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The Business of the Supreme Court: How We Do, Don't, and Should Talk About SCOTUS

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**THE BUSINESS OF THE SUPREME COURT: HOW WE DO, DON'T,
AND SHOULD TALK ABOUT SCOTUS**

STEPHEN I. VLADECK*

ABSTRACT

Any holistic assessment of the contemporary Supreme Court tends to focus largely (if not exclusively) on the Court's "merits docket"—the sixty-ish signed opinions in argued cases that the Justices hand down each Term. Given recent developments, that focus is unsurprising. But as Professor Vladeck argues in the 2022 Richard J. Childress Memorial Lecture, it is also alarmingly myopic, and tells a deeply unhelpful and skewed story about the current Court as an institution. Such a narrative doesn't just ignore the rest of the Court's output—including the increasingly significant substance of the "shadow docket"; it also marginalizes other less case-driven symptoms of institutional disease, signs that were everywhere to be found during the October 2021 Term.

Harkening back to then-Professor Felix Frankfurter's more-holistic annual assessments of the Supreme Court between 1925 and 1938, Vladeck's lecture argues that our contemporary focus on the merits docket as the sum total of what's important about the Supreme Court is problematic in at least three distinct respects. First, focusing on the most ideologically divisive features of the Court's work (high-profile merits decisions) reinforces charges of polarization and partisanship, because, from the public's perspective, an ever-increasing majority of news and academic discussion of the Court involves cases in which the Justices have sorted into their "normal" camps. Second, because the focus on the merits docket has obscured discourse about the Court's relationship with other constituencies, that shift has also reinforced both the perception and the reality that the Court is isolated (and has isolated itself) from other government institutions—to a degree unheard of at any earlier point in our history. And third, because we've become so bad at talking about the Court

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as an institution, we've also lost the facility for talking about how to make the Court healthier in ways that aren't intensely and inevitably polarizing.

Vladeck's lecture aims to provoke a meaningful public conversation about how we do, don't, and should think, write, and talk about the Supreme Court as an institution—in ways that might make it that much more possible and politically palatable to talk about how to fix it.

“For this material to have meaning, it must be put into the context of the personal and professional forces which condition the labors of the Court.”¹

I. FELIX FRANKFURTER AND “THE BUSINESS OF THE SUPREME COURT”

Between 1925 and 1938, Felix Frankfurter co-authored seventeen different articles in the *Harvard Law Review* under the title “The Business of the Supreme Court.”² That phrase will be familiar to many; it’s the name of the far-better-known monograph that Frankfurter published with his former student James Landis in 1928.³ Indeed, the book-length version was effectively a reprint and update of the first nine articles in the *Harvard Law Review* series, recounting (in painstaking detail) the history of the Supreme Court as an institution from its inception through the first few years under the paradigm-shifting “Judges’ Bill”—the Judiciary Act of 1925.⁴

This was not a history simply of the Court’s major decisions between 1790 and 1928; it was a history of the Court’s broader institutional evolution, focusing on changes to the Court’s jurisdiction and workload; shifts in the Justices’ internal practices; and broader trends in the Court’s relationships with the political branches (with a special focus on how the political branches regulated the Court), the states, and the people. It was about the “business” of the Supreme Court in every meaning of the term. In these magisterial writings, which remain, in my view, the definitive account of the Court’s first century-plus, Frankfurter and Landis repeatedly came back not only to how the Court shaped the country, but to how the country shaped the Court.

Less well known are the next eight pieces. Starting with the Supreme Court’s October 1928 Term,⁵ Frankfurter, first with Landis, then with Henry Hart, and last with Adrian Fisher, published annual holistic assessments of the Supreme Court’s overall performance during the previous year. In these essays, Frankfurter and his co-authors inaugurated the practice of publishing annual statistics about the Court’s output, the absence of which had been a source of more than a little consternation among practitioners and scholars. But Frankfurter and his assistants did quite a bit more. Indeed, the statistics were just a small part of the narrative—much like even the most significant individual

1. Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term 1928*, 43 HARV. L. REV. 33 (1929).

2. I will not list them all here, but rather will cite to them as they are particularly relevant below. The first installment is Felix Frankfurter & James M. Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 38 HARV. L. REV. 1005 (1925).

