maintenance,[2] immigration enforcement,[3] and religious exercise[4] have brought focused attention to what had been a relatively obscure practice area outside of the death penalty context.[5] Press attention,[6] congressional hearings,[7] and discussion by a presidential commission on Court reform[8] demonstrate

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[1] *See, e.g.*, Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021) (denying an application to enjoin a Texas law prohibiting certain then-constitutional abortions and delegating enforcement to private parties).

[2] *See, e.g.*, Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (per curiam) (granting an application to stay a lower court's injunction extending a deadline to request absentee ballots due to pandemic-induced health concerns).

[3] *See, e.g.*, Barr v. E. Bay Sanctuary Covenant, 140 S. Ct. 3 (2019) (mem.) (granting an application to stay a lower court's injunction of a regulation limiting asylum seeking).

[4] *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curium) (granting an application to enjoin enforcement of a governor's executive order limiting in-person attendance at religious gatherings due to pandemic-induced health concerns).

[5] The Court's decisions on death penalty applications have long attracted attention. For examples of studies concerning capital applications, see generally Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225 (1992); Arthur J. Goldberg, *The Supreme Court Reaches Out And Touches Someone—Fatally*, 10 HASTINGS CONST. L.Q. 7 (1982); Nicole Veilleux, Note, *Staying Death Penalty Executions: An Empirical Analysis of Changing Judicial Attitudes*, 84 GEO. L.J. 2543 (1996).

[6] For examples of press coverage concerning the applications docket, see generally Editorial, *The "Shadow Docket" Diversion*, WALL ST. J. (Oct. 1, 2021, 7:43 PM), https://www.wsj.com/articles/the-shadow-docket-diversion-supreme-court-samuel-alito-11633123922 [https://perma.cc/BT5W-64S2]; John Fritze, *The Supreme Court Shadow Docket: Alabama Redistricting Case Renews Fight Among Justices*, USA TODAY (Feb. 8, 2022, 12:04 PM), https://www.usatoday.com/story/news/politics/2022/02/08/supreme-court-alabama-redistricting-case-renews-shadow-docket-fight/6698753001/ [https://perma.cc/6NH4-GNQY]; Charlie Savage, *Texas Abortion Case Highlights Concern Over Supreme Court's "Shadow Docket"*, N.Y. TIMES (Sept. 4, 2021), https://www.nytimes.com/2021/09/02/us/politics/supreme-court-shadow-docket-texas-abortion.html.

[7] For congressional hearings on the applications docket, see generally *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 117th Cong. (2021); *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (2021).

[8] *See* PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT, 203–15 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-

heightened political awareness. Scholarly commentary on applications is proliferating,[9] and Justices are discussing this practice area in opinions[10] and in public.[11]

1.pdf [https://perma.cc/3HKF-B5TE] (discussing various issues concerning applications practice).

[9] For examples of scholarly commentary concerning applications practice and the broader shadow docket, see STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023) [hereinafter VLADECK, SHADOW DOCKET]; Benjamin H. Barton, *Why Are These Justices Using the Shadow Docket More than Past Justices?*, 23 NEV. L.J. 845 (2023); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015); Jenny-Brooke Condon, *The Capital Shadow Docket and the Death of Judicial Restraint*, 23 NEV. L.J. 809 (2023); Caroline Frederickson, *Will American Democracy Last in Light of the Shadow Docket?*, 23 NEV. L.J. 727 (2023); Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827 (2021); Richard J. Pierce, Jr., *The Supreme Court Should Eliminate Its Lawless Shadow Docket*, 74 ADMIN. L. REV. 1 (2022); Michael E. Solimine, *Three-Judge District Courts, Direct Appeals, and Reforming the Supreme Court's Shadow Docket*, 98 IND. L.J. 37 (2023); Stephen I. Vladeck, *Emergency Relief During Emergencies*, 102 B.U. L. REV. 1787 (2022); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019) [hereinafter Vladeck, *Solicitor General*]; Cole Waldhauser, *Unprecedented Precedent: The Case Against Unreasoned "Shadow Docket" Precedent*, 37 CONST. COMMENT. 149 (2022); Andrew J. Wistrich, *Secret Shoals of the Shadow Docket*, 23 NEV. L.J. 863 (2023).

[10] *See, e.g.*, Merrill v. Milligan, 142 S. Ct. 879, 889 (2022) (Kagan, J., dissenting) (mem.) ("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."); *id.* at 879 (Kavanaugh, J., concurring) (responding that "[t]he principal dissent's catchy but worn-out rhetoric about the 'shadow docket' is . . . off target."); Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) (criticizing an application ruling "[w]ithout full briefing or argument, and after less than 72 hours' thought," with the majority "act[ing] without any guidance from the Court of Appeals" and "barely bother[ing] to explain its conclusion," adding that "[i]n all these ways, the majority's decision is emblematic of too much of this Court's shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend").

[11] *See* Krishnadev Calamur & Nina Totenberg, *Justice Breyer Says Supreme Court Upholding Texas Abortion Ban Was 'Very, Very Wrong,'* NPR (Sept. 9, 2021, 4:10 PM), https://www.npr.org/2021/09/09/1035181247/justice-breyer-says-supreme-court-upholding-texas-abortion-ban-was-very-very-wro [https://perma.cc/K862-ZPEB] (reporting on an interview with Justice Breyer where he criticized an application ruling and said it is "a huge mistake to decide major things without the normal full argument"); 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 (reporting on an interview with Justice Breyer where he suggested that the Court should "be careful" about the frequency of its decisions and explain its rulings more often); Adam Liptak, *Alito Responds to Critics Of the Supreme Court's "Shadow Docket*,*"* N.Y.

Despite increased prominence, the applications docket remains poorly understood. The Court's plenary decisions have been thoroughly catalogued[12] and analyzed.[13] Empirical studies inform our understanding of topics such as agenda setting,[14] briefing,[15] oral argument,[16] opinion assignment,[17] bargaining over opinion

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TIMES (Oct. 4, 2021), https://www.nytimes.com/2021/09/30/us/politics/alito-shadow-docket-scotus.html [hereinafter Liptak, *Alito Responds*] (reporting on a speech by Justice Alito defending the Court's applications practice).

[12] For examples of data on merits decisions, see generally Harold J. Spaeth, *The Expanded Burger Court Judicial Database*, JUD. RSCH. INTITIATIVE, UNIV. S.C., http://artsandsciences.sc.edu/poli/juri/sct.htm [https://perma.cc/4LTL-AE47]; Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger & Sara C. Benesh, *The Supreme Court Database*, WASH. UNIV. ST. LOUIS, http://scdb.wustl.edu/index.php [https://perma.cc/LU5R-3E3K].

[13] For examples of empirical studies on merits decisions, see generally TOM S. CLARK, THE SUPREME COURT: AN ANALYTIC HISTORY OF CONSTITUTIONAL DECISION MAKING (2019); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992).

[14] For examples of empirical studies on agenda setting, see generally DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT (1980); Ryan C. Black & Christina L. Boyd, *U.S. Supreme Court Agenda Setting and the Role of Litigant Status*, 28 J.L. ECON. & ORG. 286 (2012); Gregory A. Caldeira, John R. Wright & Christopher J.W. Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549 (1999).

[15] For examples of empirical studies on briefing, see generally Morgan L.W. Hazelton & Rachael K. Hinkle, PERSUADING THE SUPREME COURT: THE SIGNIFICANCE OF BRIEFS IN JUDICIAL DECISION-MAKING (2022); Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties' Brie*fs, 61 POL. RSCH. Q. 468 (2008); Justin Wedeking, *Supreme Court Litigants and Strategic Framing*, 54 AM. J. POL. SCI. 617 (2010).

[16] For examples of empirical studies on oral argument, see generally RYAN C. BLACK, TIMOTHY R. JOHNSON & JUSTIN WEDEKING, ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT (2012); TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT (2004); Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. 1161 (2019).

[17] For examples of empirical studies on opinion assignment, see generally Jeffrey R. Lax & Kelly Radar, *Bargaining Power in the Supreme Court: Evidence from Opinion Assignment and Vote Switching*, 77 J. POLITICS 648 (2015); Forrest Maltzman & Paul J. Wahlbeck, *A Conditional Model of Opinion Assignment on the Supreme Court*, 57 POL. RSCH. Q. 551 (2004); Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729 (2006).

content,[18] opinion writing,[19] precedent treatment,[20] and separate opinion production.[21] Empirical studies concerning applications are emerging,[22] but we still lack a comprehensive understanding of this practice area.

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[18] For examples of empirical studies on bargaining over opinion content, see generally LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 65–79 (1998); Cliff Carrubba, Barry Friedman, Andrew D. Martin & Georg Vanberg, *Who Controls the Content of Supreme Court Opinions?*, 56 AM. J. POL. SCI. 400 (2012); Paul J. Wahlbeck, James F. Spriggs, II & Forrest Maltzman, *Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court*, 42 AM. J. POL. SCI. 294 (1998).

[19] For examples of empirical studies on opinion writing, see generally Ryan C. Black, Ryan J. Owens, Justin Wedeking & Patrick C. Wohlfarth, *The Influence of Public Sentiment on Supreme Court Opinion Clarity*, 50 L. & SOC'Y REV. 703 (2016); Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 621, 624–25 (2008); Pamela C. Corley, Paul M. Collins Jr. & Bryan Calvin, *Lower Court Influence on U.S. Supreme Court Opinion Content*, 73 J. POLITICS 31 (2011).

[20] For examples of empirical studies on precedent treatment, see generally SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946–1992 (1995); THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT (2006); Frank B. Cross, James F. Spriggs II, Timothy R. Johnson & Paul J. Wahlbeck, *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489.

[21] For examples of empirical studies on concurring and dissenting opinions, see generally PAMELA C. CORLEY, CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT (2010); Pamela C. Corley, Amy Steigerwalt & Artemus Ward, *Revisiting the Roosevelt Court: The Critical Juncture from Consensus to Dissensus*, 38 J. SUP. CT. HIST. 20 (2013); Lee Epstein, Jeffrey A. Segal & Harold J. Spaeth, *The Norm of Consensus on the U.S. Supreme Court*, 45 AM. J. POL. SCI. 362 (2001).

[22] For examples of empirical studies on applications, see generally Alex Badas, Billy Justus & Siyu Li, *Assessing the Influence of Supreme Court's Shadow Docket in the Judicial Hierarchy*, 43 JUST. SYS. J. 609 (2022); Lawrence Baum, *Applications for Supreme Court Stays: Patterns in Responses by Justices and the Court*, L. & CTS. NEWSL., Fall 2022, at 5 [hereinafter Baum, *Patterns*]; Lawrence Baum, *Decision Making in the Shadows: A Look at Supreme Court Decisions on Stays*, L. & CTS. NEWSL., Fall 2020, at 1 [hereinafter Baum, *Shadows*]; Nicholas D. Conway & Yana Gagloeva, *Out of the Shadows: What Social Science Tells Us About the Shadow Docket*, 23 NEV. L.J. 673 (2023); Pablo Das, Lee Epstein & Mitu Gulati, *Deep in the Shadows?: The Facts About the Emergency Docket*, 109 VA. L. REV. ONLINE 73 (2023); Benjamin B. Johnson, *The Active Vices*, 75 ALA. L. REV. 917 (2023); Ben Johnson & Logan Strother, *Shedding Light on the Roberts Court Shadow Docket* (Aug. 27, 2022) (unpublished manuscript), https://dx.doi.org/10.2139/ssrn.4202390; *Case Selection and Review at the Supreme Court: Hearing Before the Comm'n*, PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S. 4–5 (2021) (testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Fed. Cts., Univ. of Tex. Sch. of L.), https://www.whitehouse.gov/wp-content/uploads/2021/06/Vladeck-SCOTUS-Commission-Testimony-06-30-2021.pdf [https://perma.cc/5P8B-D92L]; Vladeck, *Solicitor General*, *supra* note 9.

I advance our understanding of the applications docket with original data on Court (as opposed to in-chambers) decisions from the 2003 through 2021 Terms.[23] Several key findings emerge. Contrary to conventional wisdom, dispositions declined on average.[24] But this result masks divergent trends: among applications involving stays and injunctions, capital dispositions decreased while noncapital dispositions increased.[25] Moreover, noncapital applications now comprise a larger share of the docket than capital applications.[26] This shift enhances docket salience because, as I show, most capital applications are denied simultaneous to denying plenary review, while most noncapital applications are disposed of without a merits petition on file.[27] Thus, whereas applications were once primarily subsumed by agenda setting decisions, they are now increasingly impactful in their own right. Among noncapital applications, other recent changes include more initial referrals, grants, reason giving, and written dissents.[28] Among capital cases, requests to vacate stays of execution are increasingly common and typically granted.[29]

Before proceeding, it is important to explain why I use the term "applications docket"[30] rather than "shadow docket"[31] or "emergency

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[23] For more information regarding in-chambers decisions on applications, see Das, Epstein & Gulati, *supra* note 22, at 82–87; Baum, *Shadows*, *supra* note 22, at 2.

[24] *See infra* section II.C.

[25] *See infra* section II.C. Dispositions involving miscellaneous requests such as bail, certificates of appealability, and filing exemptions comprise a relatively small share of applications decided by the Court as opposed to in chambers. *See infra* section II.C. Most applications decided in chambers involve requests for time extensions. *See infra* note 69.

[26] *See infra* section II.C.

[27] *See infra* section section IV.A.*3*.

[28] *See infra* Part IV.

[29] *See infra* section III.A.*2* (discussing the increase in requests to vacate stays of execution); section III.C.*1* (discussing the grant rate on requests to vacate stays of execution).

[30] *See* Johnson, *supra* note 22, at 928 (2023) (using the terms "applications docket" and "shadow docket" when referring to applications); Johnson & Strother, *supra* note 22, at 3 (same); *see also* Das, Epstein & Gulati, *supra* note 22, at 80 (using the term "emergency applications docket").

[31] *See, e.g.*, Solimine, *supra* note 9, at 37–38 ("The term [shadow docket] lacks a precise definition, but it usually refers to the Court deciding emergency orders, granting or denying requests for stays of lower court decisions, often on a hurried basis with rudimentary briefing and no oral argument, and with no or limited explanation by the Court as a whole or individual Justices.").

docket."[32] Debating what to call this practice area may seem pedantic, or like "little more than a distraction,"[33] but discussion about applications is conceptually confused, which has deleterious consequences for conversation quality and empirical assessment.[34] The positive case for "applications docket" is that it is unambiguous: "applications" is a term of art, and there is a distinct "docket" with submissions receiving "A" series numbers.[35]

Aside from the positive case, "shadow docket" and "emergency docket" are misleading as applied solely to all applications. The term "shadow docket" has a broader connotation, meaning "the many things the Supreme Court does outside of the normal course of its merits docket."[36] As originally understood, "shadow docket" was synonymous with "orders list."[37] Applications are just one part

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[32] For examples of references to the "emergency docket," see William Baude, *Reflections of a Supreme Court Commissioner*, 106 MINN. L. REV. 2631, 2649 (2022); Das, Epstein & Gulati, *supra* note 22 at 74; Edward L. Pickup & Hannah L. Templin, *Emergency-Docket Experiments*, 98 NOTRE DAME L. REV. REFLECTION 1, 1 (2022); Carolyn Shapiro, *The Limits of Procedure: Litigating Voting Rights in the Face of a Hostile Supreme Court*, 83 OHIO ST. L.J. ONLINE 111, 111 (2022). *See also infra* note 46 (discussing recent use of the term in opinions).

[33] VLADECK, SHADOW DOCKET, *supra* note 9, at 243.

[34] It is particularly problematic when empirical studies ostensibly generate conclusions about the same topic while actually studying different phenomena as a result of conceptual confusion embedded in the literature. *See, e.g.*, Greg Goelzhauser, *Classifying Judicial Selection Institutions*, 18 STATE POL. & POL'Y Q. 174 (2018) (demonstrating difficulties evaluating institutional performance with respect to judicial selection and retention mechanisms due to a lack of conceptual and empirical coordination). This problem is already arising in empirical studies concerning the shadow docket. *Compare* Badas, Justus & Li, *supra* note 22 (drawing inferences about the shadow docket using data on applications), *with* Johnson & Strother, *supra* note 22 (applications and motions).

[35] *See* STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE 16-10 (11th ed. 2019) (describing applications practice).

[36] Baude, *supra* note 32, at 2649; *see also* Baude, *supra* note 9, at 1 (defining the "shadow docket" as "a range of orders and summary decisions that defy [the Court's] normal procedural regularity").

[37] *See generally* Baude, supra note 9 (introducing the term "shadow docket" but using "orders list" as a synonym throughout); *see also* Barry Friedman, *Letter to Supreme Court (Erwin Chemerinsky is Mad. Why You Should Care.)*, 69 VAND. L. REV. 995, 1011 (2016) (suggesting "what Will Baude calls the 'shadow docket' [is] the 'orders list' to the rest of us"); Zina Makar, *Per Curiam Signals in the Supreme Court's Shadow Docket*, 98 WASH. L. REV. 427, 428 (2023) (using the terms "shadow docket" and "orders docket" synonymously). For an argument that the shadow docket should be reconceptualized, see *infra* section VI.B.

of the shadow docket on this definition.[38] Increasing controversy surrounding applications seems to have generated some definitional drift such that "shadow docket" is now regularly used synonymously with "applications docket." Meanwhile, however, the term continues to be used in accordance with its broader original definition.[39]

The term "emergency docket" is generally used synonymously with "applications docket," but this is misleading. The Cambridge Dictionary defines "emergency" as "a dangerous or serious situation that happens unexpectedly and needs fast action in order to avoid harmful results."[40] Some but not all applications involve emergencies, and the mix is an open empirical question.[41] Moreover,

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[38] On this definition, the shadow docket also includes, for example, summary decisions, motions, and cert denials.

[39] *See, e.g.*, Barry P. McDonald, *SCOTUS's Shadiest Shadow Docket*, 56 WAKE FOREST L. REV. 1021 (2021) (discussing opinions related to orders); Aaron L. Nielson & Paul Stancil, *Gaming Certiorari*, 170 U. PA. L. REV. 1129, 1181–89 (2022) (summary reversals). The term "shadow docket" has also been transported outside the U.S. Supreme Court context. *See, e.g.*, Rebecca Frank Dallet & Matt Woleske, *State Shadow Dockets*, 2022 WIS. L. REV. 1063 (discussing state supreme courts); Faiza W. Sayed, *The Immigration Shadow Docket*, 117 NW. U. L. REV. 893 (2023) (Board of Immigration Appeals); Jennifer E. Sturiale, *The* Other *Shadow Docket: The JPML's Power to Steer Major Litigation*, 2023 U. ILL. L. REV. 105 (Judicial Panel on Multidistrict Litigation).

[40] *Emergency*, CAMBRIDGE ACAD. CONTENT DICT., https://dictionary.cambridge.org/us/dictionary/english/emergency [https://perma.cc/T4XD-YZUB].

[41] Some but not all applications are presented as "emergency" applications. *Compare* Emergency Application for Stay of Injunctive Relief at i, Barnes v. Ahlman, No. 20A19 (U.S. Aug. 5, 2020), *with* Application for Stay, Clarno v. People Not Politicians Or., No. 21A21 (U.S. Aug. 11, 2020). The Court's rules do not distinguish "emergency" applications, and it is unclear whether an applicant's presentation of an "emergency application" matters with respect to internal management. The Court occasionally uses the phrase "emergency application" in orders, but it is unclear whether this is intended to be a term of art. *See, e.g.,* Whitcomb v. Chavis, 396 U.S. 1055 (1970) (mem.) ("Emergency application for stay . . . granted pending timely filing and disposition of an appeal."). If the Court distinguishes emergency applications, it should be transparent about this practice and revise its rules to clarify procedures. For more on the formal creation of an emergency docket, see *infra* section VI.C.

The term "emergency docket" has been used in opinions three times, each of them concurring or dissenting in the disposition of an application. Louisiana v. Am. Rivers, 142 S. Ct. 1347, 1349 (2022) (Kagan, J., dissenting) (mem.); Merrill v. Milligan, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring) (mem.); Does v. Mills, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring) (mem.). The first opinion was published about one month after Justice Alito gave a speech using the phrase while criticizing the term "shadow docket." *See infra* notes 45–46 and accompanying text (discussing Alito's speech). Relatively recent emergence of the term "emergency docket" in opinions suggests, as with Alito's speech, that it may be at least partly

an emergency need not be present to submit applications or obtain relief under the Court's rules, authorizing legislation, or applicable analytical frameworks.[42] These issues remain even if emergency is defined more loosely in terms of time sensitivity.[43] Federal and state courts have long considered emergency filings, but regularly distinguish requests that can be handled in due course from those that arise unexpectedly and require immediate attention.[44] As applied to all applications, the term "emergency docket" is overinclusive.

