SHADOW DOCKETS LITE

HAYLEY STILLWELL[†]

ABSTRACT

Inherent to the role of judges is the obligation to explain themselves and to create precedent—which is why the U.S. Supreme Court's "shadow docket" has recently garnered ample criticism. Unfortunately, other courts share these deficiencies. Oklahoma Supreme Court justices often decline to vote without explanation. They also note their disagreement with some or all of an opinion, but fail to explain why. Tenth Circuit Court of Appeals judges decide whether an opinion is unpublished—and thus nonprecedential—without explanation. These practices are "shadow dockets lite" because they are more consistent with the role of judges than the Supreme Court's shadow docket, but are still problematic and worthy of scrutiny. This Article explains how these practices run afoul of the role of judges and proposes rules to bring these practices in line with the obligation of judges to explain themselves and to create precedent.

TABLE OF CONTENTS

† Hayley Stillwell is a graduate of the University of Oklahoma College of Law (2017) and served as a law clerk on the Oklahoma Supreme Court (2018), the U.S. District Court for the Western District of Oklahoma (2019), the United States Court of Appeals for the Tenth Circuit (2020), and the United States Court of Appeals for the Second Circuit (2021).

INTRODUCTION

The U.S. Supreme Court's "shadow docket" has garnered ample attention in the last few years because a problematic portion of the Justices' work consists of decisions that are a mystery to the public.[1] The orders and summary decisions on the shadow docket are often unsigned and issued without explanation or a vote tally.[2] These characteristics of the shadow docket contravene the obligations of judges—to be transparent, to be accountable, to provide explanation, and to create precedent. Unfortunately, other courts share these deficiencies.

The Oklahoma Supreme Court and the United States Court of Appeals for the Tenth Circuit both employ practices similar to the shadow docket. Oklahoma Supreme Court justices can decide not to vote in a case without explanation.[3] They also often concur, dissent, or concur in part and dissent in part without explanation.[4] And in the Tenth Circuit, the reasons for publication designations—which determine whether an opinion creates binding precedent—are unknown.[5] The Tenth Circuit's rules do not outline publication criteria panels must consider, so what makes one opinion worthy of publication and precedential value and another unworthy and nonprecedential is a mystery to all but the panel members. Worse yet, most opinions issued by the Tenth Circuit are unpublished, meaning they simultaneously create no precedent and problematic incentives for subpar performances from judges.[6]

---

1. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 10 (2015).

2. *See id.*

3. *See, e.g.*, Immel v. Tulsa Pub. Facilities, 490 P.3d 135, 148 (Okla. 2021) (showing that Justice Darby refrained from voting without providing a reason).

4. *See, e.g.*, Tay v. Malone (*In re* State Question No. 813), 476 P.3d 471, 471 (Okla. 2020) (showing that multiple justices concurred without additional writing or explanation).

5. *See* Jane Michaels Talesnick*, Understanding the United States Court of Appeals for the Tenth Circuit: A Guide for the Practioner*, 52 DENV. L.J. 375, 400 (1975) (explaining that the court used to have a mandatory publication for cases that had been published by a district court, an administrative agency, or the tax court, but no longer does).

6. *See* ADMIN. OFF. OF THE U.S. CTS., JUDICIAL BUSINESS OF THE UNITED STATES COURTS: TABLE B-12 (2020), https://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2020.pdf (data shows that 81.7% of cases were unpublished in the Tenth Circuit in 2020).

These practices are "shadow dockets lite."[7] Although they are more consistent with the obligations of judges than shadow docket practices, they are still problematic and worthy of scrutiny. Unlike most shadow docket orders, the vote counts in all Oklahoma Supreme Court decisions and most unpublished Tenth Circuit opinions are disclosed to the public.[8] These practices thus embrace some transparency and accountability, but not enough considering what is *not* disclosed to the public. Namely, it is not disclosed why Oklahoma Supreme Court justices did not vote or disagreed with the majority opinion's reasoning, outcome, or both without explanation, and why the Tenth Circuit strips some opinions of precedential authority by designating them as "unpublished." And like the shadow docket, the Tenth Circuit's unpublished opinion practice runs afoul of the obligation of judges to create precedent.

The problems with shadow dockets lite should be addressed to ensure Oklahoma Supreme Court justices and Tenth Circuit judges fulfill their obligations as judges. Rule amendments should force the Oklahoma Supreme Court and the Tenth Circuit's mysterious decisions out of the shadows and into the light. Likewise, rule amendments should require judges to provide explanations for their decisions and should make the practice of declining to create precedent the exception, not the rule. With such transparency will come accountability and legitimacy, both in appearance and in truth.

Part I of this Article analyzes the role of judges in American society and argues that judges have an obligation to explain themselves, particularly when they disagree with a majority opinion's reasoning or outcome, as well as an obligation to create precedent. This Part also argues that even if these obligations are not inherent in the relevant constitutional judicial authority, they should nevertheless be imposed upon judges for policy reasons. Part II highlights the practices of two courts that conflict with these obligations. First, this Part outlines the practice of Oklahoma Supreme Court justices to concur, dissent, or partially concur and dissent, but not write separately, as well as the practice of "not participating" or "not voting" in a decision without explanation. Second, this Part highlights the practice of Tenth Circuit judges to designate opinions as unpublished—rendering them nonprecedential—and failing to explain the reason for such designations. Finally, Part III proposes rules to bring these practices in line with the obligations of judges to explain themselves and to create precedent.

---

7. This phrase is a play on the Supreme Court's shadow docket. *See infra* Part II.

8. *See, e.g.*, Farley v. City of Claremore, 465 P.3d 1213, 1243 (Okla. 2020) (listing seven concurring justices, one dissenting justice, and one disqualified justice); United States v. Taylor, 672 F. App'x 860, 865 (10th Cir. 2016) (listing justices that joined the court's opinion).

I. THE ROLE OF JUDGES

Judges hold immense power and respect in our society. They pass judgment on cases and controversies, including by sometimes declining to enforce statutes enacted by legislatures and invalidating acts of the executive. Because our system of government grants judges such power, society expects that power to be used justly and impartially.[9] But civilians only know whether judges are fulfilling this expectation if they explain their decisions. Without transparency, the legitimacy of the judicial system is compromised, and judges have flouted their fundamental obligation to explain themselves. This responsibility carries over into explaining any disagreement judges have with a majority opinion's reasoning or outcome.

Along with the obligation to explain, inherent in the Article III judicial power is the obligation to create precedent. Constitutional requirements aside, when judges decline to create precedent, they are incentivized to spend less time critically analyzing issues and bury tough cases because an opinion is nonbinding. This practice should therefore be looked upon with skepticism as not only constitutionally improper, but also as an outlet for judicial mischief.

A. Explanations

Article III of the U.S. Constitution leaves little doubt that the judiciary is a fundamental pillar in our nation's tripartite governmental system.[10] Aside from the judiciary's role as a check on the executive and legislative branches, it serves as the adjudicator of legal disputes and criminal allegations.[11] The judiciary enjoys a similar role in state governments.[12] Americans have come to expect that not only do judges or multi-judge courts resolve disputes one way or the other ("the motion for summary judgment is denied"), but they also explain why ("because there is a genuine issue of material fact about the cause of the car accident").[13] But there is no explicit mandate, constitutional or otherwise, that requires judges to explain themselves.[14] So why do we expect judges to explain themselves and why do judges often do so?

Inherent to the judicial power is the obligation of judges to justify their applications of the law to the facts of the cases before them.[15] But,

---

9. *See Guide to Judiciary Policy*, Vol. 2A, Ch. 2, Canon 3 (2019).
10. *See* U.S. CONST. art. III, §§ 1–2.
11. *See* Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2046 (2020) (Thomas, J., dissenting).
12. *See, e.g.*, OKLA. CONST. art. VII, § 1.
13. *See* Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1097–98 (2010) (arguing that judges are typically held to a higher standard than other branches of government when explaining their reasoning).
14. *See id.*
15. *See* Micah Schwartzman, Essay, *Judicial Sincerity*, 94 VA. L. REV. 987, 1005 (2008) ("[T]he fact of reasonable disagreement does not excuse political officials, including judges, from their responsibility to justify their decisions."); Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 486 (2015) ("More than other branches of government, judges are expected to be model reason-givers.").

without giving an explanation of those reasons to the public, the legitimacy of the issuing court is compromised and "there can be no opportunity to evaluate, scrutinize, and possibly assent to the reasons for a decision."[16] Public explanation is thus an implicit obligation of judges in order to maintain the judiciary's legitimacy, and for good reason.[17]

Consider parties who disagree that summary judgment is proper in a negligence action for a car accident. The attorneys spend hours writing briefs and may even present oral arguments to the court. If the presiding judge simply issues a ruling stating "summary judgment is denied," the parties are left in the dark as to why summary judgment was denied. The party who opposed summary judgment will undoubtedly be pleased, but the party who moved for summary judgment will be dissatisfied and left wondering why their argument failed. "The most immediate function of an opinion is to explain to parties and their counsel what is being done with their case."[18] The outcome, without the reasoning, throws the explanation out the window. As a result, the losing party is less likely to accept the outcome and less likely to view the court and its ruling as legitimate.[19] But if judges explain themselves, losing parties are more likely to accept outcomes because they will think their arguments were carefully considered.[20]

Future courts are another audience left wondering why when judges issue decisions without explanation. Judges do not decide cases in a vacuum and often stare decisis prohibits them from doing so. For example, any judge who is not on a court of last resort is bound by vertical stare decisis, "a court's obligation to follow the precedent of a superior court."[21] Some judges, like those on federal courts of appeals, are additionally bound by horizontal stare decisis, "a court's obligation to follow its own precedent."[22] A judicial decision without explanation, however, does not

16. Schwartzman, *supra* note 15, at 1004–05 ("[T]he principle of legal justification is based on the idea that legal and political authorities act legitimately only if they have reasons that those subject to them can, in principle, understand and accept.").

17. *See* William L. Reynolds & William M. Richman, *The Non-Precedential Precedent-Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1201 (1978) ("[Judges have] the obligation to develop and elaborate the law . . . .").

18. *See* Robert A Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 811 (1961).

19. Schwartzman, *supra* note 15, at 1002 ("Decisions reached without regard to reasons are not responsive to the underlying conflict between the parties. The parties can therefore complain that the purpose of the adjudicative process has been corrupted or ignored. The reasons they presented were not given proper consideration in resolving the conflict between them. The winning party may be pleased with the outcome. But even the winner may realize that the decision was reached incorrectly or, worse yet, illegitimately.").

20. Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CALIF. L. REV. 541, 567 (1997) ("When a judge's reasoning in a particular case is open to public scrutiny, litigants may be less likely to believe that the decision was arbitrary or unfair.").

21. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1712 (2013).

22. *Id.* at 1712. Horizontal stare decisis "is a virtually absolute rule in courts of appeals, which prohibit one panel from overruling another, allowing only the rarely seated en banc court to overrule precedent." *Id.* at 1713.

create precedent for future courts to apply. If an appellate court resolves an appeal without explanation, the case can have no precedential effect[23]—vertical or horizontal—because the legal reasons for the decision are unknown. In a world where all judicial decisions lack explanation, contrary to America's common law practice of precedent, courts would be forced to decide cases without guidance, and uniformity of judicial decisions—a virtue of the rule of law—would become improbable.

Lack of explanation in judicial decisions further eradicates the virtue of predictability, "a defining feature of the rule of law."[24] "Achieving predictability of outcomes within a jurisdiction and uniformity in the law across parallel jurisdictions helps [en]sure consistency in judicial decisions, giving people a greater sense of certainty in the way judges will resolve disputes. In this way, predictability lends strength and legitimacy to a rule-of-law system."[25] But without explanations for judicial decisions, predictability is lost, and all are left unsure how their actions or problems will be treated in a court of law.

Practical ends are also served by judicial opinions that explain judges' reasoning. Other than the U.S. Supreme Court and state courts of last resort, all courts sit as inferior courts and are therefore subject to appellate review. Judges on lower courts that fail to show their work make the reviewing court's job exponentially more difficult. By showing their work, lower court judges can provide the reviewing court a roadmap for affirmance or can expose flawed reasoning.

In addition, providing explanations in judicial opinions helps ensure the outcome's accuracy. Indeed,

> [T]he necessity for preparing a formal opinion assures some measure of thoughtful review of the facts in a case and of the law's bearing upon them. Snap judgments and lazy preferences for armchair theorizing as against library research and time-consuming cerebral effort are somewhat minimized. The checking of holdings in cases cited . . . the answering of arguments seriously urged, the announcement of a conclusion that purportedly follows from the analysis set out in the opinion, are antidotes to casualness and carelessness in decision. They compel thought.[26]

---

23. At least not in a way that would allow a judge to apply the case to different factual circumstances. *See* Schwartzman, *supra* note 15, at 1003 ("[I]n many cases, judges make decisions that reach beyond disputes between particular litigants. In common law systems, cases or controversies arising from the same or similar circumstances are often governed by precedent. For that reason, the demand for justification can be issued not only by present litigants but also by any future parties whose claims will be controlled by a court's prior decisions.").

24. Kem Thompson Frost, *Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities*, 67 BAYLOR L. REV. 48, 51 (2015).

25. *Id.*

26. Leflar, *supra* note 18, at 810.

Such careful thought can also expose weaknesses in the initially expected outcome.[27] In such cases, judges may "initially mak[e] a decision" but then "find[ ] [themselves] unable to craft an opinion justifying that decision" because the opinion "simply 'won't write.'"[28]

> Most of these reasons for why judges must show their work apply with equal force to the argument that judges on multi-member courts should write separately if they disagree with a majority opinion's reasoning or outcome. Writing separately used to be a Supreme Court requirement, even if the Justices agreed.[29] Seriatim opinions, a series of opinions, were the norm for Supreme Court decisions at the birth of the American judiciary.[30] Each Justice wrote separately, "leav[ing] the Court with no single controlling opinion."[31] This type of opinion "created substantial uncertainty and instability in the law."[32] But with Chief Justice Marshall's leadership, the practice of issuing seriatim opinions came to an end in 1801.[33] In its place, the Supreme Court began issuing opinions of the Court, wherein one Justice spoke for the members of the majority in agreement about the resolution of a case—much like the current practice of multi-judge courts today.[34] Although unanimity (or close to it) is the norm in Supreme Court decisions,[35] and even more so in federal courts of appeals decisions, judges often write separately to

---

27. *See* Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1411 (1998) ("[W]riting is thinking. Thus the drafting of an opinion may enforce, undermine, or modify an initial conclusion.").

28. *See id.* (quoting Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 270 (1997)).

29. *See* M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 303–04 (2007).

30. *See id.* ("England's long tradition of seriatim opinions crossed the Atlantic along with much of the common law during the formative stages of American judicial development.").

31. Joshua M. Austin, *The Law of Citations and Seriatim Opinions: Were the Ancient Romans and the Early Supreme Court on the Right Track?*, 31 N. ILL. U. L. REV. 19, 27 (2010).

32. Henderson, *supra* note 29, at 308; *see also* Calder v. Bull, 3 U.S. 386, 386, 395, 398, 400 (1798) (four justices writing separate opinions with diverse reasoning on the question of whether a state statute violated the *Ex Post Facto* Clause of the U.S. Constitution).

33. Austin, *supra* note 31, at 27–28 ("Important to note is the intention of Marshall in abolishing the practice of seriatim opinions. At the time of his ascension to Chief Justice, the judiciary was not only the weakest branch of the government, it was also the only branch remaining in the hands of Jefferson and the Republican's rival, the Federalists. Marshall wanted to build the power of the judiciary so as to put it on equal footing with the other branches of the government. 'He saw the termination of seriatim opinions as one step toward achieving that goal.' Ultimately, Marshall and the Federalists won this battle, and in so doing, 'buil[t] much of what we recognize as the American legal system.") (quoting THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 780 (Kermit L. Hall ed., 1992)) (internal footnotes omitted).

34. *See, e.g.*, Talbot v. Seeman, 5 U.S. 1, 1 (1801) (issuing one opinion of the court with no separate writings).

35. Between 2008 and 2019, Supreme Court Justices were unanimous or had no dissenting opinions in about 36%-66% of their decisions. *See Stat Pack Archive*, SCOTUSBLOG, https://www.scotusblog.com/reference/stat-pack/ (checking each year). And in 2020 October Term, the Justices were unanimous in 43% of their cases. *See* Kalvis Golde, *In Barrett's First Term, Conservative Majority is Dominant but Divided*, SCOTUSBLOG (July 2, 2021, 6:37 PM), https://www.scotusblog.com/2021/07/in-barretts-first-term-conservative-majority-is-dominant-but-divided/.

explain their disagreements with a majority opinion or their alternate reasoning for a majority opinion's outcome.[36]

While the practice of writing separately may not present a unified court to the world,[37] doing so should be accepted as a crucial role of a judge. Even Chief Justice Marshall, the source of the modern majority opinion, took on this role periodically.[38] Writing separately has no impact on the parties in a particular case (other than making the losing party feel heard and perhaps validated); the majority opinion controls the outcome and an alternate rationale in a concurrence or complete disagreement in a dissent cannot change that. Yet, writing separately is crucial for the development of the law. If stare decisis dictated all outcomes without exception, then there would be no function in writing separately; in every case, the majority opinion would establish precedent that could never be overruled. But the doctrine of stare decisis requires courts to weigh competing factors,[39] and this exercise sometimes permits courts to overturn precedent.[40] This happens not only in the Supreme Court, but also in the federal courts of appeals.[41] Thus, writing separately is not necessarily all for nothing; separate writings play important roles in shaping future law.

There are notable examples of this in Supreme Court jurisprudence. One of the most well-known dissents was authored by Justice Harlan in *Plessy v. Ferguson*.[42] In *Plessy*, the majority opinion held that separate but equal facilities did not violate the Constitution.[43] In his dissent, Justice Harlan rejected the majority opinion's conclusion, famously stating: "Our Constitution is color-blind and neither knows nor tolerates classes among citizens."[44] Fifty-eight years later in *Brown v. Board of Education*,[45] the

---

36. *See* Golde, *supra* note 35.

37. *See* Austin, *supra* note 31, at 31 ("It is Chief Justice John Roberts's opinion that the Court speaking with one voice is more respected, stabilizes the law, and makes decisions harder to overturn."); *see also* Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 142 (1990) ("Concern for the well-being of the court on which one serves, for the authority and respect its pronouncements command, may be the most powerful deterrent to writing separately.").