3. See generally FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* (1928).

4. Judiciary Act of 1925, ch. 229, 43 Stat. § 936.

5. Frankfurter & Landis, *supra* note 1.

merits decisions. As Frankfurter and Landis explained in the first of these, looking at the October 1928 Term

involves a statistical analysis of the business of the term for which, unhappily, a system of adequate official statistics does not yet exist. Reliance, therefore, must be based upon independent investigation of the cases adjudged, as recorded in the United States Reports, and of the entries in the Journal of the Supreme Court. *For this material to have meaning, it must be put into the context of the personal and professional forces which condition the labors of the Court.*⁶

In other words, Frankfurter and his co-authors emphasized from the outset that their annual reviews would endeavor to put the Court in context—a story in which the substantive decisions were obviously a key player, but they weren't the end of the matter. Thus, the annual *Business of the Supreme Court* essay offered a comprehensive view of the Court as a body—not just the workload of the Justices, but the external pressures they faced from the political branches and the public; the internal dynamics they created and facilitated; the impact of shifts in the Court's composition; and the role of the Supreme Court in our federal system more generally. Headline-generating rulings weren't the focus, or even a dominant feature of the analysis; the theme was the *institution*, in context.

The October 1929 Term recap, for instance, focused heavily on the unique administrative role played by Chief Justice Taft;⁷ the October 1930 Term recap, after discussing the impact of shifts in personnel (including the transition from Taft to Chief Justice Hughes), offered an extended reflection on the Court's treatment of the legislative process in statutory interpretation disputes;⁸ and so on.

In the October 1931 Term review, in explaining why they were not providing a retrospective on the work of the recently retired Justice Holmes, Frankfurter and Landis made their purpose overt:

The concern of this series is with the functioning of the Supreme Court as the head of the federal judicial system—the exercise of its powers in the light of the Court's relation to the effective work of the lower federal courts and of the political implications of review by the Supreme Court of state adjudications.⁹

Thus, into the mid-1930s, even as the Court entered a period of blockbuster rulings heaped on top of blockbuster rulings, the focus of the *Business of the Supreme Court* essays remained the 10,000-foot view of the Court. Frankfurter and his co-authors didn't miss the seismic jurisprudential changes on which the

6. *Id.* at 33 (footnote omitted; emphasis added).

7. Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 1 (1930).

8. Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1930*, 45 HARV. L. REV. 271, 271–72 (1931).

9. Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1931*, 46 HARV. L. REV. 226, 226 (1932) (footnote omitted).

Court embarked between 1934 and 1938—how could they? But those changes were framed, as in each of these essays, as part of a broader story about the Court’s institutional evolution—not as a story in which the decisions *themselves* were the leading players.¹⁰

For obvious reasons, Frankfurter abandoned the project upon his confirmation to the Court in 1939. Hart briefly picked up the ball, publishing an article in 1940 that looked back at the October 1937 and October 1938 Terms.¹¹ Even then, though, the piece was a bit more mechanical than the ones Frankfurter had co-authored. Perhaps that’s why no similar essays followed; for whatever reason, Hart didn’t carry the project forward, at least on an annual or biennial basis.

Nine years later, October 1949 saw the debut of the annual Supreme Court issue of the *Harvard Law Review*, including the by-now familiar annual “Statistics.”¹² But the reimaged issue was an entirely different beast. In place of Frankfurter’s holistic yearly assessment of the Court as an institution came student notes about individual cases or broader “Developments in the Law,” and faculty pieces (including the Foreword, which debuted with Louis Jaffe’s eponymous 1951 contribution¹³) that likewise tended to focus more on trends in the Court’s doctrine than on non-case-driven institutional developments or concerns.¹⁴ Hart’s 1959 *Harvard Law Review* Foreword, “The Time Chart of the Justices,” offered one last swan song for the Frankfurter school,¹⁵ but it, too, was quickly lost to history.

Into the 1960s (and ever since), the focus of the Supreme Court issue—and a significant majority of the legal scholarship about the Court—has been on the Justices’ substantive output. Perhaps to drive the point home, between 1965 and 1990, eleven out of the twenty-six Forewords focused (either principally or substantially) on the Supreme Court’s equal protection jurisprudence, specifically.¹⁶ The Frankfurter-esque assessments of the Court as an institution

10. See, e.g., Felix Frankfurter & Adrian S. Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577 (1938).

11. Henry M. Hart, Jr., *The Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 HARV. L. REV. 579 (1940).

12. *The Supreme Court, 1948 Term*, 63 HARV. L. REV. 119, 124–25 (1949).

13. Louis L. Jaffe, *The Supreme Court, 1950 Term—Foreword*, 65 HARV. L. REV. 107, 107 (1951).

14. For a helpful overview of the origins and evolution of the *Foreword*, see Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 CONST. COMMENTARY 463, 475–76 (1994–95). Tushnet and Lynch also make the connection between Frankfurter’s “Business of the Supreme Court” essays and the more modern student-run iteration, but only loosely. See *id.* at 463–64.

15. Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 84 (1959).