Coordinating around "applications docket" also avoids persuasive-framing concerns. Justice Alito criticized the phrase "shadow docket" as a "sinister term . . . used to portray the [C]ourt as having been captured by a dangerous cabal that resorts to sneaky and improper methods to get its ways," in turn "feed[ing] unprecedented efforts to intimidate the [C]ourt and to damage it as an independent institution."[45] Preferring "emergency docket," he added: "You can't expect [emergency medical technicians] and the

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intended to counter use of the phrase "shadow docket." *See Merrill*, 142 S. Ct. at 879 (Kavanaugh, J., concurring) (using "emergency docket" after criticizing "[t]he principal dissent's catchy but worn-out rhetoric about the 'shadow docket'"). Among Justices nominated by Democratic presidents, Justice Kagan is the only one to have used the term "emergency docket" in an opinion. Moreover, Kagan's use of the term may have been somewhat sarcastic. *See Am. Rivers*, 142 S. Ct. at 1349 (Kagan, J., dissenting) (criticizing the majority for granting a stay despite "the applicants hav[ing] failed to make the irreparable harm showing," arguing that the decision "render[ed] the Court's emergency docket not for emergencies at all," leaving it "only another place for merits determinations—except made without full briefing and argument").

[42] For more information on applications practice, see *infra* section II.A. The irreparable harm standing governing stays and injunctions may come closest. *See* Louisiana v. Am. Rivers, 142 S. Ct. 1347, 1349 (2022) (Kagan, J., dissenting) (mem.) (linking use of the phrase "emergency docket" to the irreparable harm standard). But "emergency" and "irreparable harm" are distinct concepts notwithstanding overlap in particular cases. Moreover, not all applications involve stays and injunctions. *See infra* Part V (discussing miscellaneous requests); note 69 (highlighting evidence that most applications request time extensions).

[43] *See, e.g.*, *Emergency*, MERRIAM-WEBSTER DICT., https://www.merriam-webster.com/dictionary/emergency [https://perma.cc/NE6M-WDLM] (providing a secondary definition of "emergency" meaning "an urgent need for assistance or relief"). *See also infra* note 47 (discussing a recent rule change concerning amicus briefs where the Court indicates that applications involve time-sensitive matters).

[44] *See infra* notes 217–220 and accompanying text (describing example court rules distinguishing emergency requests).

[45] Liptak, *Alito Responds*, *supra* note 11 (quoting Justice Alito).

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."[46] But if "shadow docket" is problematic because it suggests the Court uses "improper methods," the opposite might be said about "emergency docket," particularly when analogizing applications practice to emergency medical treatment on people. The arguable implication is that concerns about procedural legitimacy and institutional transparency are misguided, or at least overstated, given the purported emergency posture in which the Court manages applications.

Going forward, Part II provides essential background information for understanding the ensuing empirical analysis. I discuss applications practice, data collection, and disposition trends. Part III analyzes data on capital applications involving stays and injunctions. Part IV analyzes data on noncapital applications involving stays and injunctions. Part V analyzes data on miscellaneous applications. Part VI discusses lessons for drawing inferences about institutional performance, reconceptualizing the shadow docket, and debates concerning procedural legitimacy and institutional transparency. Part VII concludes.

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[46] *Id*. Justice Alito's analogy invokes an "emergency" concept resembling common usage as reflected in the Cambridge Dictionary definition rather than one merely emphasizing time sensitivity. *See supra* note 40 and accompanying text (noting the Cambridge Dictionary definition); note 43 and accompanying text (noting a secondary definition emphasizing time sensitivity). The extent to which applications involve emergencies as that term is commonly understood is an open empirical question. Most applications involve requests for time extensions. *See infra* note 69. As applied to these applications, for example, Alito's analogy is strained. *See also infra* note 220 (describing a federal district court's rule stating that most time-extension requests will not be considered under emergency procedures). Alito is obviously not discussing time extensions, but either "emergency docket" describes all applications or only a subset of applications. Assuming at best only a subset of applications warrant comparing Justices determining whether to grant relief to emergency medical treatment on people, then "emergency docket" is misleading when used as a synonym for "applications docket." If the Court already distinguishes "emergency" applications, it should be transparent about this and revise its rules to clarify procedures. *See supra* note 41 (discussing occasional use of "emergency" in applications and opinions). If not, the Court might consider revising its rules to create an actual "emergency docket" with transparent procedures. *See infra* section VI.C (discussing potential value in creating an "emergency docket").

II. APPLICATIONS

This Part informs the ensuing empirical analysis. First, I discuss background principles governing applications practice. Second, I describe data collection procedures. Third, I situate the data within broader normative debates concerning applications. Last, I discuss disposition trends and the importance of data disaggregation.

A. BACKGROUND

Applications are governed by authorizing legislation, Court rules, and custom. The Court does not define "application" despite it being a term of art.[47] No authorizing legislation addresses applications per se, but statutes confer the Court with relevant authority. Most prominently, the All Writs Act authorizes federal courts to "issue all writs necessary or appropriate in aid of their

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[47] *See* SUP. CT. R. 22 (discussing procedure rather than substance). A recent "Reporter's Guide to Applications" published by the Court's Public Information Office states: "An application is a request for emergency action addressed to an individual Justice." PUB. INFO. OFF., U.S. SUP. CT., A REPORTER'S GUIDE TO APPLICATIONS PENDING BEFORE THE SUPREME COURT OF THE UNITED STATES 2 (2022), https://www.supremecourt.gov/publicinfo/reportersguide.pdf [https://perma.cc/57TL-35KJ]. That definition does not appear in the Court's rules or any authorizing legislation. If the Court intends to define applications in terms of "emergency action," it should revise its rules accordingly. If not, the Public Information Office should revise its "reporter's guide" accordingly. *See also supra* notes 40–46 and accompanying text (discussing misleading use of "emergency" as applied to all applications).

A 2023 revision to the rule governing amicus participation reads: "An *amicus curiae* brief in connection with an application . . . must be filed as promptly as possible considering the nature of the relief sought and any asserted need for emergency action. In light of the time-sensitivity of such applications, the filing of these briefs is discouraged . . . ." SUP. CT. R. 37.4. This provision contains the only official references to "emergency" or "time-sensitivity" as applied to applications. The "time-sensitivity" reference seems to apply to applications generally, but the "any asserted need for emergency action" reference (correctly) indicates that applications may but need not involve emergencies. The "any asserted need for emergency action" language also appears in a rule governing responses to motions that was adopted more than half a century earlier. *Id.* 21.4; *see also id.* 35.4 (1967) (adopting the "any asserted need for emergency action" language for responses to motions). If the Court intends to define applications in terms of "emergency action" or "time-sensitivity," it should do so in its rule governing applications rather than one governing amicus participation.

respective jurisdictions and agreeable to the usages and principles of law."[48] The Court's rules passingly acknowledge that power to grant relief via application is limited, but do not define the contours of this authority.[49]

Applications are submitted to individual Justices.[50] Upon receipt, the assigned Justice can decide the matter in chambers or refer it to the Court.[51] Subject to certain restrictions, if an application is denied in chambers it can be resubmitted to any Justice, though reapplication is "not favored" by Court rule unless it was denied without prejudice.[52] Upon reapplication, the second-assigned Justice can decide the matter in chambers or refer it to the Court.[53] To disincentivize judge shopping and conserve time, the norm is to refer reapplications.[54]

B. DATA COLLECTION

I collected applications data from two sources. First, I used the *Journal of the Supreme Court of the United States* (*Journal*) to acquire every Court (as opposed to in-chambers) decision on an application from the 2003 through 2021 terms.[55] From the *Journal*,

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[48] All Writs Act, 28 U.S.C. § 1651(a); *see also* SHAPIRO ET AL., *supra* note 35, at 17-9 (stating that the All Writs Act is a "crucial source of authority" governing applications). In addition, 28 U.S.C. § 2101(f) authorizes the Court or a single Justice to issue stays.

[49] *See* SUP. CT. R. 22.1 (indicating that "the Clerk . . . will transmit [an application] promptly to the Justice concerned if an individual Justice has authority to grant the sought relief").

[50] *Id.* 22 (discussing "Applications to Individual Justices"). This distinguishes applications from motions, which are submitted to the Court. *See id.* 21 (discussing "Motions to the Court"). *See also id.* 22.3 (discussing assignment procedures for applications).

[51] *Id.* 22.5. Although this rule specifies that "an application for a stay or for bail" may be referred, it seems requests for other types of relief may be referred as well.

[52] *Id.* 22.4. Reapplications are not permitted if the requested relief must be granted by the Circuit Justice, they are untimely, or they seek a time extension. *Id.*

[53] *Id.* 22.5.

[54] SHAPIRO ET AL., *supra* note 35, at 16-9.

[55] The *Journal* is a comprehensive source for orders list data. *See, e.g.*, Darcy Covert & Annie J. Wang, *The Loudest Voice at the Supreme Court: The Solicitor General's Dominance of Amicus Oral Argument*, 74 VAND. L. REV. 681, 685–86 (2021) (using the *Journal* to collect data on amicus motions to participate in oral argument). The *Journal* "contains the official minutes of the Court" and is available online with volumes dating back to 1889. *Journal,* U.S. SUP. CT., https://www.supremecourt.gov/orders/journal.aspx [https://perma.cc/VF79-BKDW]. I acquired decisions on applications by manually searching *Journal* volumes for the word

I collected the limited information provided in each order, including docket number, request description (e.g., stay, injunction), outcome (e.g., grant, deny), and separate-position taking (e.g., concur, dissent). Next, I acquired information on briefing, referrals, and time to disposition from the Court's online docket.[56]

The data presented here inform various normative debates about applications practice.[57] As an initial matter, commentators often express concern about "procedural regularity" with respect to the applications docket, including "consistency and transparency" on the understanding that advancing these goals promotes legitimacy.[58] But fully understanding the scope of this concern requires developing a better understanding of the docket's empirical foundations.

Our lack of knowledge about the applications docket extends to basic empirical questions. Observers often state, for example, that applications activity is "increasing" without clarifying the empirical evidence establishing that proposition.[59] Rather, statements such as these are generally followed by references to controversial decisions or empirical studies that establish more limited propositions. The

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"application." The sample begins with the 2003 Term because that is the first for which supplemental case information was systematically available from the Court's online docket. The *Journal* does not include orders on applications decided in chambers.

[56] *Docket Search*, U.S. SUP. CT. (2023), https://www.supremecourt.gov/docket/docket.aspx [https://perma.cc/T74M-RMMG].

[57] For an overview of common concerns about applications practice, see generally *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 16–22 (2021) (testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Fed. Cts., Univ. of Tex. Sch. of L.), https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf [https://perma.cc/V528-43CW].

[58] Baude, *supra* note 9, at 9–10.

[59] *See, e.g.*, Editorial, *supra* note 6 ("[S]ince about 2014 the Court's emergency orders have become more frequent, despite the Justices' preference that cases be resolved through the regular briefing and argument process."); Ian Millhiser, *The Supreme Court's Enigmatic "Shadow Docket" Explained*, VOX (Aug. 11, 2020), https://www.vox.com/2020/8/11/21356913/supreme-court-shadow-docket-jail-asylum-covid-immigrants-sonia-sotomayor-barnes-ahlman [https://perma.cc/4AVV-NEJH] ("The Court . . . has shifted an increasing share of its output to [the] shadow docket."); Savage, *supra* note 6 ("With increasing frequency the [C]ourt is taking up weighty matters in a rushed way, considering emergency petitions that often yield late-night decisions issued with minimal or no written opinions.").

data presented in this Article provide information on basic matters such as dispositions and grants over nearly two decades.

The applications data presented here contribute to other debates as well. For example, there is concern about a lack of reason giving,[60] such that a bill has been introduced in Congress requiring the Court to explain application rulings under certain circumstances.[61] But while the Court's norm of issuing unreasoned orders concerning applications is widely recognized, we do not know the reason-giving rate over a long time horizon. We also lack systematic data that would help assess concerns regarding controversial docket features such as time to disposition and briefing adequacy.[62] The data presented here address these issues.

Several issues concerning applications practice are beyond this Article's scope. As noted previously, I limit the analysis to Court as opposed to in-chambers decisions.[63] Moreover, I do not address

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[60] *See, e.g.*, Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) ("[S]hadow-docket decisionmaking . . . every day becomes more unreasoned . . . ."); 169 CONG. REC. H560 (daily ed. Jan. 31, 2023) (statement of Rep. Casten) ("Why do we allow ourselves to continue to live in a world where the Supreme Court can just decide to rule on something and not even explain it?"); 167 CONG. REC. S6880 (daily ed. Oct. 4, 2021) (statement of Sen. Durbin) (suggesting that "shadow docket" decisions "are often rendered . . . without . . . detailed explanation, or signed opinions"); Baude, *supra* note 9, at 14 (suggesting "we [are] often ignorant of the Justices' reasoning" on orders and that "it is difficult for lower courts to follow the Supreme Court's lead without an explanation of where they are being led" (emphasis omitted)); Adam Liptak, *Missing From Supreme Court's Election Cases: Reasons for Its Rulings*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/supreme-court-election-cases.html [https://perma.cc/UR3F-KTKB] (noting decisions on applications that "d[o] not bother to supply even a whisper of reasoning").

[61] Restoring Judicial Separation of Powers Act, H.R. 642, 118th Cong. § 202(h) (2023). Under a section titled "shadow docket limitation," the relevant provision reads: "No order reversing a decision of a court on appeals before the Supreme Court . . . shall issue unless [the Court] provides to the parties a written explanation supporting such reversal, which shall be published on [its] website." *Id*.

[62] *See, e.g.*, *Whole Woman's Health*, 141 S. Ct. at 2500 (Kagan, J., dissenting) (lamenting decisions on applications "[w]ithout full briefing"); 167 CONG. REC. S6880 (daily ed. Oct. 4, 2021) (statement of Sen. Durbin) (suggesting that "shadow docket" decisions "are often rendered . . . without full briefing").

[63] *See supra* note 23 and accompanying text.

matters such as vote suppression[64] or partisan divisions.[65] Last, neither the docket nor *Journal* include detailed case-level information over the sample period.[66]

C. DISAGGREGATING APPLICATIONS DATA

The Court considers various requests for relief through its applications docket. Although it is tempting to pool all applications when assessing institutional performance, doing so risks drawing misleading inferences. Data aggregation problems are common in

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[64] *See, e.g.*, Baude, *supra* note 9, at 14 (noting that "we often do not even know the votes of the orders with any certainty" (emphasis omitted)); Mark Sherman, *Justices Silent Over Execution Drug Secrecy*, AP NEWS (Aug. 4, 2014), https://apnews.com/article/9ce5b8d6ac5f47b3ab1e5b26a7bb4f00 [https://perma.cc/QZ58-AFQZ] ("[Justice] Ginsburg cautioned not to read too much into the absence of public dissent when the court rejects eleventh-hour appeals to stop executions. 'When a stay is denied, it doesn't mean we are in fact unanimous,' she said."). Although vote suppression is generally unobservable by definition, it clearly occurred in one case in this sample. In *Arthur v. Dunn*, 137 S. Ct. 14, 15 (2016) (separate statement of Roberts, C.J.) (mem.), Chief Justice Roberts indicated that he was providing a courtesy fifth vote to grant an application for a stay of execution. With eight Justices sitting, two noted dissent. *See id.* (Thomas and Alito, JJ. dissenting). Thus, one Justice did not disclose a vote to deny the application.

The literature on separate-opinion suppression yields some insight into this practice. *See, e.g.*, Greg Goelzhauser, *Graveyard Dissents on the Burger Court*, 40 J. SUP. CT. HIST. 188 (2015) [hereinafter Goelzhauser, *Graveyard Dissents*] (using Justices' private papers to reveal reasons for suppressing dissents); Greg Goelzhauser, *Silent Acquiescence on the Supreme Court*, 36 JUST. SYS. J. 3 (2015) [hereinafter Goelzhauser, *Silent Acquiescence*] (examining the empirical conditions under which Justices suppress dissents). Noting concurrence or dissent without explanation is a middle ground between suppressing a separate position entirely and joining the majority. *See, e.g.*, Madelyn Fife, Greg Goelzhauser, Kaylee B. Hodgson & Nicole Vouvalis, *Concurring and Dissenting without Opinion*, 42 J. SUP. CT. HIST. 171 (2017) (discussing silent concurrences and dissents over time); Greg Goelzhauser, *Silent Concurrences*, 31 CONST. COMMENT. 351 (2016) [hereinafter Goelzhauser, *Silent Concurrences*] (using Justices' private papers to reveal reasons for concurring silently).

[65] *See, e.g.*, David Cole, *The Justices Are Misusing the "Shadow Docket,"* WASH. POST, Aug. 20, 2020, at A21 (suggesting that "the [C]ourt has increasingly split along party lines" in its "shadow docket" decisions). For a discussion of Justice-level voting patterns during the 2021 Term, see Das, Epstein & Gulati, *supra* note 22.

[66] For recent Terms, the online docket includes electronic filings that can be used to observe case details over a more limited time horizon.

empirical research.[67] Pooled data may yield one conclusion, while disaggregation reveals disparate results.

The aggregation problem impacts basic issues concerning applications, including disposition trends over time. From the 2003 through 2021 Terms, the Court disposed of 1,565 applications, with a median of 84 per Term and range from 57 to 126. Figure 2.1 plots dispositions by Term.[68] Contrary to conventional wisdom, dispositions declined on average. Since the 2015 Term, for example, dispositions per Term have been at or below the sample-period median. Moreover, the 2020 and 2021 Terms respectively produced the fourth- and fifth-lowest number of dispositions over the sample period.

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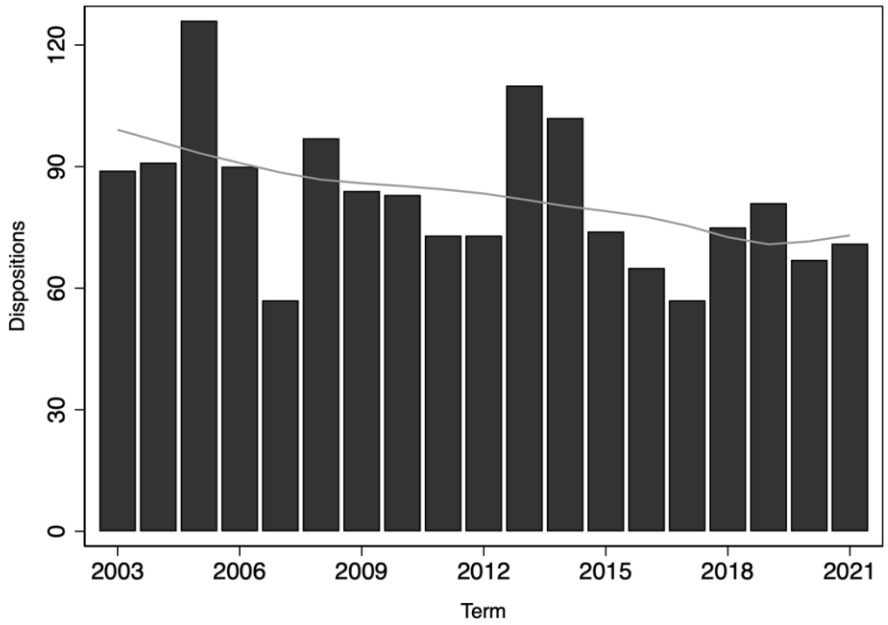
[67] *See, e.g.*, Ryan C. Black & Lee Epstein, *(Re-)Setting the Scholarly Agenda on Transjudicial Communication*, 32 L. & SOC. INQUIRY 791, 797–99 (2007) (finding that differential trends emerge when disaggregating data on U.S. federal court references to courts in other countries); Tina J. Kauh, Jen'nan Ghazal Read & A.J. Scheitler, *The Critical Role of Racial/Ethnic Data Disaggregation for Health Equity*, 40 POPULATION RSCH. & POL'Y REV. 1, 2–3 (2021) (discussing the importance of disaggregating health data on the basis of race and ethnicity due to within-group differences).

[68] The horizontal bars represent the number of dispositions; the gray line is a lowess smoother clarifying the trend.

