NORTH CAROLINA LAW REVIEW

Volume 102 | Number 6 Article 2

9-1-2024

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Recommended Citation

Adam B. Sopko, *Invisible Adjudication in State Supreme Courts*, 102 N.C. L. REV. 1449 (2024).
Available at: https://scholarship.law.unc.edu/nclr/vol102/iss6/2

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INVISIBLE ADJUDICATION IN STATE SUPREME COURTS*

ADAM B. SOPKO**

As the U.S. Supreme Court continues retrenching important constitutional rights, interest is shifting to state courts and constitutions to serve as a backstop. More and more, state supreme courts are at the center of some of our most important debates of law and policy, resolving questions concerning bodily autonomy, democracy, the environment, and more. The increased attention on state supreme courts highlights the complexity and nuance that attend these institutions and reveals our limited understanding of how they operate and influence society. This Article examines one such aspect of state supreme court practice: the shadow docket. While the U.S. Supreme Court's shadow docket has garnered a significant amount of scholarly attention and public engagement, state shadow dockets are virtually absent from scholarly literature and public debate.

This Article finds state shadow dockets are both broader and less transparent than their federal counterpart. Due to structural differences between state and federal courts, state supreme courts have access to a larger universe of procedural and administrative devices that empower them in subtle but significant ways. Beyond the more expansive universe of shadow docket tools, state supreme courts are substantially less transparent than the U.S. Supreme Court. Unlike the Supreme Court's docket, where the public can easily access the inputs on and outputs from its shadow docket, most state supreme court dockets lack meaningful public access. In other words, compared to the U.S. Supreme Court, state high courts have access to more power and are subject to less scrutiny. This Article refers to this broader, less transparent form of shadow docket activity as "invisible adjudication."

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** Staff Attorney, State Democracy Research Initiative at University of Wisconsin Law School. Thanks to Michael Buenger, Zach Clopton, Billy Corriher, Ethan Kisch, Miriam Seifter, Bob Williams, and Rob Yablon for helpful feedback. This Article also benefitted from the thoughtful engagement of the participants in the *Case Western Reserve Law Review*'s symposium on judicial transparency and ethics. Thanks also to Sarah Cannon for superb research assistance, as well as the editors of the *North Carolina Law Review*, especially Connor P. Fraley. I served as a law clerk to Chief Justice Stuart J. Rabner of the New Jersey Supreme Court during September Term 2021. Any discussion of the Court's business in this Article represents my own views and is based on publicly available materials only.

The Article's analysis of invisible adjudication offers both institutional and theoretical insights. At the institutional level, the analysis offers a new perspective on the ways state supreme courts can influence case outcomes and advance their institutional interests vis-à-vis coordinate branches. Invisible adjudication can also raise political costs that supreme courts must grapple with. On a theoretical level, invisible adjudication sheds light on the nature of the state judicial power. The Article then reflects on the practice's doctrinal and methodological implications for fundamental questions concerning the role of state supreme courts and the power they wield.

INTRODUCTION

The past two years have seen two of the highest profile state supreme court races in history. In 2022 and 2023, partisan control was up for grabs on the high courts of North Carolina and Wisconsin. As scholars and commentators observed, at stake was the future of abortion rights, democracy, and more, both within the states and perhaps beyond.[1]

Elections in both states resulted in a change to the status quo. Republican justices took control of North Carolina's supreme court and Democratically affiliated justices regained a majority in Wisconsin. Despite the many differences between these new majorities, once in office, both took a similar tack. Among their first acts were changes to the managerial side of their courts' business. Specifically, both sought to centralize more power and control over the administrative aspects of their courts' work, like scheduling oral arguments and revising court rules.[2]

In Wisconsin, the new four-justice majority voted to transfer various tasks previously assigned to the (Republican-affiliated) chief justice, like oversight of key court staff, control of the court's calendar, and review of original petitions and extraordinary writs, to a three-justice administrative committee, consisting of the chief justice and two associate justices selected by a majority vote of the

1. *See* Dustin Brown, *The "Biggest" Election of 2023: What to Know About the Upcoming Wisconsin Supreme Court Election*, STATE DEMOCRACY RSCH. INITIATIVE (Feb. 13, 2023), https://statedemocracy.law.wisc.edu/featured/2023/the-biggest-election-of-2023-what-to-know-about-the-upcoming-wisconsin-supreme-court-election/ [https://perma.cc/LZH5-C39F]; Billy Corriher, *The Biggest Judicial Races in the Country Are in North Carolina. Democrats Are Losing*, SLATE (Oct. 13, 2022), https://slate.com/news-and-politics/2022/10/north-carolina-supreme-court-races-republican-majority.html [https://perma.cc/JJ6E-XWWZ]; Donna King, *Big Spenders: NC Supreme Court Races Get Some of the Biggest Ad Buys in the Nation*, CAROLINA J. (Nov. 4, 2022), https://www.carolinajournal.com/big-spenders-nc-supreme-court-races-get-some-of-the-biggest-ad-buys-in-the-nation/ [https://perma.cc/WZ3A-QA8B]; *WisPolitics Tracks $56 Million in Spending on Wisconsin Supreme Court Race*, WISPOLITICS (July 19, 2023), https://www.wispolitics.com/2023/wispolitics-tracks-56-million-in-spending-on-wisconsin-supreme-court-race/ [https://perma.cc/BZQ6-UZ5H].

2. *See* Jack Kelly & Matthew DeFour, *Wisconsin Supreme Court Emails Detail Chaotic First Week of Liberal Control*, WIS. WATCH (Aug. 29, 2023), https://wisconsinwatch.org/2023/08/wisconsin-supreme-court-emails-detail-chaotic-first-week-of-liberal-control/ [https://perma.cc/5DZ8-M9HY]; Virginia Bridges, *Is the NC Supreme Court Considering Weakening the Court of Appeals? What We Know*, NEWS & OBSERVER (Feb. 5, 2023, 3:28 PM), https://www.newsobserver.com/news/politics-government/article271725567.html#storylink=cpy [https://perma.cc/7ZV3-AFDT (dark archive)].

court.[3] In other words, the new majority increased its control over decisions about which cases the court hears and when it hears them.

In North Carolina, the five-member Republican majority worked with the Republican-controlled legislature to enhance the supreme court's power over the state judiciary.[4] Lawmakers agreed, eliminating appeals of right whenever a judge dissents in a case from the Republican-controlled intermediate appellate court.[5] The legislature also created special judgeships, filled by legislative appointment rather than by election, designed to hear constitutional challenges in three-judge panels selected by the chief justice.[6] The court has also reportedly begun the process of issuing a rule that would grant the supreme court the power to determine whether a court of appeals decision should remain precedential.[7] Thus, without hearing an appeal from the lower court, the new majority could decide whether a decision below applies beyond the parties themselves.

These changes to seemingly unremarkable aspects of court business were deeply contested. Justices in the minority of both courts issued impassioned dissents. In Wisconsin, for example, Justice Rebecca Bradley tweeted a condemnation of the changes as a "breach [of] universal judicial norms" and an "unprecedented and illegitimate" "abuse of power."[8] Chief Justice Ziegler published an op-ed that described the administrative changes as "the raw exercise of overreaching power" and "shameful."[9] In North Carolina, Justice Anita Earls noted during a public judicial panel and in a committee meeting with the state bar association that the Republican majority was attempting to

3. *See* Kelly & DeFour, *supra* note 2; Jack Kelly, *Wisconsin Supreme Court Changes Procedures Again to Speed Up Cases*, WIS. WATCH (Mar. 1, 2024), https://wisconsinwatch.org/2024/03/wisconsin-supreme-court-justices-operating-procedures/ [https://perma.cc/5L2A-YYZB]; *Changes to Internal Operating Procedures*, WIS. WATCH (Mar. 1, 2024), https://wisconsinwatch.org/wp-content/uploads/2024/03/IOP_changes.pdf [https://perma.cc/Z8FN-UEVJ] (highlighting changes to internal operating procedures as published by Wisconsin Watch); *Statement of Supreme Court Justice Rebecca Dallet Regarding Transparency and Accountability Measures*, WIS. CT. SYS. (Aug. 4, 2023), https://www.wicourts.gov/news/view.jsp?id=1579 [https://perma.cc/PZ5A-ERTG] (discussing the amendments to the court's internal operating procedures).

4. *See, e.g.*, Will Doran, *Leaked Document Shows Big Changes Could Be Underway at GOP-Majority NC Supreme Court*, WRAL NEWS (Feb. 14, 2023, 11:44 AM), https://www.wral.com/story/leaked-document-shows-big-changes-could-be-underway-at-gop-majority-nc-supreme-court/20716857/ [https://perma.cc/4ES7-K48R]; Bridges, *supra* note 2.

5. *See* Shea Denning, *2023 Appropriations Act Enacts Significant Court-Related Changes*, N.C. CRIM. L. (Sept. 27, 2023), https://nccriminallaw.sog.unc.edu/2023-appropriations-act-enacts-significant-court-related-changes/ [https://perma.cc/M47E-UZ9V]; Appropriations Act of 2023, ch. 134, sec. 16.21(d), § 7A-30(2), 2023 N.C. Sess. Laws 1, 425 (repealed).

6. Denning, *supra* note 5.

7. Doran, *supra* note 4; Bridges, *supra* note 2.

8. *See* Justice Rebecca Bradley (@JudgeBradleyWI), X (Aug 1, 2023, 10:42 AM), https://x.com/JudgeBradleyWI/status/1686386830294515712 [https://perma.cc/5VKA-G285].

9. Annette Kingsland Ziegler, Opinion, *Firing of State Courts Director Unwarranted*, CAP TIMES (Aug. 3, 2023), https://captimes.com/opinion/guest-columns/opinion-firing-of-state-courts-director-unwarranted/article_db230a72-247e-53e9-ae5f-63348c0e0832.html [https://perma.cc/89WS-RM3K].

make their rules changes in secret, outside the ordinary amendment process, and, if successful, the changes would "fundamentally alter[]" the supreme court's influence over the judiciary.[10]

The disputes did not arise out of particular cases where a majority overruled precedent or struck down a statute—acts that typically generate that level of disagreement. Instead, the flashpoint was over the level of control these new majorities have over the workaday aspects of court business. The contention arises because the justices of both courts recognize that seemingly prosaic aspects of supreme court business can empower them in subtle but significant ways. Many of the rules and procedures associated with the administrative side of supreme court business are discretionary in nature. And, as we shall see, these managerial procedures can nonetheless meaningfully influence case outcomes and shape the court's overarching jurisprudence.

The power and discretion inherent in these administrative decisions are perhaps best illustrated by the U.S. Supreme Court's shadow docket. "Shadow docket" is a term first used by appellate litigator Pamela Baron to describe the list of petitions for review pending before the Texas Supreme Court for more than a year.[11] Professors William Baude and Steven Vladeck later applied the term to the decisions the U.S. Supreme Court makes outside of its merits docket.[12] Each year, the Court selects roughly sixty cases for review in which parties file substantial briefing, amici participate, and the Court hears oral argument and ultimately issues a lengthy written opinion. These sixty or so

10. *See* Doran, *supra* note 4; *Special Episode: Carolina Forward Judicial Forum*, CAROLINA DEMOCRACY, at 11:05 (Mar. 20, 2023), https://www.carolinademocracy.com/1844103/12454255-special-episode-carolina-forward-judicial-forum [https://perma.cc/4Y8F-ETB3 (staff-uploaded archive)] (special episode featuring a forum with Associate Justice Anita Earls and Associate Justice Sam Ervin IV).

11. *See Provocative Subtitle*, DIVIDED ARGUMENT, at 01:40 (May 16, 2023), https://www.dividedargument.com/episodes/provocative-subtitle [https://perma.cc/WHR3-NCWL] (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"); Laurence H. Tribe, *Constrain the Court—Without Crippling It*, N.Y. REV. BOOKS (Aug. 17, 2023), https://www.nybooks.com/articles/2023/08/17/constrain-the-court-without-crippling-it-laurence-h-tribe/ [https://perma.cc/PF9H-F2UD] (noting that Baude "borrow[ed]" the term "from a Texas appellate lawyer, Pamela Baron"); *see also* Pamela Stanton Baron, *Texas Supreme Court Docket Analysis: What You and Your Client Need to Know*, *in* TXCLE ADVANCED CIV. APP. PRAC. Part III, Westlaw (database updated 2016) (discussing a study of the Texas Supreme Court's shadow docket); Brief for Tenet Healthcare Corporation as Amici Curiae at 3 n.3, Marks v. St. Luke's Episcopal Hosp., 319 S.W.3d 658 (Tex. 2010) (No. 07-0784) (noting an issue is currently pending on the Texas Supreme Court's "shadow docket").

12. *See, e.g.*, William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–5 (2015); STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC, at xi–xv (2023) [hereinafter VLADECK, THE SHADOW DOCKET].

cases constitute the Court's merits docket.[13] Its shadow docket consists of everything else—the thousands of orders and miscellaneous decisions the Court issues outside its merits opinions. The shadow docket has traditionally been used to dispose of routine aspects of the Court's business, like scheduling and other mundane administrative issues. As a result, these decisions generally involve minimal party briefing, no oral argument, and are resolved through terse orders that lack meaningful explanations. It is this relative lack of transparency that generated the "shadow" metaphor.

Despite its seemingly unremarkable purpose, the Supreme Court's shadow docket has garnered a great deal of attention over the past several years. This is largely because the Court is increasingly issuing both more decisions and more significant decisions on its shadow docket.[14] For example, the Court has used the shadow docket to issue substantive decisions in cases concerning COVID-19 regulations, voting rights, and abortion, among others.[15] Other decisions have seemingly generated a change in tests governing certain preliminary remedies, and others have evinced a reimagining of constitutional doctrines.[16] All of these decisions have come in short, conclusory orders, following minimal participation of the parties and no oral argument. As Vladeck has shown, the Court has relied on this administrative device that was designed primarily for ministerial, case management decisions to make binding jurisprudential changes that have a substantial impact on society.[17]

As the recent disputes in North Carolina and Wisconsin suggest, all state supreme courts have their own shadow dockets too. However, the broader phenomenon captured by the shadow docket—largely discretionary

13. *See* Harry Isaiah Black & Alicia Bannon, *The Supreme Court 'Shadow Docket'*, BRENNAN CTR. FOR JUST. (July 19, 2022), https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket [https://perma.cc/RC55-7HGX].

14. *See, e.g.*, Paul LeBlanc, *Here's What the 'Shadow Docket' Is and How the Supreme Court Uses It*, CNN (Apr. 7, 2022), https://www.cnn.com/2022/04/07/politics/shadow-docket-supreme-court/index.html [https://perma.cc/LHU4-XEM5] ("[W]hat we've seen over the last really five years is both a qualitative and quantitative uptick in how many of these emergency orders the court is issuing and in how those orders are affecting all of us.").

15. *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65 (2020) (invalidating New York City's capacity restrictions on religious services ordered to minimize the spread of COVID-19); Merrill v. Milligan, 142 S. Ct. 879, 879–80 (2022) (mem.) (reinstating redistricting maps two prior courts ruled violated the Voting Rights Act); Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021) (refusing to enjoin at pre-enforcement stage Texas statute that effectively nullified existing federal constitutional protections for abortion rights).

16. *See* Steve Vladeck, *Brett Kavanaugh's Defense of the Shadow Docket Is Alarming*, SLATE (Feb. 8, 2022, 4:32 PM), https://slate.com/news-and-politics/2022/02/the-supreme-courts-shadow-docket-rulings-keep-getting-worse.html [https://perma.cc/NS45-VUX4] (discussing the apparent change to the relevant test for stays pending appeal); Stephen I. Vladeck, *The Supreme Court Is Making New Law in the Shadows*, N.Y. TIMES (Apr. 15, 2021), https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html [https://perma.cc/27W9-8YAE (staff-uploaded, dark archive)].

17. *See generally* VLADECK, THE SHADOW DOCKET, *supra* note 12 (demonstrating the U.S. Supreme Court's usage of the shadow docket to make binding jurisprudential changes).

administrative procedures empowering supreme courts to meaningfully affect case outcomes via unexplained orders—differs significantly at the state level from the U.S. Supreme Court. First, due to structural differences between state and federal courts, state supreme courts have access to a larger universe of procedural and administrative devices that empower them in significant ways.[18] In addition to the various forms of temporary and summary relief that characterize the U.S. Supreme Court's shadow docket, like stays, vacatur, and summary reversals, state courts have access to a host of additional powers that lack a reliable federal analogue. Second, beyond the more expansive universe of shadow docket tools, state supreme courts are substantially less transparent than the U.S. Supreme Court. A key feature of the Supreme Court that helped facilitate public awareness of and engagement with its shadow docket was public access to court filings. Users could track shadow docket inputs and outputs to evaluate how the Court uses the tool. But for most state supreme courts, that level of public access is almost impossible.[19] In fact, for many state supreme courts, the public cannot even view the docket, let alone access case documents like briefs, motions, and orders.[20]

In other words, unlike the U.S. Supreme Court's shadow docket, the public typically cannot tell who is invoking a state supreme court's shadow docket, what they are seeking, or how the court is responding. State supreme court shadow dockets are not just in the shadows; they are effectively invisible. This Article refers to this broader, less transparent form of shadow docket activity as *invisible adjudication*.[21]

18. *See infra* Section II.A.

19. *See infra* Section II.B.

20. State Democracy Rsch. Initiative, Fifty-State Survey of Public Access to Supreme Court Filings (unpublished manuscript) (on file with the North Carolina Law Review) [hereinafter State Democracy Rsch. Initiative, 50-State Survey (Transparency)] (survey conducted as part of the research efforts of the State Democracy Research Initiative, University of Wisconsin Law School); *see also* Nancy Watzman & Douglas Keith, *How To Use the State Case Database*, STATE CT. REP. (Mar. 1, 2024), https://statecourtreport.org/our-work/analysis-opinion/how-use-state-case-database [https://perma.cc/KR6E-SG33]; Kathrina Szymborski Wolfkot, *Kansas Online Court System Faces Long Recovery Time After Cyberattack*, STATE CT. REP. (Nov. 16, 2023), https://statecourtreport.org/our-work/analysis-opinion/kansas-online-court-system-faces-long-recovery-time-after-cyberattack [https://perma.cc/P668-AJ4R].

21. To be sure, I am not the first to study state supreme court shadow dockets; others have engaged the topic. *See* Rebecca Frank Dallet & Matt Woleske, *State Shadow Dockets*, 2022 WIS. L. REV. 1063, 1065–67; Hayley Stillwell, *Shadow Dockets Lite*, 99 DENV. L. REV. 361, 362–63 (2022); *see also* Justin R. Long, *State Courts Have Their Own Shadow Dockets*, STATE CT. REP. (Oct. 19, 2023), https://statecourtreport.org/our-work/analysis-opinion/state-courts-have-their-own-shadow-dockets [https://perma.cc/TS8N-4C95]. However, the scope of this Article is much broader than prior studies. Stillwell exclusively examines the Oklahoma Supreme Court, whereas this Article explores state supreme courts nationwide. *See* Stillwell, *supra*, at 379–90, 397–400. This Article also differs in methodology from Dallet and Woleske. Their article is focused on a single state supreme court (Wisconsin) and adopts a federal lens for its study. *See* Dallet & Woleske, *supra*, at 1077–83. In contrast,

To the extent the impacts of the U.S. Supreme Court's use of its shadow docket are concerning, we should be doubly worried about invisible adjudication. State courts are the real engines of the American legal system. They preside over the vast majority of disputes in this country, providing the final word on some of our most important questions of rights and policy.[22] Despite their outsized role, state courts receive a fraction of the attention federal courts attract. And relevant to this study, invisible adjudication has thus far received almost zero attention. This Article aims to correct that asymmetry.

This Article proceeds in four parts. Part I sketches the scholarly context for invisible adjudication. It highlights the predominant themes in the state courts literature and connects them to this study. Part II traces invisible adjudication's two features. It first unpacks the extensive universe of managerial and procedural devices that significantly enhance the power of state supreme courts to influence cases outside the merits process. It then highlights the limited transparency of state supreme court dockets which largely obscures these decisions from public view.

Part III draws on the preceding descriptive work to offer an institutional analysis that highlights the opportunities and costs associated with invisible adjudication. The analysis shows how invisible adjudication empowers courts to advance their institutional interests vis-à-vis coordinate branches, as well as the risks it presents to their legitimacy. Part IV draws on the preceding parts to discuss the theoretical implications of invisible adjudication on our understanding of the state judicial power and highlights additional considerations for future study.

I. THE STATE COURT ECOSYSTEM

State courts scholars have long recognized that state courts differ in many important ways from their federal counterparts. As Bob Williams has noted, state supreme courts "are not simply 'little' versions" of the U.S. Supreme

this Article examines state supreme courts on their own terms, see *infra* Part I, and thus necessarily results in findings that build on and exceed theirs, see *infra* Section II.A. Nor is this the first article to use the term "invisible adjudication." *See* Michael Kagan, Rebecca Gill & Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO. L.J. 683, 683 (2018). However, this Article uses the term to refer to a different phenomenon. There, the authors were referring to decisions in immigration appeals—on both merits and nonmerits issues—that are not accessible on commercial legal databases like Westlaw. *See id.* at 687–90. In contrast, this Article refers to decisions by state supreme courts that are functionally inaccessible due to the level of public access to their dockets and case documents or because the court did not issue a written decision. *Cf. id.* at 700–01.

22. *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 [https://perma.cc/LV82-966P].

Court.[23] Alan Tarr and Mary Cornelia Porter have argued that, compared to the federal constitution, state constitutions are more explicit in situating judiciaries in the state's political and policymaking apparatus, necessitating that any discussion of judicial authority account for the state's larger political and legal context.[24] In a similar vein, Michael Buenger and Paul De Muniz have shown how the state judicial power is a supple, nuanced concept that is variable and contingent on a host of factors, including a state's constitutional text and doctrine, as well as its history, culture, politics, and norms.[25] In other words, state judiciaries operate within their own environments that may share certain elements with the federal judiciary, but have their own distinctive ecosystems that contain a variety of unique structural arrangements and norms.

Invisible adjudication is one such feature. To be sure, it has a federal counterpart—the "shadow docket"—but like other aspects of the state court ecosystem, it relies on several state-specific features that distinguish it in notable ways. Briefly stated, invisible adjudication relies on the broader set of procedural and administrative powers available to state supreme courts and is obscured by the generally less transparent nature of state supreme court dockets. In this way, even if individual instances of invisible adjudication are inspired by the U.S. Supreme Court's use of its shadow docket, the force and effects of the broader phenomenon are products of the state court ecosystem. This part briefly describes that ecosystem with a particular emphasis on its relevance to invisible adjudication.

A. *"Little" Federal Courts?*

Debates around the power of state supreme courts typically focus on their ability to interpret state constitutions to offer protections beyond those granted by the federal constitution.[26] Judicial review is no doubt an important manifestation of state court authority, but it typically overshadows other

23. *See* Robert F. Williams, *Juristocracy in the American States?*, 65 MD. L. REV. 68, 78 (2006); *cf.* Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 207–08 (1983) [hereinafter Williams, *Processes*] ("A major focus of the study of state constitutional law . . . should be on the nonadjudicatory functions of state supreme courts.").

24. *See generally* G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION (1990) (offering a theory of institutional relations between state supreme courts and other state government institutions); Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 457–71 (2010) (discussing the role of judicial elections, direct democracy, and other features unique to state government that draw a tighter nexus between courts and politics than at the federal level).

25. *See generally* MICHAEL L. BUENGER & PAUL J. DE MUNIZ, AMERICAN JUDICIAL POWER: THE STATE COURT PERSPECTIVE (2015) (offering a contextual account of the state judicial power that is sensitive to several state-specific factors, like history, culture, politics, etc.).

