

Power and Politics in Original Jurisdiction

Zachary D. Clopton[†]

The original jurisdiction of the U.S. Supreme Court is a topic of scholarly interest but little practical significance. The original jurisdiction of state supreme courts is exactly the opposite—it is virtually absent from the scholarly literature but of significant practical importance. For example, dozens of cases related to elections, COVID-19 responses, and abortion were filed in the original jurisdiction of state supreme courts in the last few years. Legislatures also recognize the importance of original jurisdiction, as state legislators have proposed dozens of recent bills to change the scope of original jurisdiction.

This Article offers a comprehensive review of the original jurisdiction of state supreme courts. The Article and its Appendix include a catalog of the original jurisdiction law of all fifty states; a survey of scores of recent original actions related to elections, COVID-19, and abortion; and a review of relevant legislation from the last decade.

This Article also analyzes the distinct functional and institutional considerations relevant to state original jurisdiction. Functionally, original jurisdiction limits opportunities for appellate review, shifts fact-finding responsibility, and has the potential to permit quicker resolution of disputes. Original jurisdiction also has the capacity to streamline litigation, presenting cleaner questions to the high court without the frictions of lower court litigation.

Institutionally, original jurisdiction distributes agenda-setting power among courts, parties, and legislatures. Original jurisdiction takes power from lower courts, depriving them of any opportunity to shape the course of litigation. Meanwhile, original jurisdiction often gives power to the state supreme court, though original jurisdiction also may make it more difficult for courts to engage in “avoidance” maneuvers that sometimes serve their interests. Original jurisdiction also interacts with party control, as it affects the ability of parties to shop for friendly forums. Aware of these effects, legislatures can use original jurisdiction to achieve their preferred outcomes, for example by channeling cases to ideologically friendly high courts—and away from ideologically hostile lower courts that might make mischief along the way.

[†] Professor of Law, Northwestern Pritzker School of Law. Thank you for helpful feedback to Roger Alford, Sam Bray, Christian Buset, Kevin Clermont, Erin Delaney, David Fontana, Maggie Gardner, Nicole Garnet, Tracey George, Paul Gowder, Allison Orr Larsen, Maggie Lemos, Marin Levy, Lloyd Mayer, John McGinnis, Tejas Narechania, Jide Nzelibe, Jim Pfander, Teddy Rave, Judith Resnik, Tom Schmidt, Kate Shaw, Mila Sohoni, Adam Sopko, Jay Tidmarsh, Xiao Wang, and Justin Weinstein-Tull. Thank you for assistance with research to Zachary Barron, Matthew Caister, Brigid Carmichael, Akiva Frishman, Martha Kiela, Addie Maguire, Leah Regan-Smith, Sarah Reis, Erin Wright, and Ken-Terika Zellner.

This analysis has both theoretical and practical relevance. Theoretically, the capacity of decisions about original jurisdiction to advantage some political parties and causes over others shows its familial resemblance to the more often studied phenomena of court curbing and court-packing. Practically, while original jurisdiction is often designed to serve neutral values, it has the capacity to serve partisan ends—and given our political polarization, we should expect partisanship to play an increasing role in these seemingly neutral choices.

INTRODUCTION	85
I. THE LAW OF ORIGINAL JURISDICTION	92
A. The Scope	95
B. Advisory Opinions	99
C. Mandatory or Discretionary.....	100
D. Exclusive or Concurrent.....	103
E. Sources of Law	104
F. Summary.....	105
II. RECENT CASES	105
A. Election Cases.....	107
B. COVID-19 Cases	111
C. Abortion.....	112
III. RECENT LEGISLATION	114
A. Court Curbing Context.....	115
B. Original Jurisdiction Legislation.....	115
IV. FUNCTIONAL ANALYSIS	118
A. Procedural Effects	118
1. Fact-finding	119
2. Appellate review	121
3. Timing	124
4. Review	124
B. Dynamic Effects.....	125
1. Intralitigation friction	126
2. Extralitigation developments.....	127
3. Federal courts	128
4. Review	130
V. INSTITUTIONAL ANALYSIS.....	130
A. Parties	131
1. Party preferences	131
2. Party choice: exclusive versus concurrent	134
B. Courts	134
1. Court preferences	135
2. Court choice: mandatory versus discretionary.....	137
C. Court and Party Summary	139
D. Legislatures	140

1. Legislative preferences.....	141
2. Legislative choices.....	144
3. Design as delegation.....	146
CONCLUSION	147

INTRODUCTION

In the wake of the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*,¹ reproductive justice advocates have repaired to state courts, seeking to protect abortion rights under state law.² In a 147-page decision, the Supreme Court of South Carolina sided with Planned Parenthood and its allies to hold unconstitutional the state’s near-total ban on abortion.³ On the same day, the Idaho Supreme Court went the other way, upholding its state’s law.⁴ Seven months later, after a change in personnel, the South Carolina Supreme Court upheld a revised abortion ban.⁵ In between, the Oklahoma Supreme Court held in two cases that the state constitution protected a limited right to abortion,⁶ while the Ohio Supreme Court passed on a case raising similar issues.⁷

One thing these cases have in common is that the plaintiffs opted out of the traditional litigation hierarchy and filed their cases directly in state supreme courts. These cases thus engaged those courts’ *original jurisdiction*, rather than their more common *appellate jurisdiction*.⁸ In addition to these abortion cases, parties in recent years have sought state original jurisdiction in actions related to the 2020 presidential election,⁹ Florida’s

¹ 142 S. Ct. 2228 (2022).

² See David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 42–52 (2023).

³ Planned Parenthood S. Atl. v. State, 882 S.E.2d 770, 785–86 (S.C. 2023).

⁴ Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1214 (Idaho 2023).

⁵ Planned Parenthood S. Atl. v. State, 892 S.E.2d 121, 132 (S.C. 2023).

⁶ Okla. Call for Reprod. Just. v. Drummond, 526 P.3d 1123, 1132 (Okla. 2023) (per curiam) (holding that the state constitution protects the right to obtain an abortion to protect the life of patient); Okla. Call for Reprod. Just. v. State, 531 P.3d. 117, 122 (Okla. 2023) (per curiam) (applying *Drummond* to strike down two pieces of 2022 legislation restricting abortion access within the state).

⁷ State *ex rel.* Preterm-Cleveland v. Yost, 194 N.E.3d 375 (Ohio 2022) (unpublished table decision).

⁸ For more on this Article’s definition of original jurisdiction, see *infra* Part I.

⁹ See, e.g., Trump v. Evers, No. 2020AP1971-OA (Wis. Dec. 3, 2020).

