

THE TWO FACES OF STAYS PENDING APPEAL: AN ESSAY ON INSTITUTIONALISM AND APPELLATE PROCEDURE

*Charles M. Yablon**

As I sometimes tell my students, the difference between Constitutional Law scholars and Civil Procedure teachers is that although we both write about Supreme Court decisions, Civ Pro teachers only get to write about the boring ones. So imagine my elation in June 2023 upon reading the Supreme Court's decision in *Coinbase, Inc. v. Bielski* (*Coinbase v. Bielski*).¹ In that hotly contested but little noticed case, a 5–4 majority held that the losing party in a motion to compel arbitration has an “automatic”² right to a stay pending appeal, thereby refusing to apply the “traditional” four-part balancing test for determining whether to grant such stays.³ Great, I thought, an opportunity to contrast and evaluate two competing conceptions of the little-understood role of the stay pending appeal, which may seem an arcane and technical aspect of the litigation process, but which, as all true Civ Pro aficionados know, can sometimes be the key to winning cases, or at least achieving a fat settlement offer.

Every case, and especially every Supreme Court case, can be analyzed from many perspectives and explained in lots of different ways. So, while *Coinbase v. Bielski* is most certainly about the proper standard to apply to motions for stays pending appeal, it can also be seen as an arbitration case which has revived, to some extent, the Court's preferential approach to arbitration clauses. Or, it can be viewed as a slap at the plaintiff's class action bar, since the automatic stay rule⁴ endorsed in that consumer class action reduces the immediate threat of

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* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University.

1 *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915 (2023).

2 *Id.* at 1920, 1923.

3 *Id.* at 1924 (Jackson, J., dissenting).

4 The automatic stay rule had previously been rejected by three of the more litigation-friendly circuit courts of appeals but accepted by five others. See *infra* notes 75–77 and accompanying text.

expensive and possibly unnecessary trial court litigation.⁵ It might even be seen as a rather unique approach to statutory interpretation, since both the majority and dissent devote some pages to analyzing how the Federal Arbitration Act might apply to such stay motions despite everyone's recognition that the text of the Arbitration Act says nothing whatsoever on the subject.⁶

I believe, however, that the most interesting and fruitful way to analyze *Coinbase v. Bielski* is as an exercise in pure, unadulterated, inherent judicial authority. That arcane judicial power is what both the majority and dissent rely on to reach their diametrically opposing positions. It is a power based not on any statute, rule, or express Constitutional right. Rather, it is a power judges derive simply from the fact that they are judges. It has long been recognized to empower judges to make rules governing the practices and procedures to be followed in their courts, at least in the absence of contrary instructions from statutes or other authorities.⁷ Inherent judicial authority can be seen as a sort of procedural federal common law and has been described that way by one of the current Justices.⁸

But the Court's efforts to apply that power in *Coinbase v. Bielski* turned out to be surprisingly difficult and disputatious. The disagreement mostly broke down along conservative/liberal lines. Justice Kavanaugh wrote the majority opinion, joined by Justices Roberts, Alito, Gorsuch, and Barrett.⁹ Justice Jackson wrote the dissent, which was joined by Justice Sotomayor, Justice Kagan, and, perhaps surprisingly, in substantial part by Justice Thomas.¹⁰ The language in their opinions shows that Justices Kavanaugh and Jackson did not view the issue in this case as a minor disagreement on a technical point of law. Rather, each side condemned the other for deeply flawed reasoning

5 This, of course, also reduces the settlement value of plaintiff's class action claims.

6 See *infra* notes 101–104, 110 and accompanying text regarding the “background principle” against which Section 16(a) of the FAA should be interpreted.

7 See Charles M. Yablon, *Inherent Judicial Authority: A Study in Creative Ambiguity*, 43 CARDOZO L. REV. 1035, 1051 (2022). In *Coinbase v. Bielski*, both the majority and dissenting opinions agree that inherent judicial authority gives them power to decide what the appropriate rules for stays pending appeal should be. See *infra* note 100 and accompanying text.

8 See Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 842–46, 888 (2008). It has been the source of some fairly significant legal doctrines, including *forum non conveniens* and the work product protection. *Id.* at 826–27; Michael A. Blaise, *The Uncertain Foundation of Work Product*, 67 DEPAUL L. REV. 35, 64–68 (2017). The powers conferred under inherent judicial authority extend significantly beyond purely procedural issues. They include the contempt power, as well as the power to determine admission and exclusion from the Bar. Barrett, *supra*, at 816.

9 *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915, 1918 (2023).

10 *Id.* at 1923 (Jackson, J., dissenting).

that posed dangerous consequences to the judicial system.¹¹ One of the main purposes of this Article is to figure out what the Justices thought was actually at stake in *Coinbase* and why they were fighting so hard about it.

The fundamental issue underlying *Coinbase* is a dispute over what has come to be called “institutionalism.” Broadly speaking, judges are said to be acting “institutionally” when they decide cases in a manner intended to enhance the reputation, power, influence or effectiveness of the institution they represent.¹² The concept of “institutionalism” and “institutionalist judges” has received renewed interest with the recent changes on the Supreme Court.¹³ While some see a Court riven by ideological factions and disputes, others point out that much of the Court’s work is based more on institutional than ideological concerns.¹⁴ They suggest that institutional concerns may unify the Court, avoid or minimize disagreement on controversial issues, and maintain the Court’s reputation for careful and dispassionate decisionmaking.¹⁵

Coinbase v. Bielski is a contemporary case study on institutionalism which demonstrates that institutional concerns can be as divisive as ideological ones. The automatic-stay rule approved by the majority is institutional in that it reduces costs and avoids duplication and wasted effort by district courts. It is justified as simple “common sense” by Justice Kavanaugh.¹⁶ But the traditional four-part test for granting a stay, which Justice Jackson endorses,¹⁷ is also based on institutional concerns. It “promotes procedural fairness because it allows for a balancing of all relevant interests.”¹⁸

11 Justice Kavanaugh refers to the dissent’s position as “not especially sensible” and potentially leading to the “‘worst possible outcome’ for parties and the courts.” *Id.* at 1921 (majority opinion) (quoting *Bradford-Scott Data Corp. v. Physician Comput. Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997)). Justice Jackson states “[the majority’s] logic has such significant implications for federal litigation that the majority itself shies away from the Pandora’s box it may have opened.” *Id.* at 1924 (Jackson, J., dissenting).

12 See Rachel Bayefsky, *Judicial Institutionalism*, 109 CORN. L. REV. 1297, 1306 (2024). The “institution” on whose behalf the judges act is sometimes seen as the Supreme Court and sometimes the entire federal judiciary. See *id.* at 1306–07; see also Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 880 (2022).

13 See Bayefsky, *supra* note 12, at 1300.

14 See *id.* at 1318; Adam Feldman, *The Ways in Which Justices Reach Their Decisions*, SCOTUSBLOG (July 29, 2025), <https://www.scotusblog.com/2025/07/how-supreme-court-justices-reach-their-decisions/> [<https://perma.cc/3MLR-B6ZP>] (empirical study of Supreme Court judicial methodologies finding that they “reflect[] a court more invested in institutional logic than ethical or identity-based appeals”).

15 See *infra* notes 124–46 and accompanying text.

16 *Coinbase*, 143 S. Ct. at 1921.

17 *Id.* at 1924 (Jackson, J., dissenting).

18 *Id.*

The goals of this Article are three-fold. On one level, it is an analysis of an important recent case in an understudied area of Civil Procedure which has received little attention from the popular or legal media. Second, it examines the *Bielski* litigation¹⁹ to provide contemporary insights into the important but somewhat nebulous concepts of institutionalism, inherent judicial authority, and appellate judicial discretion. *Bielski* provides a concrete example of how institutional concerns can divide as well as unite judges, an example consistent with recent theoretical work on this subject. It also seeks to show that judges act a little differently when they decide cases utilizing their inherent judicial authority. They act with greater discretion, more creativity, and less concern about precedent, all features of the debate between Justices Kavanaugh and Jackson which is at the center of *Coinbase v. Bielski*.

Third, this institutional analysis also provides us with a useful perspective on the current controversy over the “shadow docket,” the Supreme Court’s practice of deciding various motions filed with the Court on an expedited schedule, often without opinion or oral argument.²⁰ Many of these shadow docket motions are for stays pending appeal or other equitable remedies that raise serious institutional concerns.²¹ Understanding the shadow docket controversy as a problem of institutionalism may lead to a fuller understanding of what is at stake and possible paths to ameliorating the conflicts it has created among the justices. It also helps explain much of what was at stake in the *Bielski* litigation. An automatic stay, after all, is one that can be issued without briefing, argument, or written opinion.

This Article is also organized into three sections. The first provides an extensive account of the *Bielski* litigation itself—its prior proceedings, its origins in a doctrinal split among the circuits, and the controversial concept of an “automatic” stay pending appeal. The second takes a deep dive into the Supreme Court’s decision itself and analyzes the sources of the disagreement between Justices Kavanaugh and Jackson. It shows that their fundamental dispute is over competing institutional concerns, whether it is more important to promote “efficiency” or “fairness” in this area of federal court practice. The final section takes an even wider, more theoretical approach, examining the

19 In this Article, I will use “*Coinbase, Inc. v. Bielski*” to refer to the Supreme Court case and opinions in that case. I will use “*Bielski*” to refer to the litigation generally, and “*Bielski v. Coinbase, Inc.*” to refer to proceedings in the lower courts.

20 Commentators and legal scholars have expressed concerns that under the truncated procedures of the shadow docket there may be important legal decisions made without full briefing, written opinions, or adequate consideration by the Court. There are indications that at least some of the Justices share these concerns. See *infra* note 154 and accompanying text.

21 See Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 133–34 (2019).

jurisprudential bases of the *Bielski* controversy with regard to contemporary debates regarding institutionalism and the “shadow docket” controversy. It applies recent scholarship to provide a more sophisticated and nuanced understanding of institutional interests. It shows how conflicts among such interests develop over time and can give rise to serious institutional problems, as they have done in the “shadow docket” controversy. The Article ends by applying this analysis to the current state of the law and making a few tentative predictions about the future course of institutionalism, the shadow docket, and the law of stays pending appeal.

I. A BRIEF HISTORY OF A BRIEF CASE

A. *The Proceedings Below*

In May 2021, Abraham Bielski opened an account with Coinbase, Inc. (Coinbase) “for the purpose of buying and selling cryptocurrencies for his personal use.”²² Coinbase operates an “exchange on which Coinbase users can buy and sell various cryptocurrencies and fiat currencies using their Coinbase accounts, or electronic ‘wallets,’ which are typically funded and de-funded via electronic transfers to and from Coinbase users’ banks.”²³ On September 8, 2021, Bielski “realized that an unauthorized electronic transfer had been made from his Coinbase account to an unknown third party. Specifically, the third party electronically transferred USD 31,309.06 out of” his account.²⁴

Bielski’s efforts to get help from Coinbase to recover those funds were described by the District Court as a “customer-service nightmare.”²⁵ As the Court states,

Upon realizing he had been swindled, Bielski initiated a “live chat” with a Coinbase representative, which turned out to be a mere bot that provided canned responses. Bielski then called the specific customer service “hotline” specified in his user agreement as where to get help for a compromised account. He was once again unable to speak with a human. Bielski then wrote two letters to Coinbase at its San Francisco office pleading for help. It was not until this lawsuit

22 Second Amended Class Action Complaint at 3, *Bielski v. Coinbase, Inc.*, No. 21-cv-07478, 2022 WL 1062049 (N.D. Cal. Apr. 8, 2022).

