
ESSAY

FIXING THE SUPREME COURT THROUGH ITS DOCKET

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INTRODUCTION

Most contemporary discussions of what is wrong with the Supreme Court and how to fix it tend to focus on the Court's personnel—whether through calls to expand the Court; to impose term limits on the current justices; to create externally enforceable ethics rules; or some combination of the three. Such proposals typically run into two separate problems. First, as a practical matter, they face insurmountable political obstacles. Second, and more fundamentally, they do not identify, or seem calibrated to address, what is *actually* wrong with today's Supreme Court—at least in contrast to its predecessors. Indeed, the Court's history is replete with its fair share of troubling personal behavior by individual justices and vilified decisions by the full Court.¹ The Supreme Court of the mid-2020s may be more of a lightning rod (and less popular) than its forebears, but it takes more than justice-by-justice criticism or case-by-case analysis to unpack whether its contemporary shortcomings reflect differences of kind, or just degree.

My own view, as I have previously expressed, is that there are at least two fundamental respects in which this Court is different from its predecessors: (1) the collapse of meaningful interbranch accountability; and (2) the impunity that has followed.² From Chief Justice Roberts refusing to testify before Congress,³ to Justice Alito asserting that “[n]o provision in the Constitution gives [Congress] the authority to regulate the Supreme Court—period,”⁴ we live in an age in which the justices are not, and many of them believe they *ought* not to be, subject to any of the formal constraints or informal pressures that helped to maintain a relatively stable constitutional equilibrium for most of the nation's first two centuries.⁵ The result has been a Court that may be fiercely independent, but in ways that are only continuing to erode public faith in the institution—at least among large swaths of society, as recent Gallup surveys have found:

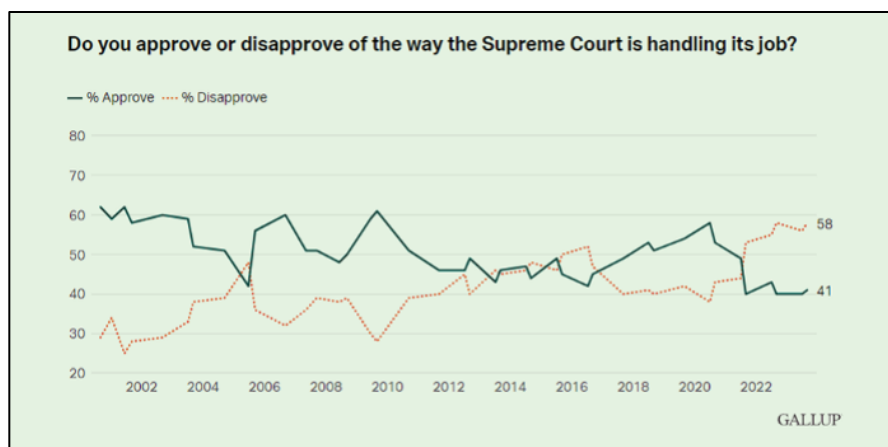
¹ See, e.g., Scott Bomboy, *Drama, Controversy Marked the First Supreme Court Justices*, NAT'L CONST. CTR. (Sept. 24, 2016), <https://constitutioncenter.org/blog/drama-controversy-marked-the-first-supreme-court-justices> [<https://perma.cc/Z4M6-DDM9>].

² See, e.g., Steve Vladeck, 25. *Judicial Independence vs. Judicial Accountability*, ONE FIRST (May 1, 2023) [hereinafter Vladeck, *Independence vs. Accountability*], <https://www.stevavladeck.com/p/25-judicial-independence-vs-judicial> [<https://perma.cc/DU2Y-X8TA>].

³ Letter from John G. Roberts, Jr., C.J., Sup. Ct. of the U.S., to Sen. Richard J. Durbin, Chair, S. Comm. on Jud. (Apr. 25, 2023), <https://www.govinfo.gov/content/pkg/GOVPUB-JU6-PURL-gpo212369/pdf/GOVPUB-JU6-PURL-gpo212369.pdf> [<https://perma.cc/3F5R-V6UB>].

⁴ David B. Rivkin, Jr. & James Taranto, *The Weekend Interview with Samuel Alito: The Supreme Court's Plain-Spoken Defender*, WALL ST. J., July 29, 2023, at A11.

⁵ See Vladeck, *Independence vs. Accountability*, *supra* note 2.

Figure 1. Supreme Court Approval Gallup Survey.⁶

This Essay seeks to establish that one of the principal culprits of this shift is hiding in plain sight—to wit, the Supreme Court’s docket, and how it has evolved over time. It is not just that the Court has gone from having no control over the cases it heard (from 1790 to 1891) to almost complete control (since 1988);⁷ it is that this shift has spawned a series of other, less appreciated changes in both the volume and nature of the justices’ workload. Among other things, as the number of cases to which the justices give plenary review has declined precipitously, the “merits docket”⁸ has skewed increasingly toward disputes at the heart of contemporary culture wars—in which the justices are choosing to decide more and more cases presenting legal disputes that tend to sort the parties and the public in line with their partisan political preferences.⁹ Historically, the Court has suggested that it should be wary of deciding too many cases in which “[t]he

⁶ *Supreme Court*, GALLUP, <https://news.gallup.com/poll/4732/supreme-court.aspx> (last visited Sept. 3, 2025).

⁷ See Steve Vladeck, *Bonus 123: The Judges’ Bill Turns 100*, ONE FIRST (Feb. 13, 2025), <https://www.stevvladeck.com/p/bonus-123-the-judges-bill-turns-100> [<https://perma.cc/7HM4-RBQQ>].

⁸ I use the term “merits docket” as a shorthand for the cases in which the justices have (1) accepted an appeal or original action for plenary review; (2) received briefing on the merits; (3) held oral argument; and (4) issued a formal ruling disposing of the case. The “shadow docket”—at least as I use the term—comprises everything *else* that the Court does. See generally STEPHEN I. VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023) [hereinafter VLADECK, *SHADOW DOCKET*].

⁹ Cf. Simon Lazarus, *How to Rein in Partisan Supreme Court Justices*, BROOKINGS INST. (Mar. 23, 2022), <https://www.brookings.edu/articles/how-to-rein-in-partisan-supreme-court-justices> [<https://perma.cc/49K7-GTEV>] (reporting 62% of poll respondents believe the Supreme Court makes decisions based on politics).

Court is most vulnerable and comes nearest to illegitimacy.”¹⁰ And yet, we have not stopped to reflect on what it means that there are more of these now than ever before—both in absolute terms, and, given the declining denominator, as an even greater percentage of the merits docket overall.

Unsurprisingly, that shift has also reinforced the ideological divides among the justices. During the October 2023 Term (“OT2023”),¹¹ the most common voting lineup in non-unanimous cases had the six justices appointed by Republican presidents in the majority and the three justices appointed by Democratic presidents in dissent.¹² Indeed, that lineup was reflected in more non-unanimous decisions than the next three most common lineups combined.¹³ When the overwhelming majority of newsworthy decisions from the Supreme Court are splitting along those lines, it is not difficult to understand why so many members of the public have come to view the Court in increasingly partisan terms—regardless of whether they agree or disagree with the justices’ bottom lines.¹⁴

The recent diminution of the merits docket has come at the same time as the emergence of the “shadow docket”—with the justices deciding ever-more-significant legal questions through unsigned and (usually) unexplained orders.¹⁵ That phenomenon, too, has tended to reinforce at least the appearance of sharply ideological (if not partisan) behavior by the justices. To take one revealing data point, in orders respecting emergency applications, there have been zero examples since Justice Jackson joined the Court of public dissents from both a Democratic appointee and any of Justices Thomas, Alito, or Gorsuch.¹⁶

¹⁰ *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), *overruled on other grounds by Lawrence v. Texas*, 539 U.S. 558 (2003).

¹¹ I use “OT ___” to denote the Supreme Court’s October Term beginning in the listed year (e.g., “OT2023” would be the Term that began the first Monday in October 2023 and concluded the following year).

¹² Cf. Angie Gou, *As Unanimity Declines, Conservative Majority’s Power Runs Deeper than the Blockbuster Cases*, SCOTUSBLOG (July 4, 2022), <https://www.scotusblog.com/2022/07/as-unanimity-declines-conservative-majoritys-power-runs-deeper-than-the-blockbuster-cases> [<https://perma.cc/UC7P-2NAD>].

¹³ Steve Vladeck (@steve_vladeck), X (July 1, 2024, 11:40 AM), https://x.com/steve_vladeck/status/1807801529560113506 [<https://perma.cc/3SRF-MDC9>] (“#SCOTUS handed down 32 non-unanimous rulings this Term. The most common lineup, by far, had the 6 [Republican] appointees in the majority and the 3 [Democratic] appointees in dissent. It happened 11 times, plus 2 5-4 rulings w/ all three [Democrats] in dissent. The next most common lineup happened 3 times.”).

¹⁴ See Lazarus, *supra* note 9.

¹⁵ See generally VLADECK, SHADOW DOCKET, *supra* note 8.

¹⁶ I say “public” because, as is now well-known, there can be “stealth” dissents from orders, where a justice may vote against the Court’s disposition, but not publicly announce that they did so. For an example in which there was clearly a “stealth” dissent, see *Arthur v. Dunn*, 580 U.S. 977 (2016) (mem.). There, the Court (with eight justices) granted a stay of execution over only two public dissents, but Chief Justice Roberts wrote to note that he was providing a *fifth* vote for a stay. *Id.* at 977 (statement of Roberts, C.J.). In other words, the vote was 5-3, even though only Justices Thomas and Alito had publicly dissented.

Instead, for whatever reason, the Court is sorting itself ideologically in virtually all of those cases, with the “middle” bloc of Chief Justice Roberts, Justices Kavanaugh and Barrett invariably controlling the outcome.¹⁷ And unlike on the merits docket, the rulings the Court is handing down in these contexts invariably come without principled justification—opening the justices up further to charges that they are voting their political preferences rather than what neutral legal principles would seem to require.¹⁸

As the justices are spending more time on *these* kinds of cases compared to a generation ago, they are necessarily (and demonstrably) spending less time on others. To take one especially illustrative (but hardly unique) example, during OT2024, the Supreme Court did not hear a single direct appeal from a state criminal conviction.¹⁹ A decade ago, it was averaging five to seven such cases per year. The disappearance of a criminal appellate docket has been part of a broader disappearance of a criminal *procedure* docket.²⁰ That result, in turn, has had direct implications for criminal defendants in both state and federal courts, and even more significant indirect implications for civil rights plaintiffs and state and federal prisoners—whose ability to obtain relief for constitutional violations usually depends upon the existence of “clearly established” law.²¹

The upshot of this story is that we can trace quite a lot of the current Court’s problematic behavior—and the public’s reaction thereto—to how the Court’s caseload has shifted both quantitatively and qualitatively. Some of those shifts can be linked, directly, to how Congress has altered the statutes governing the Court’s docket—alterations that, for better or worse, have transferred virtually all control over the justices’ caseload from the legislature to the judiciary. But others are the result of changes in the Court’s (and the justices’) own behavior, some of which have been previously documented, and some of which have not been. Thus, understanding what is different about the Court’s docket today depends upon understanding not just how the relevant statutes have changed, but how the justices’ applications of those statutes, many of which are reflected only in patterns of unexplained decisions, have evolved.

¹⁷ An especially revealing example of this 3-3-3 split was the Court’s initial decision to grant a stay and certiorari before judgment in the Idaho case involving the Emergency Medical Treatment and Labor Act, and its subsequent vacatur of the stay and dismissal of certiorari—with a concurrence by those three justices as the only separate writing endorsing both sets of moves. *See Moyle v. United States*, 144 S. Ct. 2015, 2019-23 (2024) (Barrett, J., concurring).

¹⁸ *See, e.g.*, Steve Vladeck, 77. *Justice Gorsuch and “Nationwide” Injunctions*, ONE FIRST (Apr. 22, 2024), <https://www.stevevladeck.com/p/77-justice-gorsuch-and-nationwide> [<https://perma.cc/3CMX-3LUQ>].

¹⁹ Steve Vladeck, 113. *Direct Appeals from State Criminal Convictions*, ONE FIRST (Dec. 16, 2024) [hereinafter Vladeck, *Direct Appeals*], <https://www.stevevladeck.com/p/113-direct-appeals-from-state-criminal> [<https://perma.cc/934Q-K5VA>].