Figure 2.1: Applications Docket Dispositions



Total dispositions are a useful measure of aggregate workload, but distinguishing applications substantively yields more nuanced insights concerning docket activity. I disaggregate applications into three categories: noncapital applications involving stays and injunctions (noncapital applications), capital applications involving stays and injunctions (capital applications), and miscellaneous applications that do not involve stays or injunctions (miscellaneous applications). There are other ways to bin applications, but this approach strikes a reasonable balance between recognizing important qualitative distinctions while guarding against excessive disaggregation, which would frustrate systematic empirical analysis.[69]

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[69] One alternative binning strategy would be to disaggregate what I call "miscellaneous" applications, distinguishing, for example, requests for exemptions from Court rules (e.g., filing deadlines, page limits) from requests for substantive relief (e.g., bail, certificate of appealability). Among Court dispositions in this sample, there were insufficient miscellaneous applications to warrant disaggregation. But there may be enough variation among in-chambers dispositions to warrant more nuanced categorization. Most in-chambers

Disaggregating applications by category, Figure 2.2 plots trends in total dispositions (left panel) and dispositions as a percentage of the docket (right panel). It is apparent that Figure 2.1 conceals divergent trends for capital and noncapital applications, which respectively decreased and increased on average. Furthermore, after considerable divergence early in the sample, noncapital dispositions surpassed capital dispositions for the first time during the 2015 Term, then again from the 2019 through 2021 Terms.[70] To the extent contemporary docket controversy emphasizes noncapital cases, these divergent trends, and inverted disposition totals, are consistent with the conventional wisdom of increasing activity.[71]

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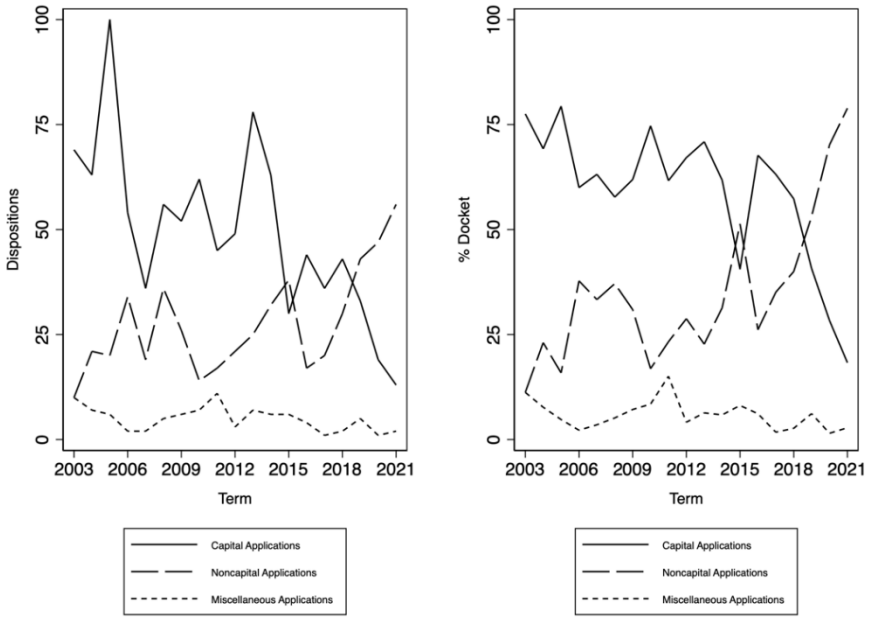
dispositions involve requests for time extensions. *See* Baum, *Patterns*, *supra* note 22, at 12 ("Except for a brief period in 2020–2021, the preponderance of . . . applications [were] for extensions of time . . . ."); Das, Epstein & Gulati, *supra* note 22, at 79 ("[T]he vast majority of emergency applications are requests to extend the filing time of certiorari petitions . . . ."); Daniel M. Gonen, *Judging In Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159, 1172 (2008) ("The vast majority of . . . applications–almost 80%–are applications for extensions of time . . . ."). Reapplications requesting time extensions are not permitted by Court rule. SUP. CT. R. 22.4

[70] Comparing the sample period's beginning and end, for example, capital and noncapital applications respectively comprised 78% and 11% of the docket during the 2003 Term, and 18% and 79% of the docket during the 2021 Term.

[71] As shown later, most capital applications are denied simultaneous to denying plenary review, while most noncapital applications are disposed of without a linked merits petition on file. *See infra* section III.A.*3* (discussing merits petitions linked to capital applications); section IV.A.*3* (noncapital applications).

Figure 2.2: Dispositions by Category



Analyzing disposition trends reveals the importance of data disaggregation.[72] The overall grant rate provides another example. In total, the Court granted 12% of applications over the sample period. But aside from generalized willingness to grant relief, what does that mean substantively? Does the rate differ across capital and noncapital applications? Does it differ within categories, such as by whether capital applications seek to halt or advance death penalty proceedings? Does it differ by whether an application is referred for initial disposition or first denied in chambers? Does it differ by linked merits petition status? Similar questions arise when considering other matters. The point is that the applications docket is complex. In the remainder of this Article, I analyze category-specific data and trends to account for this complexity.

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[72] The decrease in capital dispositions is consistent with broader declines in death sentences and executions. *See infra* notes 76–77. But that does not explain the increase in noncapital dispositions.

III. CAPITAL STAYS AND INJUNCTIONS

This Part analyzes capital applications concerning stays and injunctions.[73] I begin by discussing total workload before disaggregating dispositions by substantive goal and merits petition status.[74] Next, I examine briefing and time to disposition. Last, I discuss grants, reason giving, and separate positions.

A. WORKLOAD

1. Dispositions. The Court disposed of 945 capital applications from the 2003 through 2021 Terms, with a median of 56 per term and range from 13 to 100.[75] Figure 3.1 plots the trend. Consistent with broader downward trends in death sentences and executions,[76] capital dispositions declined on average. Sample-period low totals were recorded during the 2020 and 2021 Terms, presumably due in part to the pandemic-induced reduction in state executions.[77] All but one capital application was referred to the Court for initial

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[73] Applications involving stays and injunctions in capital cases can generally be identified from the order text or docket page. I resolved uncertainty by searching state and federal opinion databases by party name to determine whether a death sentence was at issue below.

[74] The probability of the Court granting a stay in a capital case presumably depends in part on the procedural posture. *See, e.g.*, SHAPIRO ET AL., *supra* note 35, at 18-4 (indicating that "a stay of execution is virtually automatic" on direct review); *id.* at 18-10 ("Obtaining a stay of execution pending a second or successive federal habeas petition is considerably more difficult than at the earlier stages."); Z. Payvand Ahdout, *Direct Collateral Review*, 121 COLUM. L. REV. 159, 168–83 (2021) (suggesting that there has been a recent increase in the likelihood of the Court granting merits review in capital cases on collateral review from state courts). This information is not available from the *Journal* or docket over the sample period.

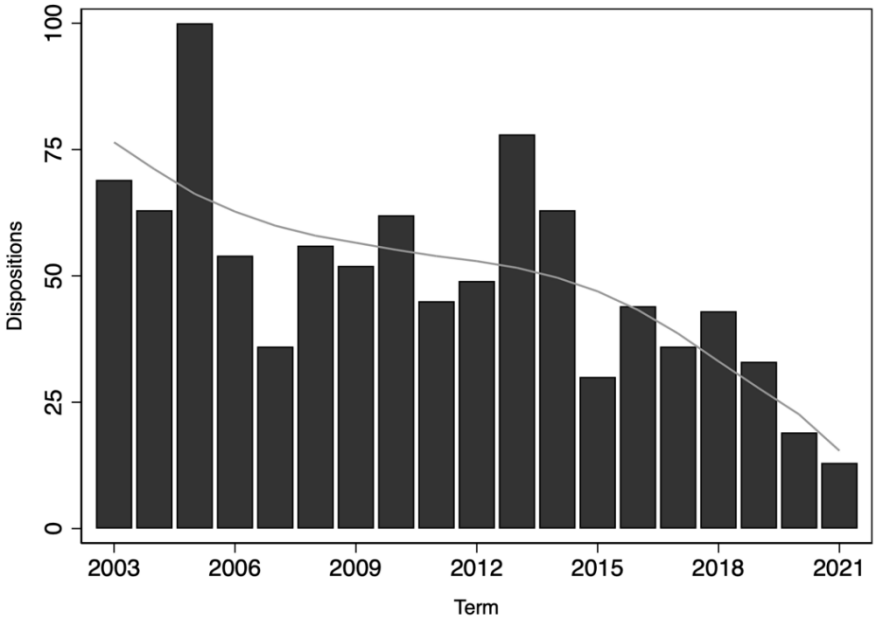
[75] The mean was fifty-eight, with standard deviation of twenty-one.

[76] *See, e.g.*, FRANK R. BAUMGARTNER, SUZANNA L. DE BOEF & AMBER E. BOYDSTUN, THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE 35–39 (2008) (discussing declining numbers of death-row inmates, death sentences, and executions); Ankur Desai & Brandon L. Garrett, *The State of the Death Penalty*, 94 NOTRE DAME L. REV. 1255 (2019) (discussing declining death sentences).

[77] *See, e.g.*, Austin Sarat & Ryan Kyle, *The Death Penalty in Dark Times: What Crises Do (or Do Not Do) to Capital Punishment*, 7 U. PA. J.L. & PUB. AFFS. 227, 228–29 (2022) (discussing the COVID-19 pandemic's impact on state executions); Hailey Fuchs, *Federal Executions Set to Resume Amid a Pandemic and Protests*, N.Y. TIMES (June 30, 2020), https://www.nytimes.com/2020/06/30/us/politics/federal-executions-pandemic.html (same).

disposition,[78] suggesting this may be the norm regardless of perceived merit.[79]

Figure 3.1: Capital Application Dispositions



2. Substantive Goal. Disaggregating applications by whether the underlying substantive goal was to halt or advance capital proceedings reveals disparate trends.[80] Applications to halt

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[78] For the in-chambers denial, see Order Denying Application, Green v. Texas, 568 U.S. 960 (Oct. 10, 2012), No. 12A346 (Scalia, J.). Justice Ginsburg referred the matter to the Court upon reapplication. *See* Order Referring Application, Green v. Texas, 568 U.S. 960 (Oct. 10, 2012), No. 12A346 (Ginsburg, J.). On the same day Justice Scalia denied this application in chambers, he referred another from the same petitioner for initial disposition. *See* Order Referring Application, Green v. Thaler, 568 U.S. 960 (Oct. 10, 2012), No. 12A343 (Scalia, J.). For more on capital applicants filing multiple requests for relief, see *infra* note 88.

[79] *See* SHAPIRO ET AL., *supra* note 35, at 18-4 ("Applications in capital cases are often referred by the Circuit Justice to the full Court.").

[80] The terms "halt" and "advance" lack substantive nuance but efficiently distinguish between applications respectively requesting that the Court intervene to prohibit an execution from going forward and those that seek to move toward carrying out an execution. Applications to halt proceedings are generally filed by death-sentenced individuals or parties

proceedings comprised 93% of the sample, with a median of forty-four per Term and range from eleven to ninety-three.[81] Applications to advance proceedings, which comprised 7% of the sample, were submitted at a median rate of three per Term, with a range from zero to ten.[82] Figure 3.2 plots trends.[83] On average, decisions concerning applications to halt proceedings (left panel) declined. For applications to advance proceedings (right panel), the trend was concave up—declining on average early before increasing in recent Terms. As emphasized by Figure 3.2's same-scale y-axes, however, these applications were relatively rare, which complicates comparison.[84] The Trump administration's resumption of federal executions presumably partly explains the increase in applications

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either acting or attempting to act on their behalf, while requests to advance proceedings are generally filed by government officials. I identified one exception in this sample: *Glossip v. Gross I*, 574 U.S. 1143 (2015) (mem.). The Court previously denied stays of execution for three death-sentenced individuals over four dissenting votes, while the linked cert petition, which had been submitted on the same day as the application, was pending. Warner v. Gross, 574 U.S. 1112 (2015) (mem.). Oklahoma then executed the lead petitioner. *Glossip v. Gross II*, 576 U.S. 863, 876 (2015). Subsequently, the Court granted cert, but the other petitioners were scheduled to be executed prior to oral argument. *Id.*; Sean Murphy, *Oklahoma Executions on Hold as U.S. Supreme Court Reviews Drug*, AP NEWS (Jan. 28, 2015, 05:45 AM), https://apnews.com/article/ca8add2aa4f84545ada00b0aa3d158ea [https://perma.cc/7SXM-TDZD]. After Oklahoma Governor Mary Fallin refused to halt the executions, the state attorney general applied for a stay, which was granted. *See id.* (noting the governor's "prefer[ence] that the [C]ourt act.").

Capital applications also vary by requested relief. In this sample, 93% of applications requested a stay, 6% that a stay be vacated, and 1% either an injunction or that an injunction be vacated. Requests can be further disaggregated substantively, but not with these data. For example, some requests involve underlying challenges to a death sentence, while others involve questions concerning implementation, such as the government's use of a particular protocol or refusal to permit a religious advisor to be present. While statistics such as the grant rate may vary based on considerations like these, the information is not available from the *Journal* or docket over the sample period.

[81] The mean was forty-six, with a standard deviation of twenty.

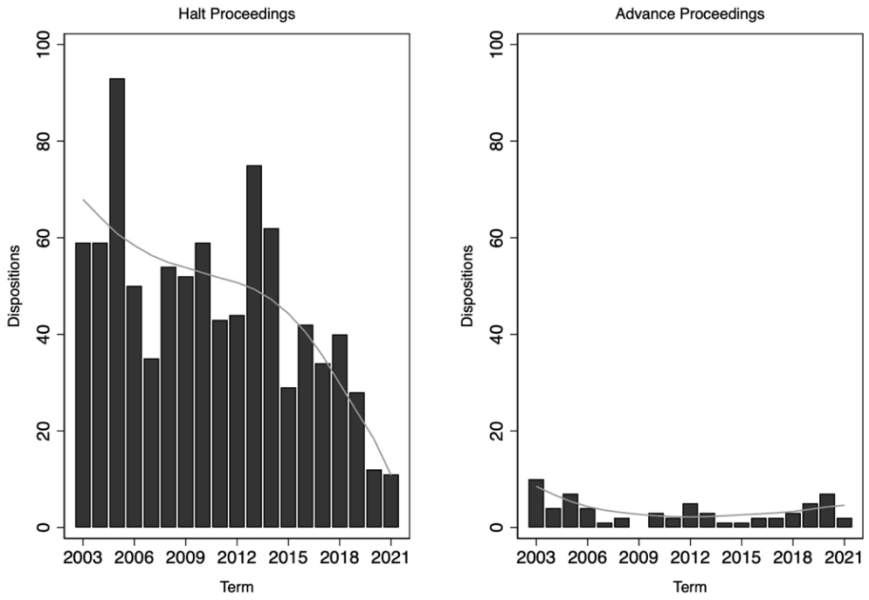
[82] The mean was three, with a standard deviation of three.

[83] The missing bar for the 2009 Term in the right panel indicates zero applications filed.

[84] The concave-up trend is more clearly depicted when truncating the y-axis, but doing so gives a misleading impression of the comparative frequency of applications to halt and advance proceedings.

to advance proceedings,[85] but the upward trend predates that initiative.[86]

Figure 3.2: Capital Dispositions by Substantive Goal



3. Merits Petition Status. Disaggregating capital applications by merits petition status yields important insights.[87] Overall, 72% of capital applications were decided simultaneous to the Court denying a linked merits petition, 19% without a linked merits

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[85] *See generally* Lee Kovarsky, *The Trump Executions*, 100 TEX. L. REV. 621 (2022) (discussing the Trump administration's resumption of federal executions).

[86] Applications to advance proceedings also increased, for example, in the 2018 and 2019 Terms.

[87] Aside from requesting cert, capital applicants regularly seek plenary review through petitions for a writ of habeas corpus. *See, e.g.*, *In re* Atwood, 142 S. Ct. 2809 (2022) (mem.) (simultaneously denying an application for a stay of execution and petition for a writ of habeas corpus). I coded merits petition status from the Court's docket, which lists merits petitions as being "linked with" applications. I then cross-checked the petition's docket page to confirm the sequence of submissions.

petition on file,[88] 7% with a merits petition pending decision, and 2% at miscellaneous stages.[89] Figure 3.3 plots trends. Following a period of relative stability, the percentage of applications decided simultaneous to denying a linked merits petition decreased on average in recent Terms, while the percentage of applications decided without a linked merits petition on file increased.[90]

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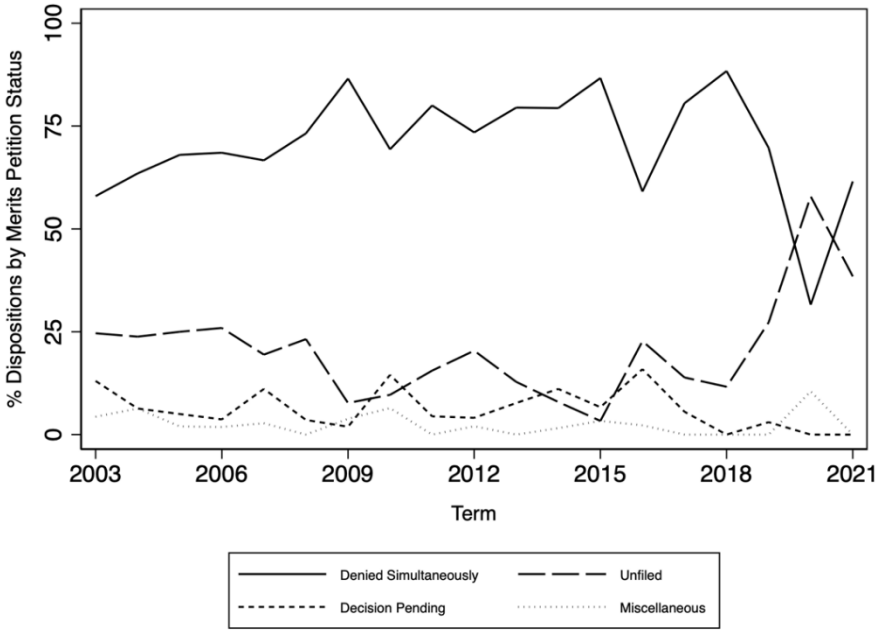
[88] Death-sentenced individuals regularly file multiple applications and merits petitions at the same time. These filings generally seem to arise out of cases with different procedural postures and questions presented. Classifying application interdependence such that some should be excluded from the empirical analysis is a difficult problem. A similar issue arises with cert petitions and companion opinions, though the problem is generally not acknowledged in empirical studies on agenda setting and merits decisions. Given my emphasis on aggregate docket activity, combined with lacking a reliable and valid way to measure nonindependence, I treat every disposition as a separate event.

[89] Of the twenty-three applications in the miscellaneous category, eighteen were linked to a previously denied merits petition, three to a petition that had been granted with a merits decision pending, one to a petition that was granted and decided simultaneously, and one to a petition that was granted and decided previously.

[90] During the 2020 Term, applications decided without a linked merits petition on file were more common than those decided while simultaneously denying a linked merits petition. This inversion was presumably due in part to a combination of the pandemic-induced reduction in state executions and the Trump administration's resumption of federal executions. While applications to halt proceedings are generally associated with wanting the Court to grant plenary review, applications to advance proceedings generally seek to end litigation in order to proceed with the executions.

Figure 3.3: Capital Dispositions by Merits Petition Status



Convergence between the trends in dispositions with a linked merits petition denied simultaneously and without a linked merits petition on file has important docket implications. As an initial matter, however, it is important to emphasize that every application disposed of simultaneous to the Court denying plenary review was filed to halt capital proceedings and denied.[91] When the Court simultaneously denies a merits petition and application in these circumstances, the latter is essentially subsumed by the former and

[91] Among applications to halt proceedings, 77% were decided simultaneous to the Court denying a linked merits petition, 13% were not linked to a merits petition, 7% were linked to a petition pending decision, and 3% can be grouped into a miscellaneous category. Of the twenty-two applications in the miscellaneous category, eighteen were linked to a previously denied merits petition, three to a granted petition pending decision on the merits, and one to a prior merits decision. Among applications to advance proceedings, 97% were not linked to a merits petition. Of the two applications that were linked, one petition was pending and the second was granted with the decision announced simultaneous to issuance of the order concerning the application. The convergence between dispositions linked with a simultaneously denied merits petition and without a linked merits petition depicted in Figure 3.3 may be partly due to the relative increase in applications to advance proceedings.

broader agenda setting considerations.[92] As a result, even with aggregate capital dispositions declining on average, decisions concerning applications independent from merits petitions were more prominent in recent Terms.[93]

B. INFORMATION ENVIRONMENT

1. Briefing. Briefing adequacy is a common concern regarding applications,[94] but we lack a systematic understanding of institutional practice. Overall, 37% of capital applications attracted a dedicated response brief.[95] Of the 348 response briefs in this sample, three followed from a call for response (CFR).[96] Conditioned

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[92] For an exception in the cert before judgment context, where the Court denied plenary review in a noncapital case while granting a stay to permit filing a regular cert petition in due course, see *infra* note 175 and accompanying text.