16. James S. Liebman, *Desegregating Politics: “All-Out” School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1541–42 & n.360 (1990).

were, at least in the (admittedly hyper-specific dataset) pages of the *Harvard Law Review*, a thing of the past.

II. THE OCTOBER 2021 TERM: THE COURT AS THE SUM OF ITS MERITS DOCKET

Fast-forward to the Court's October 2021 Term. From cable news to major newspapers; from blogs to law reviews; and from Twitter to TikTok, the consensus is that it was one of the most momentous sessions in the Court's history.¹⁷ By themselves, each of the Justices' rulings in *Bruen*,¹⁸ *West Virginia v. EPA*,¹⁹ and the religion cases—*Carson*²⁰ and *Kennedy*²¹—might each have provided the dominant headline of many a previous Term. And they were all drowned out, for obvious reasons, by the Court's ruling in *Dobbs*—in which, by a 5-4 vote, the Justices overruled *Roe v. Wade* and eliminated the federal constitutional right to abortion.²² Alone and together, these monumental and divisive merits decisions were—and remain—the central story of those 364 days.²³

My submission, and the thesis of this lecture, is that the merits of these merits cases aside, our tunnel-vision focus on them both reflects and reinforces a dangerous pathology in how we (by which I mean those of us who write about and cover the Supreme Court academically or professionally, or both) talk about the Court today. For whatever reason, too many of us have come to view the Court largely as the sum of its signed opinions—and to act as if all of the most important questions about the Court as an institution can be answered there. Are the Justices getting along? Look at how often Justices Sotomayor and Gorsuch voted the same way! Has the Court become too polarized? Look at how often the Court is unanimous—and at how often even the splits aren't the ones we expected! (I hereby move to retire the phrase “strange bedfellows” from all Supreme Court discussions.) Is the Court moving too quickly? No; look at how few precedents they overruled! Has the Chief Justice broken from the other conservatives? No; he and Justice Kavanaugh were together in each of his

17. See, e.g., All Things Considered, *The U.S. Supreme Term in Review*, NPR (July 5, 2022), <https://www.npr.org/2022/07/05/1109883082/the-u-s-supreme-court-term-in-review> [https://perma.cc/L9GA-LABQ].

18. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

19. West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587 (2022).

20. Carson ex rel. O.C. v. Makin, 142 S. Ct. 1987 (2022).

21. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

22. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). The judgment in *Dobbs*, was 6-3, but I follow what appears to be the conventional view that the most important part of the decision was the overruling of *Roe* and concomitant elimination of a federal constitutional right to pre-viability abortions—on which the Justices divided 5-4.

23. See, e.g., Khiara M. Bridges, *The Supreme Court, 2021 Term—Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23 (2022).

October Term 2021 (“OT2021”) dissents (in fact, they weren’t—but that it’s a different issue about how those who keep the statistics count rulings like the SB8 case).²⁴

This is a bit of a caricature, but only a bit. To come at the point from a different direction, consider the following (entirely non-exhaustive) list of significant moments during—or features of—the Supreme Court’s October 2021 Term, all of which one would be hard-pressed to find in most popular or academic assessments of the Court’s “work:”

1. The Court’s substantive and procedural disposition of the SB8 cases (including the unexplained dismissal of the federal government’s relatively stronger suit and the contested remand of the providers’ suit to the Fifth Circuit rather than the district court);²⁵

2. The final report of President Biden’s Supreme Court reform commission;²⁶

24. Because the Court does not publish its own statistics other than in the later-distributed annual Journal, the two most significant annual compendia of semi-official statistics are the *Harvard Law Review* and SCOTUSblog. And in its annual “Stat Pack” for the October 2021 Term, SCOTUSblog treats the SB8 case, *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021), as an 8-1 ruling, even though the most important part of the ruling—whether federal courts could enjoin state court clerks from docketing lawsuits under SB8—divided the Justices 5-4 in the negative. *See Stat Pack for the Supreme Court’s 2021–22 Term*, SCOTUSBLOG (July 1, 2022), <https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT-2021.pdf> [<https://perma.cc/6HSQ-FBTK>]. As a result, its statistics do not count as a “dissent” the opinion by Chief Justice Roberts on behalf of the four Justices who *would* have allowed for such injunctions. *See Whole Woman’s Health*, 142 S. Ct. at 543–45 (Roberts, C.J., concurring in the judgment in part and dissenting in part). That omission thereby obscures one of the most important breaks between the Chief Justice and the other conservatives from the entire Term.