²⁰ *See id.*

²¹ *See, e.g.*, 28 U.S.C. § 2254(d)(1) (limiting habeas relief to cases where state court acted contrary to or unreasonably applied “clearly established federal law”); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that government officials are shielded from liability unless they violate “clearly established statutory or constitutional rights”).

But perhaps the most important point this Essay hopes to establish is that it does not have to be this way. Even bracketing the long-running debate over whether Congress may constitutionally exercise complete control over the Supreme Court's appellate jurisdiction,²² there is no serious dispute that it has the power to *broadly* regulate the Court's docket, including by deciding which statutory grants of jurisdiction are mandatory and which are discretionary.

Thus, this Essay concludes by suggesting that, against this backdrop, one of the least controversial ways to begin to "fix" the Supreme Court would be for Congress to reassert more control over the justices' workload—and to require the Court to spend more of its time deciding the kinds of lower-profile, non-ideological disputes through which the justices historically behaved more like judges, and the Court looked more like a court.

The upshot is not that we should go back to the pre-1891 all-mandatory docket. Rather, it is that the justices should be forced to spend at least some of their time each term deciding cases they wouldn't otherwise have chosen to resolve. Indeed, such a reform would have an array of salutary direct and indirect consequences. Some of that can be accomplished by making more of the Court's jurisdiction in particular subsets of cases mandatory—to swing the pendulum back toward the pre-1988 approach. And there are some intriguing candidates for categories of cases to include. But another reform worthy of serious consideration is to take the existing power of federal courts of appeals to "certify" questions to the Supreme Court and turn that into a mandatory appeal. This would be useful for those issues on which lower courts need guidance and the Supreme Court does not want to provide it. This Essay offers some thoughts on how these reforms might most effectively (and constitutionally) be accomplished.

Ultimately, docket reform may seem too technical and insufficiently tantalizing to be worth it at first blush. But if you are, or can be, persuaded that docket reform has *already* played a central role in how the Supreme Court came to play the controversial role that it plays today, then it ought to follow that docket reform is also an important place to focus contemporary reform efforts. Indeed, it is possible that docket reform should not just be *part* of conversations about Supreme Court reform, but that it should come first.

I. THE COURT TAKES (AND IS GIVEN) CONTROL OVER ITS DOCKET

It may be helpful to start with some data about where we are. During OT2023, the Supreme Court handed down fifty-eight total rulings in cases that received plenary consideration.²³ Fifty-seven of the fifty-eight decisions came in cases the justices *chose* to hear—fifty-six on discretionary appeals from lower courts

²² See, e.g., *Felker v. Turpin*, 518 U.S. 651, 667 & n.2 (1996) (Souter, J., concurring).

²³ See 2023 J. SUP. CT. U.S., at II (2024). The Court's total included fifty-five cases decided by "written" opinions and four decided by "per curiam" opinions—for a total of fifty-nine. But one of the former rulings came in *Ohio v. EPA*, 144 S. Ct. 2040 (2024), in which the Court resolved four emergency applications, rather than a plenary appeal.

(on petitions for writs of certiorari, or “cert.”), and a single dispute between two states falling within the Court’s “original” jurisdiction.²⁴ Only a racial gerrymandering dispute from South Carolina was within the Court’s “mandatory” jurisdiction.²⁵ And in seven of the fifty-seven cases the justices chose to hear, they restructured the appeal when they took it—either by granting only some of the questions presented in the cert. petition or by writing their own.²⁶

OT2023 was the fifth straight Term in which the Court issued fewer than sixty “merits” rulings.²⁷ In contrast, prior to OT2019 (which was interrupted by the initial onset of the COVID-19 pandemic), the last time the Court had issued so few rulings after plenary consideration was in 1864.²⁸ Indeed, the last five completed terms (and, as of this writing, OT2024) reflect the culmination of a downward trend in the merits docket since 1988—when Congress took away virtually all of the Court’s remaining mandatory appellate jurisdiction.²⁹ To help visualize both that development and what preceded it, consider this chart of the Court’s merits decisions over time, by Dr. Adam Feldman:³⁰

²⁴ See 2023 J. SUP. CT. U.S., at II. See generally *Texas v. New Mexico*, 144 S. Ct. 1756 (2024).

²⁵ See generally *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221 (2024).

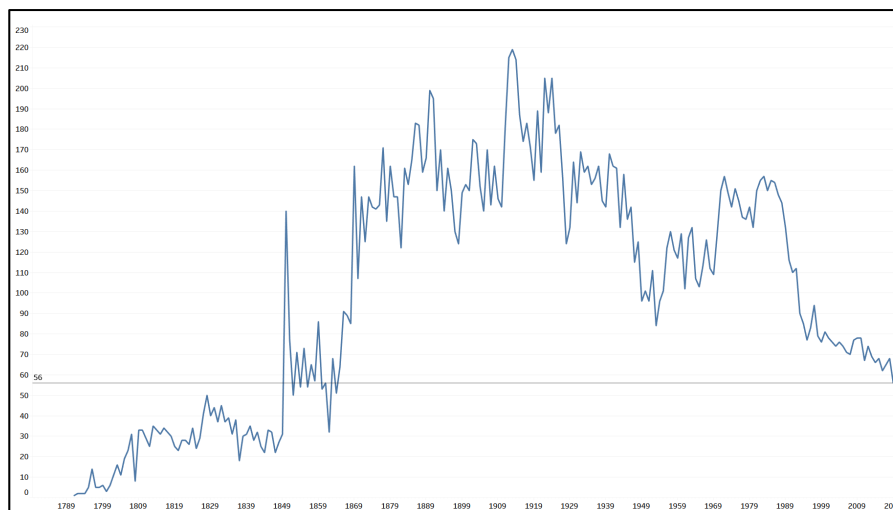
²⁶ See generally *Trump v. United States*, 144 S. Ct. 2312 (2024); *Dep’t of State v. Muñoz*, 144 S. Ct. 1812 (2024); *Warner-Chappell Music, Inc. v. Nealy*, 144 S. Ct. 478 (2023) (mem.); *Nat’l Rifle Ass’n v. Vullo*, 144 S. Ct. 375 (2023) (mem.); *Relentless, Inc. v. Dep’t of Commerce*, 144 S. Ct. 325 (2023) (mem.); *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 44 (2023) (mem.); *Muldrow v. City of St. Louis*, 143 S. Ct. 2686 (2023) (mem.).

²⁷ Steve Vladeck, *79. 42(ish) Decisions to Go...*, ONE FIRST (May 6, 2024), <https://www.stevevladeck.com/p/79-43ish-decisions-to-go> [<https://perma.cc/6D3G-GJUZ>].

²⁸ See *id.*

²⁹ See Steve Vladeck, *Bonus 36: Why Congress Should Expand the Supreme Court’s Docket*, ONE FIRST (July 20, 2023), <https://www.stevevladeck.com/p/bonus-36-why-congress-should-expand> [<https://perma.cc/UZ57-NLU7>].

³⁰ See Adam Feldman, *Looking Back to Make Sense of the Court’s (Relatively) Light Workload*, EMPIRICAL SCOTUS (Jan. 9, 2018), <https://empiricalscotus.com/2018/01/09/light-workload> [<https://perma.cc/S9MM-NMUY>].

Figure 2. Supreme Court's Merits Decisions Over Time.³¹

This Part is devoted to telling the relatively straightforward story of the causes of the longer-term peaks and valleys reflected above. To give away the punchline, the party responsible for most of the story, at least until 1988, was Congress.

A. 1789-1891: “*Treason*” to the Constitution

Article III of the Constitution established the Supreme Court,³² but it was the Judiciary Act of 1789 (“1789 Act”) that set the Court up and gave it anything to do. Without getting lost in the details, there are three central points to make about the Court’s appellate jurisdiction at the Founding. First, section 25 authorized the Supreme Court to review, by writ of error, final judgments from the highest state courts in cases that rejected a federal claim or defense.³³ Second, as tweaked in 1803, sections 13 and 22 of the 1789 Act authorized the Supreme Court to review, by writ of error or appeal, certain decisions by the lower federal courts in civil cases.³⁴ And third, *both* species of appellate jurisdiction were understood by everyone involved to be mandatory; parties who took appeals to the Supreme Court falling within those statutory grants had an appeal as of right.³⁵

³¹ *Id.*

³² U.S. CONST. art III, § 1.

³³ Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (codified as amended at 28 U.S.C. § 1257).

³⁴ Act of Mar. 3, 1803, ch. 40, § 2, 2 Stat. 244, 244-45. On the difference between writs of error and appeals, see WILLIAM BAUDE, JACK GOLDSMITH, JOHN F. MANNING, JAMES E. PFANDER & AMANDA L. TYLER, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 326 n.3 (8th ed. 2024).

³⁵ BAUDE ET AL., *supra* note 34, at 326 n.3, 616-17.

Although Congress would provide some modest amendments along the way, these three jurisdictional features of the 1789 Act would persist, intact, for over a century. And for all of the debate over the 1789 Act, there was no contemporaneous suggestion that mandatory appellate jurisdiction raised any constitutional concerns.

The early Supreme Court embraced this understanding of Congress's power over its docket in both directions. In an 1810 opinion by Chief Justice Marshall, the Court would explain that the affirmative *grants* of appellate jurisdiction by Congress necessarily implied the exclusion of any *other* appellate jurisdiction.³⁶ And in 1821, Chief Justice Marshall, again writing for the Court, noted that “[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.”³⁷ “The one or the other,” he concluded, “would be treason to the Constitution.”³⁸

Of course, appellate jurisdiction was not the *only* (or even most important) means through which Congress exercised control over the Court. During the same time period, Congress periodically changed the *size* of the Court;³⁹ it changed the timing of the Court's sittings (including the elimination of the 1802 Term as part of the contretemps leading up to *Marbury v. Madison*⁴⁰); it limited but then reasserted the justices' obligations to ride circuit (nineteenth-century circuit courts were staffed by the local district judge sitting with one of the justices);⁴¹ and through the power of the purse, it exerted various other means of control over the justices and the Court—which sat in the first floor of the Capitol from 1810 to 1860, and even then, moved only upstairs to the Old Senate Chamber.⁴²

The result was a Court that was neither (1) particularly busy nor (2) regularly confronted with high-profile disputes. Indeed, although the justices handed down a number of major constitutional rulings over this time period, those decisions tended to be spaced apart pretty widely. Most of the Court's docket was consumed by customs and admiralty cases and routine commercial disputes.⁴³

³⁶ See *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810).

³⁷ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

³⁸ *Id.*

³⁹ See BAUDE ET AL., *supra* note 34, at 39-40.

⁴⁰ 5 U.S. (1 Cranch) 137 (1803); see BAUDE ET AL., *supra* note 34, at 87.

⁴¹ See BAUDE ET AL., *supra* note 34, at 38-39.

⁴² To take just one example, Congress would at times use the lack of a permanent retirement system as a cudgel—including offering pensions to individual justices in exchange for their immediate retirement. See, e.g., Act of Jan. 27, 1882, Cong. ch. 4, 22 Stat. 2 (offering pension to Justice Hunt if he retired within thirty days despite him not fulfilling usual service requirement).

⁴³ See Michael Sevel, *Lost at Sea: The Continuing Decline of the Supreme Court in Admiralty*, 71 U. MIAMI L. REV. 938, 939-40 (2017).

And the justices' time was consumed as much by their responsibilities on circuit as by their part-time jobs in Washington.⁴⁴

As in so many other ways, the Civil War changed everything. It is not just that the new constitutional amendments adopted in its aftermath generated substantial new federal litigation; the universe of substantive federal *statutory* law expanded dramatically during and after the war—as the federal government itself expanded in kind.⁴⁵ These developments were reflected, *inter alia*, in Congress's 1875 conferral, for the first time, of subject-matter jurisdiction upon lower federal courts in *all* cases presenting federal questions (and meeting a specified amount-in-controversy).⁴⁶ More generally, as the dockets of the lower federal courts exploded, the Supreme Court, which was powerless to control the flood (and the justices of which were still also expected to ride circuit), was swept up in it.⁴⁷

By the mid-1880s, the Court was overwhelmed. Chief Justice Fuller reported that the Court had over 1,800 active cases on its docket.⁴⁸ The typical time from when an appeal was docketed to when it was argued and decided was more than three years.⁴⁹ Clamor for reform came not just from frustrated lawyers, but from the justices themselves. And although there was significant debate over the form they should take, all agreed that *some* reforms were necessary.