26. *See, e.g.*, Williams, *Processes*, *supra* note 23, at 207–08; ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 451–59 (2d ed. 2023) (summarizing the literature as focusing almost exclusively on the possibility of heightened individual rights protections).

significant aspects of their business. There are subtler ways a supreme court can meaningfully affect the reach of individual rights and state policy.[27] A greater focus on the administrative and procedural aspects of their business provides a more nuanced view of their role and broader universe of possibilities that flow from wielding judicial power.[28]

This Article builds on work by scholars who have explored the more complicated conceptions of the judicial role that is typical of state courts, and how they wield their power in ways that challenge generalized views of judging. For example, Helen Hershkoff, Hans Linde, and Michael Pollack have shown how the more flexible approach to separation of powers among the three branches has allowed states to allocate governance roles differently than at the federal level.[29] As a result, state supreme courts are often responsible for various tasks that are administrative, legislative, or executive in nature.[30]

Indeed, it is common for state supreme courts to work with legislatures to draft legislation, participate in prosecutorial decisions with the executive branch, and act as a regulatory bodies, among other functions that might seem at odds with our Article III-informed sensibilities of what courts do.[31] For example, Arkansas's supreme court appoints city tax commissioners;[32] the Idaho Supreme Court "report[s] in writing" to the governor any "defects and omissions" the justices "find to exist" "in the Constitution and laws";[33] the Indiana Supreme Court determines whether the governor "is unable to discharge the powers and duties of the office";[34] and many courts play an active role in the legislative apportionment process.[35] Based on this broader notion of

27. *See, e.g.*, Adam B. Sopko, *Catalyzing Judicial Federalism*, 109 VA. L. REV. ONLINE 144, 155–60 (2023) [hereinafter Sopko, *Catalyzing Judicial Federalism*].

28. *See, e.g.*, *infra* Part IV.

29. *See, e.g.*, Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1836–42 (2001); Michael C. Pollack, *Courts Beyond Judging*, 46 BYU L. REV. 719, 724 (2021); Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248 (1972).

30. *See, e.g.*, Pollack, *supra* note 29, at 719.

31. *See, e.g.*, Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1561 (1997); Pollack, *supra* note 29, at 747–48 (noting that in nineteen states, courts possess "the explicit law enforcement power to unilaterally dismiss prosecutions on the judge's own initiative," meaning they "are not evaluating the sufficiency of evidence, but are instead making normative judgments about whether a case ought to be pursued even if there is ample evidence of guilt—and concluding that it *ought* not be"); James P. White, *State Supreme Courts as Regulators of the Profession*, 72 NOTRE DAME L. REV. 1155, 1155 (1997) (assessing the role of state supreme courts in the development of legal education). From a normative perspective, scholars have reached differing conclusions concerning the more robust formulation of judging we see among state supreme courts. *Compare, e.g.*, Pollack, *supra* note 29, at 724 (offering a more critical view), *with, e.g.*, Hershkoff, *supra* note 29, at 1841–42 (offering a more sanguine view).

32. ARK. CONST. amend. 18.

33. IDAHO CONST. art. V, § 25.

34. IND. CONST. art. V, § 10(d).

35. *See, e.g.*, N.J. CONST. art. II, § 2; OR. CONST. art. IV, § 6(d).

the judicial role, Buenger and De Muniz have argued, "[n]o federal court can claim such broad and extensive authority."[36]

Consistent with the more flexible conception of judging at the state level, state supreme courts are vested with several sources of power that enable them to fulfill these varied responsibilities. Some powers, like the authority to regulate the practice of law, lack federal analogues; whereas others do have a federal analogue, but are much broader at the state level, like the rulemaking power.[37] Indeed, compared to the U.S. Supreme Court, state supreme courts' authority to promulgate rules is generally broader, more centralized, and more durable.[38] This muscular form of rulemaking power vests state supreme courts with near plenary authority to shape law and policy. For example, in recent years, state courts have invoked this power to expand the rights of the accused, minimize the effects of racial bias in the legal system, and enhance protections for indigent litigants.[39]

State supreme courts also exercise powers incidental to their roles as the apex courts in the state system, most notably their supervisory power. Courts have invoked this phrase in a variety of contexts that resist a single, crisp definition.[40] But it generally refers to supreme courts' prerogative power to control judiciary business and participate in state governance.[41] To be sure, the U.S. Supreme Court has indicated that it possesses a similar power,[42] but the scope of the power and frequency with which supreme courts invoke it is greater

36. BUENGER & DE MUNIZ, *supra* note 25, at 17–18.

37. *See, e.g.*, Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 BYU L. REV. 959, 959 (1991) ("Traditionally, state courts have been the primary source for regulating lawyers and articulating standards of legal ethics. Although federal courts have asserted inherent power to regulate the attorneys before them in the past, they have not been the dominant voice in defining the lawyer's role in our adversary system.").

38. Randall T. Shepard, *The New Role of State Supreme Courts as Engines of Court Reform*, 81 N.Y.U. L. REV. 1535, 1539–40, 1540 n.17 (2006) (comparing federal and state-court rulemaking processes); Steve Vladeck, *The Supreme Court's (Formal) Rulemaking Power*, ONE FIRST (Apr. 8, 2024), https://stevevladeck.substack.com/p/75-the-supreme-courts-formal-rulemaking [https://perma.cc/MY9T-BPZE] (noting that rulemaking in the federal judiciary is "intended to be a slow, drawn-out process").

39. *See* Sopko, *Catalyzing Judicial Federalism*, *supra* note 27, at 159 (collecting examples).

40. *Cf.* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of Federal Courts*, 84 COLUM. L. REV. 1433, 1434 (1984) (noting the lack of consensus around definitions of the U.S. Supreme Court's supervisory power).

41. *See, e.g.*, Adam B. Sopko, *The Supervisory Power of State Supreme Courts*, 98 S. CAL. L. REV. (forthcoming 2025) (manuscript at 10–12) (on file with the North Carolina Law Review) [hereinafter Sopko, *Supervisory Power*]; BUENGER & DE MUNIZ, *supra* note 25, at 165–70; *see also* FELIX F. STUMPF, INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY 31–35 (1994).

42. *See, e.g.*, Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 324–25 (2006); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 864–65 (2001).

at the state level.[43] Indeed, state supreme courts have variously invoked their supervisory power to invalidate statutes,[44] compel funding from the legislature,[45] and narrow law enforcement discretion,[46] among other actions that appear outside the ambit of the U.S. Supreme Court's authority.[47] Some scholars have argued this broader scope of judicial power follows from state courts' more expansive view of the judicial role, the unique structure of some state judiciaries, and the express provision of supervisory authority in many state constitutions.[48]

State courts scholars have also examined the relationship between judicial power and jurisdictional features of state judiciaries, like original and discretionary appellate jurisdiction and docket control, among others.[49] They have found that many of these internal aspects can serve as significant sources

43. *See* Sopko, *Supervisory Power*, *supra* note 41 (manuscript at 4); *see also* Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 361.

44. *See, e.g.*, People v. Williams, 577 N.E.2d 762, 764–65 (Ill. 1991) (invalidating statute that restricted bail pending appeal because that question falls under the supreme court's supervisory authority and resides exclusively with the judiciary); Kittles v. Rocky Mountain Recovery, Inc., 1 P.3d 1220, 1223 (Wyo. 2000) (holding statute that prescribed a certain time limit for appeals unconstitutional on similar grounds); State v. Ellis, 361 N.C. 200, 204, 639 S.E.2d 425, 428 (2007) (striking application of jurisdictional statute that seemingly limited supreme court review of certain criminal appeals as inconsistent with the court's supervisory authority).

45. *See, e.g.*, Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979, 984–85 (2004).

46. Courts typically influence law enforcement discretion by using the supervisory power to craft remedies, like exclusionary rules, as redress for certain law enforcement conduct, see, for example, People v. Vigil, 729 P.2d 360, 366–67 (Colo. 1986), or develop additional court procedures that law enforcement must follow, see, for example, Roman v. State, 570 P.2d 1235, 1243–44 (Alaska 1977). Perhaps more controversially, though, some courts have used the supervisory power to direct law enforcement policy in certain contexts. *See, e.g.*, *In re* Jerrell C.J., 2005 WI 105, ¶ 59, 699 N.W.2d 110, 123 (2005) (invoking the court's supervisory power "to require that all custodial interrogation of juveniles in future cases be electronically recorded where feasible").

47. *See, e.g.*, Sopko, *Supervisory Power*, *supra* note 41 (manuscript at 1–5) (noting that the supervisory power appears to be broader among state supreme courts); Beale, *supra* note 40, at 1448–49 (explaining that the U.S. Supreme Court has limited its use of its supervisory power to promulgating various evidentiary and procedural rules or imposing sanctions or contempt orders on prosecutors).

48. *See* Vermeule, *supra* note 43, at 411–13; WILLIAMS & FRIEDMAN, *supra* note 26, at 319–22; BUENGER & DE MUNIZ, *supra* note 25, at 45–95; Barrett, *supra* note 42, at 387 (suggesting "that the detailed scheme of supervisory rulemaking prescribed by the Rules Enabling Act extinguishes the Court's ability to act outside that process"); Pushaw, *supra* note 42, at 866 (arguing that broader conceptions of the court's supervisory power are "both unlawful and unnecessary").

49. *See, e.g.*, Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source*, 89 B.U. L. Rev. 1451, 1454 (2009); Paul Brace & Melinda Gann Hall, "*Haves" Versus "Have Nots" in State Supreme Courts: Allocating Docket Space and Wins in Power Asymmetric Cases*, 35 LAW & SOC'Y REV. 393, 393 (2001); Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209, 210–11 (1990).

of power for supreme courts.[50] Of course, these features are not necessarily unique to state supreme courts; the U.S. Supreme Court has several analogues. However, prior studies have shown there can be a meaningful difference between how the U.S. Supreme Court and their state counterparts utilize common jurisdictional elements. For example, Zachary Clopton has explored original jurisdiction in state supreme courts and shown how, unlike the U.S. Supreme Court, where it is of "little practical significance," state-level original jurisdiction can serve as a meaningful source of power for courts to influence case outcomes.[51] Other scholars have explored the ways that docket control, opinion assignment procedures, and other similar features can expand or minimize their agenda-setting capacity as well as their ability to influence case outcomes.[52] Thus, while these features may be present in both the state and federal judiciaries, the ways they enhance judicial power vary significantly.

Though the U.S. Supreme Court and state supreme courts share several features, the ways in which these elements function may differ meaningfully between the two. Additionally, the wider range of responsibilities assigned to state supreme courts often resists the more rigid conception of "judging" typically associated with federal courts. Indeed, as Hershkoff has noted, state supreme court practice "departs considerably from the theory and practice" of the U.S. Supreme Court.[53] Thus, a comprehensive evaluation of state courts may rely on federal comparators, but ultimately the power and function of state supreme courts must be taken on their own terms, even when looking at features shared by both.

B. *State Courts and Judicial Power*

As discussed above, state supreme courts exercise a multitude of subtle, but significant powers that lack meaningful federal parallels and generally embody a more flexible conception of judging, which together support a broader notion of judicial authority relative to the U.S. Supreme Court's. Additionally, scholars have long observed that the state judicial power is contextual—its sources and limitations are products of a state's constitutional, political, and cultural systems.[54] This view of judicial power explains much state-to-state

50. *See, e.g.*, Eisenberg & Miller, *supra* note 49, at 1454; Zachary D. Clopton, *Power and Politics in Original Jurisdiction*, 91 U. CHI. L. REV. 83, 83 (2024).

51. Clopton, *supra* note 50, at 83.

52. *See, e.g.*, Eisenberg & Miller, *supra* note 49, at 1462–63; Brace & Hall, *supra* note 49, at 393; Hall, *supra* note 49, at 209.

53. *See* Hershkoff, *supra* note 29, at 1875.

54. *See, e.g.*, BUENGER & DE MUNIZ, *supra* note 25, at 32; TARR & PORTER, *supra* note 24, at 48; HARRY P. STUMPF & JOHN H. CULVER, THE POLITICS OF STATE COURTS 6–8 (1992).

variation—intrastate differences often turn on distinctions between states' legal and political ecosystems.[55]

Specifically, state supreme courts' identities, and the scope and nature of their power, often differ based on various constitutional and political features, like a state constitution's text, structure, and age; the way a state's judiciary is designed; a state's political environment; and a state's cultural norms and traditions. Seemingly subtle differences in the text and structure of a state's constitution can inform how broadly a supreme court interprets its powers. Consider the rulemaking authority. In some states, like New York, Texas, and Vermont, the state constitution vests the power primarily with the legislature.[56] In these states, the supreme court's ability to make rules is often construed more narrowly and is generally subject to legislative override.[57] In others, like New Jersey and Wyoming, courts have adopted a robust conception of their rulemaking power because the authority is clearly vested by the state constitution or the court has broadly construed a more ambiguous provision.[58]

The structure of a state's judiciary similarly informs state supreme court identity and power. In the first part of the twentieth century, several states amended their constitutions to "unify" their court systems.[59] States consolidated scattered lower courts into single tiers of trial and appellate courts, all under a final court of review; shifted rulemaking and administrative authority from the legislative branches to the judiciary; and vested these powers in a supreme court (often in the chief justice).[60] Robert Kagan, Bliss Cartwright, Lawrence Friedman, and Stanton Wheeler have shown these "architectur[al]" changes shifted supreme courts' perceived roles from those of adjudicators of private

55. *See, e.g.*, STUMPF & CULVER, *supra* note 54, at 6–8 (exploring the interaction between various aspects of a state's political system in the context of state court power); BUENGER & DE MUNIZ, *supra* note 25, at 32–44 (sketching contextual theory of state supreme court power).

56. N.Y. CONST. art. 6, § 30; TEX. CONST. art. 5, § 31(c); VT. CONST. ch. II, § 37.

57. *See, e.g.*, Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1, 176–77 (1996) (discussing the New York Court of Appeals' more narrow view of its rulemaking power); Alan Nichols, *Gatekeeping the Gatekeeper: Judicial Rulemaking Authority in Several States*, 48 U. TOL. L. REV. 585, 603 (2017).

58. *See* Winberry v. Salisbury, 74 A.2d 406, 408 (N.J. 1950); Bruce D. Greenberg, *New Jersey's "Fairness and Rightness" Doctrine*, 15 RUTGERS L.J. 927, 929 (1984) (discussing examples of the New Jersey Supreme Court's broad reading of its rulemaking power); WYO. CONST. art. V, § 2; White v. Fisher, 689 P.2d 102, 106 (Wyo. 1984) (holding the constitutional grant of superintending control allows the court to prescribe rules of practice and procedure); Petersen v. State, 594 P.2d 978, 982 (Wyo. 1979) (recognizing an inherent power to create procedural rules).

59. My reference to unified court systems is to describe the historical phenomenon. I recognize that the definition of what constitutes a unified judiciary is contested in the literature. *See, e.g.*, William Raftery, *Unification and "Bragency" A Century of Court Organization and Reorganization*, 96 JUDICATURE 337, 337 (2013). I take no position in that debate here.

60. *See id.*

disputes to policymaking bodies.[61] Others have similarly concluded that in states that have updated or modernized their constitution's judiciary articles, supreme courts generally construe their power more broadly, operate more independently of the other branches and from majority political factions, and adopt a more active conception of the judicial role.[62]

For decades, courts scholars, particularly political scientists, have noted the linkage between a state's politics and culture and state supreme court identity.[63] This literature has shown how elements of a state's political environment, like judicial selection methods,[64] the level of partisanship and party alignment in state government,[65] the influence of interest groups (the state bar, trade associations, etc.),[66] the scope and frequency of court reform,[67] the availability of direct democracy,[68] and other variables, influence a court's authority. While the exact effect is nuanced and varies from state to state, Harry Stumpf and John Culver perhaps said it best when referring to state supreme courts as "creatures" of their political environments.[69] As organs of state governance, their institutional identities are shaped and molded by what Alexander Aikman has described as the "tug-and-pull" of state politics.[70]

This political dynamic also includes more subtle features, like norms and traditions. In many states, these unwritten conventions can similarly influence a court's composition and authority.[71] Though there has been comparatively

61. *See* Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Business of State Supreme Courts, 1870–1970*, 30 STAN. L. REV. 121, 132 (1977) [hereinafter Kagan et al., *Business*]; Project, *The Effect of Court Structure on State Supreme Court Opinions: A Re-Examination*, 33 STAN. L. REV. 951, 952 (1981).

62. *See, e.g.*, TARR & PORTER, *supra* note 24, at 237–73 (discussing findings of a multi-state study examining the effect of modern courts amendments on supreme court identity); BUENGER & DE MUNIZ, *supra* note 25, at 37–40; *see also* Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 997–98 (1978) [hereinafter Kagan et al., *The Evolution*]; Kagan, et al., *Business*, *supra* note 61, at 152–55.

63. *See, e.g.*, Paul Brace, Melinda Gann Hall & Laura Langer, *Placing State Supreme Courts in State Politics*, 1 STATE POL. & POL'Y Q. 81, 81–92 (2001) (synthesizing the literature).

64. *See generally, e.g.*, CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES (1997) (offering a framework to understand how judicial selection affects judicial behavior).

65. TARR & PORTER, *supra* note 24, at 237–73 (comparing level of partisanship in New Jersey and Ohio and its influence on supreme court authority).

66. *See, e.g.*, MICHAEL S. KANG & JOANNA M. SHEPHERD, FREE TO JUDGE: THE POWER OF CAMPAIGN MONEY IN JUDICIAL ELECTIONS 1–18 (2023).

67. *See, e.g.*, STUMPF & CULVER, *supra* note 54, at 32–34.

68. *See*, *e.g.*, Jonathan L. Marshfield, *The Amendment Effect*, 98 B.U. L. REV. 55, 56 (2018).

69. STUMPF & CULVER, *supra* note 54, at 9, 12.

70. ALEXANDER B. AIKMAN, THE ART AND PRACTICE OF COURT ADMINISTRATION 298 (2007).

71. *See, e.g.*, Adam Sopko, *Constitutional Norms and State Judicial Confirmations*, STATE DEMOCRACY RSCH. INITIATIVE (Jan. 19, 2023), https://statedemocracy.law.wisc.edu/featured/2023/constitutional-norms-and-state-judicial-confirmations/ [https://perma.cc/4WPW-ZPWE] [hereinafter Sopko, *Constitutional Norms*].

little scholarly engagement around the role of norms in state courts, the existing literature nevertheless reveals that a broad range of court practice is subject to local custom. From court composition to how justices vote in certain cases, important decisions that affect the business of state supreme courts are governed by various state-specific norms.[72] For example, in New Jersey, supreme court justices are appointed for an initial seven-year term and then must be renominated by the governor and granted tenure by majority vote in the senate.[73] This constitutional feature was originally designed to check runaway judges, but a state norm has modified this design as a means of ensuring judicial independence: short of criminal conduct, judges are guaranteed tenure.[74] Scholars have pointed to this aspect of the Garden State's political environment as enhancing the supreme court's power and encouraging it to issue controversial decisions some describe as "activism."[75]

To be sure, some or even all states may overlap along some of these axes. Indeed, a subject of ongoing debate in the literature is whether state constitutions and their related politics reflect state-specific values, national values, or a mishmash of overlapping interests.[76] Regardless of one's view of that question, the contingent nature of the state judicial power persists and so must be evaluated in the larger context of each state's legal and political systems.[77] As this Article shows in greater detail below, invisible adjudication relies on many of the subtle features of judicial power that are unique to state supreme courts. Thus, the exact contours of the phenomenon in a given state will be similarly contingent.

C. *State Court Transparency*

As state courts scholars have previously suggested, the study of state judiciaries is particularly difficult compared to their federal counterparts due to

72. *See, e.g.*, *id.*; David A. Skeel Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 VA. L. REV. 127, 130 (1997); Stephen J. Ware, Elections, Not so Much (Aug. 7, 2023) (unpublished manuscript) (on file with the North Carolina Law Review).

73. N.J. CONST. art. VI, § VI, ¶ 3.

74. *See* Sopko, *Constitutional Norms*, *supra* note 71.

75. *See* John B. Wefing, *The New Jersey Supreme Court 1948–1998: Fifty Years of Independence and Activism*, 29 RUTGERS L.J. 701, 702 (1998).

76. *See, e.g.*, G. Alan Tarr, *State Constitutional Politics: An Historical Perspective*, *in* CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 3–15 (G. Alan Tarr ed. 1996) (distilling the common framings of this debate); Miriam Seifter, *Unwritten State Constitutions? In Search of Constitutional Communities*, *in* AMENDING AMERICA'S UNWRITTEN CONSTITUTION 112–20 (Richard Albert, Ryan C. Williams & Yaniv Roznai eds. 2022).

77. *See, e.g.*, TARR & PORTER, *supra* note 24, at 237–73.

the limited access to court information that pervades these institutions.[78] Court outputs are often unwritten, unpublished, not digitized, require users to visit courthouses to obtain paper records, or are not kept up to date and thus are potentially not reflective of court business.[79] While the level of accessibility—or inaccessibility—encourages "methodological novelty" among scholars and encourages new lines of inquiry, limited transparency has various downstream consequences on the state's legal system.[80] In particular, it raises issues of accountability, accessibility, and quality.

Access to supreme court records is central to understanding how the highest decision maker operates in a branch of government that wields coercive, binding power.[81] Yet, beyond merits opinions, the output of most supreme courts remains functionally inaccessible to the public.[82] Thus, basic questions like whether a justice or the court is following procedural rules or abusing grants of discretion are largely unanswerable. For elected judiciaries, this presents significant democracy concerns, especially now as the stakes surrounding state supreme court elections are higher and we are seeing increased voter turnout and engagement.[83]

Limited or zero public access raises issues in states with other methods of judicial selection as well, since policymakers are often similarly in the dark.[84] But even in instances when legislators have easier access to court records, the cursory orders and unwritten decisions that typify invisible adjudication can limit their utility.[85]

The state-court transparency deficit also implicates issues of accessibility and equity. Compared to the federal judiciary, where information and records

78. *See, e.g.*, Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249, 266–67 ("Even the most basic information about state courts is generally difficult to obtain, if it exists at all, as state court data collection is diffuse and inconsistent."); Watzman & Keith, *supra* note 20; Wolfkot, *supra* note 20.

79. *See* State Democracy Rsch. Initiative, 50-State Survey (Transparency), *supra* note 20; Watzman & Keith, *supra* note 20; Wolfkot, *supra* note 20.

80. *See* Carpenter et al., *supra* note 78, at 266; Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1036 (2020) [hereinafter Weinstein-Tull, *The Structures*].

81. *See, e.g.*, David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 900 (2017); Dallet & Woleske, *supra* note 21, at 1083 ("[I]t is unacceptable for any court to make consequential decisions in a way that is practically inaccessible to the public.").

82. *See* Watzman & Keith, *supra* note 20.

83. *See, e.g.*, *Turnout in Wisconsin Supreme Court Race Breaks Record*, ASSOCIATED PRESS (Apr. 4, 2023, 11:46 PM), https://apnews.com/article/wisconsin-supreme-court-election-turnout-record-bac438d1d79e32f0bacdc7d5966adf75 [https://perma.cc/FRJ7-JWJM]; John Cole, *Crunching The Numbers: Comparing The Pa. Supreme Court Elections of 2023 and 2021*, PA. CAP.-STAR (Nov. 13, 2023, 6:00 AM), https://www.penncapital-star.com/blog/crunching-the-numbers-comparing-the-pa-supreme-court-elections-of-2023-and-2021/ [https://perma.cc/W62H-YPSD].

84. *See* Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 496–97 (2009); Weinstein-Tull, *The Structures*, *supra* note 80, at 1103.

85. *See* LoPucki, *supra* note 84, at 496–97.

"can be downloaded with a few mouse clicks," most state court docket systems are antiques.[86] In some instances, basic information like a hearing transcript—often necessary for a litigant to appeal an adverse ruling—is essentially impossible to obtain.[87] For corporate parties, or frequent or sophisticated litigants, this presents minimal challenges. But for the majority of state-court litigants, it is one of the hurdles that makes equal justice "nearly unattainable."[88]

Beyond the challenges limited transparency poses for all but the sophisticated, well-resourced litigant, it also creates tensions with the institutional values we generally attribute to courts. As Judith Resnik has argued, courts serve a vital function as democratic sites that provide a forum to test government authority, enforce individual rights, and contest political values.[89] To vindicate these values, though, we must be able to observe a court's work through explanations of their decisions that are available to the parties and public. Thus, these core institutional features depend on the "public-ness" of state courts.[90]

Yet, as courts and access-to-justice scholars have shown, state judiciaries are often typified by their overly complex procedures, lack of basic technological solutions, and general operational opacity.[91] In this way, the vital function state courts serve is in part limited by their transparency and accessibility. Indeed, a judiciary's opacity can undermine its institutional commitments to justice and equality, providing what Justin Weinstein-Tull has described as "the justice we have, not the justice we aspire to or the justice required by law."[92]

Some scholars have also suggested that limited public access raises issues of decisional quality. In the context of the federal judiciary, scholars have suggested that a lack of meaningful access to a court's work product raises the likelihood of "decisional atrophy."[93] Limited access to court decisions promotes an erosion of the court's "decisional quality" by concealing the reason behind the court's ruling and making it difficult to determine whether the court truly

86. Carpenter et al., *supra* note 78, at 266.

87. Weinstein-Tull, *The Structures*, *supra* note 80, at 1072–73.

88. Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 744 (2015); Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 COLUM. L. REV. 1183, 1184 (2022).