23 *Id.* at 1. It is wholly owned by Coinbase Global Inc., whose shares are publicly traded on the NASDAQ exchange. See *Coinbase Global, Inc. Class A Common Stock (COIN)*, NASDAQ, <https://www.nasdaq.com/market-activity/stocks/coin> [<https://perma.cc/4N3W-K85S>] (last visited Jan. 16, 2026).

24 Second Amended Class Action Complaint, *supra* note 22, at 3.

25 *Bielski*, 2022 WL 1062049, at *1.

that Coinbase deigned to respond, albeit again with only automated inquiries.²⁶

Bielski initiated a class action against Coinbase alleging violations of the Electronic Fund Transfer Act (EFTA) and Regulation E of that Act.²⁷

Plaintiff's action was commenced on September 24, 2021.²⁸ Coinbase's motion to compel individual arbitration of Bielski's claims and stay the court action pending completion of that arbitration was filed on January 13, 2022.²⁹ After briefing and oral argument, the motion to compel was denied on April 8, 2022.³⁰ Pursuant to the Federal Arbitration Act,³¹ Coinbase "immediately appealed," filing an interlocutory appeal as of right with the Ninth Circuit.³² Shortly thereafter, on May 5, 2022, Coinbase filed a motion for an order "staying all proceedings in the district court pending appeal of the Court's April 8, 2022 Order Denying Motion to Compel Arbitration."³³

²⁶ *Id.*

²⁷ See Electronic Fund Transfer Act, Pub. L. No. 95-630, 92 Stat. 3728 (1978) (codified as amended in scattered sections of 12 and 15 U.S.C.); 12 C.F.R. § 1005 (2025). The Complaint alleged that Coinbase

failed to undertake its responsibilities to remedy unauthorized electronic fund transfers under the EFTA and Regulation E by, for example, failing to timely and in good faith investigate fraudulent transfers, and failing to timely credit and/or provisionally recredit, or credit and/or provisionally recredit at all, users' accounts pending investigation. Coinbase users have repeatedly implored Coinbase to help them rectify the unauthorized transfers from their accounts, but Coinbase has routinely and repeatedly effectively ignored such requests, instead relying on automated responses that have not specifically addressed Coinbase users' concerns and have not provided timely, meaningful customer service.

Second Amended Class Action Complaint, *supra* note 22, at 2.

²⁸ The initial class action complaint had a different named representative and sued some additional parties. See Class Action Complaint, Zubin v. Coinbase Glob., Inc., No. 21-cv-07478 (N.D. Cal. Sep. 24, 2021). It was not until the second amended complaint that Bielski became a named plaintiff and Coinbase Inc. the only defendant. See Second Amended Class Action Complaint, *supra* note 22.

²⁹ Defendant Coinbase, Inc.'s Motion to Compel Individual Arbitration & to Stay; Memorandum of Points & Auths. in Support Thereof, *Bielski*, 2022 WL 1062049.

³⁰ The oral argument took place over Zoom. See Transcript of Oral Argument, Zubin v. Coinbase Glob., Inc., No. 21-cv-07478 (N.D. Cal. Mar. 22, 2022); *Bielski*, 2022 WL 1062049, at *1.

³¹ See Federal Arbitration Act, 9 U.S.C. § 16(a) (2018).

³² See Brief for Petitioner at 12, 12–13, *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915 (2023) (No. 22-105).

³³ Defendant Coinbase, Inc.'s Notice of Motion & Motion to Stay Pending Appeal; Memorandum of Points & Auths. in Support Thereof at vi, *Bielski v. Coinbase, Inc.*, No. 21-cv-07478, 2022 WL 1062049 (N.D. Cal. Mar. 22, 2022).

The motion to stay was denied by the District Court on June 7, 2022.³⁴ Following prior Ninth Circuit law,³⁵ it applied the four-part discretionary standard for stays pending appeal set forth in *Nken v. Holder*.³⁶ Coinbase then moved in the Ninth Circuit Court of Appeals for a stay of district court proceedings pending appeal of the district court's order denying arbitration.³⁷ That motion was denied on July 11, 2022 without opinion.³⁸ The Court of Appeals also refused Coinbase's request for *en banc* consideration of the Ninth Circuit's continuing use of the minority discretionary standard for determining whether to grant stays pending appeal.³⁹

B. Coinbase's Petition for Certiorari

Coinbase's petition for a writ of certiorari from the Ninth Circuit's denial of its stay motion was filed with the United States Supreme Court on July 29, 2022,⁴⁰ less than one year after the case was first filed in district court. From a certain perspective, the case was a minor one, an appeal about "nothing" in the Seinfeldian sense. It would not decide the underlying class action nor even whether the district court had been correct in denying Coinbase's motion to compel arbitration.⁴¹ It would not even decide, as a formal matter, whether the stay pending appeal should have been granted, but merely the proper legal standard the lower courts should have applied in determining whether to grant such a stay.⁴² Yet it was the very insignificance of this issue that made it important, indeed, cert-worthy. Its lack of specificity to the merits of the particular case made it potentially applicable to a vast array of potential litigations.⁴³

34 Order Denying Motion to Stay Pending Appeal & Vacating Hearing, Bielski v. Coinbase, Inc., No. 21-cv-07478 (N.D. Cal. June 7, 2022). The court found, *inter alia*, "there is a strong risk of harm to Bielski if a stay is imposed and further finds Coinbase has not shown that the balance of hardships tips in its favor." *Id.* at 3.

35 *Id.* at 2 (citing *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990), *abrogated by* *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915 (2023)).

36 *Id.* (citing *Nken v. Holder*, 556 U.S. 418, 426 (2009)).

37 Motion for Stay Pending Appeal, Bielski v. Coinbase, Inc., 87 F.4th 1003 (9th Cir. 2023) (No. 22-15566) (motion filed on June 14, 2022).

38 Order Denying Motion to Stay Pending Appeal, Bielski v. Coinbase, Inc., 87 F.4th 1003 (9th Cir. 2023) (No. 22-15566) (order filed on July 11, 2022).

39 Joint Petition for a Writ of Certiorari at 10, *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915 (2023) (No. 22-105).

40 *See id.*

41 *See id.* at i.

42 *See id.* However, it should be noted that adopting the automatic stay rule meant that such stays would almost always be granted. Applying the discretionary equitable rule meant that the vast majority would not. *See infra* notes 94–95 and accompanying text.

43 *See infra* Part II (discussing the scope of the Coinbase decision).

A company like Coinbase, whose problematic consumer product was always sold with a broad and clearly stated arbitration clause,⁴⁴ had a strong interest in expanding the procedural protections afforded by such clauses. It would benefit from the universal adoption of an “automatic” stay rule which became applicable every time Coinbase lost a motion to compel arbitration. Indeed, at the same time it was seeking a stay in *Bielski*, Coinbase had another class action pending against it in the Ninth Circuit, *Suski v. Coinbase*, alleging improprieties in a contest Coinbase had sponsored.⁴⁵ In that case, as in *Bielski* and at approximately the same time, Coinbase had lost the motion to compel and had been denied a stay pending appeal both in the district and circuit courts.⁴⁶ Accordingly, the petition for certiorari Coinbase filed with the Supreme Court was originally a “joint petition” seeking review of the orders in both the *Bielski* and *Suski* cases.⁴⁷

In addition to demonstrating the frequency and importance of the issue being raised in its cert petition, seeking cert with respect to two different lawsuits had another advantage for Coinbase. It lessened the chances that its appeal would be dismissed for mootness. This was a frequent problem with appeals from orders involving provisional remedies. By the time the appeal from the stay could be fully briefed and decided by the Supreme Court, a decision by a lower court on the underlying matter might well have been issued, thereby obviating the need for a stay.⁴⁸ Indeed, that was precisely the danger that loomed over both the *Bielski* and *Suski* cases. On the same day it filed its cert petition, Coinbase also sought a stay of lower court proceedings pending certiorari and expedited consideration of its cert petition.⁴⁹ Both motions were quickly denied.⁵⁰

While the petition for cert was pending in the Supreme Court, the Ninth Circuit heard oral argument in *Suski* and had scheduled oral

44 See *Bielski v. Coinbase, Inc.*, No. 21-07478, 2022 WL 1062049, at *2 (N.D. Cal. June 7, 2022).

45 See *Suski v. Coinbase, Inc.*, 55 F.4th 1227, 1228–29 (9th Cir. 2022), *aff’d*, 144 S. Ct. 1186 (2024); Joint Petition for a Writ of Certiorari, *supra* note 39, at 6–11.

46 See Order Denying Motion to Compel, *Suski v. Marden-Kane, Inc.*, No. 21-cv-04539, 2022 WL 103541, at *9 (N.D. Cal. Jan. 11, 2022); Order Denying Motion to Stay, *Suski v. Marden-Kane, Inc.*, No. 21-cv-04539 (N.D. Cal. Apr. 19, 2022); Order Denying Motion to Stay, *Suski v. Coinbase, Inc.*, No. 22-15209, 2022 WL 3099846, at *1 (9th Cir. May 27, 2022).

47 Joint Petition for a Writ of Certiorari, *supra* note 39, at 1.

48 See, e.g., *Mills v. Green*, 159 U.S. 651 (1895); *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 11–12 (1992).

49 Conditional Motion to Expedite Consideration of Joint Petition for a Writ of Certiorari at 3, *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915 (2023) (No. 22-105).

50 See Docket (Aug. 10, 2022), *Coinbase*, 143 S. Ct. 1915 (No. 22-105).

argument in *Bielski*.⁵¹ Counsel for Coinbase informed the Court of these developments in a letter,⁵² and stated that if cert was granted, Coinbase would ask the Ninth Circuit panel hearing *Bielski* “to hold the case in abeyance” pending the Supreme Court’s decision.⁵³

The Supreme Court granted cert on December 9, 2022.⁵⁴ One week later the Ninth Circuit affirmed the district court’s denial of Coinbase’s motion to compel in *Suski*, thereby mooted Coinbase’s need for a stay pending appeal of that motion.⁵⁵ The appeal in *Bielski*, however, did not suffer from the same problem because the Ninth Circuit panel deciding that appeal, after hearing oral argument, had “deferred submission of the appeal for decision” until after the Supreme Court had ruled.⁵⁶

C. *The Law Prior to Coinbase: The Two Faces of Stays Pending Appeal*

At the time cert was granted in *Bielski*, there was a clear split among the circuits regarding the standard to be applied to stays pending appeal of motions to compel arbitration. That split was not only doctrinal, but conceptual. It represented two distinctly different ways of thinking about the nature and purpose of stays pending appeal.

Courts had struggled to define the precise nature of stays in order to determine the appropriate standards for granting them. A central question was whether a stay was simply a particular type of injunctive relief (and therefore subject to the same rules) or something a little bit different. In 2009, the Supreme Court decided *Nken v. Holder*,⁵⁷ which appeared to provide an answer.

Nken was a citizen of Cameroon who had sought asylum in the United States.⁵⁸ In the Court of Appeals, Nken sought “to stay his

51 Letter from Neal Kumar Katyal to Scott S. Harris at 1 (Dec. 5, 2022), *Coinbase*, 143 S. Ct. 1915 (No. 22-105).

52 *Id.* Note that these were arguments on appeal from denial of the underlying motion to compel arbitration, not denial of the motion to stay pending those appeals, which was the subject of Coinbase’s cert petition. *See id.*

53 *Id.*

54 *See* Docket (Dec. 9, 2022), *Coinbase*, 143 S. Ct. 1915 (No. 22-105).

