A MOVE IN THE BRIGHT DIRECTION: WHY CONGRESS HAS THE POWER TO BRING THE DOCKET OUT OF THE SHADOWS

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I. INTRODUCTION TO THE SHADOW DOCKET

Abortion, vaccine mandates in schools, and immigration all have two things in common: they are controversial topics in American discourse, and they have all been the subject of important rulings on the "shadow docket" of the Supreme Court.[1] "Shadow docket"[2] is a popular term used to describe all cases that the Supreme Court handles outside of its traditional merits docket.[3] The merits docket typically consists of sixty to seventy cases that undergo multiple rounds of briefing and oral argument, culminating in written opinions that specify both the Court's reasoning in its decision and identify which Justices voted for and against the resolution.[4] The shadow docket, on the other hand, consists of "thousands of other decisions" that typically undergo only one round of briefing, rarely identify the Justices' votes,

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[1] *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 529–30 (2021) (recent case concerning challenges to Texas abortion law); Klassen v. Trs. of Ind. Univ., No. 21A15, 2021 U.S. LEXIS 3677 (2021) (recent case concerning vaccine mandates for Indiana University students); Biden v. Texas, 142 S. Ct. 2528, 2534–35 (2022) (recent order concerning the "remain in Mexico" policy for asylum seekers).

[2] *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–5 (2015). University of Chicago professor William Baude first coined the term "shadow docket" in this essay when referring to "a range of orders and summary decisions that defy [the Supreme Court's] normal procedural regularity." *Id.* at 1.

[3] PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., CASE SELECTION AND REVIEW AT THE SUPREME COURT 2 (2021) [hereinafter CASE SELECTION AND REVIEW AT THE SUPREME COURT] (testimony of Steven I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas), https://www.whitehouse.gov/wp-content/uploads/2021/06/Vladeck-SCOTUS-Commission-Testimony-06-30-2021.pdf.

[4] *Id.*

and offer little to no insight into the Justices' reasoning.[5] The most common examples of orders from the shadow docket include staying lower court decisions, vacating a stay (often in the case of executions), granting emergency injunctions, and vacating lower courts' grants of emergency injunction.[6]

Recent developments in the political landscape, including changes in the Court's composition, have increased national discourse about Supreme Court reform. The swift replacement of the late Justice Ruth Bader Ginsburg with the ideologically juxtaposed Justice Amy Coney-Barrett led many to call upon President Biden to reform the Court.[7] In response, President Biden established the Presidential Commission on the Supreme Court of the United States ("Commission") to brainstorm ideas for reform and assess their practicality.[8] The Commission's objective was to provide an "analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform . . . ."[9] Through the testimony of experts, the Commission considered all avenues of reform, from adding Justices to the Court to implementing term limits.[10] It also investigated the Court's increasingly controversial shadow docket, which is the subject of this Comment.[11] The Commission reached its final conclusions on docket reform in December 2021, and the resulting recommendations drive much of this discussion.[12]

In addition to the President's Commission, Congress has taken steps to investigate the shadow docket in both of its chambers.[13] In

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[5] *Id.*

[6] *Id.* at 4.

[7] Jonathan Lemire & Jessica Gresko, *Group to Study More Justices, Term Limits for Supreme Court*, AP NEWS (Apr. 9, 2021), https://apnews.com/article/joe-biden-donald-trump-ruth-bader-ginsburg-amy-coney-barrett-judiciary-8734750b75318ed429bf206e2a8af6d1.

[8] *Id.*

[9] PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT i (2021) [hereinafter FINAL REPORT], https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

[10] *See generally id.*

[11] *See generally* CASE SELECTION AND REVIEW AT THE SUPREME COURT, *supra* note 3.

[12] *See generally* FINAL REPORT, *supra* note 9.

[13] *See generally The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Int. of the H. Comm. on the Judiciary*, 117th Cong. (2021) [hereinafter *House Committee*]; *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing before Sen. Comm. on the Judiciary*, 117th Cong. (2021) [hereinafter *Senate Committee*].

August 2021, numerous orders stoked political polarization concerning the shadow docket, including the overturning of President Biden's COVID-19 eviction moratorium, to the Court's refusal to block the Texas law restricting abortion access.[14] On September 3, 2021, Senator Dick Durbin criticized both the process and the holding of the Texas case and announced that the Senate Judiciary Committee would respond by "hold[ing] a hearing examining the Supreme Court's abuse of its 'shadow-docket . . . .'"[15] Neither the House nor the Senate hearings led Congress to take any concrete actions, but cries for reform get louder with every controversial decision.

These cries for reform underscore the Court's lack of transparency.[16] Many decisions from the shadow docket are not accompanied by reasoned opinions and often do not disclose which Justices voted for the resolution and which ones dissented.[17] Experts have proposed that Congress should compel the Court to issue written opinions when altering the status quo[18] and likewise compel the Justices to disclose their votes in all instances when cases are referred to the full Court.[19] It is uncertain whether Congress has the authority to compel the Court in either manner without overstepping its constitutional bounds and violating separation of powers principles.

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[14] *See* Press Release, Comm. on the Judiciary, Senate Judiciary Committee to Examine the Texas Abortion Ban and the Supreme Court's Abuse of its "Shadow Docket" (Sept. 3, 2021), https://www.judiciary.senate.gov/press/dem/releases/senate-judiciary-committee-to-examine-the-texas-abortion-ban-and-the-supreme-courts-abuse-of-its-shadow-docket.

[15] *Id.* Senator Durbin stated that the Senate Judiciary Committee "must examine not just the constitutional impact of allowing the Texas law to take effect, but also the conservative Court's abuse of the shadow docket." *Id.* Note Senator Durbin's reference to the Court as "conservative," highlighting how increasingly partisan this issue has become. This Comment will not take a partisan stance on whether reforms to the docket should or should not be implemented, but merely assess whether reforms *can* be implemented. *Id.*

[16] *See* CASE SELECTION AND REVIEW AT THE SUPREME COURT, *supra* note 3, at 19–20.

[17] *Id.* at 2–3.