89. Judith Resnik, *Reinventing Courts as Democratic Institutions*, 143 DAEDALUS 9, 22 (2014).

90. Carpenter et al., *supra* note 78, at 266.

91. *See, e.g.*, Weinstein-Tull, *The Structures*, *supra* note 80, at 1058–63.

92. *Id.* at 1036.

93. Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 537 (2020); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 283 (1996).

grappled with the parties' arguments.[94] State judiciaries are particularly at risk of atrophy, as most decisions are resolved via unwritten or unpublished orders from trial courts.[95] The transparency deficit among state judiciaries thus makes much of their work product functionally invisible. As a result, for many state judiciaries, a meaningful evaluation of the quality of their output is not possible.[96] This raises concerns of quality as well as potential manipulation by judges, litigants, or both.

This Article offers additional insights into the limits of state court transparency and its effects. Its descriptive discussion of public access to state supreme court dockets contributes to our understanding of state-level transparency.[97] This Article focuses on state supreme courts, but builds on existing work that has studied the level of public participation in state and local courts.[98] As explained in greater detail below, due in part to the general opacity of many supreme courts, and the stigma associated with the U.S. Supreme Court's shadow docket, invisible adjudication raises legitimacy and reputational issues that state supreme courts may need to grapple with going forward as they are increasingly asked to resolve high-salience issues concerning abortion, democracy, climate, and others.[99]

II. UNPACKING INVISIBLE ADJUDICATION

This Article's core descriptive claim is that state supreme court shadow dockets are broader and less transparent than the U.S. Supreme Court, which I refer to as invisible adjudication. State-level shadow dockets are broader because 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 substantially more limited. This part unfolds in two sections, tracking both attributes of invisible adjudication.

A. *Empowering State Supreme Courts*

As discussed above in Part I, the differences in judicial role, structure, and authority between the U.S. Supreme Court and state supreme courts results in a variety of mechanisms that uniquely empower state supreme courts. This section highlights this broader universe of tools. It explores several examples

94. *See, e.g.*, Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101, 1133 n.147 (2021) [hereinafter McAlister, *Missing Decisions*]; Weinstein-Tull, *The Structures*, *supra* note 80, at 1096, 1104–05; Richman & Reynolds, *supra* note 93, at 283.

95. *See* Carpenter et al., *supra* note 78, at 267.

96. *See* Weinstein-Tull, *The Structures*, *supra* note 80, at 1070–72.

97. *See infra* Section II.B.

98. *See, e.g.*, Justin Weinstein-Tull, *Traffic Courts*, 112 CALIF. L. REV. (forthcoming 2024) (manuscript at 5 n.10) (on file with the North Carolina Law Review) (collecting sources).

99. *See infra* Section III.B.

that demonstrate how these seemingly innocuous aspects of supreme court business can significantly affect case outcomes. By no means exhaustive, these examples are illustrative of the wider range of powers state supreme courts can employ to influence case outcomes beyond the merits or traditional appellate process.

1. 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, like an injunction, affects the status quo by, for example, deciding whether a challenged law will take effect. Summary relief entails a ruling on the merits, often without the regular aspects of the state's appellate process, like full briefing and oral argument. In both instances, state supreme courts typically rely on short, conclusory orders. And while states generally reserve these kinds of procedures for routine cases where the law is settled, some have relied on them to answer novel questions or to make significant changes to state law.

a. Summary Relief

As with the U.S. Supreme Court, state supreme courts issue summary relief—decisions reversing or affirming a decision on the merits that typically lack full procedure like full briefing and oral argument. While there is some state-by-state variation as to summary practices, the result is the same—a court abbreviates some of its typical procedure to issue a merits decision with minimal reasoning or no explanation at all.[100]

In states like Delaware and Montana, where the supreme court is the only appellate court in the state, summary relief is routine.[101] But reliance on summary relief is not limited to states that lack intermediate appellate courts. For example, in Michigan, which has an intermediate appellate court, the supreme court has developed a "regular" practice of summary dispositions.[102] The court relies on peremptory orders, a unique feature of state procedure, to

100. *Compare, e.g.*, Constr. Indus. Laborers Pension Fund v. Bingle, No. 411, 2022, 2023 WL 3513271, at *1 (Del. May 17, 2023), *with, e.g.*, Halford v. Sloan, No. CV-20-0133-AP/EL, 2020 WL 9174906, at *1 (Ariz. May 12, 2020).

101. *See, e.g.*, ADMIN. OFF. OF THE CTS., 2022 STATISTICAL INFORMATION FOR THE DELAWARE SUPREME COURT, https://courts.delaware.gov/aoc/annualreports/fy22/doc/Supreme%20Disposition%20Breakdown%20By%20Type%20And%20Method.pdf [https://perma.cc/57L3-4MF2]; Noah P. Hill & Shelby Towe, *The Montana Supreme Court – The Statistics*, 82 MONT. L. REV. 479, 489 (2021). There are six other states where the supreme court serves as the sole appellate court: Maine, New Hampshire, Rhode Island, South Dakota, Vermont, and Wyoming. *See States Without Intermediate Appellate Courts*, BALLOTPEDIA, https://ballotpedia.org/Intermediate_appellate_courts [https://perma.cc/8JQF-AJJF].

102. *See* Long, *supra* note 21. *See generally* Gary M. Maveal, *Michigan Peremptory Orders: A Supreme Oddity*, 58 WAYNE L. REV. 417 (2012) (discussing the history of peremptory orders).

summarily resolve the merits without granting formal review of an appeal[103]—in fact the court has even reached the merits of a case *after denying* the application for leave to appeal.[104]

Summary orders are typically short, containing minimal analysis or reasoning. For example, in 2022, the South Carolina Supreme Court affirmed a lower court's order requiring Mark Meadows, former Chief of Staff to President Trump, to "appear and testify" before a grand jury empaneled in Fulton County, Georgia, to investigate alleged attempts to disrupt Georgia's administration of the November 2020 elections.[105] The entirety of the court's analysis in its one-page per curiam opinion was this: "We have reviewed the arguments raised by Appellant and find them to be manifestly without merit. Accordingly, we affirm the order of the circuit court."[106]

The lack of a meaningful explanation has traditionally not presented an issue, as courts usually reserve summary relief for routine cases or issues squarely controlled by settled authorities.[107] But some courts have expanded the instances where such relief is appropriate to include novel and unsettled questions. The New York Court of Appeals, for instance, typically writes short opinions, consisting of a few sentences of analysis when it issues summary relief.[108] This procedure is said to be limited to easy cases, where the law is settled and the issues are capable of straightforward resolution.[109] But that is not always so.[110] In the past few years the court has summarily decided cases where the legal issue was a matter of first impression,[111] the appellate court had

103. *See, e.g.*, Holman v. Farm Bureau Gen. Ins. Co., 990 N.W.2d 364, 367 (Mich. 2023) (mem.) (Viviano, J., dissenting); People v. Gross, 970 N.W.2d 672, 673 (Mich. 2022) (mem.); Brown v. City of Sault Ste. Marie, 910 N.W.2d 300, 300 (Mich. 2018) (mem.).

104. *See, e.g.*, People v. Veach, 974 N.W.2d 837, 837 (Mich. 2022).

105. Georgia v. Meadows, No. 2022-001604, 2022 WL 17335653, *1 (S.C. Nov. 29, 2022) (mem.) (citation omitted).

106. *Id.*; *see also* Rieman v. Rieman, 985 N.W.2d 828, 828–29 (Mich. 2023) (reversing a lower court over two dissents and providing two sentences of analysis).

107. *See, e.g.*, MONT. SUP. CT. INTERNAL OPERATING PROCS. R. § 1(3)(c)(i); N.Y. CT. R. 500.11 (b); MICH. CT. R. 7.305; *see also* Maveal, *supra* note 102, at 456–64 (discussing other states).

108. *See, e.g.*, People v. Timko, 175 N.E.3d 472, 472 (N.Y. 2021) (reversing the appellate court and dismissing the criminal complaint as "legally insufficient"); People v. Webb, 10 N.E.3d 188, 188–89 (N.Y. 2014) (summarily affirming reversal of conviction based on insufficiency of evidence).

109. *See* Vincent Bonventre, *NYCOA: (Part 2: Unsigned 4-3) [Back to] June 14 Hand Downs*, N.Y. CT. WATCHER (Sept. 6, 2018), http://www.newyorkcourtwatcher.com/2018/09/nycoa-part-2-unsigned-4-3-back-to-june.html [https://perma.cc/4ZK7-EM3T] (noting the "company line" offered "by former and current members of the Court . . . is that these unsigned writings are used in cases where the issues are already well-settled or readily resolved or otherwise insignificant").

110. *See, e.g.*, Sam Mellins, *A New Conservative Majority on New York's Top Court Is Upending State Law*, N.Y. FOCUS (July 7, 2022), https://www.nysfocus.com/2022/07/07/court-of-appeals-conservative-bloc/ [https://perma.cc/XE4H-YFTZ] (discussing the court's increased use of summary decisions).

111. *See, e.g.*, People v. Rodriguez, 123 N.E.3d 255, 256 (N.Y. 2019); Spence v. Dep't of Agric. & Markets, 111 N.E.3d 307, 307 (N.Y. 2018).

reversed factual findings,[112] and in cases that drew dissents from other members of court, which suggests the legal issue was not settled.[113]

Courts have generally not attached precedential status to these orders.[114] But not always. In some states, the precedential status of these decisions is less clear. In New York, lower appellate courts have cited summary opinions from the Court of Appeals as controlling precedent.[115] And in Michigan, ambiguity similarly surrounds the supreme court's peremptory orders, which include anywhere from one or two sentences to several paragraphs of analysis.[116] The level of detail the supreme court provides matters, though, because it has said these orders are binding precedent when they include "a concise statement of the applicable facts and the reason for the decision."[117] However, lower courts have interpreted this standard differently, creating complications for the Court of Appeals.[118]

b. Preliminary Relief

An erroneous decision from a lower court may do irreparable harm before it can be fully reviewed by a supreme court, requiring litigants to seek some form of preliminary relief. Relief typically comes in the form of stays, injunctions, vacatur and other similar remedies, and is largely intended to maintain the status quo until the underlying litigation is resolved.

But like decisions governing summary relief, some courts have relied on orders issuing preliminary relief to make significant doctrinal changes. 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

112. *In re* Kotsones, 181 N.E.3d 547, 547 (2022).

113. *See, e.g.*, People v. Dukes, 177 N.E.3d 985, 985 (N.Y. 2021) (Rivera and Wilson, JJ., dissenting) (noting dissent based on dissenting memorandum in Appellate Division); *In re* Irelynn S., 185 N.E.3d 504, 504 (N.Y. 2022); People v. Dawson, 190 N.E.3d 1151, 1152 (N.Y. 2022).

114. BRYAN A. GARNER, CARLOS BEA, REBECCA WHITE BERCH, NEIL M. GORSUCH, HARRIS L. HARTZ, NATHAN L. HECHT, BRETT M. KAVANAUGH, ALEX KOZINSKI, SANDRA L. LYNCH, WILLIAM H. PRYOR JR., THOMAS M. REAVLEY, JEFFREY S. SUTTON & DIANE P. WOOD, THE LAW OF JUDICIAL PRECEDENT 214–19 (2016).

115. *See, e.g.*, People v. Meyers, 125 N.E.3d 822, 823–24 (N.Y. 2019).

116. *See, e.g.*, People v. Cramer, 986 N.W.2d 597, 597–98 (Mich. 2023) (reversing the Court of Appeals and providing a single-sentence explanation); People v. Clark, 986 N.W.2d 602, 602–03 (Mich. 2023) (providing discussion of relevant legal authority but no discussion of underlying facts); People v. Jaber, 986 N.W.2d 601, 601–02 (Mich. 2023) (reversing the decision below, vacating the defendant's sentence, and providing legal and factual guidance for remand).

117. People v. Crall, 510 N.W.2d 182, 182 n.8 (Mich. 1993) (mem.) (criticizing the lower appellate court for describing a prior peremptory order as "not binding precedent").

118. *See* Phillip J. DeRosier, *Supreme Court Orders as Binding Precedent*, DICKINSON WRIGHT (Nov. 2021), https://www.dickinson-wright.com/news-alerts/derosier-mi-supreme-court-binding-precedent [https://perma.cc/2NEM-89TD] (collecting cases and discussing the precedential questions peremptory orders raise).

years ago, however, the court appeared to revise the test in a series of unpublished orders—i.e., making doctrinal changes through nonprecedential, 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.[119]

In other states, supreme courts have made doctrinal changes through the ordinary appellate process, but these changes have had significant effects on the availability of preliminary relief. The Texas Supreme Court's mandamus docket is illustrative. Mandamus is typically issued by the supreme court to "correct clear errors in exceptional cases and afford appropriate guidance to the law" when the ordinary appellate process would be inappropriate.[120] Mandamus enables the supreme court to intervene in a lower court proceeding before it is final.[121] In Texas, petitions to the supreme court seeking mandamus generally follow the same procedure as petitions seeking review of a lower court's decision—two rounds of briefing, oral argument, and a written decision explaining why the writ is granted or denied.[122] Of particular relevance to invisible adjudication, petitioners can also move for emergency or temporary relief—like a stay pending appeal—from the order or action they are attempting to mandamus. When the court grants temporary relief, it typically issues no more than a brief entry on its orders list noting that a "stay [was] issued" in the relevant appeal.[123]

Analysis of these emergency orders suggests they may be affecting changes to the court's underlying mandamus doctrine. First, the court's emergency mandamus docket has grown over the past five years, while its traditional merits docket has been shrinking.[124] Further, both the volume of motions seeking preliminary relief pending mandamus and the rate at which the court grants

119. *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.

120. *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 138 (Tex. 2004).

121. *See* William E. Barker, *The Only Guarantee Is There Are No Guarantees: The Texas Supreme Court's Inability to Establish a Mandamus Standard*, 44 HOUS. L. REV. 703, 704–05 (2007).

122. *See, e.g.*, Elec. Reliability Council of Tex., Inc. v. Panda Power Generation Infrastructure Fund, LLC, 619 S.W.3d 628, 628 (Tex. 2021).

123. *See, e.g.*, SUP. CT. OF TEX., ORDERS ON CAUSES (Apr. 5, 2024), https://www.txcourts.gov/supreme/orders-opinions/2024/april/april-5-2024/ [https://perma.cc/4DJ3-C4CY].

124. *See* OFF. OF CT. ADMIN., ANNUAL STATISTICAL REPORT: FISCAL YEAR 2021, at 40–41, https://www.txcourts.gov/media/1454127/fy-21-annual-statistical-report-final.pdf [https://perma.cc/JNZ3-DN5V] (noting a six percent decrease in petitions for review but double-digit increase in other writs, which includes petitions for emergency and temporary relief); OFF. OF CT. ADMIN., ANNUAL STATISTICAL REPORT: FISCAL YEAR 2020, at 37–38, https://www.txcourts.gov/media/1451853/fy-20-annual-statistical-report_final_mar10_2021.pdf [https://perma.cc/GWF9-5KW4] (noting a nearly ten percent decrease in filings of petitions for review).

them has been increasing.[125] At the same time, traditional appeals have decreased. A possible factor for this change is the court's apparent expansion of its mandamus jurisdiction on its merits docket.[126] Petitioners are entitled to temporary relief so long as they can show a cause of action, probable right to relief, and imminent irreparable harm.[127] Claimants typically could not satisfy the right to relief under the court's more limited conception of mandamus, but as the court has expanded that power, some commentators have suggested the availability of temporary relief has expanded as well.[128] But because both mandamus merits opinions and stay orders are conclusory, we do not know whether grants of preliminary relief are informing merits docket decisions or vice versa.

2. Decisional Authority

Supreme courts also have access to various powers that can influence judicial accountability and the law's development outside of litigation, like opinion publication procedures and anonymous opinions. 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. And by obscuring which judges are deciding which cases, anonymous opinions can minimize the effect of elections, which the majority of state supreme justices stand for in some form.[129]

125. The court's grant rate has increased over the past five years from less than twenty percent to more than thirty percent. *See Statistics & Other Data*, TEX. JUD. BRANCH, https://www.txcourts.gov/statistics/annual-statistical-reports/ [https://perma.cc/RE9Q-X8CG] (providing mandamus statistics from 2016 through 2021).

126. *See* Marialyn Barnard, Lorien Whyte & Emmanuel Garcia, *Is My Case Mandamusable?: A Guide to the Current State of Texas Mandamus Law*, 45 ST. MARY'S L.J. 143, 182 (2014). Historically, the court took a more categorial approach to mandamus. If the contested order fell into one of a handful of narrow kinds of improper acts, the court would grant relief; otherwise, the court typically preferred parties go through the traditional appellate process. But that standard has evolved to a seemingly more discretionary standard that has expanded the instances where mandamus is granted. *See* LISA BOWLIN HOBBS, THE SEVEN YEAR ITCH: PRUDENTIAL AND EXPANSION OF MANDAMUS POWERS 4–7 (2017), https://kuhnhobbs.com/wp-content/uploads/2018/07/Hobbs_Ch-1_Seven-Year-Itch.pdf [https://perma.cc/P4LH-GW63]. However, while the court has granted relief in seemingly new and novel contexts, its mandamus analysis has remained somewhat conclusory in explaining why relief was appropriate.

127. *See* Butnaru v. Ford Motor Co., 84 S.W.3d 198, 204 (Tex. 2002).

128. *See, e.g.*, Barker, *supra* note 121, at 721 (discussing the increased availability of mandamus); Richard E. Flint, *Mandamus Review of the Granting of the Motion for New Trial: Lost in the Thicket*, 45 ST. MARY'S L.J. 575, 650 (2014) ("The court . . . has crossed the red line by giving itself the authority to determine the legal or factual merits of a trial court's granting of a new trial.").

129. *See Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST. (Oct. 11, 2022), https://www.brennancenter.org/judicial-selection-map [https://perma.cc/NAW3-J93B].

a. Opinion Publication

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 its 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.

Though a court's decision to publish or not publish its opinion does not alter the merits of that particular case, publication decisions have profound implications on a supreme court's institutional role and important values in our legal system. Law development is an institutional priority for state supreme courts.[130] An overly restrictive or selective view of opinion publication can impede that goal and potentially create asymmetries in a state's jurisprudence.[131]

Publication decisions also raise fairness considerations, as judges may use publication as a bargaining tool, which can change the outcome in close cases.[132] Courts can also use publication decisions to mask certain case outcomes: unpublished opinions are often located on different pages of a court's website from precedential decisions, may not be included in online legal databases, cannot be cited, and thus enable courts to focus public attention on some cases over others.[133] Selective publication can also serve as a form of avoidance, as courts can dispose of cases without meaningfully engaging with an issue.[134]

The Supreme Court of Hawai'i's practice in the early 2000s illustrates some of these concerns. For nearly a decade, the court, which has discretionary appellate jurisdiction, decided approximately seventy-five percent of its caseload via unpublished opinions.[135] Members of the bench and bar noted the trend as deeply troubling, as it stifled development of the law, created opacity around the court's business, and was perceived by the bar as reflecting

130. *See, e.g.*, Kagan et al., *The Evolution*, *supra* note 62, at 983 (recounting that as state judiciaries grew in size and scope, "an emerging societal consensus" suggested state supreme courts "should not be passive, reactive bodies . . . but that these courts should be policy-makers"); Victor Eugene Flango, *State Supreme Court Opinions as Law Development*, 11 J. APP. PRAC. & PROCESS 105, 106 (2010) (similar).

131. *See* Frederick Schauer, *Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) About Analogy*, 3 PERSP. ON PSYCH. SCI. 454, 457 (2008).

132. Rachel Brown, Jade Ford, Sahrula Kubie, Katrin Marquez, Bennett Ostdiek & Abbe R. Gluck, *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 CORNELL L. REV. 1, 91–92 (2021).

133. *See id.* at 98.

134. *See* McAlister, *Missing Decisions*, *supra* note 94, at 573–75 (discussing publication as avoidance).

135. *See Hawaii Appellate Court Opinions and Orders 1999 to 2009*, HAWAI'I STATE JUDICIARY, https://www.courts.state.hi.us/opinions_and_orders/hawaii-appellate-court-opinions-and-orders-1999-to-2009 [https://perma.cc/7Q4Z-CJ47]; Nichole K. Shimamoto, *Justice Is Blind, But Should She Be Mute?*, HAW. BAR J., 6, 6–7 (2002).

indifference to maintaining the state's legal system.[136] The core issue for critics was not that the court could issue unpublished decisions, it was that the court lacked any formal process or guidelines to determine whether or when an opinion qualified for publication.[137]

Almost all state supreme courts have rules governing opinion publication decisions.[138] While the rules range in their scope and the amount of discretion they confer on the court, many are open ended.[139] As Hawai'i illustrates, courts can strategically employ publication decisions to manage their docket while preserving any agenda-setting goals shared by a majority of the court. The strategic use of opinion publication is a feature of invisible adjudication that is not shared by the U.S. Supreme Court, as all of its merits opinions are published.

In addition to deciding whether to publish their own opinions, some supreme courts have authority over the publication status of *lower* court opinions. For example, *depublication* enables a court to depublish lower appellate court opinions, eliminating the decision's precedential effect. The judgment in a depublished case still binds the individual parties, but the opinion no longer carries precedential weight and cannot be cited in subsequent cases.[140] This, too, lacks a ready federal analogue. While the Supreme Court's *Munsingwear* vacatur orders are perhaps close, they require the underlying appeal to proceed in an adjudicative context.[141] In contrast, depublication is an administrative decision, thus the court does not typically take jurisdiction over the case nor does it need to wait for a party to file a motion.[142] Like other invisible adjudication decisions, orders depublishing a lower court's opinion typically lack any explanation.[143]

136. *See, e.g.*, Shimamoto, *supra* note 135, at 6.

137. *See id.* ("Although most other jurisdictions have instituted guidelines to dictate when courts may properly withhold publication, Hawai'i has not.").

138. *See generally* State Democracy Rsch. Initiative, 50-State Survey (Transparency), *supra* note 20.

139. *See, e.g.*, KAN. STAT. ANN. § 60-2106 (Westlaw through laws enacted during the 2023 Reg. Sess. of the Kansas Leg. effective on June 8, 2023) (reserving for the supreme court the decision whether the opinion warrants publication); TENN. SUP. CT. R. 4 (similar); VA. CODE ANN. § 17.1-323 (LEXIS through the 2023 Reg. Sess.) (providing that opinions are reported at the supreme court's direction). One additional feature worth noting is that some rules turn on a majority vote. *See, e.g.*, AZ. SUP. CT. R. 111; OKLA. SUP. CT. R. 1.200. In these instances, intra court dynamics and majoritarian concerns may come into play, as was reportedly the case in Hawai'i. *See generally* Shimamoto, *supra* note 135 (describing the "silencing" of up to two justices by the court majority).

140. CAL. R. CT. 8.1125.

141. *See, e.g.*, Lisa A. Tucker & Michael Risch, *Canceling Appellate Precedent*, 76 FLA. L. REV. 175, 175–76 (exploring the Court's strategic use of *Munsingwear* orders).

142. *See, e.g.*, Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033, 1035, 1042–43 (1993) (noting that the court depublishes opinions "without hearing the case or giving reasons").

143. *Id.*

In California, the supreme court has construed the state constitution as providing authority to depublish courts of appeal opinions it feels are legally mistaken.[144] When the court depublishes an opinion, it is not disagreeing with the lower court's determination that the case meets the standard governing publication; rather, a majority of the justices believe the opinion is "wrong in some significant way, such that it would mislead the bench and bar if it remained citable as precedent."[145] In other words, it's a merits issue. It can exercise this power sua sponte or on a motion of any person, whether a party to the appeal or not.[146] There are no meaningful limitations on this power, as 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.[147]

In the 1980s and 1990s, the California Supreme Court depublished, on average, over one hundred opinions per year.[148] Scholars and commentators have suggested the high volume was in part a form of agenda setting by the court, as the ideological balance of its majority had shifted.[149] Following the highly-publicized failed retention elections of three Democratically-affiliated justices in the 1980s, Republican Governor Deukmejian's nominees "dramatically" shifted the court's ideological center to the right.[150] A

144. CAL. CONST. art. 6, § 14 (providing for publication of "such opinions of the Supreme Court and courts of appeals as the Supreme Court deems appropriate"); CAL. R. CT. 8.1125 (providing the procedure).

145. Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CALIF. L. REV. 514, 514–15 (1984).

146. *See* CAL. R. CT. 8.1125 (a)–(c).

147. Court rules impose a thirty-day window from publication for individuals to submit depublication motions. But there is no timeline for the court to decide those motions, nor is there a timeline for the court to move sua sponte. 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) ("[T]he court has been known to depublish opinions as late as fifteen months after publication.").

148. *See id.* at 1022 tbl.1; J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 496 (1994).

149. *See, e.g.*, Kelso, *supra* note 148, at 493 ("[F]or many years the supreme court has used its depublication power as a way of shaping the development of California law."); Uelmen, *supra* note 147, at 1017–20 ("[I]t is not surprising that the divisions of the court of appeal, dominated by a political philosophy at odds with that of the supreme court, will see more of their opinions depublished.").

150. *See* Uelmen, *supra* note 147, at 1017–18. The 1986 election was the first and only time a justice of the court has not been retained since the state implemented retention elections in 1934. *See* Bob Egelko, *How the California Supreme Court Went from Political Lightning Rod to Low-Key Happy Family*, S.F. CHRON. (Oct. 10, 2022, 10:33 AM), https://www.sfchronicle.com/politics/article/california-supreme-court-17489438.php [https://perma.cc/8NG7-R8QR (staff-uploaded, dark archive)].

consequence of the partisan change was a significant increase in depublication rates of opinions issued by more progressive courts of appeal.[151]

The California experience may provide a lens to view recently proposed rule changes in North Carolina. Following a change in the partisan majority on the Supreme Court of North Carolina in January 2023, the new Republican majority reportedly intend to adopt a depublication rule.[152] If adopted, such a rule would seemingly grant the court authority to sua sponte "order an opinion of the Court of Appeals that was designed [sic] by that [c]ourt as 'published' and therefore having precedential effect to be 'unpublished.'"[153] The exact text of the rule is not currently public, but if California's procedure is any guide, depublication in North Carolina could come via order without formal opinion or explanation and may pose challenges to consistent development of state law.[154]

In contrast to depublication is *super-publication*, where a supreme court confers supreme court authority on an intermediate appellate court's opinion. The Texas Supreme Court is the only court that has a formal process along these lines, codified in the court's "refusal" procedure.[155] Under state appellate rules, the court can take a variety of actions on a petition for review, ranging from denial to refusal.[156] When a petition to review a lower court's decision is "refused," the appellate court's opinion is branded with supreme court-level precedential weight.[157] Thus, an opinion that would otherwise only apply in a given appellate district is now binding statewide.[158] Refusal proceeds outside the standard appellate process: the supreme court reviews appellate court decisions, but accepts no briefs, hears no argument, and does not write an opinion explaining why it is "refusing" the appeal.[159] Instead, the court of

151. *See* Uelmen, *supra* note 147, at 1018 (finding "[f]ive of the six [appellate] divisions with the highest overall rate of depublication were dominated by Democratic appointees"). The practice saw a sharp decline in the 2000s, but over the past decade it has steadily increased. *See* JUD. COUNCIL OF CAL., 2022 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 2011–12 THROUGH 2020–21, at 22–23 (2022), https://www.courts.ca.gov/documents/2022-Court-Statistics-Report.pdf [https://perma.cc/Y8AZ-NKTD].

152. *See* Doran, *supra* note 4.

153. Bd. of Governors of the N.C. Bar Ass'n, 2023 Winter Board of Governors Meeting (Jan. 19, 2023), https://wwwcache.wral.com/asset/news/state/nccapitol/2023/02/13/20718987/NCBA_Jan_12_2023_Meeting_Notes-DMID1-5xwzsroi0.pdf [https://perma.cc/ZK9R-K5NZ].

154. *See* Barnett, *supra* note 142, at 1035 (noting that the court depublishes opinions "without hearing the case or giving reasons"); Stephen R. Barnett, *Depublication Deflating: The California Supreme Court's Wonderful Law-Making Machine Begins to Self-Destruct*, 45 HASTINGS L.J. 519, 525–43 (1994) (discussing the impact of depublication on law development).

155. Andrew T. Solomon, *The Texas Supreme Court's Petition System: A System in Need of Reexamination*, 53 S. TEX. L. REV. 695, 727 (2012).

156. *Id.* at 717–19.

157. *Id.* at 721.

158. *Id.*

159. *Id.*

appeals opinion remains as it was written, but is elevated to heightened precedential status, which is only noted via citation.[160]

b. Anonymous Opinions

Like the federal courts, state courts similarly rely on unsigned or per curiam decisions to resolve cases on the merits. This is often used in cases where the court unanimously disposes of a straightforward legal question based on existing authorities or when it wishes to speak as an institution.[161] But most state supreme courts lack any formal rule or guidelines that govern when a merits opinion must or should be signed.[162] And some supreme courts seem to disregard these general norms of per curiam usage. Rather, these courts rely on them in complex or controversial cases or even where the court is fractured.[163] In these cases, per curiam decisions function less as institutional statements and more as anonymous opinions.

While unsigned opinions are not inherently problematic, their selective use by courts can create transparency and accountability issues. This is especially so in states that rely on elections to select judges.[164] In Oklahoma, for instance, where justices stand for retention elections, the supreme court lacks any formal rule providing for per curiam opinions; thus, whether and when the court issues them is seemingly a matter of discretion.[165] In the past five years, it has issued over one dozen per curiam opinions.[166] Some of these cases dealt with

160. *See generally, e.g.*, Zepeda v. State, 993 S.W.2d 167 (Tex. App. 1999, pet. ref'd) (mem.); Prieto Bail Bonds v. State, 994 S.W.2d 316 (Tex. App. 1999, pet. ref'd).

161. *See, e.g.*, DEL. SUP. CT. INTERNAL OPERATING PROCS. XIII(1)(b) ("*Per curiam* opinions are generally used when the Court wishes to speak with one voice."); KY. R. APP. P. 40(A)(1) (allowing per curiam opinions when the court is unanimous); NEV. SUP. CT. INTERNAL OPERATING PROCS. 9(b) (same); *see also* Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1200 (2012) ("Traditionally, the per curiam was used to signal that a case was uncontroversial, obvious, and did not require a substantial opinion.").

162. *See generally* State Democracy Rsch. Initiative, Fifty-State Survey of Supreme Court Per Curiam Rules (on file with the North Carolina Law Review) [hereinafter State Democracy Rsch. Initiative, 50-State Survey (per curiam)] (collecting findings from fifty-state study of publicly available court rules and internal operating procedures).

163. *See, e.g.*, *infra* notes 164–70 and accompanying text.

164. Robbins, *supra* note 161, at 1221 (noting anonymous opinions "reduce[] the information available to voters on which to make their decisions"). In fact, these transparency problems are partially responsible for the West Virginia Supreme Court of Appeals' decision nearly a decade ago to abandon its use of per curiam opinions. State v. McKinley, 764 S.E.2d 303, 309 (W.V. 2014) ("[W]e conclude that the per curiam opinion is no longer necessary.").

165. *See* State Democracy Rsch. Initiative, 50-State Survey (per curiam), *supra* note 162.

166. This is based on a review of the court's recent decisions via public database, *Oklahoma Supreme Court Decisions*, JUSTIA, https://law.justia.com/cases/oklahoma/supreme-court/ [https://perma.cc/P7WV-VEXT], as the Oklahoma Supreme Court's website does not appear to archive opinions more than thirty days old, see *Supreme Court Decisions*, OKLA. SUP. CT., https://oksc.oscn.net/decisions/ [https://perma.cc/2UBV-33E7]. *See also infra* Section II.B (discussing the lack of transparency at state supreme courts).

attorney discipline, state bonds, and corporate tax liabilities—not exactly headline-grabbing issues. But the court has also recently decided more salient cases concerning marijuana legalization, abortion, and voter ID via per curiam opinions.[167]

In these higher-profile cases, the court was often fractured, with justices writing separate concurring and dissenting opinions. In March 2023, in *Oklahoma Call for Reproductive Justice v. Drummond*,[168] the court affirmed that the state constitution protects abortion access in certain circumstances.[169] The justices split 5–4 and collectively wrote seven opinions: a per curiam for five justices, two concurrences signed by three justices in the majority, and four dissents. Of the three justices in the majority who did not author a separate opinion, one is a Republican appointee who faces a retention election in 2028 and another is a Democratic appointee who faces retention in 2024.[170] Just two months after *Drummond*, the court split 6–3 in another abortion case that was also decided via a per curiam opinion.[171] We do not know whether use of per curiam opinions in these cases is a matter of course or is a strategic choice to anonymize the author. But according to some commentators, the court has developed various unwritten practices seemingly designed to minimize electoral accountability, and so perhaps strategic use of per curiams is another tool in the justices' toolkit.[172]

The New York Court of Appeals provides another example. Under former Chief Judge Janet DiFiore, the court increasingly relied on memorandum opinions—unsigned decisions consisting of two or three sentences of analysis—

167. *In re* State Question No. 807, Initiative Petition No. 423, 468 P.3d 383, 396 (Okla. 2020) (per curiam) (dismissing challenge to legal sufficiency of ballot measure that would amend constitution to legalize, regulate, and tax adult marijuana use); Okla. Call for Reprod. Just. v. Cline, 441 P.3d 1145, 1147–48 (Okla. 2019) (per curiam) (holding abortion law imposed an undue burden); Gentges v. State Election Bd., 419 P.3d 224, 225 (Okla. 2018) (per curiam) (upholding voter ID law).

168. Okla. Call for Reprod. Just. v. Drummond, 526 P.3d 1123, 1128 (Okla. 2023) (per curiam).

169. *Id.* at 1128.

170. Louis Jacobson, *The State Supreme Court Skirmishes*, CTR. FOR POL. (May 16, 2024), https://centerforpolitics.org/crystalball/the-state-supreme-court-skirmishes/ [https://perma.cc/A27G-Z4YG]; Chris Casteel, *A Look at the Four Oklahoma Supreme Court Justices on the Retention Ballot in November*, OKLAHOMAN (Oct. 7, 2022, 7:01 AM), https://www.oklahoman.com/story/news/politics/elections/state/2022/10/03/stitt-appointees-among-supreme-court-justices-on-retention-ballot/69520723007/ [https://perma.cc/GEU2-H983]; *cf.* Robbins, *supra* note 161, at 1222–23 (discussing a similar dynamic in Iowa).

171. Okla. Call for Reprod. Just. v. State, 153 P.3d 117, 122–23 (Okla. 2023) (per curiam).

172. *See* Stillwell, *supra* note 21, at 379–86 (discussing the court's practice of permitting partial dissents and concurrences without writing separately as well as a practice of declining to vote "at all" in high-salience cases—distinguished from recusal and disqualification—as a way to not participate when retention elections are close in time).

to decide its cases.[173] This change came with a historic reduction in the court's caseload.[174] Unlike the Oklahoma Supreme Court, choices by the New York Court of Appeals to decide a case by memorandum are governed by a court rule that reserves these short, anonymous opinions essentially for cases presenting pure questions of law that are controlled by settled precedent and are "not of statewide importance."[175] But as discussed, the court's recent practices suggest it is not strictly adhering to the rule, as it has issued memorandum opinions in consequential cases with disputed facts and where the law is unsettled.[176]

As with opinion publication, unsigned or per curiam opinions are not inherently problematic and, in some circumstances, may be beneficial.[177] But challenges with per curiam opinions arise when a supreme court selectively relies on them in a way that could be interpreted as a means to skirt accountability or responsibility. This is one feature of invisible adjudication that perhaps overlaps with U.S. Supreme Court shadow docket practices.[178] But the critique is particularly more acute among state supreme courts, since justices are primarily elected by the people.[179]

3. Broad Managerial Powers

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, and various actors, like lower court judges, litigants, and jurors. These managerial decisions are typically made on the shadow docket and provide courts with additional ways to subtly influence case outcomes.

a. Supervisory Power

All state supreme courts have some form of supervisory authority over their respective state judiciaries that is said to flow from the state constitution,

173. *See, e.g.*, Mellins, *supra* note 110 ("Most of the court's decisions were issued in the form of memorandums – brief explanations of the majority's view of the case, not signed by any particular judge."); Zielinski v. Venettozzi, 156 N.E.3d 274, 274–75 (N.Y. 2020); People v. Rodriguez, 123 N.E.3d 255, 256 (N.Y. 2019); *In re* Luis P., 117 N.E.3d 814, 814 (N.Y. 2018).

174. *See, e.g.*, Roy Yancey, *Appeals Court Sees Cases Dip: Chances of Getting Heard Depend on Which Judge Decides the Case*, PROQUEST (July 19, 2021), https://www.proquest.com/docview/2552808290?accountid=14244&parentSessionId=f2b9dwKRvMOGiMXOirME%2B4DSUwyOUaFNOFGbNmLt0vA%3D&sourcetype=Newspapers [https://perma.cc/VS2X-6KD4 (staff-uploaded archive)].

175. N.Y. COMP. CODES R. & REGS. tit. 22, § 500.11(a)–(b) (2024); *see also* Bonventre, *supra* note 109.

176. *See supra* text accompanying notes 107–13.

177. For example, per curiam opinions can create efficiencies when courts have particularly high caseloads, as well as show unity among the justices. Robbins, *supra* note 161, at 1200–01.

178. *Id.* at 1205–07.

179. *See id.* at 1221; Dmitry Bam, *Voter Ignorance and Judicial Elections*, 102 KY. L.J. 553, 570–75 (2013–2014).

statutes, or inherent powers.[180] While the contours of the power differ by state, each court wields their supervisory authority as a means of overseeing the proper functioning of the judiciary. It can manifest in a variety of actions, like removing particular judges for improper behavior in the midst of litigation, coordinating proceedings in a single court akin to federal multidistrict litigation, and reversing discovery rulings by trial courts.

Several states have construed this power as a broad grant of authority to take whatever actions are needed to serve the interests of justice and sound policy. In Louisiana, the supreme court has described this power as "plenary, unfettered by jurisdictional requirements, and exercisable at the complete discretion of the Court."[181] The New Jersey Supreme Court's supervisory power "is 'far-reaching' and 'encompasses the entire judicial structure [as well as] all aspects and incidents related to the justice system . . . .'"[182] Other courts take a narrower view of their supervisory power, describing it as "limited both in purpose and availability"[183] or reserving it "only to rectify errors and prevent injustice in extraordinary cases when no adequate alternative remedy exists."[184]

The standards that govern this authority are not always clear, especially among state courts that have a more expansive conception of their power. For example, the Wisconsin Supreme Court has said that how it "choose[s]" to invoke its supervisory authority is not reducible to an exact formula but rather "is a matter of judicial policy."[185] Similarly, the Arkansas Supreme Court's supervisory power is "hampered by no specific rules or means."[186] Indeed, in many states, whether the supreme court exercises this extraordinary power is left to its discretion and made on a "case-by-case" basis.[187]

When courts invoke their supervisory power, they often do not provide an explanation for why relief was granted. The Illinois Supreme Court, for instance, recently invoked its supervisory power to vacate a temporary restraining order that enjoined certain COVID-19 precautions that were

180. *See generally* Sopko, *Supervisory Power*, *supra* note 41 (offering a new synthesis of state supreme court supervisory power); STUMPF, *supra* note 41 (collecting cases and discussing state supreme court supervisory authority).

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

182. State v. Vega-Larregui, 248 A.3d 1224, 1241 (N.J. 2021) (quoting *In re* P.L. 2001, Chapter 362, 895 A.2d 1128, 1136 (N.J. 2006)).

183. People v. Voth, 2013 CO 61, ¶ 12, 312 P.3d 144, 147 (2013).

184. Manning v. Jaeger, 2021 ND 162, ¶ 26, 964 N.W.2d 522, 530 (2021).

185. Koschkee v. Evers, 2018 WI 82, ¶ 12, 913 N.W.2d 878, 883 (2018).

186. Foster v. Hill, 275 S.W.3d 151, 155 (Ark. 2008).

187. Stokes v. Mont. Thirteenth Jud. Dist. Ct., 361 Mont. 279, ¶ 5, 259 P.3d 754, 756 (Mont. 2011) (noting the supreme court issues supervisory writs to prevent "a gross injustice" and where "constitutional issues of statewide importance are involved"); Wrigley v. Romanick, 2023 ND 50, ¶¶ 5–9, 988 N.W.2d 231, 235–36 (2023) ("This Court will determine whether to exercise supervisory jurisdiction on a case-by-case basis, considering the unique circumstances of each case." (internal quotation marks omitted)).

imposed on teachers by executive order.[188] The court's unsigned order granting relief reads: "In the exercise of this Court's supervisory authority, the February 4, 2022, temporary restraining order is vacated. The matter is remanded."[189]

To be sure, most supreme courts state that such relief is rarely granted and limited to extraordinary circumstances.[190] But some courts seemingly deviate from these general limitations, granting relief more often or in contexts generally considered inappropriate for supervisory relief. Consider the Illinois Supreme Court again. It has traditionally limited supervisory relief to straightforward issues, like where a recent decision squarely resolves a case pending on the court's leave to appeal docket.[191] Recently, however, the court has seemingly expanded the scope of supervisory relief to intervene earlier in litigation, including interlocutory issues outside its direct appellate process.[192] For example, it has vacated injunctions,[193] removed a judge for alleged bias,[194] and reinstated a motion to suppress in a high-profile trial associated with the Chicago Police Department's torture scandal.[195] In these instances, the court is issuing relief via unsigned, conclusory orders without oral argument, sometimes based only on the pleadings and writ briefing.[196]

188. Austin v. Bd. of Educ., 2022 WL 602455, at *1 (Ill. Feb. 22, 2022).

189. *Id.* (citation and emphasis omitted).

190. *See, e.g.*, *In re* Aisjaha N., 275 A.3d 1181, 1191 (Conn. 2022) ("Supervisory authority is an extraordinary remedy that should be used 'sparingly . . . .'" (alteration in original)); State v. Ellis, 361 N.C. 200, 204, 639 S.E.2d 425, 428 (2007) (describing the supervisory power as "rarely used"); State v. Moniz, 742 P.2d 373, 376 (Haw. 1987) (referring to the court's "sparing use" of its supervisory authority).

191. *See, e.g.*, People *ex rel.* Birkett v. Bakalis, 752 N.E.2d 1107, 1109 (Ill. 2001) (noting the "predominate use" of the court's supervisory authority "is to address issues which are brought to our attention in the context of petitions for leave to appeal").

192. J. Timothy Eaton & Jonathan B. Amarilio, *A Fresh Look at Supervisory Orders*, 106 ILL. BAR J. 40, 40–41 (2018).

193. *Id.* at 41.

194. Order Denying Leave (Ill. 2021), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/cb70eb0d-4877-4b8a-ae3e-fafe34f57eca/Closed%20-%2005/10/21.pdf [https://perma.cc/8RDM-KUN6] (summarily vacating a trial court's order entered by Hon. Thomas J. Hennelly and ordering the matter be heard by another judge on remand).

195. *See* Megan Crepeau, *Judge Reinstates Conviction, Life Sentence*, CHI. TRIB. (May 5, 2024, 1:18 AM), https://digitaledition.chicagotribune.com/tribune/article_popover.aspx?guid=486d7b75-f799-4e39-b8f3-ab365a22a500 [https://perma.cc/B4WK-Z4GL] (describing Judge Hennelly's order as "a stunning reversal").

196. *See* Gabriel A. Fuentes, *How To Get a Supervisory Order from the Illinois Supreme Court*, CBA REC., Sept.–Oct. 2021, at 28, 30 ("The thin nature of the record in a supervisory order posture has generated concerns in the past at the Court."); Eaton & Amarilio, *supra* note 192, at 40–41 (observing that "recently, the supreme court has been willing to exercise its supervisory power outside of the traditional context of [traditional appeals]" and that "the record considered by the court in these cases consist[s] only of the attached pleadings and exhibits").

b. Transfer Decisions

In five states, appeals come to the supreme court directly from the trial court and are either assigned to the intermediate appellate court or retained and decided by the supreme court.[197] In states with a traditional hierarchical structure, supreme courts can invoke their supervisory power to route a pending appeal to their docket before it has been heard by the intermediate appellate court, similar to federal grants of certiorari before judgment.[198] Some supreme courts can do this sua sponte.[199] Often, the relevant court rule or statute that governs these transfer decisions lacks meaningful standards, leaving the decision largely to the court's discretion.[200] When supreme courts decide to retain or transfer a case, or route an appeal pending before an intermediate court—workload management decisions—they rarely provide explanations.

These managerial decisions can have significant consequences. Both decisions—whether to retain a case in the first instance or transfer cases before an intermediate appellate court rules—bear on *when* a case is decided, and a case's path to the supreme court matters.[201] Due to their largely discretionary nature, and the lack of any meaningful explanations, transfer and retention decisions create opportunities for courts to account for various nonmerits factors when making decisions that can have significant consequences.

For example, to account for a sitting justice's vote, courts may retain a case before they face 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.[202] Transfer decisions may also account for case-specific timing issues. For instance, 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 from party settlement, litigants declining to seek supreme

197. *See* Richard S. Brown, *Allocation of Cases in a Two-Tiered Appellate Structure: The Wisconsin Experience and Beyond*, 68 MARQ. L. REV. 189, 209 (1985) (referring to this design as the "deflection" model). Those states include Idaho, Iowa, Mississippi, Nevada, Oklahoma, and North Dakota. *See* State Democracy Rsch. Initiative, 50-State Survey (Transparency), *supra* note 20.

198. *See, e.g.*, N.J. CT. R. 2:12-2 (providing for direct certification to the supreme court of appeals pending unheard in the Appellate Division); MICH. CT. R. 7.311(E) (providing leave to appeal prior to decision by court of appeals); COLO. APP. R. 50(a) (same).

199. *See, e.g.*, ARIZ. R. CIV. APP. P. 19(f); COLO. APP. R. 50(b); TENN. CODE ANN. § 6-3-201(d)(3) (LEXIS through the 2023 Reg. Sess.).

200. *See, e.g.*, N.C. GEN. STAT. § 7A-31 (LEXIS through Sess. Laws 2023-111 of the 2023 Reg. Sess. of the Gen. Assemb.); WIS. SUP. CT. INTERNAL OPERATING PROCS. III; VA. CODE ANN. § 17.1-409 (LEXIS through the 2023 Reg. Sess.).

201. *See, e.g.*, Clopton, *supra* note 50, 105–14 (examining state supreme courts' use of original jurisdiction).

202. *See, e.g.*, *infra* notes 225–36 and accompanying text (discussing examples from the North Carolina and Ohio supreme courts).

court review, or other conduct outside judicial control. Beyond individual cases, transfer decisions can interact with external factors to significantly affect a state's broader political environment. For example, a court could transfer 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.[203] Similarly, courts might transfer controversial cases, hoping the issue is resolved outside the courts or the spotlight dims on the issue, as in a recent case before the Michigan Supreme Court asking whether a former president was disqualified from the state's primary ballot.[204]

Beyond questions of timing, transfer decisions can similarly impact the scope of *what* is appealed, which can shape a court's merits decision. A more direct path to the supreme court can ensure a cleaner issue is presented.[205] A lower appellate court may be less willing to waive jurisdictional or other nonmerits bases to decide the case, which could narrow the scope of the issue or otherwise undermine a merits decision when the appeal reaches the supreme court.[206] Similarly, a lower appellate court may find justiciability defects as a way to avoid reaching a particular outcome. But if a supreme court retains a case in the first instance, it can often be sure it presents pure merits considerations. As with California's depublication rule, transfer decisions may be particularly relevant in states where a majority of the supreme court justices differ ideologically from certain segments of the appellate courts.