55 *Suski v. Coinbase, Inc.*, 55 F.4th 1227, 1228 (9th Cir. 2022), *aff’d*, 144 S. Ct. 1186 (2024); Respondent Abraham Bielski’s Suggestion of Mootness at 3, *Coinbase*, 143 S. Ct. 1915 (No. 22-105). The Supreme Court subsequently dismissed the grant of certiorari in *Suski* as having been “improvidently granted.” *Coinbase*, 143 S. Ct. at 1923 n.7.

56 Respondent Abraham Bielski’s Suggestion of Mootness, *supra* note 55, at 1.

57 *Nken v. Holder*, 556 U.S. 418 (2009).

58 *Id.* at 422. His request, first heard in the administrative immigration courts, was denied by the immigration judge and affirmed by the Board of Immigration Appeals. *Id.* Nken then filed a petition for review of that order with the United States Court of Appeals for the Fourth Circuit. *Id.* Under 8 U.S.C. § 1252(b)(2), “[t]he petition for review [of the immigration proceedings] shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings.” 8 U.S.C. § 1252(b)(2) (2018). It was denied.

deportation pending resolution of his appeal.”⁵⁹ He also challenged the Fourth Circuit standard which “required an alien seeking to stay a removal order to show by ‘clear and convincing evidence’ that the order was ‘prohibited as a matter of law.’”⁶⁰ That stay motion was denied by the Fourth Circuit without opinion.⁶¹ The Supreme Court then granted cert “to resolve a split among the Courts of Appeals on what standard governs a request for such a stay.”⁶²

The Fourth Circuit had applied the language of subsection (f)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) to Nken’s request for a stay of the immigration authority’s order of removal.⁶³ That section set forth strict requirements for any order that would seek to “enjoin the removal of any alien pursuant to a final order.”⁶⁴ The question for the Supreme Court was whether the stay Nken sought was an order to “enjoin” his removal pursuant to the statute.⁶⁵

Chief Justice Roberts, for the majority, held that a stay was a different form of relief from an injunction, although the two were similar in many respects.⁶⁶ He relied on three main distinctions: (1) that while

Nken, 556 U.S. at 422. Nken sought unsuccessfully to reopen his case a second time, and the petition to review that denial was also denied. *Id.* His third motion to reopen, based on “changed circumstances in Cameroon,” was also denied in the immigration courts and appealed to the Fourth Circuit. *Id.* at 423.

59 *Nken*, 556 U.S. at 423.

60 *Id.* (quoting 8 U.S.C. § 1252(f)(2) (2018)).

61 *Id.*

62 *Id.*

63 *See id.* at 423–425. “Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.” 8 U.S.C. § 1252(f)(2).

64 8 U.S.C. § 1252(f)(2).

65 *See Nken*, 556 U.S. at 426.

66 *See id.* at 428–30 (“A stay pending appeal certainly has some functional overlap with an injunction, particularly a preliminary one. Both can have the practical effect of preventing some action before the legality of that action has been conclusively determined. But a stay achieves this result by temporarily suspending the source of authority to act—the order or judgment in question—not by directing an actor’s conduct. A stay ‘simply suspend[s] judicial alteration of the status quo,’ while injunctive relief ‘grants judicial intervention that has been withheld by lower courts.’ An alien seeking a stay of removal pending adjudication of a petition for review does not ask for a coercive order against the Government, but rather for the temporary setting aside of the source of the Government’s authority to remove. Although such a stay acts to ‘ba[r] Executive Branch officials from removing [the applicant] from the country,’ it does so by returning to the status quo—the state of affairs before the removal order was entered. . . . But the relief sought here would simply suspend *administrative* alteration of the status quo, and we have long recognized that such temporary relief from an administrative order—just like temporary relief from a court order—is considered a stay.” *Id.* at 428–29, 429 n.* (alterations in original) (citations omitted) (first quoting *Ohio Citizens*

injunctions acted on persons or parties, stays were directed only at court proceedings, (2) that stays were intended only to preserve an existing status quo, and (3) that stays provided only preliminary, not final relief.⁶⁷ While recognizing that the stay in *Nken* effectively acted as an order preventing Nken's removal from the country, (as two dissenting Justices had noted),⁶⁸ Roberts argued that still did not make it an injunction. He stated,

Whether such a stay might technically be called an injunction is beside the point; that is not the label by which it is generally known. The sun may be a star, but "starry sky" does not refer to a bright summer day. The terminology of subsection (f)(2) does not comfortably cover stays.⁶⁹

Roberts also relied, however, on another legal principle, that courts should not lightly infer that ambiguous statutory language is intended to limit inherent judicial authority. He noted that the power to issue stays pending appeal was a power "inherent" in appellate courts,⁷⁰ "a power as old as the judicial system of the nation,"⁷¹ and that "we are loath to conclude that Congress would, 'without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review.'" ⁷²

Having established that stays pending appeals were not injunctions and therefore not covered by subsection (f)(2) of the IIRIRA, it also followed that they were not subject to the standards for granting preliminary injunctions that had recently been set forth by the Supreme Court.⁷³ Accordingly, the question arose what was the appropriate

for *Responsible Energy v. Nuclear Regul. Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers); and then quoting *Nken*, 556 U.S. at 445 (Alito, J., dissenting)).

67 See *id.* at 428–429, 429 n.*.

68 "The dissent would [argue] that Nken does not really seek to stay a final order of removal, but instead seeks 'to enjoin the Executive Branch from enforcing his removal order pending judicial review of an entirely separate order.'" *Id.* at 429 n.* (quoting *id.* at 442 n.* (Alito, J., dissenting)).

69 *Id.* at 430. Note that the distinction Roberts recognizes seems more based on linguistic practice than fundamental legal principles.

70 *Id.* at 426.

71 *Id.* at 427 (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 17 (1942)).

72 *Id.* at 433 (quoting *Scripps-Howard*, 316 U.S. at 11). This requirement of a clear expression of Congressional purpose to displace or modify an exercise of inherent judicial authority is a well-established feature of such jurisprudence. See Yablon, *supra* note 7, at 1039–41, 1074–1077 (discussing a series of cases from the late 19th and early 20th century which illustrate "the Supreme Court's tendency to construe federal statutes narrowly to provide room for judicial discretion," *id.* at 1077).

73 See *Nken*, 556 U.S. at 433–34; *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Court did note that there was "substantial overlap" between the standards for granting stays and those governing preliminary injunctions, "because similar concerns arise

standard for granting such stays. Roberts opted for what he called the “traditional standard,” which involved a discretionary weighing of four factors similar, but not quite the same, as those considered by courts on motions for preliminary injunctions.⁷⁴ By the time of the *Bielski* appeal, this “traditional standard” was the standard used by three federal courts of appeals in determining whether to grant stays pending appeals, including appeals from denials of motions to compel arbitration.⁷⁵

Another five courts of appeals, however, applied an “automatic stay” rule to such appeals, a rule which had originated with a Seventh Circuit case, *Bradford-Scott v. Physicians Computer Network*.⁷⁶ In that case, an appeal from denial of a motion to compel arbitration, Judge Easterbrook noted that granting a preliminary stay of the lower court proceedings under the traditional four-factor discretionary standard would be difficult since “the costs of litigation are not irreparable injury.”⁷⁷

Judge Easterbrook announced he would “approach the subject from a different perspective.”⁷⁸ He questioned whether, in light of the appeal, the district court retained any jurisdiction to continue hearing the litigation.⁷⁹ He cited language from a 1982 Supreme Court case, *Griggs v. Provident Consumer*, that filing a notice of appeal was an act of “jurisdictional significance” which “divests the district court of its control over those aspects of the case involved in the appeal.”⁸⁰

whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.” *Nken*, 556 U.S. at 434.

74 See *Nken*, 556 U.S. at 434 (“[T]hose legal principles have been distilled into consideration of four factors: ‘(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.’” (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987))).

75 See *infra* notes 82, 89–92 and accompanying text (noting the three courts of appeal using this discretionary standard).

76 *Bradford-Scott Data Corp. v. Physician Comput. Network, Inc.*, 128 F.3d 504 (7th Cir. 1997); see *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915, 1920 n.3 (2023). *Bradford-Scott* involved a motion to compel arbitration, which the district court judge denied, and the denial of a stay pending appeal from the motion, which the district court erroneously thought was unappealable. See *Bradford-Scott*, 128 F.3d at 505.

77 *Bradford-Scott*, 128 F.3d at 505 (first citing *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980); then citing *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); then citing *Petroleum Expl., Inc. v. Pub. Serv. Comm’n*, 304 U.S. 209, 222 (1938); and then citing *PaineWebber Inc. v. Farnam*, 843 F.2d 1050 (7th Cir. 1988)).

78 *Id.*

79 *Id.*

80 *Id.* (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam)). *Griggs* was a per curiam opinion which did not involve arbitration or stays of any kind but did support the principle that “a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously.” *Griggs*, 459 U.S. at 58.

Easterbrook took a broad view of what “aspects of the case” were involved in an appeal from denial of arbitration. He argued that there could be no litigation of the merits while such an appeal was pending because such litigation was a “mirror image” of the issue on appeal.⁸¹

At first reading, *Bradford-Scott* seems to endorse a highly formalistic argument based on an all-or-nothing concept of subject-matter jurisdiction. Once the motion to compel arbitration and dismiss the court case went to the court of appeals, there was nothing left in the district court to adjudicate. Accordingly, the lower court proceedings were stayed “automatically.” Yet Easterbrook was well aware that what was involved here was more than just a matter of logic or a mechanical rule. The key to his argument was the claim that the issue of arbitrability encompassed the entire merits of the action. A prior case by the Ninth Circuit had reached the opposite conclusion.⁸² It held that the only issue on appeal in such cases was the issue of arbitrability itself.⁸³ Power to adjudicate the underlying merits remained with the court below.⁸⁴ Whether proceedings regarding those underlying merits issues should continue in the lower court was, in the Ninth Circuit, a question to be decided by applying the traditional discretionary multi-factor standard for stays pending appeal.⁸⁵

Easterbrook responded by pointing out the close logical connection between arbitrability and merits issues⁸⁶ and by noting that the danger that cases will be delayed by frivolous appeals can be avoided by the appellate courts’ power to summarily dismiss frivolous appeals.⁸⁷

Most of the federal courts of appeals that considered the matter after *Bradford-Scott* followed that case and endorsed the “automatic stay” rule.⁸⁸ Yet it was rejected by two others. In *Motorola Credit Corp. v.*

81 *Bradford-Scott*, 128 F.3d at 505 (“Whether the case should be litigated in the district court is not an issue collateral to the question presented by an appeal under § 16(a)(1)(A), however; it is the mirror image of the question presented on appeal. Continuation of proceedings in the district court largely defeats the point of the appeal and creates a risk of inconsistent handling of the case by two tribunals.”).

82 *See* *Britton v. Co-op Banking Grp.*, 916 F.2d 1405 (9th Cir. 1990), *abrogated by* *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915 (2023); *Bradford-Scott*, 128 F.3d at 506 (discussing *Britton*).

83 *See* *Britton*, 916 F.2d at 1412.

84 *See id.*

85 *See id.*

86 *See* *Bradford-Scott*, 128 F.3d at 506. “Whether the litigation may go forward in the district court is precisely what the court of appeals must decide.” *Id.*

87 *See id.* (citing *Abney v. United States*, 431 U.S. 651, 662 n.8 (1977)).