B. 1891-1925: *The Rise of Certiorari (and the Modern Court)*

Enacted in 1891, the Evarts Act is responsible for the modern structure of the federal judicial system—including standalone circuit courts with primarily appellate jurisdiction.⁵⁰ One of the justifications for the new circuit courts was to have *them*, rather than the Supreme Court, issue the “final” decisions in certain (non-constitutional) cases.⁵¹ Those decisions, in turn, could be reviewed by the Supreme Court, but not as of right.⁵² Only if the circuit courts certified them, or

⁴⁴ See SUP. CT. HIST. SOC'Y, <https://civics.supremecourthistory.org/article/riding-the-circuit/> [<https://perma.cc/2J8Q-VYXW>] (last visited Sept. 3, 2025) (describing circuit riding practice).

⁴⁵ See Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2116-17 (2019).

⁴⁶ See Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331).

⁴⁷ H.R. REP. NO. 50-942, at 3-4 (1888) (discussing mounting case backlogs and overburdened Supreme Court justices).

⁴⁸ *The Fuller Court, 1888-1910*, SUP. CT. HIST. SOC'Y, <https://supremecourthistory.org/history-of-the-courts/fuller-court-1888-1910> [<https://perma.cc/CHY4-XKWP>] (last visited Sept. 3, 2025).

⁴⁹ See *id.*

⁵⁰ See Evarts Act, ch. 517, 26 Stat. 826 (1891).

⁵¹ Raymond Lohier, *The Court of Appeals as the Middle Child*, 85 FORDHAM L. REV. 945, 947 (2016) (noting appeals courts assumed the Supreme Court's duties such as direct review of district court final judgments, and posttrial or post-hearing determinations of circuit courts).

⁵² See *id.* at 948.

if the justices granted a writ of certiorari to review them, could the case be further appealed.⁵³

At least as it was initially contemplated, certiorari was intended not as a means of giving the Court more power, but simply as a docket-clearing expedient. Indeed, in the first four years after 1891, the Court granted certiorari in only two cases—stressing that “this branch of our jurisdiction should be exercised sparingly and with great caution.”⁵⁴ If anything, the animating goal was to free up the justices’ resources *for* the mandatory docket—not to give them control over their caseload, writ large.

The 1891 reforms were directed toward the federal courts. But the Court soon faced new docket pressures (in both directions) in appeals from state courts—especially after the Court’s 1905 invigoration of the Due Process Clause of the Fourteenth Amendment in economic liberty cases in *Lochner v. New York*.⁵⁵ The problem that quickly emerged was the old (1789) limit on the Court’s jurisdiction over state courts—which permitted review only when the federal claim had been *denied*.⁵⁶ As state courts started wielding *Lochner* to strike down more and more laws (such as the New York Court of Appeals’ 1911 invalidation of the nation’s first workers’ compensation statute),⁵⁷ the Supreme Court was powerless to intervene. Congress reacted in 1914 by expanding certiorari to encompass appeals from state courts in cases in which federal rights were upheld, but that only brought *more* cases to the Court.⁵⁸

Thus, by the mid-1910s, the Court was once again in the middle of a docket-driven crisis. And the most obvious way to ameliorate that crisis, according to former Solicitor General, Circuit Judge, and President (and then-Yale law professor) William Howard Taft, was to expand the scope of certiorari—and give the justices more control over their docket. President Taft did not hide his motivations. In an influential 1908 article published while he was running for the White House, he had argued that the Supreme Court’s function was not to resolve individual cases, but rather to “cover the whole field of law upon the subject involved.”⁵⁹ In a 1910 speech, then-President Taft directly connected the vision of the Supreme Court as a general expositor of legal principles to discretionary review of specific appeals.⁶⁰ And after joining the faculty at Yale as a professor at the end of his presidency, Taft explicitly urged Congress in 1916 to

⁵³ See BAUDE ET AL., *supra* note 34, at 327.

⁵⁴ *Ex parte Lau Ow Bew*, 141 U.S. 583, 589 (1891).

⁵⁵ 198 U.S. 45 (1905).

⁵⁶ Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (codified as amended at 28 U.S.C. § 1257).

⁵⁷ *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431, 448 (N.Y. 1911).

⁵⁸ See Judiciary Act of 1914, ch. 2, 38 Stat. 790.

⁵⁹ William H. Taft, *Delays and Defects in the Enforcement of Law in This Country*, 187 N. AM. REV. 851, 851-52 (1908).

⁶⁰ 46 CONG. REC. 16, 25 (1910) (President’s Annual Message).

do away with the requirement that the justices hear appeals except in cases involving interpretations of the federal Constitution.⁶¹

For Taft, it was not just that the justices were overworked. It was that a Court without discretion to pick and choose its cases could not truly function as a constitutional court because it would forever be deluged and distracted by technical appeals—appeals that, whatever their significance to the parties, were inconsequential to the nationwide development of the law. A supreme court, in Taft's view, was one that controlled its docket, and not one that was told which cases to resolve.⁶²

When Chief Justice White died in 1921, President Harding appointed Taft to replace him. And although Taft has, until recently, received short shrift from the Court's historians, it is no overstatement to say that he had as profound an impact on the Court and its relationship with the other branches of government as any Chief Justice since—and perhaps *including*—John Marshall. The centerpiece of that impact was the Judiciary Act of 1925, known then and since as the “Judges’ Bill.”⁶³

C. *1925-1988: Give the Court an Inch . . .*

In the Judges’ Bill, Congress limited the Court’s mandatory jurisdiction in appeals from state courts to cases in which the state court had either invalidated a treaty or Act of Congress or upheld a state statute that had been challenged on federal grounds. All other appeals from state courts were reviewable only by certiorari.⁶⁴ Congress imposed similar limits on mandatory appeals from lower federal courts—requiring the justices to hear only those cases “where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity.”⁶⁵ Otherwise, lower federal courts could be reviewed only by certiorari—including the new vehicle of certiorari “before judgment” in the court of appeals, for those cases in which the Court’s intervention was more urgently needed.⁶⁶ As we will see, the Judges’ Bill also laid the foundation for the modern shadow docket—expressly authorizing, for the first time, the issuance of stays pending the disposition of cert. petitions.⁶⁷

But what is especially striking about the Judges’ Bill are the *additional* powers that the Supreme Court soon claimed—all of which only further enhanced the justices’ control of their caseload. First, starting in 1928, the Court required parties to mandatory appeals to file a “jurisdictional statement,” creating an

⁶¹ See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1705-06 (2000).

⁶² See *id.* at 1704.

⁶³ Judiciary Act of 1925, ch. 229, 43 Stat. 936.

⁶⁴ See *id.* § 1, 43 Stat. at 937.

⁶⁵ See *id.* at 939.

⁶⁶ *Id.*

⁶⁷ See *id.* § 8, 43 Stat. at 940-41.

additional procedural step at which the justices could decide whether a case belonged on their docket.⁶⁸ Although there are examples from prior to 1925 of the Court dismissing a mandatory appeal for failing to present a substantial federal question, it was only *after* the rule changes in 1928 that the justices started using that authority in contexts in which the assertion of mandatory jurisdiction was nonfrivolous—including cases in which there clearly *was* a “substantial federal question”; the Court just wanted an excuse to avoid resolving the dispute.⁶⁹ By 1945, one of the Court’s deputy clerks would publicly acknowledge that “jurisdictional statements and petitions for certiorari now stand on practically the same footing.”⁷⁰

Second, the Court also quickly inaugurated the practice of “limited” grants of certiorari. Whereas Taft (and others) had promised Congress that a grant of certiorari brought with it the entire case from the lower court, the Court soon retreated from that understanding—granting certiorari to decide specific questions, such as in *Olmstead v. United States*,⁷¹ where the Court was able to hold that wiretaps did not implicate the Fourth Amendment only because it had declined to take up the antecedent question of whether the wiretap in that case was unlawful under state law.⁷² We take for granted today that a cert. petition presents specific questions, and the Court agrees to decide them (or not). But at least at the time the Judges’ Bill was enacted, that understanding was not exactly self-evident; at one point, Taft had testified specifically to the contrary.⁷³

Over time, the Court would go even further—and would begin altering the questions presented when granting a petition, either by granting on only some of the questions the petition presented; granting the *respondent’s* questions presented; *adding* to the questions presented; or, in some cases, writing its *own* questions presented.⁷⁴ All of these developments reflected ways in which the Court took the power Congress gave it in 1925, and converted it into ever more discretion.

By 1971, the idea that the Supreme Court should have the power to pick and choose which cases it heard, and which issues it decided within those cases, had become an article of faith. Perhaps the best evidence of its ubiquity was that it even pervaded that part of the Court’s jurisdiction that had never been thought to be up to Congress—the justices’ “original” jurisdiction in cases involving states or foreign ambassadors. Thus, in *Ohio v. Wyandotte Chemicals Corp.*,⁷⁵ the Supreme Court refused to allow Ohio to bring a suit directly in the Supreme

⁶⁸ See VLADECK, SHADOW DOCKET, *supra* note 8, at 49-50.

⁶⁹ *See id.* at 50.

⁷⁰ Harold B. Wiley, *Jurisdictional Statements on Appeals to the U.S. Supreme Court*, 31 A.B.A. J. 239, 239 (1945).

⁷¹ 277 U.S. 438 (1928).

⁷² *Id.* at 439.

⁷³ Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 838 (2022).

⁷⁴ *See* VLADECK, SHADOW DOCKET, *supra* note 8, at 48.

⁷⁵ 401 U.S. 493 (1971).

Court against out-of-state chemical companies that were allegedly responsible for mercury pollution of Ohio's rivers.⁷⁶

Because Ohio was the plaintiff, the case clearly fell within the constitutional grant of original jurisdiction, a grant the Supreme Court had long held that Congress could neither expand nor contract.⁷⁷ But as Justice John Marshall Harlan II wrote for the Court, it was not that Ohio's suit fell outside of the Court's jurisdiction; it was that it was a suit that the Court simply did not *need* to hear:

In our opinion, we may properly exercise such discretion, not simply to shield this Court from noisome, vexatious, or unfamiliar tasks, but also, and we believe principally, as a technique for promoting and furthering the assumptions and value choices that underlie the current role of this Court in the federal system.⁷⁸

Justice Harlan did not identify whose "assumptions and value choices" should inform the Court's exercise of its discretion, but the implication was obvious: he meant the Court's.⁷⁹ *Wyandotte* thus said out loud what a half-century of practice under the Judges' Bill had implied: that underneath the Court's increasing exercise of discretion were the justices' personal preferences for which cases were—and were not—worth their time. Here, in print, was the manifestation of Taft's vision; discretion enabled the Court to act entirely upon its value choices.

Deciding a suit between a state and private parties that was almost certain to turn on questions of state—rather than federal—law, and that could also have been brought in the lower courts, was, from the Court's point of view, inconsistent with those assumptions and value choices. The *Wyandotte* ruling was yet another step along the same path: the justices retained the power to hear such a suit if ever they wanted to, but whether to do so was, and would be, entirely up to them. With amorphous standards invented by the justices to circumscribe that discretion, rather than black-letter rules legislated by Congress, it could hardly be a surprise that the justices increasingly accused each other of manipulating (or, at least, misapplying) their standards for whether to hear a case to suit whatever their aims happened to be.⁸⁰

To drive home how far the justices saw their discretion as extending, they would even apply it not long after *Wyandotte* to cases brought by states against other states.⁸¹ Unlike *Wyandotte*, which Ohio could have brought in the lower federal courts before appealing an adverse ruling to the Supreme Court, in disputes where both parties are states, the Supreme Court's original jurisdiction is

⁷⁶ See *id.* at 510.

⁷⁷ See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁷⁸ *Wyandotte*, 401 U.S. at 499.

⁷⁹ See *id.*

⁸⁰ See BAUDE ET AL., *supra* note 34, at 338-40.

⁸¹ See *Arizona v. New Mexico*, 425 U.S. 794, 796-98 (1976) (per curiam) (declining to exercise original jurisdiction absent showing that resort to that jurisdiction is necessary and no other suitable forum exists).

not just original; it is also *exclusive* of any other court in the country.⁸² Thus, when one state sues another, it is the Supreme Court or bust. After *Wyandotte*, it was increasingly “bust.” The Court never fully explained why it had the power to decline to hear those disputes; it summarily dismissed them through orders that were, with rare exceptions, unexplained and unsigned. Perhaps the most famous of these was the December 11, 2020, order tossing Texas’s challenge to the 2020 presidential election results in four states President Biden won.⁸³ Although some were surprised to learn for the first time that the justices did not have to hear cases like Texas’s, that ruling was entirely consistent with the Court’s post-*Wyandotte* approach (as were the dissents by Justices Thomas and Alito).