[93] Where denying a stay in a capital case without a linked merits petition will result in execution before a merits petition can be filed, the Justices presumably do their best to determine whether the application raises an issue warranting plenary review. *See, e.g.*, Memorandum of Justice Brennan 12 (Jan. 24, 1983), *archived in* Supreme Court Case Files: *Barefoot v. Estelle*, at 19, 30, WASH. & LEE SCHOLARLY COMMONS: LEWIS F. POWELL JR. ARCHIVES, https://scholarlycommons.law.wlu.edu/casefiles/736/ [https://perma.cc/WE4U-GH7P] ("[W]e cannot avoid at least the semblance of a decision on the merits [when denying a stay of execution], because it is difficult, if not impossible, that this Court would send a man to his death without actually deciding whether [the underlying claim warrants review]."). To the extent that is true, decisions on applications that are not linked to merits petitions may effectively be subsumed by agenda setting considerations as well. Nonetheless, some independence remains assuming dedicated briefs on whether to grant plenary review would be of nonzero value. The standard assumption is that briefs are valuable. *See supra* note 15 (highlighting empirical evidence that briefs influence decision making); note 62 (highlighting criticism for deciding applications without additional briefing). The extent to which the merits claims underlying capital applications that are not linked to merits petitions are adequately presented in the applications or parallel filings is an important question for future research. For more on multiple filings in capital cases, see *supra* note 88.

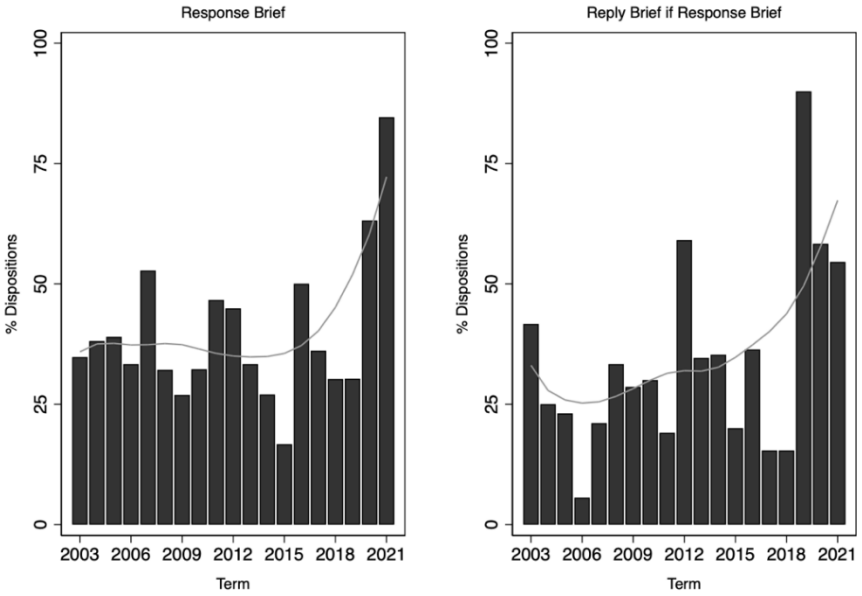
[94] *See supra* note 62 and accompanying text.

[95] I coded briefing information from the Court's docket. These data include briefs listed on the application's docket page, not briefs filed on the merits, which are listed on the linked petition's docket page. The Court's rules require response briefs on the merits in capital cases. *See* SUP. CT. R. 15.1 (requiring response briefs for cert petitions in capital cases); SUP. CT. R. 20.4(b) (habeas petitions). Since most capital cases are linked to merits petitions, there will generally be parallel merits briefing that is not recorded on the application's docket page.

[96] For more on CFRs for merits petitions, see 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, 245–70 (2009).

on a response brief being filed, a reply was submitted 32% of the time. Figure 3.4 plots trends. Briefing rates are somewhat noisy, but there were noticeable upticks for responses (left panel) and replies (right panel) in recent Terms. Amicus briefs, "discouraged" by Court rule beginning with the 2023 Term,[97] were filed in connection with 1% of capital dispositions.[98] Of the thirteen dispositions attracting at least one amicus brief, five were decided during the last two Terms and eleven during the last five Terms.

Figure 3.4: Capital Dispositions and Briefing



[97] *See supra* note 47 (discussing the rule change).

[98] Of the thirteen applications attracting amicus participation, eleven attracted one brief and two attracted two briefs. More amicus briefs may have been filed in connection with linked merits petitions, but those are beyond this Article's scope. For more information on the importance of amicus briefs on the merits, see generally PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING (2008). Features of amicus activity aside from total filings, such as the coalition of signatories, may also inform decisions. *See, e.g.*, Greg Goelzhauser & Nicole Vouvalis, *Amicus Coalition Heterogeneity and Signaling Credibility in Supreme Court Agenda Setting*, 45 PUBLIUS 99, 108 (2015) (finding that an increase in the ideological heterogeneity of state amici coalitions is positively associated with the probability of granting plenary review in state-filed cases). This information is not available from the docket over the sample period.

While aggregate briefing data is informative, it is important to distinguish patterns by merits petition status because dedicated briefing on applications is presumably more important absent parallel merits briefing. Moreover, information value may be heightened in capital cases given the Court's response brief requirement.[99] Among applications that were not linked to merits petitions, about 19% of the sample,[100] response briefs were filed 91% of the time.[101] Of the 163 response briefs, 2 were filed after a CFR, suggesting there may be a norm in favor of filing responses to capital applications similar to the merits rule.[102] Conditioned on a response brief being filed, a reply was filed 34% of the time. Of the thirteen capital applications attracting an amicus brief, six were not linked to a merits petition.

2. Time to Disposition. The Court quickly disposes of capital applications.[103] The median number of days from filing to disposition was 1, with a range from same-day disposition to 111 days.[104] Figure 3.5's left panel plots the kernel density distribution for total days from filing to disposition, depicting right skew with a long tail.[105] The right panel plots the trend in median days from filing to disposition by Term, which is fairly stable.[106] The Court announced every decision on the referral date. Given the Court's norm of automatically referring capital applications, and variation in days from submission to disposition, the Justices presumably begin consideration prior to the referral date.

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[99] *See supra* note 95.

[100] *See supra* section III.A.*3*.

[101] Of the 179 capital applications disposed of without a linked merits petition on file, 16 did not attract a response brief. These sixteen instances occurred sporadically from the 2003 through 2017 Terms.

[102] It is not surprising that most response briefs to capital applications were filed unilaterally rather than after CFRs given the merits response requirement, time pressure in capital proceedings, related proceedings in lower courts, and the relative prominence of applications to halt proceedings.

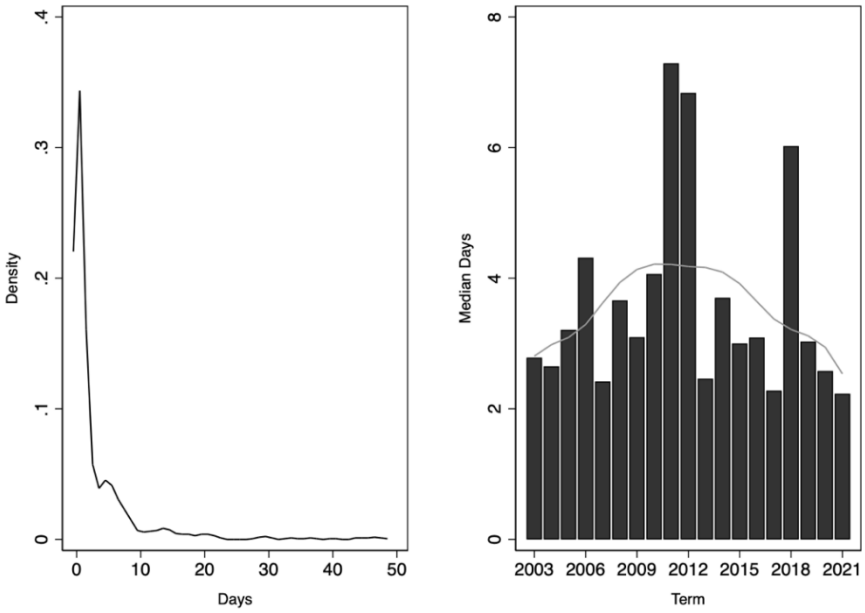
[103] Data from the *Journal* and docket do not permit distinguishing capital applications by whether an execution has been scheduled over the sample period.

[104] The mean was four, with a standard deviation of nine.

[105] The plot omits outlying values over fifty days to clarify the core distribution.

[106] The concave-up appearance is somewhat misleading given the outliers and narrow range from two to seven days.

Figure 3.5: Time from Filing to Disposition for Capital Applications



C. DECISIONS AND EXPLANATIONS

1. Outcomes.

a. Substantive Goal. The overall capital application grant rate was 7%, but disaggregating by substantive goal is more informative for understanding the Court's role in death penalty administration.[107] The Court respectively granted 4% and 50% of applications to halt and advance capital proceedings. Figure 3.6 plots trends.[108] The trend for applications to halt (left panel) is relatively stable.[109] For applications to advance (right panel), there

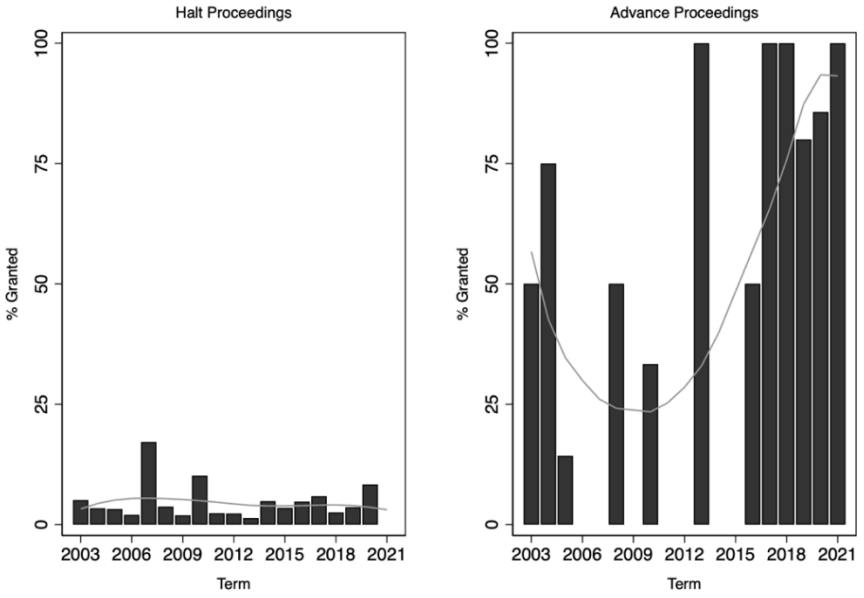
[107] The overall grant rate ranged from 2% to 17% per Term.

[108] The missing bar in the left panel reflects zero applications to halt proceedings being granted that Term.

[109] The grant rate for applications to halt proceedings ranged from 0% to 17%, with the 2021 Term being the only to record a 0% grant rate.

is considerable variation but relatively few dispositions per Term, with several yielding 0% and 100% grant rates.[110] During the last five Terms, which yielded five of the six highest sample-period grant rates, the Court granted seventeen of nineteen applications to advance capital proceedings.

Figure 3.6: Capital Applications Granted by Substantive Goal



b. Merits Petition Status. Disaggregating grant rates by merits petition status has important implications for understanding docket activity. As noted previously, the Court denied 72% of all capital applications simultaneous to denying a linked merits petition, all of which were filed to halt proceedings.[111] There is no need to discuss these outcomes further here. Slicing the remaining 28% of the data

[110] Of the seven missing bars in the right panel, there were zero applications to advance capital proceedings during the 2009 Term, and a 0% grant rate for such applications in the others.

[111] *See supra* section III.A.*3*.

by outcome and merits petition status does not permit systematic temporal comparison, but the summary data is informative.

As noted previously, after simultaneous merits petition denials, ruling on applications without a linked merits petition on file is the most common occurrence—comprising 19% of the sample.[112] The Court granted 20% of these applications. Disaggregating by substantive goal, the respective grant rates for applications to halt and advance proceedings were 4% and 50%. These percentages are similar to the overall rates.[113]

For capital applications decided with a linked merits petition pending, which comprise 7% of the sample, the overall grant rate was 45%. One of the sixty-five applications in this category was to advance proceedings, and it was denied. The others sought to halt proceedings, 45% of which were granted. These grants are presumably mostly temporary victories for applicants, with the Court staying executions to consider linked merits petitions but denying the applications later when denying the linked petitions.[114]

Of the twenty-three applications decided with a merits petition at miscellaneous stages, five were granted. These grants further illustrate overlap between the applications and plenary dockets. In two instances, the Court granted a stay of execution simultaneous to granting cert, presumably to stop executions before reaching a decision on the merits.[115] In one instance, the Court granted a stay of execution simultaneous to granting a motion for leave to file a

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[112] *See supra* section III.A.*3*.

[113] This is not surprising for applications to advance proceedings because all but two were disposed of without a linked merits petition on file. Among applications to halt proceedings, 13% were disposed of without a linked merits petition on file.

[114] The extent to which this is true remains an open question and an important one for future research. Orders sometimes condition the grant of a stay on whether the Court subsequently grants plenary review. *See, e.g.*, Madison v. Alabama, 138 S. Ct. 943 (2018) (mem.) (granting a stay of execution "pending the disposition of the petition for writ of certiorari," adding that "[s]hould the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court."). This relatively high grant grate also presumably illustrates the importance of distinguishing capital applications by procedural posture. For additional discussion on variation by procedural posture, see *supra* note 74.

[115] *See* Ramirez v. Collier, 142 S. Ct. 50, 50 (2021) (mem.) (granting cert and a stay of execution); Hill v. Crosby, 546 U.S. 1158, 1158 (2006) (mem.) (granting cert and conditionally granting a stay of execution).

rehearing petition after denying cert.[116] In another, the Court granted a stay of execution after granting cert to prevent the petitioners from being executed before oral argument.[117] Last, the Court granted an application to vacate a stay of execution simultaneous to granting cert before judgment and issuing a summary reversal.[118]

c. A Dismissal. The one dismissal in this sample illustrates the time pressure that can accompany capital dispositions. On October 1, 2015, Virginia was scheduled to execute Alfred Prieto at 9:00 PM.[119] According to Prieto's attorney, Governor Terry McAullife's counsel was informed at 8:50 PM that a stay application would be submitted to the Court absent lower court intervention.[120] The Fourth Circuit denied a stay request seconds after the death warrant became active at 9:00 PM, and the application was submitted at about 9:05 PM.[121] Corrections officials inserted the lethal injection IV tubes at about 9:06 PM.[122] At 9:13 PM, the Court's Public Information Office informed the state attorney general's office about the application, and was told that a response brief would be filed "shortly."[123] Before the brief was filed, and without the Court acting, Prieto was pronounced dead at 9:17 PM.[124]

The Court's docket records Chief Justice Roberts referring the application to the Court on October 2, followed by it being dismissed as moot without explanation.[125] Corrections officials said they were not informed about the application before the execution.[126] The state

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[116] *See* Foster v. Texas, 563 U.S. 931, 931 (2011) (mem.) (granting a motion for leave to file a rehearing petition and granting a stay of execution).

[117] *See* Glossip v. Gross I, 574 U.S. 1143, 1143 (2015) (mem.) (granting stays of execution). For details on this incident, see *supra* note 80.

[118] *See* United States v. Higgs, 141 S. Ct. 645, 645 (2021) (mem.) (vacating a stay of execution after granting cert).

[119] *See* Chris Geidner, *What Happened When Virginia Executed Alfred Prieto*, BUZZFEED NEWS (Oct. 9, 2015, 12:06 AM), https://www.buzzfeednews.com/article/chrisgeidner/what-happened-when-virginia-executed-alfredo-prieto [https://perma.cc/5LRQ-3DQ6] (reporting timeline details).

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] Prieto v. Clarke, 576 U.S. 1096 (2015) (mem.).

[126] Geidner, *supra* note 119.

attorney general's office said the Court informed it about the application after execution proceedings began, but in any event emphasized that such a filing "does not automatically halt" proceedings, adding that corrections officials would have been informed of "any court order halting the execution."[127] Governor McAullife's office did not respond to questions about the incident.[128]

2. Reasoning. The Court rarely explains decisions on capital applications. Overall, the Court issued opinions accompanying 1% of its capital dispositions. However, there were only three total opinions due to application interdependence.[129] Moreover, two of those opinions addressed similar issues despite being decided nearly three years apart.[130] The reasoned decisions were similar in other ways as well. First, the underlying issues were politically salient—two involved a state's authority to proceed with an execution in violation of international treaty obligations,[131] while the other involved the Trump administration's resumption of

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[127] *Id.*

[128] *Id.*

[129] *See* Garcia v. Texas, 564 U.S. 940 (2011) (per curiam) (denying an application for a stay of execution and petition for a writ of habeas corpus); Medellin v. Texas, 554 U.S. 759 (2008) (per curiam) (denying an application to recall and stay the mandate, an application for a stay of execution, and a petition for a writ of habeas corpus); Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam) (allowing executions to proceed).

[130] *Garcia*, 564 U.S. 940; *Medellin*, 554 U.S. 759.

[131] *Garcia*, 564 U.S. 940; *Medellin*, 554 U.S. 759; *see also* James C. McKinley Jr., *Texas Executes Mexican Despite Objections from Bush and International Court*, N.Y. TIMES (Aug. 6, 2008), https://www.nytimes.com/2008/08/06/world/americas/06iht-texas.4.15052398.html (noting that *Medellin* attracted "international attention"); Dave Montgomery, *Texas Executes Mexican, Defying World Outcry*, CALGARY HERALD, Aug. 6, 2008, at A6 (noting "world outcry" after the applicant in *Medellin* was executed); Editorial, *The World Is Watching*, N.Y. TIMES (July 6, 2011), https://www.nytimes.com/2011/07/07/opinion/07thu4.html (discussing *Garcia*'s salience and arguing that the Court "should grant the stay to allow Congress to pass" a law requiring state recognition of treaty obligations, and that failing to do so "would be a miscarriage of justice"); Editorial, *Texas Should Obey Law*, PHILA. INQUIRER (July 2, 2011), https://www.inquirer.com/philly/opinion/inquirer/20110702_Inquirer_Editorial__Texas_should_obey_law.html [https://perma.cc/47JP-K5PF] (arguing that the pending execution in *Garcia* should not take place "before Congress has had time to act," and that "Americans would [not] want a fellow citizen accused of a crime in another country to be denied access to U.S. consular officials").

federal executions.[132] Second, each involved federal interests,[133] which is relatively rare for capital applications. Third, each denied a stay over four dissenting votes—a sufficient number to grant plenary review.[134]

Aside from designated opinions, the Court sometimes provides reasons for its decisions within orders. By my count, the Court at least arguably provided some order-based explanation for decisions on six capital applications during the sample period.[135] In three

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[132] *Lee*, 140 S. Ct. at 2591–92 (granting an application to vacate an injunction against resuming the federal death penalty amidst concern about the constitutionality of the government's execution protocol). For examples of press coverage on controversy surrounding the Trump administration's resumption of federal executions, see Devlin Barrett & Mark Berman, *U.S. to Restart Death Penalty*, DAILY HERALD, July 26, 2019, at 1; Katie Benner, *U.S. to Resume Capital Punishment for Federal Inmates on Death Row*, N.Y. TIMES (July 25, 2019), https://www.nytimes.com/2019/07/25/us/politics/federal-executions-death-penalty.html.

[133] *See* Chris McGreal, *Obama Tries to Stop Execution in Texas of Mexican Killer*, THE GUARDIAN (July 5, 2011, 11:39 AM), https://www.theguardian.com/world/2011/jul/05/obama-stop-texas-mexican-execution [https://perma.cc/HS5F-WS6U] (reporting on the Obama administration's amicus brief, which argued that permitting execution "would place the United States in irreparable breach of [an] international-law obligation," causing "serious repercussions for United States foreign relations, law-enforcement and other cooperation with Mexico, and the ability of American citizens traveling abroad to have the benefits of consular assistance in the event of detention"); *Lee*, 140 S. Ct. 2590 (permitting federal executions to proceed).