Amendment 4 (felon re-enfranchisement),¹⁰ COVID-19 mitigation measures,¹¹ the death penalty,¹² gerrymandering,¹³ climate change,¹⁴ and the ability of a governor and aspiring presidential candidate to suspend an elected state attorney.¹⁵

Today, the original jurisdiction of the Supreme Court of United States is quite narrow and fairly unimportant, comprising mostly cases between states,¹⁶ often over scintillating issues such as water rights that receive little public attention.¹⁷ Original jurisdiction in the states is a different matter. It is broader. It is more consequential. And it raises different considerations in favor of original jurisdiction and against it.

This Article offers the first comprehensive survey of original jurisdiction in the states.¹⁸ Forty-four states provide for original jurisdiction in some circumstances. In many states, these grants are fairly open-ended, for example the power to issue writs in original actions.¹⁹ In some states, special grants of original jurisdiction also exist for advisory-opinion requests, certain election-related disputes, and other specific categories typically involving government parties.²⁰

The state law of original jurisdiction is of real-world significance. This Article identifies more than eighty original actions filed since 2020 related to three hot-button issues: elections, COVID-19, and abortion.²¹ Original jurisdiction in election cases also connects with—and presents a challenge to—strong versions of the so-called independent state legislature

¹⁰ See, e.g., Advisory Op. to the Gov. *re* Implementation of Amend. 4, The Voting Restoration Amend., 288 So.3d 1070, 1071 (Fla. 2020) (per curiam).

¹¹ See, e.g., *Kelly v. Legis. Coordinating Council*, 460 P.3d 832, 834 (Kan. 2020) (per curiam).

¹² See, e.g., *State ex rel. Hogan Lovells U.S., L.L.P. v. Dep't. of Rehab. & Corr.*, 123 N.E.3d 928, 930 (Ohio 2018).

¹³ See, e.g., *Johnson v. Wis. Elections Comm'n*, 971 N.W.2d 402, 419 (Wis. 2022), *rev'd on other grounds sub nom. Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398 (2022).

¹⁴ See, e.g., *In re Haw. Elec. Light Co.*, 526 P. 3d 329 (Haw. 2023).

¹⁵ See, e.g., *Warren v. DeSantis*, 365 So.3d 1137, 1138 (Fla. 2023) .

¹⁶ U.S. CONST. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.”); 28 U.S.C. § 1251; see *infra* Part I.

¹⁷ See generally, e.g., *Mississippi v. Tennessee*, 595 U.S. 15 (2021).

¹⁸ See *infra* Part I.

¹⁹ See, e.g., TEX. CONST. art. V, § 3(a).

²⁰ See, e.g., *infra* Part I.

²¹ See *infra* Part II.

theory.²² Original jurisdiction has been a frequent topic of state legislative attention as well. While federal original jurisdiction is rarely a topic of legislative interest,²³ state legislatures have considered and passed dozens of laws related to original jurisdiction in recent years.²⁴ Among these laws, elections were the most common topic, though they also addressed various issues such as the separation of powers, government spending, and more.

This Article's descriptive contributions also permit more analytical inquiries. Scholars have debated the historical purposes of original jurisdiction in the U.S. Supreme Court, suggesting that it might be about geographic convenience,²⁵ a "dignified tribunal,"²⁶ or enforcement of federal law.²⁷ None of these accounts illuminate today's debates in the states. Geographic convenience is not an issue within a state given modern transportation and communication technology; state original jurisdiction laws do not reflect the need for a dignified tribunal that the nascent federal government provided to states and ambassadors; and issues of state immunity from federal law are not present here. Instead, more relevant are functional and institutional considerations absent from those accounts.

To begin with, decisions about the scope of original jurisdiction implicate certain functional, almost mechanical, considerations.²⁸ An expansion of original jurisdiction almost necessarily

²² See *infra* note 89. See generally Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137 (2023); Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235.

²³ The leading database of proposed constitutional amendments, which includes thousands of proposals spanning over two hundred years, includes only two that seek to change the original jurisdiction of the U.S. Supreme Court. See *Jurisdiction of Courts, AMENDS. PROJECT*, <https://perma.cc/VM8J-5Z6A>; *Original Jurisdiction, THE AMENDS. PROJECT*, <https://perma.cc/R8YD-9X94>. In 1788, at the New York State ratifying convention, founding father John Lansing proposed an amendment providing a version of appellate review of original actions. And in 2009, a "radical centrist" suggested amending the Constitution to provide that original jurisdiction over state party suits was concurrent with the lower courts. See E. Jon Roland's Draft Amendments, *RADICAL CENTRISM*, <https://perma.cc/7TJ3-GUSK>.

²⁴ See *infra* Part III.

²⁵ See, e.g., Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 469–78 (1989).

²⁶ James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 560 (1994); see *California v. Arizona*, 440 U.S. 59, 65–66 (1979).

²⁷ See Pfander, *supra* note 26, at 597. For a critical take on original jurisdiction, see generally Heather Elliott, *Original Discrimination: How the Supreme Court Disadvantages Plaintiff States*, 108 IOWA L. REV. 175 (2022).

²⁸ See *infra* Part IV.A.

has three effects: (i) it assigns any necessary fact-finding to courts not typically engaged in that task, (ii) it eliminates or at least dramatically reduces opportunities for appellate review, and (iii) it creates opportunities for quicker resolution. These functional considerations are not the only relevant concerns, but they could be quite significant in evaluating some grants of original jurisdiction. Certain types of cases might require little fact-finding, such as requests for advisory opinions on questions of law. Or the need for an immediate, definitive determination might countenance in favor of original jurisdiction, despite any drawbacks. And, indeed, legislatures have authorized, and parties and courts have taken advantage of, original jurisdiction to resolve issues of election administration close to elections.²⁹

Original jurisdiction also affects litigation dynamically.³⁰ In original jurisdiction actions, the parties frame the issues, typically presenting a clean question for the high court to answer. In contrast, when cases must be litigated through the lower courts, the path is far less certain. Lower court judges may make certain findings, and parties may make certain arguments or concessions, that change the questions that ultimately reach the high court. Lower court judges can “cert-proof” their decisions to make reversal more difficult.³¹ Even if the same case gets to the supreme court either way, lower courts can slow the pace, permit invasive discovery, and issue preliminary rulings with real bite.³² Because original jurisdiction avoids these frictions, it makes it easier for litigants (and legislatures) to have their questions answered.

This analysis produces two principles regarding original jurisdiction that are elaborated below. First, the case for original jurisdiction is stronger for important legal questions for which time is of the essence.³³ Second, original jurisdiction favors those actors who want the state high court to answer questions frictionlessly.³⁴

²⁹ See *infra* Part II.A (describing examples).