203. *See, e.g.*, Bram Sable-Smith & Rachana Pradhan, *Protecting Abortion Rights in States Hangs in the Balance of National Election Strategies*, USA TODAY (Mar. 18, 2024, 12:58 PM), https://www.usatoday.com/story/news/nation/2024/03/18/abortion-ballot-measures-states-hinge-national-election-strategy/72996887007/ [https://perma.cc/BGP3-B6LP]; Zack Beauchamp, *The Supreme Court Lost Republicans the Midterms*, VOX (Nov. 10, 2022, 12:40 PM), https://www.vox.com/policy-and-politics/23451103/2022-midterms-results-data-analysis-abortion-dobbs-shor [https://perma.cc/V9WJ-L78A] (describing *Dobbs* as "the biggest factor" that contributed to Democrats' success in the 2022 midterms); Ashley Kirzinger, Audrey Kearney, Alex Montero, Liz Hamel & Mollyann Brodie, *How the Supreme Court's Dobbs Decision Played in 2022 Midterm Election: KFF/AP VoteCast Analysis*, KAISER FAM. FOUND. (Nov. 11, 2022), https://www.kff.org/other/poll-finding/2022-midterm-election-kff-ap-votecast-analysis/ [https://perma.cc/9GA7-VB7P] (suggesting pro-choice voters may have helped Democratic candidates prevail "especially in places where the contests were decided by marginal shifts in turnout").

204. *See, e.g.*, LaBrant v. Sec'y of State, 997 N.W.2d 707, 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."). *But see id.* (Welch, J. dissenting) (arguing the supreme court should have granted bypass and remanded the case to the trial court to develop the record, as the issue was "of monumental importance for our system of democratic governance").

205. *See, e.g.*, Clopton, *supra* note 50, at 88 (discussing a similar phenomenon in the context of state supreme courts' use of original jurisdiction).

206. *See, e.g.*, Yakutat Land Corp. v. Langer, 2020 CO 30, ¶ 2, 462 P.3d 65, 72 (2020).

c. Fast Tracks

Invisible adjudication can also arise in the related context of fast tracks. While the exact name differs by state—special actions, docket preferences, etc.—fast tracks are rules that provide an expedited appellate process. Filing deadlines and briefing schedules are abbreviated, courts may proceed without oral argument, and under some regimes, they are obligated to issue a decision within a certain timeframe. In other words, fast tracks compress a state supreme court's ordinary appellate process.

In some states, these procedures are subject-matter specific and limited to the kinds of cases where a quick resolution may make sense. For example, in Illinois and Pennsylvania, appeals concerning child custody disputes receive expedited treatment by the states' respective supreme courts.[207] Challenges to certain sentences for juvenile offenses are accelerated in Washington.[208] Wisconsin courts expedite certain antitrust actions.[209] And several states resolve juvenile abortion notification appeals via expedited timeline.[210]

But in others, fast-tracks are not subject-matter limited, are based on open-ended standards, can be activated sua sponte, or are otherwise largely within a court's discretion. In North Carolina, for instance, the supreme court can place cases on a fast track when an expedited decision would be "in the public interest" or "[t]o prevent manifest injustice to a party."[211] The Illinois Supreme Court's rule has seemingly no limitations and permits the court "on its own motion" to "place the case on an accelerated docket."[212] Fast tracks to the Nevada and Washington supreme courts are subject to similar standards.[213] And the Arizona Supreme Court has wide discretion to expedite actions seeking extraordinary relief, like mandamus or certiorari, under their special action jurisdiction.[214]

While the additional speed is no doubt necessary in certain cases, expediting appeals carries significant costs. In particular, the abbreviated timeframe can minimize the quantity and quality of inputs the court has to decide the case. When cases are fast tracked, courts often permit a single round of briefing and impose tight timelines, meaning litigants may not be able to

207. ILL. S. CT. R. 311(a); PA. R. APP. P. 102.

208. WASH. R. APP. P. 18.13; WASH. REV. CODE § 13.40.230 (2022) (providing expedited appeal under Juvenile Justice Act of 1977).

209. WIS. STAT. § 133.18(5) (2021–22).

210. *See, e.g.*, IOWA R. APP. P. 6.401; OHIO APP. R. 11.2(B); S. CT. GA. R. 65.

211. N.C. R. APP. P. 2.

212. ILL. S. CT. R. 311(b).

213. NEV. R. APP. P. 2; WASH. R. APP. P. 18.12.

214. *See* AZ. ST. SPEC. ACT. R. 3, cmt.(c) (noting that the relevant standard governing special actions is "deliberately broad so as to cover the myriad of possible situations which may arise"); *see also* Jennifer M. Perkins, *Tips for Successful Special Action Litigation*, ARIZ. ATT'Y, Apr. 2022, at 20 (describing special actions as a "lesser-known" means to "jump the appeal line").

provide the most comprehensive or highest quality presentation of the issues.[215] The short timeline also reduces the likelihood of amicus participation, and in some states the courts forego oral argument, meaning all they have to work off of is the single round of accelerated party briefing. Many of these cases are decided via short, cursory opinions—or no opinion at all.[216] In complex, high-profile cases, expediting an appeal can incentivize judges to shoot from the hip and resolve the case with minimal analysis.[217] These risks are still present when courts issue a summary order with a full opinion to follow. The additional time working through the issues between the order and opinion may result in justices changing their votes, creating additional complications.[218]

Though both the United States and state supreme courts fast track cases, the procedure is much more common among state judiciaries. Over the past three years, the U.S. Supreme Court has expedited review (consideration of petitions of certiorari as well as motions requesting expedited merits briefing schedules) in four cases.[219] During the same period, state supreme courts were

215. *See, e.g.*, Hooker v. Ill., State Bd. of Elections, 63 N.E.3d 824, 832 (Ill. 2016) (expediting appeal decided without oral argument); WASH. REV. CODE ANN. § 13.40.230 (2022) (providing "[n]o written briefs may be required").

216. *See, e.g.*, IOWA R. CIV. P. 6.401(3) ("The court's decision may be rendered by order or opinion, and may simply state that the district court's order is affirmed or reversed.").

217. *See, e.g.*, Jonathan Lai & Jeremy Roebuck, *The Pa. Supreme Court Has Issued a Second Order on Mail Ballot Dates as the Legal Fight Continues* PHILA. INQUIRER (Nov. 5, 2022, 4:20 PM), https://www.inquirer.com/politics/election/pennsylvania-undated-ballots-supreme-court-wrongly-dated-lawsuit-20221105.html [https://perma.cc/V9HC-2Y7W] (noting that in a high-profile election suit that the Pennsylvania Supreme Court heard on an expedited schedule and decided via cursory order, the court "unexpectedly issued an additional order clarifying" its reasoning just days after releasing the first order). While a headline-grabbing case may focus judicial attention better than a routine case, such high-profile issues are typically complex and usually benefit from more deliberation and reflection. *See infra* note 219 and accompanying text.

218. *See, e.g.*, *In re* Cohen, 225 A.3d 1083, 1090 (Pa. 2020). *Cohen* concerned a challenge to a candidate's qualifications to appear on a primary ballot. Due to the lawsuit's proximity to the election, the Pennsylvania Supreme Court fast-tracked the case and resolved it via summary order with a full opinion "to follow." 218 A.3d 387, 387 (Pa. 2019) (mem.). When the court issued its opinion nearly four months later, two justices wrote separately noting that they had changed their votes after thinking more about the case. *In re Cohen*, 225 A.3d at 1090 (Donohue and Todd, JJ., concurring). Though the change in votes did not alter the court's ultimate judgment in *Cohen*, it did create a fractured decision, raising complications in a subsequent case as to what *Cohen*'s precedential rule was. *See, e.g.*, *In re* Avery, 286 A.3d 1217, 1227–30 (Pa. 2023) (addressing the precedential wrinkles); *see also* Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 1943–47 (2019).

219. I searched the court's docket for the phrase "motion to expedite" for any date between January 1, 2020 and December 31, 2022, and found four grants. *See generally*, Students for Fair Admissions, Inc. v. Univ. of North Carolina, 143 S. Ct. 2141 (2023) (holding that race-based college admissions programs violate the Equal Protection Clause of the Fourteenth Amendment); Whole Woman's Health v. Jackson, 142 S. Ct. 522, 531 (2021) (prohibiting pre-enforcement challenges to statute authorizing private enforcement of abortion restriction); Trump v. New York, 141 S. Ct. 530 (2020) (dismissing challenge to Administration's census policies for lack of ripeness and standing); Bourgeois v. Barr, 141 S. Ct. 180, 180 (2020) (denying application for stay of the mandate pending the disposition

significantly more active. For example, the Alaska Supreme Court granted more than twice as many motions to expedite.[220] The Michigan Supreme Court fast tracked nearly four times as many cases as the U.S. Supreme Court.[221] And the supreme courts of Arizona[222] and Arkansas[223] expedited approximately one

of the petition for writ of certiorari and petition for writ of certiorari). I did not include cases where the court did not expressly rule on a motion or expressly indicate expedited review but nevertheless appeared to do so any way, *e.g.*, Texas v. Pennsylvania, 141 S. Ct. 1230 (2020), since the limited access to state court dockets makes an accurate comparison too difficult.

220. *See, e.g.*, Wright v. State, No. S18607 (Alaska Dec. 14, 2022) (order granting expedited review); State v. K.T., No. S18500 (Alaska Aug. 9, 2022) (order granting expedited review); State v. Corbisier, No. S18442 (Alaska June 10, 2022) (order granting expedited review); *In re* 2021 Redistricting Cases, 528 P.3d 40 (Alaska 2023) (order granting expedited review); L.B. v. State, No. S18003 (Alaska 2021) (order granting expedited review); Dunleavy v. Alaska Legis. Council, No. S18003 (Alaska 2021) (order granting expedited review); Res. Dev. Council v. Kevin Meyer, No. 17834 (Alaska 2020) (order granting expedited review).

221. Davis v. Highland Park City Clerk, 979 N.W.2d 202, 202 (Mich. 2022) (mem.); Reprod. Freedom for All v. Bd. of State Canvassers, 978 N.W.2d 854, 854 (Mich. 2022) (mem.); O'Halloran v. Sec'y of State, 981 N.W.2d 149, 149 (Mich. 2022) (mem.); House of Representatives v. Governor, 944 N.W.2d 706, 706 (Mich. 2020) (mem.); *In re* Certified Questions From U.S. Dist. Ct., W. Dist. of Michigan, S. Div., 944 N.W.2d 911, 911–12 (Mich. 2020) (mem.); League of Women Voters v. Sec'y of State, 948 N.W.2d 70, 70 (Mich. 2020) (mem.); People v. Calhoun, 952 N.W.2d 913, 913 (Mich. 2021) (mem.); Morrow v. Jud. Tenure Comm'n, 958 N.W.2d 849, 849 (Mich. 2020) (mem.); People v. Walker, 951 N.W.2d 904, 904 (Mich. 2020) (mem.); People v. Burr, 963 N.W.2d 351, 351 (Mich. 2021) (mem.); Raise the Wage MI v. Bd. of State Canvassers, 970 N.W.2d 677, 677 (Mich. 2022) (mem.); Costantino v. City of Detroit, 950 N.W.2d 707, 707 (Mich. 2020) (mem.); People v. Post, 943 N.W.2d 112, 112 (Mich. 2020) (mem.); People v. Winburn, 950 N.W.2d 748, 748 (Mich. 2020) (mem).; Great Lakes Cap. Fund for Hous. Ltd. P'ship XII v. Erwin Cos., LLC, 943 N.W.2d 109, 109 (Mich. 2020) (mem.).

222. Molera v. Hobbs, 474 P.3d 667, 672 (Ariz. 2020); Martinez v. Wood, No. CV-22-0101-AP/EL, 2022 WL 1467514, at *1 (Ariz. May 9, 2022); Mussi v. Hobbs, No. CV-22-0207-AP/EL, 2022 WL 3652456, at *1 (Ariz. Aug. 24, 2022); Ward v. Jackson, No. CV-20-0343-AP/EL, 2020 WL 8617817, at *1 (Ariz. Dec. 8, 2020); Ross v. Pearson, No. CV-22-0104-AP/EL, 2022 WL 1450021, at *1 (Ariz. May 9, 2022); Hansen v. Finchem, No. CV-22-0099-AP/EL, 2022 WL 1468157, at *1 (Ariz. May 9, 2022); Leibsohn v. Hobbs, No. CV-22-0204-AP/EL, 2022 WL 3652058, at *1 (Ariz. Aug. 24, 2022); Arizona Free Enter. Club v. Hobbs, No. CV-21-0304-AP/EL, 2022 WL 1448677, at *1 (Ariz. Apr. 21, 2022); Protect Our Arizona v. Hobbs, No. CV-22-0203-AP/EL, 2022 WL 3652458, at *1 (Ariz. Aug. 24, 2022); James v. Hobbs, No. CV-20-0226-AP/EL, 2020 WL 13912835, at *1 (Ariz. Aug. 20, 2020); Molera v. Hobbs, No. CV-20-0213-AP/EL, 2020 WL 9174901, at *1 (Ariz. Aug. 19, 2020); Leach v. Hobbs, No. CV-20-0233-AP/EL, 2020 WL 9174909, at *1 (Ariz. Aug. 20, 2020). These cases are all challenges arising out of ballot initiatives that the supreme court expedites according to statute, see ARIZ. REV. STAT. ANN. § 19-122 (Westlaw through the First Reg. Sess. of the Fifty-Sixth Leg.); however, there is no express requirement that the court hear these appeals on an expedited basis. Instead, that rule is the product of judicial gloss. *See* Benjamin Gottlieb, *Election Law: A Discussion of the Arizona Supreme Court's 2008–2009 Decisions*, 42 ARIZ. ST. L.J. 563, 567 n.46 (2010).

223. Kimbrell v. Thurston, 2020 Ark. 392, at *5–*7, 611 S.W.3d 186, 190 (2020); Ark. Wins In 2020, Inc. v. Thurston, 2020 Ark. 263, **1, 2020 WL 4381518, at *1 (2020); Thurston v. Safe Surgery Ark., 2021 Ark. 55, at **6, 619 S.W.3d 1, at *6 (2021); Miller v. Thurston, 2020 WL 4251759, at *1, 2020 Ark. 262, 262 (2020); Pruitt v. Smith, 2020 Ark. 382, *2, 610 S.W.3d 660, 662 (2020); Weeks v. Thurston, 2020 Ark. 64, at *2, 594 S.W.3d 23, 24 (2020); Blackburn v. Lonoke Cnty. Bd. of Election Comm'rs, 2022 Ark. 167, at *3, 652 S.W.3d 574, 578 (2022); Stay Strong, Status Quo v. Bradford, 2020 Ark. 331, at *2, 609 S.W.3d 367, 369 (2020); Harris v. Crawford Cnty. Bd. of Election Comm'rs,

dozen cases each. Courts do not generally provide an explanation for why individual cases qualify for an expedited decision. And, in some instances, orders to expedite have drawn dissents, with justices arguing that the particular case was ill-suited for accelerated consideration.[224]

Of course, fast tracks do not directly control case outcomes; but they can nevertheless influence results. Like transfer decisions, fast tracks control the speed at which a case appears before a court. As noted, this can affect the number of parties and amount of information in a case, but it can also influence who decides the case. Notably, fast tracks can help court majorities minimize the risk of particular case outcomes being complicated by potential changes in court composition due to elections or retirements.

Consider some recent examples. Following the November 2022 election, the partisan composition of the seven-member Supreme Court of North Carolina changed from a four-justice Democratic majority to a five-justice Republican majority.[225] Earlier that year, in late July and early September, the court split 4–3 in favor of fast tracking two high-profile election cases, with the three Republicans dissenting from both orders, arguing that neither case met the relevant standard.[226] 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 the three Republican justices dissenting. But the decisions did not last. In an unprecedented decision, perhaps responding to the then-majority's seemingly strategic use of fast tracks,[227] the

2022 Ark. 160, at *2, 651 S.W.3d 703, 705 (2022); Cherokee Nation Bus., LLC v. Gulfside Casino P'ship, 2021 Ark. 183, at *1, 632 S.W.3d 284, 285 (2021); Thurston v. League of Women Voters, 2022 Ark. 32, at *4, 639 S.W.3d 319, 321 (2022).

224. *See, e.g.*, Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs, 471 P.3d 607, 637 (Ariz. 2020) (Bolick, J., dissenting); Holmes v. Moore, 382 N.C. 690, 690, 876 S.E.2d 903, 904 (2022) (Newby, C.J., dissenting).

225. *See* Amanda Powers & Douglas Keith, *Key 2022 State Supreme Court Election Results and What They Mean*, BRENNAN CTR. FOR JUST. (Nov. 9, 2022), https://statecourtreport.org/our-work/analysis-opinion/key-2022-state-supreme-court-election-results-and-what-they-mean [https://perma.cc/T3HF-9AEH].

226. Harper v. Hall, 382 N.C. 314, 317, 874 S.E.2d 902, 904 (2022) (Barringer, J., dissenting) (order granting expedited review); Holmes v. Moore, 382 N.C. 690, 691, 876 S.E.2d 903, 904 (2022) (Newby, C.J., dissenting) (order granting expedited review). The orders in both cases were substantively identical, relying on conclusory language that tracks the relevant standard. The court granted both motions to expedite "[i]n light of the great public interest in the subject matter of this case, the importance of the issues to the constitutional jurisprudence of this State, and the need to reach a final resolution on the merits at the earliest possible opportunity." *Harper*, 382 N.C. at 316, 874 S.E.2d at 904 (majority opinion); *Holmes*, 382 N.C. at 690, 876 S.E.2d at 904 (majority opinion).

227. *See Harper*, 382 N.C. at 317, 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, 384 N.C. 292, 372, 886 S.E.2d 393, 445 (2023) ("A petition for rehearing is particularly appropriate here because the four-

now five-member Republican majority granted motions to rehear both cases on its first day in office.[228] Upon rehearing, the court split along party lines and ultimately came out the other way in both cases.[229]

We saw similar reliance on fast tracks recently in Ohio, as well. The 2022 election resulted in a reliable Republican majority on the seven-member court.[230] During the court's lame duck period, plaintiffs filed reconsideration motions in five cases the court had decided under its existing composition, presumably because they foresaw different outcomes under the incoming justices.[231] Following the ordinary appellate timeline would have seen the new majority consider the applications after taking office in January 2023.[232] Instead, the court split 4–3 in deciding sua sponte to expedite review of and deny all five motions.[233]

The court's orders each consisted of a single line declining to grant reconsideration.[234] But one justice's concurring opinion suggests the court fast tracked all five motions based on "a historied practice of accelerating internal timelines during election years based on the reasonable understanding that . . . motions for reconsideration should be decided by the same court that decided the case on the merits."[235] The justices in dissent saw things differently, arguing that what motivated the majority's decision to expedite their review was because

justice majority in *Harper I* expedited the consideration of this matter over the strong dissent of the other three justices on this Court."); Holmes v. Moore, 384 N.C. 426, 462, 886 S.E.2d 120, 145 (Morgan, J., dissenting) (intimating the court granted reconsideration in *Holmes* for similar reasons).

228. *See, e.g.*, Robyn Sanders, *North Carolina Supreme Court Upholds Voter ID Law 5 Months After Striking It Down*, STATE CT. REP. (May 8, 2023), https://statecourtreport.org/our-work/analysis-opinion/north-carolina-supreme-court-upholds-voter-id-law-5-months-after-striking [https://perma.cc/4ST5-2VWG] ("On a single day, the court granted as many rehearings as it had in the past 20 years.").

229. *See Harper*, 384 N.C. at 296–301, 886 S.E.2d at 393–401; *Holmes*, 384 N.C. at 427–28, 886 S.E.2d at 120–25.

230. *See, e.g.*, Marty Schladen, *Republicans Take All Three Ohio Supreme Court Elections*, OHIO CAP. J. (Nov. 9, 2022, 12:46 AM), https://ohiocapitaljournal.com/2022/11/09/republicans-headed-for-sweep-of-ohio-supreme-court-elections [https://perma.cc/JJ6R-Y5DJ]; Press Release, Mike DeWine, Governor, Ohio, Governor DeWine to Appoint Joseph T. Deters to Ohio Supreme Court (Dec. 22, 2022), https://governor.ohio.gov/media/appointments/governor-dewine-to-appoint-joseph-t-deters-to-ohio-supreme-court-12222022 [https://perma.cc/S7FF-X5MG].

231. *Cf.* Zachary D. Clopton & Katherine Shaw, *Public Law Litigation and Electoral Time*, 2023 WIS. L. REV. 1513, 1513–15 (introducing the concept of "temporal forum shopping").

232. *See, e.g.*, State v. Haynes, 2022-Ohio-4776, ¶¶ 4–15, 200 N.E.3d 300, 301–03 (2022) (Kennedy, Fischer & DeWine, JJ., dissenting).

233. *See* State v. Bowman, 2022-Ohio-4799, ¶¶ 1–3, 200 N.E.3d 306, 307 (2022); State v. Schubert, 2022-Ohio-4809, ¶¶ 1–3, 200 N.E.3d 296, 296 (2022); *In re* D.R., 2022-Ohio-4797, ¶¶ 1–3, 200 N.E.3d 310, 310 (2022); Ricksecker v. Thomson, 2022-Ohio-4798, ¶¶ 1–3, 200 N.E.3d 313, 314 (2022); *Haynes*, 2022 Ohio ¶¶ 1–3, 200 N.E.3d at 301.

234. *E.g.*, *Bowman*, 2022 Ohio ¶¶ 1–3, 200 N.E.3d at 307 (Donnelly, J., concurring).

235. *Id.*

a "change in the court's membership is imminent," and the majority did not want the newly composed court deciding the motions.[236]

As these brief examples illustrate, the seemingly perfunctory administrative decisions discussed in this subsection can influence, and in some instances, dictate case outcomes. To be sure, the U.S. Supreme Court's shadow docket includes some of these features, like granting temporary relief and expediting cases. However, some of these shared elements are significantly more common among some state courts, which rely on them with greater frequency than the U.S. Supreme Court. 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. In this way, state shadow dockets are broader than the U.S. Supreme Court's, granting state courts more ways to shape cases outside their traditional merits process.

B. *Institutional Opacity*

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

While the U.S. Supreme Court is by no means a paragon of transparency,[237] at the very least, the court makes most case documents readily accessible to the public on its website. Members of the public can search the court's docket by case number, party name, even by statute or constitutional provision, to find relevant cases.[238] Party and amicus briefs, petitions for certiorari, emergency motions, and the court's resulting orders can all be viewed and downloaded, free of charge, from the court's website. This level of public access helped scholars like Baude and Vladeck identify and conceptualize the court's shadow docket.[239] Scholars and journalists relied on this ease of access as well to help draw the general public's attention to the shadow docket.[240]

What would our understanding—if any—of the shadow docket be if the U.S. Supreme Court only made its orders available through a computer terminal at One First Street? Or if individuals could access all records, but only

236. *Id.* ¶ 11, 200 N.E.3d at 309 (Kennedy, Fischer & DeWine, JJ., dissenting).

237. *See, e.g.*, Eric J. Segall, *Invisible Justices: How Our Highest Court Hides from the American People*, 32 GA. STATE UNIV. L. REV. 787, 787–88 (2016).

238. *See Docket Search*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/docket/docket.aspx [https://perma.cc/92UP-QGWN].

239. *See* Baude, *supra* note 12, at 22 & n.67; VLADECK, THE SHADOW DOCKET *supra* note 12, at 22–23, 22 n.39.

240. *See, e.g.*, Nicholas D. Conway & Yana Gagloeva, *Out of the Shadows: What Social Science Tells Us About the Shadow Docket*, 23 NEV. L.J. 673, 682 (2023); Jon Allsop, *Transparency and Its Limits at the Supreme Court*, COLUM. JOURNALISM REV. (Oct. 5, 2021), https://www.cjr.org/the_media_today/transparency-and-its-limits-at-the-supreme-court.php [https://perma.cc/THY3-URXB].

if they were a member of the Supreme Court Bar? Or if the public could request records by emailing the clerk's office, but had to know the case's docket number in the Supreme Court and lower court, the names of both parties, and the title of the requested document, but the docket was not publicly accessible? In any of these worlds, it is hard to imagine we would have the nuanced understanding of the U.S. Supreme Court that we have now and certainly not as to its shadow docket. Yet each of these alternate universes is representative of transparency among nearly a third of state supreme courts.

