The Shadow Docket Debate

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[00:00:00] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center. And welcome to We The People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan non-profit, chartered by Congress to increase awareness and understanding of the Constitution among the American people. The NCC recently hosted a great conversation about the Supreme Court's Shadow Docket with Steve Vladeck, who has written a new book on the subject, in conversation with Adam Liptak of the New York Times and Jennifer Mascott of the Antonin Scalia Law School. The program was live-streamed on May 22nd, 2023, and I'm excited to share it with you now.

[00:00:46] Jeffrey Rosen: Welcome Adam, Jennifer, and Steve. Steve, congratulations on your new book which all of us have read with great interest and profit. Why don't you start off by summing up your important argument that the Supreme Court is increasingly resorting to the shadow docket in ways that are not transparent, not consistent with non-partisan norms and not consistent with the rule of law.

[00:01:16] Steve Vladeck: Sure. Thanks, Jeff. Thank you so much for having me. Thanks also especially to Jen and to Adam for taking the time from their busy schedules to join us. So, the book really has two, I think, overlapping but rather distinct theses. And I want to just describe them both briefly because I don't want to sort of give either short shrift. So the first part of the book is really devoted to an argument that we ought to, just in general, be paying more attention to what happens in the shadows. And just to make sure we're all on the same page. The shadow docket is a term that was coined by Chicago Law Professor Will Baude, a former clerk for Chief Justice Roberts in 2015, really to describe everything other than the merit docket.

[00:01:59] Steve Vladeck: So everything the Supreme Court does beyond the 60-ish decisions that the justices hand down each spring after multiple rounds of briefing and after oral argument. Will's insight, which I've rather shamelessly appropriated , s that there's actually a whole lot of really important stuff that happens in the rest of the court's work, whether it's granting or denying certorari granting, or denying emergency applications, structuring its dockets, structural remands, you name it. And so, first part of the book, and I think probably the less controversial part of the book, is basically an invitation to all of us to learn more about the court and to learn more about the court's history and to sort of view the court's work more holistically in ways that I hope will make us all better informed about what the justices are doing.

[00:02:51] Steve Vladeck: And then the second part uses that contextualizing and uses that historical framing to try to put into context how I think the court over the last six or seven years has actually used these kinds of traditionally unsigned and unexplained orders in ways that are both novel and problematic. And we can get into some of the details, but just at a top level, I think it's a combination of really four features of how the court is using these orders, almost all of which are concentrated on the emergency side, almost all of which are involving applications for emergency relief.

[00:03:30] Steve Vladeck: The first is that we're seeing the court intervene more often and in the types of disputes that are qualitatively more impactful than what had traditionally been fodder for emergency applications. Not so long ago, an overwhelming majority of the emergency applications that the court ruled on, and that sort of divided the court, if at all, involved last minute challenges to executions, either to stay executions or to unstay them. Now we're seeing it becoming increasingly the norm that the court is using emergency applications to affect statewide or nationwide policies. So that's a really big shift relative to prior practice.

[00:04:10] Steve Vladeck: The second piece of this is that consistent with the norm in the older context, in the traditional context, they're not explaining themselves, right? So these decisions are by tradition, almost never explained in ways that create lots of troubling questions, not just for those of us who follow the court, but for lower court judges and for the parties in these disputes.

[00:04:33] Steve Vladeck: The third is that these rulings are, as you look at the broader pattern across the last six years, inconsistent in how they would follow the most plausible, coherent, substantive principles that might explain them. So just to give one example. The court's regular interventions to unfreeze President Trump's immigration policies, which seem to be predicated on deference to the executive, a view that injunctions of executive branch policies irreparably harmed the president, et cetera. Hostility and nationwide injunctions hasn't followed to the Biden administration where similar disputes have actually resulted differently in the court. And that that inconsistency feeds charges that have been leveled by some of the justices themselves. That the court is not actually following principles in these cases so much as it's just sort of voting up and down on which policies will and will not go into effect.

[00:05:30] Steve Vladeck: And then the last part of the critique is all the while the court is, for the first time, treating at least some of these unsigned unexplained orders as precedents that lower courts are bound to follow. In one, especially notorious example, in February 2021, the court chastised the ninth circuit for failing to follow an unsigned unexplained order in a previous case. And so, Jeff, just to sort of sum it all together.

[00:05:54] Steve Vladeck: The critique of the recent behavior is that the court has taken this authority it has always had, and that I don't contest that it needs, but is using it in ways that are inconsistent, in ways that appear at least to be more partisan than they are principled, in ways that are problematic from a structural perspective, and in ways that I think are doing a lot to exacerbate charges, however fair or not that the justices are acting more like partisan political

actors than like neutral jurists. So that's sort of the two big thrusts of the book which I hope are not mutually exclusive.

[00:06:35] Jeffrey Rosen: Thank you so much for summing both parts of the book up so well. Jennifer Mascott, you have testified before Congress that concerns about the shadow docket are overstated. And you've said that the arguably increased rate of Supreme Court orders is due in large part to actions taken outside of the control of the court, including the increase in federal nationwide injunctions and state executive actions during the pandemic to address crises. Tell us more about that critique and whether or not you're persuaded by any of Steve Vladeck's arguments to the contrary.