[18] *See* PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., ACCESS TO JUSTICE AND TRANSPARENCY IN THE OPERATION OF THE SUPREME COURT 2 (2021) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC, Washington, DC) [hereinafter ACCESS TO JUSTICE AND TRANSPARENCY IN THE OPERATION OF THE SUPREME COURT], https://www.whitehouse.gov/wp-content/uploads/2021/06/Gupta-SCOTUS-Commission-Testimony-Final.pdf; Jeffrey L. Fisher, Opinion, *The Supreme Court's Secret Power*, N.Y. TIMES (Sept. 24, 2015), https://www.nytimes.com/2015/09/25/opinion/the-supreme-courts-secret-power.html?partner=slack&smid=sl-share.

[19] Fisher, *supra* note 1818.

This Comment will address these separation of powers concerns and argue that Congress has the power to (1) compel the Court to issue written opinions when it alters the status quo by reversing a lower court and (2) compel the Court to disclose all the Justices' votes. Part II of this Comment will discuss the congressional hearings addressing the shadow docket in detail by first highlighting common concerns about the shadow docket, and then explaining the resolutions experts believe would remedy these concerns. Part III will analyze the separation of powers between Congress and the Court. Part IV will then take the separation of powers principles from Part III and apply them to the remedies from Part II. Part IV ultimately concludes that Congress has the power to compel the Court to implement these changes through its Necessary and Proper powers.

II. PROPOSALS: HOW CONGRESS CAN REDRESS THE SHADOW DOCKET

Experts have proposed numerous solutions to remedy the pitfalls of the shadow docket. This Part will begin by discussing why a lack of transparency is the docket's greatest weakness and highlight what experts propose Congress can do to fix it.

A. *Motivations: Explaining the Lack of Transparency in Reasoning*

Many critics of the shadow docket argue that the Court's lack of transparency in its reasoning is a serious concern.[20] Specifically, commentators are concerned about the implications of shadow docket orders that reverse a lower court's directive yet do not include a written opinion.[21] This lack of reasoning contrasts entirely with the Court's merits cases, which always include detailed opinions explaining the majority's logic and provide guidance for lower courts.[22]

Detailed reasoning is important because it provides lower courts with guidance—the Supreme Court offers the final word on issues that it sees.[23] The Constitution vests the judicial power in "one supreme Court," and lower courts must follow the directives of that Court.[24] Lower courts must follow the precedent that this Court establishes "unless we wish anarchy to prevail within the federal judicial system."[25]

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[20] *See* CASE SELECTION AND REVIEW AT THE SUPREME COURT, *supra* note 3, at 19–20.

[21] *Id.*

[22] *Id.*

[23] *See* Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827, 844 (2021).

[24] U.S. CONST. art. III, § 1, cl. 1.

[25] Hutto v. Davis, 454 U.S. 370, 375 (1982) (per curiam).

The Court's current absence of reasoning in many of its shadow docket orders, however, makes it incredibly difficult for lower courts to apply the law when parallel circumstances arise.[26] Scholars, judges, and litigants alike often debate the extent to which these decisions are controlling. It is long established that all Supreme Court cases are completely controlling over lower courts,[27] but shadow docket orders without a reasoned opinion complicate that relationship. If these orders are not completely controlling, then the commonly accepted custom that lower courts must follow the directives of the Supreme Court "no matter how misguided the judges of those courts may think it to be" is erroneous.[28]

Many of the Court's COVID-19 emergency orders exposed the lack of transparency and the weaknesses associated with it. In *South Bay United Pentecostal Church v. Newsom*, for example, the Court granted injunctive relief that effectively halted California restrictions on places of worship during the COVID-19 pandemic.[29] The Court did not issue a majority opinion explaining the scope of the decision or its reasoning.[30] When a similar case came before the Court again, it was swiftly dismissed with the (unknown) Justice abrasively stating that "[t]his outcome is *clearly* dictated by this Court's decision in [*South Bay*]."[31] It is easy to see how lower courts can become frustrated and confused when trying to interpret a Supreme Court decision that explains neither how the case was decided nor how its legal reasoning should be applied in the future.

Scholars have also questioned the Court's lack of reasoned opinion writing in the context of executions, which are some of the most frequent cases the Court handles on its shadow docket.[32] Prior to an execution, trial courts may consider whether more time is required to contemplate its legality and may issue a stay of the

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[26] *See* McFadden & Kapoor, *supra* note 23, at 883–84 (suggesting this lack of transparency by the Court may "erode the public's faith in the constitutional power structure as a whole" and "create confusion for litigants.").

[27] *See* Davis, 454 U.S. at 375.

[28] *Id.*

[29] 141 S. Ct. 716, 716 (2021).

[30] *Id.*

[31] Gateway City Church v. Newsom, 141 S. Ct. 1460, 1460 (2021) (emphasis added).

[32] *See, e.g.*, *House Committee*, *supra* note 13 (statement of Amir H. Ali, Director, Washington, D.C. Office, Deputy Director of Supreme Court & Appellate Practice, Roderick & Solange MacArthur Justice Center), https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-AliA-20210218-U2.pdf.

execution to grant more time.[33] The decision whether to stay an execution may be appealed to the Supreme Court, and Justices are often left with only a few hours to deliberate on whether to issue the stay or authorize the execution.[34] Like *South Bay*, orders concerning execution are often resolved without a reasoned opinion explaining the Court's logic.[35] Critics of the shadow docket posit that this absence of reasoning leaves the public and the historical record with "little or no indication of what made it lawful for this person to be executed."[36] Additionally, critics fear that the lack of published reasoning may cause the Court to issue arbitrary orders, since it need not explain itself to justify its decision.[37]

Three recent orders exemplify what scholars argue could be the result of arbitrary decision-making.[38] Each of these orders feature virtually the same fact pattern: the defendant challenges a statute allowing only a Christian spiritual advisor to be present at execution.[39] In each of these cases, the petitioners challenged their executions, arguing that each was entitled to a spiritual advisor of his choosing: a Muslim prisoner requesting an iman, a Buddhist prisoner requesting a Buddhist priest, and a Christian prisoner requesting a pastor.[40] Without providing detailed reasoning or addressing the lower court's arguments, the Court ruled against the Muslim prisoner's stay, and he was executed without a spiritual advisor.[41] The Buddhist prisoner had his stay granted in a two-sentence order that said he could be executed either if he was permitted to have a Buddhist priest or if the state decided to deny spiritual advisors to all prisoners.[42] The state chose the latter option.[43] Finally, under a new statute barring any spiritual advisors, the Christian prisoner had his execution stayed in an order

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[33] *Id.* at 2.