In a majority of states (twenty-nine), online access is either unavailable or limited to specific kinds of documents (e.g., briefs only), or all documents are available but only in cases the supreme court deems sufficiently important.[241] An additional five states condition online access on bar membership or charge users per use or, in some instances, per page.[242] In approximately one-third of the states, public access is limited to formal requests with a clerk's office or printing from judiciary computer terminals located in courthouses.[243] Ten courts offer public access comparable to that of the U.S. Supreme Court.[244] Based on a review of the level of public access to each of the fifty supreme courts, they fall into three groups—open access, variable access, and limited access. Briefly, in open access states, all or nearly all documents are freely available to the public. Supreme courts with variable access offer all documents, but only in select cases, or they avail access in all cases, but only to a subset of all documents. And limited access courts offer minimal, if any, online access to the public. It is in these blind spots that invisible adjudication can thrive.

1. Open Access

In sixteen states, the public can freely access all or nearly all documents online through supreme court websites or a document portal. Ten states in particular have a level of public access similar to that of the U.S. Supreme Court, meaning all of the party filings, as well as the court's decisions, are freely available for download through the court's website or online docket.[245] For example, in Arkansas, individuals can search the supreme court's docket by

241. State Democracy Rsch. Initiative, 50-State Survey (Transparency), *supra* note 20 (AK, AZ, CA, CO, GA, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, NH, NJ, NM, ND, PA, RI, SD, TN, UT, VA, WA, WV, WI). The discussion in this section relies on the findings of a study of public access to state supreme court records conducted by the State Democracy Research Initiative in Summer 2023. The survey tested the level of public access to case "documents," which it defined as any document associated with a state supreme court case, including but not limited to briefs, pleadings, orders, motions, petitions, dispositions, court communications, and notices. The survey and methodology are on file with the author.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* The ten states are AR, CT, FL, MN, MO, MS, NV, NC, OH, and TX. *Id.*

party name and access party filings, like briefs and petitions for review, as well as court-issued documents, like orders and opinions. Florida, Minnesota, and North Carolina have comparable accessibility via state-specific document portals. A further six states offer access that's close but is subject to minor limitations.[246] For example, the New York Court of Appeals makes available online nearly all documents except motions filed with the court. Similarly, the Montana Supreme Court makes available most case documents through the court's online docket search, but excludes certain administrative documents, like notices and some orders. Vermont's supreme court offers online access to briefs and final decisions, but all other documents require users visit computer terminals in the courthouse or file formal requests with the clerk's office.

2. Variable Access

In a second group of states, the limitations on public access to supreme court documents are highly variable. Seven states offer nearly complete access to case documents, but only in cases the court has selected for review and argument or that it labels high-profile.[247] In Alaska, for example, only court orders and published opinions are generally available online, except in cases the clerk's office deems of sufficient public interest.[248] In those cases, the public can access party filings. The Arizona and Idaho supreme courts follow a similar approach.[249] In Illinois, the supreme court provides access to all documents in cases it labels high-profile, but otherwise limits access to cases accepted for review.[250] The Washington Supreme Court makes many case documents available online, but users must know the case number, caption, or argument date.[251]

An additional six states have further limitations on public access.[252] In these states, users have full online access to one or two kinds of documents (e.g., briefs and motions) but otherwise limited or no online access to others (e.g.,

246. *Id.* The six states are MT, NY, OK, SC, VT, and WY. *Id.*

247. *Id.* The seven states are AK, AZ, ID, IL, MI, WA, and WV. *Id.*

248. *Id.*

249. For example, in Arizona, users can access filings in cases the court deems "high profile," but are otherwise limited to docket sheets in all other cases. *Compare High Profile Cases*, ARIZ. JUD. BRANCH, https://www.azcourts.gov/newsandinfo/High-Profile-Case-Update [https://perma.cc/U6XH-4F6P], *with Active Case Lists*, ARIZ. APP. CT. CASES, https://apps.supremecourt.az.gov/aacc/asc/asccase.htm [https://perma.cc/UR9W-F56N].

250. State Democracy Rsch. Initiative, 50-State Survey (Transparency), *supra* note 20. Similarly, in Michigan and West Virginia, public access is limited to briefs filed in cases accepted for review. *Id.* The Michigan Supreme Court also makes its orders available online. *Id.* Other documents are only available by contacting the clerks' offices for both courts. *Id.*

251. *Supreme Court Briefs*, WASH. CTS., https://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coaBriefs.ScHome&courtId=A08 [https://perma.cc/ZM5Q-S9SG].

252. State Democracy Rsch. Initiative, 50-State Survey (Transparency), *supra* note 20. The six states are CA, IN, MA, ND, TN, and WI. *Id.*

orders, petitions for review). For example, the California Supreme Court allows the public to search its docket but only makes available the briefs filed in argued cases.[253] Wisconsin's supreme court allows the court to view its docket and access some briefs, but other filings, like motions and petitions for review, require users to contact the clerk's office.[254]

3. Limited Access

A final group includes states that offer very limited, and in some instances, essentially zero, online access to the public. Six states allow users to see entries on case dockets, but they cannot view any of the filings or related court orders online.[255] Users can view supreme court dockets in Georgia, Iowa, Louisiana, and Maryland, but must contact the clerk's office in each state to access any filings or orders.[256] The Pennsylvania and Utah supreme courts have a similar level of access, but in these states, users cannot view relevant dockets without a filing date or docket number.[257] In ten states, access to court documents is limited to records requests with the clerk's office (or a similar administrative role) or to computer terminals located in the supreme court building or other courthouses.[258] In Colorado, the court issues an orders list online following each conference, but for case filings, users must submit a formal records request that includes the case numbers for both the supreme court and lower courts, the names of both parties, and pay a processing fee.[259] The Supreme Judicial Court in Maine also charges a fee and will not process requests via email.[260] The New Hampshire Supreme Court only makes its documents available via in-person computer terminals.[261] In the remaining seven states, users must contact the clerk's office.[262]

The five remaining states do not fit neatly into the three groups above. Both Alabama and Nebraska supreme courts make nearly all documents available online, but the Alabama Supreme Court limits access to members of

253. *Briefs of Argued Cases*, SUP. CT. OF CAL., https://supreme.courts.ca.gov/case-information/briefs-argued-cases [https://perma.cc/5P49-78AV].

254. State Democracy Rsch. Initiative, 50-State Survey (Transparency), *supra* note 20.

255. *Id.* The six states are GA, IA, LA, MD, PA, and UT. *Id.*

256. *Id.*

257. *Id.* The Pennsylvania Supreme Court does post court documents in a small number of cases labeled "cases of public interest" each year. In the past few years, the page has been dedicated almost exclusively to election cases, like redistricting, challenges to the vote-by-mail statute, and questions concerning the Secretary of State's authority over voting machines. *See Cases of Public Interest*, UNIFIED JUD. SYS. OF PA., https://www.pacourts.us/news-and-statistics/cases-of-public-interest [https://perma.cc/FX3X-X8Y9].

258. State Democracy Rsch. Initiative, 50-State Survey (Transparency), *supra* note 20. The ten states are CO, KS, KY, ME, NH, NJ, NM, RI, SD, and VA. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

the state bar and Nebraska's online docket requires a paid subscription.[263] And the supreme courts of Delaware, Hawai'i, and Oregon make some documents available but require that users pay to view individual documents.[264] Thus, while these courts afford users relatively open online access, they impose significant hurdles that, in practice, make access quite limited.

Taken together, the state court experience varies. To be sure, some states offer a relatively commendable level of online access to the public. But these states are outliers. The typical state supreme court enables the public to view a case docket, but only if users have a docket number, filing date, or other specific information, and otherwise prohibits online access to case filings and orders. As we will see in the next part, this lack of transparency may present legitimacy concerns for supreme courts in a world that is more aware of the shadow docket.[265]

III. EVALUATING INVISIBLE ADJUDICATION

Invisible adjudication refers to the broader, less transparent version of the shadow docket we see in state supreme courts. It captures the broad range of tools available to these courts to meaningfully influence case outcomes outside merits determinations—and sometimes the adjudicative context entirely.[266] These decisions largely escape the public eye, primarily due to the opacity that surrounds most state supreme courts' operations.[267] While we can see how invisible adjudication might affect individual cases in specific courts, its broader institutional implications are less obvious. This part explores these implications with respect to two central components of invisible adjudication: court power and transparency.

Like other branches, state supreme courts are "creatures" of a state's larger constitutional and political environment.[268] Understanding their role and influence necessarily requires us to examine how they interact with other institutions of governance.[269] This part proceeds in that vein by assessing the implications of invisible adjudication in the context of other coordinate institutions and the public. It emphasizes the institutional opportunities and costs associated with invisible adjudication drawn from the interactions between state supreme courts, coequal branches, and the public. To be sure, many of these interactions will be contingent on various factors, like the contours of a court's procedural features, the idiosyncrasies of a state's political environment,

263. *Id.*
264. *Id.*
265. *See infra* Section III.B.
266. *See supra* Section II.A.
267. *See supra* Section II.B.
268. STUMPF & CULVER, *supra* note 54, at 9, 12.
269. *See, e.g.*, TARR & PORTER, *supra* note 24, at 41.

and so on.[270] In that sense, this part is not intended as a comprehensive institutional analysis, but instead aims to highlight the broader institutional interests and stakes associated with invisible adjudication.

A. *Procedure as Politics*

As state courts scholars like Henry Glick, Alan Tarr, and Mary Cornelia Porter have argued, understanding state supreme courts requires us to place their legal and doctrinal output in the state's larger political context.[271] Accounting for the ways internal and external factors interact to empower and constrain state supreme courts provides deeper insights into their roles and a more complete view of their powers.[272] Along these lines, invisible adjudication calls for a greater sensitivity to the ways in which the obscure or seemingly unexceptional aspects of state supreme court business can influence case outcomes and shape state policy.

As with more recognizable aspects of court business, invisible adjudication can serve as a medium for state supreme courts to participate in state governance.[273] In both cooperation and conflict with other branches, invisible adjudication affords courts the means to interact with and influence other institutions.[274] But as Part II has shown, invisible adjudication differs from what might be seen as more conventional judicial acts—i.e., adjudicating disputes on the merits—because it largely falls outside the public eye and often appears distinct from traditional conceptions of judicial business. Its subtle, less transparent nature enables courts to engage other branches in ways that may be infeasible through more traditional means.

Because of the rich interstate variation among the many procedural and managerial tools available to state supreme courts, we can reasonably expect a similar level of variety as to how they engage through invisible adjudication. As such, this section does not exhaust the possibilities, but instead highlights the broader institutional opportunities invisible adjudication creates.

For example, invisible adjudication enables supreme courts to enhance the power of politically or ideologically aligned branches. Recall, in Wisconsin, the

270. *See, e.g.*, *id.* at 237–42.

271. *See id.*; HENRY R. GLICK, SUPREME COURTS IN STATE POLITICS: AN INVESTIGATION OF THE JUDICIAL ROLE 3–5 (1971); STUMPF & CULVER, *supra* note 54, at 4–8; BUENGER & DE MUNIZ, *supra* note 25, at 32–33.

272. *See, e.g.*, GLICK, *supra* note 271, at 3–7; Herbert Jacob & Kenneth Vines, *The Role of the Judiciary in American State Politics*, *in* JUDICIAL DECISION-MAKING 247–49 (Glendon Schubert ed. 1963); *see also* Rogers M. Smith, *If Politics Matters: Implications for a "New Institutionalism*," 6 STUD. AM. POL. DEV. 1, 31–37 (1992).

273. *See generally, e.g.*, LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY (2002) (constructing a model that shows the particular demands of a state's political environment offers the best explanatory power for state supreme court decision making).

274. TARR & PORTER, *supra* note 24, at 41.

Republican-affiliated majority modified the test for stays in a way that minimized the interests of the Democratic governor and significantly favored the Republican-majority legislature.[275] Or in California, where the Republican-affiliated majority relied on its depublication authority to channel lower court precedent in a direction that aligned with theirs and the Republican governor's ideological commitments.[276] The accretion of subtle procedural decisions like these can have a significant effect on the allocation of power among state institutions. Regardless of whether these examples reflect conscious political calculations or were the product of reasoned legal analysis, they nevertheless illustrate the possibilities for invisible adjudication to serve as a mechanism for cooperation and coordination with other branches.

Invisible adjudication can also serve as a means to protect a court's own institutional interests, including relevant state policies, as well as its own reputation. For example, in New Jersey, judges are appointed by the governor and confirmed by the senate. The state constitution also vests the chief justice with the authority to appoint the senior lower appellate court judge to temporarily fill supreme court vacancies.[277] In 2021 and 2022, the governor and senate were deadlocked over filling two supreme court vacancies created by mandatory retirements, primarily due to entrenched political norms that govern the confirmation process. Per the norm, the court cannot have more than four justices affiliated with a single political party.[278] Under the particular circumstances, the chief justice could have temporarily filled both vacancies, which would have relieved some pressure on negotiations between the elected branches, but also would have violated the norm, as the two most senior appellate judges were Democrats. The chief justice filled one vacancy but issued a statement explaining that he would not fill the second, because doing so would violate the state's "valued tradition" of partisan balance.[279] Taking the chief justice at his word, we see the court actively participating in the state's political culture—doing politics—as well as perhaps more subtly attempting to pressure the coordinate branches to take more seriously the court's interests in maintaining a full bench of judges.

The Arizona Supreme Court's recent decision to abolish peremptory strikes via its rulemaking power offers another example. In the first part of

275. *See* Mandell, *supra* note 119, at 36–42.

276. *See supra* notes 144–51 and accompanying text.

277. N.J. CONST. art. VI, § 2, ¶ 1. Use of the appointment power can influence case outcomes by affecting the likelihood an evenly divided court will split in a close case or substantively shape the result by altering the composition of the court. *Cf. supra* Section II.A.3 (discussing fast tracks and transfer decisions). *See generally* Clopton & Shaw, *supra* note 231 (explaining the concept of temporal forum shopping).

278. Sopko, *Constitutional Norms*, *supra* note 71.

279. *See* Press Release, Statement of C.J. Stuart Rabner on Sup. Ct. Vacancy (Feb. 16, 2022).

2020, activists set out to reform the state's rules governing the tool.[280] The state bar convened working groups that presented two proposals to the supreme court, one that called for reform and another that proposed abolition.[281] According to interviews with relevant stakeholders, the abolitionist proposal was initially seen as a nonstarter, but several cultural and political events eventually pushed the court to adopt it.[282] Specifically, this process took place during summer 2020, amidst racial justice protests around the country, including in Arizona. According to one judge involved in the process, the protests placed significant pressure on the state's court system to do something in response "to preserve the [judiciary's] credibility."[283] As the court and others involved in the decision dug into the proposals, an attitude emerged that the reform option was potentially politically unpalatable. According to some, it would make the court look "too woke," whereas abolition could be framed as a "colorblind" policy.[284] In a two-sentence order dated August 30, 2021, the court abolished peremptory strikes in Arizona, becoming the first state to adopt such a policy.[285]

Both examples are uses of judicial power outside of the traditional merits process that significantly influenced state law and politics. While we cannot know the exact motivations for either decision, they illustrate the broader point of how a closer look at the ways state supreme courts use their authority outside the merits docket can shed light on their institutional power and role in state governance. To be sure, there will be variation from state to state, as the ways courts participate in state governance differ based on a number of structural, doctrinal, cultural, and political factors.[286] But a greater sensitivity to procedure and administration supports a more holistic view and thus promises a more comprehensive institutional understanding of state supreme courts.[287]

280. *See* Petition to Amend the Rules of the Sup. Ct. of Ariz. at 1, R-20-0009 (Ariz. Jan. 9, 2020); Emmanuel Felton, *Many Juries in America Remain Mostly White, Prompting States to Take Action to Eliminate Racial Discrimination in Their Selection*, WASH. POST (Dec. 23, 2021, 3:00 PM), https://www.washingtonpost.com/national/racial-discrimination-jury-selection/2021/12/18/2b6ec690-5382-11ec-8ad5-b5c50c1fb4d9_story.html [https://perma.cc/5GUH-Z9ZC].

281. Thomas Ward Frampton & Brandon Charles Osowski, *The End of* Batson*? Rulemaking, Race, and Criminal Procedure Reform*, 124 COLUM. L. REV. 1, 39–42 (2024).

282. *See id.* at 42–46.

283. *Id.* at 39.

284. *Id.* at 44–45.

285. Order Amending Rules 18.4 & 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020 (Ariz. 2021).

286. *See, e.g.*, TARR & PORTER, *supra* note 24, at 54–59 (noting that a court's specific role in its state system "depends in large part on the state's political and legal climate").

287. *See, e.g.*, Jacob & Vines, *supra* note 272, at 249 ("To further understand the role of the courts in the political system, it is necessary to consider the flow of judicial action and to show at which points the judicial process impinges on other parts of the political system.").

B. *Transparency as Legitimacy*

Beyond the various consequences associated with reduced transparency that access to justice and courts scholars have surfaced, institutional legitimacy is an additional cost supreme courts should be aware of. Legitimacy is particularly important to judiciaries, as the power they wield relies almost exclusively on the perceived validity of their actions. On this view, legitimacy serves as a fulcrum for judicial power.[288]

For the past several years, scholars and commentators alike have argued that the U.S. Supreme Court's increasing use of the shadow docket, especially in high-salience cases, is undermining the Court's legitimacy.[289] Recent empirical scholarship on the shadow docket generally supports these claims.[290] Using public support as a marker of legitimacy, these studies found that when the Court uses its shadow docket, support for the specific case, as well as the institution more generally, wanes.[291] A major factor driving the negative sentiments was the lack of transparency surrounding the shadow docket.[292] The terse orders and lack of consistent procedures offer little insight into what is motivating the Court's decisions and can easily support perceptions of arbitrariness and unfairness, which diminish the Court's public standing.[293]

This linkage between transparency and legitimacy could present similar risks to state supreme courts. In this context, we might think of transparency as both understanding the relevant rules courts are applying as well as tangibly seeing their work.[294] Invisible adjudication falters at both steps. For many of the tools discussed in Part II, the relevant standard is either highly discretionary or nonexistent, and courts rarely offer any explanation when depublishing opinions, fast tracking cases, granting stays, and so on. In addition to this general murkiness, public access to state supreme court dockets is extremely limited.[295]

288. *See, e.g.*, Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 710 (1994) (modeling attitudinal responses to *Planned Parenthood v. Casey* and finding "institutional legitimacy relates significantly to empowerment").

289. *See, e.g.*, Pablo Das, Lee Epstein & Mitu Gulati, *Deep in the Shadows?: The Facts About the Emergency Docket*, 109 VA. L. REV. ONLINE 73, 74–75 (2023) (collecting a variety of sources); VLADECK, THE SHADOW DOCKET, *supra* note 12, at 18–23.

290. *See, e.g.*, EmiLee Smart, *A Shadow's Influence? How the Shadow Docket Influences Public Opinion*, 52 AM. POL. RSCH. 249, 256–57 (2023); Taraleigh Davis, The Supreme Court's Third Shift: Policy, Precedent, and Public Opinion via the Shadow Docket 164 (May 2023) (Ph.D. dissertation, University of Wisconsin-Milwaukee) (on file with the North Carolina Law Review).

291. *See* Smart, *supra* note 290, at 259–60; Davis, *supra* note 290, at 175–76.

292. *See* Smart, *supra* note 290, at 259–60; Davis, *supra* note 290, at 175–76.

293. *See* Davis, *supra* note 290, at 175–76; Smart, *supra* note 290, at 256–75.

294. *See* Smart, *supra* note 290, at 252.

295. *See supra* Section II.B.

As a result, both the relevant legal rules and the court's rationale are often unknowable, and the underlying decision itself unreachable. To fill in this judicially created information gap, the public might reasonably attribute decisions they do not like to partisanship or bad faith. For low-salience cases, the risk to a state supreme court's legitimacy may be minimal. But for high-profile and politically or ideologically charged cases, we might reasonably expect an effect to a state supreme court's legitimacy similar to the effect the U.S. Supreme Court's recent uses of its shadow docket has had on its own legitimacy. This could present an increasing challenge for state supreme courts, as more and more they find themselves resolving the issues that often place the U.S. Supreme Court in the spotlight. In 2023 alone, state supreme court dockets included cases concerning abortion,[296] gun rights,[297] climate change,[298] and partisan gerrymandering,[299] among other high-profile issues.

While some state supreme courts have a history of taking on big cases like these, for others, appearing in the national spotlight is new. Indeed, some courts view their dockets more as fora for private dispute resolution, not the new battlefield for the country's most pressing social and policy disputes.[300] In these states, the norms and practices around court procedure may be formulated more around protecting litigant privacy and less around ensuring the public can see how the court is resolving cases of substantial public interest.[301] In others, increasing transparency may be a priority but courts may simply believe there are more pressing issues that require judiciary time and resources.[302]

296. *See, e.g.*, Amy Myrick, *Mapping State Supreme Court Abortion Rights Decisions*, STATE CT. REP. (Jan. 30, 2024), https://statecourtreport.org/our-work/analysis-opinion/mapping-state-supreme-court-abortion-rights-decisions [https://perma.cc/F4GH-YDP9].

297. *See, e.g.*, Jerry Nowicki, *Illinois Supreme Court Upholds Assault Weapon Ban, But Federal Test Remains*, ILL. CAP. NEWS (Aug. 11, 2023), https://capitolnewsillinois.com/news/illinois-supreme-court-upholds-assault-weapon-ban-but-federal-test-remains [https://perma.cc/TN6H-83V4].

298. *See, e.g.*, Order, Natalie R. v. State, No. 2023022-SC (Utah May 1, 2023); Order, Held v. State, No. DA-23-0575 (Mont. Oct. 17, 2023).

299. *See, e.g.*, HARRY ISAIAH BLACK, STATE DEMOCRACY RSCH. INITIATIVE, UNIV. WIS. L. SCH., EXPLAINER: STATUS OF PARTISAN GERRYMANDERING CLAIMS ACROSS THE COUNTRY 2–3 (2024), https://uwmadison.app.box.com/s/r4yzvecq09bydujg4z8mi5jkv6rvo7la [https://perma.cc/69PL-5MG7 (staff-uploaded archive)].

300. *See, e.g.*, Lawrence M. Friedman, Robert A. Kagan, Bliss Cartwright & Stanton Wheelert, *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 817–18 (1981); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 4 (1995) ("Today's state court dockets comprise the battlefields of first resort in social revolutions of a distinctly modem vintage . . . .").

301. *See, e.g.*, CONF. STATE CT. ADMINS., COURTING PUBLIC TRUST AND CONFIDENCE: EFFECTIVE COMMUNICATION IN THE DIGITAL AGE 16, https://cosca.ncsc.org/__data/assets/pdf_file/0020/86015/COSCA-Policy-Paper-Courting-Public-Trust.pdf [https://perma.cc/6MA4-5G8F (staff-uploaded archive)] (suggesting judiciary norms prioritize litigant privacy).

302. One can easily imagine the numerous important issues state supreme courts are grappling with, from regulating use of artificial intelligence and reducing post-COVID case backlog, to reducing racial bias in the judiciary and improving court access for the indigent. Thus, while better transparency may be a priority, it may not be *the* priority.

Regardless of the reasons most state supreme courts are less transparent than the U.S. Supreme Court, as state judiciaries are increasingly called on to resolve high-profile cases presenting salient issues, increasing use of invisible adjudication could undermine courts' legitimacy in the eyes of the public. For state supreme courts, this reputational harm may come at a higher cost, as it could lead to electoral or political liabilities that U.S. Supreme Court justices do not contend with. Indeed, judicial independence "is more tenuous in the states than at the federal level."[303]

Specifically, it could have implications for both individual justices and courts in general. Despite the highly technical nature of the underlying procedures, criticism of courts and individual justices can rest on easily digestible rhetoric—e.g., shadowy, unfair, arbitrary decisions allowed courts to reach outcomes in politically charged cases. Framing state supreme court decisions this way—regardless of accuracy or fairness—could create electoral or retention liabilities for individual justices.[304] Especially as supreme court elections become more contested and high profile, invisible adjudication could serve as an issue candidates use to draw contrasts between themselves and primary challengers or incumbents.[305]

There are institutional concerns, as well. One effect of reduced court legitimacy is increased public support for court-curbing legislation.[306] At the state level, the risk of legislative checks on court power is often higher.[307] With

303. Meghan E. Leonard, *New Data on Court Curbing by State Legislatures*, 22 STATE POL. & POL'Y Q. 483, 485 (2022) [hereinafter Leonard, *New Data*].

304. *Cf.* Sopko, *Catalyzing Judicial Federalism*, *supra* note 27, at 151 (making a similar argument concerning originalism).