38. *See, e.g.*, Bank of the United States v. Dandridge, 25 U.S. 64, 90 (1827) (Marshall, C.J., dissenting).

39. Justice Kavanaugh explained in his *Ramos v. Louisiana* concurrence:

> The *stare decisis* factors identified by the Court in its past cases include:
> the quality of the precedent's reasoning;
> the precedent's consistency and coherence with previous or subsequent decisions;
> changed law since the prior decision;
> changed facts since the prior decision;
> the workability of the precedent;
> the reliance interests of those who have relied on the precedent; and
> the age of the precedent.

Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part).

40. *See, e.g.*, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2096 (2018) ("Here, *stare decisis* can no longer support the Court's prohibition of a valid exercise of the States' sovereign power.").

41. *See, e.g.*, Riccio v. Sentry Credit, Inc., 954 F.3d 582, 593 (3d Cir. 2020) (overruling Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991), and abrogating Caprio v. Healthcare Revenue Recovery Grp., LLC, 709 F.3d 142 (3d Cir. 2013), upon consideration of stare decisis factors.

42. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

43. *Id.* at 548–51 (majority opinion).

44. *Id.* at 559 (Harlan, J., dissenting).

45. 347 U.S. 483 (1954).

Supreme Court overturned *Plessy*'s constitutional blessing of separate but equal and the views expressed in Justice Harlan's dissent prevailed.[46]

Separate writings can also prompt the overruling of a majority holding in other ways. For example, in response to *Dred Scott v. Sandford*[47] announcing that Black Americans were not citizens, the Civil War erupted. Subsequently, Congress added the Reconstruction Amendments to the Constitution, abolishing slavery and guaranteeing former slaves equal protection of the laws and the right to vote.[48] Two Justices, Justice Curtis and Justice McLean, dissented in *Dred Scott*, attacking the logic of the majority opinion.[49] Although their dissents were not the sole reason for the Civil War and the adoption of the Reconstruction Amendments, they validated the views of non-slaveholding citizens,[50] moving the ball forward for change.

Another, more recent example of this is the overruling of *Ledbetter v. Goodyear Tire & Rubber Co*.[51] by the Lilly Ledbetter Fair Pay Act of 2009 (the Act).[52] In *Ledbetter*, Lilly Ledbetter sued her former employer, Goodyear, for sex discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII).[53] She had worked for Goodyear for nineteen years.[54] Ledbetter introduced evidence at trial that several of her supervisors had given her poor performance evaluations because of her sex.[55] In turn, Ledbetter's pay did not increase as much as it should have throughout her time at Goodyear.[56] The jury found for Ledbetter, but the court of appeals and the Supreme Court held that Ledbetter's claim was time-barred.[57] The statute required Ledbetter to file her discrimination claim within 180 days after Goodyear's alleged pay discrimination, but she only did so at the end of her nineteen-year employment.[58]

---

46. *Id.* at 494–95. Other examples include Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), *overruled by* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018); Sykes v. United States, 564 U.S. 1 (2011), *overruled by* Johnson v. United States, 576 U.S. 591 (2015); McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

47. 60 U.S. 393 (1857), *superseded by statute as stated in* Fletcher v. Haas, 851 F. Supp. 2d 287 (D. Mass. 2012).

48. *See* Henry L. Chambers, Jr., *The Constitution and the Sectional Conflict: Slavery, Free Blacks and Citizenship*, 43 RUTGERS L.J. 487, 502, 504–05 (2013).

49. *See Dred Scott*, 60 U.S. at 529–64 (McLean, J., dissenting); *id.* at 564–633 (Curtis, J., dissenting).

50. *See generally id.* at 531–34, 536–38, 547, 554, 557–64 (MacLean, J., dissenting); *id.* at 564, 567–73, 575–76, 578–79, 582–83, 587–89 (Curtis, J., dissenting).

51. 550 U.S. 618 (2007), *superseded by statute as stated in* Davis v. Bombardier Transp. Holdings, Inc., 794 F.3d 266, 269–70 (2d Cir. 2015).

52. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

53. *Ledbetter*, 550 U.S. at 621.

54. *Id.*

55. *Id.* at 622.

56. *Id.*

57. *Id.* at 622–23, 637.

58. *Id.* at 628–29.

Justice Ginsburg authored a compelling dissent based not on the text of the statute, but on "common characteristics of pay discrimination."[59] She explained:

> Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.[60]

Justice Ginsburg also highlighted that pay discrimination is not as readily identifiable to an employee as other forms of discrimination like termination, failure to promote, or refusal to hire.[61] Because employees suffering from pay discrimination, like Ledbetter, are unlikely to realize the discrimination after every pay decision, under the majority opinion's holding, "[e]ach and every pay decision [an employee does] not immediately challenge wipe[s] the slate clean."[62] In Justice Ginsburg's view, this was "a cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose."[63] She concluded her dissent by calling on Congress to act: "[T]he ball is in Congress' court."[64]

Congress and the President heard Justice Ginsburg loud and clear. Less than two years later, they enacted the Lilly Ledbetter Fair Pay Act. The Act amended various discrimination laws "to clarify that a discriminatory compensation decision or other practice that is unlawful under such [discrimination laws] occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice . . . ."[65] The Act made no secret of Congress's disagreement with *Ledbetter* and its intention to overrule it:

> Congress finds the following:
>
> (1) The Supreme Court in [*Ledbetter*] significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.

---

59. *Id.* at 645 (Ginsburg, J., dissenting).
60. *Id.*
61. *Id.* (citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002)).
62. *Id.* at 660.
63. *Id.* at 661.
64. *Id.*
65. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

> (2) The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.[66]

Even though Justice Ginsburg's view did not win the day in 2007, the other branches of government answered her call to fix Title VII with legislation overruling the majority opinion in *Ledbetter*. Justice Ginsburg's dissent was thus a catalyst for legal change.

Sometimes separate writings that agree with the majority opinion's outcome, but disagree with its reasoning or offer additional reasoning, become future law. In *Katz v. United States*,[67] Justice Harlan II's concurrence announced what later became known as the *Katz* test: to determine whether the Fourth Amendment protects a person, house, paper, or effect from a government search, the Court asks "first [whether] a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, [whether] the expectation be one that society is prepared to recognize as 'reasonable.'"[68] The *Katz* test was later adopted by the Supreme Court in *Smith v. Maryland*.[69] And in *Youngstown Sheet & Tube Co. v. Sawyer*,[70] Justice Jackson's concurrence outlining a tripartite framework for executive authority has become the modern rule.[71]

The power of separate writings is not limited to the Supreme Court. In the federal courts of appeals, "a separate opinion may signal to the [Supreme] Court that the case is troubling and perhaps worthy of a place on its calendar."[72] A notable example in the Tenth Circuit is Chief Judge Tymkovich's concurrence in the denial of rehearing en banc in *Murphy v. Royal*,[73] wherein he proposed, "[T]his challenging and interesting case makes a good candidate for Supreme Court review."[74] The Supreme Court agreed and granted the petition for certiorari in *Royal v. Murphy*.[75]

---

66. *Id.*

67. 389 U.S. 347 (1967), *superseded by statute as stated in* People v. Darling, 742 N.E.2d 596, 599 (N.Y. 2000).

68. *Id.* at 361 (Harlan II, J., concurring).

69. 442 U.S. 735, 740–41 (1979), *superseded by statute as stated in* S. Bell Tel. & Tel. Co. v. Hamm, 409 S.E.2d 775, 778 (S.C. 1991).

70. 343 U.S. 579 (1952).

71. *Id.* at 635–38 (Jackson, J., concurring); *see, e.g.*, Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 10 (2015) ("In considering claims of Presidential power this Court refers to Justice Jackson's familiar tripartite framework from *Youngstown*. . . .").

72. Ginsburg, *supra* note 37, at 144.

73. 875 F.3d 896 (10th Cir. 2017) (Tymkovich, C.J., concurring in part).

74. *Id.* at 968.

75. 138 S.Ct. 2026 (2018). Although the Supreme Court granted the petition for certiorari, it ultimately held the case over until the resolution of *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), which presented the same issue. Other examples include Judge McKeown's dissent in *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1038 (9th Cir. 2020) (McKeown, J., dissenting), *cert. granted in part*, 141 S. Ct. 972 (2020), *rev'd and remanded*, 141 S. Ct. 2190 (2021), and Judge Ikuta's dissent from the denial of rehearing en banc in *Cedar Point Nursery v. Shiroma*, 956 F.3d 1162 (9th Cir. 2020) (Ikuta, J. dissenting).

Whether it be by offering alternate reasoning in a concurrence or dissent or urging the legislature or a reviewing court to scrutinize the majority opinion and take action, separate writings play important roles in shaping future law.

Writing separately also has the desirable effect of sharpening the majority opinion. "The prospect of a dissent or separate concurring statement pointing out an opinion's inaccuracies and inadequacies strengthens the test; it heightens the opinion writer's incentive to 'get it right.'"[76] Separate writings also serve to point out weaknesses in the majority opinion, provoking "clarifications, refinements, [or] modifications in the court's opinion."[77] Few would disagree that separate writings produce a stronger final work product.

At a more fundamental level, it is the job of judges to apply the facts of a case to the law, regardless of whether their determination and rationale align with other judges. When appointed to their positions, judges take an oath to administer justice and uphold the relevant constitution and laws.[78] To disagree with a majority opinion's rationale or outcome and stay silent flouts the fundamental responsibility of judges to explain their disagreement. The judicial role is not to be a pushover and succumb to a majority's position simply because the judge's position is in the minority. It is judges' prerogative to disagree with each other, but it is also their duty to explain their disagreement.

Of course, it may not always be possible for judges to write an extensive explanation of their disagreement with a majority opinion's rationale or outcome. As Justice Ginsburg recognized, "[A]ll [judges] operate under one intensely practical constraint: time."[79] For example, among the twelve federal courts of appeals,[80] 50,258 cases were filed in 2020.[81] And at the Supreme Court, consisting of a mere nine Justices, 5,411 cases were filed in the 2019 October term.[82] These large numbers of filings in the federal

---

76. Ginsburg, *supra* note 37, at 139.

77. *Id.* at 143.

78. For example, the oath taken by federal justices and judges states:

> I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God.

28 U.S.C. § 453.

79. Ginsburg, *supra* note 37, at 142. Justice Ginsburg also noted that "[i]n collegial courts, one gets no writing credit for dissenting or concurring opinions; however consuming the preparation of a separate opinion may be, the judge must still carry a full load of opinions for the court. Dissents or concurrences are written on one's own time." *Id.*

80. U.S. CTS., FEDERAL JUDICIAL CASELOAD STATISTICS (2020). The twelve federal courts of appeals include the First through the Eleventh Circuits and the D.C. Circuit. *Court Website Links*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links (last visited Dec. 22, 2021).

81. U.S. CTS., JUDICIAL CASELOAD INDICATORS - FEDERAL JUDICIAL CASELOAD STATISTICS 2020 (2020) (judicial indicators were collected within a twelve-month period ending March 31, 2020).

82. *2020 Year-End Report of the Federal Judiciary*, SUP. CT. U.S. (2020), https://www.supremecourt.gov/publicinfo/year-end/2020year-endreport.pdf.

courts impose significant time constraints and leave little room for judges to write separately. Also, disagreement may not be worth explaining if it is insignificant and would have no impact on the case at hand or future cases.[83] But, consistent with their role of independently applying the law to the facts in a given case and explaining their reasoning, judges' default should be to write separately when they disagree with a majority opinion's holding or reasoning.[84] Judges certainly have the capacity to write separately in some cases, and even if they cannot write separately in all cases, noting disagreement in a paragraph is better than completely skirting their duty to explain.[85]

This is not too much to ask. Although it may not be possible for judges "to display perfect consistency across cases,"[86] "[t]here is no reason why we cannot ask [judges] to develop a principled jurisprudence and to adhere to it consistently."[87] If judges are not required to explain themselves, then they can hide their reasons for decisions, consistent or not, and avoid accusations of being unprincipled or contradictory, even if that is the truth.[88]

If judges' applications of law to facts in a case differs from their colleagues on a multi-judge court, judges have an obligation to note their differences of opinion in as many words as feasible given workload and time restraints. This job expectation is reasonable, as society has entrusted judges with the power to adjudicate disputes, uphold the relevant constitutions, and check the other branches of government.[89] With the ability to exercise such immense power should likewise come the obligation to

---

83. *See* Ginsburg, *supra* note 37, at 139–42 (discussing the deterrents for writing separately in the U.S. judicial system). For example, if a judge disagrees with the majority opinion's iteration of the facts, or if a judge would have crafted the legal rule slightly differently, such disagreements do not affect the opinion's outcome or general precedent, so writing separately may not be worth it. *See id.*

84. *See* 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 192 (2016). As evidenced by the differing seriatim opinions of the past, no two judges would write the same opinion verbatim. *See id.* at 183. It is not the role of judges to note their disagreement over the use of an oxford comma or dicta. *Id.* at 54 (quoting Kappo v. Hyatt, 566 U.S. 431 (2012)). Instead, judges have an obligation to note their disagreement with an opinion's holding. *Id.* at 44 ("The *holding* of an appellate court constitutes the precedent, as a point necessarily decided.").

85. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657 (1995). Providing explanations in judicial opinions does come at some cost. *Id.* at 658. As Professor Frederick Schauer explained,

> Not only does giving reasons take time and sometimes open up conversations best kept closed, it also commits the decisionmaker in ways that are rarely recognized. Specifically, giving reasons requires decisionmakers to decide cases they can scarcely imagine arising under conditions about which they can only guess, in a future they can only imperfectly predict.

Id. These costs aside, "[i]n law, . . . giving reasons is seen as a necessary condition of rationality." *Id.* at 633–34. Without reasons, a court's legitimacy is compromised, among the other issues discussed *supra*.

86. Baude, *supra* note 1, at 17.

87. Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 832 (1982).

88. *See* Schauer, *supra* note 85, at 656 ("Having given a reason, the reason-giver has, by virtue of existing social practice, committed [them]self to deciding those cases within the scope of the reason in accordance with the reason.").

89. *See* U.S. CONST. art. III, §§ 1–2.

explain the reasoning of decisions and any disagreement with majority opinions. Without such an obligation, litigants are left questioning the judiciary's legitimacy, the weaknesses of majority opinions are unchallenged, and the development of the law is stunted. This obligation is unwritten in the law.[90] But it is nevertheless an essential duty of all judges that is woven into the fabric of our legal system of common law and precedent. The obligation to explain is necessary to maintain the judiciary's legitimacy and transparency and to hold judges accountable.

B. Precedential Effect of Opinions

Not all opinions are created equal. Precedential opinions bind future courts.[91] Nonprecedential opinions only bind the parties of that particular case.[92] In the Tenth Circuit, only opinions designated as "published" have precedential effect, leaving those designated as "unpublished" as mere persuasive authorities.[93] Courts have utilized practices of issuing opinions with varying precedential effect for decades.[94] Since the 1970s, the "number of unpublished" and thus likely nonprecedential "opinions [has] escalated sharply,"[95] reaching approximately 65% of the federal courts of appeals' merits dispositions in 2019.[96] But a practice, however established, cannot be justified on longevity alone.

The common justifications for issuing nonprecedential opinions are the increased cost and workload associated with "the exponential growth in case law."[97] But these justifications hardly hold up today. The cost justification is that if more opinions are published, more reporters containing opinions must be purchased and stored, and attorneys must spend more time sifting through opinions.[98] These costs will be passed on to consumers, exacerbating the issue of access to justice as those with greater resources will be better positioned to succeed in legal actions.[99] To decrease these costs and the trickle-down access to justice problem, the argument is

---

90. *See* Ginsburg, *supra* note 37, at 134 ("We *permit* our appellate judges to disagree or distance themselves from the court's judgment by dissenting or concurring opinion.") (emphasis added).

91. *See* Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L. J. 711, 719 (2004).

92. *See, e.g.*, 10TH CIR. R. 32.1(A) (citation of unpublished opinions).

93. *Id.* But all Tenth Circuit opinions are published in the sense that they are available online. *See Today's Decisions*, U.S. CT. OF APPEALS FOR THE TENTH CIR., https://www.ca10.uscourts.gov/clerk/opinions/daily (last visited Dec. 21, 2021).

94. *See generally* Michael Hannon, *Developments and Practice Notes: A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 200–01 (2001).

95. *See* Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 76 (2001) (internal quotations omitted) (quoting Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Court of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 308 (1990)).

96. *Federal Case Law*, UCLA SCH. OF L. HUGH & HAZEL DARLING L. LIBR., https://libguides.law.ucla.edu/c.php?g=183345&p=1208531 (last updated Sept. 29, 2021, 9:57 PM) (noting that 35% of opinions in the courts of appeals are published).

97. Shuldberg, *supra* note 20, at 547.

98. *See id.* at 547–48.

99. *See id.* at 548.

that more opinions should be unpublished. And because unpublished opinions are difficult to secure, giving them anything more than persuasive authority would be unfair to many litigants. This logic made sense when unpublished opinions were truly unpublished and difficult to secure, but that is not the case today: "Unpublished opinions are now published in every relevant sense. They are printed in bound volumes, are available on law library shelves, come complete with West Key Numbers, and even have their own citation format: __ Fed. Appx. __."[100]

Most circuit court websites also provide access to all opinions, including unpublished, nonprecedential opinions, issued by the court.[101] There may have been costs associated with publishing all opinions prior to the digital age, but those costs, along with any access to justice concerns, are no longer legitimate justifications for not publishing opinions.

Nor is the increased workload of federal court of appeals judges a legitimate justification. If an unpublished, nonprecedential opinion necessarily means the case is easy, the opinion does not break any new ground, and the opinion is simple, then unpublished opinions could theoretically help to manage the federal courts of appeals' heavy workload by reducing backlog and allowing judges to spend less time writing opinions and more time deciding hard cases.[102] But "many unpublished opinions do contain legal analyses that are important to future litigants and to the public at large."[103] And, probably related to the complexity and importance of some unpublished opinions, "[m]any 'unpublished opinions' published in the Federal Appendix are relatively long [with more] than five pages or [with] more than 10 headnotes."[104] With such opinions, judges are not saving much time, if any, by designating them as "unpublished." Moreover, if unpublished opinions are necessarily easy, then they should "generally be unanimous opinions."[105] Yet, "[d]issenting opinions in the Federal Appendix arise in a wide variety of cases, and frequently include the kinds of purely legal disagreements that prove, if nothing else, that the case at issue is not 'easy.'"[106] The workload of each circuit varies.[107] Although it may severely slow the wheels of justice if all opinions were published and

100. Brian P. Brooks, *Publishing Unpublished Opinions: A Review of the Federal Appendix*, 5 GREEN BAG 2d 259, 259–60 (2002).

