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Shadow Shadow Dockets

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Introduction

In recent years, legal commentators have analyzed—and often criticized—the U.S. Supreme Court's "shadow docket."[1] Rulings on this docket proceed without the usual, public-facing steps of briefing and oral argument and are often unexplained, leaving the public in the dark as to the Court's reasoning.[2] While the Supreme Court has historically used its shadow docket to resolve mundane matters like scheduling, the Court has recently used it for merits decisions in high-profile cases,[3] including pivotal rulings on redistricting,[4] pandemic restrictions,[5] pollution control,[6] and the First Amendment.[7] Critics argue that robust use of the shadow docket undermines transparency, legitimacy, and the rule of law.[8]

To date, this dialogue has focused on the U.S. Supreme Court. But the real engines of the American legal system are state, not federal, courts. They resolve the overwhelming majority of lawsuits in this country and are increasingly serving as the final word on some of the most consequential issues facing society. State courts have shadow dockets too. Yet state-court shadow dockets have received virtually no attention.[9]

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1 *See, e.g.*, William Baude, Foreword: The Supreme Court's Shadow Docket, 9 N.Y.U. J.L. & Liberty 1 (2015); Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic (2023); *see also* Whole Woman's Health v. Jackson, 595 U.S. 30, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) ("Today's ruling illustrates just how far the Court's 'shadow-docket' decisions may depart from the usual principles of appellate process."); Merrill v. Milligan, 142 S. Ct. 879, 883 (2022) (Kagan, J., dissenting) (criticizing the majority for basing its decision to grant a stay of a lower court's judgment "based on the scanty review this Court gives matters on its shadow docket"). Professor Baude has noted that while he coined the term "shadow docket" in 2015 as a description of the U.S. Supreme Court's docket, it had been used for nearly a decade beforehand by litigators in Texas as a reference to an aspect of the Texas Supreme Court's docket. *See* Provocative Subtitle, Divided Argument (May 16, 2023), https://www.dividedargument.com/episodes/provocative-subtitle (Vladeck noting that the term "shadow docket" "was used to refer to a different phenomenon on the Texas Supreme Court as early as apparently 2006").

2 Baude, *supra* note 2, at 1 (defining the shadow docket as decisions that proceed without "normal procedural regularity").

3 *See* Vladeck, *supra* note 1.

4 *Merrill*, 142 S. Ct. 879 (reinstating Alabama's Congressional map that two lower courts held unlawful, keeping it in place for the 2022 midterm elections).

5 Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (invalidating New York City's capacity restrictions on religious services enacted to limit the spread of COVID-19).

6 Louisiana v. Am. Rivers, 142 S. Ct. 1347 (2022) (reinstating a Trump administration regulation that prevented states from blocking infrastructure projects that could pollute waterways).

7 *See* Vladeck, *supra* note 5, at 163-96 (reviewing the cases).

8 *See, e.g.*, Vladeck, *supra* note 1; Nicholas D. Conway & Yana Gagloeva, Out of the Shadows: What Social Science Tells Us About the Shadow Docket, 23 Nev. L.J. 673 (2023).

9 *But see* Rebecca Frank Dallet & Matt Woleske, State Shadow Dockets, 2022 Wis. L. Rev. 1063 (2022) (discussing the Wisconsin Supreme Court's shadow docket practices); Hayley Stillwell, Shadow Dockets Lite, 99 Denv. L. Rev. 361 (2022) (Oklahoma Supreme Court); Justin R. Long, State Courts Have Their Own Shadow Dockets, State Ct. Report (Oct. 19, 2023), https://statecourtreport.org/our-work/analysis-opinion/state-courts-have-their-own-shadow-dockets (Michigan Supreme Court).

This paper offers a primer on shadow dockets in the states.[10] Its core observation is that state supreme court shadow dockets are broader and less transparent versions of the federal model—*shadow shadow dockets*. State-level shadow dockets have broader reach than the U.S. Supreme Court's because, as detailed below, state supreme courts possess and regularly exercise a wider variety of powers. And they are less transparent because public access to state court dockets is extremely limited. As the public increasingly turns to state supreme courts to resolve important legal and social issues,[11] state shadow dockets warrant careful attention.

This paper unfolds in two parts, tracking the twin mechanisms of shadow shadow dockets. It first unpacks the extensive administrative tools that yield expansive state high court authority over shadow dockets. It then explains the limited transparency that obscures these shadow-docket rulings from public view. A brief conclusion outlines an agenda for further research and reform.