³⁰ See *infra* Part IV.B.

³¹ For more on cert-proofing, see Aaron L. Nielson & Paul Stancil, *Gaming Certiorari*, 170 U. PA. L. REV. 1129, 1143–48 (2022).

³² For high-profile recent examples of this phenomenon at the federal level, see Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 961–73 (2022).

³³ See *infra* Part IV.A.

³⁴ See *infra* Part IV.B.

The lack of parallelism in the way I present these principles is intentional. The first principle suggests that there could be shared agreement that certain categories of disputes lend themselves better to original jurisdiction. The second principle, however, suggests that original jurisdiction may favor some institutional actors over others. These tradeoffs demand an institutional account of how original jurisdiction affects parties, courts, and legislatures.³⁵

The most direct institutional effect of original jurisdiction is on lower courts. Original jurisdiction disempowers lower courts, who lose the ability to set the agenda.³⁶ This effect is especially meaningful in states where lower and high court judges represent different constituencies, such as local versus statewide voters. Local judges in blue cities in red states, for example, might value opportunities to affect politically salient litigation before it gets to the supreme court elected statewide. Original jurisdiction takes away those opportunities.

In many situations, the reduction in lower court power will result in a symmetrical increase in high court power. A grant of original jurisdiction empowers a supreme court eager for more opportunities to say what the law is—and legislatures might opt for original jurisdiction with this dynamic in mind.³⁷ High courts accrue even more power when original jurisdiction is *discretionary*, rather than *mandatory*.³⁸ Mandatory jurisdiction may make it more difficult for high courts to engage in “avoidance” when they would prefer not to answer the question presented. When original jurisdiction is discretionary, high courts presumably will choose to hear cases when they want to answer the question, and they will decline when they want to pass the buck.³⁹ The elected justices of the Wisconsin Supreme Court, for example, can pick and choose when to weigh in on election disputes—a power the closely

³⁵ These features of original jurisdiction also might be of interest to those policymakers considering court reform at the federal level. See, e.g., *Presidential Commission on the Supreme Court of the United States*, WHITE HOUSE, <https://perma.cc/V5P6-8YUS>.

³⁶ See *infra* Part V.B.

³⁷ See *infra* Part V.B.

³⁸ See *infra* Part V.B.2.

³⁹ This discussion connects with literatures on certiorari as well as literatures on constitutional avoidance. See, e.g., Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 936–41 (2022); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 705–07 (2012).

divided court used to dodge multiple challenges to the 2020 election by President Donald Trump's campaign without reaching the merits.⁴⁰

Regarding parties, original jurisdiction favors parties that want clear answers from the high court, and it disfavors those who prefer a more circuitous path to resolution or who prefer to shop among lower court judges.⁴¹ Quicker resolutions might be valuable in their own right, where parties are aligned with the high court. In certain cases, parties also might be able to use original jurisdiction to fast-track cases to the U.S. Supreme Court—an alternative pathway to the so-called shadow docket.⁴² For parties, the key design question is whether jurisdiction is *exclusive* or *nonexclusive*.⁴³ Exclusive jurisdiction means that Arkansas citizens challenging initiative petitions must proceed in the state supreme court,⁴⁴ whereas nonexclusive (concurrent) jurisdiction means that Ohio citizens challenging the government's decision on a referendum petition could choose whether to proceed in the state supreme court or a lower court.⁴⁵

The way that original jurisdiction distributes power among courts and parties suggests that legislatures defining jurisdiction can make choices depending on their preferences.⁴⁶ If legislatures want to funnel cases to ideologically friendly judges selected statewide—and away from locally selected courts—they might opt for original jurisdiction, as the Arkansas legislature recently did for challenges to the state's lethal injection protocol.⁴⁷ If the legislature trusts supreme court judges to calibrate their docket, they might make original jurisdiction discretionary. Meanwhile,

⁴⁰ See *infra* notes 158–60 and accompanying text.

⁴¹ See *infra* Part V.A.

⁴² See, e.g., STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC*, at ix–xv (2023); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–5 (2015).

⁴³ See *infra* Part V.A.2.

⁴⁴ See, e.g., *Arkansans for Healthy Eyes v. Thurston*, 606 S.W.3d 582, 586 (Ark. 2020).

⁴⁵ Compare *State ex rel. Nauth v. Dirham*, 163 N.E.3d 526 (Ohio 2020) (per curiam) (considering a writ of mandamus filed directly with the state supreme court) with *Doss Petroleum, Inc. v. Columbiana Cnty. Bd. of Elections*, 842 N.E.2d 66 (Ohio Ct. App. 2005) (per curiam) (considering a writ of mandamus filed first with a lower appellate court).

⁴⁶ See *infra* Part V.D.

⁴⁷ ARK. CODE ANN. § 5-4-617(j)(2) (2019).

if legislators prefer to give control to litigants, including legislators themselves in some cases,⁴⁸ then nonexclusive original jurisdiction might be the choice. From the perspective of legislatures, then, original jurisdiction is essentially a form of delegation.

This institutional account, sounding in positive political theory, does not permit easy pronouncements such as “original jurisdiction is bad,” or even “original jurisdiction in election cases is bad.” Instead, it suggests that original jurisdiction can have important effects on the distribution of political power, and so we should scrutinize choices about original jurisdiction in light of those potentially potent effects.

Recognizing original jurisdiction as a political tool connects this Article with a broader topic, often discussed under the heading “court curbing.” Legal scholarship has attended to issues such as jurisdiction stripping and court-packing primarily (though not exclusively⁴⁹) at the federal level.⁵⁰ In political science, there is a growing literature on federal and state legislation that limits the power of courts or changes how those courts operate.⁵¹

These literatures have not attended to original jurisdiction, but they should. A legislature can use original jurisdiction to “judicialize” policy questions, picking and choosing issues to send to the courts as a means of reaching the legislature’s preferred results.⁵² Grants of original jurisdiction also might make life more difficult for high courts—court curbing through jurisdiction expansion, rather than through jurisdiction stripping. And, of course, original jurisdiction curbs the power of lower courts to influence the course of litigation.

This does not mean, by the way, that legislatures always or even usually define supreme court jurisdiction to achieve political

⁴⁸ See, e.g., S.C. CODE § 7-1-110(H) (2022) (authorizing the state legislature to seek writs of mandamus against state elections officials in the supreme court).

⁴⁹ For a notable counterexample, see Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121, 1131–49 (2020). For examples of the recent uptick in scholarly interest in the states, see generally Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275 (2022); Anna E. Carpenter, Alyx Mark, Colleen F. Shanahan & Jessica K. Steinberg, *The Field of State Civil Courts*, 122 COLUM. L. REV. 1165 (2022); Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704 (2022).