[134] In *Lee*, Justice Breyer, joined by Justice Ginsburg, published a written dissent. *Lee*, 140 S. Ct. at 2592–93 (Breyer, J., dissenting). Justice Sotomayor also dissented, joined by Justices Ginsburg and Kagan. *Id.* at 2593–94 (Sotomayor, J., dissenting). In *Garcia*, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, published a written dissent. *Garcia*, 564 U.S. at 943–48 (Breyer, J., dissenting). And in *Medellin*, separate written dissents were filed by Justices Stevens, Souter, Ginsburg, and Breyer. *Medellin*, 554 U.S. at 761–62 (Stevens, J., dissenting); *id.* at 762 (Souter, J., dissenting); *id.* at 762–63 (Ginsburg, J., dissenting); *id.* at 763–66 (Breyer, J., dissenting). Four votes to grant a stay does not necessarily mean there are four votes to grant plenary review. In *Medellin*, for example, Justice Souter would have deferred action on the linked merits petitions to hear from the Solicitor General and give Congress time to act. *Id.* at 762 (Souter, J., dissenting). Justice Ginsburg would have deferred action to call for the views of the Solicitor General. *Id.* at 762–63 (Ginsburg, J., dissenting).

[135] While opinion production is an objective proxy for reason giving, classifying order-based explanation is necessarily subjective. Most orders include only standard text and clearly do not provide reasons, but there are borderline cases. *See* Das, Epstein & Gulati, *supra* note 22, at 87 (noting that certain decisions on applications are accompanied by "some explanation"). Reasonable people may disagree about what constitutes reason giving. My goal was to include every instance that could arguably be considered to have crossed any plausible reason-giving threshold.

instances, any arguable reason giving was limited to a single sentence.[136] In the other three, any arguable explanation was somewhat more developed, while apparently falling short of the threshold for per curiam opinion designation.[137]

3. Separate Positions. Justices regularly indicate separate positions from the majority on capital dispositions. Overall, 19% of capital applications attracted a separate position, which took four forms in this sample: written dissents, silent dissents,[138] written concurrences, and written statements concerning the decision.[139]

The Court sometimes amends orders or publishes opinions after announcing decisions on applications. I cross-checked the *Journal* and docket, and searched the former for updates, which revealed subsequent additions. But it is possible that I missed opinions or order-based explanation added after the initial announcement. The deadline for changes is presumably entry into the United States Reports. *See* Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 543 (2014) (discussing changes to merits opinions up to inclusion in the United States Reports).

[136] *See* Barr v. Roane, 140 S. Ct. 353, 353 (2019) ("We expect that the Court of Appeals will render its decision with appropriate dispatch."). This sentence may not seem like reason giving in the abstract, but I count it as arguable explanation to the extent it came in the context of denying the Trump administration's request to stay or vacate a lower court decision halting proceedings. Perhaps the sentence was intended to appease the administration insofar as it signaled that the Court was not denying the application due to a merits-related concern. The sentence may have also been intended as a signal to the lower court to act quickly. Justice Alito, joined by Justices Gorsuch and Kavanaugh, concurred, adding that he would state "that the denial of the application to vacate is without prejudice to the filing of a renewed application if the injunction is still in place 60 days from now." *Id.* at 354 (Alito, J., statement concerning decision). Further clarifying that the denial had more to do with timing than the merits, Alito added: "The [merits] question, though important, is straightforward and has already been very ably briefed in considerable detail by the Solicitor General and by the prisoners' 17-attorney legal team." *Id.* at 353. For the other arguable single-sentence explanations, see Ryan v. Wood, 573 U.S. 976, 976 (2014) (mem.) ("The district judge did not abuse his discretion in denying [the applicant's] motion for a preliminary injunction."); Berry v. Mississippi, 552 U.S. 1007, 1007 (2007) (mem.) ("The judgment of the Mississippi Supreme Court relies on an adequate and independent state ground that deprives this Court of jurisdiction.").

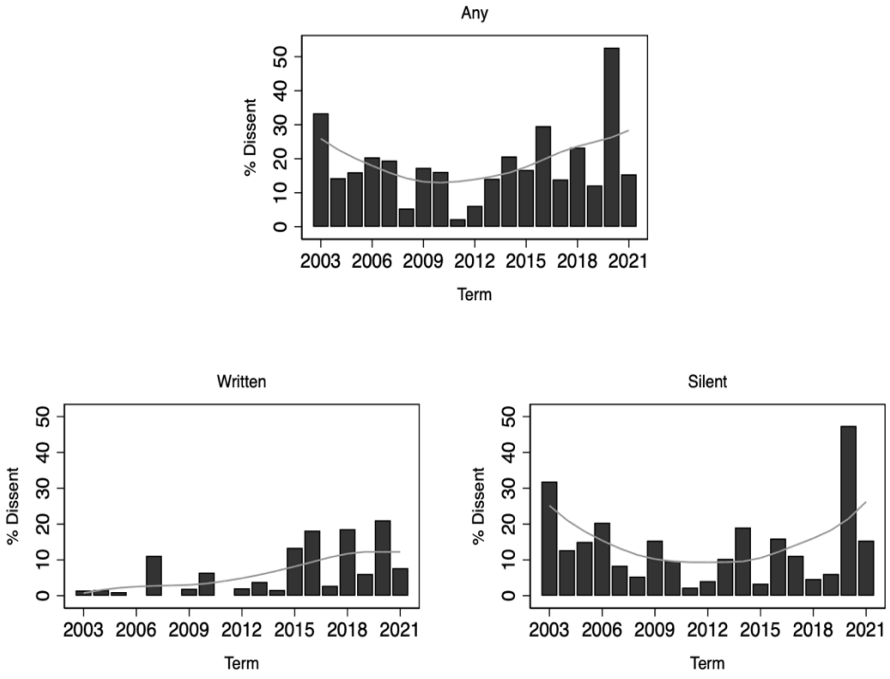
[137] *See* Dunn v. McNabb, 138 S. Ct. 369 (2017) (mem.) (providing explanation); Johnson v. Lombardi, 577 U.S. 970 (2015) (mem.) (same); Brewer v. Landrigan, 562 U.S. 996 (2010) (mem.) (same). The Court granted relief in each instance.

[138] Silent dissents, also called noted dissents, occur when Justices note dissent without explaining why the disagree. *See* Fife et al., *supra* note 64, at 173 (discussing trends in silent concurrences and dissents on the merits); *cf.* Goelzhauser, *Silent Concurrences*, *supra* note 64 (using Justices' private papers to explain silent concurrences on the merits).

[139] When applications are disposed of simultaneous with a linked merits petition, the separate position heading sometimes refers only to the merits petition. Where it was clear

Dissents were more common than concurrences and statements. In total, 17% of capital applications attracted at least one dissenting vote. Disaggregating by type, 5% of dispositions yielded at least one written dissent, and 13% at least one silent dissent. Figure 3.7 plots trends.[140] The overall trend (top row) appears concave up but is influenced by sample-period highs recorded during the 2003 and 2020 Terms; the same is true for silent dissents (bottom row, right panel).[141] Written dissents (bottom row, left panel) were rare early, but increased on average toward the end of the sample.

Figure 3.7: Capital Application Dissents



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the separate position also encompassed the application, I counted it as concerning the application as well.

[140] The missing bars for written dissents (bottom row, left panel) are all due to zero written dissents being recorded during those Terms.

[141] This similarity is not surprising given that silent dissents comprise a sizeable percentage of all dissents.

Concurrences and statements were relatively rare. Written concurrences were published for 1% of capital dispositions.[142] Statements were also uncommon but may be increasing in regularity. Overall, statements were published for 2% of capital dispositions. Of the fifteen statements in this sample, ten appeared during the last five Terms.

IV. NONCAPITAL STAYS AND INJUNCTIONS

This Part examines noncapital applications concerning stays and injunctions.[143] First, I discuss workload, beginning with total dispositions, then disaggregating by referral status and merits petition status.[144] Next, I describe briefing and time to disposition. Last, I discuss grants, reason giving, and separate positions.

A. WORKLOAD

1. Dispositions. The Court disposed of 526 noncapital applications from the 2003 through 2021 Terms, with a median of 25 per Term and range from 10 to 56.[145] Figure 4.1 plots the trend. Consistent with conventional wisdom, dispositions increased in each of the last five Terms. Going back further in time shows that the 2016 Term baseline for starting that five-Term increase tied for

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[142] The five written concurrences appeared sporadically from the 2008 through 2020 Terms, with no Term yielding more than one.

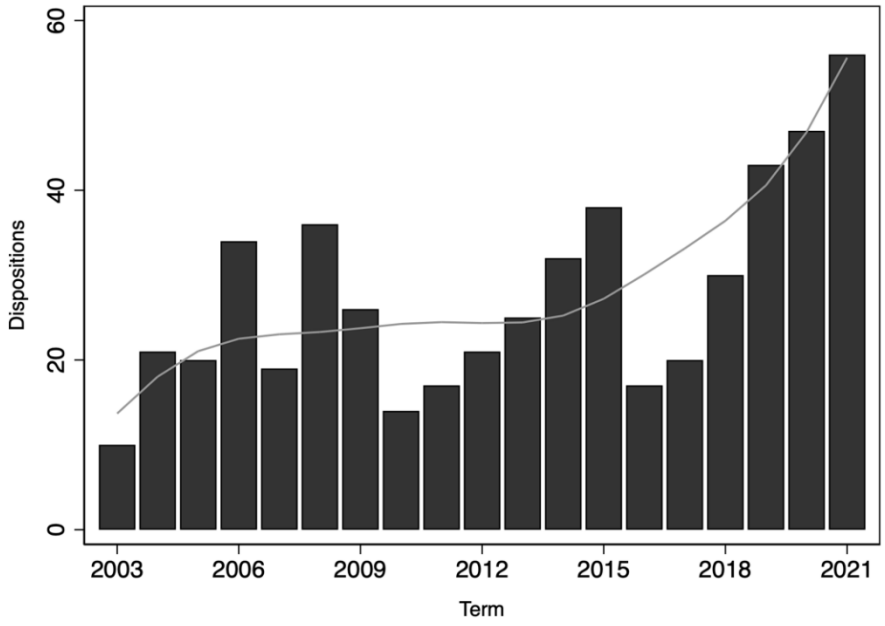
[143] I refer to these as "noncapital applications," but not all noncapital applications involve stays and injunctions. Part V examines miscellaneous applications, which may involve capital or noncapital proceedings. After identifying capital applications involving stays or injunctions, the remaining applications involving stays and injunctions were classified as noncapital. For details on classifying capital applications, see *supra* note 73.

[144] Unlike with capital applications, the request and party do not inherently provide information about the substantive goal underlying noncapital applications. Coding the "ideological direction" of the applicant's merits claim would be analogous to my prior discussion of underlying substantive goal for capital applications. *Cf.* Lee Epstein, William M. Landes & Richard A. Posner, *Are Even Unanimous Decisions in the United States Supreme Court Ideological?*, 106 NW. U. L. REV. 699, 710–12 (2012) (discussing the relationship between the ideological direction of lower court decisions and unanimous Court decisions on the merits). Noncapital applications vary by request type, but this information does not convey information about substantive goals. Overall, 79% of noncapital applications requested a stay, 14% requested an injunction, and 8% requested that a stay be vacated.

[145] The mean was twenty-eight, with a standard deviation of twelve.

producing the third lowest number dispositions, and that another five-Term span of increases preceded the 2016 Term decrease. Nonetheless, the last three Terms recorded sample-period highs.

Figure 4.1: Noncapital Application Dispositions



2. Referral Status. Unlike capital applications, which are typically referred to the Court for initial disposition by custom,[146] it is important to distinguish noncapital applications by whether they were referred initially or upon reapplication following in-chambers denial.[147] The conditions under which a Justice refers an application for initial disposition remains an open question, but it has been suggested that this "usually occurs where very important or complex questions are raised by the application."[148] If that is correct,

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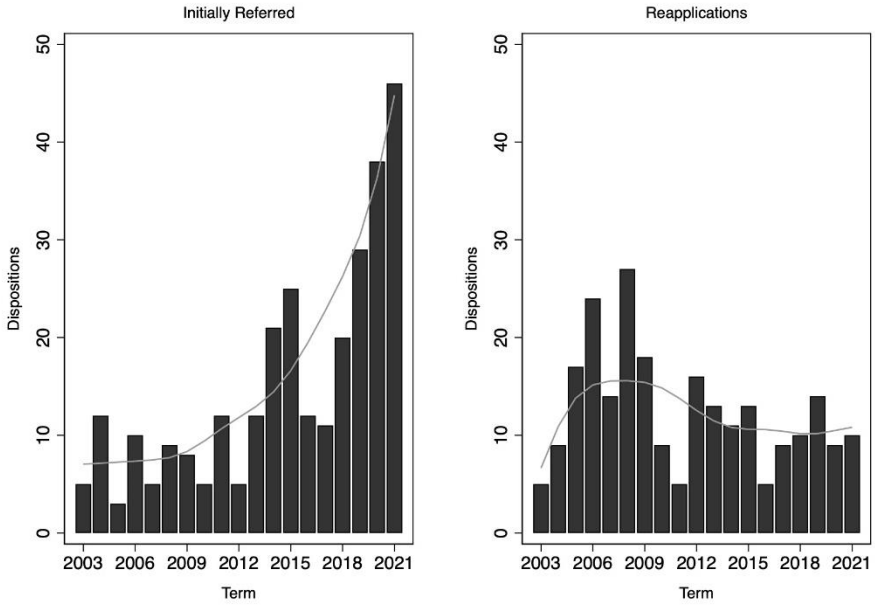
[146] *See supra* notes 78–79 and accompanying text.

[147] A request to overturn an individual Justice's granted application proceeds via motion. SHAPIRO ET AL., *supra* note 35, at 17-31. It has been suggested that the Court will reverse such a decision "only in the most extraordinary circumstances." *Id.* In any event, these requests are beyond this Article's scope since motions are a distinct practice area.

[148] *Id.* at 17-29. The Court's rules do not explain what motivates initial referral decisions.

initial referrals may be a useful proxy for question difficulty and salience. More generally, since reapplications are referred by custom,[149] it is worth distinguishing between applications the Court decides because the initially assigned Justice presumably thought that was best from those it decides because of a norm designed to prevent judge shopping and conserve time.[150]

Figure 4.2: Noncapital Dispositions by Referral Status



Disaggregating disposition data by referral status reveals distinct trends.[151] As Figure 4.2 shows, the number of initially

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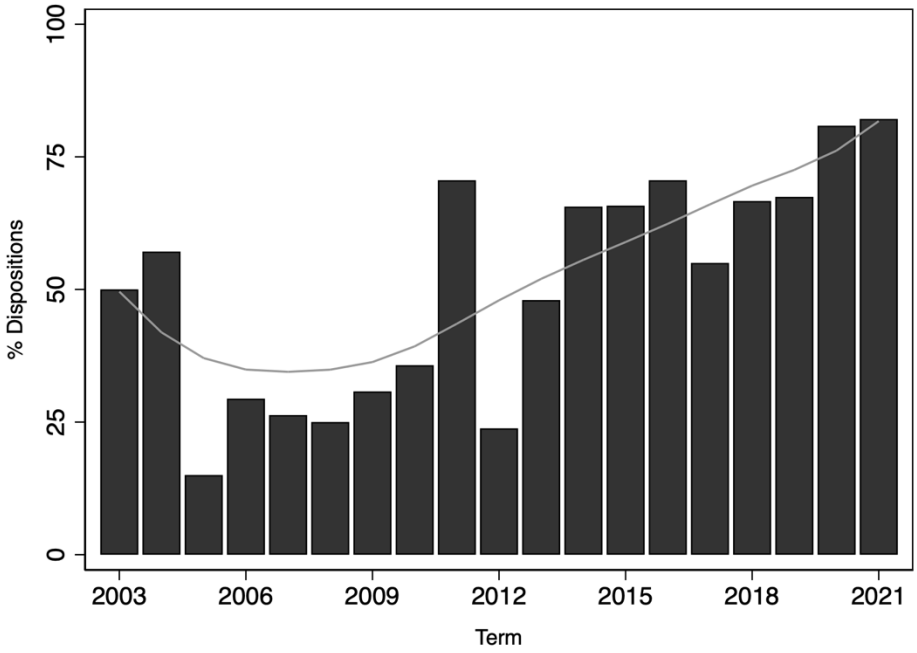
[149] *See supra* note 54 and accompanying text.

[150] Referral status may presumptively speak to this distinction, but various alternatives are plausible in particular circumstances. Examples include a Justice thinking that a request is meritorious but denying it in chambers on the assumption that a majority will disagree, or thinking that a request lacks merit and that everyone will agree, but referring it for initial disposition because it is time sensitive and reapplication seems likely.

[151] I used the docket to distinguish applications that were referred to the Court for initial disposition from those that were first denied in chambers. Orders published in the *Journal* note the referring Justice, but do not indicate whether an application was referred initially or upon reapplication. The docket provides this information.

referred noncapital dispositions (left panel) increased on average, reaching sample-period highs the last three Terms. In contrast, the number of dispositions upon reapplication increased early, then decreased and flattened on average. As Figure 4.3 better clarifies, the percentage of noncapital applications that were initially referred increased on average, reaching sample-period highs during the last two Terms. Overall, 55% of noncapital applications were initially referred, with a range from 15% to 82% per Term.

Figure 4.3: Initially Referred Noncapital Dispositions



3. Merits Petition Status. Capital and noncapital applications differ considerably with respect to linked merits petition status. While 72% of capital applications were decided simultaneous to the Court denying linked merits petitions,[152] this occurred 5% of the time with noncapital applications. In contrast, 77% of noncapital applications were decided without a linked merits petition on file,

[152] *See supra* section III.A.*3.*

which occurred for 19% of capital applications.[153] Among the remaining noncapital applications, 15% were decided with a linked merits petitions pending, while the remaining 3% can be grouped into a miscellaneous category.[154]

Figure 4.4 plots dispositions by merits petition status. The trends are relatively stable except for notable divergence in the percentage of dispositions without a linked merits petition and those with a pending petition. During the 2011 Term, the Court recorded a sample-period high 94% of noncapital applications decided absent a linked merits petition, with prior Terms ranging from 53% to 81%. After the 2011 Term, the range was 68% to 93%. Moreover, the last two Terms crossed the 90% threshold for the first time since the 2011 Term. These trends indicate that noncapital applications are increasingly decided absent parallel merits proceedings.

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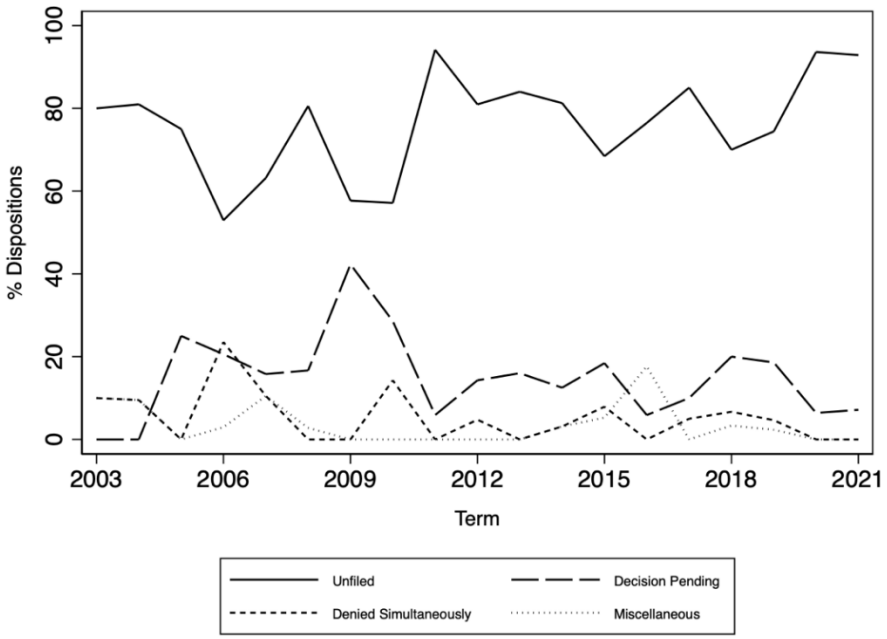
[153] *See supra* section III.A.*3*.

[154] Of the fifteen applications in the miscellaneous category, nine were linked to already-granted merits petitions with outcomes pending, five to already-denied merits petitions, and one to an already-granted merits petition with the case decided simultaneously.