101. *See, e.g.*, 4th Cir. R. 36(B) ("Unpublished Dispositions; Opinion Distribution. . . . Published and unpublished opinions are also posted on the Court's Web site each day and distributed in electronic form to subscribers to the Court's daily opinion lists. Published and unpublished opinions issued since January 1, 1996 are available free of charge at www.ca4.uscourts.gov.").

102. *See* Shuldberg, *supra* note 20, at 549.

103. *See id.* at 551; *see also* Robert A. Mead, *"Unpublished" Opinions as the Bulk of the Iceberg: Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeals*, 93 LAW LIBR. J. 589, 604 (2001) ("Many unpublished opinions either create new law or apply new factual situations to existing law, yet they remain unpublished at the discretion of the panel.").

104. Brooks, *supra* note 100, at 260.

105. *Id.* at 261.

106. *Id.* at 262.

107. *See U.S. Court of Appeals Summary -- 12 -Month Period Ending March 31, 2021*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsumary0331.2021.pdf (last visited Dec. 22, 2021).

precedential in circuits with the heaviest workloads, that issue is distinct from the legitimacy of the practice of issuing nonprecedential opinions.

The constitutional legitimacy of issuing nonprecedential opinions is debatable. Some scholars argue that judges lack authority to issue nonprecedential opinions.[108] Indeed, an original understanding of the "judicial power" clashes with this practice as creating precedent is inherent to the judicial power as it was understood at the founding.[109] Article III states that: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[110] At the founding, the understanding of "the judicial power" included an obligation to follow precedent.[111] William Blackstone explained in his commentaries on law:

> [I]t is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason[.][112]

Implicit in this original understanding of the judicial power is not only an obligation to follow precedent, but also to create precedent that

---

108. *See, e.g.*, Penelope Pether, *Strange Fruit: What Happened to the United States Doctrine of Precedent?*, 60 VILL. L. REV. 443, 474 (2015) ("This effectively admits that the circuit courts are evading the legislature's mandating of appeals as of right and substituting a system of discretionary appellate jurisdiction de facto.").

109. *See* Anastasoff v. United States, 223 F.3d 898, 902 (8th Cir. 2000), *vacated on other grounds*, 235 F.3d 1054 (8th Cir. 2000) (en banc) ("The Framers thought that, under the Constitution, judicial decisions would become binding precedents in subsequent cases."); *id.* at 903 ("[E]arly Americans demonstrated the authority which they assigned to judicial decisions by rapidly establishing a reliable system of American reporters in the years following the ratification of the Constitution."); David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 106 (2009) ("For the vast majority of the history of common law courts in America and England, the publication status of an opinion was not directly determinative of its precedential value. That is, while it may have been difficult for litigants to find a court's past decisions, nothing prevented a litigant from bringing such a decision to the court's attention or suggested that the court need not follow it.").

110. U.S. CONST. art. III., § 1.

111. *See Anastasoff*, 223 F.3d at 900 ("[T]he doctrine of precedent was not merely well established; it was the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past struggles for liberty.").

112. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1769).

must be followed.[113] When judges designate opinions as nonprecedential, they exceed their Article III authority to exercise "the judicial power."

Constitutional legitimacy aside, nonprecedential opinions create incentives for judges to flout their obligations. Supreme Court Justice Story warned of the inherent danger of judges unbound by prior opinions, the functional result of issuing nonprecedential opinions: "A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles."[114]

The practice of issuing nonprecedential opinions, particularly when judges themselves determine whether an opinion will be precedential, allows judges to insulate their decisions from the dictates of stare decisis. And because judges are not bound by nonprecedential opinions—even those they decided—judges are free to change course in future cases, unbeholden to judicial principles or philosophies.[115] Of course, judges sometimes change course between precedential opinions. But when they do, they must explain why stare decisis does not require adherence to precedent, as well as overcome other barriers to overturning precedent.[116] In contrast, no explanation or stare decisis analysis is required when judges deviate from nonprecedential opinions. The practice of issuing nonprecedential opinions incentivizes judges to not create precedent to avoid having to later explain a contradictory case or deal with stare decisis restrictions. Thus, nonprecedential opinions eliminate the need for explanations of inconsistencies, which in turn erodes the judiciary's legitimacy and transparency—the preservation of which are foundational obligations of judges.

The practice of issuing nonprecedential opinions is also problematic as a matter of fairness to litigants:

---

113. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them."); William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 9 (1994) ("Hamilton maintained that the common law method, and more specifically, a Blackstonian reverence for precedent as the principal guarantee of the rule of law, was inherent in Article III."); William D. Bader & David R. Cleveland, *Precedent and Justice*, 49 DUQ. L. REV. 35, 40–41 (2011) ("[J]ustice-seeking precedent, treating similar cases equally, is built into the judicial function under the Constitution.").

114. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 377–78 (1833).

115. *See* Merritt & Brudney, *supra* note 95, at 120–21 ("[D]enying precedential value to unpublished opinions gives judges discretion to decide which of their rulings will bind future decisionmakers--and sets the stage for inconsistent treatment of like cases.").

116. *See, e.g.*, United States v. Torres-Duenas, 461 F.3d 1178, 1183 (10th Cir. 2006) ("[A]bsent en banc review or intervening Supreme Court precedent, we cannot overturn another panel's decision.").

> The courts cannot discount the effects of the law upon one litigant because the judge found that litigant's case uninteresting or repetitious or, more dangerously, less well understood or less favored. The acts of the courts upon each person must be presented for consideration in every later case, either to be accepted or repudiated. To do less not only discounts the effects of law upon the early litigant but also limits access to the law by the later litigant.[117]

Less precedent means less clearly established law for society members to rely upon in conducting their affairs. For example, if only nonprecedential opinions explain that the admission of certain evidence at trial is not an abuse of discretion, then attorneys cannot be sure how an appellate court would rule on the matter if appealed and thus cannot be sure whether they should proffer the same kind of evidence at trial. Unbound by precedent, there is nothing stopping a judge from later holding admission of the evidence is an abuse of discretion. In short, less precedent means more uncertainty, forcing litigants to expend resources asking judges to decide issues judges may have already decided, but in nonprecedential opinions that litigants cannot rely on and that judges are free to ignore.[118]

II. PRACTICES INCOMPATIBLE WITH THE ROLE OF JUDGES

Lack of explanation and lack of precedential effect are two of the troubling characteristics of the Supreme Court's shadow docket, "a range of orders and summary decisions that defy [the Supreme Court's] normal procedural regularity."[119] Unlike the Court's merits cases, which are resolved via lengthy opinions and disclose the vote of each Justice, the orders on the shadow docket are bare, typically without explanation for a disposition or disclosure of the votes. And without explanation, these decisions can hardly create precedent. The shadow docket and the lack of care attended to it may be partially attributed to time constraints,[120] but time constraints notwithstanding, the shadow docket "lack[s] the transparency we have come to appreciate in [the Supreme Court's] merits cases" and "[s]ome of those orders merit more explanation[.]"[121]

The shadow docket is an extreme example of judges flouting their obligations to explain themselves and to create precedent. In addition to the lack of transparency, the shadow docket also erodes the Supreme Court's legitimacy and the Justices' accountability for their mysterious decisions. The remainder of this Article focuses on the practices of two other courts that also flout judicial obligations to explain themselves and to

---

117. Steve Sheppard, *The Unpublished Opinion Opinion: How Richard Arnold's* Anastasoff *Opinion Is Saving America's Courts from Themselves*, 2002 ARK. L. NOTES 85, 98 (2002).

118. *See* Drew R. Quitschau, Anastasoff v. United States*: Uncertainty in the Eighth Circuit-Is There A Constitutional Right to Cite Unpublished Opinions?*, 54 ARK. L. REV. 847, 864 (2002) ("[T]he sheer number of affirmations of a particular point of law allows attorneys to rely on the stability of that legal doctrine with greater confidence.").

119. *See* Baude, *supra* note 1, at 1.

120. *See id.* at 15.

121. *Id.* at 1.

create precedent, but to a lesser extent than the Supreme Court's shadow docket. I call these practices "shadow dockets lite." After examining these shadow dockets lite, I propose reforms to address these problems.

A. The Oklahoma Supreme Court

1. Practices of the Oklahoma Supreme Court: Not Writing Separately and Not Participating

The Oklahoma Supreme Court is the court of last resort for civil matters in Oklahoma.[122] It is currently composed of nine justices nominated by a state commission, appointed by the governor, and then subjected to retention elections by the people.[123] The decision to grant a petition for certiorari rests with the justices, is discretionary, and must be supported by a majority of the justices.[124] Once certiorari is granted, the concurrence (or agreement) of a majority of the justices is required to decide any question before the court.[125] Oklahoma Supreme Court justices have many options when deciding how to vote in a case. They may concur,[126] concur

122. *See Appellate Courts: Oklahoma Supreme Court Justices 2011*, SUP. CT. BROCHURE (June 30, 2011, 4:27 PM), https://digitalprairie.ok.gov/digital/collection/stgovpub/id/20999 ("Unlike most states, Oklahoma has two courts of last resort. The Supreme Court determines all issues of a civil nature, and the Oklahoma Court of Criminal Appeals decides all criminal matters."); *id.* ("The first five Justices initially presided over all civil and criminal cases, but as the population began to grow and the court docket lengthened, it became clear that a five-judge court would not be able to handle all the cases. Four other Justices were appointed in 1917. In 1918, the Court of Criminal Appeals was created and three judges were appointed to preside over all criminal matters. (The Court of Criminal Appeals now consists of five judges).").

123. *Id.*

124. Oklahoma Supreme Court Rule 1.178(a) provides:

> (a) Reasons for Certiorari.
>
> A review of an opinion of the Court of Civil Appeals in the Supreme Court on writ of certiorari as provided in 20 O.S. § 30.1 is a matter of sound judicial discretion and will be granted only when there are special and important reasons and a majority of the justices direct that certiorari be granted. The following, while neither controlling nor fully measuring the Supreme Court's discretion, indicate the character of reasons which will be considered:
>
> (1) Where the Court of Civil Appeals has decided a question of substance not heretofore determined by this court;
>
> (2) Where the Court of Civil Appeals has decided a question of substance in a way probably not in accord with applicable decisions of this Court or the Supreme Court of the United States;
>
> (3) Where a division of the Court of Civil Appeals has rendered a decision in conflict with the decision of another division of that court;
>
> (4) Where the Court of Civil Appeals has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such procedure by a trial court as to call for the exercise of this Court's power of supervision.

Okla. Sup. Ct. R. 1.178(a) (review by the supreme court on certiorari); *see also* Estate of Brown v. Brown, 2013 OK 102, 102 (Okla. 2013) ("Pursuant to the Okla. Const. art. 7, § 5, a concurrence of the majority of the Justices is necessary to decide any question.").

125. *See* OKLA. CONST. art. VII, § 5 ("A majority of the members of the Supreme Court shall constitute a quorum and the concurrence of the majority of said Court shall be necessary to decide any question.").

126. *See, e.g.*, McClanahan v. City of Tulsa, 439 P.3d 963, 963 (Okla. 2019).

specially,[127] concur in result,[128] concur in judgment,[129] concur by reason of stare decisis,[130] concur in part and dissent in part,[131] or dissent.[132] If justices decide to write separately, they may state "the reasons why the law as stated by [a] majority opinion is correct in the cause presented"[133] if they concur or concur specially; explain why they disagree with a majority opinion's reasoning but agree with its outcome if they concur in result or judgment; or state why they disagree with both a majority opinion's reasoning and its outcome if they dissent.

No justice is required by the Oklahoma constitution or Oklahoma law to write separately from the majority opinion. And often justices do not, despite noting their disagreement with a majority opinion's reasoning or holding. For example, in *In re State Question No. 813, Initiative Petition No. 429*,[134] one justice concurred in the result of declaring an initiative petition unconstitutional without writing separately to explain his reasoning.[135] In the last five years, Oklahoma Supreme Court justices have voted to concur in result seventy-four times.[136] And in *In re Initiative Petition*

127. *See, e.g.*, Northrip v. Montgomery Ward & Co., 529 P.2d 489, 498 (Okla. 1974); *see Brown*, 2013 OK at 102 ("[C]oncurring specially votes are treated as a full concurrence and may be counted in obtaining a majority vote.").

128. *See, e.g.*, *Northrip*, 529 P.2d at 498; *see Brown*, 2013 OK at 102 ("Concurring-in-result . . . votes may not be counted as votes to form a majority opinion.").

129. *See, e.g.*, *In re* Initiative Petition No. 317, State Question No. 556, 648 P.2d 1207, 1217 (Okla. 1982); *see Brown*, 2013 OK at 102 ("[C]oncurring-in-judgment votes may not be counted as votes to form a majority opinion.").

130. *See, e.g.*, *McClanahan*, 439 P.3d at 963.

131. *See, e.g.*, *id.*

132. *See, e.g.*, *Northrip*, 529 P.2d at 498.

133. *Appellate Courts*, *supra* note 122.

134. 476 P.3d 471 (Okla. 2020).

135. *Id.* at 474; *see also* Dawson v. Tindell, 733 P.2d 407, 409 (Okla. 1987) ("Hodges, J., concurred in the result" without separate writing).

136. Fourteen justices in 2016 in the following cases. *See Oklahoma Supreme Court Cases*, *Decisions Published in 2016*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2016&level=1 (last visited Dec. 22, 2021); *In re* M.K.T., 368 P.3d 771 (Okla. 2016); *In re* Estate of Carlson, 367 P.3d 486 (Okla. 2016); Robinson v. Fairview Fellowship Home for Senior Citizens, Inc., 371 P.3d 477 (Okla. 2016); Murlin v. Pearman, 371 P.3d 1094 (Okla. 2016); State *ex. rel.* Okla. Bar Ass'n v. O'Laughlin, 373 P.3d 1005 (Okla. 2016); Torres v. Seaboard Foods, LLC, 373 P.3d 1057 (Okla. 2016); Save the Ill. River, Inc. v. State *ex. rel.* Okla State Election Bd., 378 P.3d 1220 (Okla. 2016); Okla. Assoc. of Broads., Inc. v. City of Norman, 390 P.3d 689 (Okla. 2016); Christian v. Lee, 385 P.3d 991 (Okla. 2016); Tiger v. Verdigris Valley Elec. Coop., 410 P.3d 1007 (Okla. 2016).

Thirteen justices in 2017 in the following cases. *See Oklahoma Supreme Court Cases*, *Decisions Published in 2017*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2017&level=1 (last visited Dec. 22, 2021); Nichols v. State *ex. rel.* Dep't of Pub. Safety, 392 P.3d 692 (Okla. 2017); State *ex. rel.* Okla. Bar Ass'n v. Moody, 394 P.3d 223 (Okla. 2017); Beach v. Okla. Dep't of Pub. Safety, 398 P.3d 1 (Okla. 2017); Multiple Inj. Tr. Fund v. Wiggins, 404 P.3d 35 (Okla. 2017); Green Tree Servicing LLC., v. Dalke, 405 P.3d 676 (Okla. 2017); Sierra Club v. State *ex rel.* Okla. Tax Comm'n, 405 P.3d 691 (Okla. 2017); Richardson v. State *ex rel.* Okla. Tax Comm'n, 406 P.3d 571 (Okla. 2017); Truel v. A. Aguirre LLC, 430 P.3d 1016 (Okla. 2017); Clements v. Sw. Bell Tel., 413 P.3d 539 (Okla. 2017).

Thirty-four justices in 2018 in the following cases. *See Oklahoma Supreme Court Cases*, *Decisions Published in 2018*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2018&level=1 (last visited Dec. 22, 2021); *In re* Adoption of M.A.S., 419 P.3d 204 (Okla. 2018); *In re* Rules of the Sup. Ct. of Okla. on Licensed Legal Internship, 2018 OK 16 (Okla. 2018); Montgomery v. Airbus Helicopters, 414 P.3d 824 (Okla. 2018); Okla.

No. 358, State Question No. 658,[137] two justices dissented without explanation from the majority opinion's conclusion that an initiative petition did not violate the Oklahoma constitution.[138] Dissenting without explanation occurs far more often than concurring in result, which occurred 178 times in the last five years.[139] When justices concur in result, the public at least

---

Indep. Petroleum Ass'n v. Potts, 414 P.3d 351 (Okla. 2018); Okla. Oil & Gas Assoc. v. Thompson, 414 P.3d 345 (Okla. 2018); Berry & Berry Acquisitions v. BFN Props., 416 P.3d 1061 (Okla. 2018); Sierra Club v. Corp. Comm'n, 417 P.3d 1196 (Okla. 2018); Indep. Sch. Dist. No. 54 v. Indep. Sch. Dist. No. 67, 418 P.3d 693 (Okla. 2018); Gentges v. Okla. State Election Bd. 419 P.3d 224 (Okla. 2018); State *ex. rel* Okla. Bar Ass'n v. Knight, 421 P.3d 299 (Okla. 2018); Hall v. Galmor, 427 P.3d 1052 (Okla. 2018); Tulsa Adjustment Bureau v. Callan, 427 P.3d 1050 (Okla. 2018); City of Tulsa v. Hodge, 429 P.3d 685 (Okla. 2018); Upton v. City of Tulsa, 428 P.3d 314 (Okla. 2018); Stubblefield v. Oasis Outsourcing Inc., 428 P.3d 325 (Okla. 2018); Henry v. IC Bus. Of Okla., 428 P.3d 323 (Okla. 2018); Twyman v. Kibois Cmty. Action Found., 428 P.3d 324 (Okla. 2018); Lunt v. EZ Mart Stores, Inc., 428 P.3d 324 (Okla 2018); Gorden v. Braums Inc., 428 P.3d 325 (Okla. 2018); *In re* J.L.O, 428 P.3d 881 (Okla. 2018); State *ex. rel.* Okla. Bar Ass'n v. Dalton, 431 P.3d 57 (Okla. 2018); Barrios v. Haskell Cnty. Pub. Facilities Auth., 432 P.3d 233 (Okla. 2018); *In re* C.M., 432 P.3d 763 (Okla. 2018).
Four justices in 2019 in the following cases. *See Oklahoma Supreme Court Cases*, *Decisions Published in 2019*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2019&level=1 (last visited Dec. 22, 2021); Okla. Coal. For Reprod. Just. v. Cline, 441 P.3d 1145 (Okla. 2019); McClanahan v. City of Tulsa, 439 P.3d 963 (Okla. 2019); Forrest v. City of Tulsa, 439 P.3d 963 (Okla. 2019); *In re* Establishment of Rule 1.19 of Okla. Sup. Ct. Rules, 2019 OK 51 (Okla. 2019).
Nine justices in 2020 in the following cases. *See Oklahoma Supreme Court Cases*, *Decisions Published in 2020*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2020&level=1 (last visited Dec. 22, 2021); State *ex. rel.* Okla. Bar Ass'n v. Wiland, 461 P.3d 205 (Okla. 2020); *In re* Reinstatement of Watson, 461 P.3d 207 (Okla. 2020); Sparks v. Old Republic Home Prot. Co., 467 P.3d 680 (Okla. 2020); Indep. Sch. Dist. No. 52 v. Hofmeister, 473 P.3d 475 (Okla. 2020); Kiesel v. Rogers, 470 P.3d 294 (Okla. 2020); *In re* State Question No. 813, Initiative Petition No. 29, 476 P.3d 471 (Okla. 2020); Comanche Nation of Okla. v. Coffey, 480 P.3d 271 (Okla. 2020); *In re* Marriage of Rader, 478 P.3d 438 (Okla. 2020).