[00:07:09] Jennifer Mascott: Great. Well, thank you so much for having me on. And first I should start by just saying generally I'm really grateful to the National Constitution Center for its programs and feel honored to be here, because the more I have talked to my daughter when she was in middle school and my nieces and nephews, the more I'm learning that school children across the country are benefiting from your resources and know a tremendous amount about Supreme Court decisions in many different areas. And so I feel like a particularly cool aunt being on the National Constitution Center programming today. And so, thanks for doing that. And you're right. In fact, I think not only have Steve and I testified before on these issues together before the Senate Judiciary Committee, but I believe that Steve and Adam and I and you all engaged in a conversation on similar issues quite a few months ago. And so, it's a treat to be back here.

[00:07:57] Jennifer Mascott: One development that's happened since then that I want to explore later with Steve is that actually Steve and I, since this prior discussion, teamed up together, in fact on a matter on the shadow docket. So we can talk about the petition for cert and how that may or may not differ or be similar to some of the other emergency orders we're talking about today. But to your question about whether there's something to be concerned about and what I've learned from Steve's book, I've obviously learned a tremendous amount. Steve's done a lot of work and really digs in deep to each of these cases and decisions and has a lot of helpful statistics and empirical analysis. And I certainly agree that we can never go wrong when we study and bring awareness to what's happening with the court's docket.

[00:08:38] Jennifer Mascott: And so I'm thrilled to see the public paying attention to both the court's merits decisions and then also what's happening on the orders dockets, just to be able to understand every component of what's happening at the top of this third branch in our federal government. And you're correct that in my testimony, maybe 18 months ago, I did say and still believe that I think that each of the nine justices, they're often coming from very different jurisprudential views. But I do really think it's evident from their work and the explanation and their decisions and how they're handling these cases, that they are each trying to apply the rule of law fairly and evenly and transparently to the best of their ability.

[00:09:17] Jennifer Mascott: And arguably, even though we do have a lot of these cases resolved on the orders docket, which has been around since the beginning of practice in the Supreme Court. As a lot of Steve's initial chapters in his book explain, and in great detail,

arguably the Supreme Court is maybe the most transparent branch in the federal government in the sense that particularly in the merits cases, we get detailed explanation of the justice's view, their thinking. We can read the parties' pleas to the justices, we can read amicus briefs. And I think now even on the orders docket, we're getting increasing explanations from various justices who are dissenting from different orders and learning more about what's influencing decisions as opposed to sometimes what's happening in Congress and the executive branch where there are a lot of closed-door meetings and we're not sure exactly what's leading to a particular vote in a particular case.

[00:10:08] Jennifer Mascott: Also I do think that the rise in quantity of some of these orders, as Steve points out, is partly due to the issue of nationwide injunctions and what's reaching the court from the district courts. But I think also as I've reflected more in reading Steve's book and his citation of many of the important matters on which the court has to rule, like the eviction, moratorium, student loans, COVID decisions and actions, religious liberty matters, actions at the border. A lot of this is being driven, I think even more, even in an earlier stage, by what the political branches are doing for the states.

[00:10:46] Jennifer Mascott: And so in a time when we have, for example, the president issuing by paper orders that are trying to erase payment of student loans in a particular way or put a moratorium on evictions and massive actions like this, and perhaps even more recently discussion about is there anything that can be done unilaterally on the debt limit. That issues of those kind of magnitude, when they're challenged in the court, are necessarily going to lead to the third branch being asked to weigh in. And so, a lot of the magnitude of what the court's ruling on is the magnitude of what governmental actors are trying to do in a really rapid way, I think, for our country's citizens.

[00:11:28] Jennifer Mascott: And so we should also take time to pause and focus on whether we're comfortable, I think, with the balance of power that's happening between the federal and state levels and executive branch and Congress before it even gets to the court.

[00:11:42] Jeffrey Rosen: Adam, in your role as scrupulously neutral observer, I wonder what you make of Steve Vladeck's argument that, in particular, the use of the shadow docket has been deployed in partisan ways because the justices are inconsistent in how they'd follow the most plausible rule and they're treating Trump policies different than Biden policies. What's your response?

[00:12:08] Adam Liptak: Thanks for that question, Jeff. Thanks for having me. Congratulations to Steve for a fabulous book and also for his superhuman book tour, that we're now all part of. So the court divides along partisan lines happens in both the merits docket and the shadow docket. So I don't know that that's an especially illuminating metric to look at, but I think, and Steve's book is really quite fair in exploring some of the cross currents here. I guess I'd make two points. One is that I think we all agree, and Jen inflicted this, that the court is different from the political branches in that it claims legitimacy by dint of giving reasons. And what tends to be missing on the emergency orders are any, or certainly any fully set out, reasons. And that alone ought to make us suspicious of this process.

[00:13:16] Adam Liptak: The second thing I would say is that the court's ordinary attitude toward what happens in the lower courts when people seek review on the merits docket is to leave them alone. Then you have to clear a very high bar to get the court to grant your petition seeking review, your petition for certiorari. You got about a one-in-a-hundred shot. And the shadow docket should not give people a shortcut to get to the court and to get a preview of a merit's decision. And ordinarily the answer ought to be that the status quo below ought to hold. Now you can argue about what the status quo means, what it is. These are hard issues, but I was very taken by a short concurrence that Justice Barrett, joined by Justice Kavanaugh, issued in a COVID case from Maine, in which she said, "Listen, basically we're going to let the lower courts decide most of the stuff, most of the time and only intervene when it's really important. And that same standard that we use on the merit docket for deciding whether we're going to intervene, ought to influence the shadow docket."