[34] *Id.* at 2–3.

[35] *Id.* at 1.

[36] *Id.* at 3.

[37] *Id.* at 4.

[38] Ali, *supra* note 32, at 4.

[39] *Id.*; *see generally* Dunn v. Ray, 139 S. Ct. 661 (2019); Murphy v. Collier, 139 S. Ct. 1475 (2019); Dunn v. Smith, 141 S. Ct. 725 (2021).

[40] Ali, *supra* note 32, at 4–5; *Ray*, 139 S. Ct. at 661; *Murphy*, 139 S. Ct. at 1475; *Smith*, 141 S. Ct. at 725.

[41] Ali, *supra* note 32, at 4; *Ray*, 139 S. Ct. at 661.

[42] Ali, *supra* note 32, at 4–5; *Murphy*, 139 S. Ct. at 1475.

[43] Ali, *supra* note 32, at 5.

that provided no legal analysis.[44] Scholars suggest that the Justices' failure to explain the logic behind their decisions may have led to arbitrary rulings.[45]

Justices have also expressed concern about the shadow docket's lack of transparency and reasoning.[46] In a COVID-19 order lifting some of California's capacity restrictions on places of worship, Justice Kagan, in dissent, argued that the majority's complicated and fractured reasoning was insufficient to guide lower courts and other state governments.[47] The case concerned complicated quarantine restrictions, but as Justice Kagan pointed out, the order "[left] state policymakers adrift, in California and elsewhere" because of its unclear and limited reasoning.[48] In another dissent, this time concerning a high-profile abortion case, Justice Kagan argued that "the majority's decision is emblematic of too much of this Court's shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend."[49] She alleged that the majority "barely bother[ed] to explain its conclusion" and reviewed the parties' documents "only hastily."[50] Her criticisms highlight that even when the Court does draft opinions, they are often limited in their reasoning, with the dissents doing much of the heavy lifting.[51]

Not all of the Justices have concerns about the shadow docket, however, as Justice Alito called criticisms of the docket "silly" and "misleading."[52] In response to Justice Kagan's dissent in *Whole Woman's Health*, Justice Alito argued that "[t]he truth of the matter . . . is that there is nothing shadowy" about the docket.[53] In another shadow docket order featuring only a one-paragraph majority opinion, but

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[44] Ali, *supra* note 32, at 5; *Smith*, 141 S. Ct. at 725.

[45] *See, e.g.*, Ali, *supra* note 32, at 5.

[46] *See, e.g.*, S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 722 (2021) (Kagan, J., dissenting).

[47] *See id.* at 723.

[48] *Id.*

[49] Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting).

[50] *Id.*

[51] *See, e.g.*, Louisiana v. Am. Rivers, 142 S. Ct. 1347 (2022) (referring to the fact that the majority opinion here is one paragraph, while the dissenting opinions is over two pages).

[52] Nina Totenberg, *Justice Alito Calls Criticisms of the Shadow Docket 'Silly' and 'Misleading'*, NPR (Sept. 30, 2021, 7:12 PM), https://www.npr.org/2021/09/30/1042051134/justice-alito-calls-criticism-of-the-shadow-docket-silly-and-misleading.

[53] *Id.*

twenty-one pages of concurrences and dissents, Justices Kavanaugh and Kagan engaged in a back-and-forth argument concerning the Court's usage of the shadow docket.[54] Justice Kagan argued that the opinion was "one more in a disconcertingly long line of cases in which this Court uses its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument."[55] Justice Kavanaugh responded to Justice Kagan by countering that her "catchy but worn-out rhetoric" of the shadow docket was "off target," and that reasoning was not necessary because the majority's opinion was not on the merits.[56]

Despite Justice Kavanaugh's dismissal, however, the majority in *Merrill* managed to reverse a lower court without authoring a majority opinion. Amir H. Ali, a witness at the Commission's hearings, argued that Justice Kavanaugh's response was insufficient to explain the Court's "drastic departures from the ordinary functioning of the judicial system, all of which seem to flow in one political direction."[57] He argued, contrary to Justice Kavanaugh's assertion that the shadow docket rhetoric is worn-out, that the dialogue is in fact "urgent and it is precisely why public confidence in the Supreme Court is eroding."[58]

Statistically, shadow docket orders rarely feature Justices crossing ideological lines, raising even more concerns in the political community about docket reform. In fact, Professor Steve Vladeck noted that during the 2020–2021 term, sixty-eight shadow docket orders contained a public dissent, and *none* of those dissents were authored by "a Justice to the right of the Chief Justice join[ing] a Justice to his left."[59] Likewise, criticism of the docket tends to track ideological lines, with the more progressive-leaning Justices and commentators seeking reform, and those leaning opposite finding no grievances with the system.

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[54] *See generally* Merrill v. Milligan, 142 S. Ct. 879, 889 (2022).

[55] *Id.* at 889 (Kagan, J., dissenting).

[56] *Id.* at 879 (Kavanaugh, J., concurring).

[57] Jordan S. Rubin, *Kavanaugh Comment Ups Supreme Court Tension Over 'Shadow Docket'*, BLOOMBERG L. (Feb. 8, 2022, 6:06 PM), https://news.bloomberglaw.com/us-law-week/kavanaugh-comment-ups-supreme-court-tension-over-shadow-docket.

[58] *Id.*

[59] Steve Vladeck (@steve_vladeck), TWITTER (Sep. 3, 2021, 11:57 PM), https://twitter.com/steve_vladeck/status/14 34002701881380864.