305. *See, e.g.*, Herbert M. Kritzer, *Polarization and Partisanship in State Supreme Court Elections*, 105 JUDICATURE 64, 73–74 (2021); Nathaniel Rakich, *How Did State Supreme Court Races Get So Expensive?*, FIVETHIRTYEIGHT (Mar. 16, 2023, 6:00 AM), https://fivethirtyeight.com/features/wisconsin-state-supreme-court-spending/ [https://perma.cc/9A5F-SKWK]; Christine Fernando & Andrew Demillo, *Abortion Debate Creates 'New Era' for State Supreme Court Races in 2024, with Big Spending Expected*, ASSOCIATED PRESS (Dec. 29, 2023, 1:12 PM), https://apnews.com/article/state-supreme-courts-abortion-redistricting-2024-931a453131fac282815ae31b4f0ea271 [https://perma.cc/7DLA-K2X9].

306. *See* Smart, *supra* note 290, at 259–60; Meghan E. Leonard, *State Legislatures, State High Courts, and Judicial Independence: An Examination of Court-Curbing Legislation in the States*, 37 JUST. SYS. J. 53, 54 (2016) [hereinafter Leonard, *State Legislatures*] ("[C]ourt curbing is directly related to the legitimacy of the Supreme Court."); *see also* Leonard, *New Data*, *supra* note 303, at 486 ("Initial work suggests that court curbing at the state level is driven by republican partisanship and institutional ideological disagreement, rather than the institutional structure of the court." (citations omitted)); BRANDON L. BARTELS & CHRISTOPHER D. JOHNSTON, CURBING THE COURT: WHY THE PUBLIC CONSTRAINS JUDICIAL INDEPENDENCE 9–10 (2020) (arguing that policy and ideological agreement is a primary driver for court curbing measures).

307. *See, e.g.*, Leonard, *State Legislatures*, *supra* note 306, at 54 (observing that, compared to Congress and the President, "[t]he other branches of [state] government have increased ability to fight back against [state supreme] courts"); Patrick Berry, Michael Milov-Cordoba, Douglas Keith & Alicia Bannon, *Legislative Assaults on State Courts—December 2022 Update*, BRENNAN CTR. FOR JUST. (Dec. 12, 2022), https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-december-2022-update [https://perma.cc/2JWU-TUHT].

a more realistic threat of court reform, and greater ease of constitutional amendments, invisible adjudication might serve as a basis for intrusions on supreme courts' power and independence. State supreme courts' opacity could provide a basis for both legislation genuinely aimed at improving public access and reforms designed to centralize more power in the legislature or otherwise undermine a court's authority.

IV. INVISIBLE ADJUDICATION AND THE STATE JUDICIAL POWER

This Article's primary aims were to offer a descriptive account of the state-level shadow docket phenomenon and a positive analysis of its institutional implications for state supreme courts. It highlighted the larger universe of tools available to state supreme courts to influence cases outside of their merits docket, as well as the generally less transparent nature of their work. Part III highlighted the institutional costs and opportunities associated with this broader, more opaque formulation of the shadow docket.

The Article has not offered normative judgments of invisible adjudication or a prescriptive analysis to address its effects. To be sure, those are important considerations that deserve careful study. Answering those questions, however, calls for both diagnosis and some baseline to measure assertions of court authority against. This Article supports the diagnostic step by introducing invisible adjudication and providing a framework to study the phenomenon. Additional work along these lines is needed, however; specifically, a fuller descriptive picture of the scope, content, and volume of state shadow docket practice. But, as shown in Section II.B, such a study will be difficult without improving state supreme court transparency. Thus, any efforts to provide meaningful normative or prescriptive analyses of state court shadow dockets must begin with improvements to transparency by increasing access to court documents.

The second step similarly calls for additional work. As discussed above, state constitutions tend to vest state supreme courts with a broader and more flexible judicial power and place the institutions in a different role than their federal counterpart.[308] And in the context of shadow dockets, 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. In this way, we should not presume that federal practice is the appropriate baseline or normative ideal, or that federal critiques necessarily map onto the states. Instead, a proper normative analysis requires a theory of state judicial power. When state judicial power is evaluated as such, it is possible that some of the practices described in this Article—when paired with improved transparency and public understanding—pose no normative problem. Without such a theory, though,

308. *See supra* Sections I.A & I.B.

our understanding of state supreme courts in general, and invisible adjudication in particular, will necessarily be incomplete.

In this part, I take the first steps towards such a theory by offering the conceptual foundation for a more holistic view of state judicial power. I then sketch a research agenda to further explore the concept and its institutional implications.

A. *Hard and Soft Powers of State Supreme Courts*

In their classic study of the U.S. Supreme Court, Felix Frankfurter and James M. Landis advanced an important theme of federal judicial power and the role of the Court.[309] Their key insight is that we must account for the procedural aspects of the Court's business to appreciate its power and understand its institutional identity.[310] These more technical aspects of the Court's work had previously gone unexplored, yet, as Frankfurter and Landis illustrated, they nevertheless serve as a "subtle" but "powerful force" in shaping its influence.[311] In other words, procedure is power. Their paradigm instructs that studying the Court's jurisdiction and procedure can teach us about its role in the federal system and American politics.[312]

This Article has proceeded in a similar vein. Much of our understanding of state supreme court power focuses on their role deciding cases on the merits via their conventional resolution process.[313] Invisible adjudication challenges that view by concretizing the effects supreme courts' nonmerits business has on those outcomes. It shows that the many decisions that fall outside the formal merits process or traditional adjudicative side of supreme courts' business can meaningfully affect law and policy—both via individual cases as well as a state's jurisprudence writ large. Accounting for these less conventional aspects of supreme court business suggests a more complex, nuanced concept of supreme court power.[314]

Borrowing from political science literature, I suggest we think of this power as *hard* and *soft*. Political scientists have turned to the hard-soft power distinction to capture the informal aspects of institutional power that escape traditional theories.[315] It was initially developed as an account of international

309. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 1–3 (1928).

310. *Id.* at 2.

311. *Id.* at vi.

312. *See id.* at v–vii; *see also* Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 681–88 (1999).

313. *See, e.g.*, WILLIAMS & FRIEDMAN, *supra* note 26, at 451–59; Williams, *Processes*, *supra* note 23, at 207–08.

314. *See supra* Section II.A.

315. *See, e.g.*, Matthias Goldmann, *We Need To Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law*, 25 LEIDEN J. INT'L L. 335, 336 n.5 (2012).

law in response to existing theories of sovereign power that failed to recognize the realities of international relations. In particular, the frame accounts for the many subtle, less direct, nonbinding means sovereigns employ to assert their power and prerogatives.[316] Beyond international relations, the concept has been applied to a host of institutions and actors, from Congress and the President, to executive agencies and local officials.[317] As these literatures show, the hard-soft power concept offers a more comprehensive understanding of the relevant institution and the power it wields by accounting for the ways the institution can assert influence beyond its traditional means.[318]

The paradigm similarly offers insights into state supreme courts and the power they wield. As we shall see, it can provide greater institutional clarity into the role of supreme courts and the complex, dynamic interbranch relations at the state level. This will serve as a foundation for subsequent work studying the normative dimensions of state shadow dockets and possible efforts for reform.

Let's first begin with a brief primer on the concepts of hard and soft power and then consider how it applies to state supreme courts. While there is disagreement over an exact definition of hard and soft power,[319] there is some consensus in the literature as to a few basic principles. Hard power refers to the ways an institution uses its traditional means to directly achieve its prerogatives.[320] It typically necessitates compliance with formalized procedures, is less discretionary, and can result in binding, even coercive, rules or orders.[321] Soft power, by contrast, generally refers to an institution's unconventional or less traditional means of achieving its prerogatives.[322] These are informal tools that are not subject to procedural regularity, are often discretionary, and achieve outcomes indirectly.[323]

316. *See, e.g.*, Jean d'Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, 19 EUR. J. INT'L L. 1075, 1075–77 (2008); R.R. Baxter, *International Law in "Her Infinite Variety*," 29 INT'L & COMP. L.Q. 549, 549 (1980).

317. *See, e.g.*, Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 579–86, 623 (2008) (conceptualizing Congressional soft power); Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 742 (2012) (same); Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735, 766 (2014) (discussing presidential soft power); Paul MacMahon, *Soft Adjudication*, 69 ADMIN. L. REV. 529, 547–50 (2017) [hereinafter MacMahon, *Soft Adjudication*] (discussing soft power of executive agencies); Paul MacMahon, *The Inquest and the Virtues of Soft Adjudication*, 33 YALE L. & POL'Y REV. 275, 315–17 (2015) [hereinafter MacMahon, *Inquest*] (discussing soft power of local officials).

318. *See, e.g.*, Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 422 (2000).

319. *See, e.g.*, MacMahon, *Inquest*, *supra* note 317, at 316 n.242 (collecting citations).

320. *See, e.g.*, Gersen & Posner, *supra* note 317, at 577.

321. *See, e.g.*, *id.* at 579–80; MacMahon, *Soft Adjudication*, *supra* note 317, at 537–38.

322. *See* MacMahon, *Soft Adjudication*, *supra* note 317, at 537–38; McMahon, *Inquest*, *supra* note 317, at 316–18; Gersen & Posner, *supra* note 317, at 580–82.

323. *See* Gersen & Posner, *supra* note 317, at 580–82.

Many of these distinctions can inform the hard and soft forms of state supreme court power. Hard power thus refers to aspects of judicial authority that mandate compliance, are legally binding on individuals, are subject to procedural formalities, or are directly responsible for case outcomes. The most recognizable instance of hard power is judicial review, but it includes the rulemaking power and perhaps certain uses of supervisory authority, as well.

Soft power, in contrast, refers to the less direct means available to state supreme courts to shape or influence outcomes. It is often not subject to conventional procedural formalities, as we saw with many of the tools described in Part II. But soft power also includes subtler aspects of supreme court business that challenge existing understandings of judicial power and may bear a closer resemblance to generalized notions of policymaking or politics.[324]

To be sure, the hard-soft distinction is not a rigid binary but is instead better understood as a continuum, reflecting the fact that some instances of judicial action share attributes of both. Judicial power gets softer as it is subject to fewer limits on discretion, procedural regularity, and institutional formalities.[325] Whether a judicial act is properly described as hard or soft is less important than the institutional view the paradigm encourages.

B. *Invisible Adjudication as Soft Power*

As we have seen, invisible adjudication refers to the largely discretionary administrative and managerial decisions that fall outside state supreme courts' merits dockets yet empower them in subtle ways to meaningfully affect outcomes in individual cases as well as a state's larger body of law. Part II illustrated this concept by highlighting several examples of specific tools supreme courts have at their disposal.

These tools affect case outcomes indirectly and generally serve as a way for courts to shape and influence the ultimate merits decision without deciding it. For example, the Supreme Court of North Carolina's use of fast tracks in *Harper* and *Holmes* did not resolve either of the cases, but did dictate *who* decided them, which proved dispositive.[326] So too with transfer and retention decisions. There, courts make nonmerits decisions that can structure the context in which a case is decided and thus influence its outcome.

We can see a similar dynamic with use of the supervisory power. Recall that broad authority flows primarily from a supreme court's managerial role over a state's judiciary. As such, it enables supreme courts to intervene in litigation at any point from when a complaint is filed in the trial court to when the case reaches the supreme court's docket. Supervisory decisions like

324. *See* MacMahon, *Inquest*, *supra* note 317, 315–16.

325. *Cf.* Abbott & Snidal, *supra* note 318, at 422.

326. *See supra* notes 225–29 and accompanying text.

removing judges, reversing evidentiary decisions, and overturning or reinstating certain forms of preliminary relief, are outside of the merits but their effects can ultimately determine which party prevails.

Beyond influencing individual cases, invisible adjudication enables supreme courts to alter a state's larger body of law outside of the merits docket. This feature illustrates the systemic effects soft power can have. For example, the New York Court of Appeals' recent decisions to resolve much of its criminal docket via nonprecedential memorandum opinions limited the development of the state's criminal law which affected the rules lower courts applied as well.[327]

Invisible adjudication also enhances supreme courts' agenda-setting capacity—an important aspect of soft power—to shift the ideological or policy center of the state's jurisprudence, as we saw with the California Supreme Court's depublication power. In these instances, supreme courts are determining system-wide, outside of the adjudication context, the substantive rights available to litigants and the forms of relief lower courts can issue. The examples demonstrate the ways seemingly perfunctory aspects of judicial management empower supreme courts to affect legal change without issuing a judgment. Moreover, tools like fast tracks, transfers, depublication, and so on are generally not governed by traditional legal formalities—namely, reason giving. Indeed, as we have seen, a common feature of these decisions is that supreme courts generally announce these decisions via cursory orders—if at all.

As discussed in Part II, in addition to the various procedural and administrative tools available to state supreme courts, court transparency plays an important role. Decisions around court transparency and public access can be a form of soft power as well. As Theodore Eisenberg and Stewart Schwab have shown, varying levels of public access to a court's decisions can skew perceptions of its business.[328] Thus, the level of public access to court information can shape attitudes about a court and its operations. This is particularly true among state supreme courts, where much of their output is effectively outside the public's reach.[329] In this way, state supreme courts can emphasize or deemphasize aspects of their work or individual decisions.

For example, even among courts that have relatively open access, they can separate their various outputs across their website, making some easier to locate than others.[330] The ability to focus public attention on some cases rather than others is especially pronounced in states that generally limit public access to a curated docket—often presented as a "cases of public interest" page on a court's

327. *See supra* notes 173–76 and accompanying text.

328. Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 504 (1989).

329. *See supra* Section II.B.

330. *Cf.* VLADECK, THE SHADOW DOCKET, *supra* note 12, at 22–23 (noting that the Supreme Court of the United States makes some of its work product easier to find than others).

website—where the public can really only see the outputs the court selects.[331] These choices allow courts to frame their business to the public, excluding certain cases that might reasonably be relevant to the polity.[332]

Another form of soft power discussed above is anonymous opinions, which can be particularly influential in states where justices stand for some form of an election. As we saw in Oklahoma, the decisions justices make whether to sign full merits decisions can shape public awareness of what individual justices are doing. When the public does not know who authored a majority opinion, especially in high-salience cases, the author "cannot be criticized for it," making it harder for voters who oppose the decision to hold them accountable.[333] Of course, the level of public access to information does not dictate case outcomes, but as work on the U.S. Supreme Court's shadow docket has shown, it can influence them by empowering courts to deviate from procedural and administrative regularity and thus produce results they might not have otherwise.[334]

C. *Revisiting State Supreme Court Identity*

The discussion of invisible adjudication thus far has focused attention on the internal and operational features of supreme courts. But a comprehensive theory of state supreme court power cannot be based entirely on a static view of the institution; it must also look at supreme courts in their broader political context.[335] To continue laying the foundation for a more holistic conception of state judicial power, we should consider the ways supreme courts use their soft powers to interact, through cooperation and conflict, with coordinate branches of government. An emphasis on how supreme courts engage with other actors in a state's governance apparatus will provide a richer account of supreme court identity and the power they wield.

The examples discussed below are demonstrative of this broader concept. Specifically, they highlight the ways supreme courts can wield soft power to subtly shape state law and policy. It can serve as both a sword and shield, enabling courts to protect important policies or confront other branches hostile to their prerogatives. Soft power also provides the means for supreme courts to

331. *See, e.g.*, *High-Profile Supreme Court Cases*, ILL. CTS., https://www.illinoiscourts.gov/courts/supreme-court/courts-supreme-court-high-profile-cases/ [https://perma.cc/QXU8-AZ7N].

332. Consider, for example, *Allegheny Reprod. Health Ctr. v. Pa. Dept. of Hum. Servs.*, 309 A.3d 808 (Pa. 2024), which asked whether and to what extent the state constitution protects abortion rights, in the context of Medicaid funding prohibitions. *Id.* at 819–20.

333. *See* Stillwell, *supra* note 21, at 386–87 (discussing the Oklahoma Supreme Court's means of "keep[ing] the public in the dark about a justice's views").

334. *See, e.g.*, VLADECK, THE SHADOW DOCKET, *supra* note 12, at 276.

335. *See* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 3–4 (2017); BUENGER & DE MUNIZ, *supra* note 25, at 3–4; TARR & PORTER, *supra* note 24, at 9–31.

shape a state's larger policy agenda, influencing both executive and legislative branches. Courts also affect issues via soft power by engaging the public and rallying support in favor of particular positions or policies. These examples are illustrative of the broader claim that a more holistic theory of judicial power must be more sensitive to the ways supreme courts express their identity through the less formal aspects of their business.[336]

1. Convening Power

Consider the ways soft power enhances state supreme courts' agenda-setting capability. Prior studies of state supreme courts have shown, for example, how various structural and jurisdictional features, like discretionary jurisdiction, provide justices with tools to decide the cases they want and avoid ones they do not.[337] Similarly, this Article has shown that these same features enable courts to decide *when* to hear certain cases. But there are subtler aspects of court business that offer a similar means for supreme courts to highlight or prioritize certain issues. Take their ability to convene committees and interbranch conferences.[338] In recent years, we have seen courts shape the faces of their states' policies on important, contested issues, like criminal justice, child welfare, and mental health outside of adjudication by convening committees and task forces to frame these policy areas.

In 2008, for instance, the California Supreme Court established the Task Force for Criminal Justice Collaboration on Mental Health Issues, charging it with crafting recommendations to improve the state's responses to offenders with mental illness.[339] Among the proposed solutions was amending state law to allow for community release of certain individuals as an alternative to custodial or hospital detention.[340] Following publication of the final report, the legislature passed a bill that sought "to codify the task force

336. *See supra* notes 300–303 and accompanying text; *cf.* BUENGER & DE MUNIZ, *supra* note 25, at 33–40 (synthesizing the history surrounding the governance role of state courts and the emergence of their institutional identity); Kagan et al., *The Evolution*, *supra* note 62, at 978–81 (discussing findings of an empirical study tracking changes in supreme court dockets and arguing various structural changes to state judiciaries influenced their perceived role and identity); Kagan, et al., *Business*, *supra* note 61, at 152–55 (same).

337. Eisenberg & Miller, *supra* note 49, at 1499–1501; Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1624–25 (2009); Stefanie A. Lindquist, *Judicial Activism in State Supreme Courts: Institutional Design and Judicial Behavior*, 28 STAN. L. & POL'Y REV. 61, 88 (2017).

338. The exact source of this authority likely comes from state supreme courts' inherent or supervisory powers, a topic I plan to take up in the future. *See* Sopko, *Supervisory Power*, *supra* note 41 (manuscript at 30–41).

339. Dan Lyman, Comment, *The Role of Collaborative Courts in California's Criminal Justice System*, 51 U.S.F. L. REV. F. 1, 20 (2017).

340. CAL. ADMIN. OFF. CTS., TASK FORCE FOR CRIMINAL JUSTICE COLLABORATION ON MENTAL HEALTH ISSUES: FINAL REPORT 29 (2011), http://courts.ca.gov/documents/Mental_Health_Task_Force_Report_042011.pdf [https://perma.cc/C3MP-QA28 (staff-uploaded archive)].

recommendation."[341] More recently, the Kansas Supreme Court convened members from all three branches of government, as well as the bar, law enforcement, and other stakeholders, for a "child welfare summit."[342] The goal of the conference was to hear from experts, review recent research, and generate consensus around innovative policy solutions to address issues affecting children in the state's foster system.[343] Here, the court used its authority outside of the traditional dispute resolution context to frame an issue that has been "a high priority" for lawmakers in the context of developing legislative answers.[344]

The convening power can also serve as a shield to protect aspects of state law supreme courts may see as normatively desirable or necessary to the public good.[345] In 2013, the New Jersey Supreme Court convened a joint committee consisting of representatives from all three branches, as well as members of the bar, to study the state's criminal justice system and recommend "innovative, alternative approaches."[346] The resulting report served as the policy foundation for a substantial overhaul of the state's criminal justice system, with the functional elimination of cash bail at the center.[347] The resulting changes have

341. CAL. COMM. REP., CA A.B. 2190 (NS), 2013–2014 Reg. Sess. (2014).

342. *See 2024 Kansas Child Welfare Summit*, KAN. JUD. BRANCH, https://www.kscourts.org/About-the-Courts/Court-Administration/Court-Initiatives/2024-Kansas-Child-Welfare-Summit [https://perma.cc/JU8T-VAXP (staff-uploaded archive)]; Sherman Smith, *Kansas Supreme Court Plans Child Welfare Summit to Forge 'Better Paths Forward'*, KAN. REFLECTOR (Aug. 22, 2023, 1:45 PM), https://kansasreflector.com/2023/08/22/kansas-supreme-court-plans-child-welfare-summit-to-forge-better-paths-forward/ [https://perma.cc/A7PQ-PMUY].

343. *See* Smith, *Kansas Supreme Court*, *supra* note 342; *2024 Kansas Child Welfare Summit*, *supra* note 342.

344. *See* Linda J. Sheppard, Valentina Blanchard, Cynthia Snyder & Emma Uridge, *2023 Kansas Legislative Recap*, KAN. HEALTH INST. (Oct. 19, 2023), https://www.khi.org/articles/2023-kansas-legislative-recap/ [https://perma.cc/E9KX-PJ6N]. To be sure, courts have called for convenings while resolving cases, as well. *See, e.g.*, State v. Andujar, 254 A.3d 606, 631 (N.J. 2021) (calling on "the Director of the Administrative Office of the Courts to arrange for a Judicial Conference on Jury Selection to convene this fall" where representatives from all three branches and members of the bar considered reforms to use of peremptory strikes in New Jersey).

345. For state supreme courts, operationalizing normative judgments about the public interest is neither new nor uncommon. For example, in nearly all states, justiciability doctrines—limits on judicial power—are subject to public-interest exceptions. *See, e.g.*, Miriam Seifter & Adam B. Sopko, *Standing for Elections in State Courts*, 2024 U. ILL. L. REV. 101, 113 (discussing public-interest exception to standing rules). *See generally* Lauren Waite, Comment, *The Public Interest Exception to Mootness: A Moot Point in Texas*, 41 TEX. TECH L. REV. 681 (2009) (discussing the public interest exception to mootness generally). That is, supreme courts will review a case that would otherwise be beyond their power, so long as doing so is in the public interest. Some of the devices discussed in Part II are similarly premised on a supreme court making decisions concerning the public interest.

346. *See, e.g.*, News Release, N.J. Cts., Chief Justice Forms Joint Committee to Examine Criminal Justice Process (June 19, 2013), https://www.njcourts.gov/sites/default/files/press-release/2013/pr130619a.pdf [https://perma.cc/8EG8-XAEP (staff-uploaded archive)].

347. *See, e.g.*, REPORT OF THE JOINT COMMITTEE ON CRIMINAL JUSTICE 1–3, 11–68 (Mar. 10, 2014), https://www.njcourts.gov/sites/default/files/sccr/reports/finalreport2014.pdf [https://perma.cc/2UVX-5L9K (staff-uploaded archive)]; S. Con. Res. No. 128, 216th Leg. (N.J. 2014); N.J. Stat. Ann. § 2A:162-15 to -26 (Westlaw through L.2023, chapter 256 and J. Res. No. 18).

been described as "a nationwide standard," "enormously successful," and "pro[of] that bail reform works."[348] This, as we have seen, is an example of the supreme court taking the lead in crafting policy it sees as beneficial to the public. In the years since, however, legislators have introduced bipartisan legislation aimed at peeling back many of the changes to the state's bail system, pressing pre-trial policy in a more punitive direction based in part on political calculations by lawmakers facing the pressures of reelection.[349] In response, the supreme court has continued to convene committees to study the existing regime and present data that substantiate the policy's original promises and seemingly undermine empirically thin draft legislation and criticism.[350] While the legislature has narrowed the availability of pretrial release for certain

348. *See, e.g.*, Christopher Porrino & Elie Honig, *Commentary: Illinois Bail Reformers: New Jersey's Model Works, Plain and Simple*, CHI. TRIB. (Feb. 14, 2020, 11:52 PM), https://www.chicagotribune.com/2020/02/14/commentary-illinois-bail-reformers-new-jerseys-model-works-plain-and-simple/ [https://perma.cc/CA7M-MSMQ]; Kelly Mulligan, Jeffrey Sharlein & Colleen Smith, *Beyond Bail Reform: Pretrial Assessment and Supportive Services at Newark Community Solutions*, NEWARK CMTY. SOLS. 1, 8 (2023), https://www.innovatingjustice.org/sites/default/files/media/document/2023/Guide_NCS_BeyondBailReform_10302023.pdf [https://perma.cc/G783-9ZKA (staff-uploaded archive)]; Reuben Francis, *New Jersey Is Proving that Bail Reform Works*, TALK POVERTY (Apr. 26, 2019), https://talkpoverty.org/2019/04/26/new-jersey-bail-reform-works/index.html [https://perma.cc/UTN5-M5A2].

