



JUDICIAL INTERPRETATION

GOVERNMENT STRUCTURE

## State Supreme Court ‘Shadow Dockets’: More Power with Less Transparency

State supreme courts are shaping the law and resolving some of the most consequential issues facing society in ways that are almost impossible for us to see.

By Adam Sopko | Published: May 10, 2024

North Carolina Ohio Michigan New York Wisconsin Montana Iowa

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State supreme courts routinely shape the law around salient legal issues — but sometimes they do it without full briefing, oral argument, opinions, or even parties filing suit. These decisions are coming from their “shadow dockets.”

The term [shadow docket](#) usually refers to orders and summary decisions the U.S. Supreme Court issues outside its opinions in the 50 to 60 cases it hears each term. Shadow docket decisions typically cover mundane aspects of the Court’s business,

like scheduling of oral arguments or granting parties permission to file extra-long briefs. The shadow docket is as old as the Court itself. But as law professor Steven Vladeck [has shown](#), the Court has in recent years made a marked shift in how it uses these non-merits orders, issuing decisions both more often and to make significant jurisprudential changes. Critics argue this approach to the shadow docket undermines the Court's [legitimacy](#) and the rule of law.

To date, debate around shadow dockets has focused almost entirely on the U.S. Supreme Court. But state courts have shadow dockets as well. State courts are the engines of the American legal system and are increasingly serving as the [primary forums](#) to address society's most consequential questions of law and policy, from [abortion](#) to [climate change](#). Despite the stakes, the way state supreme courts use their shadow dockets has [gone](#) largely [unnoticed](#).

My new [law review article](#) and [white paper](#) explain how state supreme court shadow dockets are broader and less transparent versions of their federal counterpart. State-level shadow dockets have a broader reach because state courts possess a wider variety of administrative and procedural powers that they exercise on a more regular basis. And they are less transparent because public access to state court documents is extremely limited.

As state high courts increasingly serve as the last word on the scope of our constitutional rights and shape of our democracy, their shadow dockets warrant careful attention.

Discussion of state shadow dockets should start with the state judicial power. State constitutions vest supreme courts with a more [expansive set of powers](#) that resemble legislative, executive, and administrative authority, resulting in a [broader conception](#) of the judicial role. Additionally, all state supreme courts possess [a variety](#) of constitutional and inherent powers that lack a federal analogue or extend beyond comparable powers. And the structures of state judiciaries themselves sometimes differ from the design of the federal courts. In Iowa, for example, appeals come first to the supreme court rather than an intermediate appellate court, and in Montana the supreme court is the state's only court of review.

These differences in state judicial role, structure, and authority cash out in a variety of mechanisms that empower supreme courts to shape case outcomes outside of the merits.

For example, supreme courts possess broad managerial authority over the state judiciary. As the head of the judicial branch, the supreme court in most states possesses an expansive [supervisory power](#) that confers near plenary control over judicial business. The power can be used for operational issues, like crafting courtroom access policies during the pandemic. But it can also be used to [remove](#) lower-court judges in the midst of litigation, [resolve legal disputes](#) before a complaint has been filed, and even [invalidate statutes](#).

Supreme courts' control of their dockets — as well as the state judiciary's overall workload — allows courts to determine when cases are heard and the path they take to the supreme court. For example, fast tracks expedite the ordinary appeal timeline. Similarly, through [bypass](#) and [assignment](#) decisions, supreme courts determine whether a case skips review by the lower appellate court. They are often governed by highly [discretionary](#) standards — or no standard at all — and can often be made on the court's own motion.

These caseload decisions can affect individual case outcomes in addition to a state's broader political environment. Justices may expedite appeals before a change in the partisan composition of the court, as happened recently in [North Carolina](#) and [Ohio](#). Bypass and assignment decisions can be used to navigate judicial elections and mandatory retirements to ensure a case reaches a high court when the votes are present to guarantee a certain outcome. And supreme courts might assign controversial cases to lower courts, hoping the case settles or the spotlight on the issue dims — an approach the Michigan Supreme Court took recently in a particularly [high-profile case](#) asking whether Donald Trump was disqualified from this year's primary election.

Discretionary opinion publication procedures enable supreme courts to shape the law, as unpublished opinions are generally nonprecedential. Many courts publish every merits opinion — decisions resolving the underlying questions in a case — as a matter of course, but some don't. In the states that do not, the decision about whether a

particular opinion should be published and, therefore, have precedential weight, is handled on the shadow docket. Some supreme courts even have the power to determine the publication status of *lower court* opinions as well. Procedures like [depublishation](#) (unpublishing a lower court's opinion) and [superpublication](#) (granting lower court decisions the precedential weight of a supreme court opinion) enable them to shape state law outside of litigation by dictating the precedential status of lower court decisions.

Supreme courts also use their shadow dockets to issue summary decisions on the merits and orders granting temporary relief, like a stay. While these kinds of extraordinary procedures are typically reserved for routine cases, some have relied on them to resolve issues of first impression or make major jurisprudential changes. Yet in both instances, courts rarely issue full opinions, instead relying on short, conclusory orders.

For example, the high courts in [Michigan](#) and [New York](#) have resolved novel issues concerning free speech and the rights of criminal defendants via summary order, and have done the same with requests for temporary relief. While perfunctory orders are common here because they typically only apply to the underlying case, some supreme courts have used them to make permanent, sweeping jurisprudential changes. Wisconsin's high court, for example, stayed a lower court order in a shadow docket decision that [had the effect](#) of broadly limiting the availability of certain remedies seemingly for all future litigants in the state.

The significant lack of transparency into their dockets makes it almost impossible to know how state supreme courts use this broader universe of procedures. In contrast, what we know about the U.S. Supreme Court's shadow docket is facilitated by relatively [easy access](#) to court documents. Through its website, the public can determine the who, what, where, and when of its shadow docket. While the Court's shadow docket is opaque, at least the public can track its inputs and outputs, allowing for a fuller picture of how it wields its power.

Not so with most state supreme courts. Indeed, in most states, free online access to documents like case filings and court orders is either nonexistent or significantly limited. Often users need case-specific information, like exact filing dates or

individualized docket numbers to see most case information. Even for sophisticated users, the universe of available documents is often limited to certain categories, like briefs. **One-third** of state supreme courts require users either to file written records requests or print documents from courthouse computer terminals.

Without greater transparency into state court business, it is nearly impossible to separate the anodyne uses of state shadow dockets from the abusive.

State supreme courts exercise a broader and more flexible form of judicial power, so in a world with a better understanding of state courts, it is possible that some shadow docket practices pose no normative problem. Until then, increasing scholarly and public awareness of these practices is a worthy objective for those who care about the role of state supreme courts and the power they wield.

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Suggested Citation: Adam Sopko, *State Supreme Court 'Shadow Dockets': More Power with Less Transparency*, STATE COURT REPORT (May 10, 2024),

<https://statecourtreport.org/our-work/analysis-opinion/state-supreme-court-shadow-dockets-more-power-less-transparency> .

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