88 Four circuit courts have followed the *Bradford-Scott* precedent. *See* *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 266 (4th Cir. 2011); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 215 n.6 (3d Cir. 2007); *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1162 (10th Cir. 2005); *Bombardier Corp. v. Nat’l R.R. Passenger Corp.*, 333 F.3d 250, 252 (D.C. Cir. 2003).

Uzan, the district court had held a trial on the merits while the motion to compel arbitration was on appeal.⁸⁹ The Second Circuit, noting that no court had ever voided a trial for failure to grant a stay pending appeal of an arbitration motion, held that the district court had jurisdiction to continue with the case.⁹⁰ Similarly, in 2011, the Fifth Circuit rejected what it called the “broad reading” of *Griggs* made in *Bradford-Scott*,⁹¹ and also rejected the automatic stay.⁹²

In short, a serious circuit split existed at the time the *Bielski* cert petition was filed. But not every circuit split gets or deserves the attention of the Supreme Court, particularly regarding procedural matters. Moreover, sometimes Supreme Court intervention just creates more circuit splits.⁹³ But the Supreme Court did grant cert in *Bielski* and the question remains why. The difference between the discretionary and automatic approaches to stays is one that has an immediate and predictable impact on litigation results, but usually not a very important one. If the automatic approach is adopted, stays pending appeal will almost always be granted.⁹⁴ If the *Nken* discretionary standard prevails, stays will be much less common, particularly in private litigation where only money damages are at stake.⁹⁵ But how often will a stay pending appeal be important to the outcome of a case? The answer would appear to be very rarely.⁹⁶ The bigger and undisputed effect of the stay pending

89 *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 53 (2d Cir. 2004). Both the motion and a stay pending appeal had been denied. *Id.*

90 *Id.* at 54.

91 *See* *Weingarten Realty Invs. v. Miller*, 661 F.3d 904, 909, 907–10 (5th Cir. 2011), *abrogated by* *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915 (2023). While noting that an automatic stay pending appeal might be appropriate when the appeal involved a public-law-based right like double jeopardy or sovereign immunity, a right based on a private contract was not entitled to the same level of deference. *Id.* at 909.

92 *Id.* at 910.

93 One example is the federal standard for granting preliminary injunctions which for many years varied substantially among the circuits, until the Supreme Court announced a unified standard in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). But that led to a different circuit split. *See* Rachel A. Weisshaar, Note, *Hazy Shades of Winter: Resolving the Circuit Split over Preliminary Injunctions*, 65 VAND. L. REV. 1011, 1032–48 (2012).

94 The sole exception being frivolous appeals which may be summarily denied or dismissed. *See* *Bradford-Scott Data Corp. v. Physician Comput. Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997).

95 The *Nken* standard, remember, requires a “strong showing” of likelihood of success on the merits, *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)), as well as irreparable injury, which parties to a lawsuit involving only money damages will have difficulty showing. *See supra* note 74, 77 and accompanying text.

96 In theory, an automatic stay should have no impact at all on the outcome of the case since it does not take into consideration the merits of the underlying appeals. The discretionary standard allows the appellate court to consider the merits at an earlier stage, and those schooled in cognitive bias theory might worry about a “lock-in” effect on subsequent merits determinations. *See infra* note 161.

appeal is on the expenditure of time and money.⁹⁷ However, in a world where each side bears its own litigation costs and most civil litigation ends in settlement, a rule which can have a serious impact on litigation costs is a rule that needs to be taken seriously.

Of course, the split in the circuits was undoubtedly a consideration as well. The fact that cert was granted in a Ninth Circuit case applying the traditional discretionary standard may have reflected a desire by at least four Justices to reject that approach. Or it may also have reflected concern over the institutional damage that was being caused by having two federal standards governing the same frequently recurring issue, which made it highly unlikely that a stay pending appeal would be granted in cases arising in New York or Los Angeles, but were almost certain to be granted in Chicago, Denver, or Washington, D.C.

II. THE INSTITUTIONAL CONFLICT AT THE CENTER OF *COINBASE*

The Supreme Court's opinions in *Coinbase v. Bielski* were vehemently argued in a 5-4 split decision. Justice Kavanaugh claimed that failure to adopt the automatic stay rule would "represent[] the 'worst possible outcome' for parties and the courts."⁹⁸ Justice Jackson argued that adoption of that rule would open a "Pandora's box" with "significant [negative] implications for federal litigation."⁹⁹ Clearly the issue was one where the Court thought important values were at stake. In this Part, we seek to understand why they thought so much hinged on this obscure question of federal procedure. The answer, I believe, is that each side thought the other's position, if adopted, would do grave institutional damage to the federal judiciary.

Both Justice Kavanaugh and Justice Jackson base their arguments on the inherent judicial authority of the federal courts.¹⁰⁰ That is the

97 If the proceedings below are stayed automatically, some cases will take longer and be more expensive to litigate, a detriment primarily to plaintiffs in the arbitration context. If the discretionary standard is applied and more stays are denied, some expenditures of time and money on merits proceedings in the lower court will turn out to have been unnecessary, a detriment in theory to all participants in the litigation, but one likely to impact corporate defendants most heavily. At one point in his opinion for the Court in *Coinbase*, Justice Kavanaugh appears to adopt these defendants' perspective. "Absent a stay, parties also could be forced to settle to avoid the district court proceedings (including discovery and trial) that they contracted to avoid through arbitration." *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915, 1921 (2023).

98 *Id.* (quoting *Bradford-Scott*, 128 F.3d at 506).

99 *Id.* at 1924 (Jackson, J., dissenting). She also says that adopting a broad view of the automatic stay rule "would upend federal litigation as we know it." *Id.* at 1931.

100 While Justice Kavanaugh calls his rule the "*Griggs* principle," he notes that *Griggs* itself applies a "longstanding tenet" of American civil procedure. *Id.* at 1919. Yet he cites no statute, constitutional provision, or landmark Supreme Court precedent as the source of this longstanding principle. Rather, he appears to be relying primarily on the longstanding

source of the “*Griggs* principle” which Justice Kavanaugh declared “resolves this case.”¹⁰¹ That principle is presented as a jurisdictional rule, holding that an appeal “divests the district court of its control over those aspects of the case involved in the appeal.”¹⁰² Although *Griggs* was not an arbitration case and posed issues factually and legally quite distinct from *Bielski*,¹⁰³ Justice Kavanaugh followed Judge Easterbrook’s argument in *Bradford-Scott*, concluding that “*Griggs* dictates that the district court must stay its proceedings while the interlocutory appeal on arbitrability is ongoing.”¹⁰⁴

This may appear to be a purely formal argument based on a mechanical conception of subject-matter jurisdiction. But Justice Kavanaugh does not put too much weight on this questionable and probably outdated approach.¹⁰⁵ More importantly and more cogently,

tradition of inherent judicial authority. He emphasizes the antiquity of the principles involved and is quite comfortable citing “common sense” as a sufficient justification for the rule. *Id.* at 1921. He clearly believes this is a matter over which the judiciary has long had virtually unlimited rulemaking discretion.

On this point, Justice Jackson is in clear and express agreement. As she states: “A court’s discretion ‘to grant a stay pending review’ is ‘firmly imbedded in our judicial system, consonant with the historic procedures of federal appellate courts.’” *Id.* at 1926 (Jackson, J., dissenting) (quoting *Nken*, 556 U.S. at 427). “It is ‘a power as old as the judicial system of the nation.’” *Id.* (quoting *Nken*, 556 U.S. at 427). She does cite the All Writs Act, 28 U.S.C. § 1651(a), itself a vague and ancient statute which reaffirmed the traditional judicial powers of the federal courts. *Id.*; see *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9–10, 10 n.9 (1942).

101 *Coinbase*, 143 S. Ct. at 1919.

102 *Id.* (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam)). In that per curiam opinion, the Court held that under the Federal Rules of Appellate Procedure, a notice of appeal filed prematurely (i.e., while a Rule 59 motion was pending in the district court) “was a nullity.” *Griggs*, 459 U.S. at 61.

103 See *Griggs*, 459 U.S. 56. The notion of *Griggs* as a binding precedent regarding arbitration appeals does seem a bit of a stretch, as Justice Jackson notes in dissent. See *Coinbase*, 143 S. Ct. at 1924 (Jackson, J., dissenting) (“This mandatory-general-stay rule for interlocutory arbitrability appeals comes out of nowhere. No statute imposes it. Nor does any decision of this Court.”).

104 *Coinbase*, 143 S. Ct. at 1920.

105 Justice Kavanaugh’s argument about the “automatic” nature of the *Griggs* principle can be read as a jurisdictional maxim. District courts simply lack power to decide issues once that power has been given to the appellate court by filing notice of an appeal. This is indeed a “longstanding tenet of American procedure” in that it embodies the formalistic approach to jurisprudence condemned by Roscoe Pound in 1908 and fairly thoroughly eviscerated by the legal realists in the following two or three decades. *Id.* at 1919–20; see generally Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Charles M. Yablon, *Justifying the Judge’s Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 235–36 (1990). They pointed out that “judicial power” is not a “thing” which can be transferred like a car or a sandwich but rather refers to a series of rules involving the decisionmaking processes that the courts, and more broadly, the society, recognize as legitimate. Courts lack “power” to decide certain cases because the rules say they lack such power. Much of civil procedure in the last century or so has involved a reconceptualization of longstanding formal rules about judicial power into looser, more discretionary and often vaguer legal principles. The classic example, and one

he also argues that the *Griggs* principle simply “reflects common sense.”¹⁰⁶ The “common sense” arguments he makes all reflect institutional policy concerns about avoiding unnecessary litigation expense, coercive settlement, and “waste” of “scarce judicial resources.”¹⁰⁷

When he says that the *Griggs* principle “dictates” an “automatic” stay pending appeal in *Coinbase*, what he seems to really mean is that the most institutionally beneficial rule, the one that most effectively conserves scarce judicial resources, is a rule that will require a stay pending appeal in most, but not quite all appeals from denials of motions to compel arbitration.¹⁰⁸ Moreover, the “common sense” that justifies this almost automatic rule is not logic or necessity, but the institutional desire to avoid excessive litigation costs, most particularly the waste of “scarce judicial resources.”¹⁰⁹ Justice Kavanaugh’s argument is, at bottom, an institutional policy argument for the minimization of litigation costs. The appeal to an “automatic” self-enforcing principle of law is mostly litigation hyperbole and rhetorical posturing, largely borrowed from prior case law and the appellant’s brief, designed to obscure the fact that this case really involves a disagreement over two competing views of the Court’s institutional interests—preservation of scarce judicial resources on the one hand, and maximization of judicial discretion to ensure fairness and accuracy in the individual case on the other.¹¹⁰

In Justice Jackson’s dissent, the “firmly imbedded” principle grounded in inherent judicial authority is that courts retain equitable power and discretion to grant or deny stays based on the facts of every

etched in the memory of almost all American law students, is the transition from the formalistic territorial basis for constitutional personal jurisdiction set forth in *Pennoyer v. Neff*, 95 U.S. 714 (1878), to the vaguer and more discretionary approach that replaced it in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny.

106 *Coinbase*, 143 S. Ct. at 1921.

107 *See id.*

108 *See id.* at 1920, 1921. Note also that the “automatic” rule is not really that “automatic.” He notes that appellate courts retain the power to dismiss or sanction appeals that they deem “frivolous.” *Id.* at 1922.

109 *Id.* at 1921.