B. *Proposal 1: Requiring Opinion Writing*

Scholars and experts suggest that Congress should mandate that the Court author opinions that explain the reasoning for their orders. Deepak Gupta argues that Justices should be required to give explanations in the form of written opinions whenever the Court changes the status quo and reverses a lower court's decision.[60] She emphasized that "[r]eason-giving is a core feature of the American legal system, and it is essential for public trust in the Court's fair and considered approach to judicial reasoning and decisionmaking."[61]

Amir H. Ali makes a similar proposal for decisions regarding executions.[62] Under his proposal, Congress would compel the Court to "state its reasons for concluding that the lower court's decision [was improper]."[63] Steve Vladeck, the seminal proponent for shadow docket reform, also proposes that the Court should be *encouraged* to provide "at least a brief explanation" for any orders that "alter[] the status quo vis-à-vis the lower courts."[64] Though Vladeck argues that the Court should encourage opinion authorship, he believes in the broader principle that it may be "time for Congress to re-assert some modicum of control over the *entire* docket of the highest court in the land, both procedurally and substantively."[65]

Authoring written opinions in each instance the Court shifts the status quo would enhance transparency, but it would also raise some concerns. For example, what qualifies as an opinion? Need it meet a certain word count? Does the Court need to satisfy a specific standard and articulate each aspect of that standard? The Commission described what reform might look like, explaining that mandatory explanations "need not be lengthy, nor does anyone suggest that opinions need to be written in every case. Instead, the goal is to enable observers to understand the bases for the Court's most significant rulings—to follow the legal trail through each decision and from one decision to the next."[66] Most importantly, would a congressional

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[60] *See* Gupta, *supra* note 18, at 22.

[61] *Id.*

[62] Ali, *supra* note 32, at 6.

[63] *Id.*

[64] CASE SELECTION AND REVIEW AT THE SUPREME COURT, *supra* note 3, at 25. Note that Steve Vladeck argues that Congress merely "encourages" and does not compel the Court in these instances. *Id.*

[65] *Id.* at 26.

[66] FINAL REPORT, *supra* note 9, at 209.

mandate be constitutional, or would it violate separation of powers as an unconstitutional encroachment into the judiciary?

C. *Proposal 2: Requiring Vote Disclosure*

Further adding to transparency issues, Justices do not need to, and often fail to, publicly disclose their votes in shadow docket orders.[67] In a 2021 order halting the execution of Willie Smith, four Justices publicly cast their vote to stay the execution, and three Justices publicly voted against the stay.[68] It is still a mystery which Justice or Justices cast the swing vote, for Justice Alito and Justice Gorsuch did not disclose their vote to the public.[69]

Scholars suggest this ambiguity is "particularly troubling" and raises significant questions about the Court's transparency and accountability.[70] Simply because Justices serve life tenures does not mean they do not have to "worry about losing their judicial position[] over a controversial decision."[71] Justices are still accountable and are subject to both impeachment[72] and public opinion.[73] Further, failing to disclose votes leaves the public guessing and damages trust in the institution.

Justices themselves have also seen the value of accountability throughout the history of the Court.[74] Before joining the Supreme Court, then-Judge Ginsburg posited that "[d]isclosure of votes and opinion writers . . . serves to hold the individual judge accountable"

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[67] *See* ACCESS TO JUSTICE AND TRANSPARENCY IN THE OPERATION OF THE SUPREME COURT, *supra* note 18, at 13.

[68] Dunn v. Smith, 141 S. Ct. 725, 725 (2021).

[69] *See id.*

[70] *See, e.g.*, ACCESS TO JUSTICE AND TRANSPARENCY IN THE OPERATION OF THE SUPREME COURT, *supra* note 18, at 12.

[71] Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197, 1211 (2012).

[72] U.S. CONST. art. III, § I (stating that federal judges shall hold their offices during good behavior).

[73] *See, e.g.*, Candy Woodall et al., *Abortion Rights Protests that Started at Supreme Court Steps Move to Justices' Front Doorsteps*, USA TODAY (May 10, 2022, 4:34 PM) https://www.usatoday.com/story/news/politics/2022/05/09/abortion-protests-supreme-court-justices/9710395002/?gnt-cfr=1 (explaining how members of the public sought to hold Justices accountable by bringing protests to the Justices' homes); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 139–40 (1990) (explaining how Justice Blackmun continued to be "targeted for attack" because of his decision in *Roe v. Wade* over sixteen years earlier).

[74] *See* Robbins, *supra* note 71, at 1210.

and "puts the judge's conscience and reputation on the line."[75] Justices are not only accountable to the people, but also to the consistency of their own interpretive methodology.[76] Justice Scalia famously commented that placing one's name on a viewpoint forces consistency in decision-making and forbids a Justice from "today providing the fifth vote for a disposition that rests upon one theory of law, and tomorrow providing the fifth vote for a disposition that presumes the opposite."[77]

Scholars argue that the Court should consider publishing vote tallies.[78] Likewise, the Commission on the Supreme Court, in its final report, endorsed a proposal that would "urge the Justices to disclose their votes in emergency orders" in order to improve transparency.[79] The Court has yet to implement this strategy on its own, and the words of the Commission and experts are not enough.[80] As a result, this imperative may fall upon Congress to pass legislation mandating that the Court tally and publish how the Justices voted for all orders which are referred to the full Court. Would imposing a mandatory vote disclosure by Congress violate separation of powers as an unconstitutional encroachment into the judiciary? Part IV seeks to answer that question using the principles of separation of powers outlined below in Part III.

III. SEPARATION OF POWERS: CONGRESS AND THE COURT'S RELATIONSHIP

What powers does Congress have over the judiciary? The founders established a careful system of checks and balances to manage the relationships between each of the three branches of government.[81] This separation of powers serves as a safeguard against the "encroachment or aggrandizement of one branch at the expense of the other."[82] This Part discusses the powers possessed by both the

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[75] *Id.* at 1210 n.87 (quoting Ginsburg, *supra* note 73, at 139).

[76] *See id.* at 1211.

[77] *See id.* at n.90 (quoting Antonin Scalia, *The Dissenting Opinion*, 19 SUP. CT. HIST. 33, 42 (1994)).

[78] *E.g.*, ACCESS TO JUSTICE AND TRANSPARENCY IN THE OPERATION OF THE SUPREME COURT, *supra* note 18, at 21.