[00:14:36] Adam Liptak: And I'll make one final point that the lack of hearing argument in these cases - and it would be possible to hear arguments on stay applications, circuit courts do it all the time - withdraws an important aspect of the court's deliberation. Oral arguments are not really an effort to gain information from advocates. It's a chance for the justices to talk to one another. And there's no reason why in big cases they couldn't schedule arguments, and they don't have to be at the bench. The court knows how to have telephone arguments, they've done it for an entire term. So there are things the court could do to address some of these issues that Steve raises.

[00:15:14] Jeffrey Rosen: Steve, make at greater length, if you will, the argument in your book that the treatment of lower court decisions shows that the shadow docket is being used in a more partisan way than the ordinary docket. You say that, far from having a general presumption of leaving the lower courts alone, the justices are intervening or not based on their substantive views of whether they like the constitutional claim. And in particular, you argue in the free exercise of religion cases and the abortion cases, they're intervening in partisan ways that can't be squared with the general procedure. And you note that Chief Justice Roberts has been joining the liberals in several of these cases in a way that he isn't in the merits docket, showing that he shares this critique. Tell us more about this powerful argument that you have.

[00:16:00] Steve Vladeck: Yeah, thanks, Jeff. I mean, so if we just sort of start with the September 1st, 2021 ruling by the court, a 5-4 decision, to not block SB8, the six-week abortion ban in Texas. I think that ruling really did a lot to put the shadow docket on the public's radar. I think there's a lot more public awareness of this after that ruling than before. And if we just looked at that ruling in the abstract compared to 15, 20 years ago, the non-intervention by the justices might not have looked that surprising, right? That historically, as Adam, I think rightly, points out, the court's sort of default was to leave the lower courts alone. And even if the lower courts had behaved badly to not sort of jump in rashly.

[00:16:45] Steve Vladeck: What I think made the SB8 non-intervention so exasperated and so vexing, and what was at least the source of my critique of it, if not everyone's, Justice Kagan's I think as well, is that this was coming at the end of this remarkable period starting in November of 2020, where the same justices, the same five justices in the majority in the SB8 case, had

intervened over and over and over again to block COVID mitigation measures in blue states, almost exclusively in New York, California, New Jersey, Colorado. There are a few others based on both novel understandings of the free exercise clause.

[00:17:24] Steve Vladeck: Ones we might like or not like, but that were clearly novel. And in sort of defiance of procedural obstacles and roadblocks that the same justices then invoke as the reason for staying on their hand in the Texas case. And so the charge that comes out of that, Jeff, the charge of inconsistency that Justice Kagan leveled in her dissent, I think actually stings more than just the word inconsistent. It's actually even more pejorative than it sounds because what it's suggesting is that the five justices who were willing to intervene in these novel procedural contexts in the COVID cases to expand an existing constitutional right were unwilling to intervene in the Texas abortion case because they didn't want to protect a settled constitutional right.

[00:18:13] Steve Vladeck: And that I think is where you get the concern that the absence of full-throated explanations does nothing to disabuse the public of those charges, right? That usually one of the things a majority opinion is good for is providing at least some basis for saying they're not ruling this way just because they want to, they're ruling this way because they have legal principles that require them to. This was Justice Barrett's defense in April 2022 in a speech at the Ronald Reagan Presidential Library. She says, "Don't just sort of look at the bottom lines of our rulings. Look at what we've said before you dismiss us as," in her words, not mine, "Partisan hacks." The quote that comes out of that speech was, "Read the opinion." Well, two days after that speech, hers is the dispositive vote in a 5-4 ruling on the shadow docket putting back into effect a controversial Trump-era clean water rule in which there was no opinion to read.

[00:19:10] Steve Vladeck: And so, Jeff, to me, the problem that we're seeing in the last couple of years is that, whether the inputs, whether Jen's right, that lower courts are forcing the justice's hands. And that there's sort of a newfound need for this degree of emergency intervention, the way the court is intervening the frequency with which it's intervening without explanation, the contexts in which it's choosing to intervene and not intervene. It's when you add that all together that you start to see serious problems. This is part of why I think it needed a book, right? Because it really takes the whole data set to see the seriousness of the charges.

[00:19:48] **Steve Vladeck:** And let me say one last thing, because I know Jen and I are going to disagree about this. I think it's perfectly awesome for folks to disagree about whether particular pieces of the court's behavior in recent terms have been as problematic as the book suggests they are. I'm just so thrilled that we're having this conversation because the first goal of the book was to get us talking about it. And so, it's a happy day for me even if not, especially if Jen is right.

[00:20:17] Jeffrey Rosen: Well, it's a happy day for constitutional debate and we're grateful to all of you for having it. Jen, you and Steve do disagree. What's your response to his, to the claim that he just made, that even if you think there are more nationwide injunctions, and even if you agree with Justice Alito, that the court's receiving more requests for intervention, a factual claim that Steve disputes, the kinds of rulings that the court's holding down and the way they're doing it show partisanship not principle?

[00:20:46] Jennifer Mascott: Well, I think that the juxtaposition that Steve raised is an interesting one in the difference of the outcome with some of the rulings during the COVID era, and then the example of Texas SB8. Because when you look at those examples, it starts to seem more that the objection is really about the outcome of what the justices are doing in these cases, rather than the shadow docket mechanism themselves, like in finding the political action to be unlawful or unconstitutional or not. And that, obviously many lawyers and litigants and justices are going to disagree about where the legal authority lies. And so it totally makes a lot of sense for there to be vigorous disagreement about that in our society. But I don't think those examples in particular show that the methodology of the justices or the procedure is necessarily particularly nefarious.