I. State Supreme Court Administrative Authority

To understand how administrative tools enhance state high courts' authority over shadow dockets, it helps to begin with some context about state supreme courts' distinctive role and powers. State high courts diverge from the U.S. Supreme Court in the power they wield, their interbranch relations, as well as the structure of the underlying judicial systems.

First, state constitutions take a more expansive view of the judicial role, vesting supreme courts with powers that resemble legislative, executive, and administrative authority.[12] For example, Arkansas's supreme court appoints city tax commissioners; the Idaho Supreme Court consults the governor on any "defects and omissions" the justices find in state law; high courts in several states play an active role in legislative apportionment; and courts in nearly half of the states exercise a form of prosecutorial discretion.[13]

10 This paper builds upon a larger study of state supreme court shadow dockets. *See* Adam B. Sopko, Invisible Adjudication in State Supreme Courts, 102 N.C. L. Rev. (forthcoming 2024), http://papers.ssrn.com/abstract=4700315.

11 *See, e.g.*, Alicia Bannon, Opinion, The Supreme Court is Retrenching. States Don't Have To, Politico (June 29, 2022, 4:30 AM), https://www.politico.com/news/magazine/2022/06/29/supreme-court-rights-00042928; Matt Ford, The Next Frontier for Abortion Rights Is State Supreme Courts, New Republic (March 17, 2023), https://newrepublic.com/article/171210/abortion-rights-state-supreme-courts; Hochul Calls for N.Y. Courts to Fill 'Judicial Void' Left by SCOTUS, Times-Union (Feb. 27, 2024), https://www.timesunion.com/capitol/article/hochul-says-n-y-courts-need-fill-void-left-18690594.php.

12 *See, e.g.*, Ellen A. Peters, Getting Away from the Federal Paradigm: Separation of Powers in State Courts, 81 Minn. L. Rev. 1543 (1997); Hans A. Linde, The State and the Federal Courts in Governance: Vive La Différence!, 46 Wm. & Mary L. Rev. 1273 (2005).

13 Ark. Const. amend. 18; Idaho Const. art. V, § 25; Ore. Const. art. IV, § 6(d); *see also* Anna Roberts, Dismissals as Justice, 69 Ala. L. Rev. 327, 330 (2017).

Second, all state supreme courts possess a variety of constitutional and inherent powers that lack a federal analogue or go beyond comparable powers of the U.S. Supreme Court.[14] For instance, state supreme courts exercise rulemaking power, regulatory authority over the practice of law in the state, and broad supervisory power of the judicial system, to name a few.

Finally, the structures of state judiciaries themselves sometimes differ from the design of the federal courts. In some states, like Delaware and South Dakota, the supreme court is the only appellate court in the state. In others, like Iowa, Mississippi, and Nevada, an appeal from a trial court first goes to the supreme court, which then decides whether to keep the case or send it to a lower appeal court for resolution.

These differences in judicial role, structure, and authority cash out in a variety of mechanisms that empower state supreme courts to influence case outcomes outside of the merits. This report describes three such mechanisms that state high courts wield: managerial authority over state judiciaries; powers to publish or depublish opinions; and potent use of summary and supposedly temporary orders.

A. Broad Managerial Authority Over State Judiciaries

As the head of their state's judiciary, supreme courts have managerial authority over the entire court system. This role includes various administrative and inherent powers that grant the courts control over the lower courts, cases in the system, as well as various actors, like lower court judges, litigants, and jurors.

The clearest example of this authority is supreme courts' supervisory power, which vests supreme courts with the authority to oversee the proper functioning of the judiciary.[15] The source and scope of the power differ between states. Depending on the court, it may be a product of statutes, state constitutions, or the court itself—as an inherent power of the state's highest court. Additionally, some states describe their supervisory power as "plenary, unfettered by jurisdictional requirements,"[16] or "'far-reaching' and 'encompass[ing] the entire judicial structure [as well as] all aspects and incidents related to the justice system,'"[17] whereas others take a narrower view, describing the power as "limited in both purpose and availability"[18] or reserving it "only to rectify errors and prevent injustice in extraordinary cases when no adequate alternative remedy exists."[19]

Further, like much of the shadow docket, the supervisory power is almost entirely discretionary and is subject to standards that are not always clear, especially among courts that have a more expansive conception of the power. For instance, the Arkansas Supreme Court has said its supervisory power is "hampered by no specific rules or

14 *See* Michael L. Buenger & Paul J. De Muniz, American Judicial Power: The State Court Perspective 17-18 (2016); Sopko, *supra* note 1 (manuscript at 33-41).