⁵⁰ These literatures are too voluminous to cite thoroughly here. For one prominent discussion, including references to other sources, see generally FINAL REPORT, PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES (2021).

⁵¹ See Meghan E. Leonard, *New Data on Court Curbing by State Legislatures*, 22 STATE POL. & POL’Y Q. 483, 486 (2022) (contributing to this literature and collecting sources).

⁵² See, e.g., Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 37–45 (1993).

ends. Nor does it even mean that political considerations are inappropriate in this context. But one important message of this Article is that original jurisdiction can be political. And in an era of party polarization, it is not unreasonable to expect that it will become more so in the near future.

The balance of this Article proceeds as follows. Part I offers a comprehensive survey of state original jurisdiction law. Complementing this survey is Part II's review of scores of recent original jurisdiction actions related to elections, COVID-19 responses, and abortion; and Part III's review of proposed and enacted changes to original jurisdiction law. The extensive Appendix provides further details on these laws, cases, and legislation.

Based on these descriptive contributions, Parts IV and V analyze the law of original jurisdiction. Part IV describes the effects of original jurisdiction on litigation, procedurally and dynamically. Part V considers the institutional consequences of these effects, focusing on the preferences of parties, courts, and legislatures. This analysis does not praise or condemn these institutional effects, but instead makes them legible. In so doing, it shows that original jurisdiction is not some legal backwater but instead an important tool for managing—if not manipulating—public policy in the states.

I. THE LAW OF ORIGINAL JURISDICTION

This Part offers a comprehensive survey of the law of original jurisdiction in the fifty states.

Before turning to the states, this Part begins with the more well-known original jurisdiction of the U.S. Supreme Court.⁵³ Article III, § 2 of the Constitution provides that the Supreme Court

⁵³ See generally RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 267–94 (7th ed. 2015). Original jurisdiction also can be found outside the United States. Using the Constitute database, I identified at least twenty-eight constitutions worldwide that include grants of original jurisdiction to the country's apex court. See, e.g., ARG. CONST. § 117 (“In the aforementioned cases the Supreme Court shall have appellate jurisdiction, with such regulations and exceptions as Congress may prescribe; but in all matters concerning foreign ambassadors, ministers and consuls, and in those in which a province shall be a party, the Court shall have original and exclusive jurisdiction.”); FLJI CONST. art. 98(3) (“The Supreme Court . . . has original jurisdiction to hear and determine constitutional questions referred [by the Cabinet] under section 91(5).”); KENYA CONST. art. 163(3) (“The Supreme Court shall have [] exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140”); SOUTH SUDAN CONST. art. 126(2):

shall have original jurisdiction “[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.”⁵⁴ For more than two centuries, the Court has held that this grant of original jurisdiction does not include the power to render advisory opinions.⁵⁵

Today, federal statutes divide original jurisdiction into exclusive and nonexclusive grants. First, there is exclusive jurisdiction over “all controversies between two or more States,”⁵⁶ such as the 2021 dispute over the Middle Claiborne Aquifer between Mississippi and Tennessee⁵⁷ or the unsuccessful 2020 suit by Texas against other states to challenge their administration of the presidential election.⁵⁸ Second, there is original but nonexclusive jurisdiction over disputes involving ambassadors, suits between the

The Supreme Court shall . . . have original jurisdiction to decide on disputes that arise under this Constitution and the constitutions of states at the instance of individuals, juridical entities or governments; . . . [and] have original and final jurisdiction to resolve disputes between the states and between the National Government and a state in respect of areas of exclusive, concurrent or residual competences.

See also Constitutions Search, CONSTITUTE PROJECT, <https://perma.cc/88JU-SKZR>. Original jurisdictional also exists in canon law. See Linda L. Ammons, *What's God Got to Do with It? Church and State Collaboration in the Subordination of Women and Domestic Violence*, 51 RUTGERS L. REV. 1207, 1230 (1999).

⁵⁴ U.S. CONST. art. III, § 2, cl. 2.

⁵⁵ See, e.g., *Hayburn's Case*, 2 U.S. 409, 410 (1792); *Muskrat v. United States*, 219 U.S. 346, 361–63 (1911). Chief Justice John Jay famously declined a request from President George Washington for an advisory opinion, writing:

We have considered the previous question stated in a letter written by your direction to us by the Secretary of State on the 18th of last month, [regarding] the lines of separation drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.

We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision, and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States.

Letter from C.J. John Jay to Pres. George Washington (Aug. 8, 1793), <https://perma.cc/Y8A5-T32Z> (emphasis in original). This view was consistent with contemporaneous trends in the United Kingdom as well. See Christian R. Buset, *Advisory Opinions and the Problem of Legal Authority*, 74 VAND. L. REV. 621, 638–43 (2021).

⁵⁶ 28 U.S.C. § 1251(a).

⁵⁷ *Mississippi v. Tennessee*, 595 U.S. 15, 19–20 (2021).

⁵⁸ *Texas v. Pennsylvania*, 141 S. Ct. 1230, 1230 (2020) (mem.).

United States and a state, and actions by a state against citizens of another state.⁵⁹ The last category, for example, was invoked (unsuccessfully) by the state of Arizona in a lawsuit against manufacturers of opioids.⁶⁰ Current precedent suggests that the Supreme Court's exercise of original jurisdiction of either type is discretionary⁶¹—hence the denial of original jurisdiction in Texas's election lawsuit⁶²—though Justices Clarence Thomas and Samuel Alito have questioned that rule, especially in exclusive jurisdiction cases.⁶³

These brief comments about the original jurisdiction of the U.S. Supreme Court help frame the remaining discussion of the state law of original jurisdiction. This Part explores (a) the scope of state original jurisdiction, (b) whether it includes advisory opinions, (c) whether it is exclusive or nonexclusive, (d) whether it is mandatory or discretionary, and (e) whether its sources are constitutional or statutory.

For each state, searches were performed on the state constitution, state code, and high court rules. Judicial opinions and secondary sources were also consulted. A full list of authorities is provided in the Appendix. Especially in states where courts exercise ad hoc or inherent authorities to justify original jurisdiction, this review could be incomplete, but every effort was made for a comprehensive accounting.

To explore these questions, this Article uses the following definition of original jurisdiction.⁶⁴ Original jurisdiction refers to cases that are filed and adjudicated, in the first instance, in the highest court of the state.⁶⁵ Original jurisdiction, of course, stands

⁵⁹ 28 U.S.C. § 1251(b).