25. In addition to the Court’s dismissal of certiorari in the federal government’s SB8 case as “improvidently granted,” *see United States v. Texas*, 142 S. Ct. 522 (2022) (per curiam), there was also a heated dispute over whether the providers’ case (in which the Court had granted certiorari before judgment) should be returned to the Fifth Circuit (what Texas wanted) or to the district court (what the providers wanted). Justice Gorsuch (as author of the majority opinion) opted for the former. *See Whole Woman’s Health v. Jackson*, No. 21-463, 2021 WL 5931622 (U.S. Dec. 16, 2021) (Gorsuch, J.) (mem.). When the Fifth Circuit then bypassed the seemingly obligatory remand to the district court by certifying a question to the Texas Supreme Court, the providers sought mandamus relief in the Supreme Court—which, over Justice Sotomayor’s public dissent, the Court denied. *See In re Whole Woman’s Health*, 142 S. Ct. 701 (2022) (mem.).

26. PRESIDENTIAL COMM’N ON THE SUPREME COURT OF THE U.S., FINAL REPORT (Dec. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/PV9C-EKSD>].

3. The Chief Justice's year-end report (including a subtle but unmistakable message about the Court's ability to reform itself without any need for Congress to step in);²⁷

4. The Gorsuch/Sotomayor mask contretemps;²⁸

5. The enormously significant but already forgotten OSHA/CMS vaccination cases;²⁹

6. The Court's unexplained interventions in redistricting cases in Alabama and Louisiana, which had a direct impact on the composition of the House of Representatives in the 118th Congress;³⁰

7. The leak of the draft opinion in *Dobbs* (and the subsequent leaks *about* the leak);³¹

8. The unprecedented security measures that the Court took in the aftermath of the *Dobbs* leak (including the internal investigation);³²

9. The (apparent) attempted assassination of Justice Kavanaugh and the judicial security debate it precipitated (including the unprecedented exchanges between the Marshal of the Supreme Court and local law enforcement officials in Maryland);³³

27. JOHN G. ROBERTS, JR., 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY (Dec. 31, 2021), <https://www.supremecourt.gov/publicinfo/year-end/2021-year-end-report.pdf> [<https://perma.cc/Z8X5-VM8K>].

28. Joan Biskupic, *The Gorsuch-Sotomayor Kerfuffle Shows How the Supreme Court Will Close Ranks Amid Controversy*, CNN (Jan. 21, 2022), <https://www.cnn.com/2022/01/21/politics/transparency-supreme-court/index.html> [<https://perma.cc/UQ5W-Q6SN>].

29. Nat'l Fed. of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 661 (2022) (per curiam); Biden v. Missouri, 142 S. Ct. 647, 647 (2022) (per curiam).

30. Ardoin v. Robinson, 142 S. Ct. 2892 (2022) (mem.); Merrill v. Milligan, 142 S. Ct. 879 (2022) (mem.). See generally Michael Wines, *Maps in Four States Were Ruled Illegal Gerrymanders. They're Being Used Anyway.*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/2022/08/08/us/elections/gerrymandering-maps-elections-republicans.html> [<https://perma.cc/28KZ-U5LW>].

31. Ariane de Vogue, *SCOTUS Maintains Public Silence on Dobbs Opinion Leak Investigation*, CNN (Oct. 21, 2022), <https://www.cnn.com/2022/10/21/politics/supreme-court-leak-investigation> [<https://perma.cc/X9JF-8Y57>].

32. Amy Howe, *Security Fencing Around Court is Removed, But Building Remains Closed to the Public*, SCOTUSBLOG (Aug. 29, 2022), <https://www.scotusblog.com/2022/08/security-fencing-around-court-is-removed-but-building-remains-closed-to-public/> [<https://perma.cc/2S94-JSYC>].

33. Becky Sullivan, *The Supreme Court Marshal Asks State Officials To Act on Protests at Justices' Homes*, NPR (July 3, 2022), <https://www.npr.org/2022/07/03/1109614708/protests-at-homes-of-supreme-court-justices> [<https://perma.cc/UF4K-LVSR>].

10. The Court's refusal to correct an outright (and problematic) misstatement in the majority opinion in *Shinn v. Ramirez* despite the parties' agreement that the correction was called for;³⁴

11. The fact that, even after retaking the bench for arguments, the Justices continued to hand down decisions remotely—which, among other things, deprived dissenting Justices of the chance to read their dissents publicly;³⁵

12. The remarkable series (and spectacle) of public speeches in which different Justices took radically different positions about the Court's legitimacy (and the health of the Court as an institution);³⁶

13. Questions about Ginni Thomas's involvement in efforts to overturn the 2020 presidential election—and whether, as a result, Justice Thomas should have recused from election-related disputes;³⁷

14. Significant omissions from several of the Justices' financial disclosure forms (that led them to dramatically under-report their outside income);³⁸

15. Any assessment of major individual cases or categories of cases that the Justices *didn't* take up—or the consequences of the Court's inaction in those contexts;³⁹

34. *Shinn v. Martinez*, 142 S. Ct. 2866 (2022) (mem.); see Motion to Modify Opinion, *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022) (No. 20-1009), https://www.supremecourt.gov/DocketPDF/20/20-1009/2271113/20220603161426294_2022.06.03%20Ramirez-Jones%20-%20Motion%20to%20Modify.pdf [<https://perma.cc/62UL-GV37>].