15 Depending on the state, supreme courts may refer to this authority as the superintendent power, supervisory authority, supervisory jurisdiction, among other formulations. But they are all references to the same power described above.

16 Marionneaux v. Hines, 902 So. 2d 373, 376 (La. 2005).

17 State v. Vega-Larregui, 248 A.3d 1224, 1241 (N.J. 2021).

18 People v. Voth, 312 P.3d 144, 148 (Colo. 2013).

19 Manning v. Jaeger, 964 N.W.2d 522, 530 (N.D. 2021).

means,"[20] and Wisconsin's high court has observed when it "chooses" to invoke its supervisory authority is not reducible to an exact formula but rather "is a matter of judicial policy."[21]

Courts invoke their supervisory power in a variety of contexts. For instance, it is often used as a way for supreme courts to intervene in lower court proceedings, like grants or denials of preliminary injunctions, and evidentiary or discovery rulings, before the lower court has reached a final judgment.[22] The power also governs judicial workload and operations, thus courts will invoke it to consolidate common cases into an MDL-like proceeding, seal court records, resolve issues of competing jurisdiction, and so on.[23] As discussed below, these seemingly routine aspects of judicial management are not decisions on the merits, but they can nevertheless have significant consequences on case outcomes.

Courts have also relied on their supervisory power for more substantive decisions. Consider recent actions from the New Jersey Supreme Court. In the 1990s, through its constitutional rulemaking power, the court promulgated a rule that prohibited county courts from accepting plea bargains in DWI cases.[24] In December 2023, the legislature unanimously passed, and the governor promptly signed, legislation that seeks to override the thirty-year old court rule.[25] The new statute provides that "[n]otwithstanding any judicial directive to the contrary, . . . a plea agreement under this section is authorized" for violations of the DWI statute.[26]

In February 2024, three days before the new legislation went into effect, the head of the judiciary's administrative office, at the supreme court's instruction, circulated a three-sentence memorandum to the state's chief trial judges. The memo instructed the chief judges to "remind" the judges in their districts that the new statute did *not* apply, and so the court's ban on plea bargains was still in place.[27] In other words, the court effectively invalidated the statute, as it does from time to time on the merits docket. But, here, the court did not review any briefs or hear arguments—indeed, there was no underlying case. Instead, the court invalidated the statute through a purely administrative process pursuant to its supervisory power over the court system. The supreme court did ultimately issue an order rescinding both its guidance and the court rule banning plea bargains, but the order frames the withdrawal as a voluntary choice and suggests

20 Foster v. Hill, 275 S.W.3d 151, 155 (Ark. 2008).
21 Koschkee v. Evers, 913 N.W.2d 878, 883 (Wis. 2018).
22 *See, e.g.*, Weems v. Appellate Court, 992 N.E.2d 1228 (Ill. 2012); Montana State Univ.-Bozeman v. Montana First Jud. Dist. Ct., 426 P.3d 541 (Mont. 2018).
23 *See, e.g.*, *In re* Bennett, 871 S.E.2d 445, 446 (Va. 2022) (court records); Edwards v. Nelson, 275 S.W.3d 158 (2008) (settling overlapping jurisdiction between trial courts); Commonwealth v. Campana, 304 A.2d 432 (consolidating criminal trials), *vacated and remanded on other grounds*, Pa. v. Campana, 414 U.S. 808 (1973).
24 *See* N.J. Ct. R. 7:4-8 ("No plea agreements whatsoever will be allowed in driving while under the influence of liquor or drug offenses.").
25 P.L. 2023, c. 191, §§ 2, 9, https://www.njcourts.gov/sites/default/files/notices/2024/02/n240226a.pdf.
26 *Id.* § 2(a)(3).
27 Mem. from Hon. Glenn A. Grant, J.A.D., Acting Admin. Dir. of the Cts. to Assignment Judges & Presiding Mun. Judges (Feb. 16, 2024), https://drive.google.com/file/d/16EGOqvrp9JD-z_3sz6KdAd_bc5WKhLua/view?usp=sharing.

the court retains the power under its supervisory authority to take similar action in the future.[28]

Beyond the supervisory power, supreme courts have access to various procedures to control the judiciary's workload, like determining when a case is heard, the path it takes to the supreme court, and so on.