137. 870 P.2d 782 (Okla. 1994).

138. *Id.* at 787; *see also, e.g.*, State *ex rel.* Okla. Bar Ass'n v. Pistotnik, 477 P.3d 376, 383 (Okla. 2020) (noting one justice dissents with no explanation).

139. Fifty-one justices in 2016 in the following cases. *See Oklahoma Supreme Court Cases*, *Decisions Published in 2016*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2016&level=1 (last visited Dec. 23, 2021); *In re* Reinstatement of Bodnar, 367 P.3d 916 (Okla. 2016); Maxwell v. Sprint PCS, 369 P.3d 1079 (Okla. 2016); State *ex. rel.* Okla. Bar Ass'n v. Auer, 376 P.3d 243 (Okla. 2016); State *ex. rel.* Okla. Bar Ass'n v. Trenary, 368 P.3d 801 (Okla. 2016); *In re* Reinstatement of Duke, 382 P.3d 501 (Okla. 2016); Price v. Bd. of Cnty. Comm'rs of Pawnee Cnty., 371 P.3d 1089 (Okla. 2016); Dep't of Hum. Servs. v. Bruce, 371 P.3d 484 (Okla. 2016); Allen v. Harrison, 374 P.3d 812 (Okla. 2016); Loyd v. Michelin N. Am., Inc., 371 P.3d 488 (Okla. 2016); *Murlin*, 371 P.3d at 1094; *In re* Initiative No. 409, State Question No. 785, 376 P.3d 250 (Okla. 2016); *In re* Amend. of Rule 5 of Rules Governing Admission to Prac. L., 2016 OK 57 (Okla. 2016); *In re* Reinstatement of Drain, 376 P.3d 208 (Okla. 2016); Nelson v. Enid Med. Assocs., 376 P.3d 212 (Okla. 2016); Watkins v. Cent. State Griffin Mem'l Hosp., 377 P.3d 124 (Okla. 2016); State *ex. rel.* Okla. Bar Ass'n v. Mirando, 376 P.3d 232 (Okla. 2016); Pizano v. Lacey & Assocs., LLC, 381 P.3d 763 (Okla. 2016); Tiger v. Verdigris Valley Elec. Coop., 410 P.3d 1007 (Okla. 2016); Hollimann v. Twister Drilling Co., 377 P.3d 133 (Okla. 2016); Steele v. Pruitt, 378 P.3d 47 (Okla. 2016); Blair v. Richardson, 381 P.3d 717 (Okla. 2016); Lee v. Bueno, 381 P.3d 736 (Okla. 2016); *In re* Limited Viewability of Certain Documents, 2016 OK 111 (Okla. 2016); Martin v. Gray, 385 P.3d 64 (Okla. 2016); Christian v. Lee, 385 P.3d 991 (Okla. 2016); *Okla. Assoc. of Broads.*, 390 P.3d at 689; Deal v. Brooks, 2016 OK 123 (Okla. 2016); *In re* Reinstatement of Wilburn, 369 P.3d 381 (Okla. 2016); *In re* M.A.P.W., 369 P.3d 1078 (Okla. 2016).
Thirty-six justices in 2017 in the following cases. *See Oklahoma Supreme Court Cases*, *Decisions Published in 2017*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2017&level=1 (last visited Dec. 22, 2021); State *ex. rel.* Okla. Bar Ass'n v. Shahan, 390 P.3d 254 (Okla. 2017); Brown v. Claims Mgmt. Res., Inc., 391 P.3d 111 (Okla. 2017); Siloam Springs Hotel, LLC v. Century Sur. Co., 392 P.3d 262 (Okla. 2017); Paul v. Hunter,

knows the concurring justices agree with a case's disposition, but does not know what alternate reasoning the concurring justices would adopt. And when justices dissent, the public knows the dissenting justices disagree with a case's disposition and reasoning but does not know why.

---

393 P.3d 202 (Okla. 2017); State *ex. rel.* Okla. Bar Ass'n v. McMillen, 393 P.3d 219 (Okla. 2017); *In re* Reinstatement of Conrady, 394 P.3d 219 (Okla. 2017); Brisco v. State *ex. rel.* Bd. of Regents Agric. & Mech. Colls., 394 P.3d 1251 (Okla. 2017); Ali v. Fallin, 2017 OK 39 (Okla. 2017); State *ex. rel.* Okla. Bar Ass'n v. Bennett, 2017 OK 46 (2017); State *ex. rel.* Okla. Bar Ass'n v. Hixson, 397 P.3d 483 (Okla. 2017); Hensley v. State Farm Fire & Cas. Co., 398 P.3d 11 (Okla. 2017); State *ex. rel.* Okla. Bar Ass'n v. Hyde, 397 P.3d 1286 (Okla. 2017); Green Tree Servicing LLC. v. Dalke, 405 P.3d 676 (Okla. 2017); Boyle v. ASAP Energy, Inc., 408 P.3d 183 (Okla. 2017); John v. Saint Francis Hosp., 405 P.3d 681 (Okla. 2017); Hunsucker v. Fallin, 464 P.3d 135 (Okla. 2017); Orman v. Econo Lodge Airport, 407 P.3d 357 (Okla. 2017); Almestica v. Roof Works of Tulsa, 407 P.3d 358 (Okla. 2017); Coston v. Pride Plating, Inc., 407 P.3d 357 (Okla. 2017); *In re* Reinstatement of Clayborne, 406 P.3d 578 (Okla. 2017); State Farm Mut. Auto. Ins. Co. v. Payne, 408 P.3d 204 (Okla. 2017); Lomoe v. Castells Tire Barn, 410 P.3d 1013 (Okla. 2017); Clements v. Sw. Bell Tel., 413 P.3d 539 (Okla. 2017).

Forty-eight justices in 2018 in the following cases. *See Oklahoma Supreme Court Cases*, *Decisions Published in 2018*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2018&level=1 (last visited Dec. 22, 2021); *In re* Adoption of M.A.S., 419 P.3d 204 (Okla. 2018); Cates v. Integris Health, Inc., 412 P.3d 98 (Okla. 2018); Gaasch v. St. Paul Fire & Marine Ins. Co., 412 P.3d 1151 (Okla. 2018); Am. Honda Motor Co. v. Thygesen, 416 P.3d 1059 (Okla. 2018); Montgomery v. Airbus Helicopters, 414 P.3d 824 (Okla. 2018); Ridings v. Maze, 414 P.3d 835 (Okla. 2018); State *ex. rel.* Okla. Bar Ass'n v. Bounds, 415 P.3d 519 (Okla. 2018); *In re* Reinstatement of Reynolds, 415 P.3d 521 (Okla. 2018); *In re* Reinstatement of McLaughlin, 419 P.3d 239 (Okla. 2018); *In re* Amends. To Rule 7.4, Rules Governing Disciplinary Proc., 2018 OK 49 (Okla. 2018); State v. Durfey, 422 P.3d 151 (Okla. 2018); City of Tulsa v. Hodge, 429 P.3d 685 (Okla. 2018); State *ex. rel.* Okla. Bar Ass'n v. Barrett, 426 P.3d 611 (Okla. 2018); Engles v. Multiple Inj. Tr. Fund, 428 P.3d 310 (Okla. 2018); Upton v. City of Tulsa, 428 P.3d 314 (Okla. 2018); Stubblefield v. Oasis Outsourcing, Inc., 428 P.3d 325 (Okla. 2018); Henry v. IC Bus. of Okla. LLC, 428 P.3d 323 (Okla. 2018); Twyman v. Kibois Cmty. Action Found., 428 P.3d 324 (Okla. 2018); Lunt v. EZ Mart Stores, Inc., 428 P.3d 324 (Okla. 2018); Gorden v. Braums, Inc., 428 P.3d 325 (Okla. 2018); *In re* Reinstatement of Tunell, 2018 OK 82 (Okla. 2018); *In re* Amend. of Rule 7 of Rules Governing Admission to the Prac. of L., 2018 OK 86 (Okla. 2018); *In re* Application of the Okla. Tpk. Auth., 431 P.3d 59 (Okla. 2018); Barrios v. Haskell Cnty. Pub. Facilities Auth., 432 P.3d 233 (Okla. 2018); Braitsch v. City of Tulsa, 436 P.3d 14 (Okla. 2018).

Eighteen justices 2019 in the following cases. *See Oklahoma Supreme Court Cases*, *Decisions Published in 2019*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2019&level=1 (last visited Dec. 22, 2021); Kohler v. Chambers, 435 P.3d 109 (Okla. 2019); McGee v. Amoco Prod. Co., 438 P.3d 355 (Okla. 2019); Mullendore v. Mercy Hosp. Ardmore, 438 P.3d 358 (Okla. 2019); McClanahan v. City of Tulsa, 439 P.3d 963 (Okla. 2019); Forrest v. City of Tulsa, 439 P.3d 963 (Okla. 2019); Southon v. Okla. Tire Recyclers, LLC, 443 P.3d 566 (Okla. 2019); Saunders v. Smothers, 454 P.3d 746 (Okla. 2019); *In re* Amend. to Okla. Sup. Ct. Rule 1.60, 2019 OK 64 (Okla. 2019); State *ex. rel.* Okla. Bar Ass'n v. Koss, 452 P.3d 427 (Okla. 2019).

Twenty-five justices in 2020 in the following cases. *See Oklahoma Supreme Court Cases*, *Decisions Published in 2020*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2020&level=1 (last visited Dec. 22, 2021); *In re* Rules of Sup. Ct. for Mandatory Continuing Legal Educ., 2020 OK 1 (Okla. 2020); State *ex. rel.* Okla. Bar Ass'n v. Miller, 461 P.3d 187 (Okla. 2020); *In re* Initiative Petition No. 420 State Question No. 804, 458 P.3d 1080 (Okla. 2020); *In re* Reinstatement of Watson, 461 P.3d 207 (Okla. 2020); Rogers v. Estate of Pratt, 467 P.3d 651 (Okla. 2020); Hamilton v. Northfield Insur. Co., 473 P.3d 22 (Okla. 2020); Farley v. City of Claremore, 465 P.3d 1213 (Okla. 2020); *In re* Initiative Petition No. 426 State Question No. 810, 465 P.3d 1244 (Okla. 2020); *In re*: State Question No. 805 Initiative Petition No. 421, 473 P.3d 466 (Okla. 2020); *Rader*, 478 P.3d at 438; Whipple v. Phillips & Sons Trucking, 474 P.3d 339 (Okla. 2020); Treat v. Stitt, 473 P.3d 43 (Okla. 2020); *In re* Guardianship of R.B., 483 P.3d 608 (Okla. 2020); Shawareb v. SSM Health Care of Okla., 480 P.3d 894 (Okla. 2020); State *ex. rel.* Okla. Bar Ass'n v. Pistonik, 477 P.3d 376 (Okla. 2020); Thurston v. State Farm Mut. Auto. Ins., Inc., 478 P3d 415 (Okla. 2020).

With other types of votes, Oklahoma Supreme Court justices disclose even less information. The justices will sometimes concur in part and dissent in part without writing separately.[140] This practice makes it impossible for the public to discern which part of a majority opinion the justices agree with and which part they disagree with and why. This vote is rare, cast only thirty-seven times in the last five years.[141] But practically speaking, these justices may as well have not voted at all.

Even worse, Oklahoma Supreme Court justices have the option to not vote at all.[142] Sometimes justices' failure to vote in cases is appropriate—they may be disqualified due to prior involvement in the case[143] or they may be recused because their participation may give the appearance of impropriety. Justices' non-participation in cases due to disqualification or recusal is noted in opinions, so the public has some idea of the reason for the justices' failure to cast votes.[144] But other times—distinct from

---

140. *See, e.g.*, Morgan v. State Farm Mut. Auto. Ins. Co., 488 P.3d 743, 753 (Okla. 2021); Darzenkiewicz v. Jackson, 904 P.2d 66 (Okla. 1994) (mem.); State ex rel. Okla. Bar Ass'n v. Levisay, 474 P.3d 875 (Okla. 2020); Conti v. Republic Underwriters Ins. Co., 782 P.2d 1357, 1363 (Okla. 1989); State *ex rel.* Okla. Bar Ass'n v. Cummings, 815 P.2d 172, 173 (Okla. 1991).

141. Seven justices in 2016 in the following cases. *See Oklahoma Supreme Court Cases*, *Decisions Published in 2016*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2016&level=1 (last visited Dec. 22, 2021); *In re* Reinstatement of Drain, 376 P.3d 208 (Okla. 2016); State *ex. rel.* Okla. Bar Ass'n v. Auer, 376 P.3d 243 (Okla. 2016); *Bueno*, 381 P.3d at 736; *Okla. Assoc. of Broads.*, 390 P.3d at 689; *Trenary*, 368 P.3d at 809.
Eighteen justices in 2017 in the following cases. *See Oklahoma Supreme Court Cases*, *Decisions Published in 2017*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2017&level=1 (last visited Dec. 22, 2021); Boatman v. Boatman, 404 P.3d 822 (Okla. 2017); *In re Okla. Rules of Pro. Conduct*, 2017 OK at 52; *Hixson*, 397 P.3d at 483; Re: Revised Civil Cover Sheet, 2017 OK 65 (Okla. 2017); Grisham v. City of Okla. City, 404 P.3d 843 (Okla. 2017); *Orman*, 407 P.3d at 357; *Almestica*, 407 P.3d at 358; *Coston*, 407 P.3d at 357; *Lomoe*, 410 P.3d at 1013; Truel v. A. Aguirre LLC, 430 P.3d 1016 (Okla. 2017); Beach v. Okla. Dep't of Pub. Safety, 398 P.3d 1 (Okla. 2017); Naifeh v. State *ex rel.* Okla. Tax Comm'n, 400 P.3d 759 (Okla. 2017).
Two justices in 2018 in the following cases. *See Oklahoma Supreme Court Cases*, *Decisions Published in 2018*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2018&level=1 (last visited Dec. 22, 2021); Okla.'s Child. Our Future, Inc., v. Coburn, 421 P.3d 867 (Okla. 2018); Lay v. Ellis, 432 P.3d 1035 (Okla. 2018).
Six justices in 2019 in the following cases. *See Oklahoma Supreme Court Cases*, *Decisions Published in 2019*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2019&level=1 (last visited Dec. 22, 2021); *Mullendore*, 438 P.3d at 358; *Stout*, 451 P.3d at 155; *McClanahan*, 439 P.3d at 963; Beason v. I.E. Miller Servs., Inc., 441 P.3d 1107 (Okla. 2019).
Four justices in 2020 in the following cases. *See Oklahoma Supreme Court Cases*, *Decisions Published in 2020*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2020&level=1 (last visited Dec. 22, 2021); *In re Initiative Petition No. 420*, 458 P.3d at 1080; *Hofmeister*, 473 P.3d 475; *Levisay*, 474 P.3d at 875; Biantrav Contractor LCC v. Condren, 2020 OK 73 (Okla. 2020).

142. A justice's vote is designated as "not participating" or "not voting." *See, e.g.*, Fritz v. Brown, 95 P. 437, 441 (Okla. 1908) ("Williams, C.J., not participating."); Immel v. Tulsa Pub. Facilities, Auth., 490 P.3d 135, 148 (Okla. 2021) ("NOT VOTING: Darby, C.J.").

143. *See* OKLA. STAT. tit. 20, § 1402 (2021) ("No Justice of the Supreme Court of [Oklahoma] . . . shall participate in the decision of any cause in such Court appealed thereto from a lower court of said state, in which court such Justice or Judge was judge presiding at the trial of such cause.").

144. *See, e.g.*, *Darzenkiewicz*, 904 P.2d at 66 ("Hargrave, J., disqualified."); Okla. Council of Pub. Affs., Inc. v. Smalley, 456 P.3d 609 (Okla. 2019) ("RECUSED: Edmondson and Colbert, JJ.").

instances of disqualification or recusal—Oklahoma Supreme Court justices simply do not vote. They can choose to do this without any explanation.[145]

The practice of not participating or not voting cannot be found in the Oklahoma constitution or Oklahoma Supreme Court rules. It predates Oklahoma's statehood and the creation of the Oklahoma Supreme Court, occurring in the Court of Appeals of Indian Territory as early 1898.[146] The newly-minted Oklahoma Supreme Court inherited the practice in 1908, and it has been used by justices ever since.[147] In recent history, the prevalence of not voting has remained steady, and it occurs more often than oral argument in the Oklahoma Supreme Court does.[148] In the merits opinions issued by the Oklahoma Supreme Court from 2016 to 2020, justices have not voted without explanation 115 times in 377 cases.[149]

---

145. *See, e.g.*, *Immel*, 490 P.3d at 148 ("NOT VOTING: Darby, C.J.").