[79] FINAL REPORT, *supra* note 9, at 209.

[80] *See, e.g.*, Dunn v. Smith, 141 S. Ct. 725, 725 (2021).

[81] *See* THE FEDERALIST NO. 46, at 264 (James Madison) (P.F. Collier 1901).

[82] Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam).

judicial and legislative branches and identifies what power the latter has over the former.

A. *The Court's Powers*

Article III of the Constitution vests "[t]he judicial Power of the United States . . . in one supreme Court."[83] Hamilton argued in Federalist No. 78 that the Court is the least dangerous branch because it has "no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever."[84] The judiciary's lack of financial and military power suggests that the Court is the weakest branch and is therefore particularly vulnerable to encroachment from other branches.[85]

In *Marbury v. Madison,* Chief Justice Marshall famously asserted that it is the Court's job to "say what the law is."[86] This responsibility rests primarily in the judiciary through its power of judicial review, and Congress intrudes on this power when it attempts to "say what the law is." Article III further "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them conclusively, subject to review only by superior courts in the Article III hierarchy."[87] Thus, attempts by Congress to pass legislation saying "what the law is" in a manner that affects the decision of a case is an encroachment on the judiciary's duty to decide its cases. Put simply, Congress cannot explicitly overrule a specific Supreme Court case by passing legislation.

The Court has the power to "say what the law is," but the Constitution is largely silent about the day-to-day procedures it uses to conduct this business.[88] Congress, on the other hand, has many of its operations outlined explicitly in the Constitution's text.[89] Section B,

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[83] U.S. CONST. art III, § 1.

[84] THE FEDERALIST NO. 78, at 428 (Alexander Hamilton) (P.F. Collier 1901).

[85] Ronald J. Krotoszynski, Jr. & Atticus DeProspo, *Against Congressional Case Snatching*, 62 WM. & MARY L. REV. 791, 817 (2021).

[86] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[87] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 212 (1995).

[88] *See* Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 457 (2013) (referencing the Constitution's instructions for Congress's procedures in Article I, section 5).

[89] *See, e.g.*, U.S. CONST. art I, § 5 (specifying that a journal of proceedings must be kept, a two-thirds majority may expel a member, and neither chamber can adjourn for more than three days without consent of the other chamber).

below, examines how Congress uses its powers vested through the Necessary and Proper clause to affect how the Court operates.

B. *Congress's Powers: Necessary and Proper*

The responsibilities of Congress are outlined in Article I of the Constitution, which vests "[a]ll legislative Powers . . . in a Congress of the United States."[90] Anti-federalists feared that Congress would take its powers too far by attempting to "draw[] all power into its impetuous vortex."[91] Responding to this fear, the framers vested in Congress enumerated powers. The legislature must not encroach beyond "the legislative sphere" and it may not "invest itself or its members with either executive power or *judicial power*."[92] Justice Marshall, again in *Marbury v. Madison*, highlighted that "[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the [C]onstitution is written."[93]

The Constitution, however, provides little guidance for the Court on how to conduct its day-to-day business, such as what cases it must take, how long it must hold oral argument, or when to write an opinion.[94] Congress has used its powers under the Necessary and Proper Clause to fill some of these gaps.[95] Congress may use its powers under the Necessary and Proper Clause to draft statutes "that will enable the other two branches to do their jobs more effectively."[96] Some scholars even argue that the judiciary itself is "not self-executing," and that "[u]ntil an Act of Congress spelled out such specifics, there would be no Supreme Court . . . ."[97] It is well accepted

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[90] U.S. CONST. art I, § 1.

[91] THE FEDERALIST NO. 47, at 272 (James Madison) (P.F. Collier 1901).

[92] Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 274 (1991) (quoting J.W. Hampton Jr., & Co. v. United States, 276 U.S. 394, 406 (1928)).

[93] Marbury v. Madison, 5 U.S. 137, 176 (1803).

[94] *See* Frost, *supra* note 88, at 457.

[95] *See id.*; U.S. CONST. art I, § 8 (stating that "Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[96] Frost, *supra* note 88, at 458 n.75 (quoting John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 532 (2000)).

[97] *Id.* at 458 n.74 (first quoting RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 20 (6th ed. 2009); then quoting Edward A. Hartnett, *Not the King's Bench*, 20 CONST. COMMENT. 283, 284 (2003)).

and established that Congress has a critical role in shaping procedures that the Court uses to conduct its business.

Congress has used its power under the Necessary and Proper Clause throughout the nation's history to impose rules on the Court. For example, Congress enacted the first Judiciary Act of 1789 that, among many rules, established the number of justices that would sit on the Court, granted the Court authority to hire court clerks, and mandated that Justices serve as circuit-court judges.[98] Congress passed the Rules Enabling Act in 1934, which permitted the Court to create "general rules of practice and procedure and rules of evidence" on the condition that those rules "shall not abridge, enlarge or modify any substantive right."[99] In affirming the constitutionality of the Act, the Court made clear that Congress has "undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States."[100]

Congress has also intervened in the field of judicial ethics, which uniquely impacts Justices beyond the bench and into their private lives. The Ethics Reform Act of 1989, for instance, prohibits Justices "from most outside employment with the exception of teaching, for which any compensation must be pre-approved by the Judicial Conference" and bars Justices from receiving certain gifts that could cause a conflict of interest.[101]

Finally, numerous other statutes passed by Congress govern the Court's current composition and procedure.[102] 28 U.S.C. § 1 defines the Court as consisting of one Chief Justice and eight associate Justices.[103] Section 2 of that statute specifies that the Court's term shall begin on the "first Monday in October of each year and may hold such adjourned or special terms as may be necessary."[104] 28 U.S.C. § 453 sets forth a specific oath of office that each Justice must take before

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[98] *See id.* at 458; An Act to Establish the Judicial Courts of the United States, ch. 20, §1, 1 Stat. 73 (1789), *invalidated by* Marbury v. Madison, 5 U.S. 137, 177 (1803).

[99] 28 U.S.C. § 2072(a)–(b).

[100] Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1940).

[101] *See* Frost, *supra* note 88, at 451–52 n.38 (referencing Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app. 7 § 502(a)(5))).