[00:21:37] Jennifer Mascott: I think during the COVID era, it was really unprecedented in many ways. And as an executive branch lawyer at the time, we were constantly faced with questions about how to be really faithful to the rule of law and thoughtful, and also try to help facilitate the elected officials being able to play the important role of trustees over the American people and our system of government that needed to happen in a rapid, efficient way. And I'd imagine those questions were coming to the justices as well. And from my standpoint, I think the Texas SB8 consideration, actually for the justices, turned out to be maybe a really wonderful model of the justices taking a lot of care in the emergency orders docket because there was actually an opinion issued, although not as lengthy as the merits docket. And there was oral argument.

[00:22:25] Jennifer Mascott: And I think one thing that made the particular question that came up to the court a little bit more complicated and maybe caused the justices to be more hesitant in wanting to weigh in on the merits right away, is there were threshold questions about who had a right to bring action by design with the individual who had helped the Texas legislature draft the bill. And so the justices were not necessarily clearly given the question "is our precedent on Roe being followed in Texas?" It was a lot of more complicated jurisdictional questions that I think merit a consideration. And my recollection is that when the court ultimately ruled in more depth, it kicked one of the interpretive questions, actually, to the Texas Supreme Court. And so it took itself out of the equation at least a little bit in terms of interpretation of the law there.

[00:23:12] Jennifer Mascott: And then in the end, obviously the core questions that were really motivating a lot of concern and interest in the country were the questions about the extent of the right of privacy under the Constitution. And the court, of course, more fully addressed that later on in the separate *Dobbs* decision a few months later on the merit docket.

[00:23:32] Steve Vladeck: Jeff, can I just clarify? There was no oral argument in the SB8 case at the emergency application stage. I posted a link in the chat to the decision, which is about a paragraph long. Right. The ultimate decision in the SB8 case in December after the emergency application was resolved didn't kick anything to the Texas Supreme Court. The Fifth Circuit did that on remand. And in fact, I think especially ironically, four of the five justices who voted to not intervene on September 1st, who voted to let SB8 go into effect because of these procedural concerns they had about whether these state officials were proper defendants, ultimately said they were, or at least four of them were.

[00:24:17] Steve Vladeck: And so this is where I think the charges of, you sort of insufficient transparency, insufficient explanation, and seeming partisanship really start to land. Because contrast that with how the same five justices just five months earlier, four months earlier in a case called Tandon v. Newsom, had reached out to block California's restrictions on how many folks could assemble in private homes with no more process based on a novel theory, the free exercise clause, with similar procedural obstacles. Like that's the problem is when you put these things side by side.

[00:24:52] Jennifer Mascott: Yeah, and I just think sometimes analyzing it, and it is very complicated and there can be disagreement about which metrics are most important. But sometimes I wonder if there aren't either category errors or oversimplifications with some of this in terms of looking at the posture of the issue when it comes up. So for example, the Texas Heartbeat bill, I mean Adam hinted at this a little bit in an orthogonal way earlier, what is the definition of the status quo? If the status quo is the government action initially, here in the Texas SB8 matter, the first time all the court really did was decline to issue a ruling that would've treated the bill as if it could not be enforced, basically.

[00:25:34] Jennifer Mascott: And so to go the other way, the justices would've essentially been rapidly, in an emergency posture, allowing lower court decisions to stand that took quite a dramatic action of stopping up an elected governmental entity's action. And so I understand why it was really noteworthy because the action itself, the legislation itself, was so unusual in terms of the type of legislation that we've seen from state legislatures in the past. But when it came to the court, the court was essentially in that first moment trying to decide whether it was going to keep the courts from being the entity that was going to change things. And I think ultimately, the justices took a little bit more time to examine some of the issues, which is how we got through the cycle that Steve detailed of eventual argument, and then a little bit more in depth examination.

[00:26:28] Steve Vladeck: So just to tie the loop together, right? What Jen's talking about is an injunction pending appeal, the most extraordinary form of emergency relief. And Jen is rightly explaining why the justices have historically been very reluctant to issue injunctions pending appeal, because unlike a stay, an injunction pending appeal is reaching out to stop the state from enforcing the law directly. And so, again, in the abstract, I think that's a perfectly coherent defense of the court's non-intervention in the SB8 case. The problem is that, whereas the court had only issued four injunctions pending appeal in Chief Justice Roberts first 15 years on the bench from 2005 to 2000, at the end of 2019, in Justice Barrett's first six months on the court, the court issued six.

[00:27:17] Steve Vladeck: And so it's just against that backdrop, where the court was doing exactly what Jen's criticizing, to block California COVID restrictions and New York COVID restrictions, the fact that all of the sudden they found their hands tied because the partisan valence of the dispute was flipped. That's the problem I'm trying to get at.

[00:27:35] Jennifer Mascott: And I agree, and I want to, I'm sure Adam has things to say too. I look again just now, I'm switching hats to the executive branch. It was an extraordinary time. My

recollection, partly because I was at DOJ at the time, is that Justice Barrett was confirmed about five months into the pandemic, and there continued to be efforts to try to deal with it. On the executive branch side, there were lots of things happening. The Trump administration was moving rapidly to try to get the economy to be producing masks, to be producing vaccines, to be trying to figure out how to keep people safe. And there were all kinds of extraordinary uses of the Defense Production Act and other healthcare emergency authorities and all sorts of efforts to try to orient the economy on the political branch side.