35. On the importance of dissents from the bench, see Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 32, 119 (2008).

36. See, e.g., Jessica Gresko, *Supreme Court Justices Spar Over Court Legitimacy Comments*, AP NEWS (Oct. 26, 2022), <https://apnews.com/article/abortion-us-supreme-court-elena-kagan-samuel-alito-government-and-politics-10bf92ae6830573054da5f756a029d1c> [<https://perma.cc/JRN2-AUDH>].

37. Aaron Blake, *Ginni Thomas's Texts Make Clarence Thomas's Non-Recusal Look Even Worse*, WASH. POST (Mar. 25, 2022), <https://www.washingtonpost.com/politics/2022/03/25/thomas-texts-recusal-worse/> [<https://perma.cc/4SSB-KKXM>].

38. *Justice Thomas Updates Two Years of Financial Disclosures*, FIX THE COURT (Apr. 12, 2022), <https://fixthecourt.com/2022/04/justice-thomas-updates-two-years-of-financial-disclosures> [<https://perma.cc/83SE-ZLTT>]; *Justice Sotomayor Amends Financial Disclosure to Include SIX Trips She Had Previously Omitted*, FIX THE COURT (June 13, 2022), <https://fixthecourt.com/2022/06/justice-sotomayor-amends-financial-disclosure-include-six-free-trips-previously-omitted/> [<https://perma.cc/YJ24-KKBF>]; Amy Howe, *Jackson's Financial Disclosure Reveals Additional Income in Previous Years*, SCOTUSBLOG (Sept. 15, 2022), <https://www.scotusblog.com/2022/09/jacksons-financial-disclosure-reveals-additional-income-in-previous-years/> [<https://perma.cc/ZXD9-JTPZ>].

39. For instance, the Justices decided only *two* direct appeals from state courts in criminal cases during the October 2021 Term, only one of which involved a constitutional question. See *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2492 (2022); *Hemphill v. New York*, 142 S. Ct. 681, 689–90 (2022).

16. Any reflection on the fact that, as has been true of every Term since the October 1989 Term, the Court's docket is comprised almost entirely of cases the Justices *chose* to decide;

17. Even within the covered merits cases, any discussion of the number of those in which the Justices either (a) limited the grant of certiorari; (b) granted certiorari on questions that they themselves had written; or (c) decided questions *other* than the ones they agreed to take up (*e.g.*, *Dobbs*);⁴⁰ or

18. Any acknowledgment of the fact that, after having gone 15 years (from 2004–19) without granting certiorari “before judgment” in a single case, the Court granted such unusual, expedited review *eight* different times during OT2021.⁴¹

My point is not that any one of these developments—or even all of them in the aggregate—are as significant as, say, the holding and impact of *Dobbs*. Nor is it that any discussion of any feature of the October 2021 Term that didn't include any or all of these is necessarily flawed. The upshot is both smaller and bigger than that: The fact that we tend not to include *any* points like these in our discussions of the Supreme Court underscores, in my view, the defects in how we talk about the Court as an institution.

We don't talk about the Court's non-doctrinal relationship with Congress or the Executive Branch—or, for that matter, the public. We don't talk about the Justices' relationships with each other. We don't talk about public access to the Court as an institution or to the Justices as individuals (fun fact: the most recent speech posted on the Supreme Court's webpage supposedly dedicated to public remarks by the Justices was given by, not kidding, Justice Ginsburg).⁴² We don't talk about structural shifts in the Court's docket—including the virtual zeroing out, in recent years, of direct appeals in state criminal cases, and the implications of the demise of such jurisprudence for, among other things, qualified immunity and post-conviction habeas doctrines.⁴³ Stepping onto my soap box, we certainly don't talk enough about the shadow docket, and how much more the Justices are using unsigned and unexplained orders to produce massive substantive shifts in the law on the ground (and, in a growing number of cases, in the law on the

40. See Ben Johnson & Logan Strother, *Shedding Light on the Roberts Court Shadow Docket* (Sept. 15, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4202390 [<https://perma.cc/4LRM-CC2W>].