Fast tracks, for instance, are orders that compress the timeline of the ordinary appellate process. When a case is fast tracked, filing deadlines and briefing schedules are abbreviated, it might proceed without oral argument, and in some states, courts must issue decisions within a matter of days. These seemingly mundane aspects of judicial administration often shape the timing around a court's decision, which can meaningfully influence its final outcome.

The North Carolina Supreme Court's recent use of the shadow docket is illustrative. In late July and early September 2022, the court split 4-3 in favor of fast tracking two high-profile election cases, with the three Republican justices dissenting from both orders, arguing that neither case met the relevant standard.[29] Because of the expedited timeline, the court was able to decide the cases in mid-December, before its partisan makeup changed in January 2023. Both cases were decided along partisan lines, with the four Democratic justices in the majority and three Republicans dissenting.[30] But the decisions did not last. In an unprecedented decision, perhaps responding to the then-majority's seemingly strategic use of fast tracks,[31] the now five-justice Republican majority granted motions to rehear both cases on its first day in office.[32] Upon rehearing, the court split along party lines and ultimately overruled both of the earlier decisions.

In addition to fast tracks, state supreme courts can and do dictate the path a case takes to the supreme court—specifically, whether the appeal bypasses intermediate appellate courts. In six states, appeals come first to the supreme court, which then decides whether to resolve the case itself or assign it to a lower appellate court for resolution

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28 *See* Order, *In re* N.J. Rules of Court, Part VII, Guideline 4 (Feb. 26, 2024), https://www.njcourts.gov/sites/default/files/notices/2024/02/n240226a.pdf

29 *See, e.g.*, Holmes v. Moore, 876 S.E.2d 903, 904 (N.C. 2022) (Newby, C.J., dissenting); Harper v. Hall, 874 S.E.2d 902, 904-06 (N.C. 2022) (Barringer, J., dissenting).

30 Both cases were decided on December 16, 2022. Holmes v. Moore, 881 S.E.2d 486, *reh'g granted*, 882 S.E.2d 552, *and opinion withdrawn and superseded on reh'g*, 886 S.E.2d 120 (2023); Harper v. Hall, 881 S.E.2d 156, *reh'g granted*, 882 S.E.2d 548, *and opinion withdrawn and superseded on reh'g*, 886 S.E.2d 393 (2023).

31 *See, e.g.*, *Harper*, 874 S.E.2d at 904-05 (Barringer, J., dissenting) (arguing that the majority's decision granting the motion to expedite "cannot be explained by reason, practice, or precedent" but instead is seemingly based on "partisan biases"); Harper v. Hall, 886 S.E.2d 393, 445 (N.C. 2023) ("A petition for rehearing is particularly appropriate here because the four-justice majority in *Harper I* expedited the consideration of this matter over the strong dissent of the other three justices on this Court."); *Holmes*, 874 S.E.2d at 145 (Morgan, J., dissenting) (intimating the court granted reconsideration in *Holmes* for similar reasons).

32 *See* Holmes v. Moore, 882 S.E.2d 552 (N.C. 2023) (order granting rehearing); Harper v. Hall, 882 S.E.2d 548 (N.C. 2023) (same); Robyn Sanders, *North Carolina Supreme Court Upholds Voter ID Law 5 Months After Striking It Down*, State Ct. Report (May 8, 2023), https://statecourtreport.org/our-work/analysis-opinion/north-carolina-supreme-court-upholds-voter-id-law-5-months-after-striking ("On a single day, the court granted as many rehearings as it had in the past 20 years.").

first.[33] In the other states with intermediate appellate courts, most appeals reach the supreme court only after review by a lower appellate court. But in these states, supreme courts still have procedures that allow cases to bypass intermediate appellate courts and come straight to the high court's docket.[34] Both decisions—whether to retain a case in the first instance or bypass a lower appellate court—can influence a case's outcome as well as the stakes of the broader political environment.