146. *See* Williams v. United States, 45 S.W. 116, 119 (Indian Terr. 1898) ("TOWNSEND, J., not participating.").

147. *See, e.g.*, Fritz v. Brown, 95 P. 437, 441 (Okla. 1908) ("WILLIAMS, C.J., not participating.").

148. *See* Joseph T. Thai & Andrew M. Coats, *The Case for Oral Argument in the Supreme Court of Oklahoma*, 61 OKLA. L. REV. 695, 695 (2008) ("The Oklahoma Supreme Court rarely permits oral argument in cases it accepts for review."); *id.* at 699 ("[T]he Court now seldom hears more than one argument a year.").

149. Thirty-three justices not voting or not participating in 2016 in the following cases. *See Oklahoma Supreme Court Cases*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2016&level=1 (last visited Dec. 22, 2021); Okla. Coal. For Reprod. Just. v. Cline, 368 P.3d 1278 (Okla. 2016); State *ex. rel.* Okla. Bar Ass'n v. Trenary, 368 P.3d 801 (Okla. 2016); State *ex. rel.* Okla. Bar Ass'n v. Farber, 366 P.3d 1149 (Okla. 2016); Price v. Bd. of Cnty. Comm'rs of Pawnee Cnty., 371 P.3d 1089 (Okla. 2016); Heath v. Guardian Interlock Network, Inc., 369 P.3d 374 (Okla. 2016); State *ex. rel.* Okla. Bar Ass'n v. Oliver, 369 P.3d 1074 (Okla. 2016); Loyd v. Michelin N. Am., Inc., 371 P.3d 488 (Okla. 2016); State *ex. rel.* Okla. Bar Ass'n v. Lewis, 371 P.3d 1099 (Okla. 2016); *In re* Initiative Petition No. 409, State Question No. 785, 376 P.3d 250 (Okla. 2016); Am. Biomedical Grp., Inc. v. Techtrol, Inc., 374 P.3d 820 (Okla. 2016); *In re* Initiative Petition No. 403, State Question No. 779, 2016 OK 59 (Okla. 2016); Nelson v. Enid Med. Assocs., Inc., 376 P.3d 212 (Okla. 2016); State *ex. rel.* Okla. Bar Ass'n v. Gaines, 378 P.3d 1212 (Okla. 2016); Steele v. Pruitt, 378 P.3d 47 (Okla. 2016); Calvert v. Swinford, 382 P.3d 1028 (Okla. 2016); C&H Power Line Constr. Co. v. Enter. Prods. Operating LLC, 386 P.3d 1027 (Okla. 2016); Calvert v. Swinford, 382 P.3d 1039 (Okla. 2016); Calvert v. Swinford, 382 P.3d 1037 (Okla. 2016); State *ex. rel.* Okla. Bar Ass'n v. Friesen, 384 P.3d 1129 (Okla. 2016); Mustang Run Wind Project, LLC v. Osage Cnty. Bd. of Adjustment, 387 P.3d 333 (Okla. 2016); Multiple Inj. Tr. Fund v. Coburn, 386 P.3d 628 (Okla. 2016); Deal v. Brooks, 2016 OK 123 (Okla. 2016).

Twenty-eight justices not voting or not participating in 2017 in the following cases. *See Oklahoma Supreme Court Cases*, OKLA. STATE CTS. NETWORK , https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2017&level=1 (last visited Dec. 22, 2021); *In re* Reinstatement of Conrady, 394 P.3d 219 (Okla. 2017); State *ex. rel.* Okla. Bar Ass'n v. Hunt, 394 P.3d 216 (Okla. 2017); Boatman v. Boatman, 404 P.3d 822 (Okla. 2017); Nichols v. State *ex. rel.* Dep't of Pub. Safety, 392 P.3d 692 (Okla. 2017); Spencer v. Wyrick, 392 P.3d 290 (Okla. 2017); Meeks v. Guarantee Ins. Co., 392 P.3d 278 (Okla. 2017); *In re* K.S., 393 P.3d 715 (Okla. 2017); Siloam Springs Hotel, LLC v. Century Sur. Co., 392 P.3d 262 (Okla. 2017); Brown v. Claims Mgmt. Res., Inc., 391 P.3d 111 (Okla. 2017); State *ex. rel.* Dep't of Transp. v. Cedars Grp., LLC, 393 P.3d 1095 (Okla. 2017); Tigges v. Andrews, 390 P.3d 251 (Okla. 2017); State *ex. rel.* Okla. Bar Ass'n v. Helton, 394 P.3d 227 (Okla. 2017); State *ex. rel.* Okla. Bar Ass'n v. Moody, 394 P.3d 223 (Okla. 2017); Osage Nation v. Bd. of Comm'rs of Osage Cnty., 394 P.3d 1224 (Okla. 2017); Brisco v. State *ex. rel.* Bd. of Regents Agric. & Mech. Colls., 394 P.3d 1251 (Okla. 2017); *In re* B.K., 398 P.3d 393 (Okla. 2017); Multiple Inj. Tr. Fund v. Mackey, 406 P.3d 564 (Okla. 2017); Orman v. Econo Lodge Airport, 407 P.3d 357 (Okla. 2017); Almestica v. Roof Works of Tulsa, 407 P.3d 358 (Okla. 2017); Coston v. Pride Plating Inc.,

Because the Oklahoma constitution requires the concurrence of only a majority of the justices to make precedent,[150] a justice not participating or not voting is not always problematic. Indeed, a justice who sits out a vote does not prevent the Oklahoma Supreme Court from conducting its business so long as a majority of the justices participate and concur. And this practice is practical to the extent that it allows the court to conduct its business when members cannot perform their job duties for good reasons, such as if they are too sick to vote.

The same rationale justifies justices concurring in judgment or dissenting without separate writing where they are capable of voting, but incapable of authoring a separate writing to explain themselves. But that rationale only works in the narrow circumstances in which justices are incapable of voting or writing separately. In all other circumstances, failing to vote and write separately are problematic practices that are contrary to the

---

407 P.3d 357 (Okla. 2017); State *ex rel.* Okla. Bar Ass'n v. Bounds, 2017 OK 98 (2017); Lomoe v. Castells Tire Barn, 410 P.3d 1013 (Okla. 2017); Truel v. A. Aguirre LLC, 430 P.3d 1016 (Okla. 2017); *In re* Petition of Univ. Hosps. Auth., 410 P.3d 1014 (Okla. 2017).

Sixteen justices not voting or participating in 2018 in the following cases. *See Oklahoma Supreme Court Cases*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2018&level=1 (last visited Dec. 22, 2021); D.A. v. State *ex. rel.* Okla. State Bureau of Investigation, 433 P.3d 727 (Okla. 2018); State *ex. rel.* Okla. Bar Ass'n v. Oliver, 369 P.3d 1074 (Okla. 2018); Christian v. Christian, 434 P.3d 941 (Okla. 2018); State *ex. rel.* Okla. Bar Ass'n v. Curthoys, 426 P.3d 608 (Okla. 2018); State *ex. rel.* Okla. Bar Ass'n v. Bedford, 426 P.3d 609 (Okla. 2018); Green Meadow Realty Co. v. Gillock, 419 P.3d 245 (Okla. 2018); Pina v. Am. Piping Inspection, 419 P.3d 231 (Okla. 2018); Lind v. Barnes Tag Agency, 418 P.3d 698 (Okla. 2018); Indep. Sch. Dist. No. 54 v. Indep. Sch. Dist. No. 67, 418 P.3d 693 (Okla. 2018); Sierra Club v. Co. Comm'n, 417 P.3d 1196 (Okla. 2018); Berry & Berry Acquisitions v. BFN Props., 416 P.3d 1061 (Okla. 2018); Benedetti v. Cimarex Energy Co., 415 P.3d 43 (Okla. 2018); State *ex. rel.* Okla. Bar Ass'n v. Bounds, 415 P.3d 519 (Okla. 2018); Okla. Ass'n of Optmetric Physicians v. Raper, 412 P.3d 1160 (Okla. 2018); Cates v. Integris Health, Inc., 412 P.3d 98 (Okla. 2018).

Twenty-two justices not voting or participating in 2019 in the following cases. *See Oklahoma Supreme Court Cases*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=S TOKCSSC&year=2019&level=1 (last visited Dec. 22, 2021); State *ex. rel.* Okla. Bar Ass'n v. Bednar, 441 P.3d 91 (Okla. 2019); Medicine Park Tel. Co. v. Okla. Corp. Comm'n, 441 P.3d 113 (Okla. 2019); Medicine Park Tel. Co. v. State *ex. rel.* Okla. Corp. Comm'n, 441 P.3d 122 (Okla. 2019); Medicine Park Tel. Co. v. State *ex. rel.* Okla. Corp. Comm'n, 441 P.3d 130 (Okla. 2019); Dobson Tel. Co. v. State *ex. rel.* Okla. Corp. Comm'n, 441 P.3d 138 (Okla. 2019); Dobson Tel. Co. v. State *ex. rel.* Okla. Corp. Comm'n, 441 P.3d 156 (Okla. 2019); Dobson Tel. Co. v. State *ex. rel.* Okla. Corp. Comm'n, 441 P.3d 164 (Okla. 2019); Dobson Tel. Co. v. Okla. Corp. Comm'n, 441 P.3d 147 (Okla. 2019); I.T.K. v. Mounds Pub. Schs., 451 P.3d 125 (Okla. 2019); Loven v. Church Mut. Ins. Co., 452 P.3d 418 (Okla. 2019); Hub Partners XXVI, Ltd. V. Barnett, 453 P.3d 489 (Okla. 2019); Williams v. Meeker N. Dawson Nursing LLC, 455 P.3d 908 (Okla. 2019); Video Gaming Techs. v. Rogers Cnty. Bd. of Tax Roll Corrs., 2019 OK 83 (Okla. 2019).

Fifteen justices not voting or participating in 2020 in the following cases. *See Oklahoma Supreme Court Cases*, OKLA. STATE CTS. NETWORK, https://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=2020&level=1 (last visited Dec. 22, 2021); Indep. Sch. Dist. No. 52 v. Hofmeister, 473 P.3d 475 (Okla. 2020); Biantrav Contractor LCC v. Condren, 2020 OK 73 (Okla. 2020); Whipple v. Phillips & Sons Trucking, 474 P.3d 339 (Okla. 2020); State *ex. rel.* Okla. Bar Ass'n v. Willis, 2020 OK 49 (Okla. 2020); *In re* State Question No. 805 Initiative Petition No. 421, 473 P.3d 466 (Okla. 2020); Nat. Gas Pipeline Co. v. Foster OK Res. LP, 465 P.3d 1206 (Okla. 2020); State *ex. rel.* Okla. Bar Ass'n v. Green, 465 P.3d 1197 (Okla. 2020); State *ex. rel.* Okla. Bar Ass'n v. Janzen, 2020 OK 19 (Okla. 2020); State *ex. rel.* Okla. Bar Ass'n v. Wiland, 461 P.3d 205 (Okla. 2020); *In re* Estate of James, 472 P.3d 205 (Okla. 2020); Duke v. Duke, 457 P.3d 1073 (Okla. 2020); *In re* Estate of Fulks, 477 P.3d 1143 (Okla. 2020); Revolution Res. v. Annecy, 477 P.3d 1133 (Okla. 2020); *In re*: Adams, 474 P.3d 346 (Okla. 2020); *In re* State Question No. 807, Initiative Petition No. 423, 468 P.3d 383, 396 (Okla. 2020).

150. OKLA. CONST. art. VII, § 5.

role of judges, with features that render the Oklahoma Supreme Court's docket a shadow docket lite.

2. Lack of Transparency, Legitimacy, and Accountability

Like the Supreme Court's practice of issuing mysterious rulings on the shadow docket, these Oklahoma Supreme Court practices also lack transparency. Concurring or dissenting without a separate writing keeps the public in the dark about a justice's views. Even worse, not participating or not voting keeps the public in the dark altogether. Not only is it a secret how these non-voting justices would have voted, but also why they did not vote.

With lack of transparency comes lack of legitimacy. Of course, parties are not left wondering the outcome of their case or the reasoning; the majority opinion provides that information. But only part of the picture is revealed to the parties and the public. They know who composed the majority and the majority's reasoning, but they have no explanation for a justice's choice to concur in result or dissent without writing separately, and, worse yet, they have no idea why a justice decided to not participate. A logical interpretation of these practices is that the justices who employ them fail to perform their job duties. Even if justices have an arguably legitimate reason for not participating—like sickness—the reason is never disclosed to the public. Human nature prompts the logic: If justices had legitimate reasons for flouting their job responsibilities, they would disclose them. The legitimate reason cannot be because they are recused or disqualified because that information is noted in opinions; therefore, if justices do not disclose why they did not vote or explain their concurrence in judgment or dissent, then they likely have illegitimate reasons for doing so.

And this logic that justices who fail to disclose their reasoning or to vote do so for illegitimate reasons may not be unfounded. These practices allow justices to decline to perform their job duties to avoid political backlash or divert it to other justices. After all, a justice who does not vote in an abortion case, for example, cannot be criticized for it. Nor can justices who concur in judgment or dissent without explanation be criticized, at least not as harshly as the members of the majority. These practices leave justices who fulfill their obligation as judges to explain themselves holding the bag. They have accountability while the others do not.[151]

151. *See* Ginsburg, *supra* note 37, at 139 ("Disclosure of votes and opinion writers . . . serves to hold the individual judge accountable."); *id.* at 140 ("Public accountability through the disclosure of votes and opinion authors puts the judge's conscience and reputation on the line, and the repercussions are sometimes severe."); Baude, *supra* note 1, at 17 ("[T]he orders list suggests that when individual personalities, and therefore individual reputations, are taken out of the Court's practice, the results might not always be as thoughtful."); Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 LAW & CONTEMP. PROBS. 157, 195 (1998) ("Accountability is crucial to ensure fidelity to rules or norms of legitimate decisionmaking.").

An analysis of the justices' voting in cases with politically charged issues supports this hypothesis. Sixteen Oklahoma Supreme Court cases have involved the substantive issue of abortion,[152] and eleven votes cast in those cases were not forthcoming: two justices concurred in judgment without separate writing, two justices concurred in part and dissented in part without separate writing, two justices dissented without separate writing, and five justices did not vote.[153] In a case involving the constitutionality of a parenting agreement between a child's biological mother and her former civil domestic partner in light of the Oklahoma constitution's (now former) ban on same-sex marriage, one justice concurred in result without writing separately.[154] And in a case dealing with the legalization of marijuana, one justice did not participate.[155] Hot-button issues are not immune from subpar treatment by Oklahoma Supreme Court justices.[156] When justices dodge their obligations to not only vote, but also to explain themselves in controversial cases with difficult decisions that society entrusts judges to make, justices simultaneously dispense with transparency, the Oklahoma Supreme Court's legitimacy, and their own accountability.

---

152. *See* Okla. Coal. for Reprod. Just. v. Cline, 441 P.3d 1145 (Okla. 2019) (holding a statute unconstitutional because it imposes an undue burden on a woman's right to an abortion); Burns v. Cline, 387 P.3d 348 (Okla. 2016) (holding that a bill placed an substantial obstacle in path of women seeking to exercise their right to an abortion); *In re* Initiative Petition No. 406, State Question No. 782, 369 P.3d 1068 (Okla. 2016) (finding a proposed amendment to the Oklahoma constitution regarding abortion unconstitutional); *Cline*, 368 P.3d at 1278 (finding permissible a statute restricting use of certain drugs for abortions); Cline v. Okla. Coal. for Reprod. Just., 313 P.3d 253 (Okla. 2013) (prohibiting the use of certain drugs to induce abortions and treat ectopic pregnancies); *In re* Initiative Petition No. 395, State Question No. 761, 286 P.3d 637 (Okla. 2012) (mem.) (finding petition regarding abortion constitutionally invalid); Nova Health Sys. v. Pruitt, 292 P.3d 28 (Okla. 2012) (mem.) (holding an Oklahoma House bill regulating abortion constitutionally invalid); Okla. Coal. for Reprod. Just. v. Cline, 292 P.3d 27 (Okla. 2012) (holding that statute prohibiting knowing or reckless prescription of abortifacient medication unconstitutional); Davis v. Fieker, 952 P.2d 505 (Okla. 1997) (holding state statutes did not impose an undue burden on women seeking an abortion); *In re* Initiative Petition No. 349, State Question No. 642, 838 P.2d 1 (Okla. 1992) (finding initiative petition impermissibly restricts the constitutional right to abortion); Morris v. Sanchez, 746 P.2d 184 (Okla. 1987) (holding plaintiffs cannot recover for failed sterilization by obtaining an abortion); Bras v. First Bank & Tr. Co. of Sand Springs, 735 P.2d 329 (Okla. 1985) (holding petitioner was improperly barred from bringing their claim); Oklahomans for Life, Inc. v. State Fair of Okla., Inc., 634 P.2d 704 (Okla. 1981) (holding anti-abortion group's free expression was not violated by the state's conduct); Spencer *ex. rel.* Spencer v. Seikel, 742 P.2d 1126 (Okla. 1987) (holding statute regulating abortion was not unconstitutional); Bowlan v. Lunsford, 54 P.2d 666 (Okla. 1936) (mem.) (holding anti-abortion statutes were constitutional and according to public policy); McFarland v. Atkins, 594 P.2d 758, 763 (Okla. 1978) (seeking an injunction requiring Planned Parenthood to comply with certain state laws, such as distribution of birth control information).

153. *See Okla. Coal. for Reprod. Just.*, 441 P.3d at 1161 (Justice Winchester concurring in result without separate writing); *Okla. Coal. for Reprod. Just.*, 368 P.3d at 1289 (Justice Edmondson dissenting without separate writing; Justice Watt and Justice Colbert not voting); *Cline*, 313 P.3d at 262 (Chief Justice Colbert and Justice Watt not voting); *Davis*, 952 P.2d at 517 (Justice Simms dissenting without explanation); *Initiative Petition No. 349*, 838 P.2d at 12 (Justice Watt concurring in part of the opinion by reason of stare decisis without explanation); *Spencer ex. rel. Spencer*, 742 P.2d at 1130 (Vice Chief Justice Hargrave not participating); *Bras*, 735 P.2d at 334 (Justice Opala concurring in part and dissenting in part without separate writing); *McFarland*, 594 P.2d at 763 (Justice Doolin concurring in part and dissenting in part without separate writing).