Figure 4.4: Noncapital Dispositions by Merits Petitions Status



B. INFORMATION ENVIRONMENT

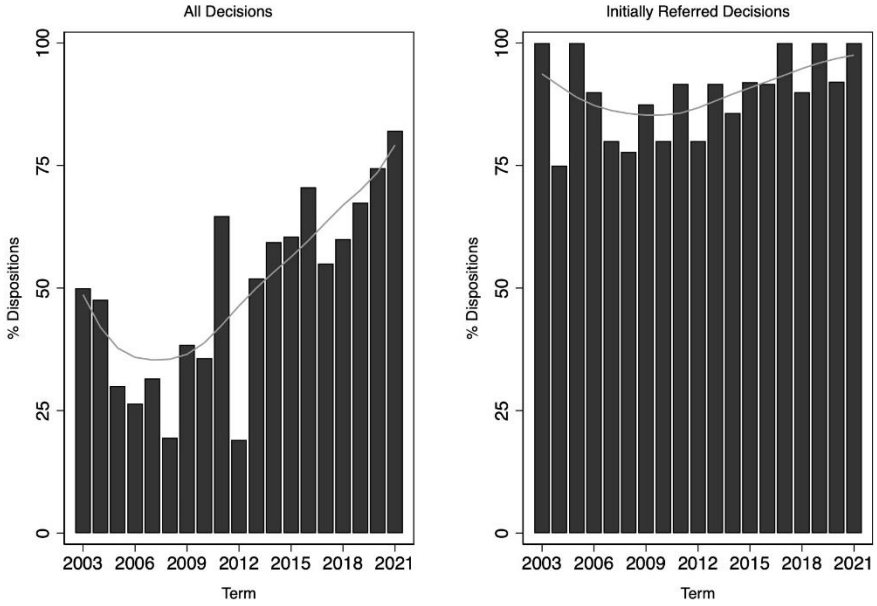
1. Briefing. Briefing patterns vary more for noncapital than capital applications.[155] Overall, 53% of noncapital applications attracted a response brief. Disaggregating by referral status, 92% of initial referrals and 6% of reapplications attracted response briefs. These percentages are similar for applications that are not linked to merits petitions, where responses would presumably be most beneficial for the Court absent parallel briefing.[156] As shown by

[155] This is not surprising given that submissions in capital cases may be influenced by rules requiring responses on the merits. *See supra* note 95 (noting Court rules requiring response briefs for merits petitions in capital cases).

[156] For applications that are not linked to merits petitions, response briefs were filed 59% of the time overall, 92% for initial referrals, and 5% for reapplications. The similarities across all noncapital applications and those without linked merits petitions are understandable given that the latter comprise a sizeable percentage of the former. As a result, I do not discuss

Figure 4.5's left panel, the percentage of noncapital applications attracting response briefs increased in recent Terms. Figure 4.5's right panel shows that the percentage of initially referred applications decided with a response brief on file remained relatively high throughout the sample, reaching 100% in three of the last five Terms.

Figure 4.5: Noncapital Dispositions with a Response Brief



Unlike with capital applications, CFRs regarding noncapital applications are common. The extent to which CFRs are issued may be a useful indicator of docket salience. In total, response briefs were filed post-CFR for 45% of all noncapital dispositions, 80% of initial referrals, and 3% of reapplications. Unilateral response briefs were filed for 8% of all noncapital dispositions, 13% of initial referrals, and 3% of reapplications. Among noncapital applications attracting a response, CFRs were issued 85% of the time overall, 86% for initial referrals, and 46% for reapplications.

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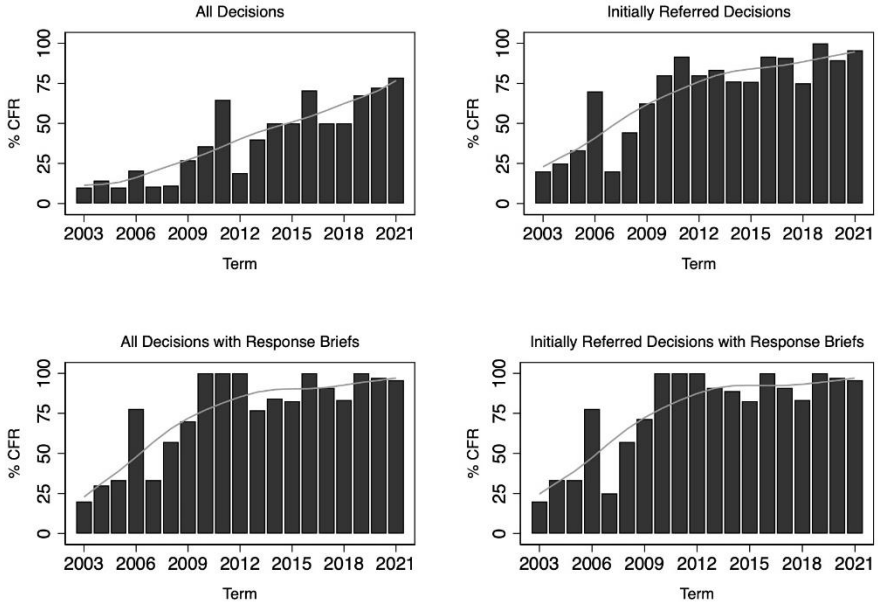
briefing by merits petition status further, though there may be differences worth exploring in future research.

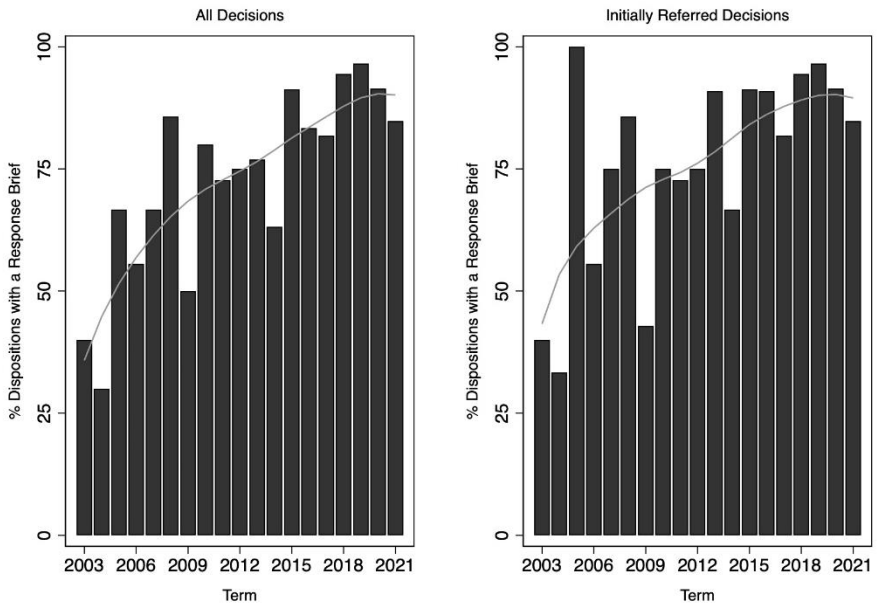
Figure 4.6 plots CFRs over time. Overall, CFRs were issued for an increasing percentage of total dispositions (top-left panel) and initial referrals (top-right panel). Among dispositions attracting a response, the percentage of CFRs as opposed to unilateral filings increased early in the sample period overall (bottom-left panel) and among initial referrals (bottom-right panel). These trends flattened later after stabilizing at a relatively high level.

Figure 4.6: Noncapital Dispositions with a CFR



When responses are filed, reply briefs are often filed as well, and their prevalence is increasing on average. Overall, 80% of responses attracted a reply. Among initial referrals, 82% of responses attracted a reply. Among reapplications, 38% of responses attracted a reply. Figure 4.7 plots trends. On average, reply brief prevalence increased for all dispositions (left panel) and initial referrals (right panel).

Figure 4.7: Noncapital Dispositions with a Reply Brief



Amicus participation, "discouraged" by Court rule beginning with the 2023 Term,[157] increased recently. In total, 18% of noncapital applications attracted at least one amicus brief. Disaggregating by referral status, the rate was 32% for initial referrals and 1% for reapplications. Figure 4.8 plots trends.[158] The 2011 Term was the last in which zero amicus briefs were filed. During the 2016 Term, 41% of all noncapital applications, and 58% of initial referrals, attracted at least one amicus brief, with prior respective highs of 20% and 40%. During the 2021 Term, 59% of all noncapital applications, and 72% initial referrals, attracted at least one amicus brief.

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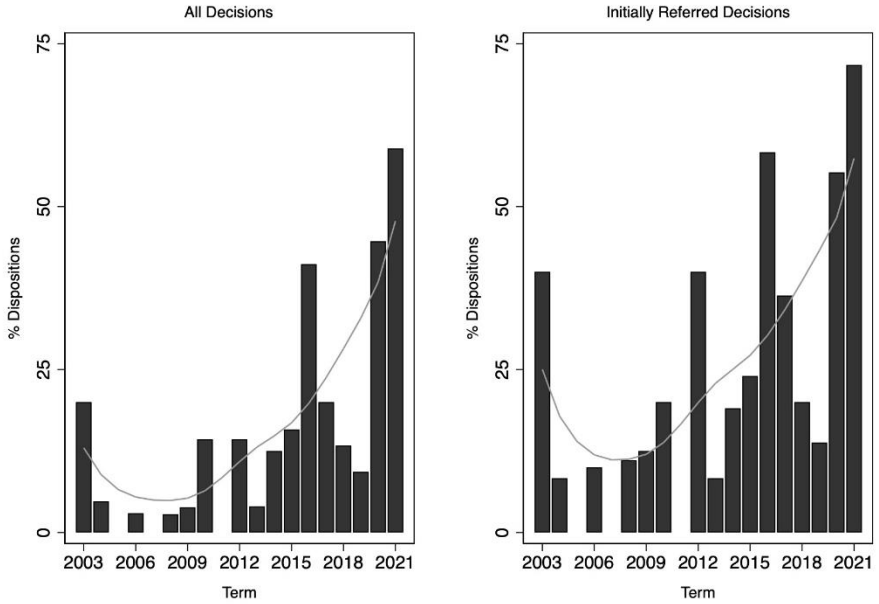
[157] *See supra* note 47 (discussing the rule change).

[158] All missing bars represent Terms in which zero amicus briefs were filed.

Figure 4.8: Noncapital Dispositions Attracting Amicus Participation



2. Time to Disposition. Disposition speed depends on referral status. Figure 4.9 plots kernel density distributions.[159] Looking at time from submission to disposition (left panel), there appear to be different tracks for initial referrals and reapplications.[160] Across all observations, the median noncapital application was disposed of 21 days after submission, with a range from same-day disposition to 202 days.[161] Disaggregating by referral status, the median initially

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[159] The plot omits outlying values over fifty days to clarify the core distribution.

[160] Docket pages reveal that reapplications are sometimes, but not always, distributed to a conference for consideration similar to cert petitions. At that point, also similar to cert petitions, it may be that applications are automatically denied if not added to the discuss list and granted.

[161] The mean was twenty-three, with a standard deviation of twenty. The 202-day outlier was *Brnovich v. Isaacson*, 142 S. Ct. 2893 (2022) (mem.). In that case, plaintiffs challenged the validity of an Arizona law restricting abortion. Isaacson v. Brnovich, 563 F. Supp. 3d 1024, 1029–31 (D. Ariz. 2021). The district court issued a partial preliminary injunction. *Id.* at 1047. Then the district court denied a stay pending appeal. Isaacson v. Brnovich, No. CV-21-01417, 2021 WL 4844105 (D. Ariz. Oct. 18, 2021). The Ninth Circuit also refused to grant

referred application was decided 11 days after submission, with a range from same-day disposition to 202 days.[162] The median reapplication was decided thirty-one days after resubmission, with a range from one to seventy-six days.[163]

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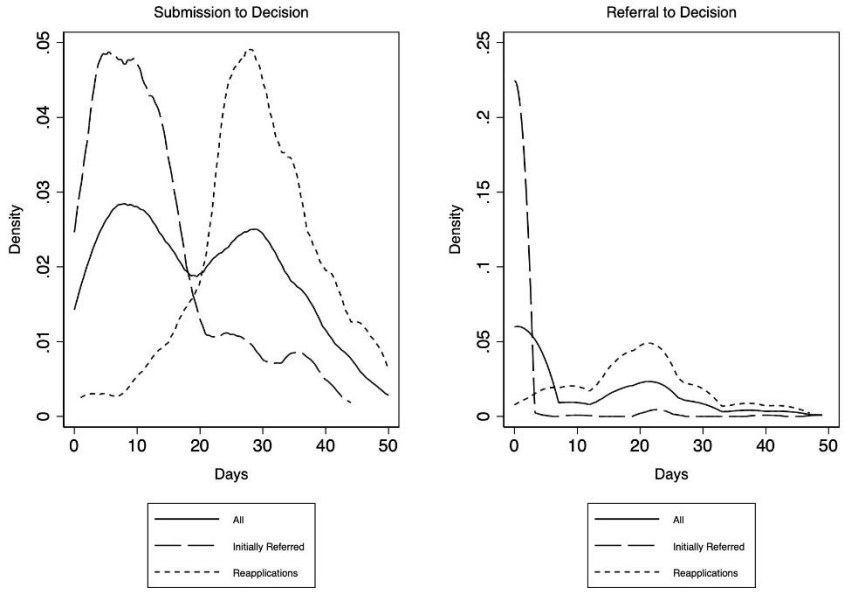
a stay pending appeal. Isaacson v. Brnovich, No. 21-16645, 2021 U.S. App. LEXIS 35096 (9th Cir. Nov. 16, 2021). Arizona's application for a stay pending appeal was submitted on December 10, 2021. Justice Kagan called for a response on December 15. The response was filed on December 21, and a reply was filed on December 22. More than six months later, on June 29, 2022, the application was simultaneously referred to the Court and distributed for the conference being held that day. On June 30, the Court announced that the application was treated as a petition for cert before judgment and granted, with a remand for further consideration in light of *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). Brnovich v. Isaacson, 142 S. Ct. 2893, 2893 (2022). The Court announced *Dobbs* on June 24, five days before the *Brnovich* application was referred and distributed to conference. Neither party in *Brnovich* seems to have requested a hold for *Dobbs* in their briefs, but the GVR implies that is effectively what happened.

Another peculiarity regarding *Brnovich* is that the application's docket page records a petition for cert before judgment being submitted simultaneous with the application, even hyperlinking a document with the label "petition" in connection with that entry. But that hyperlinked "petition" is just the application, which does not seem to request cert before judgment. Similarly, the petition's docket page lists the petition as a separate entry from the application, having been submitted on the same day, with the hyperlinked "petition" being the application, which again does not seem to request cert before judgment. Although the Court's order was clear about "treating" the application as a petition for cert before judgment, the docket entries are misleading. For purposes of coding merits petition status, *Brnovich* is counted as not being linked to a merits petition even though the application page misleadingly indicates a link. This example illustrates the importance of cross-checking merits petition status on the petition's docket page when coding disposition time relative to a linked application. *See supra* note 87 (noting this cross-check as a coding protocol).

[162] The mean was sixteen, with a standard deviation of twenty-one.

[163] The mean was thirty-two, with a standard deviation of thirteen.

Figure 4.9: Time to Disposition for Noncapital Applications



As discussed previously, the official referral date may not be a useful indicator of when the Justices effectively begin to collectively consider applications.[164] Nonetheless, since the docket records a referral date, I also calculate disposition speed from referral to decision. Figure 4.9's right panel plots kernel density distributions.[165] The median noncapital application was disposed of on referral day, with a max of 125 days.[166] Disaggregating by referral status, the median initially referred application was also disposed of on referral day, with a max of 125 days.[167] Overall, 95% of initially referred applications were decided on referral day. The median reapplication was decided nineteen days after referral, with a range from same-day disposition to sixty-two days.[168]

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[164] *See supra* section III.B.*2*.

[165] Although it is generally better to show combined plots with the same y-axis, as done elsewhere in this Article, doing so here obscures the distributions, which is the primary point of their display.

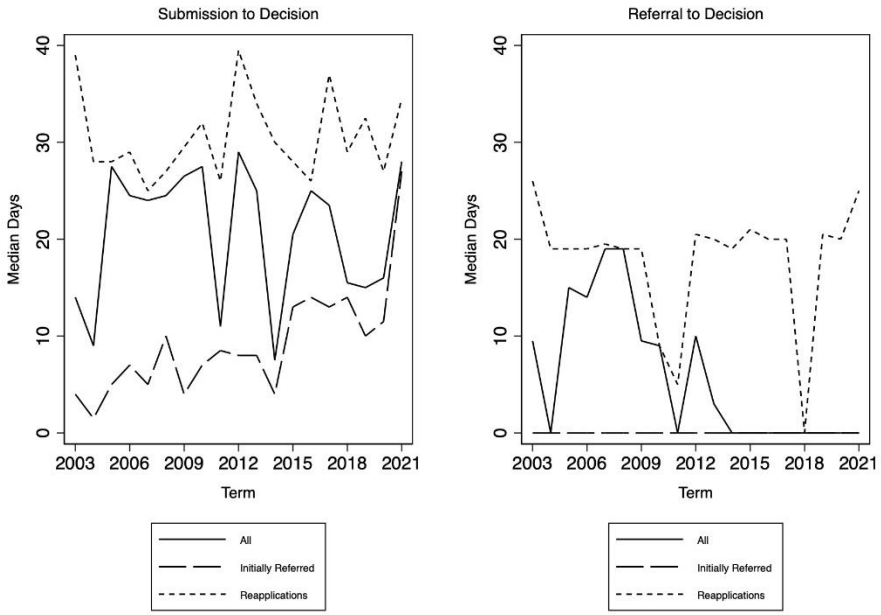
[166] The mean was ten, with a standard deviation of fourteen.

[167] The mean was two, with a standard deviation of ten.

[168] The mean was twenty, with a standard deviation of eleven.

To examine variation over time, Figure 4.10 plots the median number of days from submission (left panel) and referral (right panel) to decision by Term, in total and disaggregated by referral status. Three trends are notable. First, the median number of days from submission to decision for initially referred applications increased on average. After reaching ten days once from the 2003 through 2014 Terms, for example, median disposition time was at least that high thereafter, with a sample-period max of twenty-seven days during the 2021 Term. Second, after the median number of days from referral to decision varied from same-day disposition to nineteen days during the 2003 through 2013 Terms, same-day disposition has been the median outcome since the 2014 Term. Third, the median initially referred application was consistently disposed of on its referral date.

Figure 4.10 Median Days to Disposition for Noncapital Applications



C. DECISIONS AND EXPLANATIONS

1. Outcomes.

a. Overall. The Court regularly grants noncapital applications.[169] From the 2003 through 2021 Terms, the Court granted 23% of the noncapital applications it decided.[170] Figure 4.11 plots grant rate by Term.[171] The rate increased around the middle of the sample period before flattening out in recent Terms, ranging from 0% to 53%.[172]

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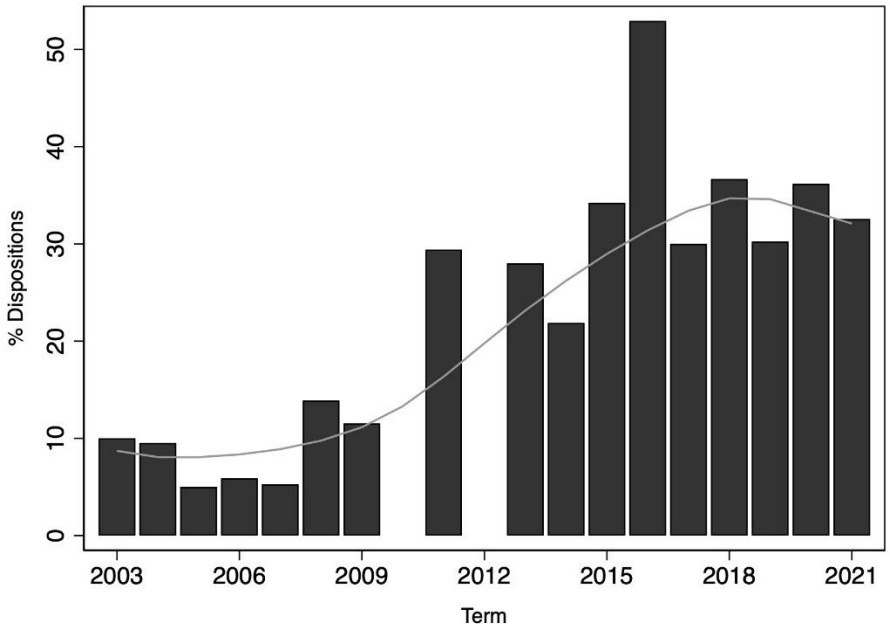
[169] Whether these grants constitute status quo alterations depends on how that phrase is defined. *Compare* Badas, Justus & Li, *supra* note 22, at 12 (referencing "shadow docket cases that grant relief and therefore change the status quo"), *with* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting) (mem.) ("I would grant preliminary relief to preserve the status quo . . . before the law went into effect . . . .").

[170] All grant statistics for noncapital applications exclude thirteen dismissals. These dismissed applications were related, but not linked, to an application for a stay that was granted in *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, 142 S. Ct. 661 (2022). The applications were dismissed in light of that decision.

[171] There were zero grants in Terms without bars.