110 Although section 16(a) of the Federal Arbitration Act gives the losing party in a motion to compel arbitration a right to an immediate interlocutory appeal, it says nothing about whether there is a right to an interlocutory stay pending that appeal. Federal Arbitration Act, 9 U.S.C. § 16(a) (2018). The lawyers for both parties spent many pages of their briefs arguing about what “background principle” applies to this question in the absence of any clear instruction from Congress. *See* Brief for Petitioner, *supra* note 32, at 22–26; Brief in Opposition of Respondent at 14–17, *Coinbase*, 143 S. Ct. 1915 (2023) (No. 22-105). This argument is continued in both Justice Kavanaugh’s and Justice Jackson’s opinions, but neither relies on congressional language or intent to any serious degree. *Coinbase*, 143 S. Ct. at 1919, 1921–23; *id.* at 1926–27 (Jackson, J., dissenting).

individual case.¹¹¹ The granting of a stay requires the careful consideration of a number of disparate concerns. “This discretionary decisionmaking promotes procedural fairness because it allows for a balancing of all relevant interests.”¹¹² Justice Jackson’s argument, like Justice Kavanaugh’s, ultimately rests on institutional judicial policy concerns. But while Justice Kavanaugh’s overarching concerns were efficiency and preservation of scarce judicial resources, Justice Jackson’s is judicial craft and procedural fairness. Both agree, however, that their power to make these rules rests on their inherent judicial authority.

The “automatic” stay concept has one other aspect that, though never expressly discussed by the Justices, likely added to the controversiality of this case. An automatic stay is among the easiest of procedural rules to apply. It will not generally require any motion papers, briefs, hearings, or reasoned written opinions. Discretionary stays under the *Nken* standard, on the other hand, were likely to require all those things in almost every case. This unspoken concern was likely implicit in Justice Kavanaugh’s concerns about wasting scarce judicial resources and Justice Jackson’s praise of discretionary individualized decisionmaking.¹¹³

Justice Kavanaugh’s argument for an automatic stay also lacks any express limits on its scope. It potentially applies to all non-frivolous appeals, or at least all non-frivolous appeals from motions seeking dismissal of the action pending in district court. This potentially enormous expansion of the automatic stay rule becomes a key ground for Justice Jackson’s dissent.¹¹⁴ Justice Kavanaugh could have expressly limited his ruling to cases involving appeals denying motions to compel arbitration. He could have based it on an interpretation of congressional intent that provided for an “automatic” right to interlocutory appeal of denials of motions to compel arbitration under section 16(a).¹¹⁵ In his opinion, however, Justice Kavanaugh explicitly rejects the notion that he is putting forth any special rule in favor of arbitration.¹¹⁶ Quite the contrary, he states that “[a]pplying the *Griggs* rule here simply subjects

111 *Coinbase*, 143 S. Ct. at 1926 (Jackson, J., dissenting) (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)).

112 *Id.* at 1924.

113 The relevance of this issue will be discussed further in the next section with respect to the shadow docket controversy. See *infra* Section III.B.

114 See *infra* notes 118–21 and accompanying text.

115 Indeed, such an argument was put forward by Coinbase in its brief and was further raised by the Justices at oral argument. See Transcript of Oral Argument at 45–50, *Coinbase*, 143 S. Ct. 1915 (No. 22-105); Brief for Petitioner, *supra* note 32, at 20–26.

116 See *Coinbase*, 143 S. Ct. at 1922–23. In this respect, Justice Kavanaugh is acting consistently with the Court’s admonition in *Morgan v. Sundance* against federal courts inventing “special, arbitration-preferring procedural rules.” 142 S. Ct. 1708, 1713 (2022). See generally Myriam Gilles, *Arbitration’s Unraveling*, 172 U. PA. L. REV. 1063 (2024).

arbitrability appeals to the same stay principles that courts apply in other analogous contexts where an interlocutory appeal is authorized, including qualified immunity and double jeopardy.”¹¹⁷ On this view, the *Griggs* rule applies equally to appeals invoking constitutional rights, like double jeopardy; private contractual rights, like arbitration; and even requests for dismissal based on substantial discretion, like *forum non conveniens*.

Justice Kavanaugh’s expansive interpretation of the *Griggs* principle and his failure to set any clear limitations on its applicability poses a problem for Justice Jackson. On one hand, she wants to show, and does, that the *Griggs* principle promulgated by the majority is far too broad and could result in automatic stays granted whenever any potentially dispositive motion is denied by the district court, even highly discretionary ones.¹¹⁸ Accordingly, she strongly argues that the only issue on appeal in this case (and the only issue that, under *Griggs*, is stayed from consideration in the district court) is arbitrability.¹¹⁹ However, by the time Justice Jackson finished writing her opinion, she undoubtedly knew she was in the minority, and she clearly hoped to at least limit the applicability of *Coinbase v. Bielski* to the arbitration context. Accordingly, she provides a clear limit on the scope of the majority’s holding, stating, “[t]oday’s holding reaches only arbitration appeals under § 16(a).”¹²⁰ Justice Kavanaugh’s opinion does not expressly endorse that statement, but does not refute it either.¹²¹

117 *Coinbase*, 143 S. Ct. at 1923.

118 “If arbitration appeals require stays of all pre-trial and trial proceedings, why not all appeals about forum-selection agreements? And why not appeals over non-contractual disputes over the proper adjudicator, like venue, personal jurisdiction, *forum non conveniens*, federal-court jurisdiction, and abstention?” *Id.* at 1931 (Jackson, J., dissenting).

119 *See id.* at 1927–29.

120 *Id.* at 1931. It is not clear where, if anywhere in Justice Kavanaugh’s opinion, Justice Jackson finds this limitation. Of course, the actual holding of the case involves an arbitration clause, but Justice Kavanaugh never sets forth any reasons why the *Griggs* principle might not apply as broadly as Jackson suggests. On the contrary, Justice Kavanaugh states, “Applying the *Griggs* rule here simply subjects arbitrability appeals to the same stay principles that courts apply in other analogous contexts where an interlocutory appeal is authorized, including qualified immunity and double jeopardy.” *Id.* at 1923 (majority opinion). Justice Kavanaugh does go on to note in that section “*Bielski* further points to forum selection clauses as an analogy. But unlike §16(a) arbitrability appeals, Congress has not created a right to an interlocutory appeal for cases involving forum selection clauses.” *Id.* This does not appear to be a claim that the *Griggs* principle does not apply to forum selection clause motions, but only that it does not apply in cases where interlocutory apply is not available either by statute or court order.

121 *See supra* notes 115–16 and accompanying text. One other interesting feature of this case is Justice Thomas’s decision to join the three most liberal Justices in dissent, and to join most of Justice Jackson’s opinion. Justice Thomas asked questions at oral argument which seemed to indicate a reluctance to extend the automatic stay principle on qualified immunity cases to other contexts. Transcript of Oral Argument, *supra* note 115, at 5–7. It is not that

III. COINBASE AND THE BIGGER PICTURE

A. *New Concerns About Institutionalism*

This final Section broadens the scope of our inquiry. Having analyzed the precise issues *Coinbase* raises about stays pending appeal, we now consider what role this small (but to the Justices quite important) procedural issue plays in the broader institutional concerns that have been roiling the Court in recent years. As we have seen, *Coinbase* is first and foremost an institutional decision. It is a dispute about the way the Court should go about its most fundamental constitutional duty—the adjudication of cases and controversies. Most important and controversial Supreme Court decisions are important and controversial because the issues they decide will have a major impact on society at large. *Coinbase* is important for its potential impact on the federal judiciary itself.

The Supreme Court, as both a court and as leader of the federal judiciary, has institutional interests separate from those of the parties who appear before it. These institutional interests have been thought to unite the Justices.¹²² They all presumably want to preserve and enhance the reputation of their Court and its authority as final arbiter in legal and constitutional matters. Scholars and jurists have argued about the degree to which basing judicial actions on such institutional concerns is a legitimate motive for use of judicial power.¹²³

The weight of judicial and scholarly opinion has frequently been seen as favoring such institutionalism, which is seen as beneficial in encouraging unity and cooperation among the members of the Court.¹²⁴

unusual for justices to rule somewhat differently on procedural and institutional matters than they do on issues of public policy, as Justice Ginsburg did with respect to general jurisdiction. See Zachary D. Tripp & Gillian E. Metzger, *Professor Justice Ginsburg: Justice Ginsburg's Love of Procedure and Jurisdiction*, 121 COLUM. L. REV. 729, 731 (2021).

122 See generally Colin Glennon & Logan Strother, *The Maintenance of Institutional Legitimacy in Supreme Court Justices' Public Rhetoric*, 7 J.L. & CTS. 241 (2019).

123 See, e.g., Bayefsky, *supra* note 12, at 1315–31. Thus, the Court has been urged to exercise the “passive virtues” by not deciding matters that are best left to more politically responsive governmental actors. See *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) (Frankfurter, J.) (“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.”). This approach to constitutional adjudication came to be called “judicial minimalism,” recognizing that the Court’s lack of fiscal or military power rendered it the “least dangerous branch.” See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); see also ANDREW NOLAN, CONG. RSCH. SERV., R43706, *THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW* 6–8 (2014).

124 See *supra* note 122 and accompanying text.

It was assumed that all the Justices, despite their varying ideological perspectives, shared an interest in enhancing the institutional prestige and authority of the Court and the federal judiciary. When cases arose which threatened those interests or, alternatively, offered an opportunity to advance them, the Justices would attempt to develop a clear and united position to advance those interests.¹²⁵

However, recent scholarship has questioned whether institutional concerns always act as a unifying force. In a recent article, Professor Rachel Bayefsky seeks to defend institutionalism as a judicial philosophy and a legitimate basis for legal decisions.¹²⁶ She also seeks to provide a more “comprehensive examination of the concept of institutionalism.”¹²⁷ Bayefsky describes the basic goal of institutionalism as preservation of the judiciary’s “*effective authority*,”¹²⁸ which she believes requires attention to two fundamentally distinct institutional interests. One, “legitimacy,” seeks to promote the positive attitudes by the public and other governmental actors “that the federal judiciary’s rulings warrant respect and compliance.”¹²⁹ The other interest, “efficient administration” involves “a concern for management-related imperatives such as resource constraints and productivity.”¹³⁰ Her article describes and defends many instances in which the Supreme Court and other federal courts have expressly based their decisions on these institutional concerns.¹³¹ In distinguishing between these disparate institutional interests, Bayefsky’s analysis raises the possibility that they may conflict.¹³² Actions which some judges see as promoting efficient administration and avoiding waste of judicial resources may be seen by others as a threat to the courts’ legitimacy and its reputation for procedural fairness.

125 The degree of “institutionalism” exhibited by individual justices varies. Chief Justice Roberts is frequently seen as having a strong institutionalist orientation. His attempt to find a unifying position on the constitutionality of the Affordable Care Act is often cited as an example of his efforts. See *Nat’l Fed’n Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); Bayefsky, *supra* note 12, at 1298–99. But see Eric J. Segall, *Chief Justice John Roberts: Institutional or Hubris-in-Chief?*, 78 WASH. & LEE L. REV. ONLINE 107, 126 (2021). Justice Kavanaugh’s institutionalism has also been analyzed. See Noah C. Chauvin, *Justice Kavanaugh’s Institutionalism*, 17 U. ST. THOMAS J.L. & PUB. POL’Y 261 (2023).

126 See generally Bayefsky, *supra* note 12.

127 *Id.* at 1300–01.

128 *Id.* at 1307.

129 *Id.* at 1310.