154. Eldredge v. Taylor, 339 P.3d 888, 895 (Okla. 2014) (Justice Combs concurring in result without writing separately).

155. *See In re* State Question No. 807, Initiative Petition No. 423, 468 P.3d 383, 396 (Okla. 2020) (Justice Colbert not participating).

156. *See generally id.*

3. Practices Are Unjustifiable

These Oklahoma Supreme Court "shadow docket lite" practices are contrary to the role of judges, but can they be justified? Probably not. There are four reasons. First, the Oklahoma Supreme Court cannot use time constraints as an excuse for these practices. Unlike the Supreme Court, which issues opinions for all cases by the end of the term, the Oklahoma Supreme Court issues opinions sporadically and at a much slower pace.[157] This is likely because Oklahoma Supreme Court justices have no deadline to issue opinions. Second, Oklahoma Supreme Court justices cannot use their workload as an excuse. Because it handles only civil matters, the Oklahoma Supreme Court's docket—without any criminal appeals—is light. From 2016 to 2020, its docket averaged about seventy-five merits decisions per year.[158] Third, virtually none of the justices' time is spent preparing for and conducting oral argument.[159] Oral argument before the Oklahoma Supreme Court rarely occurs.[160] Finally, Oklahoma Supreme Court justices do not analyze petitions for certiorari in the first instance.[161] They employ referees to analyze the petitions and provide recommendations on whether to grant certiorari petitions to the court, significantly decreasing the amount of work required to assess a petition and make a decision.[162]

Oklahoma Supreme Court justices have small dockets, no deadlines, rare oral arguments, and referees to do most of their grunt work. Aside from the periodic case about whether a question can make it on the ballot for an upcoming election, the Oklahoma Supreme Court is virtually free of time and workload pressures.[163] So why do Oklahoma Supreme Court justices hide their votes and reasoning?

The most obvious reason Oklahoma Supreme Court justices hide their votes and reasoning is because they want to keep their jobs. In stark contrast to U.S. Supreme Court Justices who are appointed for life and theoretically free of outside political pressure,[164] Oklahoma Supreme Court justices can be voted out by the people of Oklahoma in nonpartisan retention elections.[165] One year after justices are appointed, they face a retention election wherein the people vote whether to retain them as a

157. Sometimes, the pace is especially slow. For example, the opinion for *Schnedler v. Lee* was issued on June 25, 2019, but the petition for certiorari was granted a year and a half earlier in December 2017. 445 P.3d 238 (Okla. 2019). Although this may mirror the timing of certiorari grants and opinions in the Supreme Court, Oklahoma Supreme Court justices can typically start writing upon granting certiorari as the Oklahoma Supreme Court rarely orders oral argument.

158. The totals used for the average did not include administrative orders, like *Suspension of Credentials of Registered Courtroom Interpreters*, 2016 OK 22 (Okla. 2016).

159. *See* Thai & Coates, *supra* note 148, at 695.

160. *Id.*

161. *Id.* at 698 n.12.

162. *Id.*

163. *Id.*

164. *See* Randolph Moss & Edward Siskel, *The Least Vulnerable Branch: Ensuring the Continuity of the Supreme Court*, 53 CATH. U. L. REV. 1015, 1031 (2004).

165. *See* OKLA. CONST. art. VII-B, § 2.

justice.[166] If retained in the first election, justices face retention elections every six years.[167] For justices to be retained, more than 50% of the votes must be in favor of retention.[168] Although no Oklahoma Supreme Court justice has ever lost their seat in a retention election, justices in other states have lost their seats with similar retention election procedures.[169] And the margins for the retention of most justices in Oklahoma have been trending down:[170]

Oklahoma Supreme Court Justice	Retention Election Year and % "Yes"	
Combs, J.	2012	2016
	66.4%[171]	58.7%[172]
Edmondson, J.	2012	2018
	66.9%[173]	59.4%[174]
Kauger, J.	2012	2018
	65.7%[175]	62.2%[176]
Gurich, J.	2012	2018
	66.5%[177]	61.6%[178]
Colbert, J.	2014	2020
	62.6%[179]	67.4%[180]

The threat of being voted out of office, though never realized, likely looms in the back of the justices' minds when they make decisions.[181] Indeed, research suggests that "judges [subject to retention elections] may frequently shape their rulings on many different subject matters to appeal to retention agents."[182] There will always be at least a modest popular influence in retention election systems—but severe politicization of votes in Oklahoma Supreme Court cases is contrary to the virtue of judicial

166. *Id.*; *id.* § 5.
167. *Id.* § 5.
168. *Id.* § 2.
169. *See, e.g.*, Michael Karlik, *ELECTION 2020| Voters Reject 1 Judge for Retention*, COLO. POLS. (Nov. 3, 2020), https://www.coloradopolitics.com/2020-election/election-2020-voters-reject-1-judge-for-retention/article_6fdcea0e-1d42-11eb-92e2-f7fe79fef975.html.
170. *See infra* notes 171–80 and accompanying graph.
171. *OK Election Results*, (Nov. 6, 2012), https://results.okelections.us/OKER/?elecDate=20121106.
172. *OK Election Results*, (Nov. 8, 2016), https://results.okelections.us/OKER/?elecDate=20161108
173. *OK Election Results*, *supra* note 171 (2012 results)
174. *OK Election Results*, (Nov. 6, 2018), https://results.okelections.us/OKER/?elecDate=20181106.
175. *OK Election Results*, *supra* note 171 (2012 results).
176. *OK Election Results*, *supra* note 174 (2018 results).
177. *OK Election Results*, *supra* note 171 (2012 results).
178. *OK Election Results*, *supra* note 174 (2018 results).
179. *OK Election Results*, (Nov. 4, 2014), https://results.okelections.us/OKER/?elecDate=20141104.
180. *OK Election Results*, (Nov. 3, 2020), https://results.okelections.us/OKER/?elecDate=20201103.
181. Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 684 (2009).
182. *Id.*

independence and risks unchecked majority abuse on the minority. As understandable as it may be that the justices want to keep their jobs, their obligation to do their jobs by explaining their votes should trump all else. When Oklahoma Supreme Court justices do not vote or do not explain themselves, there is no way to know whether they did so to avoid upsetting retention agents. Even if justices have good reasons for not voting or failing to write separately, their silence means there is no way to rule out that they did so for political reasons. And if justices did so for political reasons, they can hide behind their nonspecific vote without accountability. This possibility underscores why the practices of not voting and failing to write separately should be critically analyzed and revised: they incentivize justices to flout their obligations as judges to explain themselves when doing so may have negative ramifications and put their jobs at risk, all while facilitating the covering up of improper motives without consequence. These practices can only be solved with more transparency and accountability.[183]

B. The United States Court of Appeals for the Tenth Circuit

1. Practice of the Tenth Circuit: Unpublished, Nonprecedential Opinions

Another shadow docket lite is the Tenth Circuit's large docket[184] of unpublished opinions. These opinions lack precedential value[185] according to a panel decision that is never explained to the public. For these opinions, the unpublished designation is a misnomer—they are published on Westlaw and Lexis, just not in West's Federal Reporter; the designation as unpublished versus published indicates precedential value rather than publication.[186] Although unpublished opinions have no precedential value in the Tenth Circuit, they "may be cited for their persuasive [authority]," or "under the doctrines of law of the case, claim preclusion, and issue preclusion."[187]

---

183. Just like the Supreme Court Justices' practices of not disclosing votes or explaining decisions on its shadow docket, it may be "hasty" to conclude that Oklahoma Supreme Court justices' decisions to not vote or to not write separately are "thoughtless or the result of unjustified inconsistency. But the [Oklahoma Supreme] Court could do more to reassure us that they are not." *See* Baude, *supra* note 1, at 25.

184. From January to June 2000, 79% of Tenth Circuit opinions were unpublished. *See* Mead, *supra* note 103, at 601.

185. *See* PRACTITIONER'S GUIDE TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT 59 (11th ed. 2021) ("Unpublished orders and judgments of the circuit court have no precedential value and do not bind other panels of the court.").

186. *See* Michael B.W. Sinclair, Anastasoff versus Hart*: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695, 699 (2003) ("[U]npublished opinions have always been obtainable. One could simply purchase a copy from the clerk of the court, and more recently many, although not all, can be found in commercial electronic databases, and at each court's web site.").

187. 10TH CIR. R. 32.1 (citation of unpublished opinions).

2. Lack of Transparency, Lack of Accountability, and Bad Incentives

The panel on a case decides with unfettered discretion whether an opinion is published or unpublished. There is no Tenth Circuit rule addressing publication, and a panel's reason for designating an opinion as published or unpublished is never disclosed to the public.[188] This hidden exercise of unfettered discretion suffers from three problems: a lack of transparency, a lack of accountability, and bad incentives for judges to not do their jobs as well as they would if an opinion were published and precedential.

First, the Tenth Circuit's published versus unpublished opinion practice lacks transparency. The Tenth Circuit has no publicized criteria for judges to follow in designating opinions as published or unpublished.[189] It is possible that the court has internal criteria, but, even assuming this exists and is faithfully followed by panels, the reasons a panel designates an opinion as published or unpublished are a mystery to the public. The value of transparency in judging that requires judges to explain themselves applies in this context. Deciding whether a case is published and thus precedential not only impacts future litigants, but also the way society members conform their actions to the law as announced by the Tenth Circuit. For example, if a published Tenth Circuit opinion announces that a police officer who uses a taser on a fleeing suspect violates the suspect's constitutional rights, all police officers in the Tenth Circuit understand from that point forward that taking the same action will violate the Constitution and deprive them of qualified immunity because the unconstitutionality of that conduct was clearly established in a precedential Tenth Circuit opinion.[190] If the Tenth Circuit announces the same holding in an unpublished opinion, however, no precedent is created, and police officers who take the same action would still be entitled to qualified immunity because the alleged unconstitutionality of their actions was not clearly established at the time of their conduct.[191] Creating or not creating precedent matters. And not creating precedent without sufficient justification flouts the obligation of judges to create precedent.[192] How panels make the publication decision deserves just as much transparency as the opinion's own reasoning. As the Tenth Circuit's practice currently stands, it has opacity, not transparency.

Second, judges that sign off on unpublished opinions lack accountability. Because unpublished opinions do not create precedent, judges on panels that issue unpublished opinions are not bound to follow them

188. *See* Gulati & McCauliff, *supra* note 151, at 164 ("No external body polices publication behavior, and there are no official sanctions attached to failures to comply with the publication rules.").

189. *See generally* 10TH CIR. RS. (2021).

190. *See Precedent*, WEX DEFINITIONS (May 2020).

191. *See* 10TH CIR. R. 32.1(A) (precedent of unpublished opinions) ("Unpublished opinions are not [considered binding precedent], but may be cited for their persuasive [authority].").

192. *See* Baude, *supra* note 1, at 25.

later.[193] If these judges change course in later opinions, they need not offer reasons or grapple with stare decisis considerations. The nonprecedential nature of prior unpublished opinions they joined allows judges to about face without accountability to the court, the parties, or themselves.[194] Furthermore, "[i]n our law the opinion has . . . a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one if not its major office to show how like cases are properly to be decided in the future."[195] This forward-looking function:

> [A]lso frequently casts its shadow before, and affects the deciding of the cause in hand. (If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus[,] the opinion serves as a steadying factor which aids reckonability.[196]

Accountability is also completely absent in the publication designation process. Because the details of the publication designation decision are never disclosed to the public, there is no way to expose inconsistencies in these decisions.[197] The public does not know (1) how many judges voted for or against publication, (2) whether a judge voted against the ultimate publication designation, or (3) why each judge voted the way they did. As a result, the public is also unable to track whether judges are consistent in their publication designation votes or to criticize judges for designating an opinion as unpublished and nonprecedential for improper purposes.

Another way accountability is compromised by the Tenth Circuit's practice of issuing unpublished opinions is the impulse of judges to decline to write separately, even when they disagree with a majority opinion's reasoning, conclusion, or both.[198] Offering reasons and explaining those reasons to the public are obligations inherent to the role of judges.[199] But when opinions are nonprecedential, judges may decide that although they disagree with the majority opinion in some way, it is not worth taking the time to explain that disagreement because the opinion has no precedential effect. Thus, judges may decline to write separately because doing so would take time and work in a case that theoretically can do no future harm. The logic may continue that writing separately will draw undesirable attention to a majority opinion's flaws, disrupting the illusion of

193. *See, e.g.*, 10TH CIR. R. 32.1(A) (precedent of unpublished opinions).

194. *See* Quitschau, *supra* note 118, at 866 ("[R]ules that rob an opinion of its precedential value have the inherent effect of diminishing a court's internal accountability to itself, its colleagues, and its office.").

195. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 26 (1960).

196. *Id.*

197. *See* Schwartzman, *supra* note 15, at 1005.

198. *See* William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Court of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 612–13 (1981) (explaining that unpublished opinions are meant to be uncontroversial, and 0%-1.5% of unpublished opinions have dissents or concurrences, which shows that judges might have impulses not to write separately in efforts to maintain unanimity).

199. *See supra* Section I.A.

correct rulings and harmony within the court.[200] Whether those are legitimate concerns is beside the point; they are flawed justifications judges may use to decline to write separately from unpublished majority opinions. Indeed, declining to write separately, regardless of precedential status, dispenses with judges' accountability to the public to fulfill their job duties.[201] In short, the Tenth Circuit practice of issuing unpublished, nonprecedential opinions discards judges' accountability to themselves and the court to be consistent, as well as to the public to explain their reasons for decisions.

Third, unpublished, nonprecedential opinions inherently come with bad incentives for judges to slack off on their job duties. Tenth Circuit rules state that unpublished opinions do not create precedent.[202] Thus, because unpublished opinions are nonbinding on future courts, judges have less incentive in these cases to critically analyze the issues or to reach the correct outcome.[203] And if panels get a case wrong, the mistake is not hugely consequential because nonprecedential opinions by definition do not create bad precedential law.

While a wrong decision in an unpublished opinion may not affect future parties, it significantly affects the parties in the case—real people with real stakes in the case's outcome. To them, all that matters is the outcome of their case. A decision that is wrongly decided but creates no precedent cannot be justified on the basis of insignificance. A panel may view an unpublished opinion like a tree that falls in a forest with no one to hear it because the opinion does not create law; but even if the rest of the world heard nothing, the parties heard a sound. Unpublished, nonprecedential opinions have real consequences, so under-considered unpublished opinions are a disservice to the parties to a case.

Another bad incentive stemming from unpublished opinions is the option to bury novel legal issues and difficult decisions in nonprecedential

---

200. *See* Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1390–91 (1995).

201. This is not to say that separate writings in unpublished opinions are unheard of; they exist. *See, e.g.*, Owners Ins. Co. v. Dockstader, No. 19-4156, 2021 WL 2662251, at *7 (10th Cir. June 29, 2021) (unpublished) (Briscoe, J., dissenting); Estate of Schultz v. Brown, 846 F. App'x 689, 695 (10th Cir. 2021) (unpublished) (Hartz, J., concurring). But regardless of the select times judges that have written separately from majority opinions in Tenth Circuit unpublished opinions, the incentive to decline to write separately for the aforementioned reasons remains.

202. *See* 10TH CIR. R. 32.1(A) (precedent of unpublished opinions).

203. This is not a hypothetical—Justice Ginsburg explained: "Judges generally do not labor over unpublished judgments and memoranda, or even published per curiam opinions, with the same intensity they devote to signed opinions." Ginsburg, *supra* note 37, at 139; *see also* Sinclair, *supra* note 186, at 700–01 ("Because the court making the decision also decides whether to publish, and thus whether to give precedential effect to its decision, critics fear that judges may be tempted to use unpublished opinions when they cannot properly distinguish a precedent or justify a decision, or that judges may not give the issue as much attention if they do not have to write opinions."); Reynolds & Richman, *supra* note 17, at 1200 ("A judge who decides early in the process that a decision will not be published might not expend sufficient energy on the opinion to track down all the 'like' cases.").

opinions.[204] For example, in *Christie v. United States*,[205] an unpublished case, the Eighth Circuit addressed "the application of the Mailbox Rule to a claim for a tax refund that was mailed on time, but received after the deadline."[206] Even though this issue was one of first impression in both the Eighth Circuit and every other circuit, the Eighth Circuit declined to publish its decision and create precedent. Used in this way, unpublished opinions act as an escape hatch for judges who are unsure how to resolve a case and do not want to get it wrong in a precedential opinion, even though that is their job.[207] This practice improperly "transforms the courts of appeals"—with mandatory appellate jurisdiction—"into certiorari courts, a step hardly consistent with common understanding and congressional design."[208]

These bad incentives are even more concerning in light of the reality that unpublished opinions almost certainly mark the end of the road for litigants.[209] Unpublished opinions are unlikely to be reviewed en banc by the Tenth Circuit or on certiorari by the Supreme Court. En banc review in the Tenth Circuit "is not favored and ordinarily will not be granted[.]"[210] It may be granted only if "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."[211] Unpublished opinions will almost never satisfy one of these requirements. Because they are by definition nonprecedential, unpublished opinions that cannot disrupt the uniformity of Tenth Circuit law. And an opinion that creates no law is unlikely to be viewed by the judges as involving a question of exceptional importance. These suppositions are confirmed by an analysis of the types

---

204. *See* Johanna S. Schiavoni, *Who's Afraid of Precedent?: The Debate over the Precedential Value of Unpublished Opinions*, 49 UCLA L. REV. 1859, 1885 (2002); Gulati & McCauliff, *supra* note 151, at 177 ("In hard cases, formulating reasons that can survive public scrutiny and a possible appeal takes much more time."); Reynolds & Richman, *supra* note 17, at 1201 ("There is evidence that the list of unreported decisions at times includes opinions that break new ground."); *id.* ("[A] court may use non-publication deliberately to suppress a lawmaking opinion. Indeed, in some cases it is impossible to believe the court did not realize that it was creating law. Why then a decision not to publish? Perhaps the court sought to avoid public disclosure, either because of uncertainty over the doctrine elaborated, or because it wished to decide the case at bar on an impermissible basis—by a rationale that will not necessarily be extended to all like cases."); Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1751 (2008) ("It stands to reason that a court that knows that its opinions will bind itself, and possibly bind lower courts, will consider more carefully its reasoning before issuing judgments and opinions that announce new rules of law.").