By the mid-1970s, then, the Court had seized discretion over most of its docket, all under the guise of protecting what *it* perceived as its proper role vis-à-vis the other branches of government. And rather than pushing back against the Court’s steady accumulation of power, Congress legislated only to protect it. Thus, when Congress in 1983 first provided for direct appeals to the Supreme Court from the military justice system, it limited those appeals to cases that the Court of Military Appeals, which itself had a largely discretionary docket, had *agreed* to hear.⁸⁴ Protecting the size of the Court’s docket was, at least at that moment, more important than giving servicemembers the ability to appeal convictions all the way to the justices.

D. 1988-present: Congress Abandons the Jurisdictional Field

Congress’s gradual acquiescence reached its apex in 1988, when it effectively converted almost all of the Court’s remaining mandatory appellate jurisdiction into certiorari.⁸⁵ After and under the 1988 Act, the Court has mandatory appellate jurisdiction *only* in appeals from three-judge federal district courts.⁸⁶ And although those courts heard a large number of cases for much of the twentieth century, Congress in 1976 had dramatically scaled back their jurisdiction.⁸⁷ Other than a few statutes that specifically require challenges to be brought before

⁸² See Steve Vladeck, 38. “Original” Jurisdiction and the *Wyandotte* Doctrine, ONE FIRST (July 31, 2023), <https://www.stevevladeck.com/p/38-original-jurisdiction-and-the> [https://perma.cc/]RT7K-8A7K].

⁸³ See *Texas v. Pennsylvania*, 141 S. Ct. 1230, 1230 (2020) (mem.).

⁸⁴ Military Justice Act of 1983, Pub. L. No. 98-209, § 10(a), 97 Stat. 1393, 1405-06 (codified as amended at 28 U.S.C. § 1259).

⁸⁵ See Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662 (codified as amended at 28 U.S.C. §§ 1254, 1257) (eliminating most avenues for directly appealing lower court decisions, rather than seeking review via certiorari).

⁸⁶ See 28 U.S.C. § 1253.

⁸⁷ See Act of Aug. 12, 1976, Pub. L. No. 94-381, §§ 1-3, 90 Stat. 1119, 1119 (repealing 28 U.S.C. §§ 2281-82 and amending § 2284).

such courts, three-judge district courts today consider only a handful of campaign finance and congressional redistricting cases.⁸⁸

What is more, unlike in 1925, when it could fairly be said that the Court had pulled a fast one on Congress, the transfer of power here was in broad daylight. Congress *knew*, when it enacted the 1988 Act, that the Court had standardized the practices not only of “limited” grants of certiorari, but of partial and re-written grants. And it knew that the Court had been, at best, inconsistent in honoring the criteria for certiorari that Chief Justice Taft had articulated in the lead-up to the Judges’ Bill. And it radically expanded the Court’s control—while surrendering almost all of its own power—anyway.

The impact was immediate. Over several years, the number of signed opinions handed down by the Court dropped steadily, from well north of 150 substantive rulings each term to fewer than 90.⁸⁹ By the late 1990s, the Court was issuing fewer signed rulings than it had at any time since the 1860s.⁹⁰ Chief Justice Rehnquist had promised Congress, when it was considering the 1988 Act, that eliminating mandatory appeals would allow the Court to grant certiorari in more cases.⁹¹ The reality has been decidedly to the contrary.

And even as the Court’s merits docket has continued to shrink, Congress has done virtually nothing to arrest that decline or otherwise meaningfully alter either the scope of the Court’s appellate jurisdiction or how it is exercised. Three statutes, either enacted or that went into effect in 2004,⁹² 2004,⁹³ and 2012,⁹⁴ gave the Supreme Court direct appellate jurisdiction over the territorial supreme courts in Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands, respectively. (So far, the Court has taken one case, combined, from those three tribunals.)⁹⁵ And a 2023 statute, which went into effect in late 2024, expanded the Court’s jurisdiction in military cases to include those

⁸⁸ See, e.g., Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a), 116 Stat. 81, 113-14; 28 U.S.C. § 2284(a).

⁸⁹ Compare 1987 J. SUP. CT. U.S., at II (1988) (listing 148 written opinions and opinions *per curiam* handed down by the Court), with 1994 J. SUP. CT. U.S., at II (1995) (listing eighty-five written opinions and opinions *per curiam* handed down by the Court).

⁹⁰ See *supra* Figure 2.

⁹¹ See William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 12-14 (1986).

⁹² Act of Oct. 30, 2004, Pub. L. No. 108-378, § 1, 118 Stat. 2206, 2206.

⁹³ See Act of Nov. 8, 1977, Pub. L. No. 95-157, § 4, 91 Stat. 1265, 1266-67 (providing that the U.S. Supreme Court will have direct review of the Supreme Court of the Northern Mariana Islands fifteen years after it came into existence—which it did in 1989); see also U.S. GOV’T ACCOUNTABILITY OFF., AMERICAN SAMOA: ISSUES ASSOCIATED WITH POTENTIAL CHANGES TO THE CURRENT SYSTEM FOR ADJUDICATING MATTERS OF FEDERAL LAW 87-88 (2008), available at <https://www.gao.gov/assets/gao-08-655.pdf>.

⁹⁴ Act of Dec. 28, 2012, Pub. L. No. 112-226, § 2, 126 Stat. 1606, 1606 (codified at 28 U.S.C. § 1260).

⁹⁵ See *Limtiaco v. Camacho*, 549 U.S. 483, 485 (2007) (directly reviewing—and reversing—an appeal from the Supreme Court of Guam).

in which the highest military court *denied* discretionary review.⁹⁶ But these marginal expansions have been the only changes to the Court's formal appellate authority in the last thirty-seven years.

The result is a Supreme Court today that *must* decide exceedingly little, and that has enormous discretion, even in the cases it chooses to decide, over exactly what to decide, and when and how to decide it.

II. THE COURT'S DOCKET SHRINKS—AND SHIFTS

Part I documented the structural shifts in the nature of the Supreme Court's appellate jurisdiction throughout its 235-year history. This Part turns to the effects of those shifts. To that end, let us return to OT2023 for a moment. Recall from above that the Court handed down fifty-eight merits rulings, fifty-seven of which came in cases the justices chose (including seven in which the justices restructured what they were deciding when they granted certiorari).

What is just as important, if harder to quantify, is the *substantive* shape of the docket. Even though the Court decided only fifty-eight cases, those fifty-eight cases included a dizzying array of high-profile, nationally important, and politically divisive decisions. As many observers noted, this was an unusual confluence of such cases—even as the Court's docket has continued to shrink.⁹⁷ In other words, this was a claim about *both* the numerator *and* the denominator—a higher total number of major rulings, and, given the shrinking total, a much higher percentage thereof.

This Part argues that these developments are not just correlated; they are causally related—that, as the justices have gained (and taken) more and more control over their docket, their own preferences have increasingly skewed *toward* cases that consume relatively more of both the Court's capital and the justices' time. There is no perfect way to measure this shift, but there is at least some strong circumstantial evidence in, among other things, how the *substance* of the Court's docket has shifted, and in what has disappeared as the Court's docket has shrunk. When we also fold in the rise of the shadow docket in recent years, the result is a Court that is handing down more and more of the kinds of rulings that tend to provoke the most public pushback. Of course, *some* of those rulings would be possible in a world in which the justices had less control over every feature of their workload. But given the justices' finite capital (and their growing observations about how busy they are), it stands to reason that not all of them would be.

⁹⁶ National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 533(a)(1), 137 Stat. 136, 261 (codified at 28 U.S.C. § 1259).

⁹⁷ See Adam Liptak, Abbie VanSickle, & Alicia Parlapiano, *The Major Supreme Court Decisions in 2024*, N.Y. TIMES (July 2, 2024), <https://www.nytimes.com/interactive/2024/05/09/us/supreme-court-major-cases-2024.html>.

A. *The Merits Docket Shrinks*

It is indisputable that, since Congress converted most of the Court's remaining mandatory jurisdiction into certiorari in 1988, the merits docket has shrunk. As one data point, during OT1989 (the first term in which the Court's docket included only cases filed under the post-1988 statutory regime), the Court handed down 129 signed decisions in argued cases.⁹⁸ Thus, the total number of signed decisions in argued cases is down more than 50% over the last thirty-five years.

But the drop-off in merits rulings was not linear. By the late 1990s, the average case-per-term total had stabilized in the mid-70s, where it remained until OT2012 (when the Court handed down seventy-three rulings in argued cases).⁹⁹ That is why the fall from there has been so striking, especially to those of us who went to law school between the 1990s and mid-2010s; the Court had appeared, for some time, to reach a post-1988 equilibrium, only to have something push it toward a new, significantly lower one. Over the last ten terms, the Court is, on average, deciding 20% fewer cases than it was deciding during the preceding fifteen. And that number gets closer to a 30% drop-off if we look only at the last five terms. In other words, there is no question that the Court's docket has shrunk not just since 1988, but since 2013—and to a degree that cannot be dismissed as a passing fluke.

Speaking at the Tenth Circuit Judicial Conference in September 2024, Justice Gorsuch suggested a seemingly obvious (and deeply plausible) explanation for the second part of this shift—that the merits docket has shrunk in proportion to the decline in the total number of appeals the Court is receiving.¹⁰⁰

By the absolute figures, Justice Gorsuch is correct. According to the statistics compiled in the Court's annual *Journal* (which, though it does not actually measure the correct time period, should be reliable enough for these purposes), as recently as its OT2006, the Court received 8,857 total appeals.¹⁰¹ That number shrunk all the way to 4,223 for OT2023 (the last for which the Court's data is public), which is a 52.32% drop-off in total appeals.¹⁰²

To be sure, OT2006 was an outlier on the high end (likely thanks to surges in post-Bureau of Immigration Appeals' streamlining immigration cases¹⁰³ and post-*Booker*¹⁰⁴ federal sentencing appeals), and OT2023 was an outlier on the

⁹⁸ See 1989 J. SUP. CT. U.S., at II (1990).

⁹⁹ 2012 J. SUP. CT. U.S., at II (2013).

¹⁰⁰ See Steve Vladeck, 98. *Why is the Court's Docket Shrinking?*, ONE FIRST (Sept. 9, 2024) [hereinafter Vladeck, *Shrinking*], <https://www.stevevladeck.com/p/98-why-is-the-courts-docket-shrinking> [https://perma.cc/6JDC-Z7D6].

¹⁰¹ 2006 J. SUP. CT. U.S., at II (2007).

¹⁰² 2023 J. SUP. CT. U.S., at II (2024).

¹⁰³ See David Giza, *The Dangers of "Streamlining" Immigration: Why Federal Courts of Appeal Should Have Jurisdiction to Review BIA Streamlining Decisions*, 36 B.U. INT'L L.J. 375, 375-77, 376 n.6 (2018) (summarizing "streamlining" and the significant judicial review it helped to precipitate).

¹⁰⁴ See *United States v. Booker*, 543 U.S. 220, 245 (2005).

low-end (almost certainly thanks to fewer total lawsuits being filed during the COVID-19 pandemic). The actual decline probably is closer to the 40% figure cited by Justice Gorsuch (although it would help to know from which term he is starting). But there is a huge problem in looking just at the total number of appeals, and it has everything to do with the two different classes of appeals that the Court receives.