130 *Id.* She notes “[f]ederal courts have acknowledged that they are deciding cases with a view toward preserving ‘scarce resources’ or avoiding the ‘floodgates of litigation.’” *Id.* at 1311 (quoting Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1008, 1039 (2013)).

131 See, e.g., *id.* at 1371–74.

132 See *id.* at 1378.

This, of course, brings us back to *Coinbase v. Bielski*. That case, while not cited or discussed in Bayefsky's article,¹³³ provides a case study and real-world demonstration of many of the points she makes. The dispute at the heart of *Coinbase* can be seen as a conflict between Bayefsky's two fundamental institutional interests. Justice Kavanaugh's defense of the automatic stay rule is expressly based on efficient administration, reduction of litigation expense, and the preservation of scarce judicial resources.¹³⁴ Justice Jackson's defense of the discretionary *Nken* standard is certainly based in part on what Bayefsky would consider a legitimacy interest—the public respect and approval conferred by the procedural fairness of the searching and multi-factor *Nken* inquiry.¹³⁵ Yet Justice Jackson's argument goes beyond public legitimacy to include considerations of judicial craft and expertise. Her argument is that individualized discretionary review not only confers greater public respect, but is an epistemologically and normatively better way to decide complex questions involving preliminary equitable remedies.¹³⁶ Justice Jackson argues that individualized discretionary analysis is simply better than the one-size-fits-all approach of the majority's rule.¹³⁷ Accordingly, Jackson's dissent can be seen as not only advancing an institutional legitimacy concern regarding public perception of the courts, but a separate institutional interest in maximizing the confidence and satisfaction the judges themselves derive from their adjudicative procedures.¹³⁸

Bayefsky's analysis recognizes that diverse institutional interests can lead to disagreement and conflict within the Court. *Coinbase*

133 It probably came down a little too late for inclusion, and in any event, Professor Bayefsky is more focused on broader theoretical concerns.

134 See *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915, 1921 (2023).

135 See *id.* at 1924 (Jackson, J., dissenting).

136 See *id.* at 1923–24, 1929.

137 See *id.* From this perspective, the dispute in *Coinbase* can be seen as an interesting variation on the rules vs. standards distinction which has been widely discussed in the academic literature. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 67–71 (1983) (rules and standards in administrative law); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 604–10 (1988) (analyzing the rhetorical impact of “crystal” and “muddy” laws); Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 527–37 (2012). In almost every one of these areas, however, the emphasis is on how different levels of precision in legal norms will affect the application and effect of those norms on the general public. While the conflict in *Coinbase* is undoubtedly between a rule (the *Griggs* principle) and a standard (*Nken*), the effect of that choice will be limited almost entirely to the judiciary itself.

138 See Yablon, *supra* note 105, at 260–277 (seeking to categorize different types of discretionary decisionmaking as judges exercising skill, expediency, or creativity).

provides a concrete example of such a dispute. Although Bayefsky does not provide any easy way to avoid or resolve such disagreements, she does suggest that institutional concerns may encourage the judges to limit the scope of their disagreements by engaging in “judicial minimalism,” deciding the case on the narrowest possible grounds and thereby leaving many potential areas of disagreement undecided.¹³⁹ It might seem that *Coinbase* represents the polar opposite of Bayefsky’s advice. Rather than seek to narrow their area of disagreement, the Justices engage in hyperbolic and vituperative rhetoric, accusing each other of lacking “common sense” and of opening a “Pandora’s Box” of potentially egregious consequences.¹⁴⁰ Yet we have also seen that the Justice Kavanaugh and Justice Jackson opinions, taken together, leave us somewhat unclear as to the actual scope of the automatic stay rule being endorsed by the majority.¹⁴¹ It is quite possible, even after *Coinbase v. Bielski*, that the Supreme Court will continue to apply the *Nken* standard to stay motions outside the arbitration context.¹⁴² The fact that this issue is left unresolved may reflect some lingering trace of judicial minimalism amidst the combative rhetoric.

Bayefsky also observed that institutional concerns are more likely to be prominent in certain types of cases, notably those in which courts have greater decisionmaking discretion. She cites equitable remedies as one such area.¹⁴³ In *Coinbase v. Bielski*, the strong institutional focus of the Court was not just because the case involved provisional equitable remedies, but because the Justices were exercising their inherent judicial authority.¹⁴⁴ Accordingly, the entire case, even the arguments between the Justices, reflects a strong institutional perspective. I would argue, moreover, that the arguments also reveal that institutional perspective in a more subtle way, in the style of argument the Justices

139 See Bayefsky, *supra* note 12, at 1352–55. “Minimalism is a way for judges to exercise discretion because it counsels judges to select a narrower ruling when they have the option of ruling in different ways. One might take the view that ‘if it is not necessary to decide more, it is necessary not to decide more.’” *Id.* at 1352 (quoting *PDK Lab’ys Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment)).

140 See *supra* Part II.

141 Justice Jackson expressly states that the majority opinion applies only to arbitration appeals, and Justice Kavanaugh’s opinion never expressly contradicts that position. See *supra* notes 120–21 and accompanying text.

142 Indeed, that is what appears to be happening. See *infra* note 164 and accompanying text.

143 See Bayefsky, *supra* note 12, at 1355.

144 Broadly speaking, inherent judicial authority refers to the “control necessarily vested in courts to manage their own affairs.” *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630 (1962). Both the sources and the scope of the doctrine are somewhat vague, but it most certainly involves an inherent right of courts to determine their own practices and procedures. See Yablon, *supra* note 7, at 1051. It enables federal courts to effectively act as common law judges with respect to procedural matters. See Barrett, *supra* note 8, at 874–75.

adopt. Their invocation of “common sense” and creative use of precedent reflect the Justices’ understanding that they are making “procedural common law.” Their primary arguments reflect their own beliefs as to institutional benefits and priorities.¹⁴⁵ Moreover, the Justices are willing to push the boundaries of existing law, creating new doctrines, new standards, and subtle new presumptions to apply to existing standards. All of this reflects a certain institutional creativity which allows judges to exercise relatively unconstrained rulemaking authority. In her article, Bayefsky argues that institutionalism can be compatible with formalistic interpretive approaches like originalism and textualism.¹⁴⁶ Inherent judicial authority, however, is an area where there is no original understanding or text to interpret, and innovative approaches based on institutional concerns can more easily become the dominant mode of argument.

B. *The “Shadow Docket” Controversy*

There have always been controversial Supreme Court cases that have generated great public interest and debate. *Coinbase v. Bielski* is not one of those. It was not subject to any significant attention in the popular media and got only perfunctory notice in the legal press. But the basic subject of that case, the appropriate procedures by which federal courts should adjudicate stays pending appeals and other emergency motions, has recently become a subject of significant public and legal interest. Such motions constitute much of what has come to be called the “shadow docket”¹⁴⁷ and the appropriate procedures for dealing with such motions have become highly controversial issues both in public debates and among the Justices themselves.

The Supreme Court has always considered emergency motions, like those seeking temporary stays or injunctions, under different procedures than those followed with its ordinary merits docket.¹⁴⁸ Such motions were usually disposed of by order, frequently unanimous, frequently unsigned, and written in conclusory terms with little or no legal analysis.¹⁴⁹ In recent years, however, those procedures have come under significant scrutiny and challenges. The challenges seem to have

145 See *supra* Part II.

146 See Bayefsky, *supra* note 12, at 1339–47.

147 Originally coined by Professor William Baude, “shadow docket” was not originally intended as a pejorative term. See William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 5 (2015). It has since acquired a rather negative connotation. See, e.g., STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023).

148 See Kristen E. Parnigoni, *Shades of Scrutiny: Standards for Emergency Relief in the Shadow Docket Era*, 63 B.C. L. REV. 2743, 2744–45 (2022).

149 See *id.* at 2775, 2779.

come largely from changes in the types of cases being decided under the shadow docket procedures. Significant governmental actions taken by executive order, administrative rulings, or federal or state statutes were being immediately challenged in federal court by advocacy groups, states' attorneys general, and others.¹⁵⁰ Federal courts were being asked to grant, and sometimes were granting as emergency relief, sweeping injunctions mandating or halting expenditures of millions and affecting multitudes of people and businesses.¹⁵¹ This "shadow docket" began to get more attention and generate greater criticism and concern.

The criticism was not only about the results being reached on the emergency motions (although that was certainly a part of it).¹⁵² The more fundamental criticism was about the procedures being followed in deciding these cases. The decisions in these increasingly important matters were having a major and immediate impact on important matters of law and public policy, yet were still generally unsigned, frequently unexplained, and issued without full briefing or oral argument.¹⁵³ Moreover, there was strong evidence that at least some of

150 See, e.g., *id.* at 2747 n.18, 2767–68 (discussing COVID-19-related executive orders).

151 See Jess Bravin, *Supreme Court Is Swamped with Emergency Appeals, Led by Challenges to EPA*, WALL ST. J. (Sep. 9, 2024, at 15:41 ET), <https://www.wsj.com/us-news/law/supreme-court-sees-wave-of-emergency-appeals-led-by-epa-challenges-d72f2bf6?mod=Searchresults&pos=1&page=1> [<https://perma.cc/YPS3-NKLD>]; VLADECK, *supra* note 147, at 16–17. Stephen Vladeck, in particular, has emphasized the important role that changes in the Supreme Court's docket and its control over that docket has played in generating controversy regarding shadow docket decisions. See Stephen I. Vladeck, *Fixing the Supreme Court Through Its Docket*, 105 B.U. L. REV. 1607 (2025); Stephen I. Vladeck, *Putting the "Shadow Docket" in Perspective*, 17 HARV. L. & POL'Y REV. 289, 293 (2023); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 152–53 (2019).

152 See, e.g., Parnigoni, *supra* note 148, at 2775–76. Perhaps the most widely criticized decision was *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (mem.). In that case, a three-judge district court had found that "Alabama's congressional districting plan likely violate[d] federal . . . law" and ordered that the districts be redrawn although there were only a few weeks before the coming election. *Id.* at 879 (Kavanaugh, J., concurring in grant of applications for stays). A stay of that order was denied by the district court and made its way to the Supreme Court on an emergency basis. See *id.* at 879–880. The Court granted the stay in an unsigned order (although Justices Kavanaugh and Alito wrote a signed concurrence), thereby reinstating the questionable districts. *Id.* at 879 (mem.). Justice Roberts filed a separate dissent, *id.* at 882 (Roberts, C.J., dissenting from grant of applications for stays), as did Justice Kagan (joined by Justices Sotomayor and Breyer). *Id.* at 883 (Kagan, J., dissenting from grant of applications for stays). Justice Kavanaugh's concurrence invoked something he called the "Purcell principle" that "federal courts ordinarily should not enjoin a state's election laws in the period close to an election." *Id.* at 880 (Kavanaugh, J., concurring in grant of applications for stays).