[00:28:18] Jennifer Mascott: And so I guess part of what I'm saying is, and I'd be curious, and actually this would be an opportunity for another book even at the five-year mark. I wonder if we'll look back and see if these justices are issuing or stepping injunction pending appeal with the same rate as Steve is citing in those few months that were Justice Barrett's first months on the court. Because again, it's just very hard with the pandemic. I think there were a lot of sui generis and efforts that were being taken at the state level and at the federal level. And I would just have to imagine that a lot of that was impacting the need for the court to be weighing in rapid order.

[00:28:59] Jeffrey Rosen: I'm going to ask Justice Liptak to adjudicate this really important discussion, both about the increase in the numbers of injunctions pending appeal and the increase in the overall grants of emergency relief. Steve says that there were about six averaging a year in Justice Roberts' first terms and 20 in OT 2020. And also, Adam, Steve claims that the Trump administration placed a big role here, that in four years Trump's solicitor general sought emergency relief from the Supreme Court a total of 41 times, a more than 20-fold increase over Bush and Obama's SGs combined. What do you make of all of these numbers?

[00:29:43] Adam Liptak: So I don't think there's a dispute in general, correct me if I'm wrong, that there has been an increase in this activity. The question is, is it problematic? What gave rise to it? And the more conservative argument is typically that, in the Trump era, lots of district court judges around the nation shut down government programs through nationwide injunctions, and that caused the Trump administration to go to the court. And it was knocking on an open door because this court was sympathetic to the Trump administration's policy goals and solicitor generals of both parties said they would've done the same thing in that same dynamic. Now, the argument gets refined a little bit because, and Steve will give me the actual numbers, but maybe a third of these applications involved nationwide injunctions and lots of them came up in other contexts.

[00:30:45] Jeffrey Rosen: Steve, your response. And what about the argument that Adam just made that although the numbers undoubtedly increased, they don't have a partisan balance?

[00:30:57] Steve Vladeck: Yeah, so I don't disagree that by themselves, the fact that the executive branch was seeking emergency relief more often was a problem independent of the executive branch. Chapter four of the book talks about the solicitor general and the role of the solicitor general historically, and it suggests that I think, the solicitor general was, at least I think in some respects, behaving very aggressively compared to the prior traditions of that office. Be that as it may, none of that would've mattered if the court had denied those applications. And I think one of the things that happens is of the 41, Jeff you mentioned, applications that the Trump

administration brings to the court, five of them never get resolved on the…five of them don't get to an up or down vote. Five of them get withdrawn before they're voted on.

[00:31:43] Steve Vladeck: The court granted 28 of the 36 in whole or in part. And so you had this repetition that we had never seen before. I mean, I'm sure Adam had this experience on the journalistic side of just sort of having more of these than we had seen previously. And in context in which the impacts were far greater. And again, I think there's a story you can tell if you just looked at the Trump cases about lower courts behaving badly, about executive branch policies and the need to carry them into force. I might not agree with that story, but it's a story. The problem once again is once you contrast how the court treats applications from the Trump administration with how the court treats applications from the Biden administration in very similar contexts.

[00:32:31] Steve Vladeck: So just to give one example. There was a case last term called *Biden v. Texas.* It's really hard to keep all the Texas cases separate. But this one was about the Biden administration's attempt to rescind the remaining Mexico migrant protection protocols, one of the Trump administration's immigration policies. So like a number of Trump policies, the Biden Initiative here was subject to a nationwide injunction issued by Judge Kacsmaryk in Amarillo. The Fifth Circuit refused to stay the nationwide injunction. The Biden administration went to the Supreme Court and said, "Just like all of these cases where you stayed nationwide injunctions against Trump immigration policies, so too we would like you to stay this one."

[00:33:18] Steve Vladeck: And in August of 2021, over three public dissents with no explanation, the court refused to stay the injunction, but then took the case on the merits and reversed and ruled for the Biden administration. And so Jeff, again, it's not any one of these rulings in the abstract that's the problem, not even any one set. It's when you start looking at context in which claims that were similarly situated are resolved differently. And where the most telling explanation for the difference is not the nature of the claim or the legal arguments that were deployed, but rather just the partisan valence of the dispute. That's where I think the charges become hardest to dispute and most serious as a critique of the court as an institution.

[00:34:06] Jeffrey Rosen: Jen, what about that claim that similar cases are not being resolved similarly? And as evidence for that, Steve mentions Chief Justice Roberts, who did tend to join the conservatives on the merits, but in a series of shadow docket cases joined the liberals because he thought that the procedures weren't being fairly followed?

[00:34:30] Jennifer Mascott: Well, I also think the Chief Justice has his opinions. Some of the recent last couple of years, shows that jurisprudentially, he does not always line up necessarily with the new block of five justices. So I think, again, jurisprudential distinctions that apply more broadly even than just on the shadow docket are some of what is motivating these differences. And that sometimes some of the trends and factors that Steve is identifying are principles that we might see carry out on the merits docket as well as in the shadow docket. I also, though, think it's important to know that the court is still issuing a lot of rulings even in the Biden administration. I mean, the mifepristone case is a recent example where Justice Alito was in dissent and the court stepping in in an emergency posture.