[172] Noncapital applications involve different types of stays and injunctions, some of which are governed by different analytical frameworks. *See, e.g.*, Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779, 794–96 (2014) (noting different types of stays and injunctions); Portia Pedro, *Stays*, 106 CAL. L. REV. 869, 883 (2018) (noting that different types of stays may have different evaluative standards). Court orders sometimes distinguish stay requests (e.g., pending appeal, pending the timely filing and disposition of a merits petition, of removal), but not always, and this information is not otherwise available from the *Journal* or docket over the sample period.

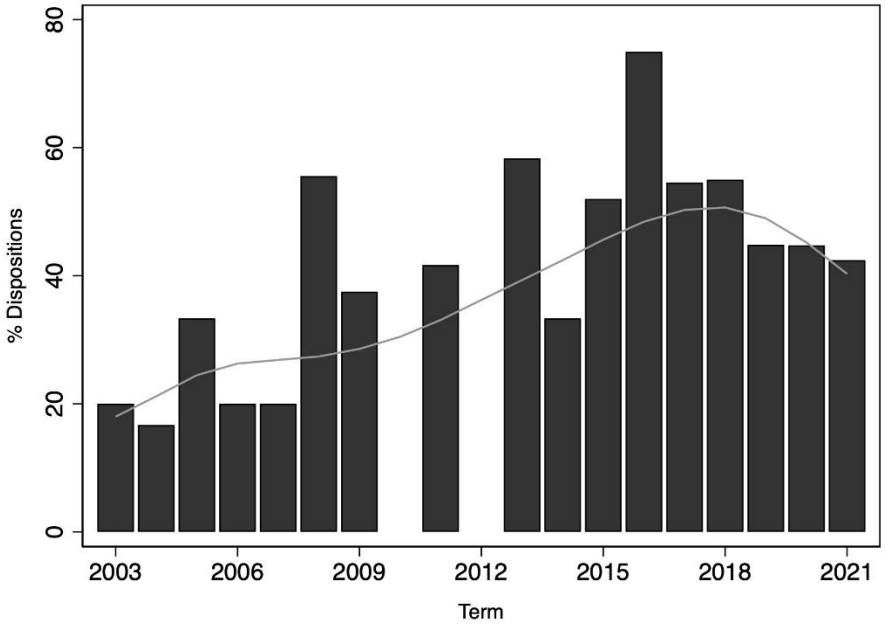
Figure 4.11: Noncapital Dispositions Granted



b. Referral Status. Disaggregating by referral status yields distinct results. Zero reapplications were granted. In contrast, the Court granted 43% of initial referrals. Figure 4.12 plots the trend.[173] The grant rate ranged from 0% to 75% per Term, and recently declined on average after an initial overall increase.

[173] There were zero grants in Terms without bars.

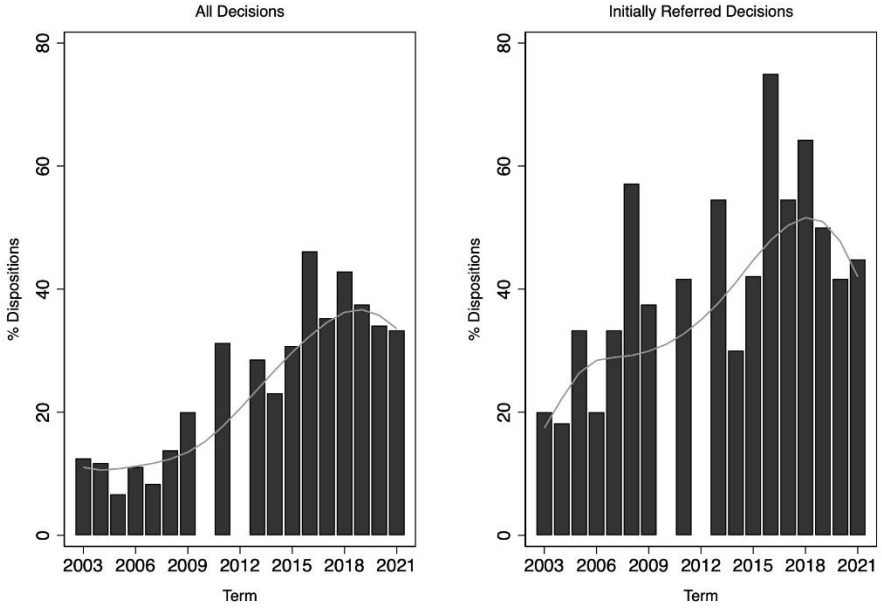
Figure 4.12: Percentage of Initially Referred Noncapital Applications Granted



c. Merits Petition Status. Disaggregating by merits petition status also yields distinct results. Noncapital applications that were not linked to a merits petition were granted 25% of the time overall, and 41% of the time they were initially referred. Figure 4.13 plots trends for all decisions (left panel) and initial referrals (right panel), both of which increased before declining on average.[174] Among all decisions, the grant rate for applications that were not linked to a merits petition ranged from 0% to 46%. Among initial referrals, the grant rate ranged from 0% to 75%.

[174] There were zero grants in Terms without bars.

Figure 4.13: Noncapital Applications Granted Without a Linked Merits Petition on File



While there are too few linked noncapital applications to draw inferences about temporal variation, the summary data are informative. For applications linked to a pending merits petition, the grant rate was 13% overall and 46% for initial referrals. Two applications, both initial referrals, were granted simultaneous to the Court denying linked merits petitions. In both instances, the Court granted a stay while denying a petition for cert before judgment, permitting the applicant to submit a regular cert petition in due course.[175] Of the fifteen applications with linked merits petitions at miscellaneous stages, five were granted.

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[175] The applications were filed by the Trump administration requesting a stay of a preliminary universal injunction prohibiting enforcement of the administration's policy restricting transgender people's eligibility to serve in the armed forces. For the Court's decisions on these applications, see Trump v. Karnoski, 139 S. Ct. 950 (2019) (mem.); Trump v. Stockman, 139 S. Ct. 950 (2019) (mem.). These examples also illustrate the difficulty of assessing application interdependence. *See also supra* note 88 (discussing nonindependence across capital applications). Although the applications concerned the same federal policy, the underlying cases were distinct in numerous ways. *See generally* Karnoski v. Trump, No. C17-

2. Reasoning. The Court rarely explains decisions on noncapital applications, though it does so more regularly than with capital applications. Moreover, the rate seems to be increasing in recent Terms. Overall, the Court issued an opinion accompanying 3% of its noncapital dispositions and 6% of initial referrals. In total, 47% of those opinions were issued during the 2020 and 2021 Terms. Every application yielding an opinion was initially referred.

Aside from opinions, the Court arguably provided some order-based explanation for 5% of all noncapital applications and 9% of initial referrals.[176] Overall, 56% of the arguable order-based explanations were issued during the 2020 and 2021 Terms. Combining opinions and orders, the Court arguably provided some explanation for 9% of all noncapital dispositions and 16% of initial referrals. Overall, 63% of these explanations were provided during the 2020 and 2021 Terms. All but one application yielding arguable order-based explanation was referred for initial disposition.[177]

3. Separate Positions. Justices regularly take separate positions on noncapital dispositions. Overall, 25% of these applications attracted a separate position indication, which took five forms in this sample: written dissent, silent dissent, written concurrence, silent concurrence, and statement concerning the decision.[178]

Dissents are common, though there is considerable variation in form and by referral status. At least one Justice dissented from 25% of all noncapital dispositions and 46% of initial referrals. Disaggregating by form, 12% of all dispositions and 22% of initial

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1297, 2018 WL 9635645 (W.D. Wash. 2018) (denying a stay); Stockman v. Trump, 331 F. Supp. 3d 990 (2018) (denying dissolution of a preliminary injunction). For example, the cases originated in different states, involved distinct threshold and merits issues, and came to the Court under different procedural postures. Furthermore, the Court's virtually identical orders granting the applications were issued on the same day, but do not mention the issues under consideration. *See Karnoski*, 139 S. Ct. 950 (granting the application); *Stockman*, 139 S. Ct. 950 (same).

[176] For more on coding arguable order-based explanation, see *supra* notes 135–137 and accompanying text.

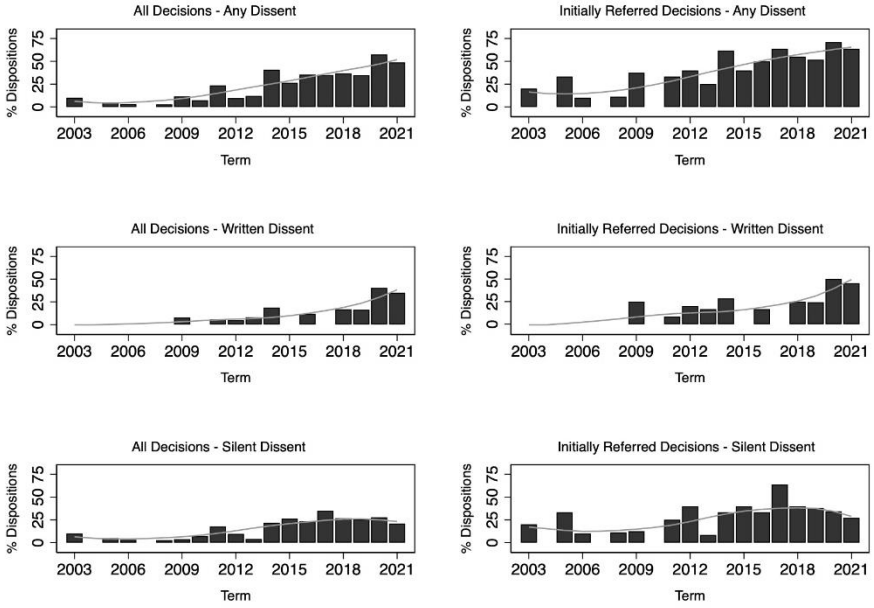
[177] For the exception, see Respect Me. PAC v. McKee, 562 U.S. 996 (2010).

[178] All separate position statistics for noncapital applications exclude thirteen related dismissals. *See supra* note 170 (discussing the dismissed applications)

referrals, generated a written dissent. Silent dissents accompanied 16% of all dispositions and 29% of initial referrals.[179]

To examine variation over time, Figure 4.14 plots trends by form and referral status.[180] Combining silent and written varieties (top row), the dissent rate increased on average. Moreover, sample-period highs were recorded during the 2020 and 2021 Terms.[181] Dissent rates ranged from 0% to 57% within a given Term among all noncapital applications (top-left panel), and 0% to 72% among initial referrals (top-right panel).

Figure 4.14: Noncapital Dispositions Attracting Dissent



Trends are distinct for written and silent dissents. Written dissent rates (middle row) increased on average. Zero written dissents were recorded from the 2003 through 2008 Terms. From the 2018 through 2021 Terms, the written dissent rate ranged from

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[179] Written and silent dissents appeared regarding the same decision 3% of the time overall, and 5% of the time upon initial referral.

[180] There were zero dissents in that category for Terms without bars.

[181] Among initially referred decisions, the 2017 Term dissent rate tied with the 2021 Term rate for second highest at 64%.

16% to 40% for all decisions and 24% to 50% for initial referrals. In contrast, silent dissent rates (bottom row) were higher on average throughout the sample period but flattened or decreased in recent Terms.[182] Of the three instances in which the written dissent rate surpassed the silent dissent rate in a given Term among all decisions, and the four instances for initial referrals, two occurred during the last two Terms.

Aside from dissents, Justices noted separate positions on noncapital decisions through concurrences and statements. Written concurrences were filed in six Terms, including each of the last three. The written concurrence rate was 4% for all decisions and 8% for initial referrals.[183] Overall, fourteen of twenty-one written concurrences were published during the 2020 and 2021 Terms. There was one silent concurrence.[184] Statements were filed in six Terms, including each of the last three. In total, seven statements were issued, with a rate of 1% for all decisions and 3% for initial referrals.

V. MISCELLANEOUS APPLICATIONS

This Part examines applications that do not involve stays or injunctions. First, I discuss workload, beginning with total dispositions, then disaggregating applications by relief requested, referral status, and merits petition status. Next, I describe briefing and time to disposition. Last, I discuss grants, reason giving, and separate positions.

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[182] From the 2018 through 2021 Terms, the silent dissent rate ranged from 21% to 28% for all decisions and 27% to 40% for initial referrals.

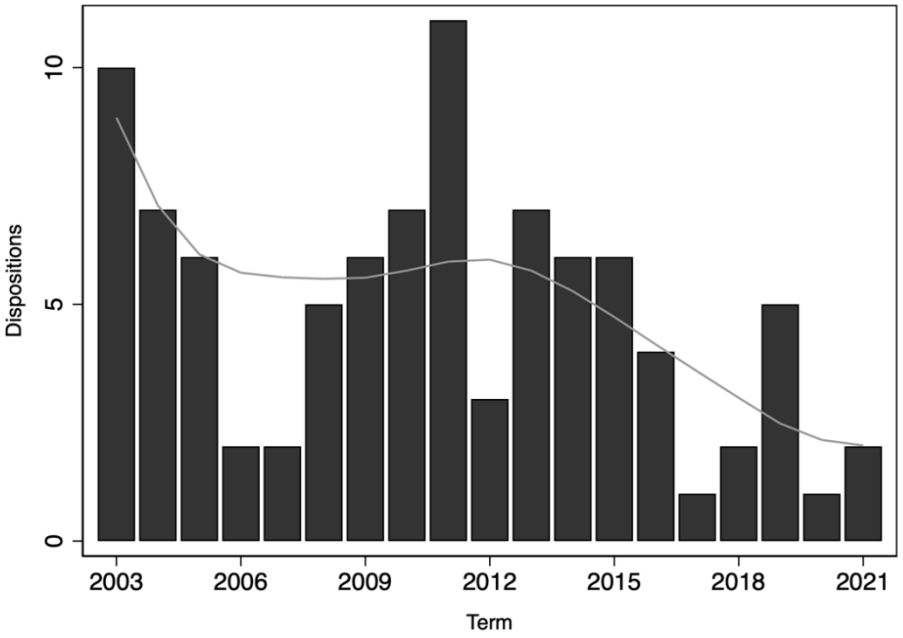
[183] Every application attracting a written concurrence was referred to the Court for initial disposition.

[184] Given that the Court does not typically explain its decisions on applications, it is not surprising that silent concurrences are rare. In the sole silent concurrence in this sample, the order contained arguable reasoning and other nonstandard text. Wheaton Coll. v. Burwell, 573 U.S. 958, 958–59 (2014). Justice Scalia concurred silently, presumably to distance himself from some or all of the order text while agreeing with the disposition *Id.* at 959 (Scalia, J., concurring). For more on silent concurrences on the merits, see Fife et al., *supra* note 64; Goelzhauser, *Silent Concurrences*, *supra* note 64.

A. WORKLOAD

1. Dispositions. Miscellaneous dispositions are relatively uncommon.[185] From the 2003 through 2021 Terms, the Court disposed of ninety-three miscellaneous applications, with a median of six per Term and range from one to eleven.[186] Figure 5.1 plots the trend, which declined on average, though few total decisions cautions against inferring meaningful temporal change. Given the few total decisions, the rest of this Part emphasizes summary data rather than trends.

Figure 5.1: Miscellaneous Application Dispositions



2. Referral Status. Miscellaneous applications are not usually referred for initial disposition. Overall, 10% of the miscellaneous applications in this sample were initially referred. The nine initial

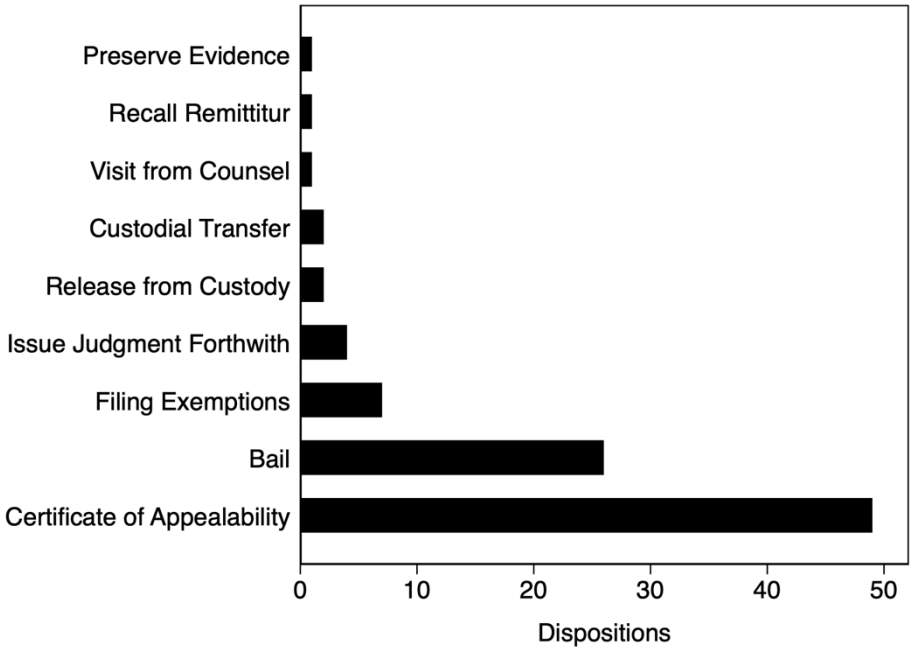
[185] This is only true for applications decided by the Court. Among applications decided in chambers, requests for time extensions are most common, but a Court rule prohibits reapplication. *See supra* note 69.

[186] The mean was seven, with a standard deviation of three.

referrals occurred sporadically from the 2003 through 2019 Terms, with no more than two in a single Term. Zero miscellaneous applications were referred for initial disposition in thirteen Terms.

3. Relief Requested. Miscellaneous applications involve various requests for relief by definition. Most in-chambers dispositions seem to involve requests for time extensions,[187] but none were referred for initial disposition in this sample and reapplications are prohibited by rule.[188] Figure 5.2 shows miscellaneous dispositions by requested relief. Requests for a certificate of appealability and bail jointly comprised 81% of miscellaneous dispositions.[189] Requests for filing exemptions and to issue judgments forthwith were the only others accounting for more than two decisions.

Figure 5.2: Miscellaneous Dispositions by Relief Requested



[187] *See supra* note 69.

[188] *See* SUP. CT. R. 22.4 (prohibiting reapplication when applications for time extensions are denied in chambers).

[189] For more on applications requesting a certificate of appealability, see Brent E. Newton, *Applications for Certificates of Appealability and the Supreme Court's "Obligatory" Jurisdiction*, 5. J. APP. PRAC. & PROCESS 177 (2003).

4. Merits Petition Status. As with other applications, miscellaneous requests vary by merits petition status. Overall, 79% of miscellaneous applications were decided without a linked merits petition on file, 8% with a linked petition pending, 2% simultaneous to denying a linked petition, and 11% with linked petitions at various stages.[190]

B. INFORMATION ENVIRONMENT

1. Briefing. Miscellaneous applications attract relatively limited briefing, though as with noncapital applications there is notable variation by referral status. Response briefs were filed in connection with 10% of all miscellaneous dispositions. Of the nine total responses filed, three followed a CFR and six attracted replies. Of the nine initially referred applications, eight attracted responses, five of which yielded replies. Zero amicus briefs were filed.

2. Time to Disposition. As with noncapital applications, disposition speed varies by referral status. The median miscellaneous application was disposed of 32 days after submission, with a range from 1 to 117 days.[191] For initial referrals, the median was seven days, with a range from one to forty-seven days.[192] For reapplications, the median was 32 days, with a range from 12 to 117 days.[193] From referral to decision, the median miscellaneous application was disposed of in 19 days, with a range from same-day disposition to 110 days.[194] For initial referrals, the median was same-day disposition, with a max of two days.[195] For reapplications, the median was 19 days, with a range from same-day disposition to 110 days.[196] Figure 5.3 plots kernel density distributions.[197]

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[190] Of the ten miscellaneous applications linked to petitions at various stages, five were to previously denied petitions, three to previously granted petitions with the cases having been subsequently decided, and two to petitions that were simultaneously granted, vacated, and remanded.

[191] The mean was thirty-five, with a standard deviation of nineteen.

[192] The mean was eleven, with a standard deviation of fourteen.

[193] The mean was thirty-eight, with a standard deviation of seventeen.