To account for a specific justice's expected vote, for instance, courts may retain a case before the justice faces reelection or mandatory retirement. Similarly, when there is a vacancy on a supreme court, justices may assign a case to the intermediate appellate court to help ensure the appeal only reaches the high court when they are certain the requisite votes are present for a certain outcome. These case-assignment decisions may also leverage timing issues. A case assigned to a lower court might be moot by the time it arrives at the supreme court, whereas retaining a case minimizes the risk it might disappear from the supreme court's reach. Beyond individual cases, assignment decisions can interact with external factors to significantly affect a state's broader political environment. For example, a court could assign or retain a case asking whether the state constitution protects abortion rights, influencing the speed at which it ultimately resolves the issue—a decision that could galvanize voter turnout and thus affect close-in-time elections.[35] Similarly, supreme courts might assign controversial cases to lower courts, hoping the issue is resolved outside the courts or the spotlight on the issue dims, as in a recent Michigan case asking whether a former president was disqualified from the state's primary.[36]

In most states, decisions to assign, retain, or expedite cases are governed by highly discretionary standards, like ensuring it would "be in the public interest" or "prevent manifest injustice to a party."[37] In some states, these decisions are not subject to *any* standard, and are thus purely a product of the court's discretion.[38] Additionally, many of these decisions are made on the court's own motion—meaning no party asked the court to move the case or deviate from the ordinary appellate process—and come without any formal opinion or explanation for the court's actions.[39]

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33 Those states are Idaho, Iowa, Mississippi, Nevada, Oklahoma, and North Dakota.

34 These procedures have a variety of names—e.g., direct certification, bypass, certiorari before judgment, etc.—but they all provide a way for cases to go directly from a trial court to the supreme court. This is different from a supreme court's original jurisdiction, which allows for parties to file cases first with the supreme court, skipping the trial court. Original jurisdiction is outside the scope of this paper, but for a comprehensive analysis of original jurisdiction in state supreme courts, see Zachary D. Clopton, Power and Politics in Original Jurisdiction, 91 Univ. Chi. L. Rev. 83 (2024).

35 *See, e.g.*, Ashley Kirzinger *et. al*, How The Supreme Court's Dobbs Decision Played In 2022 Midterm Election: KFF/AP VoteCast Analysis, Kaiser Family Found. (Nov 11, 2022), https://www.kff.org/other/poll-finding/2022-midtermelection-kff-ap-votecast-analysis/ (suggesting pro-choice voters may have helped Democratic candidates prevail "especially in places where the contests were decided by marginal shifts in turnout").

36 *See* LaBrant v. Sec'y of State, 997 N.W.2d 707 (Mich. 2023) (denying plaintiffs' motion to bypass the court of appeals "because the Court is not persuaded that the questions presented should be reviewed by this Court before consideration by the Court of Appeals").

37 *See, e.g.*, N.C. R. App. P. 2; Ill. S. Ct. R. 311(b); Nev. R. App. P. 2; Wash. R. App. P. 18.12.

38 *See* Sopko, *supra* note 3 (manuscript at 38) (collecting sources).

39 *See, e.g.*, Georgia v. Meadows, No. 2022-MO-010 (S.C. Nov. 29, 2022); Harper v. Hall, 874 S.E.2d 902

B. Publication Decisions

Beyond these managerial powers over litigation, some supreme courts have access to various powers that can shape the law's development outside of litigation. One example is opinion publication procedures. Whether an opinion is published or unpublished determines its precedential weight—i.e., whether the court's decision binds courts in future cases or is simply good for one ride only.

In many states, as with the U.S. Supreme Court, all merits opinions are published and thus precedential, but for some state supreme courts, publication is not part of the ordinary merits process. Instead, the court decides whether or not that decision should be precedential only after it grants review of a case, receives full briefing, hears oral argument, and writes an opinion. In other words, the case proceeds on the merits docket—but the publication decision proceeds on the shadow docket.