41. See Steve Vladeck, *The Rise of Certiorari Before Judgment*, SCOTUSBLOG (Jan. 25, 2022), <https://www.scotusblog.com/2022/01/the-rise-of-certiorari-before-judgment/> [<https://perma.cc/X8TU-UH6E>]. For the updated list, see Steve Vladeck (@steve_vladeck), TWITTER (Dec. 1, 2022, 1:59 PM), https://twitter.com/steve_vladeck/status/1598406453131444256 [<https://perma.cc/Z899-AS56>].

42. Supreme Court of the U.S., *News Media: Speeches*, <https://www.supremecourt.gov/public/info/speeches/speeches.aspx> [<https://perma.cc/F9RK-L7QP>] (last visited Apr. 13, 2023).

43. See *supra* note 39.

books).⁴⁴ And we don't even do a good job of talking about a lot of what happens even on the merits docket—or about why some of the Court's more technical decisions are often its most important.

Smarter people than me would do well to think about the best account of *why* things changed—or where and when our ability to talk about the Supreme Court in institutional terms became so beholden to such a small sliver of the Justices' work. The rise (and fall) of the legal process school might have a lot to say about the story,⁴⁵ along with both conscious and subconscious shifts in how we *teach* about the Supreme Court in our classes. A case method-driven course on Constitutional Law is necessarily going to privilege the substantive output of the Court over the deeper institutional issues that don't make their way into the pages of the *United States Reports*. Even the Federal Courts class, in which one might expect a focus on the Supreme Court as an institution to be a far more natural fit, has become dominated by case law over contexts. You'd look in vain in the most recent edition of Hart and Wechsler—or even its most recent supplement—for any discussion of any of the non-merits-docket topics summarized above.⁴⁶

Likewise, an increasing focus on—and debate over—how judges and justices in individual cases interpret text necessarily picks out one unrepresentative tree. Say what you will about the ongoing debate over originalism; what can't be gainsaid is the absence of any sustained discussion within those debates of the original understanding (under whatever rubric) of the Supreme Court's institutional role—as opposed to disputes over the meaning of individual constitutional provisions.⁴⁷

Some of this may also be because lawyers have become (or always were) bad at talking to non-lawyers, especially political scientists—who are, by both training and inclination, far more inclined to gravitate toward the Court's

44. See STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (forthcoming 2023).

45. Cf. Akhil Reed Amar, Book Review, *Law Story*, 102 HARV. L. REV. 688 (1989) (reviewing PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN, & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (3d ed. 1988)) (situating the evolution of contemporary Federal Courts scholarship and coursework within the rise of the legal process school).

46. See WILLIAM BAUDE, JACK L. GOLDSMITH, JOHN F. MANNING, JAMES E. PFANDER & AMANDA L. TYLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (7th ed. Supp. 2022); RICHARD H. FALLON JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (7th ed. 2015).

47. This silence extends even to more doctrine-laden topics like the availability of judge-made remedies for unconstitutional conduct by government officers. See, e.g., Stephen I. Vladeck, *The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers*, 96 NOTRE DAME L. REV. 1869 (2021).

institutional features. There aren't enough law professors who are writing about the Court the way that someone like Josh Chafetz writes about Congress.⁴⁸

And some of this may also relate to broader trends in media coverage. In the age of clickbait, individual moments outside the merits docket may get *lots* of media attention, but when the time comes to translate the work of the Court to the public, the gravitation is toward clickbait. Consider, for instance, how much popular coverage the case of the “cursing cheerleader” received during the October 2020 Term, compared to the far more important case of the incompetent credit reporting agency.⁴⁹ But whatever the causes, if one agrees with the descriptive claim *that* things have changed (without regard to *why* or *when*), it seems to me that there are at least three major ways in which this shift is problematic:

First, because so much of the public discourse about the Supreme Court turns on the substance of the Court's most divisive merits decisions, that discourse then has the effect of necessarily reinforcing charges of polarization and partisanship—distracting from those features of the Court's work that might meet with *bipartisan* disapproval. If the typical exposure to the Supreme Court of the average American, or even the average law student, is that the Court's biggest rulings are all dividing the Justices into their ideological camps, what lesson do we *expect* that message to send? It may seem counterintuitive, but the less we talk about the Court as an institution when we talk about the Court, the *more* I fear that we reinforce its most tribal features. Among other things, this opens everyone up to charges of acting and arguing in bad faith—allowing “institutional” concerns to be dismissed, however unpersuasively, as sour grapes from those on the wrong side of the big merits decisions.⁵⁰

Second, because the discourse has increasingly moved away from the Court's relationship with other constituencies, that shift has reinforced both the perception and the reality that the Court *is* isolated (and has isolated itself) from other government institutions. In Frankfurter's day, the Court was not just in the middle of a robust, ongoing interbranch dialogue about its role in our constitutional system; the Justices themselves were active participants *in* that conversation; the Judiciary Act of 1925 is called the “Judges' Bill” for a reason. It was legislation fundamentally changing the Supreme Court's role in our

48. See, e.g., JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017).

49. Compare *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2042 (2021), with *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021).