[102] *See id.* at 459.

[103] 28 U.S.C. § 1; *see* Frost, *supra* note 88, at 459.

[104] 28 U.S.C. § 2.

beginning his or her term.[105] These are just several of many widely accepted congressional controls over the Court.[106] Section C will outline when it is not so clear whether Congress is acting within its powers.

C. *When Congress Oversteps Its Bounds: Affecting Judicial Decision-Making.*

Section A of this Part defined that it is the Court's duty to "say what the law is," while Section B explained that Congress can control the Court through its powers vested in the Necessary and Proper Clause. This Section will outline when Congress has overstepped its bounds and when it is likely to overstep again by influencing the decision-making process.

First, Congress cannot assume judicial responsibilities by compelling the Court to "reach a specific substantive result."[107] The Court asserted in *United States v. Klein* that Congress may issue substantive law, but it cannot direct the Court to reach a particular conclusion in a case.[108] When Congress directs the Court to reach a specific outcome, it performs a "purely judicial function" and "seriously interfere[s] with the judiciary's performance of its proper function."[109] The Court affirmed this separation of legislative and judicial powers in *Chandler v. Judicial Council of the Tenth Circuit* when it held that "[t]here can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the *decisional* function."[110]

Second, Congress cannot dictate the judicial decision-making process. Specifically, Congress violates separation of powers when it "chooses the approach to judicial decisionmaking" because Congress "can have no more than an advisory role in selecting the interpretive process."[111] Congress crosses the line beyond a mere advisory role when it enacts statutes that "decrease the impartiality of judicial

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[105] *Id.* § 453.

[106] *See* Frost, *supra* note 88, at 459.

[107] William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 793 (1997).

[108] United States v. Klein, 80 U.S. 128, 147–48 (1871).

[109] Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 720 (1995).

[110] 398 U.S. 74, 84 (1970).

[111] Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 888 (2009).

decisions, blur the lines of public accountability, or increase the risk of arbitrary decisions."[112] Below are several examples where Congress crosses that line.

Interpretive methodologies play a critical role in the decision-making process, and Congress likely cannot dictate a Justice's methodologies. Professor Thomas Healy argues that Congress cannot compel or prohibit the Court from adhering to a specific interpretive methodology.[113] He contends that implementing such a statute—for example, one that prohibits the use of originalism—would both "affect the likelihood of reaching certain conclusions . . . [and] undermine [the Court's] ability to ensure the legitimacy of their conclusions."[114] In extending that commentary to a hypothetical statute prohibiting the use of stare decisis, Healy argues "[i]t would interfere with the power of the courts to ensure the effectiveness of their decisions by choosing whatever methodology they think will maximize the legitimacy of their legal determinations."[115]

Any intrusion by Congress that restricts a Justice's timetable for authoring opinions may also pose an unconstitutional intrusion on decision-making. This does not include timetables for litigants, such as deadlines to respond to complaints, but concerns only purely judicial functions, like authoring opinions.[116] Professor William Ryan argues that imposing time limits on when judges must issue opinions would reduce the amount of time they would have to devote to other cases, thus increasing the risk of arbitrary decision-making.[117] This increased risk of arbitrary decision-making could have an outcome determinative effect, especially considering how overworked and time-pressured the judicial system already is.

Professor William Ryan asks a similar question for a hypothetical statute requiring the Supreme Court to issue only unanimous opinions.[118] This would be a clear unconstitutional intrusion into judicial decision-making because it would suppress each Justice's independent views as to whether the majority opinion is correct.[119]

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[112] *See* Ryan, *supra* note 107, at 798.

[113] *See* Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1173, 1173 (2008).

[114] *Id.* at 1202.

[115] *Id.* at 1206.

[116] *See* Ryan, *supra* note 107, at 799–800.

[117] *Id.* at 800–01.

[118] *Id.* at 812.

[119] *Id.*

Most importantly, this would have a detrimental effect on the Court's main objective—to decide cases correctly.[120] This hypothetical statute would force compromise and unanimity at the expense of an accurate holding and would have a clear outcome-determinative result on cases before the Court. Furthermore, such a statute would force the Court to expend a tremendous effort trying to draft a unanimous holding, thus frustrating efficiency—another core goal of the justice system.

Finally, scholars argue that courts have "inherent authority to regulate their internal affairs," such as "the times for court sessions and the system for assigning cases."[121] Professor Robert Pushaw acknowledges that Congress has allowed the Court almost "complete discretion over . . . internal housekeeping details," including docket and case management.[122] Like Ryan's argument that mandating unanimous opinions is an unconstitutional intrusion into judicial decision making, managing cases and the docket impacts timing and ultimately *how* the court goes about saying what the law is. However, Pushaw argues that Article I permits Congress to "pass legislation that it deems necessary and proper for federal courts to fulfill their duties in light of changing circumstances."[123] This includes statutes regulating the internal affairs of the Court, such as 28 U.S.C. § 2, which sets the start date of every session as the first Monday of October.[124] Congress can regulate the internal affairs of the Court, but it oversteps its boundaries when it interferes with judicial decision-making in a manner that lessens impartiality, damages public accountability, or leads to arbitrary decisions.[125]

IV. APPLYING SEPARATION OF POWERS TO THE SHADOW DOCKET

This Part will evaluate the constitutionality of a statute mandating that the Court issue opinions and disclose all Justices' votes in cases on the shadow docket. Each section will first identify whether the proposal is necessary and proper, and then explain why the proposal does not violate separation of powers principles.

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[120] *Id.* at 812–13.

[121] Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 853 (2001).

[122] *Id.* at 854–55.

[123] *Id.* at 856.

[124] 28 U.S.C. § 2.

[125] *See* Ryan, *supra* note 107, at 798–99.

A. *Mandating Opinion Writing*

This section will assess the constitutionality of a hypothetical statute passed by Congress that would mandate that the Court author a written, reasoned opinion in the event it alters the status quo of a lower court.