The formal rules adopted by the Supreme Court (along with its docket numbers) separate cases into what it calls “paid” appeals (those assigned docket numbers starting at $yy-1$) and appeals that are filed “in forma pauperis” (“IFP”) (those assigned docket numbers starting at $yy-5001$). In the latter set of cases, the petitioner is not required to pay the filing fee or file the specially formatted booklet with respect to their briefs. These cases can include ones in which the petitioner is indigent and is either (1) proceeding pro se or (2) represented by court-appointed counsel. For reasons that should be obvious, a large majority of these IFP filings come from or on behalf of criminal defendants or state or federal prisoners. The categories aren’t hermetically sealed, though; there is a significant volume of “paid” criminal/prisoner cases, as well—and at least a small number of IFP appeals from non-prisoner civil petitioners.¹⁰⁵

The distinction between “paid” and “IFP” cases is significant because, both historically and today, the overwhelming majority of the cases the Court chooses to hear come from the paid docket—even though, by percentage, they represent a significant minority of total filings. In OT2012, for example, there were 1,504 paid appeals and 6,005 IFP appeals—so paid appeals comprised only 20.03% of the Court’s total docket. And yet, of the ninety-three appeals the Court chose to hear from those 7,509 filings, eighty-three were in paid cases; ten were IFP.¹⁰⁶ Thus, 20.03% of the Court’s docket accounted for 89.25% of the granted cases. And those numbers have gotten only more lopsided since; during OT2020, paid filings accounted for 34.48% of all appeals, but 95.83% of granted cases.¹⁰⁷

Some of that shift is because the Court has gotten stingier in granting IFP cases, especially since Justice Kennedy retired. But some of it is also because the total number of IFP filings has dropped off precipitously. In OT2006, there were 7,132 IFP filings.¹⁰⁸ In OT2023, there were 2,847.¹⁰⁹ And more generally, the average has fallen from roughly 6,400 per term in the 2000s to roughly 4,300 per term over the last decade. In other words, it turns out that the total number of paid filings has remained relatively flat—with only a modest decline—since the early 2000s. In OT2002, for instance, there were 1,869 paid appeals;¹¹⁰ in

¹⁰⁵ See Vladeck, *Shrinking*, *supra* note 100.

¹⁰⁶ 2012 J. SUP. CT. U.S., at II (2013).

¹⁰⁷ 2020 J. SUP. CT. U.S., at II (2021).

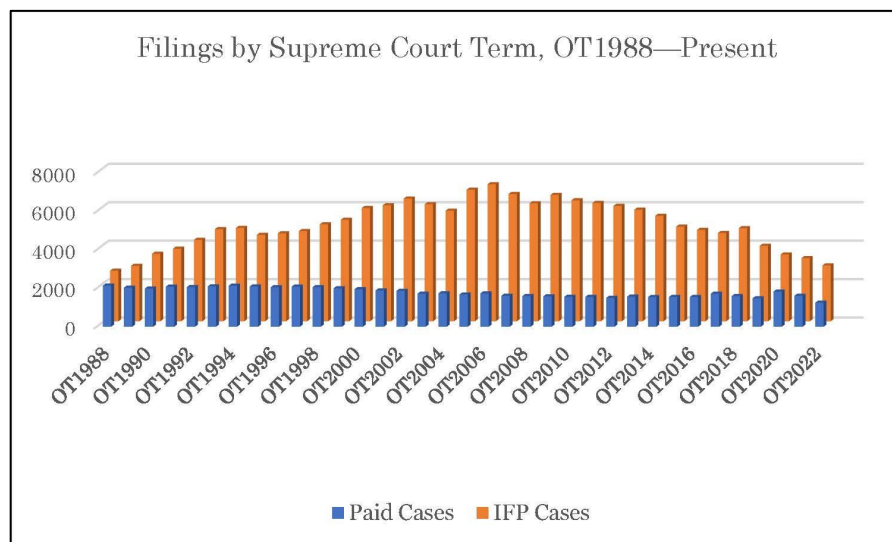
¹⁰⁸ 2006 J. SUP. CT. U.S., at II (2007).

¹⁰⁹ 2023 J. SUP. CT. U.S., at II (2024).

¹¹⁰ 2002 J. SUP. CT. U.S., at II (2003).

OT2020, there were 1,830.¹¹¹ In OT2008, there were 1,596 paid appeals;¹¹² in OT2021, there were 1,612.¹¹³ The following chart helps to illustrate the different takeaways if we break the IFP and paid data apart over time:

Figure 3. IFP Filings by Supreme Court Term.



The key takeaway from Figure 3 is the relative flatness of the blue bars from OT2003 onwards. I do not mean to overstate the point; there is surely *some* correlation between the sharp decline in IFP filings and the very modest decline in paid filings and the overall decline of the Court's merits docket. But the data suggests that the Court is, by a significant margin, granting a lower *percentage* of paid petitions today than it was a generation ago. That points to changes in behavior by the justices far more than to fewer paid petitions being filed. And if the justices will not tell us how or why *their* behavior is changing (or even publicly admit *that* it has changed), we are left to try to find other clues.

B. *The Merits Docket Shifts*

Plenty of academic and popular commentators have noted the overall decline in the Court's merits docket. But with some noteworthy exceptions (especially the certiorari-based work of Professor Tejas Narechania),¹¹⁴ there has been less attention paid to how the docket has *shifted* as it has shrunk. Put another way,

¹¹¹ 2020 J. SUP. CT. U.S., at II (2021).

¹¹² 2008 J. SUP. CT. U.S., at II (2009).

¹¹³ 2021 J. SUP. CT. U.S., at II (2022).

¹¹⁴ See, e.g., Tejas Narechania, *Certiorari in the Roberts Court*, 67 ST. LOUIS U. L.J. 587, 592 (2023).

has the decline been symmetrical, or has it been especially pronounced (or especially modest) in particular types of cases?

The answer, perhaps unsurprisingly, is the latter, at least based on the categories the Court *itself* uses to describe its docket. Indeed, the Court has a three-letter system for categorizing every case over which it exercises appellate jurisdiction.¹¹⁵ The first letter identifies whether the case is there via certiorari (C); via mandatory appeal (from a three-judge district court) (A); or on a question certified by a federal court of appeals (Q) (which has not happened since 1981). The second letter identifies the source of the case: a federal court of appeals (F), a state court (S), a three-judge district court (T), a military tribunal (M), or another source (O). And the last letter identifies whether the case is civil (X); criminal (Y); or habeas or some other collateral attack on a conviction (H). Using the Court’s own codes, here is the breakdown dating back to the mid-2000s (which is as far back as the publicly available data goes):

Figure 4. Breakdown of Supreme Court Docket Makeup.

Consolidated Cases																		
CODES	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	Totals
CFX Cert/Federal/Civil	40	41	46	49	45	47	47	50	42	38	33	47	42	41	42	42	47	739
CFY Cert/Federal/Criminal	14	10	11	12	6	10	12	7	10	7	11	9	4	7	5	8	8	151
CSX Cert/State/Civil	4	7	1	5	2	6	1	2	2	8	5	6	3	1	2	3	2	60
CSY Cert/State/Criminal	5	8	4	4	5	5	4	2	7	4	3	2	5	2	2	1	2	65
CFH Cert/Federal/Habeas	5	8	9	5	8	5	2	3	1	5	3	0	2	2	6	1	1	66
CSH Cert/State/Habeas	2	0	1	0	2	0	1	0	3	2	0	2	1	0	0	1	0	15
ATX Mandatory (3-Judge)/Civil	2	1	0	0	0	0	1	2	3	2	4	3	0	1	1	1	1	22
CMY Cert/Military/Criminal	0	1	0	0	0	0	0	0	0	0	1	0	0	1	0	0	0	3
Original	1	1	2	1	0	0	0	0	0	0	2	0	0	2	1	2	1	13
Total	73	77	74	76	68	73	68	66	68	66	62	69	57	57	59	59	62	1134

A couple of things stand out. First, the dominant source of cases on the Court’s docket—civil appeals from lower federal courts (“CFX”)—has remained fairly constant over the seventeen years’ worth of data. Thus, even as the Court’s total number of cases has fallen off, this category has stayed roughly flat. Second, the categories with visible fall-offs include federal criminal appeals (“CFY”); state criminal appeals (“CSY”); and federal habeas petitions (“CFH”), although the Court’s data does not distinguish between federal habeas petitions from state prisoners and those from federal prisoners. And third, with regard to state criminal appeals, the fall-off has been to near zero (and, during OT2024, *actually* zero!).

¹¹⁵ All of the data in the following paragraphs was generated using the Court’s Granted/Noted Cases Lists, which are posted to the Supreme Court’s website for every term going back to OT2007. See *Granted/Noted Cases List*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/orders/grantednotedlists.aspx> [<https://perma.cc/FH6V-D92X>] (last visited Sept. 3, 2025).

One additional point not reflected in this data is that the direct criminal appeals the Court *is* taking, both from lower federal courts and state courts, tend to be focused more on substantive questions than on criminal procedure. Just to take one anecdotal example, for OT2022, of the eight CFY cases (federal criminal appeals), only one (*Samia v. United States*)¹¹⁶ involved a question of constitutional criminal procedure. And the lone CSY case from OT2022, *Counterman v. Colorado*,¹¹⁷ involved a substantive First Amendment challenge to the statute of conviction—not a criminal procedure issue.

To draw a quick and unscientific contrast, consider the Supreme Court's docket ten, twenty, and thirty years ago (I'll use OT2023 for this comparison because it's the last term for which we have final data). In OT2013, the Court heard four direct appeals from state criminal convictions, all of which raised criminal procedure issues.¹¹⁸ In OT2003, the Court heard nine direct appeals from state criminal convictions, eight of which raised criminal procedure issues.¹¹⁹ And in OT1993, the Court heard seven direct appeals from state criminal convictions, six of which raised criminal procedure issues.¹²⁰ The upshot is that direct appeals from state criminal convictions are disappearing from the Supreme Court's docket, and that that decline (and the broader decline in the Court's criminal procedure docket) is a relatively recent phenomenon—with the most dramatic effects over the last few years.

Meanwhile, there is one other revealing indicator in how the shape of the Court's docket has shifted in recent years—the percentage of cases in which the federal government is a party. Of the sixty-two cases the Court has on its plenary docket for the current Term (OT2024), thirty-one include federal parties.¹²¹ If that holds, it would be only the second time that a federal party has been involved in at least *half* of the Court's merits cases. The only other time it happened was . . . OT2023. The data is noisy, and should not be overstated, but here is a plot of the percentage of the Court's merits docket with federal parties dating back to just after the 1988 Act:

¹¹⁶ *Samia v. United States*, 599 U.S. 635, 640 (2023).

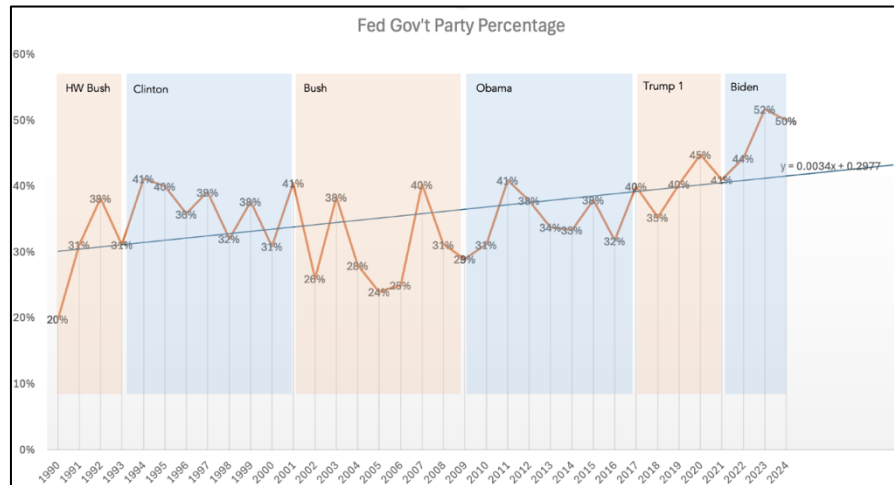
¹¹⁷ 600 U.S. 66, 69 (2023).

¹¹⁸ See SUP. CT. OF THE U.S., GRANTED & NOTED LIST: CASES FOR ARGUMENT IN OCTOBER TERM 2013 (2014), <https://www.supremecourt.gov/orders/13grantednotedlist.pdf>.

¹¹⁹ See SUP. CT. OF THE U.S., GRANTED & NOTED LIST: OCTOBER TERM 2003 (2004) (on file with author).

¹²⁰ See SUP. CT. OF THE U.S., GRANTED & NOTED LIST: OCTOBER TERM 1993 (1994) (on file with author).

¹²¹ See Steve Vladeck, *119. The Federal Government as a Party*, ONE FIRST (Jan. 27, 2025) <https://www.stevavladeck.com/p/119-the-federal-government-as-a-party> [<https://perma.cc/MLC3-PEG3>].

Figure 5. Percentage Plot of Supreme Court Merits Docket.