153 Vladeck, *Putting the "Shadow Docket" in Perspective*, *supra* note 151, at 291 ("Since the mid-2010s, there has been a radical shift in how (and how often) the Justices use the shadow docket [T]he Supreme Court has, with increasing frequency, intervened preemptively, if not prematurely, in some of our country's most fraught political disputes through decisions that are unseen, unsigned, and almost always unexplained. In the process,

the Justices shared these critiques.¹⁵⁴ The criticism generated vehement reactions from defenders of current practices, including some of the other Justices.¹⁵⁵

The shadow docket controversy poses a new and unique dilemma for the Court. It is not unusual for Supreme Court decisions to break down along ideological lines on matters of constitutional theory or public policy. The shadow docket controversy, however, is dividing the Court at both an ideological and institutional level. Indeed, there are strong indications that the shadow docket is producing at least as many ideological divisions and 5-4 decisions as the merits docket.¹⁵⁶ Bayefsky also recognizes the serious institutional damage that may result from the shadow docket controversy.¹⁵⁷ She suggests that some of the ‘moderate’ Justices may be trying to “lower the temperature” with respect to shadow docket cases by introducing more institutional

these rulings have run roughshod over long-settled understandings of both the formal and practical limits on the Court’s authority. Because they are unsigned and unexplained, shadow docket orders are supposed to be exceedingly limited in what they can accomplish. And yet, dozens of times each Term, we’re now seeing shadow docket orders that fly in the face of those understandings.”); *but see* Editorial Board, *The ‘Shadow Docket’ Diversion*, WALL ST. J. (Oct. 1, 2021, at 19:43 ET), <https://www.wsj.com/opinion/the-shadow-docket-diversion-supreme-court-samuel-alito-11633123922> [https://perma.cc/HCE-HDCF] (“Some criticism of the shadow docket is circular. On the one hand, it complains that the Justices don’t explain themselves sufficiently. On the other hand, it complains that they make significant legal judgments without briefing—a problem that is exacerbated the more they explain themselves.”).

154 “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.” *Merrill*, 142 S. Ct. at 889 (Kagan, J., joined by Breyer & Sotomayor, JJ., dissenting from grant of applications for stays).

155 See Adam Liptak, *Alito Responds to Critics of the Supreme Court’s ‘Shadow Docket’*, N.Y. TIMES (Oct. 4, 2021), <https://www.nytimes.com/2021/09/30/us/politics/alito-shadow-docket-scotus.html> [https://perma.cc/7KHT-RSKJ].

The principal dissent’s catchy but worn-out rhetoric about the “shadow docket” is similarly off target. The stay will allow this Court to decide the merits in an orderly fashion—after full briefing, oral argument, and our usual extensive internal deliberations—and ensure that we do *not* have to decide the merits on the emergency docket. To reiterate: The Court’s stay order is not a decision on the merits.

Merrill, 142 S. Ct. at 879 (Kavanaugh, J., joined by Alito, J., concurring in grant of applications for stays).

156 In a survey of the 2019 Supreme Court term, Vladeck found that that there were twelve cases on the merits docket which divided the Justices 5-4, and at least eleven decisions during the same timespan on the shadow docket which also split 5-4. Vladeck, *Putting the “Shadow Docket” in Perspective*, *supra* note 151, at 296. Moreover, all but two of the shadow docket splits were along clear ideological lines. *Id.*

157 Bayefsky, *supra* note 12, at 1357.

considerations into the discretionary standards for granting equitable relief.¹⁵⁸

Coinbase v. Bielski was not a shadow docket case. It was decided after full briefing and argument on the merits docket. But it was about the kinds of motions that frequently appear on the shadow docket and had major implications for the way such motions would be handled in the future. The “automatic stay” announced in *Coinbase* has substantial procedural implications for subsequent motions to which it is applicable. Once a motion for a stay is found to be “not frivolous,” the stay order can issue “automatically,” with no need for briefing, argument, or any discretionary equitable balancing. There will generally be no need for a written or signed opinion. This aspect of the dispute between the majority and the dissent is never explicitly discussed in either Justices Kavanaugh’s or Jackson’s opinions, but it seems to be lurking just below the surface in the debate over preserving scarce judicial resources or promoting transparency.¹⁵⁹ Some members of the Court have publicly spoken in favor of more transparency and reasoned opinions in shadow docket motions.¹⁶⁰ However, others have argued that there are good institutional grounds for leaving some decisions unreasoned and unsigned.¹⁶¹

The Justices have not had to confront this issue much, because so far *Coinbase* has not been a very popular precedent. It has only been cited in one Supreme Court opinion, and not as a controlling precedent.¹⁶² Even in the lower courts, its application has been mostly

158 *Id.* at 1357, 1357–58. Her primary example is *Does 1-3 v. Mills*, where Justice Barrett, in a concurrence, argued that the Court should consider whether an appeal is cert-worthy before granting preliminary equitable relief. *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in denial of application for injunctive relief). I might add Chief Justice Robert’s dissent in *Merrill* where he argued that because the district court’s decision followed existing law, the pending election should be allowed to go forward under that law, but that existing law could later be reviewed by the Court on the merits docket. *Merrill*, 142 S. Ct. at 883 (Roberts, C.J., dissenting from grant of applications for stays).

159 *See supra* Part II. Given the prominence of the shadow docket controversy in recent years, it may well be that Justices Kavanaugh and Jackson made a conscious decision not to mention it expressly in their decisions.

160 *See supra* note 154 and accompanying text.

161 In addition to the standard concerns about delay and expense, some of the Justices worry that too extensive a discussion of the merits in a preliminary motion may create a “lock-in effect.” *See* *Labrador v. Poe*, 144 S. Ct. 921, 934, 933–34 (2024) (Kavanaugh, J., joined by Barrett, J., concurring in grant of stay); *see also* *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1349 (2022) (Kagan, J., dissenting) (by erroneously granting a stay, the Court “signals its view of the merits”).

162 *See* *Smith v. Spizzirri*, 144 S. Ct. 1173, 1178 (2024) (holding that when a motion to compel arbitration is granted, the Federal Arbitration Act (FAA) compels the district court to stay the proceedings). *Coinbase* is cited for the unexceptional proposition that the FAA “provid[es] for immediate interlocutory appeals of orders *denying*—but not of orders

limited to arbitration cases.¹⁶³ Meanwhile, the Supreme Court continues to rely on the *Nken* standard in a wide variety of legal contexts involving stays pending appeal, even Justices who joined the majority in *Coinbase v. Bielski*.¹⁶⁴ So despite the expansive language of the majority opinion in *Coinbase* and the fears expressed in the dissent, the automatic stay appears, for now, to be generally available only from denials of motions to compel arbitration.

There are many reasons why the Supreme Court may be reluctant to extend the *Griggs* principle beyond the arbitration context. *Coinbase* was a private law case, and most of the complex issues arising in the shadow docket involve big public law issues.¹⁶⁵ Moreover, as we have seen, the automatic stay rule had been the law in five circuits for a long time prior to *Coinbase* and had never been extended in those circuits beyond the arbitration context.¹⁶⁶ Or, despite Justice Kavanaugh's assertion that the *Griggs* principle was not a special rule favoring arbitration,¹⁶⁷ the fact that the FAA grants a right to interlocutory appeal only to denials of motions to compel arbitration may have made some of the Justices more willing to grant an automatic stay in the arbitration context than in others. My personal view is that given the current shadow docket controversy, even Justices like Justice Kavanaugh, who might be inclined to see the institutional benefits of automatic stay rules in other circumstances, have recognized the institutional damage the Court might incur by extending a stay principle that provides less transparency, less discretion, and less reasoned analysis.

Some recent decisions of the Court reflect a different approach. There seems to be an effort by some of the Justices to develop new techniques for determining whether to grant stays pending appeals. Rather than extend a one-size-fits-all automatic rule like the *Griggs* principle, they seem to be developing small and limited modifications of the multi-factor individualized standard of *Nken* to make it a little more predictable and easier to apply. In recent shadow docket cases, many of the Justices have proposed various context-specific presumptions and

granting—motions to compel arbitration.” *Id.* (quoting *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915, 1919 (2023)).

163 See, e.g., *Avery v. TEKsystems, Inc.*, 757 F. Supp. 3d 973, 978 (N.D. Cal. 2024) (refusal to extend *Griggs* principle beyond arbitration); *Pandolfi v. AviaGames*, No. 23-cv-05971, 2024 WL 4951258, at *3–5 (N.D. Cal. Dec. 3, 2024); *Georgia v. Clark*, No. 23-cv-03721, 2023 WL 11796094, at *2–3 (N.D. Ga. Nov. 9, 2023). But see *City of Martinsville v. Express Scripts, Inc.*, 128 F.4th 265, 270 (4th Cir. 2025) (*Griggs* principle applied to appeal from remand of a case against a federal officer removed to federal court under 28 U.S.C. § 1442.).

164 See, e.g., *Ohio v. EPA*, 144 S. Ct. 2040, 2052 (2024); *United States v. Texas*, 144 S. Ct. 797, 800 (2024) (Barrett, J., concurring in denial of applications to vacate stay).

165 See Vladeck, *Putting the “Shadow Docket” in Perspective*, *supra* note 151, at 291.

166 See *supra* note 88 and accompanying text.

167 See *supra* notes 116–17 and accompanying text.

rules of thumb. These would not foreclose discretionary decisionmaking but would guide it and direct judicial attention to certain aspects of a case likely to be highly relevant to the ultimate decision.

As examples of such proposals, I would note Justice Barrett's suggestion that, before granting emergency relief, the Court should make "a discretionary judgment about whether the Court should grant review in the case."¹⁶⁸ In another case she also recognized a special rule for administrative stays, arguing that they should essentially be exempt from Supreme Court review.¹⁶⁹ In *Labrador v. Poe*¹⁷⁰ there were two separate Justices arguing for two separate presumptive rules. Justice Gorsuch wanted a presumptive rule against universal injunctions, while Justice Jackson sought a presumption of "restraint" particularly where a case involves a newly enacted law and the relief sought has been denied by two lower courts.¹⁷¹ Finally, in *Merrill v. Milligan*¹⁷² Justice Kavanaugh had suggested the "*Purcell* principle," a rule against "judicial tinkering" when an election is "close at hand."¹⁷³

All of these seem to be efforts not just to persuade their fellow Justices but to suggest some common ground, intermediate and tentative perhaps, but which can help ameliorate the institutional problem that the shadow docket has become. The effort, as Professor Bayefsky has suggested, is to try to reduce the areas of disagreement and find as much common ground as possible.¹⁷⁴ That would seem to require reducing the big problem of the shadow docket into a series of smaller, more manageable problems of procedural law. I wish them success.

POSTSCRIPT RE: *TRUMP V. CASA*

In academic law reviews, even those published online, there is usually a significant gap between the time an author finishes a piece (in my case early March 2025) and the time it is accepted, edited, and published or posted. This is particularly unfortunate for authors writing

168 *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in denial of application for injunctive relief).

169 *See United States v. Texas*, 144 S. Ct. 797, 799 (2024) (Barrett, J., concurring in denial of applications to vacate stay) ("[S]uch orders rarely generate opinions, which means that there is no jurisprudence of administrative stays, much less a one-size-fits-all test that courts apply before entering one. That does not strike me as a problem: Play in the joints seems appropriate for a measure that functions as a flexible, short-term tool.").

170 *Labrador v. Poe*, 144 S. Ct. 921 (2024).

171 *See id.* at 927 (Gorsuch, J., concurring in grant of stay); *id.* at 935 (Jackson, J., dissenting from grant of stay).

172 *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (mem.).

173 *Id.* at 880–81 (Kavanaugh, J., concurring in grant of applications for stays).

174 *See Bayefsky, supra* note 12, at 1357–58.

about the Supreme Court (even the boring parts) when that time gap encompasses the month of June, when the Court traditionally releases its most significant and controversial decisions.