[00:35:20] Jennifer Mascott: And I would actually be interested, I guess, in two things. One, if Steve has, is there a standard? I mean, would the better alternative be in all of these cases for the court just to give oral arguments and are we putting a particular type of lower court ruling in a particular bucket? Would this be any time there's a request for injunction pending appeal that there would be oral argument? Are there other types of emergency decisions? And then the second thing that's maybe shifting gears a little bit, I thought it was interesting that the court today actually issued a summary of reversal in a case where there had been a petition for cert review of a sixth circuit decision in a case involving the challenged FDIC action.

[00:36:03] Jennifer Mascott: And so here, the party actually petitioned and positioned the case for full merits briefing, where normally the party wants the more contracted briefing. And the court said, "Well, this was so wrong, we can get rid of this more efficiently through summary reversal." And are there some times when it is indeed the fact that the court has seen an issue so clearly that it's actually a more efficient use of resources to dispose of it without oral argument, or would it have been preferable even in this case for the court to go ahead and hear the case before issuing this kind of decision?

[00:36:35] Jeffrey Rosen: Steve, your thoughts on that?

[00:36:37] Steve Vladeck: So, I mean, let's be clear. The summary reversal this morning had an opinion of the court and it had a, I think it was an eight-page opinion of the court that provided a pretty thorough explanation for why the court was summarily reversing the sixth circuit. Yes, I think that is preferable to an unsigned unexplained order. I also just want to say I don't think, contra Jen, that Chief Justice Roberts's dissents in these cases are remotely traceable to substantive disagreements with the other conservatives. I posted into the chat that Alabama voting rights case in which last February the court stayed two different district court injunctions that would've required Alabama to redraw its congressional district maps.

[00:37:22] Steve Vladeck: And you know, I think there's no majority opinion. I think our speculation, I suspect Adam agrees, is that this is because the court is willing to reconsider a 1986 precedent called Thornberg v. Gingles. The chief is right there with them. How do we know? He said so right, he says in his dissent, "I agree maybe the time has come to reconsider Thornberg versus Gingles, but not like this." The Chief's dissents have always been about the procedural shortcuts and why he thinks it's inappropriate for the court to be taking these kinds of procedural steps for what they can eventually do on the merits docket. I actually think, Jeff, that underscores the critique rather than distinguishing it.

[00:38:05] Jeffrey Rosen: Adam, let me just give you the numbers that Steve offers about the chief. He says, by almost immediately after Justice Barrett's confirmation Roberts started joining the Democratic appointees, by April 2020, Roberts has publicly dissented from nine different 5-4 rulings. Since October 2020, seven of those nine came on the shadow docket. Do you agree with Steve or not that Robert's objections in these cases were procedural rather than substantive and has to do with his desire to preserve the court's legitimacy?

[**00:38:38] Adam Liptak:** So the case Steve just mentioned is a very good example of Roberts on the substance being in one place and on the procedure being in another place, and the consequential decision that the court has stayed for the purposes of an election a voting map that makes a difference in the composition of Congress. On the other hand, in the COVID religion cases, while Ginsburg was still alive, Roberts joined the majority to defer to state action and let state officials, accountable officials informed by their health advisors, make rules about public gatherings, including in churches. And then when Barrett replaces Ginsburg and the court's attitude toward these restrictions changes, Roberts is now in dissent with the three remaining liberals, and I think that's a point more on the merits than on procedure.

[00:39:42] Jeffrey Rosen: Steve, you started us off by saying there are two broad arguments in the book. One, the historic evolution of the court's efforts to control its own docket vis-a-vis Congress. And second, the increasingly partisan use of it today. Take us back historically. The book begins with this riveting and memorable encounter with Justice Douglass who's being asked to enjoin the Vietnam War, and tries to do it over Justice Marshall and the rest of his colleagues' objections. And then you note that the use of emergency orders has been used and expanded in death penalty cases and election cases. But you say that something recent, and you trace it back to Chief Justice Taft's effort to allow the court to control its docket in the Judiciary Act of '25. But then you say, of course that it's being used in different ways today. So put the whole thing in that broader historical perspective.

[00:40:35] Steve Vladeck: Sure. And this actually will also give me a chance to answer Jen's question from last time that I neglected to answer, about what I would prefer. So, I think a lot of folks even who pay attention to the current court may not appreciate how much of the way the current court operates is new, or at least new relative to the founding era. So, for the first 101 years that the Supreme Court exists as an institution, it has zero control over its docket. Every single case on the court's docket is one that it has to eventually resolve one way or the other. Chief Justice Marshall will say in 1821, "It would be treason to the Constitution. If we were not to exercise jurisdiction over cases Congress has given us jurisdiction."

[00:41:17] Steve Vladeck: That shift towards certiorari toward the modern approach where the court has almost unlimited control over its docket is one that starts with very, very small steps in 1891 and that is then blown up by Chief Justice William Howard Taft, once Taft is Chief Justice. And for Taft, certiorari was means to an end. Taft really wanted the court's role to evolve from what he would describe as a Supreme Court of Appeals, just the last in the spectrum, the tier of appellate courts resolving the individual cases to more of a constitutional court, an institution that was sitting above and apart from the fray of ordinary judicial business.

[00:42:00] Steve Vladeck: And he saw certiorari as one of the critical ways to achieve that alongside things like getting the court out of the capitol where it sat until 1935, right? Getting its own building created on the judicial conference of the United States. I mean, there are lots of things Taft wanted to do, basically to give Supreme Court itself, and the federal judiciary in general, more autonomy. And Jeff, what came with that was not just more control over the court's docket, but power to dictate what the court was going to decide even within the cases it chose to hear.