In other words, whereas the percentage vacillated between the high twenties and low forties throughout the first three decades under the 1988 Act, it has noticeably ticked up since the middle of the first Trump administration—starting with OT2018. Of course, it has long been true that the federal government is the most *frequent* litigant before the Supreme Court—part of why the Solicitor General is sometimes referred to as “the tenth justice.”¹²² But historically, federal parties were involved in a modest plurality of the Court’s cases during any given term—and never even close to a majority. Much of the frequency came from the cases in which the federal government participated as an *amicus curiae*.¹²³ The uptick in recent years certainly at least appears to correspond with the Supreme Court deciding more cases of nationwide import—especially factoring in the modest *decline* in federal criminal appeals, the most typical example of a case in which the federal government is a party but the stakes are relatively modest.

While all of this is happening, we are also seeing shifts in the lower courts from which these cases are coming. To take just one example, of the sixty-two cases on the merits docket for OT2024, fourteen (22.6%) are from the Fifth Circuit (the Fifth Circuit was responsible for 12.4% of all federal civil appeals during the most recent year for which the data is complete).¹²⁴ The next two busiest sources of work for the justices—the Fourth and Ninth Circuits—are responsible

¹²² See Steve Vladeck, 3. *The Tenth Justice*, ONE FIRST (Nov. 28, 2022), <https://www.stevvladeck.com/p/3-the-tenth-justice> [<https://perma.cc/7TP3-P82S>].

¹²³ See, e.g., Darcy Covert & Annie J. Wong, *The Loudest Voice at the Supreme Court: The Solicitor General’s Dominance of Amicus Oral Argument*, 74 VAND. L. REV. 681, 683 (2021).

¹²⁴ The Fifth Circuit statistics are discussed in Steve Vladeck, 117. *Judge Cannon and the Special Counsel’s Report*, ONE FIRST (Jan. 13, 2025), <https://www.stevvladeck.com/p/117-judge-cannon-and-the-special> [<https://perma.cc/U69E-725N>].

for a *total* of thirteen of the sixty-two. Indeed, although the Fifth Circuit's share of the Court's docket has been growing steadily in recent years, this will be the first term in which it is the clubhouse leader. For every previous term of the Roberts Court, the Ninth Circuit was responsible for the most cases on the Court's docket—whether reflecting the fact that it *hears* the most appeals of any federal court, that there was a long period during which it was at ideological loggerheads with the justices, or some combination of both.

And one last shift worthy of note is the subtle but significant shift of the posture in which the justices are deciding cases. As I have documented elsewhere, recent years have seen a remarkable uptick in the number of cases in which the Court is reaching the merits at preliminary and/or premature procedural postures—including on appeals from grants or denials of preliminary injunctions and through certiorari “before judgment.”¹²⁵ To take just one data point, between August 2004 and February 2019, the Court had not granted a single petition for certiorari before judgment. Since February 2019, it has granted certiorari before judgment *twenty-one* times—most recently in the Idaho cases Emergency Medical Treatment and Active Labor Act last year.¹²⁶ By jumping into high-profile disputes at ever-earlier stages, the Court is not only skewing its docket toward the very cases in which it has to spend the most capital; it is *hustling* to spend it.

Whatever the cause or normative desirability of any of these developments, the relevant point for present purposes is that these are all *meaningful* shifts not just in the size of the Court's merits docket, but in its shape. The justices are taking more of the types of cases that tend to produce the biggest consequences and/or the most public interest and division. Some of that may be by choice in only the loosest sense; when the Fifth Circuit invalidates the Universal Service Fund¹²⁷ or largely affirms a district court order blocking nationwide access to mifepristone,¹²⁸ the justices are effectively forced to intervene. But that reality does not make this trend any less of a trend; it just might be one for which the justices do not bear all of the responsibility.

C. *The Shadow Docket Emerges*

The shrinking and shifting in the merits docket over the past decade has come at the same time as the emergence of the shadow docket, especially the Court's increasing utilization of unsigned and usually unexplained orders to resolve, temporarily or otherwise, questions of nationwide significance.

¹²⁵ See Stephen I. Vladeck, *A Court of First View*, 138 HARV. L. REV. 533, 534 (2024).

¹²⁶ See *id.* at 546 tbl.1. See generally *Moyle v. United States*, 144 S. Ct. 540 (2025) (mem.); *Idaho v. United States*, 144 S. Ct. 541 (2024) (mem.).

¹²⁷ See *Consumers' Resch. Cause Based Commerce, Inc. v. FCC*, 109 F.4th 743, 752 (5th Cir. 2024).

¹²⁸ See *All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 222 (5th Cir. 2023), *rev'd*, 144 S. Ct. 1540.

As I have explained in detail elsewhere,¹²⁹ although the Court's power to grant emergency relief can be traced back to at least the Judges' Bill, the real uptick came in two phases. First, in the early 1980s, there was a dramatic spike in the number of emergency applications resolved by the full Court, rather than the relevant circuit justice, in direct response to the surge in eleventh-hour claims by prisoners on death row after the Court's reauthorization of capital punishment in 1976.¹³⁰

Second, starting in the mid-2010s, the Court started applying behaviors it had developed in those capital cases to requests for broader statewide or nationwide relief affecting much larger classes of parties. The result was a significant shift not just in the number of cases in which the justices were intervening, but in the effects of those interventions—putting back into effect, or blocking, entire federal or state policies. And yet, the Court continued to hew to the norms it had established in the death penalty cases—with almost all of the rulings coming after highly expedited and truncated briefing, without oral argument, and through unsigned, unexplained orders.¹³¹

There are four features of this shift, in particular, that seem especially salient. First, these orders had the effect of putting the justices in the middle of a larger number of divisive (and fast-breaking) policy battles. From the immigration policies of the first Trump administration to the COVID-19 pandemic and election-related disputes in 2020 to Texas's six-week abortion ban to nationwide injunctions against Biden administration policies, emergency applications provoking full Court rulings have tended to arise in especially heated political contexts.¹³²

Second, the justices' public votes have done little to lower the political temperature of these disputes. As noted above, for as rare as it is to see "strange bedfellows" lineups on the merits docket, it is practically unheard of with respect to emergency applications. With a single exception,¹³³ every public dissent from the disposition of an application since Justice Jackson joined the Court (and, indeed, since Justice Kennedy's retirement) included justices from only two of the Court's three loose three-justice blocs—and never from the two blocs at the ideological poles. Thus, one who looked only at the vote counts in these high-profile disputes would see the justices routinely lining up along ideological lines—to an even greater extent than on the merits docket.

Third, there has also been an alarming tendency, when looking at the Court's behavior in the aggregate, for the justices' votes to align with their political preferences with respect to emergency applications.¹³⁴ On the merits docket, at least,

¹²⁹ See VLADECK, SHADOW DOCKET, *supra* note 8.

¹³⁰ *See id.* at 101-08.

¹³¹ *See id.* at 129-39.

¹³² *See id.* at 154-61.

¹³³ *See* *Bessent v. Dellinger*, 145 S. Ct. 515, 515 (2025) (mem.) (noting public dissents from Justices Alito, Sotomayor, Gorsuch, and Jackson respecting the Court's decision to hold emergency application "in abeyance").

¹³⁴ *See* VLADECK, SHADOW DOCKET, *supra* note 8, at 19-20.

the justices can insulate themselves against charges of partisanship by providing principled justifications for their votes—neutral principles that, at least in theory, can be applied the same way in future cases in which the partisan or ideological valence of the dispute has flipped.

But there is virtually none of that respecting emergency applications—even as the Court’s bottom lines appear to favor Republicans and disfavor Democrats in contexts in which there are enough examples to measure the justices’ consistency. For instance, during the first Trump administration, the Court routinely issued stays of nationwide injunctions against federal immigration policies. And yet, it regularly *declined* to do so during the Biden administration—even in cases in which the justices ultimately sided *with* the Biden administration on plenary review.¹³⁵ And Justice Gorsuch, who has regularly criticized nationwide injunctions in cases in which they were directed against Republican governors or the Trump administration, has voted at least eleven times to sustain nationwide injunctions against Democratic governors or the Biden administration.¹³⁶ Again, it is possible that there are principled explanations for these patterns. The critical point here is that those explanations are not being provided, such that the shadow docket is replete with decisions that tend to paint the Court in especially sharp partisan colors—in contexts in which the absence of a written opinion may only feed public criticisms of decisions that favor one side of a statewide or nationwide political debate.

Fourth, and finally, whatever else might be said about all of these developments, what cannot be denied is that they have consumed quite a lot of the justices’ (and the Court’s) resources. Indeed, multiple justices have commented publicly on just how much the increasing prevalence of high-profile emergency applications has affected the day-to-day work of the Court—especially how much *busier* it has made the justices.¹³⁷ Whether that helps to explain the continued shrinking of the merits docket, or just to provide a bit more context, the reality is that the justices are spending that much *more* of their time on output that puts the Court in the vulnerable position to which Justice White referred than they were as recently as a decade ago. On both the merits docket and the shadow docket, the justices are issuing more and more of the decisions in which the Court is “most vulnerable.”

¹³⁵ See Steve Vladeck, *Bonus 50: On the Biden Administration’s 13 Emergency Applications*, ONE FIRST (Oct. 26, 2023), <https://www.stevevladeck.com/p/bonus-50-on-the-biden-administrations> [<https://perma.cc/3AKF-8CYW>].

¹³⁶ See Steve Vladeck, *77. Justice Gorsuch and “Nationwide” Injunctions*, ONE FIRST (Apr. 22, 2024), <https://www.stevevladeck.com/p/77-justice-gorsuch-and-nationwide> [<https://perma.cc/4ANV-AX2X>].

¹³⁷ See, e.g., Jimmy Hoover, *Justices Agree the ‘Shadow Docket’ Needs Fixing—But Not How*, LAW.COM (Apr. 18, 2024), <https://www.law.com/nationallawjournal/2024/04/18/the-justices-agree-the-shadow-docket-needs-fixing-but-not-how/>.

D. *The Docket as Culprit*

Professor Ed Hartnett refers to February 13, 1925—the day President Coolidge signed the Judges’ Bill into law—as the day on which “the modern Supreme Court was born.”¹³⁸ Indeed, it does not appear to be a coincidence that the rise of the Court’s discretion over its docket was followed in relatively short order by the birth of what is often described as “modern” constitutional law.¹³⁹ “In a series of cases beginning in 1937, the Supreme Court fundamentally reconceived its role in enforcing the Constitution against state and federal government actors.”¹⁴⁰ “Part of that reconceptualization included a repudiation of the aggressive judicial protection of economic rights, such as the right of employers to pay whatever wages the market would bear, that had dominated the first decades of the twentieth century—and in which Taft had been an active participant.”¹⁴¹ And part of it saw the Court shift gears toward more protection of the rights of defendants in both federal and state criminal proceedings, as well as toward the prohibition of discrimination against members of “discrete and insular” minority groups, all while generally embracing judicial deference to government action in other spheres.¹⁴²

In his canonical study of the Judges’ Bill (and Taft’s role in bringing it off), Professor Hartnett tied the rise of the Court’s discretion to the rise, not long thereafter, of this modern understanding of U.S. constitutional law, in which the primary purpose of judicial review is to protect individual rights and subordinated minorities while otherwise deferring to democratic processes.¹⁴³ A Court with more time on its hands and greater ability to decide which cases to hear and not to hear is necessarily better situated for pursuing long-term substantive goals than one that is limited to simply reacting to each case as it comes in.¹⁴⁴ Eventually, justices would begin publicly encouraging litigants to bring certain kinds of claims to the Court, presumably because some number of justices wanted the opportunity to decide those issues and were now empowered to do so.

Just as significant, as cases like *Naim v. Naim*¹⁴⁵ illustrated, was the Court’s growing power to *not* decide cases.¹⁴⁶ In *The Least Dangerous Branch*, Professor Alex Bickel extolled what he dubbed “the passive virtues,” that is, the “area of choice that is open to the Court in deciding whether, when, and how much to

¹³⁸ Hartnett, *supra* note 61, at 1644.

¹³⁹ See VLADECK, SHADOW DOCKET, *supra* note 8, at 51-53.

¹⁴⁰ *See id.* at 51.

¹⁴¹ *See id.* at 51-52.

¹⁴² *See generally* United States v. Carolene Prods. Co., 304 U.S. 144, 152 & n.4 (1938).

¹⁴³ *See* Hartnett, *supra* note 61, at 1732.

¹⁴⁴ *See id.* at 1733.

¹⁴⁵ 350 U.S. 985 (1956) (mem.).