1. Why Mandating Opinion Writing is Necessary and Proper

Congress has routinely regulated the Court using its power under the Necessary and Proper Clause.[126] Congress may use reasonably calculated means to achieve legitimate legislative ends.[127] This hypothetical statute is a legitimate means aimed at improving both the transparency and legitimacy of the Supreme Court. Concerns about the Court's overall legitimacy have gotten so serious that the President created a Commission investigating potential reforms.[128] The shadow docket itself has also come under fire from both chambers of Congress, with each hosting hearings to discuss the docket in the wake of controversial decisions.[129]

Congress has not been shy about imposing standards on the Court.[130] Congress has properly used its powers to enact legislation regulating the number of Justices on the bench, their oath of office, the start date for sessions, and even ethical guidelines.[131] All of these statutes are reasonably established to structure the Supreme Court in a purposeful and not arbitrary manner. A statute, for example, that mandates Justices wear a green necktie is likely arbitrary and unconstitutional. That hypothetical falls outside of Congress' ability to pass reasonable laws "necessary and proper" to achieving its constitutional ends. Even a statute mandating Justices wear black robes is likely arbitrary and fails to meet the necessary and proper standard. This Comment is not dealing with such trivial proposals. The Supreme Court's legitimacy is at stake, and the public is growing skeptical of the institution.[132] Public perception of the Court is at its

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126 *See* Frost, *supra* note 88, at 457.

127 *See* McCulloch v. Maryland, 17 U.S. 316, 411–12 (1819).

128 *See generally* FINAL REPORT, *supra* note 9.

129 *See generally House Committee*, *supra* note 13; *Senate Committee*, *supra* note 13.

130 *See infra* Part III.B.

131 *See infra* Part III.B.

132 *See infra* Part II.

lowest since the turn of the millennia, and Congress would be remiss if it neglected these concerns.[133]

A more restrictive view of the Necessary and Proper Clause, however, could be an obstacle to enacting an opinion writing requirement.[134] James Madison endorsed this narrow interpretation when he argued that Congress lacked authority to establish a national bank because no enumerated clause in the Constitution granted this power.[135] Applying that interpretation to the hypothetical statute here, one could argue it is unconstitutional because there is no explicit enumerated power granting Congress the ability to regulate internal affairs of the Court. Despite this lack of an explicit enumerated power, a broader reading would likely be used in this instance to follow centuries of precedent.[136] Congress has a long history of regulating the Court, and it should be no different here. Congress is within its power under the Necessary and Proper Clause to compel the Court to author opinions.[137] If this hypothetical statute was found to be an unconstitutional intrusion by Congress, the Court would be forced to strike down almost all widely accepted policies where Congress controls the Court—from regulating the number of Justices to defining the oaths those Justices take.

2. Why Mandating Opinion Writing Will Not Influence Judicial Decision-Making

When considering whether Congress is telling the Court *how* to say what the law is, scholars are generally concerned with outcome determinative encroachments that lessen impartiality, damage public accountability, or increase arbitrary decision-making.[138] For example, Professor Thomas Healy argues that congressional prohibition or compulsion of certain interpretive methodologies, such as stare decisis or originalism, would unconstitutionally remove some outcomes the

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[133] *See Supreme Court*, GALLUP, https://news.gallup.com/poll/4732/supreme-court.aspx (last visited Oct. 7, 2022) (Showing the highest disapproval rating for the Supreme Court in the twenty-first century at 53 percent).

[134] *See generally* Richard Primus, *"The Essential Characteristic": Enumerated Powers and the Bank of the United States,* 117 MICH. L. REV. 415 (2018) (defining a narrow reading of the Necessary and Proper Clause).

[135] *Id.* at 427–28.

[136] *See generally* McCulloch v. Maryland, 17 U.S. 316 (1819).

[137] *See generally id.* (that the broad approach in *McCulloch* should yield the result that this statute would be constitutional).

[138] *See* Ryan, *supra* note 107, at 798.

Court could arrive at.[139] By mandating that the Court author opinions, Congress would be forcing Justices to articulate their outcomes, rather than taking any off the table.

Some scholars are skeptical as to the extent the authoring of opinions factors into how judges arrive at their decisions.[140] Judge James Posner posited that "[t]here is almost no legal outcome that a really skillful legal analyst cannot cover with a professional varnish."[141] In other words, judges can author an opinion as the means to justify whatever ends they choose, no matter how "outlandish" those ends may seem.[142] Though a cynical view, these words from the thirty-six year veteran of the Court of Appeals shed light on how authorship and writing the opinion itself has little to no impact on the outcome of the case. Rather, the written opinion serves to furnish transparency to the public and lower courts, while conferring accountability upon the Justice authoring the opinion.[143]

Another concern is whether adding extra opinions to a Justice's already busy workload would be an undue influence on decision-making. Some scholars argue that placing restrictive time limits on opinions may increase the risk of arbitrary decision-making.[144] If Congress were to require the Supreme Court to issue opinions for all cases on the shadow docket, this argument would be applicable, for the Court handles thousands of cases a year.[145] This Comment, and most scholars, however, strive only to mandate opinion writing in cases where the Court alters the status quo, which occurs far less frequently. In fact, the Court only alters the status quo on average between fifteen and twenty times per year on its shadow docket.[146] The importance of these cases is not diminished by the fact that they occur less frequently; rather, it is exemplified because these instances of reversing the status quo often come in the most controversial orders.

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[139] *See* Healy, *supra* note 113, at 1202–03.

[140] *See* Richard A. Posner, *The Supreme Court, 2004 Term Foreword: A Political Court*, 119 HARV. L. REV. 31, 52 (2005).

[141] *Id.*

[142] *See id.*

[143] *See, e.g.*, Ginsburg, *supra* note 73, at 139; Antonin Scalia, *The Dissenting Opinion*, 19 SUP. CT. HIST. 33, 42 (1994).

[144] *See* Ryan, *supra* note 107, at 806.

[145] *See* CASE SELECTION AND REVIEW AT THE SUPREME COURT, *supra* note 3, at 2 (referring to the Court's shadow docket as "thousands of *other* decisions").

[146] *Id.* at 5, tbl. 1.