Moreover, some state supreme courts have the power to dictate the precedential status of *lower court* opinions. In these states, this authority takes place outside of the ordinary appellate process. Supreme courts simply change the opinion's precedential status via conclusory or unwritten court order—or no order at all—without formally granting review of the lower court's decision.[40]

For example, the California Supreme Court has the ability to *depublish* court of appeals decisions it feels are "wrong in some significant way, such that it would mislead the bench and bar if it remained citable as precedent."[41] It can exercise this power sua sponte or on a motion of any person, whether a party to the appeal or not.[42] The relevant court rules do not impose any substantive standards to guide the court's discretion; the court does not issue an explanation for why an opinion was depublished; and there is no time limit on when an opinion qualifies for depublication.[43] As prior studies have shown, this power can be used as part of the court's agenda-setting capacity to structure the ideological direction of state law.[44] Following a change in the partisan majority on the North Carolina Supreme Court in January 2023, a majority of the justices reportedly intend to adopt a comparable procedure.[45]

In contrast to depublication is *super-publication*, where a supreme court confers supreme

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(N.C. 2022); People v. Webb, 10 N.E.3d 188 (N.Y. 2014); *see also* Memorandum from Hon. Glenn A. Grant, J.A.D., *supra* note 29; Sopko, *supra* note 3 (manuscript at 25).

40 This administrative—versus adjudicative or adversarial—feature of the power distinguishes it from seemingly analogous procedures in some states or the U.S. Supreme Court's *Munsingwear* practice. *See, e.g.*, Lisa A. Tucker & Michael Risch, Canceling Appellate Precedent, 76 Fla. L. Rev. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4393097.

41 Joseph R. Grodin, The Depublication Practice of the California Supreme Court, 72 Calif. L. Rev. 514, 514 (1984).

42 *See* Cal. R. Ct. 978(a), 979(d).

43 *See* Gerald F. Uelmen, Publication and Depublication of California Court of Appeal Opinions: Is the Eraser Mightier Than the Pencil?, 26 Loy. L.A. L. Rev. 1007, 1011 (1993) (noting "the court has been known to depublish opinions as late as fifteen months after publication").

44 *See, e.g.*, *id.* at 1017-20; J. Clark Kelso, A Report on the California Appellate System, 45 Hastings L.J. 433, 493 (1994).

45 *See* Sopko, *supra* note 3 (manuscript at 29) (collecting sources).

court-authority on a lower court's opinion outside the standard appellate process. Currently, the Texas Supreme Court's "refusal" procedure is the only formal process along these lines. That procedure allows the court to review appellate court decisions, without full briefing or oral argument. If it determines the lower court's opinion "is correct," rather than grant the petition and affirm on the merits, the supreme court can "refuse" the petition, which confers on the "court of appeals' opinion in the case . . . the same precedential value as an opinion of the Supreme Court."[46] Thus, a decision made outside the traditional merits process elevates an opinion that would otherwise only apply in a given appellate district to a statewide rule.[47] The court hears no argument and does not write an opinion explaining why it is "refusing" the appeal.[48]

C. Potent "Temporary" and Summary Orders

Like the U.S. Supreme Court, state supreme courts also issue temporary and summary relief via their shadow dockets. Temporary relief, such as injunctions and stays, affects the status quo by, for example, deciding whether a challenged law will take effect. Summary relief entails a merits ruling, often without full briefing, oral argument, and other regular aspects of the state's appellate process. In both instances, courts rarely issue full opinions, instead relying on short, conclusory orders. And while states typically reserve these kinds of extraordinary procedures for routine cases controlled by settled law, some have relied on them to resolve issues of first impression or make significant changes to state law.

For example, in Michigan, the supreme court has developed a "regular" practice of summarily ruling on the merits of a case that is pending as a petition for review.[49] Through this practice, the court has even reached the merits of a case *after denying* the application for leave to appeal.[50] These summary reversals and affirmances come via conclusory orders.[51] The upshot of this procedural maneuver is that the court resolves the merits of the case quickly, but with less briefing from the parties, often no amicus participation, and no oral argument, frequently resulting in opinions that offer little, if any, analysis to guide lower courts. The court has relied on the procedure recently to address complicated questions of state and federal constitutional criminal procedure.[52] Similarly, the New York Court of Appeals has a process for summarily resolving straightforward cases on the merits, resulting in cursory, unsigned opinions. But it, too, has recently used this process to address issues of first impression and questions dividing lower courts, at times over dissents, suggesting the legal issue is neither straightforward nor governed by settled law and thus warrants more comprehensive review.[53]

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46 Texas R. App. P. 56.1(c).

47 Andrew T. Solomon, The Texas Supreme Court's Petition System: A System in Need of Reexamination, 53 S. Tex. L. Rev. 695, 721 (2012).

48 *See id.*

49 *See, e.g.*, Long, *supra* note 1; Gary M. Maveal, Michigan Peremptory Orders: A Supreme Oddity, 58 Wayne L. Rev. 417 (2012).