¹⁴⁶ *Id.* at 985 (dismissing challenge to Virginia’s anti-miscegenation statute because case was “devoid of a properly presented federal question”).

adjudicate.”¹⁴⁷ Professor Bickel’s thesis was that by denying certiorari or side-stepping mandatory appeals in cases such as *Naim*, the justices were in fact reinforcing their formal and moral authority in at least two respects.¹⁴⁸

Most directly, the fewer cases the Court decided each term, the more time the justices would have to look carefully through lower-court decisions to find the ones they most desired to review on appeal. They would also have more time to spend on each case, so that broader (and perhaps better-reasoned) constitutional principles could be expounded. As Professor Gerald Gunther wrote of Professor Bickel, his was an “emphasis on principle as the highest Court duty, but only in a limited sphere of Court actions; the 100% insistence on principle, 20% of the time.”¹⁴⁹ The power to not decide cases also meant that the justices could hand down decisions opening new frontiers in constitutional law without fearing that such rulings would inundate them with follow-on cases. For instance, as the Court gradually began to apply the Bill of Rights to the states, the power to choose which cases to take up, and which rights to “incorporate” almost certainly made it easier for the justices to pursue the project than if their first decision applying a constitutional right to the states had immediately required them to decide dozens (if not hundreds) more. The more disputes that the Court stayed out of, the more it would appear to be acting responsibly and not overstepping its authority vis-à-vis the other branches of the federal government and the states. For Professor Bickel, the rise of certiorari not only gave the justices more power in choosing which cases (and which issues) to decide, but also gave them more power anytime they chose to do nothing.¹⁵⁰

All of this is familiar sledding to constitutional law scholars. But we have neglected the unspoken but intended implication of Professor Bickel’s argument—that all of this discretion also empowered the Court to *undermine* its credibility if it used its control over the docket in the “wrong” way. As the Court moved back toward the center, and then toward the right in the 1970s, that concern largely fell away. From Justice Harlan to Justice Stewart to Justice Powell to Justice O’Connor to Justice Kennedy, the Court featured a well-tended middle for the better part of a half-century.

Although those justices varied widely in their jurisprudential commitments and their dispositions, they had similar (and similarly) moderating effects on their colleagues. Conservatives and liberals alike might shy away from voting to grant certiorari in contexts in which they could not be sure if they would have the votes on the merits. Indeed, “defensive denial” was coined largely to describe this exact phenomenon.¹⁵¹ Thus, as the Court’s docket started shrinking in the

¹⁴⁷ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 197 (1962).

¹⁴⁸ *Id.* at 174 (noting that it may not have been “wise” for the Court to find anti-miscegenation statutes unconstitutional amid attacks on integration principle).

¹⁴⁹ Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964).

¹⁵⁰ BICKEL, *supra* note 147, at 69.

¹⁵¹ *See, e.g.*, VLADECK, *SHADOW DOCKET*, *supra* note 8, at 80.

1990s, we reached a point where a “blockbuster” term might be one with five or six major decisions out of seventy-five—not twenty out of sixty.¹⁵²

What is more, especially during the Justice O’Connor/Kennedy era, a term in which the big decisions seemed to skew a bit further to the right would often be followed by a term in which they seemed to skew back the other way. And although no one would have confused Justice Stevens or Justice Souter for conservatives (or Justice White for a progressive), the presence of justices appointed by presidents of both parties on both sides of the ideological divide in major cases may have further helped to insulate the Court against the sharpest charges of partisanship. Since 2010, that has not been possible; the ideological division of the justices maps perfectly onto the party of the president who appointed them.¹⁵³

Against that backdrop, the Court’s recent terms are striking. As noted above, we have seen a greater confluence of high-profile and ideologically divided rulings—both in absolute volume and as a larger share of the docket. We have seen a greater number of significant interventions from the Supreme Court that come with no explanation, even as the justices are, at least publicly, sorting into their ideological camps in those cases, too. We have seen *fewer* non-unanimous cases, especially fewer *big* cases, in which the justices are dividing into unusual lineups. Of the twenty “major” rulings during OT2023, only one—the Purdue Pharma bankruptcy case—produced a dissenting opinion with justices from across the ideological spectrum.¹⁵⁴

The upshot of all of this is that more of what the Court is doing, and more of what the public *sees* the Court as doing, involves behavior that portrays the Court at its most controversial. Thus, whichever side one is inclined to agree with, the “other” side can be pigeonholed as voting its partisan political preferences far more easily. The result is public discourse *regularly* portraying the Court and almost all of its big decisions as little more than Sharks versus Jets. Indeed, it is newsworthy when, in a big case, the justices *do not* split along ideological lines (such as in the mifepristone ruling during OT2023).¹⁵⁵ That underscores the problem as much as anything.

¹⁵² *Id.* at 57.

¹⁵³ See Jan Wolfe, *U.S. Supreme Court Liberals Increasingly Marginalized as Conservatives Flex Muscles*, REUTERS (July 4, 2025, 6:22 AM EDT), <https://www.reuters.com/legal/litigation/us-supreme-court-liberals-increasingly-marginalized-conservatives-flex-muscles-2025-07-04/> (noting that the Court’s six Republican-appointed conservatives consistently out-vote the three Democratic-appointed liberals).

¹⁵⁴ *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071, 2088 (2024) (Kavanaugh, J., dissenting, joined by Roberts, C.J., and Sotomayor and Kagan, JJ.).

¹⁵⁵ See *FDA v. All. for Hippocratic Med.*, 144 S. Ct. 1540 (2024); Carter Sherman, *U.S. Supreme Court Unanimously Upholds Access to Abortion Pill Mifepristone*, GUARDIAN (June 13, 2024, 5:14 PM EDT), <https://www.theguardian.com/us-news/ng-interactive/2024/jun/13/supreme-court-abortion-pill-access> (“The unanimous ruling marked a rare moment of consensus on abortion.”).

The point is not that the docket *necessarily* led to this; a Court with nine centrists (or even three) would presumably be taking very different cases and making far fewer headlines. But Congress's gradual surrender of control over the Court's docket necessarily meant, at least for the first few generations, that the Court would go as its middle wanted it to. When the middle represented a combination of ideological centrism and institutional moderation, the Court's control over its docket produced relatively modest results. Today, however, there is very little of either quality on the Court. And with no indication that Congress intends to pull any levers, including jurisdictional ones, to rein the Court in, the result is a Court that takes whichever cases it wants, in almost whatever posture it wants, regardless of the consequences. It can hardly be a coincidence that a Court that behaves that way is becoming increasingly unpopular—especially among those who are so consistently on the short side of the cases with divided outcomes.

III. FIXING THE COURT THROUGH DOCKET REFORM

If the size and shape of the docket are at least partly responsible for how we got the Supreme Court we have today, then it ought to follow that docket *reform* should be part of any broader Court-reform conversation. And yet, it has largely been neglected to this point—including by President Biden's Supreme Court reform commission.¹⁵⁶ This Part makes the case for why docket reform should not only be *part* of the conversation, but the nominal place to start.

A. *A Taxonomy for Court Reform*

In putting docket reform in the context of Supreme Court reform more generally, it may help to distinguish among three different types of reforms. Perhaps the most aggressive set of reform proposals involves reforms geared toward changing the current composition of the Court—most typically by “expanding” the Court to thirteen justices through a statute that would add four new seats to the bench. Whether justified as recalibrating the Court's size to the number of circuits (something Congress did from 1789 to 1801 and 1802 to 1866); or, more transparently, as retaliation for the political machinations of the 2016–2020 era; or, most brazenly, as a way to arrest the Court's shrinking caseload, Court expansion tends to be at the top of a lot of progressive reformers' wish lists.¹⁵⁷

Changing the size of the Court is clearly within Congress's constitutional authority (indeed, Congress has done it seven times after initially creating a six-justice bench in 1789).¹⁵⁸ But these proposals are perhaps the most overtly

¹⁵⁶ See PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT 10 (2021) [hereinafter PRESIDENTIAL COMM'N], https://www.presidency.ucsb.edu/sites/default/files/documents_with_attached_files/376063/168144.pdf [<https://perma.cc/AV45-H53K>].

¹⁵⁷ See Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2754–55 (2020).

¹⁵⁸ See *id.* at 2747, 2749.

partisan, since they are purposefully designed not only to limit the power of the current Republican-appointed majority, but to give that power to a more ideologically balanced Court.¹⁵⁹

I have written before about why I myself am wary of Court expansion.¹⁶⁰ Even if reforms aimed at changing the current Court's composition were politically viable (and it is hard to see how that could ever be possible without a Democratic trifecta that includes a filibuster-proof or filibuster-eliminating majority in the Senate—and perhaps not even then), the principal objection to such reforms, in my view, is that they would only reinforce the perception of the Court as a front for the exercise of partisan political power—a race to the bottom in which no one (except those who would like for the Court to be irreparably damaged as an institution) wins. Put another way, reforms in this category would tend to have (1) high political barriers to entry; and (2) potentially high institutional costs, even if the short-term result were to make the Court more ideologically heterogeneous.

Term limits, in my view, suffer from the reverse problem. Although I believe that Congress has the power to redefine the justices' offices to include a fixed number of years hearing a full caseload, my own view is that *separate* constitutional constraints (specifically, the Appointments Clause¹⁶¹) would require that such material changes to the nature of the position be applied prospectively.¹⁶² Thus, we would not have a fully term-limited Court until the last current justice departs—which could be more than thirty years from now. Here, then, we have a composition-driven reform that has *no* short-term benefit, even if the costs are relatively less extreme.

A second major category of reforms are those focused not on the composition of the Court, but on its power. For instance, “jurisdiction-stripping” proposals (to prevent the Court from deciding certain types of cases); proposals to require a supermajority vote before the justices can invalidate government action (a measure that the House of Representatives actually passed in 1868, only to have it die in the Senate); and proposals to impose a higher standard of review in certain cases, all circle around the same basic idea. Congress can and should reassert its ability to keep cases away from the Court and/or to limit the Court's ability to act against the democratically-elected branches in the cases that it hears.¹⁶³

The devil is in the details in this category. Congress has broad power over the Court's appellate jurisdiction. (There is a debate as to whether that power is

¹⁵⁹ See *id.* at 2754-55.

¹⁶⁰ See Steve Vladeck, *19. When There Are Nine . . .*, ONE FIRST (Mar. 20, 2023), <https://www.stevevladeck.com/p/19-when-there-are-nine> [<https://perma.cc/38Y8-EX3Y>].

¹⁶¹ U.S. CONST. art. II, § 2, cl. 2.

¹⁶² See, e.g., *Weiss v. United States*, 510 U.S. 163, 169-76 (1994) (suggesting Appointments Clause requires reappointment for material changes to an office).

¹⁶³ PRESIDENTIAL COMM'N, *supra* note 156, at 153 (identifying several proposals to decrease Court's power as fundamentally changing relationship to elected branches).

plenary; I am of the view that it probably is not.)¹⁶⁴ And Congress also has broad power over standards of review—especially for statutory claims.¹⁶⁵ To me, the harder question about reforms falling into this category is about their efficacy. Unlike Court expansion (which, were it to happen, could produce immediate effects), here, the more dramatic the effects of the reforms, the more serious the constitutional objections to them would become.

For instance, a statute barring the Supreme Court from striking down any gun control regulation on the ground that it violates the Second Amendment would raise grave constitutional questions; a statute that limits when and how the Court can entertain such cases may not, but at the expense of not fully cutting the Court out of the loop. And the Court could frustrate a supermajority requirement (assuming it were constitutional) simply by internally agreeing that anytime a majority votes to strike down a statute, a supermajority of justices will approve at least that part of the ruling. Finally, with regard to imposing higher standards of review, that assumes that the justices will faithfully abide by such new standards. One of the recurring critiques of the Court's behavior with respect to emergency applications in recent years is that the majority regularly flouts even the standards the Court has previously articulated.¹⁶⁶

This leads to the third category: reforms designed to enhance the Court's accountability *without* changing its composition or reducing its formal power. There are many examples, but these would include: (1) expanding the Court's mandatory docket; (2) establishing an Article III Inspector General; (3) codifying *existing* standards (as opposed to raising the standards) for emergency relief; (4) increasing public congressional oversight of the Court (including of its budget); and (5) on a more basic level, heightening congressional engagement in the Court's day-to-day work.

None of these are as visible or, at least to this point, as popular as reforms geared more directly toward changing who is on the Court or how much power it has. In that respect, they will not have the short-term impact for which many of the Court's critics are clamoring. Nor will they prevent the current Court from taking the cases that at least four of the justices want to take—or directly stop the Court's majority from doing whatever it wants to do in those cases.