[00:42:34] Steve Vladeck: So today, the very first page of a cert petition lists the questions presented, the notion that the court's not taking the entire case. It's taking up particular questions that, as we know, sometimes the justices will modify. Sometimes they'll only grant one question as opposed to all of them. Sometimes they'll rewrite the questions presented and then grant it. That's what happened in the Major Second Amendment case last term, where the question that was granted was one the justices wrote themselves. Sometimes they'll decide questions that weren't presented, like overruling Roe versus Wade in Dobbs was not part of the questions presented. And so Jeff, this is all part of the Supreme Court, you know, sort of claiming more and more power over its docket, over its control.

[00:43:18] Steve Vladeck: And while this has happened, Jeff, the court's docket has shrunk. So that, as recently as the 1980s when there was still some mandatory appellate jurisdiction right, the court was hearing 150, 175 cases a term. As recently as when I was in law school, it was still hearing 90 cases a term, right? This term is going to maybe get to 57. That'll be the fourth term in a row that it's under 60, when it hadn't been under 60 since 1864. So these are all of a piece, Jeff, with the court just having more and more control as Congress has exercised less and less control.

[00:43:54] Steve Vladeck: And just really quickly, and to Jen's question about what would I prefer. Well, one, I'd prefer Congress to reassert some control. I think that would be a useful thing. But two, when it comes to emergency applications in particular, I actually think there's a lot to commend the pre-1980 model of having these resolved by individual justices in chambers where they could have argument, where they could take briefing, where they could write opinions, and where no one would mistake the opinions they wrote, whether it was Douglas in a Cambodia bombing case or Marshall for an opinion of the full court. I think that that would sort of balance the need for some kind of disposition with process, with the avoidance of sort of the full court being viewed as having resolved these matters. That, to me, is the best way to split the difference.

[00:44:39] Jeffrey Rosen: Jen, what do you make of that alternative? It is so vivid to think of Justice Douglas going from phone booth to phone booth on the Akima trail to phone in his order joining the Vietnam War. Would that promote more accountability to return to that model?

[00:44:55] Jennifer Mascott: I mean, I do obviously agree that treating all of these questions with care is a good thing. I mean, I just think in our current contemporary times, I've always perceived the justices' tradition right now of very rarely doing anything other than referring these matters to the whole court as being a matter of comedy and collegiality. Because I guess what I fear in these hyper-partisan times, and times where it seems like just a lot of folks wanting to question that there would be more room for speculation about what would the full court do and a claim that each justice was trying to be partisan and how they were handling the issue. Alternatively, on the majority of what Steve just said though, about Congress stepping in, I heartily agree. I think it's very refreshing to think about the history and the trajectory of when Congress and in what ways it used to control more of the court's docket and handle mandatory jurisdiction versus discretionary.

[00:45:56] Jennifer Mascott: And I think it'd be really actually quite interesting to see what might happen if Congress really would again, step in on the front end in terms of framing... I mean you could frame all kinds of things, right, because that's one area in which Congress has clearly been given authority, particularly with the lower courts. And often, with questions the Supreme Court takes up as well, is what questions is the court going to be able to resolve. And, I think the Congress could also look at the scope of remedial relief that the court is providing and that it would be much more preferable for Congress to weigh in on the front end ex-ante by guiding the Supreme Court's jurisdiction in advance before we get specific cases and controversy.

[00:46:39] **Jennifer Mascott:** Than a lot of what's happening now, whereas Congress doesn't want to coalesce around a certain substantive agreement, so instead it has a lot of hearings or raises transparency questions on the backend and report and requirements and things that are a little bit more second guessing, rather than trying to control and direct not the resolution of cases. We would never want Congress obviously stepping in in a way that seems to be a backdoor for certain political preferences and individual cases. But to be a little bit more clear upfront about what the court should be considering or what kind of relief it can provide, I certainly think that's an area that Congress should spend more time examining.

[00:47:17] **Jeffrey Rosen:** Adam, your thoughts on whether congressional intervention and a return to the single justice model would be better and, in particular, Steve's main concern is that these unexplained decisions are being treated as precedent in a way that they weren't before. Are you concerned about that?

[00:47:34] Adam Liptak: So the single justice model still exists to a large extent. Most of these emergency applications are turned down by a single justice. I sense after at least informing the court that that justice intends to do what he or she wants to do. On the point about increasing the court's docket, withdrawing some of its discretion, I think that would be a fabulous thing. People don't pay attention to many of the cases the court works on, but in some of the more routine cases, the justices authentically put on their lawyer hats and try to figure out the correct answer. And it's a joy to behold and it doesn't divide along partisan lines and there aren't enough of those cases, and there are plenty of hard issues the court could be looking at.

[00:48:22] Adam Liptak: And instead, we have this model that Mark Lemley at Stanford calls the Imperial Court, which is ambitious and impatient and wants to deal with the big social issues right away and devotes much of the attention through the entire term or the merits docket to that. I think if the court had to handle 100 cases a year, which is well within historical precedent, it would be to the good for the litigants seeking to get answers to those questions. But it'd also be to the good in terms of the justices working together and figuring things out. They're smart, able lawyers and when they put their minds to work on cases that are not the big social controversies, but are difficult questions of patent law or almost any other topic in the law, it, it's a good look for the court.