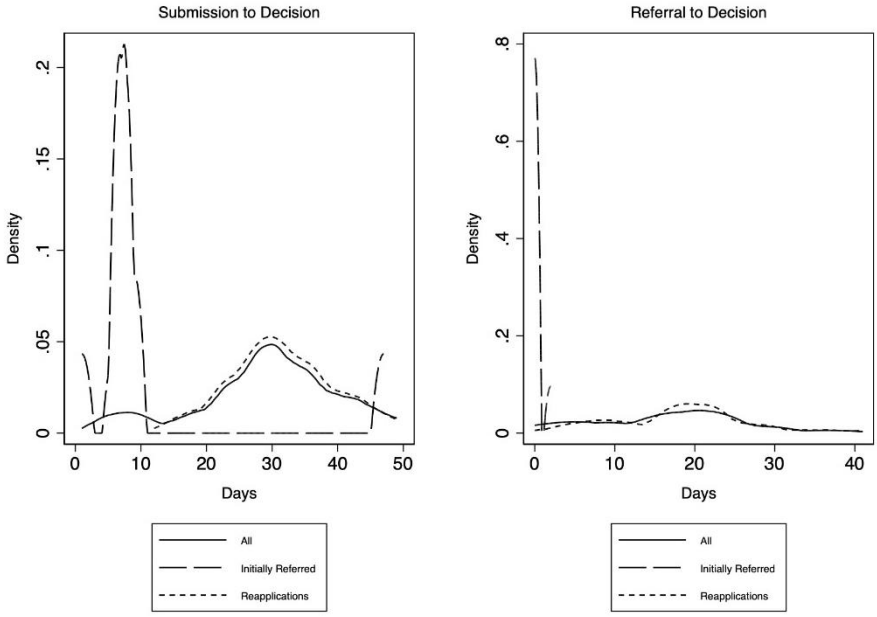
[194] The mean was seventeen, with a standard deviation of fourteen.

[195] The mean was 0.2, with a standard deviation of 1.

[196] The mean was nineteen, with a standard deviation of thirteen.

[197] The plot omits outlying values over fifty days to clarify the core distribution.

Figure 5.3: Time to Disposition for Miscellaneous Applications



C. DECISIONS AND EXPLANATIONS

1. Outcomes. The Court granted two miscellaneous applications during the sample period, both of which were referred for initial disposition. The cases were similar in several respects. First, in both instances the federal government sought permission to transfer designated "enemy combatants" from military to civilian custody.[198] Second, both respondents agreed they should be transferred but did not want this action to moot their challenges concerning the government's military detention power. Third, the cases were legal and political outliers.[199]

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[198] Al-Marri v. Spagone, 555 U.S. 1220, 1220 (2009) (mem.) (approving a transfer from military to civilian custody); Hanft v. Padilla, 546 U.S. 1084 (2006) (same).

[199] *See, e.g.*, Padilla v. Hanft, 432 F.3d 582, 585 (4th Cir. 2005) (refusing a prior request to transfer Padilla due to "at least an appearance" that the Bush administration "may be [trying] to avoid consideration of our decision by the Supreme Court"); Editorial, *A Necessary Supreme Court Showdown*, N.Y. TIMES (Mar. 5, 2009), https://www.nytimes.com/2009/03/06/opinion/06fri3.html (arguing that the Court should not

2. Reasoning. Reason giving is rare in miscellaneous cases. The Court did not issue any opinions concerning miscellaneous applications. It arguably provided some order-based explanation in connection with one of the two grants.[200] The Court may have been motivated to provide some explanation for its decision because this case was a legal and political outlier.[201]

3. Separate Positions. Justices rarely indicate separate positions on miscellaneous dispositions, with only two instances occurring during the sample period.[202] Both applications were submitted after the Court decided *Trump v. Mazars*,[203] requesting that the

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dismiss al-Marri's case because a "showdown over the reprehensible enemy combatant policy is overdue"); Eric Lichtblau, *In Legal Shift, U.S. Charges Detainee in Terrorism Case*, N.Y. TIMES, Nov. 23, 2005, https://www.nytimes.com/2005/11/23/politics/in-legal-shift-us-charges-detainee-in-terrorism-case.html (speculating that after years of detention, the newly announced criminal charges were strategically timed to avoid a potentially unfavorable Court ruling on the merits, while locking the favorable lower court ruling into place); Adam Liptak, *Justices Take Case on President's Power to Detain*, N.Y. TIMES (Dec. 5, 2008), https://www.nytimes.com/2008/12/06/us/w05scotus-web.html (suggesting that al-Marri's case raised "the most fundamental question yet concerning executive power in the age of terrorism"); Adam Liptak, *Early Test of Obama View on Power over Detainees*, N.Y. TIMES (Jan. 2, 2009), https://www.nytimes.com/2009/01/03/washington/03scotus.html (noting speculation that the Obama administration's desire to transfer al-Marri to face criminal charges may have been strategically timed to avoid taking a position on the underlying merits).

When the Fourth Circuit denied the government's request to authorize Padilla's transfer, in part due to concern about a strategic effort to avoid Court review, it noted that "the government has held Padilla militarily for three and a half years," adding that "[t]he government styled its motion as an 'emergency application,' but it provided no explanation as to what comprised the asserted exigency." *Padilla*, 432 F.3d at 584.

[200] *See Hanft*, 546 U.S. at 1084–85 (indicating that the respondent agreed with the request but for not wanting to moot the case, and addressing that concern by noting that the pending cert petition would be "consider[ed] . . . in due course").

[201] *See supra* note 199 (discussing *Padilla*).

[202] Comms. of the U.S. House of Representatives v. Trump, 141 S. Ct. 196, 197 (2020) (Sotomayor, J., dissenting) (mem.); Comms. of the U.S. House of Representatives v. Trump, 141 S. Ct. 197, 197 (2020) (Sotomayor, J., dissenting) (mem.).

[203] Trump v. Mazars USA, 140 S. Ct. 2019 (2020). There were two applications requesting the same relief because the Court consolidated two cases from different circuits in *Mazars*, which meant that the judgment would issue to separate courts on remand.

judgments be issued forthwith.[204] The Court denied the applications over Justice Sotomayor's silent dissents.[205]

VI. IMPLICATIONS

This Part discusses implications arising from a more nuanced understanding of applications practice. First, I stress the importance of accounting for docket complexity when drawing inferences about institutional performance. Next, I suggest reconceptualizing the shadow docket to better target core underlying normative concerns, and explain how doing so will focus attention on particular subsets of applications. Last, I examine lessons for debates about procedural legitimacy and institutional transparency.

A. INFERENCES ABOUT APPLICATIONS

Efforts to draw inferences about applications practice are complicated by docket complexity. Aggregate summary data can mask important variation. As detailed in this Article, for example, the overall declining trend in dispositions obscures respective downward and upward trends involving capital and noncapital

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[204] In *Mazars*, the Court considered whether the Constitution permits congressional committees to subpoena a president's personal information for investigative purposes. 140 S. Ct. at 2026. The Court delineated an analytical framework for resolving the question but remanded the case for application of that standard in the first instance. *Id.* at 2035–36. The applicants sought issuance of the judgment shortly after it was announced so the lower courts could begin proceedings on remand. The issue was time sensitive in part because the U.S. House, where the investigations were being conducted, is not a continuing body. Generally, there is a thirty-two day period between announcing and issuing a judgment to give parties time to file a rehearing petition. *See Revisions to Rules of the Supreme Court of the United States* 11 (2023), https://www.supremecourt.gov/filingandrules/SummaryOfRuleChanges2023.pdf (noting the Clerk's "current practice" of "wait[ing] seven days after the period to file a petition for rehearing to issue a judgment or mandate, to account for the possibility that a petition for rehearing may have been mailed on the 25th day after a ruling in the case"); *see also* SUP. CT. R. 44.1 (discussing rehearing petitions); SUP. CT. R. 45.3 (discussing the issuance of judgments in cases on review from federal courts).

[205] These dispositions were arguably not independent events. *See supra* notes 88 and 175 (discussing application interdependence).

applications.[206] Inferences may also vary based on distinctions such as referral status and linked merits petition status. Evaluating applications practice requires carefully specifying theoretical goals and isolating the relevant data.[207] For example, theory may warrant distinguishing applications by request type, referral status, and merits petition status. Existing commentary and empirical studies often at least implicitly treat every application the same, but this approach risks generating misleading inferences. Institutional performance assessments would also be improved by distinguishing applications along dimensions that are not addressed here due to data limitations, such as procedural posture. Classification rules can also be devised to distinguish various types of requests involving stays and injunctions, as well as to exclude nonindependent observations.

B. RECONCEPTUALIZING THE SHADOW DOCKET

The shadow docket should be more carefully conceptualized to promote productive conversation and careful empirical study with respect to core underlying normative concerns. And the empirical results presented in this Article advance this project. As originally defined, the shadow docket encompasses a "range of orders and summary decisions that defy [the Court's] normal procedural regularity."[208] This definition essentially identifies the orders list as the substantive area of interest and invokes the shadow analogy to benchmark procedural regularity against the plenary docket. Shadow analogies are common in law and the social sciences.[209] The

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[206] *See supra* section II.C.

[207] *See generally* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002) (discussing best practices for conducting empirical research).

[208] Baude, *supra* note 9, at 1.

[209] *See*, *e.g.*, ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984) (discussing how cooperation takes place in the shadow of expected future relations); FRIEDRICH SCHNEIDER & DOMINIK H. ENSTE, THE SHADOW ECONOMY: AN INTERNATIONAL SURVEY (2d ed. 2013) (discussing how the unofficial economy operates in the shadow of the official economy); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464 (2004) (discussing how plea bargaining takes place in the shadow of expected trial outcomes); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (discussing how private divorce bargaining takes place in the shadow of family law).

extent to which they are conceptually helpful, however, depends in part on the degree of fit between what is thought to be obscured and the shadow-casting reference point.

With plenary docket procedure as the reference point, the shadow analogy makes most sense as applied to orders list matters that have substantive impact. Several commentators have already identified substantive impact as the shadow docket's conceptual core.[210] Summary merits decisions (usually reversals) are the most obvious examples, so it is not surprising that William Baude emphasized them when coining the term shadow docket.[211] The shadow analogy works well for summary merits decisions because it makes sense to directly compare the procedures that generate them to the procedures that generate merits decisions on the plenary docket. But the shadow analogy is undertheorized beyond application to summary merits decisions, and it strains as applied to relatively nonsubstantive orders.[212]

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[210] *See, e.g.*, Merrill v. Milligan, 142 S. Ct. 879, 889 (2022) (Kagan, J., dissenting) (mem.) ("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."); *Case Selection and Review at the Supreme Court: Hearing Before the Comm'n*, PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S. 1 n.1, (June 2021) (testimony of Samuel L. Bray, Prof. of L., Notre Dame L. Sch.) [hereinafter Bray Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Bray-Statement-for-Presidential-Commission-on-the-Supreme-Court-2021.pdf [https://perma.cc/U7C4-K3L6] ("I use the term [shadow docket] with special reference to the portion of the orders list that is substantive, not including the mere grant or denial of a petition for a writ of certiorari."); VLADECK, SHADOW DOCKET, *supra* note 9, at 241 (arguing that orders "produc[ing] a major substantive effect . . . have the same practical, and, in many cases, legal, effects as the work of the Court's merits docket").

[211] *See* Baude, *supra* note 9, at 1 (noting an emphasis on "summary reversal orders in particular").

[212] Perhaps orders deserve systematic scrutiny due to insufficient procedural regularity, but it does not necessarily follow that the plenary docket provides the relevant benchmark for all orders list matters. Rather than start with the observation that "orders do not always live up to the high standards of procedural regularity set by [the Court's] merits cases," Baude, *supra* note 9, at 4, which is certainly true but may not be particularly helpful due to incomparability, perhaps it is best to begin by cataloguing orders and considering best practices for each type from first principles. Doing so may reveal that it is productive to benchmark some orders list matters against plenary docket procedure but not others. Then a more productive conversation can develop concerning best practices for dealing with distinct decision-making tasks.

Reconceptualizing the shadow docket to emphasize substantive impact would presumably mean including some types of orders but not others. As an initial matter, however, the concept of "substantive impact" should be carefully specified. After developing a more theoretically nuanced concept, search could begin for a reliable, valid, and outcome-independent way to classify the relevant subset of orders. These tasks may prove difficult, but accomplishing them would improve conversation quality and institutional performance assessments by more precisely targeting core underlying normative concerns.[213]

By illuminating docket complexity, this Article has implications for operationalizing a shadow docket concept emphasizing substantive impact as applied to applications. If cert denials are excluded,[214] for example, then perhaps application denials simultaneous to linked cert denials should be excluded as well. Similarly, perhaps decisions on applications concerning administrative matters such as deadline extensions and filing exemptions should be excluded. It may also be theoretically important to distinguish applications by procedural posture, differentiating, for example, requests to stay a district court's

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[213] As with most concepts, the meaning of "substantive impact" will presumably be contested, and there will be slippage with respect to measurement. But focusing discussion on these matters would improve the status quo by solving the coordination problem. *See supra* notes 31, 36–39 and accompanying text (discussing different uses of the term "shadow docket"). Given the current state of debate, the only apparent way to avoid conceptual ambiguity and measurement slippage when discussing the shadow docket would be to agree on one of the following propositions: the shadow docket encompasses (1) all orders or (2) all orders concerning applications. If that is the most that can be said about the shadow docket, however, perhaps it is best to abandon the concept. Neither of those definitions are consistent with typical invocations of the shadow analogy in law and the social sciences. *See supra* note 209 (providing examples of how the shadow analogy has been employed in research). Moreover, both are overinclusive with respect to the orders generating controversy, thereby yielding a misleading impression of the volume of work product being discussed. *See also infra* note 215 (describing how inferences about performance can differ based on failure to exclude irrelevant orders).

[214] *See, e.g.*, Bray Testimony, *supra* note 210, at 1 n.1 (using the term shadow docket "with special reference to the portion of the orders list that is substantive, not including the mere grant or denial of a petition for a writ of certiorari").

preliminary injunction and a circuit court's final judgment pending disposition of a cert petition.[215]

Not all applications warrant the same scrutiny with respect to concerns about procedural legitimacy, institutional transparency, and substantive impact. And not all applications should be benchmarked for procedural regularity against the plenary docket. Productive conversation and careful empirical study require a more nuanced approach to evaluating institutional performance.

C. PROCEDURE AND TRANSPARENCY

Concerns about procedural legitimacy and institutional transparency are prevalent in discussions concerning applications practice. Two general principles can be derived from the empirical results and broader analysis presented here. First, debate about procedure and transparency should be grounded with specific reference to applications practice rather than reflexive reference to the plenary docket. Doing so avoids false equivalence and ensures that reform proposals are tailored to institutional reality. Second, docket complexity may caution against uniform solutions.

Understanding the optimal time horizon governing deliberation over applications is critical for advancing discussions about procedure and transparency. The evidence presented in this Article suggests that the Court is committed to ruling on applications quickly, particularly initial referrals, but it may be possible to extend the time horizon. Doing so would permit more information gathering, deliberation, and reason giving. Crucially, we do not have a good sense of how time sensitive the median application is,

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[215] Excluding irrelevant orders from shadow docket statistics will yield more meaningful conclusions about institutional performance. Consider a deceptively simple question: How often does the Court explain shadow docket decisions? The answer to this question depends on what constitutes a shadow docket decision: (1) all orders, (2) orders with substantive implications, (3) or something else. Assuming (2) is a subset of (1), the reason-giving rate would presumably be lower under (1) because the denominator would likely be substantially larger while the numerator would presumably not be much larger. Thus, the decision to report the reason-giving rate based on approach (1) or (2) has implications for the inferences we draw about institutional performance. The same logic applies to distinctions among applications made within approach (2), or if "applications" is substituted for "orders" under (1) and (2).

or the distribution of time sensitivity across all applications or within various subsets of applications.

The Court could enhance procedural regularity and institutional transparency surrounding applications by creating an actual emergency docket.[216] Even if all applications are time sensitive, they are not all emergencies. The Court could begin by creating default rules governing applications that extend the decision-making time horizon where warranted. Doing so would make space for reforms, again where warranted, such as more oral arguments, amicus participation, deliberation, and reason giving—all of which would enhance procedural legitimacy and institutional transparency while improving decision quality. For genuine emergencies, as defined by the Court and demonstrated by the applicant, these default rules could be overridden and decisions could be expedited.

Various state and federal courts have already demonstrated proof of concept with respect to distinguishing emergency requests. In the Fifth Circuit, for example, requests involving noncapital stays and injunctions "seeking relief before the expiration of 14 days after filing" must be labeled "emergency motions" and follow explicit protocols.[217] Moreover, the Fifth Circuit emphasizes that "[p]arties should not file motions seeking emergency relief unless there is an emergency sufficient to justify disruption of the normal appellate process."[218] The term "emergency" can also be defined to reduce ambiguity and clarify expectations. The Northern District of Illinois, for example, states that "[t]o qualify as an 'emergency,' a motion must be based on an unforeseen circumstance that arises suddenly and unexpectedly, and requires immediate action in order to avoid serious or irreparable harm to one or more of the parties."[219] And the court provides further guidance by adding that requests

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[216] For more on the "emergency docket" label, see *supra* notes 40–46 and accompanying text.

[217] 5TH CIR. R. 27.3.

[218] *Id.* This standard is analogous to the rule governing the Court's determination of whether to grant cert before judgment. *See* SUP. CT. R. 11 (noting that a petition for cert before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court").

[219] *Motion Practice*, U.S. DIST. CT., N. DIST. ILL., https://www.ilnd.uscourts.gov/judge-cmp-detail.aspx?cmpid=457 [https://perma.cc/RM74-KK3J].

"for extension of time for filing, or for continuances of deadlines or other dates . . . are unlikely to qualify as 'emergencies.'"[220]

A better understanding of the applications docket also yields insights for the debate over reason giving. This Article demonstrates that Justices are increasingly committed to explaining decisions concerning noncapital applications.[221] This is a positive development, but the Court could do more to establish reason giving as a norm. Explaining all decisions on applications would be unnecessary, but this Article demonstrates that a small subset of applications comprise the docket's controversial core. Whether that controversial core is defined by substantive impact or something else, more reason giving would enhance transparency, encourage consistency, and offer guidance to attorneys and judges. Where time is short, opinions can be published later. There may be a historical norm against explaining rulings on applications, but docket changes and increased salience warrant reconsidering that norm.

More generally, the Court can make it easier for people to know what is going on with respect to applications. Absent press coverage, information acquisition is difficult: the typical order includes little information about the case or request, requiring anyone interested in a particular decision, after having found it on the relevant orders list, to search the docket by application number and read the filings to understand what happened. To enhance transparency, the Court could provide a more thorough summary of the matter where context would be helpful for understanding the decision. The Court could also hyperlink the docket page or create a section of the website that separately lists orders concerning applications. There is obvious selection bias in the news we consume about orders concerning applications, but that is partly the Court's fault for making information acquisition difficult. Designing institutions that lower the transaction costs to being informed, while helping the Court manage a public image beset by selection bias, seems like a starting place for reform that may generate some agreement.

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[220] *Id.*

[221] *See supra* section IV.C.*2* (discussing majority reason giving for decisions on noncapital applications); section IV.C.*3* (written dissents and statements concerning noncapital applications).

VII. CONCLUSION

The applications docket is controversial, complex, and poorly understood—a combination that has deleterious consequences for conversation quality and institutional performance evaluations. Using original data on Court decisions from the 2003 through 2021 Terms, I unravel the docket's empirical foundations. Doing so brings analytical clarity to this practice area and lays the groundwork for more productive discussion and rigorous empirical assessment.

Applications practice changed in recent years. Contrary to conventional wisdom, dispositions declined on average, but this finding masks divergent trends: among applications involving stays and injunctions, capital and noncapital dispositions respectively decreased and increased.[222] Moreover, noncapital dispositions now comprise a larger share of the docket.[223] This shift has important implications for docket salience because, as I show, most capital applications are denied simultaneous to denying plenary review, while most noncapital applications are decided without a linked merits petition on file.[224] Thus, whereas applications were once mostly subsumed by agenda setting decisions, they are now increasingly impactful in their own right.

The applications docket changed in other ways as well. In another sign of increased docket salience, noncapital applications are increasingly referred to the Court for initial disposition.[225] Noncapital applications are also yielding more CFRs, amicus participation, grants, reason giving, and written dissents.[226] In capital cases, applications to vacate stays of execution are increasingly common and typically granted.[227] Justice Alito recently said there is "absolutely nothing new about . . . applications,"[228] but this is true only insofar as they are a longstanding part of Court

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[222] *See supra* section II.C.

[223] *See supra* section II.C.

[224] *See supra* section III.A.*3* (discussing merits petitions linked to capital applications); IV.A.*3* (noncapital applications).

[225] *See supra* section IV.A.*2*.

[226] *See supra* sections IV.B & IV.C.

[227] *See supra* sections III.B & III.C.

[228] Josh Gerstein, *Alito Speaks Out on Texas Abortion Case and "Shadow Docket*,*"* POLITICO (Sept. 30, 2021, 3:33PM), https://www.politico.com/news/2021/09/30/alito-on-texas-abortion-case-shadow-docket-514828 [https://perma.cc/PUS9-6MW9].

practice. Today's applications docket is noticeably different than it was two decades ago.