On June 27, 2025, the Supreme Court released its decision in *Trump v. CASA, Inc.*¹⁷⁵ Unlike *Coinbase*, *CASA* was a public law case, a decision from the shadow docket, an appeal from orders denying a stay pending appeal, and the subject of great interest and comment.¹⁷⁶ *CASA* involves a challenge to an executive order which sought to identify circumstances in which a person born in the United States is not “subject to the jurisdiction thereof” and therefore would not be recognized as an American citizen pursuant to the Fourteenth Amendment.¹⁷⁷ Three separate district courts each “entered a universal preliminary injunction barring various executive officials from applying the policy to anyone in the country.”¹⁷⁸

Many expected the Court, in ruling on the appeal, to make some statement on the birthright citizenship issue.¹⁷⁹ It did not. Instead, the majority opinion spoke only to the sole grounds for denying the injunctions, that district courts lacked power to issue such a sweeping order and that any injunction against the executive order should only apply to the individual plaintiffs.¹⁸⁰ A six-member majority ruled for the

175 *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025).

176 See, e.g., Kate Shaw, ‘A Culture of Disdain’: The Supreme Court’s Actions Speak Louder than Its Words, N.Y. TIMES (July 1, 2025), <https://www.nytimes.com/2025/07/01/opinion/supreme-court-trump.html> [<https://perma.cc/8LUQ-BH5Y>]; Editorial Board, *The Supreme Court Kills ‘Universal’ Injunctions*, WALL ST. J. (June 27, 2025, at 17:33 ET), <https://www.wsj.com/opinion/trump-v-casa-amy-coney-barrett-ketanji-brown-jackson-supreme-court-nationwide-injunctions-122ee645?msocid=0c7fbae7921e634f1306a88293e662d8> [<https://perma.cc/X95N-7QTV>]; Mila Sohoni, *Trump v. CASA and the Future of the Universal Injunction*, SCOTUSBLOG (July 2, 2025), <https://www.scotusblog.com/2025/07/trump-v-casa-and-the-future-of-the-universal-injunction/> [<https://perma.cc/TC53-ZFXR>]; *CASA*, 145 S. Ct. at 2549. None of the six opinions in *CASA* cite *Coinbase*.

177 *CASA*, 145 S. Ct. at 2549 (quoting Protecting the Meaning and Value of American Citizenship, 90 Fed. Reg. 8449, 8449 (Jan. 20, 2025)). The executive order was challenged in three separate lawsuits in which plaintiffs, individuals, organizations, and States, sought to enjoin its implementation and enforcement on constitutional grounds. *Id.* at 2540, 2549.

178 *Id.* at 2549 (emphasis omitted). The Government then sought, in three different federal courts of appeals, to stay the preliminary injunctions and each motion to stay was denied. *Id.* Appeal to the Supreme Court followed. *Id.*

179 It was thought that even if it would be reluctant to declare the executive order invalid on a preliminary motion, the Court’s ruling would at least clarify the circumstances under which a person born in the United States could not claim citizenship under the Fourteenth Amendment. See, e.g., Shaw, *supra* note 176 (“In *Trump v. CASA*, the Supreme Court could have definitively decided that Mr. Trump’s executive order purporting to end birthright citizenship is flagrantly unconstitutional and may not be enforced.”).

180 See *CASA*, 145 S. Ct. at 2548.

Government's position.¹⁸¹ Accordingly, the issues actually considered in *CASA*, like those in *Coinbase*, involved primarily procedural and institutional concerns. The conflict among the Justices was even more acrimonious than in *Coinbase*, and the institutional interests at stake were perceived as even greater.¹⁸²

This Article has examined how differences among the Justices regarding institutional priorities, coupled with criticisms of their handling of the shadow docket, have led to serious disputes among the Justices and an institutional dilemma for the Court. *Trump v. CASA* looks like another long step towards institutional breakdown as the Court struggles both to cope with the growth of the shadow docket and the public criticism of the handling of it, while also trying to deal with the institutional problem of a reckless chief executive whose actions often seek to push, if not exceed, the boundaries of his constitutional powers.

While I have neither the desire nor the space here to engage in a full analysis of *CASA* I do believe that, as in *Coinbase*, we can observe in *CASA* both a serious and frequently vituperative dispute over institutional priorities and yet also, at least among some members of the Court, suggestions of various limited institutional changes, particularly regarding emergency motions, which might respond more effectively to current criticism and improve the Court's decisionmaking. I would note four aspects of the *CASA* decision which can be viewed in this light.

1. Recognition of external constraints on the Supreme Court's docket. It has generally been thought that under modern practice, the Supreme Court has virtually complete control over the cases that come before it and the issues it wants to decide.¹⁸³ Yet in *CASA*, Justice Barrett, writing for the majority states, "The applications do not raise—and thus we do not address—the question whether the Executive Order violates the Citizenship Clause or Nationality Act."¹⁸⁴ This could be a suggestion

181 The majority opinion, by Justice Barrett, was joined by Justices Thomas, Alito, Roberts, Gorsuch, and Kavanaugh, but Justices Thomas, Alito, and Kavanaugh also chose to write separate concurring opinions. *Id.* at 2548. Justice Sotomayor's opinion was joined by the other two dissenters, but Justice Jackson also wrote a separate dissenting opinion. *Id.*

182 See *supra* notes 140, 144, 180 and accompanying text. The legal issues decided in *CASA* may well have been more difficult for the Court to deal with than the Fourteenth Amendment issues. I assume, as do many other commentators, that the Court would have held the executive order's limits on birthright citizenship to be unconstitutional, and may still do so in the future. See Marcia Coyle, *Trump Executive Orders Are Marching Towards the Supreme Court*, NAT'L CONST. CTR. (July 29, 2025), <https://constitutioncenter.org/blog/trump-executive-orders-are-marching-towards-the-supreme-court> [<https://perma.cc/UWZ7-ZD9U>].

183 See Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 794–95 (2022).

184 *CASA*, 145 S. Ct. at 2549–50 (majority opinion).

that, on shadow docket motions, the Court is more constrained in the issues it addresses than it would be on merits appeals.¹⁸⁵

2. Treating important shadow docket cases differently. In recent years, scholars have argued that some of the decisions made by the Court in shadow docket cases are of equal or greater importance than many merits docket cases.¹⁸⁶ Little by little, some of the Justices have begun to agree. Some aspects of *CASA* can be viewed as attempts to treat important shadow docket cases with the respect they deserve. Not only was there extensive briefing and expansive opinions written, but two Justices treated the majority's ruling invalidating universal injunctions as "dispositive" despite the fact that it was issued in connection with an interim motion for a provisional remedy.¹⁸⁷ In addition, Justice Kavanaugh devotes much of his concurrence to arguing for the importance of reaching correct and preferably nationwide results in what he calls "interim-status question[s]," essentially whether to grant provisional relief.¹⁸⁸

3. Presuming irreparable injury from orders enjoining federal government actions. Applying the *Nken* factors to the stay application,¹⁸⁹ Justice Barrett dispenses quickly with the question whether the lower court injunctions constitute irreparable injury to the government. She states definitively, "The answer to that question is yes."¹⁹⁰ This is as close as we get to an automatic or presumptive rule in her opinion, and it strongly suggests that few if any universal injunctions against governmental actions will withstand an equitable balancing. She rejects Justice Sotomayor's argument that there can be no harm to the government from not enforcing an unconstitutional order, saying that it

185 This could be seen as an expression of judicial minimalism, see *supra* note 139 and accompanying text, or simply a practical recognition that the constitutional issues had not been briefed by the government. Moreover, the dissenters strongly argued that the Court could and should have considered the constitutional issue despite the Government's failure to raise it. *CASA*, 145 S. Ct. at 2573 (Sotomayor, J., dissenting).

186 See Vladeck, *Putting the "Shadow Docket" in Perspective*, *supra* note 151, at 291.

187 *CASA*, 145 S. Ct. at 2563 (Thomas, J., concurring); *id.* at 2567 (Kavanaugh, J., concurring) ("[T]oday's decision will require district courts to follow proper legal procedures [D]istrict courts can no longer award preliminary nationwide or classwide relief except when such relief is legally authorized."). Justice Barrett, however, was careful to note she was only finding a likelihood of success on the merits of the government's claim regarding the scope of relief. *Id.* at 2550 (majority opinion).

188 *Id.* at 2568, 2568–70 (Kavanaugh, J., concurring).

189 A *Griggs*-style automatic stay would be inappropriate here, because the stay being sought is only of the previously issued lower courts' injunctive orders, not any potentially pending lower court proceedings. See *supra* notes 76–87 and accompanying text.

190 *CASA*, 145 S. Ct. at 2562 (majority opinion). In support, she quotes Justice Roberts's observation that "[a]ny time a State is enjoined . . . from effectuating statutes . . . it suffers a form of irreparable injury." *Id.* (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)).

improperly considers the merits of the underlying action, not just those issues relevant to the universal injunction issue.¹⁹¹

4. The proper role of the judiciary in restraining illegal actions by the executive. This is where differing institutional perspectives threaten to turn into fundamental constitutional controversy. Much of Justice Barrett's opinion is focused on a relatively narrow historical inquiry—whether the equitable powers conferred on the federal courts by the Judiciary Act of 1789 included a reasonable analogue to the universal injunction.¹⁹² She concludes they did not.¹⁹³ She seems to be invoking a long institutional tradition of judicial restraint and judicial minimalism as well as recent efforts by some of the Justices to apply text, history, and tradition as a framework for constitutional and statutory interpretation. To Justice Jackson, and to a lesser extent, Justice Sotomayor, Justice Barrett is missing the fundamental point—the illegal, unconstitutional, and inequitable nature of the executive order that is the subject of this lawsuit.¹⁹⁴ They reject the majority's position that because the government is only challenging the universal injunction, the Court is foreclosed from considering the merits. Sotomayor claims those underlying issues are relevant to the irreparable harm and equitable balancing inquiry.¹⁹⁵ Jackson goes further, arguing that the majority makes a "foundational mistake in mischaracterizing the true scope and nature of a federal court's power."¹⁹⁶ To her, that means protecting the rule of law and restraining illegal actions by the government, goals that can frequently only be achieved by universal injunctions.¹⁹⁷ Thus challenged, Barrett, responds that "[o]bserving the limits on judicial authority . . . is required by a judge's oath to follow the law."¹⁹⁸

In the history of the Court, there have often been strong disagreements among the Justices on institutional matters, particularly those involving the degree of activism or passivity appropriate to the judicial role.¹⁹⁹ There have also been challenges to the Court's power and appropriate role relative to the other branches of government and potential illegal actions by them.²⁰⁰ At the present time, the Court

191 *Id.* at 2561–62.

192 *Id.* at 2550–54.

193 *Id.* at 2554.

194 *Id.* at 2573 (Sotomayor, J., dissenting); *id.* at 2596–97 (Jackson, J., dissenting).

195 *Id.* at 2580 (Sotomayor, J., dissenting).

196 *Id.* at 2602 (Jackson, J., dissenting).

197 *Id.*

198 *Id.* at 2561 (majority opinion).

199 See, e.g., Wallace Mendelson, *Mr. Justice Frankfurter and the Process of Judicial Review*, 103 U. PA. L. REV. 295 (1954) (comparing and contrasting the positions of Justice Black and Justice Frankfurter).

200 See Thomas A. Donovan, "John Marshall Has Made His Decision, Now Let Him Enforce It"—Attributed to President Andrew Jackson, 1832, *FED. LAW.*, Sep. 2012, at 4.

appears to be facing both types of dilemmas. The only saving grace is that there appears to be willingness by many of the Justices to seek compromise and agreement on many procedural issues roiling the Court, particularly those regarding emergency motions.²⁰¹ One hopes this may lead to greater consensus with respect to both shadow docket and merits cases and improved public regard for the Court.

201 See *supra* notes 167–174 and accompanying text.