50 *See, e.g.*, People v. Veach, No. 160469-71 (June 17, 2022).

51 *See, e.g.*, Holman v. Farm Bureau Gen. Ins. Co. of Mich., 990 N.W.2d 364 (Mich. 2023) (mem.); People v. Gross, 970 N.W.2d 672 (Mich. 2022) (mem.).

52 *See* Long, *supra* note 48 (collecting cases).

53 *See* Sopko, supra note 3 (manuscript at 22-23) (collecting cases).

In certain cases, a decision from a lower court may cause irreparable harm to a party before the supreme court can review the merits, necessitating some form of emergency, temporary relief from the high court, like a stay or injunction, to maintain the status quo until the underlying litigation is resolved. Often these orders are simply an entry on the case's docket consisting of a conclusory sentence or two stating that the requested relief was granted or denied. The lack of explanation has typically not been an issue for litigants, as these orders have traditionally been viewed as clerical—a way to preserve the underlying dispute so the justices can resolve it through the ordinary appellate process. However, some courts have used these temporary procedures to make lasting changes to their jurisprudence.

The Wisconsin Supreme Court, for instance, had traditionally granted stays pending appeal based on a four-factor test that balanced the interests of the parties and public with a certain level of deference to the lower court's decision. Several years ago, however, the court appeared to revise the test in a series of unpublished orders—i.e., making doctrinal changes through non-precedential, administrative orders. The changes were significant, consolidating the test into three factors, eliminating lower-court deference, and placing a thumb on the scale when weighing harms to the legislature in enjoining a duly enacted law against harms to other parties or the public.[54]

These orders granting temporary relief have traditionally been treated as non-precedential, issued purely for the case at hand. But not always. For example, the jurisprudential changes in Wisconsin discussed above suggest that a majority of the justices attach precedential weight to unpublished summary orders. Similarly, New York's lower appellate courts have cited the cursory memorandum opinions issued by the Court of Appeals as controlling precedent.[55] And the peremptory orders issued by the Michigan Supreme Court summarily resolving pending cases are sometimes treated as binding precedent as well.[56]

To be sure, the U.S. Supreme Court's shadow docket includes some of the features discussed above, like granting temporary relief and expediting cases. However, some of these shared features are significantly more common among some state courts, which rely on them with greater frequency than the U.S. Supreme Court.[57] And several features of state shadow dockets differ either in kind (e.g., assignment decisions) or degree (e.g., supervisory power) from the U.S. Supreme Court.[58] In this way, state shadow dockets are broader than the U.S. Supreme Court's, granting state courts more ways to shape and influence cases outside their traditional merits process.

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54 *See* Jeffrey A. Mandell, The Wisconsin Supreme Court Quietly Rewrote the Legal Standard Governing Stays Pending Appeal, Leaving Circuit Courts Effectively Powerless to Enjoin Unconstitutional Statutes, 2019 Wis. L. Rev. Forward 29, 36-42 (2019).

55 *See, e.g.*, People v. Johnson, 175 A.D.3d 14, 18 (N.Y. App. Div. 2019) (citing People v. Meyers, 125 N.E.3d 822 (N.Y. 2019)).

56 *See* Phillip J. DeRosier, Supreme Court Orders as Binding Precedent, DickinsonWright (Nov. 2021), https://www.dickinson-wright.com/news-alerts/derosier-mi-supreme-court-bindingprecedent (collecting cases and discussing the precedential questions peremptory orders raise).

57 *See* Sopko, supra note 3 (manuscript 39-40).

58 *See id.* (manuscript at Section II.A) (discussing the differences in greater detail).

II. State Supreme Court Transparency

General inattention to state courts and their distinctive powers is not the only reason state shadow docket decisions typically escape public awareness. It can also be almost impossible to know about them. State supreme court business proceeds largely in the shadows, due to a lack of transparency into state court dockets.

By comparison, public understanding of the U.S. Supreme Court's shadow docket is facilitated by relatively easy public access to the Court's docket. While the Court is no paragon of transparency,[59] its online docket nevertheless enables the public to determine the who, what, where, and when of its shadow docket by making all filings accessible for free through its website.[60] The public can search the Court's dockets using party names or keywords and phrases (e.g., "Joseph Biden," "28 U.S.C. 1441(b)(2)," "death penalty," etc.). This allows the public to view and download free of charge all motions, briefs from parties and amici, orders, and other documents filed with the Court. The public can readily ascertain the parties who invoke the Court's shadow docket, the arguments they make, and the relief they are seeking. And the online docket provides easy access to shadow docket orders when the Court ultimately rules.