⁶⁰ See *Arizona v. Sackler*, 140 S. Ct. 812, 812 (2019) (mem.); *Arizona v. Sackler*, Dkt. No. 22O151 (U.S. 2019); Adam Liptak, *Arizona Files Novel Lawsuit in Supreme Court Over Opioid Crisis*, N.Y. TIMES (July 31, 2019), <https://www.nytimes.com/2019/07/31/us/politics/arizona-supreme-court-opioid-sackler.html>.

⁶¹ See, e.g., *Arizona v. California*, 140 S. Ct. 684, 684 (2020) (mem.); *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (per curiam); *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971).

⁶² *Texas*, 141 S. Ct. at 1230.

⁶³ See, e.g., *Arizona*, 140 S. Ct. at 685 (Thomas, J., dissenting) *Texas*, 141 S. Ct. at 1230 (statement of Justice Alito, with whom Justice Thomas joins).

⁶⁴ *Black's Law Dictionary* defines original jurisdiction as “[a] court’s power to hear and decide a matter before any other court can review the matter.” *Original Jurisdiction*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁶⁵ Courts other than the highest courts have original jurisdiction too, see, for example, 28 U.S.C. § 1441 (permitting removal of cases within the original jurisdiction of the federal district courts), but this Article uses “original jurisdiction” as shorthand for the original jurisdiction of the highest state court.

in contrast to appellate jurisdiction, where the high court is passing on the decision of a lower court.⁶⁶ This Article’s definition of original jurisdiction includes the power to render advisory opinions upon the request of nonjudicial bodies, such as legislatures, even though those determinations are not necessarily adversarial.⁶⁷ The definition excludes any nonjudicial supervisory powers, including high courts’ frequently invoked power to supervise the bar of the state and less frequently invoked power over judicial discipline.⁶⁸ It also excludes a high court’s jurisdiction over petitions for writs (such as writs of mandamus) directed at lower court judges in ongoing litigation, as such petitions are functionally similar to appeals.⁶⁹ This last distinction tracks the law applied in the U.S. Supreme Court.⁷⁰

A. The Scope

The first question in the study of original jurisdiction should be about its scope—when, if ever, may a state high court exercise original jurisdiction.⁷¹

Let us begin with “if ever.” The high courts in six states do not have any original jurisdiction at all: Alaska,⁷² Georgia,⁷³ Indiana,⁷⁴ Kentucky,⁷⁵ New York,⁷⁶ and Tennessee.⁷⁷ State constitutions and statutes in most of these states do not say “no original

⁶⁶ *Black’s Law Dictionary* defines appellate jurisdiction as “[t]he power of a court to review and revise a lower court’s decision.” *Appellate Jurisdiction*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁶⁷ For more on noncontentious jurisdiction, see generally James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346 (2015).

⁶⁸ See Michael C. Pollack, *Courts Beyond Judging*, 46 B.Y.U. L. REV. 719, 743–46, 787–93 (2021).

⁶⁹ A petition for a writ against a nonjudicial official, such as a governor, would qualify as an exercise of original jurisdiction under this definition. See *infra* Part II (collecting cases).

⁷⁰ Compare *Ex parte Bollman*, 8 U.S. 75, 101 (1807) (treating a petition for a writ of habeas corpus against a lower court as an exercise of the Supreme Court’s appellate jurisdiction), with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175–78 (1803) (treating a petition for a writ of mandamus against an executive official as an exercise of the Supreme Court’s original jurisdiction). See also JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES* 69–72 (2009).

⁷¹ Complete results including citations may be found in the Appendix.

⁷² ALASKA STAT. § 22.05.010 (2016).

⁷³ GA. CONST. art. VI, § 6, ¶¶ 2–5.

⁷⁴ IND. CONST. art. VII, § 4.

⁷⁵ KY. CONST. § 110(2)(a).

⁷⁶ N.Y. CONST. art. VI, § 3.

⁷⁷ TENN. CONST. art. VI, § 2.

jurisdiction,” but they define the high court’s jurisdiction to include only appellate jurisdiction,⁷⁸ and court decisions often confirm this conclusion.⁷⁹

The remaining forty-four states authorize original jurisdiction in various circumstances.⁸⁰ Sometimes courts assert original jurisdiction based on generic grants of authority, while other times the grant of jurisdiction is more specific.

Regarding the general authorities, many states hear original jurisdiction under broad grants. Thirty-four state high courts have original jurisdiction over petitions for some or all writs, such as the writs of mandamus and prohibition.⁸¹ This practice is consistent with U.S. history going back to the Founding,⁸² and as shown below, the power to issue writs is central to many of the most important original actions in recent years.⁸³

In addition to the writs power, some states have additional, broad grants of original jurisdiction in their constitutions. Wisconsin has a broad constitutional provision allowing the high court to “hear original actions and proceedings.”⁸⁴ Pennsylvania’s high court assumes, among others, the original jurisdiction held by the King’s Bench.⁸⁵ Massachusetts gives the high court original jurisdiction under the general principles of equity, though interestingly, suits seeking a labor injunction are reserved for the trial courts.⁸⁶

⁷⁸ See, e.g., KY. CONST. § 110(2)(a).

⁷⁹ See, e.g., *Van Newkirk v. Dist. Att’y*, 218 N.E.2d 337, 337 (N.Y. 1966) (mem.).

⁸⁰ See Appendix.

⁸¹ See *id.*

⁸² See James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269, 1311–18 (2020) (collecting state cases, many of which were original actions, invoking the writs of mandamus, certiorari, and prohibition against non-judicial officials).

⁸³ See *infra* Part II (collecting cases).

⁸⁴ WIS. CONST. art. VII, § 3(2).

⁸⁵ 42 PA. CONS. STAT. ANN. § 502 (1978). I should mention here another practice that tests the boundary of the definition of original jurisdiction. In at least Pennsylvania, the high court can take “extraordinary jurisdiction” over a case pending but not yet decided in the trial court. 42 PA. CONS. STAT. ANN. § 726 (2005). These cases are not filed originally in the high court, but they are adjudicated there in the first instance. For example, shortly before the 2020 election, the Pennsylvania Supreme Court took jurisdiction over a case related to the state’s mail-in ballot law soon after it had been filed in the trial court, so it was the high court that issued the first and only state-court judgment in the case. *In re Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1079 (Pa. 2020).