349. *See, e.g.*, Matt Friedman & Joseph Spector, *New Jersey Overhauled Its Bail System Under Christie. Now Some Democrats Want To Roll It Back.*, POLITICO (Dec. 11, 2022, 7:00 AM), https://www.politico.com/news/2022/12/11/new-jersey-bail-system-roll-back-00072781 [https://perma.cc/ZND8-PF6A (staff-uploaded archive)].

350. *See, e.g.*, REPORT OF THE RECONVENED JOINT COMMITTEE ON CRIMINAL JUSTICE 2–3 (June 7, 2023), https://www.njcourts.gov/sites/default/files/courts/criminal/criminal-justice-reform/reconvenedcommreport.pdf [https://perma.cc/LW86-9VFD (staff-uploaded archive)] (reviewing several years of data and concluding the CJR has led to a "reduction in detention of people charged with minor offenses"; "consistent incarceration of defendants accused of serious crimes"; "prevention of new criminal activity"; and "improved court appearance rates for people on pretrial release"); Nikita Biryukov, *Lawmakers Weigh Changes to Bail Reform, Citing Uptick in Gun Violence*, N.J. MONITOR (Mar. 15, 2022, 7:17 AM), https://newjerseymonitor.com/2022/03/15/lawmakers-weigh-changes-to-bail-reform-citing-uptick-in-gun-violence/ [https://perma.cc/3YTL-52L9] (quoting senate testimony from the director of New Jersey's administrative office of the courts noting that proposed legislation would substantially increase the number of people held on pretrial detention, increase the racial imbalance in the state's legal system, and undermine the CJRA's policy goals).

offenders,[351] the judiciary's efforts have helped to largely maintain the state's cashless bail regime.[352]

2. Liaisons

Liaisons offer another way for supreme courts to exercise their soft power when interacting with other branches. These understudied roles within state judiciaries function as lobbyists or "agent[s]" on behalf of a state's judiciary.[353] Their roles are multifaceted and vary by state, but, at a high level, they represent the judiciary's interests when dealing with other branches, especially legislatures.[354]

Tactically, they might help shepherd judicial nominees through confirmation or retention, translate judicial opinions that include specific statutory guidance for the legislature, advocate for certain amendments or modifications to legislation, and help judiciary representatives navigate the

351. *See* Act of July 7, 2023, ch. 103, sec. 3, § 2A:162-17 2023 N.J. Sess. Laws 1, 1 (codified as N.J. STAT. ANN. § 2A:162-17 (Westlaw through L.2023, chapter 64 and J. Res. No. 10)) (eliminating the presumption of pretrial release for certain vehicle thefts). Notably, in an op-ed, the Attorney General suggested that the criticism of bail reform was part of "a steady diet of misinformation about the state of public safety here in New Jersey" designed by legislators "to score political points." Matthew J. Platkin, *Facts Don't Lie. Crime Is Down in New Jersey*, NJ.COM (Mar. 12, 2023, 7:22 PM), https://www.nj.com/opinion/2023/03/ag-facts-dont-lie-crime-is-down-in-new-jersey-opinion.html [https://perma.cc/H296-S37G].

352. *See* Star-Ledger Editorial Board, *Enough Fearmongering on Crime. Here Are the Facts*, NJ.COM (Nov. 6, 2023, 2:12 PM), https://www.nj.com/opinion/2023/11/enough-fearmongering-on-crime-here-are-the-facts-editorial.html [https://perma.cc/XU2L-88UQ] (noting that critics continue to attack the state's bail system).

353. *See* Roger E. Hartley, *Moving Past Crisis . . . Promoting Parity: How Effective Intergovernmental Relations Can Help Build a More Co-Equal Judicial Branch*, 47 NEW ENG. L. REV. 541, 555 (2013) (noting that existing work is "sparse," that it is "a topic of low salience on research agendas," and that the work that does exist is almost entirely focused on the federal system); LINDA K. RIDGE, DONNA HUNZEKER, ANTOINETTE BONACCI-MILLER & MARY FAIRCHILD, LEGISLATIVE-JUDICIAL RELATIONS: SEEKING A NEW PARTNERSHIP 11–12 (1990), https://cdm16501.contentdm.oclc.org/digital/collection/ctadmin/id/1128 [https://perma.cc/8GEX-6H8D (staff-uploaded archive)]. Arguably the most comprehensive study to do date is a report completed in the 1990s by researchers at the National Center for State Courts. *Id.* at i–iv.

354. *See, e.g.*, *Governmental Affairs*, CAL. CTS., https://www.courts.ca.gov/policyadmin-oga.htm [https://perma.cc/M8RG-XQGD] ("On behalf of the judicial branch, the Judicial Council's Governmental Affairs represents and advocates for the Judicial Council on legislative, policy, and budget matters. The office also works extensively on the judicial branch budget and related matters, meeting with legislators, committees, committee and leadership staff, as well as staff for the Governor and the state Department of Finance."); News Release, N.J. Cts., Deirdre Naughton Named New Director of Judiciary's Professional and Governmental Services (Dec. 13, 2011), https://www.njcourts.gov/sites/default/files/press-release/2011/pr111213a.pdf [https://perma.cc/9G6G-S97X (staff-uploaded archive)] (noting that the role of the Director of Professional and Governmental Services for the Judiciary entails acting as a "representative to the governor's office and the Legislature").

budget process, among other things.[355] They also allow justices to avoid possible ethical constraints imposed by judicial conduct codes.[356]

In liaisons, one can easily see the manifestation of a supreme court's soft power. Indeed, as Chief Justice Ellen Peters of the Connecticut Supreme Court put it, courts can "deploy" their liaisons to "influence the language, content, and effect of pending legislation."[357] Liaisons help build coalitions around legislation courts wish to support, identify legislative sponsors, and draft committee testimony. They also enable courts to gain exposure to the customs, norms, and pace of business in another branch, which can enhance the reach and efficacy of their soft power.[358]

3. Personnel Power

The personnel power includes the various contexts in which state supreme courts appoint judges or members of the bar to a range of important positions, from supreme court vacancies to the tie-breaking role on a redistricting commission.[359] Here too, supreme court choices extend outside the adjudicative context and can have sweeping effects on policy beyond individual cases. And yet these judicial decisions are subtle, what Hans Linde has described as mere "housekeeping."[360]

For example, in some states, the supreme court or chief justice selects the trial judges who hear important cases, like constitutional challenges to statutes and redistricting claims.[361] In Illinois, the supreme court can temporarily fill trial court vacancies.[362] Due to incumbency effects, this feature empowers the justices to shape the composition of the judiciary in a state that relies on popular

355. *See* RIDGE ET AL., *supra* note 353, at 11.

356. *See* Shirley S. Abrahamson, *Remarks of the Hon. Shirley S. Abrahamson Before the American Bar Association Commission on Separation of Powers and Judicial Independence, Washington, D.C., December 13, 1996*, 12 ST. JOHN'S J. LEGAL COMMENT. 69, 82–83 (1996); RIDGE ET AL., *supra* note 353, at 24.

357. Peters, *supra* note 31, at 1561.

358. *See* RIDGE ET AL., *supra* note 353, at 11–12; *cf.* Sopko, *Constitutional Norms*, *supra* note 71 (discussing the role of state constitutional norms in state governance).

359. *See infra* notes 360–67 and accompanying text.

360. Hans A. Linde, *Observations of a State Court Judge*, *in* JUDGES AND LEGISLATORS: TOWARDS INSTITUTIONAL COMITY 119 (Katzmann ed. 1988) [hereinafter Linde, *Observations*].

361. *See, e.g.*, N.C. GEN. STAT. § 1-267.1(b2) (LEXIS through Sess. Laws 2023-151 of the 2023 Reg. Sess. Of the Gen. Assemb.); TENN. CODE ANN. § 20-18-101(b)(1) (LEXIS through chapter 575 of the 2024 Reg. Sess.).

362. *See, e.g.*, Press Release, Sup. Ct. of Ill., Illinois Supreme Court Appoints 12 Judges to Circuit Court of Cook County (Apr. 11, 2024), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/c3cda6c9-81b7-4706-84c0-5ff3ccfe6aec/Supreme%20Court%20Appoints%2012%20Judges%20to%20Circuit%20Court%20of%20Cook%20County.pdf [https://perma.cc/2H8Z-MNZE (staff-uploaded archive)].

elections.[363] In Delaware, Hawai'i, Maryland, and New Jersey, the chief justice has the power to temporarily fill supreme court vacancies.[364] Additionally, supreme courts across the country can choose the members of important decision-making bodies, like redistricting commissions,[365] election contest panels,[366] and law reform commissions.[367] As these examples suggest, the personnel power enables supreme courts to influence certain decisions of law and policy by controlling who decides them and ensuring cases are heard by judges who are politically or ideologically aligned with the court, which can affect the ultimate outcomes as well as certain nonfinal decisions along the way.[368]

4. The Bully Pulpit

Soft power also includes ways supreme courts engage with the public. As we have seen, this includes tailoring the level of public access to court records. But more broadly it involves supreme courts' ability to influence perceptions around particular issues of law and policy by formally and informally engaging with the people.[369] For example, in many states, the supreme court provides an end-of-year report or update on the judiciary to the public or the legislature.[370] These venues offer opportunities for courts to galvanize support for or against

363. *See* Maya Dukmasova, *Dominance of Appointed Judges in Primary Election Highlights Illinois Supreme Court's Power*, INJUSTICE WATCH (Feb. 8, 2024), https://www.injusticewatch.org/judges/judicial-elections/2024/illinois-supreme-court-appointments-explainer/ [https://perma.cc/LP5K-MC2W]; *cf.* Sopko, *Constitutional Norms*, *supra* note 71 (noting that the "selection of state court judges will depend not just on the formal mechanisms of selection, which vary across the states, but also the variety of state-specific norms").

364. DEL. CONST. art. IV, § 12; HAW. REV. STAT. ANN. § 602-10 (2024); MD. CONST. art. IV, § 18(b)(2); N.J. CONST. art. VI, § 2, ¶ 1.

365. *See, e.g.*, OR. REV. STAT. § 188.125(6) (2023); N.J. CONST. art. IV, § 3, ¶ 2; MO. CONST. art. III, § 3(b); COLO. CONST. art. V, § 44.1; *see also* ALA. CODE 1975 § 17-7-22 (Westlaw through Acts 2023-1 through 2023-3 of the 2023 First Spec. Sess.; through Acts 2023-4 through 2023-491, and Acts 2023-493 through 2023-561 of the 2023 Reg. Sess.; and Acts 2023-562 through 2023-569 of the 2023 Second Spec. Sess.) (vesting the chief justice with authority to appoint a lower court judge to state's electronic voting committee).

366. *See, e.g.*, IOWA CODE § 61.4 (2024).

367. *See, e.g.*, OR. REV. STAT. § 173.315(h) (2023); CONN. GEN. STAT. § 51-14a (2023).

368. For a critical view of how this power is being used recently, consider the newly constituted Republican majority on the Supreme Court of North Carolina. *Editorial: Newby Transforms N.C. Courts to Playground to Settle Petty Political Feuds*, WRAL NEWS (Jan. 5, 2024, 7:35 AM), https://www.wral.com/story/editorial-newby-transforms-n-c-courts-to-playground-to-settle-petty-political-feuds/21221889/ [https://perma.cc/7YCP-EDKN] (describing the "stealthy move[s]" Chief Justice Paul Newby has recently made to seemingly align the lower courts with the new majority's political views).

369. *Cf.* JOSEPH NYE, THE PARADOX OF AMERICAN POWER 10 ("If a country can make its power legitimate in the eyes of others, it will encounter less resistance to its wishes.").

370. *See, e.g.*, Abrahamson, *supra* note 356, at 84 ("In Wisconsin this address is delivered annually to fellow judges at the state judicial conference," and while "judges are the target audience . . . the written address is also disseminated to the executive and legislative branches.").

certain issues.[371] In recent years, we have seen courts use these fora to frame and highlight contentious issues, like reforming a state's redistricting process,[372] pressuring the governor and legislature to solve a judicial vacancy crisis,[373] and combatting efforts from other branches to undermine judicial independence.[374]

Informal engagement can offer similar opportunities via public speeches, op-eds, and other media. Consider one example from Kansas, arising out of the supreme court's decision holding then-existing funding of public schools unconstitutional. While the case was pending before the supreme court, the senate president made a statement, threatening that after the court released its decision, the Republican-controlled legislature would "focus on what is the role of the Supreme Court. Should they be interpreting the law?"[375] Shortly thereafter, in his State of the State speech, the Republican governor called to eliminate the state's merit selection method for justices in favor of elections or "the federal model."[376] The legislature then approached the state's trial court judges, promising them raises in exchange for backing legislation that would dilute the supreme court's supervisory power.[377] These provisions were then

371. *See* JEFF AMESTOY, THE POLITICS OF RESTRAINT: STATE JUDICIAL LEADERSHIP IN THE 21ST CENTURY 3 (2014), https://www.ncsc.org/__data/assets/pdf_file/0023/17267/politics-of-restraint.pdf [https://perma.cc/PHJ3-J7FT] (arguing that state of the judiciary speeches are one way for state supreme courts to influence state politics).

372. *See* Susan Tebben, *Ohio Chief Justice: 'We Do Not Have a Constitution that Will End Gerrymandering'*, OHIO CAP. J. (Sept. 16, 2022, 5:00 AM), https://ohiocapitaljournal.com/2022/09/16/ohio-chief-justice-we-do-not-have-a-constitution-that-will-end-gerrymandering/ [https://perma.cc/FP26-XANM].

373. Nikita Biryukov, *Chief Justice Raises Alarm as Court Vacancies Reach 'Highest Level in the History'*, N.J. MONITOR (May 20, 2022, 12:30 PM), https://newjerseymonitor.com/2022/05/20/chief-justice-raises-alarm-as-court-vacancies-reach-highest-level-in-the-history/ [https://perma.cc/7YYD-3FK8]; *see also* Adam Sopko, *A Judiciary by and for the Politicians*, N.J. MONITOR (Feb. 27, 2023, 7:09 AM), https://newjerseymonitor.com/2023/02/27/a-judiciary-by-and-for-the-politicians/ [https://perma.cc/36QN-94WD] (discussing how leaving judgeships unfilled for years has created a crisis in New Jersey leading to inefficient courts).

374. *See, e.g.*, Ashley Nerbovig, *Montana Supreme Court Justice: 'Will Our Institutions Be Lost . . . Over My Dead Body'*, KTVH (June 17, 2022, 7:19 PM), https://www.ktvh.com/news/montana-supreme-court-justice-will-our-institutions-be-lost-over-my-dead-body [https://perma.cc/7UHQ-M26P] (describing a speech by Justice Jim Rice as "a commentary on the ongoing power struggle between the three branches" and noting that he received a "standing ovation" from the audience consisting of members of the bar and public); Nikita Biryukov, *N.J. Chief Justice Again Urges Against Giving Senate Power To Name Appellate Judges*, N.J. MONITOR (May, 17, 3:43 PM), https://newjerseymonitor.com/2024/05/17/n-j-chief-justice-again-urges-against-giving-senate-power-to-name-appellate-judges/ [https://perma.cc/4T92-ZDAQ].

375. *See* Kansas Oral History Project, Inc., *Interview of Lawton Nuss by Richard Ross, July 27, 2022*, YOUTUBE, at 40:30 (Aug. 9, 2022), https://www.youtube.com/watch?v=1aafU-KpfxE [https://perma.cc/KWA4-F6ME] (on file with the North Carolina Law Review).

376. Sam Brownback, *Kansas Gov. Sam Brownback's 2013 State of the State Speech*, GOVERNING (Jan. 17, 2013), https://www.governing.com/archive/kansas-brownback-state-of-the-state-speech.html. [https://perma.cc/AB77-W5AR]

377. *See* Kansas Oral History Project, Inc., *supra* note 375, at 41:00–42:24.

attached to the judiciary's funding bill, which included a nonseverability provision, and signed into law.[378]

In response, the chief justice penned a series of op-eds, speaking directly to the people of Kansas, highlighting the legislature's and governor's efforts to intimidate the judiciary, their effects on the people's day-to-day interactions with the court system, as well as the rule of law.[379] Chief Justice Nuss's exercise of soft power generated significant local engagement, as well as national media attention in outlets like *The New Yorker* and *The New York Times*.[380] Thanks in part to the spotlight Nuss shined on the issue, the standoff ultimately ended with lawmakers releasing their grip on the judiciary's funding and relenting in their attempts to dilute the court's power.[381]

This episode, while provocative, illustrates the subtle but consequential effect supreme courts' soft power can have. In particular, the capacity for courts to appeal to the public in ways that can influence case outcomes and shape policy—here, preserving the ability to hold public school funding levels unconstitutional and retaining its supervisory authority and the existing method of judicial selection.

D. *A Research Agenda*

Thus far, the discussion of state supreme courts' soft power has proceeded at a high level of abstraction, focused primarily on the concept itself. But the theory discussed in this part raises doctrinal and methodological implications, as well. Future work within this paradigm might explore these considerations and how they might help illuminate new answers to existing normative questions concerning state supreme courts and the power they wield.

Consider statutory interpretation, an important aspect of a supreme court's hard power, and an evergreen issue among judges and scholars alike.

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378. Act of Apr. 17, 2014, ch. 82, § 43, 2014 Kan. Sess. Laws 537 (codified at KAN. STAT. ANN. § 20-1a17 (Westlaw through laws enacted during the 2023 Reg. Sess. of the Kansas Leg. effective on June 8, 2023)).

379. *See* Lawton R. Nuss, *Do You Like Where this Road Will Lead?*, HUTCHINSON NEWS (Mar. 18, 2014, 7:00 PM), https://www.hutchnews.com/story/opinion/columns/2014/03/18/do-you-like-where-this/20892304007/ [https://perma.cc/AA6J-DBXN]; Lawton R. Nuss, *Justice Selection System Should Remain*, HUTCHINSON NEWS (Feb. 26, 2015, 5:45 PM), https://www.hutchnews.com/story/opinion/columns/2015/02/26/justice-selection-system-should-remain/20953715007/ [https://perma.cc/A7P6-STE6].

380. *See, e.g.*, Lincoln Caplan, *The Political War Against the Kansas Supreme Court*, NEW YORKER (Feb. 5, 2016), https://www.newyorker.com/news/news-desk/the-political-war-against-the-kansas-supreme-court [https://perma.cc/625K-5KNR]; Erik Eckholm, *Outraged by Kansas Justices' Rulings, Republicans Seek To Reshape Court*, N.Y. TIMES (Apr. 1, 2016), https://www.nytimes.com/2016/04/02/us/outraged-by-kansas-justices-rulings-gop-seeks-to-reshape-court.html [https://perma.cc/JK6C-732C (staff-uploaded, dark archive)].

381. *See* Kansas Oral History Project, Inc., *supra* note 375, at 58:20; Caplan, *supra* note 380 (noting that "the legislature blinked").

Viewed through the perspective sketched above, we might ask whether supreme courts construe statutes differently if they were involved in the antecedent lawmaking process via their soft power. As active participants in the process, especially in states where judges are popularly elected statewide, the traditional assumptions that call for greater judicial deference to the legislature may make less sense.[382] One can see similar questions arise in the context of certain constitutional provisions, as supreme courts similarly play an active role in the ways in which some constitutional amendments make their way onto state ballots.[383]

Additionally, as we explore the sources and nature of state supreme court power, we might think about its limits, like justiciability. Here, too, attention to hard and soft power raises important questions. For example, state supreme courts generally refer to conventional forms of justiciability—e.g., standing, ripeness, and the political question doctrine—as a limitation on the power they wield—the "judicial power." So too with stare decisis. This raises the question of whether these rules apply to soft power, as well.

Finally, with this framework in mind, we can approach the important normative questions raised by soft power in general and invisible adjudication in particular. Some assumptions drawn from the discussion thus far might help frame future work. For example, we might hypothesize that as the costs of using hard power in certain instances increase, supreme courts will increasingly rely on soft power; and as soft power's ability to achieve a given outcome decreases, courts will increasingly resort to hard power. As an analytical device these background assumptions might help us address the line-drawing questions

382. To be sure, scholars have explored the possibility of state courts playing a more active role in statutory interpretation. However, that literature has focused on their common law power as the source of authority to practice less deference to the legislature, whereas here I am referring to their nonadjudicative administrative powers. *See generally* Kaye, *supra* note 300 (discussing the role of state courts in shaping policy through the development of the common law); Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479 (2013) (highlighting the power that the common law provides state courts). Kaye focused largely on statutes that codified judicial decisions, especially common law rules, like negligence, and argued state supreme courts can rely on their role as keeper of the common law to show less deference to the legislature when construing the underlying statute. Kaye, *supra* note 300, at 5–9. The point I raise here is related, but distinct. I suggest that the amount of legislative deference courts traditionally observe when construing a statute because they were the lawmaking actor and are democratically elected might make less sense in instances where supreme courts were actively engaged via their soft power, especially in states where the justices are popularly elected. Further, in these circumstances, supreme courts need not be limited necessarily to the common law when resolving difficult interpretive questions.

383. *See* Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 123–30 (1995); *cf.* Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 509 (discussing how the highest court of the state "used interpretive techniques to . . . fill a gap by effectively legislating a death penalty in deference to perceived public opinion although the capital punishment statute adopted by the electorate was defective").

invisible adjudication raises—e.g., how "hard" or "soft" should a supreme court's business be?

They might also inform more tactical questions associated with court reform, like how to reduce the power of a court seen as too strong or enhance the power of one seen as not strong enough. With more sensitivity to a supreme court's capacity and views as to how hard or soft its power should be, we can design a variety of policy responses. For example, we can see how a state's political environment might raise or lower the costs associated with use of a court's hard power. Coordinate branches might modify a court's structure or the norms that govern its operations to enhance or undermine the availability and efficacy of its soft power. Participants involved in judicial selection (e.g., governors, senators, selection commissions) might identify candidates who have a sophisticated grasp of soft power—or ones who are oblivious—to influence the shape and identity of a given supreme court. This theory also speaks to the other side of this coin—judicial independence. Reliance on older conceptions of judicial power risks understating the scope of a court's institutional independence.[384] The consequences are increasingly relevant, as supreme courts are under threat from legislative and executive branches in states across the country.[385]

Viewing state judicial power from the perspective outlined above better accounts for the fact that it is the product of a dynamic process that is contingent on and influenced by a variety of factors.[386] Placing the judicial power in traditional frames of adjudicative or nonadjudicative, administrative or procedural, etc. artificially compartmentalizes it and fails to capture the subtlety of the state judicial role.[387] As a result, we risk skewing our institutional understanding of how state supreme courts function in state governance. We also risk failing to fully appreciate the stakes of judicial selection and institutional design. By relying on wooden conceptions of judicial power, our approach to important normative questions about structural revision, ideal selection methods, desirable candidates, and others is necessarily limited. As a result, we overlook many of the challenges and opportunities these institutions present.

384. *See* G. Alan Tarr, *Contesting the Judicial Power in the States*, 35 HARV. J.L. & PUB. POL'Y 643, 660–61 (2012).

385. *See* Berry et al., *supra* note 307.

386. *See* STUMPF & CULVER, *supra* note 54, at 6–8.

387. *See* BUENGER & DE MUNIZ, *supra* note 25, at 39 ("The development of modern judicial institutions and the evolving role of the judiciary in governing American society seems, at times, to conflict with conventional assumptions and often historically misplaced understandings of interbranch relations."); Linde, *Observations*, *supra* note 360, at 117 ("The active participation of state judges in the policy process is much more taken for granted and much less controversial than the involvement of federal judges in the national government.").

CONCLUSION

Invisible adjudication describes the numerous decisions state supreme courts make outside of their traditional appellate process, using the uniquely expansive set of procedural and administrative devices at their disposal. These seemingly unremarkable features empower state supreme courts in subtle ways, enabling them to significantly affect case outcomes. Almost all of these decisions escape public scrutiny due to the opaque nature of state supreme court dockets. As we increasingly turn to state supreme courts to protect and enhance our most important constitutional rights, invisible adjudication is likely to become more pervasive—and perhaps pernicious—in the years to come, and thus deserves our careful attention.