205. No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (per curiam) (unpublished).

206. Schiavoni, *supra* note 204, at 1878.

207. *See also* Reynolds & Richman, *supra* note 17, at 1200 ("A court might . . . use the cloak of non-publication to avoid the task of reconciling arguably inconsistent decisions. That reconciliation would require the court to elaborate a rule that would deprive it of the freedom to decide on the basis of 'intuitive justice' rather than articulated doctrine. While such license might be tempting to some appellate judges, it is not what we expect from them.").

208. *Id.* at 1201.

209. *See* Sinclair, *supra* note 186, at 701 ("[L]oss of a prior holding of a case 'as precedent significantly disadvantages their likelihood of obtaining a favorable holding on appeal.'").

210. FED. R. APP. P. 35.

211. *Id.*

of opinions the Tenth Circuit typically vacates and reconsiders en banc, which are typically published opinions.[212]

Unpublished opinions generally meet the same fate when the parties to an unpublished opinion petition for certiorari to the Supreme Court. There, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion[,]" and a petition "will be granted only for compelling reasons."[213] Typically, compelling reasons include a circuit split, a state court of last resort deciding a question of federal law in conflict with another state court or a court of appeals, or a court deciding an important question of federal law that the Supreme Court has yet to address or that conflicts with Supreme Court precedent.[214] Unpublished opinions are unlikely to meet this certiorari criteria; they cannot create a circuit split or conflict with federal law or Supreme Court precedent as they are nonprecedential. Although it is possible,[215] the Supreme Court is unlikely to grant petitions for certiorari to review unpublished, nonprecedential opinions.[216] In the 2020 October term, only 19% of the Supreme Court opinions[217] issued following oral argument stemmed from appeals of unpublished opinions.[218]

---

212. *See id.* For example, the two most recent en banc rehearings reviewed published (and therefore precedential) panel decisions. *See* Kerr v. Polis, 930 F.3d 1190 (10th Cir. 2019), *reh'g en banc granted, judgment vacated*, 977 F.3d 1010 (10th Cir. 2020); Aposhian v. Barr, 958 F.3d 969 (10th Cir.), *reh'g en banc granted, judgment vacated*, 973 F.3d 1151 (10th Cir. 2020), *vacated sub nom.*, Aposhian v. Wilkinson, 989 F.3d 890 (10th Cir. 2021), *and opinion reinstated sub nom.*, Aposhian v. Wilkinson, 989 F.3d 890 (10th Cir. 2021).

213. U.S. SUP. CT. R. 10.

214. *Id.*

215. The Tenth Circuit's unpublished opinion, *Lomax v. Ortiz-Marquez*, 754 F. App'x 756 (10th Cir. 2018) (unpublished), was taken up by the Supreme Court in *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721 (2020).

216. *See* Quitschau, *supra* note 118, at 866 ("[A]n unpublished opinion is less likely to be reviewed by the [United States Supreme Court]."); Reynolds & Richman, *supra* note 17, at 1203 ("An unpublished opinion is less likely to be reviewed [by the Supreme Court] . . . because an unpublished opinion (in most circuits) has no precedential value, [and thus] the felt need to correct error in such an opinion is less than with published opinions. The Supreme Court is confronted merely with a wrong result, not with 'bad law.' It is not often that the Court will make room on its discretionary and highly crowded docket for a case that merely settles a dispute incorrectly, that is, a case whose error is not likely to be perpetuated in future cases.").

217. The total does not include cases that were dismissed following oral argument as improvidently granted or appeals from state courts, federal circuit courts, or federal district courts.

218. Adams v. Governor of Del., 922 F.3d 166 (3d Cir. 2019) (published); Texas v. New Mexico, 141 S. Ct. 509 (2020) (original jurisdiction); Pharm. Care Mgmt. Ass'n v. Rutledge, 891 F.3d 1109 (8th Cir. 2018) (published); Tanvir v. Tanzin, 915 F.3d 898 (2d Cir. 2018) (published); Oracle Am., Inc. v. Google LLC, 886 F.3d 1179 (Fed. Cir. 2018) (federal circuit appeal); Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 443 P.3d 407 (Mont. 2019) (state court appeal); United States v. Briggs, 78 M.J. 289 (C.A.A.F. 2019) (published); *In re* Fulton, 926 F.3d 916 (7th Cir. 2019) (published); Torres v. Madrid, 769 Fed. App'x 654 (10th Cir. 2019) (unpublished); Pereida v. Barr, 916 F.3d 1128 (8th Cir. 2019) (published); Sierra Club, Inc. v. U.S. Fish & Wildlife Serv., 925 F.3d 1000 (9th Cir. 2019) (published); Salinas v. U.S. R.R. Ret. Bd., 765 Fed. App'x 79 (5th Cir. 2019) (mem.) (unpublished); Jones v. State, No. 2015-CT-00899-SCT, 2018 WL 10700848 (Miss. Nov. 27, 2018) (unpublished state case); United States v. Borden, 769 Fed. App'x 266 (6th Cir. 2019) (unpublished); Fulton v. City of Phila., 922 F.3d 140 (3d Cir. 2019) (published); Niz-Chavez v. Barr, 789 Fed. App'x 523 (6th Cir. 2019) (unpublished); King v. United States, 917 F.3d 409 (6th Cir. 2019) (published); Texas v. United States, 945 F.3d 355 (5th Cir. 2019) (published); New York v. Trump, 485 F. Supp. 3d 422 (S.D.N.Y. 2020) (district court appeal); United States v. Van Buren, 940 F.3d 1192 (11th Cir. 2019) (published); Doe v. Nestle, U.S.A., 906 F.3d 1120 (9th Cir. 2018) (published); CIC Servs., LLC v. IRS, 925 F.3d

Although there are theoretically good reasons for nonprecedential opinions, many of these reasons do not hold up in the Tenth Circuit. One reason for unpublished, nonprecedential opinions is a court's heavy workload.[219] Two former Ninth Circuit judges argued the practice of issuing unpublished, nonprecedential opinions is necessary for judges to handle their significant workloads; otherwise, judges would be forced to neglect their other responsibilities.[220] But the workload in the Ninth Circuit (and most other circuits) is far different than the workload in the Tenth Circuit.[221] During the year preceding March 31, 2021, while 10,225 appeals were filed in the Ninth Circuit, only 1,656 were filed in the Tenth Circuit.[222] The Tenth Circuit ranked tenth out of twelve circuits in the total appeals filed, having the third lowest caseload.[223] Statistics on appeals terminated that year are similar: while 10,367 appeals were terminated in the Ninth Circuit, only 1,684 were terminated in the Tenth Circuit, which ranked tenth in total appeals terminated.[224]

---

247 (6th Cir. 2019) (published); Edwards v. Cain, No. 15-00305-BAJ-RLB, 2018 WL 4373644 (M.D. La. Sept. 13, 2018) (unpublished); Simon v. Republic of Hungary, 911 F.3d 1172 (D.C. Cir. 2018) (published); Philipp v. Fed. Republic of Germany., 925 F.3d 1349 (D.C. Cir. 2019) (published); Duguid v. Facebook, Inc., 926 F.3d 1146 (9th Cir. 2019) (published); Archer & White Sales, Inc. v. Henry Schein, Inc., 935 F.3d 274 (5th Cir. 2019) (published, cert denied); Collins v. Mnuchin, 938 F.3d 553 (5th Cir. 2010) (published); Chavez v. Hott, 940 F.3d 867 (4th Cir. 2019) (published); Uzuegbunam v. Preczewski, 781 Fed. App'x 824 (11th Cir. 2019) (unpublished); FTC v. AMG Cap. Mgmt., 910 F.3d 417 (9th Cir. 2018); Prometheus Radio Project v. FCC, 939 F.3d 567 (3d Cir. 2019) (published); Mayor of Balt. V. BP P.L.C., 952 F.3d 452 (4th Cir. 2020) (published); Florida v. Georgia, 141 S. Ct. 1175 (2021) (original jurisdiction); Dai v. Barr, 916 F.3d 731 (9th Cir. 2018) (published); People v. Lange, A157169, 2019 WL 5654385 (Ca. Ct. App. Oct. 30, 2019) (unpublished); Arthrex, Inc. v. Smith & Nephew, Inc., 941 F.3d 1320 (Fed. Cir. 2019) (published); Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989 (9th Cir. 2020) (published); Carr v. Comm'r, SSA, 961 F.3d 1267 (10th Cir. 2020) (published); Cedar Point Nursery v. Shiroma, 923 F.3d 524 (9th Cir. 2019) (published); United States v. Cooley, 919 F.3d 1135 (9th Cir. 2019) (published); Caniglia v. Strom, 953 F.3d 112 (1st Cir. 2020) (published); Ark. Tchr. Ret. Sys. V. Goldman Sachs Grp., 955 F.3d 254 (2d Cir. 2020) (published); Ramirez v. TransUnion LLC, 951 F.3d 1008 (9th Cir. 2020) (published); Alston v. NCAA, 958 F.3d 1239 (9th Cir. 2020) (published); Confederated Tribes of the Chehalis Rsrv. v. Mnuchin, 976 F.3d 15 (D.C. Cir. 2020) (published); Sanchez v. Sec'y U.S. Dep't of Homeland Sec., 967 F.3d 242 (3d Cir. 2020) (published); United States v. Greer, 798 Fed. App'x. 483 (11th Cir. 2020) (unpublished); United States v. Gary, 963 F.3d 420 (4th Cir. 2020) (published); City of San Antonio v. Hotels.com, L.P., 959 F.3d 159 (5th Cir. 2020) (published); Hologic, Inc. v. Minerva Surgical, Inc., 957 F.3d 1256 (Fed. Cir. 2020) (published); Ams. for Prosperity Found. v. Becerra, 919 F.3d 1177 (9th Cir. 2019) (published); Gov't of Guam v. United States, 950 F.3d 104 (D.C. Cir. 2020) (published); Renewable Fuels Ass'n v. U.S. Env't. Prot. Agency, 948 F.3d 1206 (10th Cir. 2020) (published); United States v. Palomar-Santiago, 813 Fed. App'x. 282 (9th Cir. 2020) (unpublished); B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170 (3d Cir. 2020) (published); *In re* Penneast Pipeline Co., 938 F.3d 96 (3d Cir. 2019) (published); United States v. Terry, 828 Fed. App'x. 563 (11th Cir. 2020) (unpublished).

219. *See* J. Lyn Entrikin Goering, *Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor*, 1 SETON HALL CIR. REV. 27, 72 (2005).

220. Alex Kozinski & Stephan Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Opinions*, CAL. LAW., June 2000, at 44.

221. *U.S. Ct. App. Summary 12-Month Period Ending March 31, 2021*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsumary0331.2021.pdf (last visited Dec. 23, 2021).

222. *Id.*

223. *U.S. Ct. App. Judicial Caseload Profile*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0331.2021.pdf (last visited Dec. 23, 2021).

224. *Id.*

Additionally, there is often no less work that goes into unpublished opinions in the Tenth Circuit than published opinions. Indeed, an unpublished opinion may look the same as a published opinion other than the first footnote indicating its designation as unpublished and that the opinion may therefore only be cited in accordance with Federal Rule of Appellate Procedure 32.1.[225] For example, in the unpublished case *Owners Insurance Co. v. Dockstader*,[226] the majority opinion is sixteen pages and is accompanied by an eighteen-page dissent, a typical length for published opinions. Sometimes unpublished opinions are even longer, like in the unpublished case *Kennett v. Bayada Home Health Care, Inc.*,[227] which had a twenty-four-page majority opinion and a nineteen-page concurrence.

At first glance, the practice of designating opinions as unpublished does not seem to flout the judicial responsibility to explain a disagreement with a majority opinion. Dissents are sometimes filed in unpublished opinions,[228] and to say that every judge gives less attention to unpublished opinions would be an overgeneralization. Nevertheless, the bad incentives to do so are there, and all these incentives are objectionable. Judges have an obligation to explain themselves[229] but because unpublished opinions do not create precedent, judges are less likely to spend as much time doing so.[230]

Moreover, judges arguably have an obligation to create precedent,[231] but because unpublished opinions do not create precedent, judges are incentivized to bury issues of first impression and hard cases in unpublished opinions. The Tenth Circuit's practice of issuing unpublished opinions without explanation or precedential effect thus creates a shadow docket lite—lacking transparency and accountability and replete with bad incentives.

III. SOLUTIONS

A. Proposed Oklahoma Supreme Court Rules

When Oklahoma Supreme Court justices flout their obligations as judges to vote and to explain their disagreement with majority opinions, the Oklahoma Supreme Court docket starts to resemble the Supreme Court

225. FED. R. APP. P. 32.1 ("(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like; and (ii) issued on or after January 1, 2007."); *see* Mead, *supra* note 103, at 602 ("The Tenth Circuit's unpublished decisions during the first six months of 2000 include a number of rather long decisions that create law, apply existing law to new factual situations, or adopt decisions from other circuits as authority.").

226. No. 19-4156, 2021 WL 2662251 (10th Cir. June 29, 2021) (unpublished).

227. 845 F. App'x 754 (10th Cir. 2021) (unpublished).

228. *See, e.g.*, Midway Leasing, Inc. v. Wagner Equip. Co., 842 F. App'x 209, 218 (10th Cir. 2021) (unpublished) (Tymkovich, C.J., dissenting).

229. *See supra* Section I.A.

230. Kozinski & Reinhardt, *supra* note 220, at 43–44.

231. *See supra* Part I.

shadow docket with unknown votes and unknown reasoning.[232] To remedy this problem, Oklahoma Supreme Court justices should be governed by rules in the voting process that increase transparency and accountability.

1. Rule Proposal to Remedy the Practice of Concurring in Result or Dissenting Without Separate Writing

To remedy the improper practice of not writing a concurrence or dissent, the discretion of Oklahoma Supreme Court justices to engage in this practice should be eliminated. Although theoretically the justices themselves could adopt such a rule in their discretion,[233] the Oklahoma Supreme Court rules generally govern litigants, not justices.[234] Moreover, it would probably be hard to convince justices to adopt a rule that would terminate a longstanding practice that has made their jobs (or, rather, not doing their jobs) easier.[235]

A state statute is thus the ideal approach to impose an additional rule upon the justices.[236] The statute should state:

> Unless an Oklahoma Supreme Court justice concurs fully in a majority opinion's reasoning and conclusion, that justice must not only disclose their vote, but must also provide an explanation for their vote. This rule is inapplicable if a justice is disqualified, recused, or is unable to participate or vote.[237]

Consistent with the obligation of judges to explain themselves, this proposed rule requires justices to do just that. With this rule in force, when justices concur in result or judgment, they must go further than stating their vote and explain why they disagree with a majority opinion's reasoning. Likewise, when justices dissent, they must indicate their dissent and additionally explain why they disagree with a majority opinion's reasoning and conclusion. The same is true when justices concur in part and dissent in part without explanation. By requiring justices to explain themselves, this proposed rule would require justices to articulate their judicial philosophies and prevent later inconsistencies without explanation.[238] It would

---

232. *See supra* Section II.A.

233. *See* OKLA. STAT. tit. 12, § 74 (2021) ("The Justices of the Supreme Court shall meet every two (2) years during the month of June at the capitol of the state and revise their general rules, and make such amendments thereto as may be required to carry into effect the provisions of this Code, and shall make such further rules consistent therewith as they may deem proper. The rules so made shall apply to the Supreme Court, the county courts, the superior courts, the district courts and all other courts of record.").

234. *See generally* OKLA. STAT. tit. 12, ch. 15 app. 1.

235. *See* Schauer, *supra* note 85, at 657 ("Decisionmakers usually desire flexibility and the freedom to try to reach the optimal outcome in each case."); *id.* ("[D]ecisionmakers themselves are unlikely to fully apprehend and appreciate [the function of giving reasons], for most decisionmakers underestimate the need for external quality control of their own decisions.").

236. Some statutes already do, like the disqualification statute. *See generally* Okla. Sup. Ct. R. 9 (disqualification of judges).

237. The latter portion of this rule will be discussed more fully *infra* Section III.A.2.

238. *See supra* Section I.A.

also sharpen majority opinions,[239] ensure a justice's reasons for not fully joining a majority opinion are sound,[240] and increase the Oklahoma Supreme Court's transparency in its decision-making.

Note that this rule leaves how much explanation justices must provide to their discretion. The line between enough and not enough explanation is difficult to discern. That is why the proposed rule entrusts the justices to use their discretion to determine how much explanation is required for their votes. It is of course possible, if not likely, that some justices will take advantage of this discretion by explaining very little. Some justices already regularly do this. For example, in *Beach v. Oklahoma Department of Public Safety*,[241] a justice concurred in part and dissented in part, stating: "In my opinion, this cause is moot."[242] And in *Biantrav Contractor, LLC v. Condren*,[243] a justice concurred in part and dissented in part, noting: "I concur in the result. I dissent to the procedure."[244] These brief explanations for votes are better than no explanations, yet they remain inadequate to meet the obligation of judges to adequately explain themselves.[245] The public is left wondering why the justice thinks the cause is moot and why the other justice thinks the procedure was wrong but the result was right. These are easy examples where more explanation is clearly warranted, and hopefully the enactment of the proposed rule would underscore the importance of explanation and prompt future justices to provide more than vague one-liners. If it does not, the rule should be revisited to decrease the justices' discretion and explicitly require lengthier explanations.

2. Rule Proposal to Remedy the Practice of "Not Participating" or "Not Voting"

The option to not participate or to not vote should not be completely eliminated, as it serves some utility by allowing the Oklahoma Supreme Court's work to proceed when a justice is unable to vote.[246] But permitting opinions to simply note that justices did not participate or did not vote in a case relieves those justices of accountability because they cannot be criticized or face consequences for concurring or dissenting and lacks transparency because it is unknown why they did not vote.[247] Accordingly, if justices decide to not participate or to not vote, they should be required by rule to give an explanation. This explanation need not be too detailed; for

239. *See supra* Section I.A.

240. *See* Schauer, *supra* note 85, at 657 ("[W]hen institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decisionmakers to give reasons may counteract some of these tendencies. Under some circumstances, the very time required to give reasons may reduce excess haste and thus produce better decisions.").

241. 398 P.3d 1 (Okla. 2017).

242. *Id.* at 7 (Kauger, J., concurring in part, dissenting in part).

243. 489 P.3d 522 (Okla. 2020).

244. *Id.* at 523.