⁸⁶ MASS. GEN. LAWS ch. 214, § 1 (1973). For background, in 1932, Congress outlawed labor injunctions in federal court with the Norris-LaGuardia Act. Pub. L. No. 72-65, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101 et. seq.). Three years later, the Massa-

On top of the broad grants, state constitutions and statutes frequently specify categories of cases for which original jurisdiction is appropriate. Elections are a common subject of original jurisdiction laws. More than half of the states have some election-related original jurisdiction in their constitutions or statutes.⁸⁷ Fifteen states provide for original jurisdiction in apportionment or redistricting challenges,⁸⁸ including two states that expressly authorize their high courts to draw maps in certain circumstances.⁸⁹ Eight states provide for original jurisdiction in election contests⁹⁰—that is, challenges to the results of an election—though Oklahoma’s grant is limited to elections to relocate a county seat.⁹¹ Indeed, as early as 1794, New Jersey’s highest court exercised its original jurisdiction to hear a challenge to a disputed congressional election.⁹² Four states provide for original jurisdiction over challenges to decisions about placing initiatives and referenda on the ballot⁹³ and four provide original jurisdiction over

chusetts state legislature also addressed labor injunctions, removing them from the original jurisdiction of the state’s highest court and instead placing them within the exclusive jurisdiction of the trial court.

⁸⁷ See Appendix.

⁸⁸ See *id.*

⁸⁹ MICH. COMP. LAWS § 3.71 (2000); CONN. CONST. art. III, § 6(d). Other state supreme courts have inferred such an authority from broad provisions. See, e.g., *Johnson v. Wis. Elections Comm’n*, 971 N.W.2d 402, 408 (Wis. 2022), *rev’d on other grounds sub nom. Wis. Legislature v. Wis. Elections Comm’n*, 595 U.S. 398 (2022).

Legislative directives to draw maps sit in tension with extreme versions of the so-called independent state legislature theory, which suggests that only legislatures draw congressional districts. See, e.g., Shapiro, *supra* note 22, at 140; Litman & Shaw, *supra* note 22, at 1238–39. As noted, in at least Michigan and Connecticut, the legislature has expressly authorized the supreme court to draw maps.

⁹⁰ COLO. REV. STAT. § 1-11-203 (1993); CONN. GEN. STAT. § 9-323 (2011); HAW. CONST. art. IV, § 10; ME. REV. STAT. tit. 21-A, § 737-A (2023); MO. CONST. art. VII, § 5; NEB. CONST. art. V, § 2; OKLA. STAT. tit. 19, § 87 (1910); S.D. CODIFIED LAWS § 12-21-48 (1982).

⁹¹ OKLA. STAT. tit. 19, § 87 (1910).

⁹² *State v. Justs. of Middlesex Cnty.*, 1 N.J.L. 244, 249–55 (1794). Interestingly, the decision of the Supreme Court of Judicature of New Jersey was reversed by the Governor and Privy Council. See *id.* at 255 (handwritten note of the Chief Justice).

⁹³ ARK. CONST. art. V, § 1; N.D. CONST. art. III, § 6; OHIO CONST. art. II, § 1e(C); OHIO REV. CODE ANN. § 3519.01 (2012); MONT. CODE ANN. § 3-2-202 (2007).

aspects of ballot wording.⁹⁴ Minnesota,⁹⁵ Texas,⁹⁶ and South Carolina⁹⁷ provide original jurisdiction for challenges to actions by election officials, though South Carolina's provision is limited to actions brought by the legislature.⁹⁸

Some states also provide for original jurisdiction for certain actions involving government parties outside of the election context. Arizona provides for original jurisdiction in suits between counties⁹⁹ and suits by the attorney general, upon the request of a legislator, against local governments for violations of state law.¹⁰⁰ Missouri provides original jurisdiction when statewide elected officials bring certain challenges to new tax statutes.¹⁰¹ Arkansas provides original jurisdiction for challenges to the drugs used in lethal injection.¹⁰²

Notably, virtually all of the aforementioned grants of original jurisdiction relate to suits involving the government. Most of the writs are limited to actions against public officials; most of the

⁹⁴ MINN. STAT. § 204B.44 (2015) (providing original jurisdiction for petitions alleging “an error or omission in the placement or printing of the name or description of any candidate or any question on any official ballot”); MONT. CODE ANN. § 3-2-202 (2007) (ballot statements); S.C. CODE § 7-13-2130 (1975) (constitutional amendment statements); OHIO CONST. art. XVI, § 1 (ballot wording).

⁹⁵ MINN. STAT. § 204B.44 (2015) (providing original jurisdiction for petitions alleging “any wrongful act, omission, or error of any election judge, municipal clerk, county auditor, canvassing board or any of its members, the secretary of state, or any other individual charged with any duty concerning an election”).

⁹⁶ 16 TEX. ELECTION CODE § 273.061 (2021) (providing jurisdiction for “a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer”).

⁹⁷ S.C. CODE § 7-1-110(H) (2022):

The President of the Senate, on behalf of the Senate, and the Speaker of the House of Representatives, on behalf of the House of Representatives, have standing to bring an action in mandamus in the original jurisdiction of the Supreme Court to compel an election official to faithfully apply, enforce, and defend the election laws of the State.

⁹⁸ *Id.* The same law adding this provision to South Carolina's code also created a state election commission and gave the state supreme court original jurisdiction over actions to remove commissioners. S.C. CODE § 7-3-10(E)(3) (2022); *see* S.B. 108, 124th Gen. Assemb. Sess. (S.C. 2022).

⁹⁹ ARIZ. CONST. art. VI, § 5(2).

¹⁰⁰ ARIZ. CONST. art. VI, § 5(6) (providing that the state supreme court's jurisdiction can be extended by law); ARIZ. REV. STAT. § 41-194.01(B)(2) (2021).

¹⁰¹ MO. CONST. art. X, § 18(e). The Missouri Constitution requires voter approval for large tax increases. *Id.* If the legislature authorizes an increase above the ceiling without seeking voter approval, voters or elected officials may challenge the law. *Id.* at 18(e)(5). The state supreme court has original jurisdiction when the challenges are filed by statewide elected officials. *Id.*

¹⁰² ARK. CODE ANN. § 5-4-617(j)(2) (2019).

election actions would have public officials as plaintiffs, defendants, or both; and many of the other special jurisdictional categories explicitly or implicitly involve government parties.

B. Advisory Opinions

Next are advisory opinions. Although advisory opinions might be considered part of the “scope” of original jurisdiction, the nature of this category is sufficiently different from those discussed in the previous Section to necessitate separate treatment.