[00:49:20] Jeffrey Rosen: Steve, you contrast the current situation with the age of what, as you know, Alexander Bickle called the passive virtues and the idea in the 1950s and '60s, when the

court decided not to decide the interracial marriage cases for years after Brown, there was a bipartisan consensus around the virtue of not deciding to promote the court's legitimacy. What changed in that regard, aside from the partisan valence of the justices and why is it that no one on the current court seems to be devoted to the passive virtues?

[00:50:01] Steve Vladeck: You know, that's such a good question, Jeff. We probably need another hour. But I'll start by saying, I think it's worth reminding folks of something that I think is obvious in retrospect, but even the Warren Court, the ideological alignments did not match up with the partisan affiliation of the presidents who appointed the justices. Right. I mean, Warren himself was appointed by a Republican. Brennan was appointed by a Republican, you know, Byron White was appointed by a Democrat. And that part of the problem of the moment we're in is that, since 2010, for the first time in the court's history, there's one-to-one parity between where the justices are ideologically and what party's president appointed them. And that wasn't true until 2010.

[00:50:44] Steve Vladeck: So I think that's sort of sharpening the edges of the conversation in ways that are pretty significant. As for sort of the passive virtues, only taking 55 cases a year is somewhat passive, right? Or at least somewhat virtuous from Bickle's perspective. The problem is the one that I think Adam puts his finger on, which is when the 55 cases are the 55 hot button divisive issues the justices want. All that does is it reinforces the worst perceptions of the court and not the best perceptions of the court, right? That, when the court is actually doing technical lawyering, I think the justices really are at their best.

[00:51:24] Steve Vladeck: And I think one of the problems of the shadow docket is that that's the opposite of the spectrum where there's no technical lawyering and it's just a quick up-or-down vote on whether this policy can go into effect and this one can't be. And that's where I think we're not all going to agree on what the right reforms are. But I think we might all agree that there's opportunities for movement and for making the relationship better that don't all turn on changing who's on the court, that don't turn on altering the composition of the court as I think so many progressives are clamoring for. And that's the conversation I hope the book helps to precipitate.

[00:52:00] Jeffrey Rosen: And you do indeed emphasize that you're offering these proposals in the hope of increasing the court's legitimacy rather than thwarting it. Jen, Steve argues that justices of both, of all perspectives, but certainly the current majority, is impatient and is reaching out to decide questions because it wants to change the law. And this mirrors the critique that Justice Kagan and Justice Sotomayor have talking about the impatient court and he's claiming that in that sense, substance is following procedure. What's your thought?

[00:52:35] Jennifer Mascott: I mean, I don't think so. I agree with the point that if you look at the small number of cases, the court clearly is not being as aggressive as it could be in taking on many, many matters. It has had a lot of big matters kicked to it. Sometimes it's gone many terms in a row without taking on the big questions. Some of us in the administrative law space, which is a little bit different from some of what we're talking about here, have wanted the court to reexamine deference doctrines like Chevron for a long time. And I have to say, I mean, they've

possibly taken up the question next term, and I just have a feeling that again, we're going to see the court not take it head on.

[00:53:13] Jennifer Mascott: But, I don't know, maybe it'll require some rewriting of the ad-law case book I've just joined after, after the end of next term, we'll see. But look, this is a very legitimate, highly honored professional institution that we should all be really grateful for, I think, in American society. For decades and decades and decades, the number of justices has been stable. President Biden put in place a commission of many, dozens of experts, and they did really not coalesce around one strong majority sense that there's a particular reform that really must happen that everybody agreed we'd be better off with.

[00:53:50] Jennifer Mascott: And to the point about unanimity and controversy, and in at least the past 10 terms leading up to 2022, about 35% of the court's judgments, merits cases, had been unanimous. And so I think that's Adam's point a little bit before, that there are a number of cases sometimes which don't necessarily captivate our imagination as much where the court actually unanimously agrees. And so I'm grateful for what the justices are doing and grateful for this chance to talk with all of you about how we can all be better students and more attentive to figuring out what's happening in the nation's highest court.

[00:54:28] Jeffrey Rosen: Very well said. Adam, I think we'll give the last word to you in this wonderful and thoughtful and wide-ranging discussion. What did you learn from Steve's book, The Shadow Docket, about whether or not the Supreme Court is, as his subtitle said, using stealth rulings to amass power and undermine the republic?

[00:54:52] Adam Liptak: So Steve's book is fantastic. People should go out and buy it and read it. As to the subtitle, there's little doubt in my mind that they're using this procedure to amass power, and I will not pass on the question of whether they're destroying the republic in the process.

[00:55:08] Jeffrey Rosen: [laughs] wonderful. Thank you so much, Steve Vladeck, Jennifer Mascott, and Adam Liptak for a wide-ranging, illuminating and just great discussion. Friends who are listening whether you're persuaded or not by Steve's arguments, he has convinced us of the urgent interest and importance of studying procedure. And I join Adam and Jen in urging you to read the book because I know you'll learn from it. Steve, congratulations and Jennifer and Adam, thank you so much for joining.

[00:55:43] Jennifer Mascott: Thank you.

[00:55:43] Adam Liptak: Thank you.

[00:55:45] Steve Vladeck: Thanks to all of you guys for having me.

[00:55:52] Jeffrey Rosen: This episode was produced by John Guerra, Tanaya Tauber, Lana Ulrich, and Bill Pollock. It was engineered by the National Constitution Center's AV team.

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