50. One example (of many) is conservatives' dismissal of critiques of the Court's increasing abuse of the shadow docket as nothing more than progressive dissatisfaction with the bottom lines of the Court's unsigned, unexplained procedural orders. See, e.g., Editorial, *The 'Shadow Docket' Diversion*, WALL ST. J. (Oct. 2, 2021), <https://www.wsj.com/articles/the-shadow-docket-diversion-supreme-court-samuel-alito-11633123922> [https://perma.cc/KB6S-4EPB].

constitutional system that was both conceived and publicly and privately lobbied for by the Justices *themselves*.⁵¹

That all happened at a time when Chief Justice Taft would regularly walk from his Woodley Park home to the Court (hence the “Taft Bridge”), partly for the exercise and partly to interact with members of the public. Indeed, as late as 1935, the Court still sat in the Old Senate Chamber *in* the Capitol; it was impossible for the Justices to absent themselves from interbranch dialogue. Today, in contrast, the Court is cloistered in every way that matters—as publicly indifferent to the sharp decline in its public approval as it is seemingly untroubled by the specter that this mounting dissatisfaction will turn into any meaningful political pushback, partisan or otherwise. And Congress has done nothing to disabuse the Justices of that mentality. The last meaningful reforms of the Court’s docket, in 1988, only gave the Court *more* power (at its request).⁵² It’s hard to believe that these developments are completely unrelated.

Finally, because we’ve become so bad at talking about the Court as an institution, we’ve also lost the facility for talking about how to make the Court healthier in ways that aren’t intensely and inevitably polarizing. Public debate over reforming the Supreme Court is (or at least should be) about so much more than the number of seats on the Court or the length of the Justices’ tenures. But when we’re obsessed with individual votes in individual cases—and what Suzanna Sherry calls “the Kardashian Court”⁵³—it isn’t hard to see why the dominant topic becomes who’s casting those votes, and how to change that. We’re trapped in a seemingly permanent feedback loop about Court reform at least in part because we’re trapped in a seemingly permanent feedback loop about how we talk about the Court as an institution.

If we shifted our gaze instead to broader institutional reforms—reforms designed to rein in procedural abuses and to more generally reassert the role of the other branches of government in circumscribing some of the Justices’ more concerning ambitions—there might be much more fertile ground, and more topics of common interest, to discover. Over its last three Terms, the Supreme Court has handed down fifty-three, fifty-six, and fifty-eight signed decisions in argued cases (as of this writing, it’s not even on pace to match *those* totals during the October 2022 Term). It hadn’t previously handed down fewer than sixty signed decisions in argued cases since—not a typo—1864. Presumably, suggesting that this Court do *more* won’t be so quickly dismissed as an effort to take the Justices’ power away. And other examples abound.

51. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1645 (2000).

52. Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. § 662.

53. Suzanna Sherry, *Our Kardashian Court (and How To Fix It)*, 106 IOWA L. REV. 181, 182, 223 (2020).

To make a long story short(er), I want us to have a meaningful public conversation about how we do, don't, and should think, write, and talk about the Supreme Court as an institution—one for which then-Professor Frankfurter gives us a pretty good, if mostly forgotten, model.

* * *

Most public discourse about the Supreme Court's October 2022 Term is, once again, focused on the most visible merits cases. Affirmative action; the "independent state legislature" theory; the Voting Rights Act;⁵⁴ and so on. By most accounts, we're heading for a repeat of the October 2021 Term in both the divisiveness of these major decisions and their dominance of public discourse about the Court.

But another theme of the Court's current Term that we ought to be discussing is the ubiquity of state-driven litigation against the federal government. Consider both the aptly named *United States v. Texas* case and the dispute over President Biden's student loan debt relief program. Both cases started as efforts by red states to obtain nationwide injunctions against politically divisive Biden Administration policies—even though the standing of the states in these cases is . . . dubious, at best. In both cases, the states initially succeeded—with Texas obtaining a nationwide injunction from a cherry-picked district judge,⁵⁵ and Nebraska and its five co-plaintiff states obtaining an emergency nationwide injunction from the Eighth Circuit pending appeal.⁵⁶ In both cases, the Biden Administration sought emergency relief from the Supreme Court (in the Texas case, after initially succeeding—and then failing—to obtain such relief from the Fifth Circuit).⁵⁷ And in both cases, instead of granting such relief, the Court took the alternative step of expediting the disputes onto the merits docket by granting certiorari before judgment.⁵⁸

These cases are part of a much larger pattern of states whose elected leaders are hostile to the incumbent President using creative theories of standing and various procedural tricks to elevate policy disputes into nationwide injunctions

54. *October Term 2022*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/terms/oct2022/> [<https://perma.cc/2YGH-4EL6>].