An advisory opinion is typically not the result of a contested case. Instead, it is a nonbinding statement of law, issued by a court, typically at the request of a government official.¹⁰³ A proposal to include an advisory opinion mechanism in the U.S. Constitution was defeated at the Constitutional Convention,¹⁰⁴ and the Supreme Court has confirmed that no such power exists on the federal level.¹⁰⁵

The story differs in the states. At least two of the original states, Massachusetts and New Hampshire, included the authorization to issue advisory opinions in their eighteenth-century constitutions.¹⁰⁶ Today, state constitutions or statutes provide for advisory opinions from the high courts of Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota, typically referring to questions about the constitution or important questions of law.¹⁰⁷ Oklahoma statutes also permit advisory opinions in capital cases, requested by the governor, from the Court of Criminal Appeals, the highest

¹⁰³ See, e.g., *Opinion*, BLACK’S LAW DICTIONARY (11th ed. 2019); Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1842–52 (2001).

¹⁰⁴ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 334 (Max Farrand ed., 1911); see also Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any “Dear John” Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473, 477–83 (1998) (book review). See generally STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES (1997); Bursset, *supra* note 55 (documenting the decline of this practice in English courts).

¹⁰⁵ See, e.g., *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344–46 (2006); *Flast v. Cohen*, 392 U.S. 83, 96 (1968); *Muskrat*, 219 U.S. at 361–62; *Hayburn’s Case*, 2 U.S. at 410; see also Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1003 (1924).

¹⁰⁶ MASS. CONST. pt. 2, ch. III, art. II, *amended* by MASS. CONST. art. LXXXV; N.H. CONST. pt. II, art. 74.

¹⁰⁷ ALA. CONST. art. VI, § 140(b)(3); ALA. CODE § 12-2-10 (1940); COLO. CONST. art. VI, § 3; DEL. CODE ANN. tit. 10, § 141 (1995); FLA. CONST. art. IV, § 1(c); *id.* at art. V, § 3(b)(10); ME. CONST. art. VI, § 3; MASS. CONST. pt. 2, ch. III, art. II, *amended* by MASS. CONST. art. LXXXV; MICH. CONST. art. III, § 8; N.H. CONST. pt. II, art. 74; R.I. CONST. art. X, § 3; S.D. CONST. art. V, § 5.

state court for criminal cases.¹⁰⁸ Some other states have exercised this power without constitutional or statutory authority,¹⁰⁹ but by implication, most states have followed the federal model, rejecting advisory opinions.

C. Mandatory or Discretionary

Not all grants of original jurisdiction are created equal. Among the important ways original jurisdiction can vary is whether the jurisdiction is mandatory or discretionary. This inquiry, however, is not as simple as sorting the states into two categories. The variations in the states are too many to catalog here, but a few comments are in order.¹¹⁰

Occasionally the state constitution expressly confers discretion on the high court. The Oregon Constitution provides that “the supreme court may, in its own discretion, take original jurisdiction in mandamus, quo warranto and habeas corpus proceedings.”¹¹¹ Wisconsin’s Constitution simply says the supreme court “may hear original actions and proceedings.”¹¹² Most constitutions, however, are ambiguous on the question.

Statutes and court decisions provide a little more guidance. To generalize, narrowly tailored grants of jurisdiction are more likely to provide for mandatory jurisdiction, while the open-ended grants of original jurisdiction, including original jurisdiction grants for extraordinary writs,¹¹³ are often treated as discretionary.

A few examples of narrowly tailored grants highlight their mandatory nature. Colorado, for example, provides that “[i]n all cases involving contests for state offices, the supreme court shall

¹⁰⁸ OKLA. STAT. tit. 22, § 1003 (1910).

¹⁰⁹ See, e.g., Hershkoff, *supra* note 103, at 1846 n.70 (collecting cases); Wash. State Lab. Council v. Reed, 65 P.3d 1203, 1207 (Wash. 2003) (collecting examples).

¹¹⁰ Even for individual provisions, often the language of the statute or constitution is sufficiently ambiguous that the courts have some leeway in interpreting the provision as mandatory or discretionary. As a result, this Article does not attempt to sort the provisions comprehensively.

¹¹¹ OR. CONST. art. VII, § 2.

¹¹² WIS. CONST. art. VII, § 3(2).

¹¹³ OR. CONST. art. VII, § 2.

take original jurisdiction for the purpose of summarily adjudicating any contest.”¹¹⁴ Under certain circumstances, the Florida Supreme Court “shall” make the legislative apportionment.¹¹⁵ And Arizona law provides that the supreme court “shall give . . . precedence over all other cases” to actions filed by the attorney general against local governments for violations of state law or the state constitution,¹¹⁶ a law seemingly adopted to stop liberal cities from regulating guns, sanctuary status, and other hot-button issues.¹¹⁷

For the open-ended grants, courts tend to interpret these provisions as discretionary and then offer judge-made standards for exercising that discretion. Some courts have adopted court rules articulating the standards,¹¹⁸ but most have done so in the common law manner. The Pennsylvania Supreme Court, for example, explained that original King’s Bench jurisdiction typically is limited to “an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law.”¹¹⁹ The court did so in a lawsuit by the Friends of Danny DeVito—not that Danny DeVito¹²⁰—challenging the governor’s COVID-19 mitigation measures.¹²¹ Other courts have ex-

¹¹⁴ COLO. REV. STAT. ANN. § 1-11-203(1) (1993). Maine law also provides that the high court “shall determine the result of the [contested] election.” ME. REV. STAT. ANN. tit. 21-A, § 737-A(10) (2023).

¹¹⁵ FLA. CONST. art. III, § 16(b).

¹¹⁶ ARIZ. REV. STAT. § 41-194.01 (2021).

¹¹⁷ See Richard Briffault, *Preemption: The Continuing Challenge*, 36 J. LAND USE & ENVTL. L. 251, 261 (2021).

¹¹⁸ S.C. APP. CT. R. 245(a):

The Supreme Court will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties. If the public interest is involved, or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised, the facts showing the reasons must be stated in the petition.

MICH. CT. R. 3.301 (“[A]n original action may not be commenced in the Supreme Court . . . if the circuit court would have jurisdiction of an action seeking that relief.”).

¹¹⁹ *Commonwealth v. Williams*, 129 A. 3d 1199, 1206 (Pa. 2015); see also NEB. CONST. art. V, § 2.

¹²⁰ *Compare TWINS* (Universal Pictures 1988) and *It’s Always Sunny in Philadelphia* (FX (2005–12); FXX (2013–present)) with *Devito Hopes Famous Name, Plans for Future Translate to Votes for State Rep*, TRIB LIVE (Jan. 24, 2020, <https://perma.cc/8G5G-4UAP>).