But it is possible that those realities can be viewed as a feature, rather than a bug. Reforms that will have subtler, longer-term effects with a greater focus on pushing the Court to situate its work against a better and healthier interbranch dynamic instead of preventing it from doing things should properly be perceived as less partisan. And docket reform, as much as the others, would reshape the Court's relationship with the other branches of government with the same

¹⁶⁴ See, e.g., Steve Vladeck, *93. Jurisdiction-Stripping and the Supreme Court*, ONE FIRST (Aug. 5, 2024), <https://www.stevevladeck.com/p/93-jurisdiction-stripping-and-the> [https://perma.cc/S8EF-7QFH].

¹⁶⁵ See, e.g., *Miller v. French*, 530 U.S. 327, 340-41 (2000) (holding that Congress may displace courts' equitable discretion with mandatory statutory review standards).

¹⁶⁶ See, e.g., VLADECK, *SHADOW DOCKET*, *supra* note 8, at 177-89.

understanding (if in the exact opposite direction) that Taft initially contemplated a century ago. The point would not be to punish the Court; it would be to restore more of its responsibility to the other branches—on the theory that responsibility would bring with it at least the informal accountability of a Court that, every once in a while, looks over its shoulders.

B. *Some Modest Docket Reform Proposals*

The point of docket reform is not merely reform for its own sake; it is to actually *improve* the Court's relationship with the other institutions of government—including not only Congress and the President—but the lower courts as well. And whereas there were plenty of legitimate complaints that the Court's pre-1988 mandatory jurisdiction was both too broad and not sufficiently well-defined (so that the justices spent a fair amount of time sorting out which cases were even *within* their mandatory jurisdiction), it seems to me that there are at least three easy, easily defined categories in which Congress could make the Court's jurisdiction mandatory.

Nationwide Injunctions Against the Federal Government. Providing for mandatory appeals from lower-court rulings *granting* nationwide relief against the federal government, whether through traditional equitable actions or under the Administrative Procedure Act,¹⁶⁷ would, in my view, be a salutary development in two respects. First, it would absolve the government of the need to expend capital persuading the Court that the lower-court ruling is worth its time. It ought to follow that *any* lower-court decision that would effectively frustrate a nationwide policy is cert.-worthy, but I think Congress can and should make that determination on a category-wide basis. And second, knowing that grants of relief will be subject to mandatory review in the Supreme Court may put that much more pressure on district courts and courts of appeals to provide specific justification for issuing such relief, rather than the boilerplate decisions we tend to see today.

The First Post-Conviction Appeal in Capital Cases. Especially with the Court having adopted a presumption *against* eleventh-hour stays in capital cases,¹⁶⁸ it seems crucial to ensure that the justices take at least one hard look at cases in which a state or federal prisoner has been sentenced to death and raises a federal constitutional (or, for federal prisoners, statutory) objection to their conviction and/or their sentence. For state prisoners, an appeal from the first state post-conviction proceeding is almost certainly the best vehicle. By that point, constitutional challenges to the conviction and sentence, along with claims collateral to the trial, such as ineffective assistance of counsel, should have been ventilated.¹⁶⁹ Ditto for federal prisoners and their first § 2255 motion.¹⁷⁰

¹⁶⁷ 5 U.S.C. §§ 701-706.

¹⁶⁸ See, e.g., *Barr v. Lee*, 591 U.S. 979, 981 (2020) (per curiam).

¹⁶⁹ See, e.g., *Montgomery v. Louisiana*, 577 U.S. 190, 205 (2016).

¹⁷⁰ See, e.g., *Welch v. United States*, 578 U.S. 120, 135 (2016).

Circuit Certification. Finally, although this one is more than a little idiosyncratic, I would also give some power to the federal courts of appeals to certify questions to the justices in a case in which a certiorari petition is filed contesting a ruling from their court. Indeed, the Judges' Bill created just such a power—which is still codified today at 28 U.S.C. § 1254(2).¹⁷¹ But the justices view it as discretionary, and they have not accepted a certificate since 1981.¹⁷² In my view, any time that a majority of the active judges of a federal court of appeals (and not just a panel majority) believes that an issue is worthy of the justices' attention, and a party properly presents it, the justices should *have* to decide the matter.¹⁷³ Among other things, this would allow lower-court judges to obtain the Court's guidance on circuit splits that the Court otherwise has not agreed to resolve, and other areas of federal law in which lower courts believe they could benefit from the justices' guidance.

I do not mean to suggest that these three categories are exhaustive or exclusive. But, they represent three classes of cases in which there are compelling arguments for mandatory review; classes the size of which ought not to overload the Court's docket (at least by the standards of a generation ago); and classes that would reassert a modicum of control over the justices' work by Congress (death penalty cases), the executive branch (nationwide injunctions), and lower-court judges (certification), respectively.

C. *Counterarguments*

There are, of course, a battery of counterarguments both to docket reform in general and to these ideas, specifically. Perhaps the two most common rejoinders are that (1) as it often did with pre-1988 mandatory appeals, the Court will just give the back of its hand to any of these new categories of cases; and (2) whether or not it does, these reforms won't do anything to moderate the Court's behavior in the cases it chooses to take—if anything, it will provide the veneer of legitimacy to rulings that would otherwise continue to be worthy of reproach.

To the first critique, I see two responses. First, the pre-1988 categories of mandatory appellate jurisdiction were both overbroad and not precisely defined. A well-tailored, carefully crafted statute could both eliminate the need for line-drawing cases and underscore Congress's intent that the Court actually decide *every* case falling within the defined categories. And second, Congress has any number of other levers it can pull if the Court refuses to take these reforms seriously. Presumably, a Court that thumbed its nose at modest docket reforms would be inviting Congress to intervene more aggressively—whether in jurisdictional, budgetary, or other respects. At the very least, the *possibility* that the

¹⁷¹ See 28 U.S.C. § 1254(2) (“Cases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired . . .”).

¹⁷² *Iran Nat'l Airlines Corp. v. Marschalk Co.*, 453 U.S. 919 (1981) (mem.).

¹⁷³ See Vladeck, *Direct Appeals*, *supra* note 19.

Court might not give full force to these reforms does not seem like a sufficient reason to ditch them altogether.

The sharper critique is that the very behavior that has precipitated the decline in public confidence animating this paper would continue apace even *with* these reforms. Indeed, if anything, these reforms might serve only to legitimize the Court's actions elsewhere—since, instead of responding harshly to that behavior, Congress would be giving the Court *more* to do (and, presumably, decisions that the Court could point to as proof of how principled and non-ideological it is).

The first problem with this critique is that it assumes that the Court's capacity is unbounded—or, at least, not at its limits. That assumption is belied by the Court's own behavior and the justices' public statements. The Court is taking longer than ever to turn out opinions in argued cases;¹⁷⁴ those opinions are themselves longer than ever;¹⁷⁵ and the justices are, at least by their own accounts, working as hard as ever.¹⁷⁶ Without adding clerks or other support, it stands to reason that giving the justices more to do in a context in which they are presently doing nothing will necessarily require them to cut back on some of their current behavior. Indeed, if history is any guide, the busier the Court is, the *less* time it has to craft its own agenda. That, after all, was exactly why Taft pushed so hard for the 1925 expansion of certiorari in the first place.¹⁷⁷

The second problem with this critique is that it understates, if not completely neglects, the broader value of docket reform in the quest to create more accountability for the Supreme Court going forward. There are any number of levers Congress used to pull to help keep the Court from getting too unmoored from the other institutions of government—everything from where the Court sits to when it sits to the size of the Court to its budget (and the justices' pensions). Those levers were not pulled one at a time; they were pulled in sequence as part of a complicated, ongoing dialogue between the branches, in which no one lever, by itself, was a magic bullet. The accountability came from all of the levers working together in concert—and the broader extent to which the Court was impelled to look over its shoulder. Even if docket reform does not immediately reallocate the Court's capacity away from the cases in which it has to spend the most capital, it would *still* have the salutary effect of reestablishing that these are levers Congress can (and should) be pulling.

¹⁷⁴ See, e.g., Adam Feldman, *2023 Stat Review*, EMPIRICAL SCOTUS (July 1, 2024), <https://empiricalscotus.com/2024/07/01/2023-stat-review/> [<https://perma.cc/F5ZT-83A3>].

¹⁷⁵ See, e.g., Jake S. Truscott & Adam Feldman, *Lengthier Opinions and Shrinking Cohesion: Indications for the Future of the Supreme Court*, SCOTUSBLOG (July 28, 2022, 4:26 PM), <https://www.scotusblog.com/2022/07/lengthier-opinions-and-shrinking-cohesion-indications-for-the-future-of-the-supreme-court/> [<https://perma.cc/W2PK-SPZV>].

¹⁷⁶ See, e.g., Hoover, *supra* note 137.

¹⁷⁷ See *supra* Section I.B (discussing Taft's motivations behind the Judges' Bill).

D. *The Need for Better Data*

Finally, any conversation about docket reform, and Court reform more generally, would benefit from better data—some of which we’re already working on developing, and some of which the Court itself could help to provide. The Court’s own statistics follow strange conventions about when the term starts and ends (you might think it would be when the term *legally* starts and ends, but you would be wrong).¹⁷⁸ And the Court has been inconsistent about how to count opinions respecting emergency applications (which, though few and far between, are not an empty set).¹⁷⁹ The Court also does not publicly provide its case classification data for terms prior to OT2007 (which means it has to be tabulated by hand). It does not break any of that data out by the originating Court or whether the federal government is a party. And so on. Here, too, Congress could also be part of the story, since it could, as part of any Court reform measure, include standardized term-over-term reporting requirements (or fold those into part of what an Article III Inspector General would do).

CONCLUSION

One hundred years ago, Congress set off a revolution in U.S. appellate procedure—and in the role of the Supreme Court—when it enacted the Judges’ Bill. In key respects, the Judges’ Bill succeeded beyond Chief Justice Taft’s wildest dreams—empowering the Court to provide just the kind of final word in constitutional cases that he thought it was lacking while it had been buried under the flood of post-Civil War ordinary appeals. It is no exaggeration to suggest that the Warren Court could not have done what it did, for better or worse, had it not been for the 1925 docket reforms. But if docket reform transformed the Supreme Court’s institutional role in 1925, it can transform it in 2025, too.

Just as docket reform in 1925 was intended to put the Court on more of a level playing field with the other branches of government, it could do the same in 2025. Indeed, docket reform might be *better* situated to accomplish that goal than any of the other contemporary proposals that have been bandied about. After all, the more aggressive and partisan the reform is (or is perceived to be), the less likely it is to make it into law—even in a future world in which Democrats simultaneously control the House, the Senate, and the presidency. More than that, an effort to make the Court more accountable would not just have a better chance of making it into law in the short term, but would also be more effective in creating the conditions for some of the more aggressive reforms—if, for example, the Court were to resist measures as benign as modest expansions to its mandatory docket or the creation of an Article III Inspector General with no authority to punish misbehaving justices.

¹⁷⁸ See, e.g., Jon O. Newman, *The Mistake in Supreme Court Statistics and How to Correct It*, 26 GREEN BAG 2D 9, 9 (2022).

¹⁷⁹ For instance, the Court counts a ruling on an emergency application as a ruling of the Court if—but only if—it produces a majority opinion. See *supra* text accompanying note 23.

Last, and most importantly, is my own (increasingly contested) view that our constitutional system *depends* upon a legitimate and strong Court—that a bulwark against tyrannies of the majority is as important now as it has ever been, but the bulwark cannot be a tyranny of unelected judges. Changing who is on the Court will not, in itself, make the Court more accountable. Imposing term limits will not, in itself, make the Court more accountable. Taking away the Court’s power to do certain things will not, in itself, make the Court more accountable. The way to make the Court more accountable is to create more accountability—through greater congressional involvement and engagement with the Court as an institution, with the justices’ behavior, and with their workload. We could have the exact same Court with the exact same powers, but with the specter of meaningful interbranch accountability pushing the justices to wield those powers more responsibly. Indeed, conservatives who want this Court to be able to continue to exercise power for generations should be even more invested in shoring up the Court’s public credibility. Docket reform ought to be a relatively low-cost way to do it.

I will be the first to admit that accountability-enhancing reforms like docket reform are not perfect. But prioritizing that category strikes me as a better (and more politically viable) way forward than anything else that is out there, not just because of the low politics of the moment, but because of the high politics of our institutions, too. The Court can and should be fixed. And the docket may not be the most interesting place to start, but it might be the most meaningful.