This level of public access is largely unavailable for state supreme courts. In a majority of states, free online access is either nonexistent or significantly limited.[61] To be sure, some states have relatively open access to court documents, like Florida and Minnesota, but these states are unrepresentative.

The typical state supreme court requires case-specific information, like individualized docket numbers, exact filing dates and party names, etc., to search its docket online. And even for the sophisticated users who have that information, the documents they are able to access are often limited to certain categories, like to court orders and opinions only—i.e., no online access to briefs or motions. Indeed, approximately one-third of state supreme courts limit public access to formal requests with a clerk's office or printing from judiciary computer terminals located in courthouses.[62] In five states, online access to court documents requires users to be a member of the state bar, purchase a subscription to the judiciary's online docket system, or pay per-document for access.[63]

In short, while the U.S. Supreme Court's shadow docket is opaque, at the very least, its website affords access to both its inputs and outputs, allowing the public to piece together a fuller picture of how the Court wields its power. As discussed above, that is often impossible to do with state supreme courts.

59 *See, e.g.*, Eric J. Segall, Invisible Justices: How Our Highest Court Hides from the American People, 32 Ga. St. U. L. Rev. 787 (2016); Johanna Kalb & Alicia Bannon, Supreme Court Ethics Reform: The Need for an Ethics Code and Additional Transparency, Brennan Ctr. for Just. (Sept. 24, 2019), https://www.brennancenter.org/sites/default/files/2019-09/Report_2019_09_SCOTUS_Ethics_FINAL.pdf

60 There are certain exceptions, like with documents filed under seal. *E.g.*, Sup. Ct. R. 34.7.

61 *Id.* (manuscript at 44-45).

62 *Id.* (manuscript at 43-44).

63 *Id.* (manuscript at 46) (discussing Alabama, Delaware, Hawaii, Nebraska, and Oregon).

Conclusion: A Research Agenda for State Court Shadow Dockets

As more of the most pressing legal and policy questions find their way to state supreme courts, their shadow dockets are likely to play a significant role in how the courts resolve them. To date, state shadow dockets have received almost no attention. As a result, we lack a basic understanding of a consequential feature of state high courts. This paper takes a step forward by illuminating the distinctiveness of state shadow dockets and some of their nuances.

Looking ahead, a research agenda should begin with a fuller descriptive picture of the scope, content, and volume of shadow docket practice. But such a study will be difficult without improving state supreme court transparency. As such, any meaningful efforts to reform or improve state court shadow dockets must begin with improvements to transparency by increasing access to court documents.[64]

A dialogue built atop these findings should not presume that federal practice is the appropriate baseline or normative ideal, or that federal critiques necessarily map onto the states. Because state constitutions tend to vest state supreme courts with a broader and more flexible judicial power, it is possible that some of the practices described in this paper—when paired with improved transparency and public understanding—pose no normative problem. But for now, most state high courts operate shadow shadow dockets. Increasing scholarly and public awareness of these practices is a worthy objective for those who care about the future of state courts.

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64 In fact, increased transparency could function as a reform in itself. By some measures, the U.S. Supreme Court self-regulated its use of the shadow docket based on public scrutiny of the docket that was driven by public access to court records. *See, e.g.*, @Steve_Vladeck, Twitter (Oct. 1, 2023, 8:56 AM), https://twitter.com/steve_vladeck/status/1708465946724069830/photo/1 (observing that the Supreme Court granted eight emergency applications in October Term 2022, "the fewest grants of emergency relief since the October 2013"), https://twitter.com/steve_vladeck/status/1708465946724069830/photo/1; @StevenMazie, Twitter (Oct. 1, 2023, 10:18 AM), https://twitter.com/stevenmazie/status/1708486627171983597 (attributing the noticeable drop in shadow docket activity "to the observer effect" from Vladeck's scholarship and consistent commentary on the court's "uses and abuses" of the shadow docket). In this way, improved public access to state supreme court documents—paired with an awareness of their shadow dockets—could be a more cautious approach to reform state shadow dockets before pursuing stronger alternatives.