55. *Texas v. United States*, 555 F. Supp. 3d 351, 362, 442 (S.D. Tex. 2021). By filing in the Victoria Division of the U.S. District Court for the Southern District of Texas, Texas had a 100% chance of having the case assigned to Judge Drew Tipton. See Brief of Professor Stephen I. Vladeck as *Amicus Curiae* in Support of Petitioners, *United States v. Texas*, No. 22-58, 9–10 (U.S. filed Sept. 19, 2022) (No. 22-58).

56. *Nebraska v. Biden*, 52 F.4th 1044, 1048 (8th Cir. 2022) (per curiam).

57. A three-judge panel initially stayed the district court's injunction in part in a signed opinion. See *Texas v. United States*, 14 F.4th 332, 334 (5th Cir. 2021). The Fifth Circuit, sitting en banc, then vacated that stay without explanation. See *Texas v. United States*, 24 F.4th 407, 408 (5th Cir. 2021) (en banc) (mem.).

58. *Biden v. Nebraska*, 143 S. Ct. 477 (2022) (mem.); *United States v. Texas*, 143 S. Ct. 51 (2022) (mem.).

before those policies can ever go into effect. Reasonable minds can differ about who started it, or whether Republican- and Democrat-led states have behaved equally badly. The key for present purposes is that the result has been to put the Court even *more* in the middle of some of our most divisive policy disputes, and at a far earlier stage in the litigation than the Justices are accustomed to—and then they at least *say* they prefer. In the student loan case, for instance, neither the district court nor the Eighth Circuit has opined on *at all*—let alone conclusively addressed—the merits.⁵⁹ And in the Texas case, the Fifth Circuit likewise never addressed the substance of the state’s challenge; the only ruling in the case is the district court’s grant of a preliminary injunction.⁶⁰

Here, then, is a current (and paradigmatic) example of an institutional issue the Court is facing—one that transcends the merits of the disputes in these cases (both of which end up turning on specific and contested questions of statutory interpretation). And yet, even discussions of these cases have *themselves* focused almost entirely on their merits, rather than the institutional inflection point that they have come to represent. That’s a mistake. It misses why these cases are important. It misses the institutional questions they raise for the Justices. It misses the broader implications of the ways in which outside actors are trying to take advantage of the Court for partisan political purposes by fundamentally changing the Court’s relationship with lower federal courts. And it misses the forest because we are so programmed to go (and fixated on going) one tree at a time.

We need to do better. Not just for the sake of having nuanced and holistic conversations about the Court and how to fix it, but for the sake of enhancing public understanding of the role that the Supreme Court plays in our legal and political system—a role that goes way the heck beyond the five-dozen merits cases it resolves each year. That effort begins with events like this symposium—and discussions like those we’re going to have today. But the onus should be on those who cover the Court, those who write about the Court, those who teach about the Court, and even those who practice before the Court, to strive to talk about the Court as such, and not just as the sum of *Dobbs* and *Bruen* and their companions. And that should be when we’re talking to each other, when we’re talking to our students, and when we’re talking to the public.

Ultimately, not everything that is problematic about the Supreme Court’s current behavior stems from the bottom lines of the decisions the justices are reaching or the methodological commitments embraced by the current conservative majority. Indeed, I dare say that, stripped of the results in the high-profile merits cases, we might even be able to find cross-spectrum consensus on some of the institutional rot pervading the Court—because rot there is.

59. *Nebraska v. Biden*, 52 F.4th at 1048.

60. *See Texas v. United States*, 14 F.4th at 334.

To be sure, given those bottom lines, some may be perfectly happy to let the rot continue—to burn down the Court, metaphorically, in order to limit the damage that the current majority can cause. But I, at least, would rather save the Court than bury it. After all, we may well need the Court to save us from ourselves—perhaps sometime very soon. In that vein, we ought to be thinking of *plausible* ways to make the institution healthier. And the more that such a conversation is devoted to reforming the Court entirely so that it hands down different merits rulings, the less likely that conversation is going to succeed in stimulating *any* Court reform, let alone the meaningful reform the Court clearly needs.

Professor Frankfurter understood that; too many of us today don't.