Opponents could also argue that the fact that Justices need only author opinions when the Court alters the status quo could disincentivize reversing lower courts. The burdens of drafting an opinion could motivate Justices to uphold lower courts so that they need not draft an opinion, thus making their decision arbitrary. This concern is unfounded. Even when shadow docket orders are issued without opinions, they often include lengthy dissents and concurrences, suggesting Justices are not prioritizing their free time at the expense of expounding upon their opinions.[147] Additionally, this will not have an adverse effect on any litigant generally but depends merely on what side of the procedural aisle a litigant is on. Could progressive litigants struggle more to have a Fifth Circuit opinion reversed, and likewise a more conservative litigant in the Ninth Circuit? This is unlikely so long as Justices would not prioritize saving time from drafting a mandatory opinion over voting for the litigant they feel should be victorious. This concern is unconvincingly based solely on the idea that the Justices would lazily and arbitrarily rule to save from drafting an opinion.

Further, to argue that mandating opinion authorship would have any objective effect on the outcome of a case is a dangerous suggestion. Such a suggestion would imply that Justices would rule differently if they actually needed to justify their ruling to the public. That would also imply that Justices who issue orders without written opinions might deliver decisions that cannot be justified. This reinforces the notion that this statute is within Congress's power, for it would reduce the likelihood of arbitrary decision-making, rather than escalate it.

Finally, Congress would not be encroaching on the Court because it is not seizing the Court's power to author opinions for itself or another branch.[148] Richard Murphy explains that "separation of powers does not protect the independence of the courts by preventing Congress, the lawmaker, from using laws to regulate the courts, the law-enforcers. Rather, separation of powers protects judicial independence by preventing Congress from usurping the judicial

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[147] *See e.g.*, Louisiana v. Am. Rivers, 142 S. Ct. 1347 (2022) (referring to the fact that the majority opinion here is one paragraph, while the dissenting opinions is over two pages); Merrill v. Milligan, 142 S. Ct. 879, 889 (2022) (referring to the fact that the majority opinion here is one paragraph, but the concurrences and dissents were over twenty-one pages long).

[148] *See* Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1128 (2003).

power for itself."[149] Congress would merely be compelling the Court, in limited circumstances, to provide reasoning and do *its own* job. Justice Marshall assigned the system of opinion writing to the judiciary by insisting "a single Justice deliver[s] the opinion of the Court, [and] the other Justices [are] free to write separately to express disagreement with the majority or [] offer alternate theories . . . ."[150] In *Marbury*, Justice Marshall further established that it is exclusively within the power of the judiciary to "say what the law is," and that it must "expound and interpret that rule."[151] Contemporary understanding of judicial review vests in the Supreme Court the power to both say what the law is and articulate its reasoning through written opinions. Congress would be making no attempt to usurp that power for itself by requiring the Court to issue written opinions.

B. *Mandating Vote Disclosure*

This section will assess the constitutionality of a hypothetical statute passed by Congress mandating that each Justice of the Court disclose his or her vote on an order. As with the argument above, Congress is within its power under the Necessary and Proper Clause to pass this proposed statute.

1. Why Mandating Vote Disclosure Will Not Influence Judicial Decision-Making

First, compelling the Court to disclose each Justices' vote would not limit any potential outcomes, like limiting ideological interpretations would.[152] In fact, such a requirement would not affect decision-making at all. Disclosure of each Justices' vote occurs only after the Court has deliberated and the merits of the case have been decided. Publishing these votes would do nothing more than enhance the transparency of the Court in the eyes of the public. Further, on all of their merits cases (besides per curiam opinions),[153] Justices publicly

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[149] *Id.*

[150] *See* Robbins, *supra* note 71, at 1210.

[151] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[152] *See* Healy, *supra* note 113, at 1202–03.

[153] *See* James Markham, Note, *Against Individually Signed Judicial Opinions*, 56 DUKE L.J. 923, 925 (2006) (referring to the per curiam opinion as an exception from the rule that each decision is "issued under the name of the Justice who wrote it."). Per curiam opinions raise many of the same arguments concerning the Court's transparency and legitimacy that the shadow docket arguments raise. This Comment will not delve into the conversations surrounding per curiam opinion reform.

display their votes without issue anyway. This question is even clearer than the question concerning opinion authorship because it would not require the time and mental commitment that authoring opinions does.[154]

Second, arguments to the contrary would raise significant concerns about an individual Justice's commitment to his or her decisions. Looking back to the Willie Smith case, four Justices cast their vote publicly to stay execution, three publicly dissented, and Justices Alito and Gorsuch did not announce their vote to the public.[155] Either one or both of Justices Alito and Gorsuch must have sided with the majority, and to argue that either would have voted differently had they publicly cast their vote would be an insult to their integrity as independent jurists. To argue any Justice would cast votes they are not prepared to stand by further emphasizes the importance of this potential legislation to improve the transparency of the Court. Therefore, as with opinion authorship discussed above, Congress likely can compel the Court to disclose each Justices' vote without interfering with the doctrine of separation of powers.

V. CONCLUSION

The Supreme Court is in the headlines, and the usage of its emergency docket, commonly known as the "shadow docket," is at the forefront of controversy. The issues with the docket are not simply with the outcomes of the cases, but rather how they are released to the public. The Court issues more than ten times the number of orders on its shadow docket than its traditional merits docket, and many of those orders are released without reasoning and without identifying who voted for the resolution. For the more controversial orders, this ambiguity leaves many to wonder if the Justices can be held accountable for their decisions. The absence of transparency presents difficulties not just for lower courts, but for public officials who are finding it increasingly challenging to hold the Court responsible for its actions.

Experts propose that Congress should respond and pass legislation that compels the Court to both author opinions on all orders that alter the status quo and publish all the Justices' votes to the

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[154] *See* Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 61 (2011) (explaining that a vote-disclosure requirement in the context of certiorari grants demands fewer judicial resources than mandating opinion authorship).

[155] *See* Dunn v. Smith, 141 S. Ct. 725, 725 (2021).

public. It is within Congress's powers to pass legislation to reform the Court so long as it does not have an influence on decision-making that lessens impartiality, damages public accountability, or increases arbitrary decision-making. These statutes do just the opposite: they increase accountability by making the Court more transparent and decrease the risk of arbitrary decision-making by holding Justices more accountable to their votes.