245. Schauer, *supra* note 85, at 635 ("[I]f a reason were no more general than the outcome it purports to justify, it would scarcely count as a reason.").

246. *See supra* Section III.A.1, n. 150.

247. *See supra* Section II.A.1, n. 151.

example, the public does not need to know that a justice is in a medically induced coma from injuries sustained from a car accident. But the public is entitled to know that justice did not vote because of health reasons.[248] The rule should provide general categories of acceptable reasons for justices to not vote, with an "other" category that provides a catchall for unforeseen circumstances. As with the separate writing rule, a state statute is the ideal approach to impose this additional rule upon the justices.[249] The rule regarding not participating or not voting should state:

> When an Oklahoma Supreme Court justice does not participate or does not vote in a case before the Oklahoma Supreme Court, that justice must indicate one of the following reasons for their failure to participate or vote:
> - Health issues
> - Newly appointed justice
> - Other: _____

The rule commentary could offer further explanation for each of these categories. For the health issues category, justices might not vote because they are incapacitated or because their health issues make it impracticable. For the newly appointment justice category, justices might not vote because they recently joined the Oklahoma Supreme Court and were not involved in the conference, discussions, or oral argument of the case.[250] And the other category is a catchall that must be accompanied by a concise explanation.

Those justices who may not vote for political reasons could still not vote with this rule in place. Even so, the rule forces them to disclose that fact, blame their failure to vote on a disingenuous reason, or vote.[251] Whatever route they take, justices will be forced to take on more accountability with the rule than without it. Moreover, the additional information this rule requires justices to disclose enhances the Oklahoma Supreme Court's transparency. Thus, this proposed rule brings the practice of Oklahoma Supreme Court justices not voting without explanation out of the shadows of secrecy and into the light where the justices' actions are explained to the people.

B. Proposed Tenth Circuit Rules

The Tenth Circuit does not publicly outline its criteria for the designation of an opinion as published or unpublished, and thus precedential or

---

248. *See supra* Section II.A.

249. Some statutes already do, like the disqualification statute. Okla. Sup. Ct. R. 9 (disqualification of judges).

250. Newly appointed Supreme Court Justices do not participate in decisions for similar reasons. *See, e.g.*, Tanzin v. Tanvir, 141 S. Ct. 486, 493 (2020) ("Justice Barrett took no part in the consideration or decision of this case.").

251. Schauer, *supra* note 85, at 657–58 ("A reason-giving mandate will . . . drive out illegitimate reasons when they are the only plausible explanation for particular outcomes.").

nonprecedential.[252] This is not to say that the court's designations are "thoughtless or the result of unjustified inconsistency[,] . . . [b]ut the [Tenth Circuit] could do more to reassure us that they are not."[253] A rule outlining the criteria for the designation of an opinion as published or unpublished will reassure the public that these decisions are not left to Tenth Circuit judges' unfettered discretion, but are instead guided by uniform criteria. Such a rule will thus increase the transparency of publication decisions and the accountability of the judges who make them.

Circuit courts that have adopted rules outlining publication criteria publish opinions when one of the following conditions are satisfied:[254]

- An opinion articulates a new rule of law[255]
- An opinion modifies an established rule of law[256]
- An opinion clarifies or explains a rule of law[257]
- An opinion has precedential value[258]
- An opinion calls attention to an existing rule of law that appears to have been generally overlooked[259]
- An opinion applies an established rule of law to novel facts[260]
- An opinion serves as a significant guide to future litigants[261]
- An opinion "[i]nvolves a legal or factual issue of unique interest"[262]
- An opinion involves a legal issue of continuing public interest[263]
- An opinion criticizes existing law[264]
- An opinion contains a historical review of a legal rule[265]
- A panel decides a case with a dissent or concurrence[266]
- An opinion resolves a conflict between panels of this circuit[267]

---

252. The only rule that remotely addresses publication criteria—and that fails to address all instances of publication—is Tenth Circuit Rule 36.2, which states: "When the opinion of the district court, an administrative agency, or the Tax Court has been published, this court ordinarily designates its disposition for publication." 10TH CIR. R. 36.2 (publication).

253. Baude*, supra* note 1, at 18.

254. These circuits afford no precedential effect to unpublished opinions: First Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, Ninth Circuit, Tenth Circuit, and Eleventh Circuit. 1ST CIR. R. 36.0(c); 4TH CIR. R. 36(b); 5TH CIR. R. 47.5.3–47.5.4; 6 CIR. R. 32.1; 9TH CIR. R. 36-3(a); 10TH CIR. R. 32.1(A); 11TH CIR. I.O.P. 36-6.

255. *See* 1ST CIR. R. 36.0(b)(1); 4TH CIR. R. 36(a); 5TH CIR. R. 47.5.1(a); 6TH CIR. I.O.P. 32.1(b)(1)(A); 9TH CIR. R. 36-2(a).

256. *See* 1ST CIR. R. 36.0(b)(1); 4TH CIR. R. 36(a); 5TH CIR. R. 47.5.1(a); 6TH CIR. I.O.P. 32.1(b)(1)(A); 9TH CIR. R. 36-2(a).

257. *See* 4TH CIR. R. 36(a); 5TH CIR. R. 47.5.1(a); 9TH CIR. R. 36-2(a).

258. 11TH CIR. I.O.P. 36-6.

259. 5TH CIR. R. 47.5.1(a); 9TH CIR. R. 36-2(b).

260. 1ST CIR. R. 36.0(b)(1); 5TH CIR. R. 47.5.1(b); 6TH CIR. I.O.P 32.1(b)(1)(A).

261. 1ST CIR. R. 36.0(b)(1).

262. 9TH CIR. R. 36-2(d).

263. 4TH CIR. R. 36(a)(ii); 5TH CIR. R. 47.5.1(e); 6TH CIR. I.O.P. 32.1(b)(1)(C); 9TH CIR. R. 36-2(d).

264. 4TH CIR. R. 36(a)(iii); 5TH CIR. R. 47.5.1(c); 9TH CIR. R. 36-2(c).

265. 4TH CIR. R. 36(a)(iv); 5TH CIR. R. 47.5.1(c).

266. 1ST CIR. R. 36.0(b)(2)(C); 5TH CIR. R. 47.5.1; 6TH CIR. I.O.P. 32.1(b)(1)(D); 9TH CIR. R. 36-2(g).

267. 4TH CIR. R. 36(a)(v); 5TH CIR. R. 47.5.1(d); 6TH CIR. I.O.P. 32.1(b)(1)(B).

- An opinion creates a conflict with a decision in another circuit[268]
- An opinion in a case that has been previously reviewed and its merits addressed by an opinion of the Supreme Court[269]
- An opinion reverses the decision below[270]
- An opinion affirms the decision below upon different grounds[271]
- An opinion addresses a published lower court decision[272]
- An opinion addresses a published agency decision[273]
- An opinion addresses a tax court decision[274]
- An opinion should be published "for any other good reason"[275]

Many of these considerations overlap. For example, if an opinion creates a conflict with another circuit, it is also probably true that the opinion creates a new rule of law in the issuing circuit. But because creating precedent is consistent with the role of judges, overlap is not a bad thing; it creates a safety net that ensures opinions do not go unpublished and, in turn, causes more opinions to be published and precedential.[276]

The Tenth Circuit could either adopt a rule similar to established circuit rules that outlines publication criteria, or it could forge its own path by turning the standard publication rule framework on its head. Either approach will increase the transparency of publication decisions and the accountability of the judges making those decisions.

1. Rule Outlining Publication Criteria

The Tenth Circuit could adopt a publication rule like those in the First, Fourth, Fifth, Sixth, and Ninth Circuits that explicitly states publication criteria.[277] Although these circuits differ on whether they favor publication,[278] the Tenth Circuit should favor publication as creating precedent because it is consistent with the role and obligation of judges.[279] This rule could state:

> Tenth Circuit Rule X. Publication Criteria
> (1) All opinions of this Court shall be published so long as a majority of panel members determine the opinion satisfies at least one of the following criteria:

---

268. 4TH CIR. R. 36(a)(v); 5TH CIR. R. 47.5.1(d); 6TH CIR. I.O.P. 32.1(b)(1)(B).
269. 5TH CIR. R. 47.5.1(f); 6TH CIR. I.O.P. 32.1(b)(1)(G); 9TH CIR. R. 36-2(f).
270. *See* 5TH CIR. R. 47.5.1(A); 6TH CIR. I.O.P. 32.1(b)(1)(E).
271. *See* 5TH CIR. R. 47.5.1(b).
272. *See* 6TH CIR. I.O.P. 32.1(b)(1)(F); 9TH CIR. R. 36-2(e); 10TH CIR. R. 36.2.
273. *See* 6TH CIR. I.O.P. 32.1(b)(1)(F); 9TH CIR. R. 36-2(e); 10TH CIR. R. 36.2.
274. *See* 10TH CIR. R. 36.2.
275. *See* 5TH CIR. R. 47.5.2.
276. *See* discussion *supra* Section I.B.
277. *See* 1ST CIR. R. 36.0(b)(1); 4TH CIR. R. 36(a); 5TH CIR. R. 47.5.1; 6TH CIR. I.O.P. 32.1(b); 9TH CIR. R. 36-2.
278. *Compare* 1ST CIR. R. 36.0(b)(1) ("In general, the court thinks it desirable that opinions be published and thus be available for citation."), *with* 5TH CIR. R. 47.5.1 ("The publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession.").
279. *See supra* notes 15–17.

> (a) the opinion announces a new rule of law or modifies or explains an existing rule of law;
> (b) the opinion calls attention to an existing rule of law that appears to have been generally overlooked;
> (c) the opinion applies an established rule of law to novel facts;[280]
> (d) the opinion contains a historical review of a legal rule;
> (e) the opinion expresses disagreement with established circuit precedent;
> (f) the opinion creates a conflict with a decision of another circuit;
> (g) the opinion is from a case that has been previously reviewed and its merits addressed by an opinion of the Supreme Court;
> (h) the opinion addresses a published lower court, agency, or tax court decision; or
> (i) a panel member wrote separately in a concurrence or dissent.
>
> (2) If an opinion does not satisfy the publication criteria, a majority of panel members may nevertheless designate it for publication.

The number of published opinions will undoubtedly increase under this proposed rule. The rule requires publication if any of the nine publication criteria are met. The most prominent theme across the publication criteria in other circuits is that opinions are published when they create, alter, explain, or criticize precedent.[281] This theme is reflected in criteria (a) through (e). Criteria (f), (g), and (h) are satisfied when an opinion's importance is amplified by its interaction with other courts. And finally, criteria (i) recognizes that when judges feel strongly enough to write separately, the issues addressed in an opinion are probably worthy of publication and precedential effect.

Criteria that are not necessary in the proposed rule that other circuits use include: (1) an opinion serves as a significant guide to future litigants, (2) an opinion involves a legal issue of continuing public interest, (3) an opinion resolves a conflict between panels of this circuit, (4) an opinion reverses the decision below, (5) an opinion affirms the decision below upon different grounds, and (6) an opinion should be published for any other good reason. Most of these criteria could be grounds for publication based on the discretionary portion of the proposed Tenth Circuit rule. This discretionary option leaves room for judges to publish decisions that are, in their view, worthy of precedential effect. Whether an opinion serves as a significant guide to future litigants is highly subjective and, as such, is best left to the discretionary portion of the proposed rule. So too is whether an opinion resolves a legal issue of public interest or whether any other good reason exists for publication. Discretionary, not mandatory, publication is also appropriate for opinions that reverse or affirm a lower court

---

280. The key inquiry for this criterion is how broadly or narrowly to define the scope of "novel." If novel means any new fact, then virtually every case will satisfy this criterion. But if novel means a case that is not identical to a previous case, then no opinion will satisfy this criterion. Somewhere in between seems right, but it will be up to judges to make that determination.

281. *See supra* text accompanying notes 267–76.

decision on different grounds, as these could be straightforward applications of established law suitable for summary dispositions.[282] Finally, where two Tenth Circuit opinions conflict, the earliest opinion is precedential,[283] so there is unlikely to be a case that resolves a conflict between Tenth Circuit panels. Rather, cases will simply apply the earlier precedent so no standalone publication justification on this basis is necessary.

2. Rule Requiring Publication in All Cases but Summary Dispositions

The Tenth Circuit could take a novel approach by promulgating a rule unlike any other circuit. Instead of outlining publication criteria, the rule could require publication unless a case can be resolved via summary disposition. Tenth Circuit Rule 36.1 currently states:

> The court does not write opinions in every case. The court may dispose of an appeal or petition without written opinion. Disposition without opinion does not mean that the case is unimportant. It means that the case does not require application of new points of law that would make the decision a valuable precedent.[284]

The Tenth Circuit does not utilize this summary disposition method to resolve cases often. Although judges have an obligation to create precedent, judges do not flout that obligation by resolving cases via summary disposition if the case truly requires a straightforward application of established precedent. Even if accompanied by an opinion, by definition that opinion would not create precedent. So, the publication rule could state:

> Opinions of this Court shall be published unless they involve a straightforward application of established precedent that can be resolved via summary disposition.

With this proposed rule, unpublished opinions are the exception, not the rule. Under the rule, all opinions are published unless a case can be resolved via citations to precedent without elaboration in summary dispositions.

3. Rule Requiring Explanation for Publication Designation

The Tenth Circuit should go a step further. Again, inherent in the role of the judges is the obligation to explain themselves. This obligation should extend to the publication decision. For published opinions, and assuming the Tenth Circuit adopts the proposed rule outlined in Section

---

282. *See* discussion *supra* Section III.B.1.

283. *See* Haynes v. Williams, 88 F.3d 898, 900 n.4 (10th Cir. 1996) ("[W]hen faced with an intra-circuit conflict, a panel should follow earlier, settled precedent over a subsequent deviation therefrom.").

284. 10TH CIR. R. 36.1.

III.B.1,[285] the panel should be required to cite the specific Tenth Circuit rule subsection that justifies publication. For example, if a case establishes a new rule of law in the circuit, the footnote should state:

> At least a majority of panel members determined that this case should be published and precedential pursuant to Tenth Circuit Rule X(1)(a).[286]

And if a majority of panel members use their discretion to decide that an opinion should be published for a reason separate from the publication criteria in the rule, the footnote should state:

> At least a majority of panel members determined that this case should be published and precedential pursuant to Tenth Circuit Rule (X)(2) because [short explanation].

For unpublished opinions, the adoption of the proposed rule in Section III.B.1 will put the public on notice that, by designating an opinion as unpublished, the panel necessarily determined it did not satisfy any of the rule criteria. No other explanation for the publication decision is therefore needed for unpublished opinions. This rule imposes accountability on judges that issue unpublished opinions as the designation alerts the public that the panel members think the case is a routine application of law.[287] If such judges later change course, the public can point to their unpublished designation and demand an explanation or criticize their inconsistency.

4. Rule Permitting Motion for Publication

Finally, the Tenth Circuit should promulgate another rule permitting a party or interested person to motion the court to publish an unpublished opinion, thus transforming the opinion into precedent.[288] The rule could state:

> A party or interested person may motion the panel, the full Court, or both to publish an unpublished opinion. The motion must be filed within __ days of the issuance of the opinion or the denial of panel

---

285. If the Tenth Circuit adopts the proposed rule in Section III.B.2, then an explanation for a panel's publication decision is unnecessary because the designation necessarily reveals the rationale—either the opinion involves a straightforward application of established precedent that can be resolved via summary disposition or it does not.

286. If multiple publication criteria justify publication, all should be listed. And if a majority of panel members agree on publication, but disagree on the reason, that should also be noted in the footnote, which could read:

> At least a majority of panel members determined that this case should be published and precedential pursuant to Tenth Circuit Rule X(1)(a) and (c).

287. For more accountability, the footnote could note unanimity of the publication decision or if no unanimity exists, each judge's justification for their vote to publish or not.

288. *See, e.g.*, D.C. CT. APP. R. 36(c) ("An opinion may be either published or unpublished. A party or other interested person may request that an unpublished opinion be published [by] filing a motion within 30 days after issuance of the opinion, stating why publication is merited. The court sua sponte may also publish any previously issued unpublished opinion.").

> rehearing or en banc review, whichever is later, and it must state the reasons why publication is merited.
>
> * * *

All four of these proposed rules will increase the number of published opinions in the Tenth Circuit. Although the adoption of these rules may initially increase the Tenth Circuit's workload, it may be a long-term investment in efficiency. The more opinions published by the Tenth Circuit, the more precedent is created. With more precedent, there will be less room for litigants to distinguish their cases from precedential cases. In such a world of more precedent, more cases may be properly disposed of via summary disposition, eventually decreasing the Tenth Circuit's workload and creating more time to craft opinions in cases with unique facts and legal arguments.[289]

More importantly, these proposed rules will increase the transparency of Tenth Circuit judges' publication decisions, promote the accountability of Tenth Circuit judges for those decisions, and create more precedent, arguably an Article III requirement, and at the very least, a good practice. With these changes, the Tenth Circuit's publication practices will look nothing like the shadow docket and, instead, will offer marks of the court's legitimacy.

CONCLUSION

The justices of the Oklahoma Supreme Court and the judges of the Tenth Circuit have difficult jobs. Each day, they are tasked with sifting through competing arguments on tough issues with real-world consequences. These justices and judges undoubtedly perform their jobs to the best of their abilities and strive to ensure justice prevails in the cases before them. But no matter how legitimate their decisions are, if those decisions or the reasons for them are hidden under a cloak of secrecy, the courts start to resemble shadow dockets lite. The decisions lack transparency, impose no accountability, and offer no explanations, all contrary to the obligations of judges. Moreover, no matter how legitimate judges' decisions are, when decisions are not given precedential effect, judges flout their responsibility to create precedent that binds future courts and fail to put the public on notice of the requirements of the law. To shed these shadow docket characteristics, the Oklahoma Supreme Court and the Tenth Circuit should adopt rules that require more explanation for their decisions and more precedential opinions. Doing so will push these shadow dockets lite out from under the cloak of secrecy and into the light, where the legitimacy of the judiciary thrives.

---

289. This would also create more precedent in the qualified immunity context. With more precedential opinions, more constitutional rights will be clearly established for purposes of the qualified immunity analysis. This will lead to less qualified immunity interlocutory appeals and narrow the instances where government actors can assert the defense of qualified immunity because a constitutional right was not clearly established at the time of the conduct.