¹²¹ *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 876 (Pa. 2020).

plained that original jurisdiction is appropriate for cases of “public importance,”¹²² “great public importance,”¹²³ “substantial public importance,”¹²⁴ and other similar formulations.¹²⁵ Some courts also have said that they will exercise discretion to hear cases when issues are urgent¹²⁶ or require prompt resolution,¹²⁷ other courts have said that they may decline jurisdiction when lower courts provide adequate alternatives¹²⁸ or where the case requires the resolution of questions of fact.¹²⁹ That said, any announced standard may do little to constrain a motivated court.

Advisory opinion law varies. The provisions authorizing advisory opinions are written in mandatory language in some states¹³⁰ and in discretionary language in others,¹³¹ though even

¹²² *State ex rel. Boe v. Straub*, 578 P.2d 1247, 1248 (Or. 1978) (en banc).

¹²³ *Clean Air Constituency v. Cal. State Air Res. Bd.*, 523 P.2d 617, 620 (Cal. 1974) (en banc) (quotation marks omitted) (quoting *County of Sacramento v. Hickman*, 428 P.2d 593, 595 (Cal. 1967)).

¹²⁴ *Randolph v. Groscoast*, 989 P.2d 751, 753 (Ariz. 1999) (en banc).

¹²⁵ *In re Mone*, 719 A.2d 626, 630 (N.H. 1998) (“[W]e will exercise our original jurisdiction in circumstances where the parties desire, and public need requires, a speedy determination of the important issues in controversy.” (citations omitted)); *N. Chi. Hebrew Congregation v. Bd. of Appeals of Cook Cnty.*, 193 N.E. 519, 522 (Ill. 1934):

The original jurisdiction of this court is, and will be, exercised (1) to protect the rights, interests, and franchises of the state or the rights and interests of the whole people and to enforce the performance of high official duties which affect the public at large; and (2) when an emergency exists (the existence or nonexistence of which this court alone determines), to protect local public interests or private rights where there is no other adequate remedy or where it is necessary to prevent a failure of justice.

¹²⁶ *Ybarra v. Legislature by Bedke*, 466 P.3d 421, 425 (Idaho 2020).

¹²⁷ *Clean Air Constituency*, 523 P.2d at 620.

¹²⁸ *See, e.g., State ex rel. Blankenship v. McHugh*, 217 S.E.2d 49, 54 (W. Va. 1975); *State ex rel. Boe*, 578 P.2d at 1248. This limitation resonates with traditional writs practice, though state high courts may consider this factor even in proceedings of another type.

¹²⁹ *Green for Wis. v. State Elections Bd.*, 723 N.W.2d 418, 419 (Wis. 2006); *People ex rel. Jones v. Robinson*, 101 N.E.2d 100, 101 (Ill. 1951).

¹³⁰ *See, e.g., MASS. CONST.*, pt. 2, ch. III, art. II, *amended by* MASS. CONST. art. LXXXV (“Each branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.”).

¹³¹ *See, e.g., DEL. CODE ANN.* tit. 10, § 141(a) (1995) (emphasis added):

The Justices of the Supreme Court, whenever the Governor of this State or a majority of the members elected to each House may by resolution require it for public information, or to enable them to discharge their duties, *may* give them their opinions in writing touching the proper construction of any provision in the Constitution of this State, or of the United States, or the constitutionality of any law or legislation passed by the General Assembly, or the constitutionality of any proposed constitutional amendment which shall have been first agreed to by 2/3 of all members elected to each House.

some seemingly mandatory provisions have been interpreted to provide some discretion to decline to answer.¹³²

D. Exclusive or Concurrent

Another key dimension is whether the high court's jurisdiction is exclusive or concurrent.¹³³

Some state statutes expressly provide for exclusive jurisdiction, especially in the election context. For example, the supreme courts in Arkansas,¹³⁴ Ohio,¹³⁵ and South Carolina¹³⁶ have exclusive original jurisdiction over certain suits related to the initiative process. The California Supreme Court has "original and exclusive jurisdiction in all proceedings in which a certified final map is challenged or is claimed not to have taken timely effect."¹³⁷ Outside of the election context, the Maryland high court has exclusive jurisdiction over certain actions relating to the acting comptroller and treasurer.¹³⁸

Other statutes provide for concurrent jurisdiction. Perhaps most importantly, jurisdiction to issue extraordinary writs tends to be concurrent.¹³⁹ In addition, although exclusive jurisdiction frequently appears in election cases, that is not always true. For example, in Washington, jurisdiction to correct election errors is

¹³² See, e.g., Hershkoff, *supra* note 103, at 1844–52. Finally, it is worth noting that none of the constitutional or statutory sources reviewed suggest that any state applies special voting rules for exercising this discretion. It appears that state high courts exercise their original-jurisdiction discretion by majority vote. In the U.S. Supreme Court, four votes are required for certiorari. See, e.g., *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 527 (1957) (Frankfurter, J., dissenting) (describing the "rule of four"). But for original jurisdiction, the Supreme Court seems to require a majority of votes and even will decline jurisdiction by an equally divided vote. See generally, e.g., *Okla. ex rel. Williamson v. Woodring*, 309 U.S. 623 (1940).

¹³³ As above, a comprehensive sorting of the provisions is not plausible given their wide variation and susceptibility to judicial interpretation.

¹³⁴ ARK. CONST. art. V, § 1 (providing exclusive jurisdiction over challenges to the sufficiency of initiative petitions).

¹³⁵ OHIO REV. CODE ANN. § 3519.01(C) (2012):

Any person who is aggrieved by a certification decision [related to an initiative petition, allowing the people of the state to vote on a proposal of law or constitutional amendment.] . . . may challenge the certification or failure to certify of the attorney general in the supreme court, which shall have exclusive, original jurisdiction in all challenges of those certification decisions.

¹³⁶ S.C. CODE § 7-13-2130 (1975) ("The State Supreme Court shall have exclusive and original jurisdiction in any proceeding challenging the amendment [to the South Carolina Constitution] explanations prepared by the Ballot Commission.")

¹³⁷ CAL. CONST. art. XXI, § 3(b)(1).

¹³⁸ MD. CODE ANN., STATE GOV'T §§ 4-105(e), 5-106(d) (1984).

¹³⁹ See, e.g., MASS. GEN. LAWS ch. 214, § 1 (1973); VT. STAT. ANN. tit. 4, § 2 (2010).

held concurrently by the supreme court, the courts of appeals, and the superior courts.¹⁴⁰ Court rules¹⁴¹ and decisions¹⁴² also may imply concurrency not present on the face of the statute.

E. Sources of Law

Finally, as in the federal system,¹⁴³ the state law of original jurisdiction derives from both constitutional and statutory sources.

The Appendix provides additional details on this question, so only a few comments are worth attention here. First, the numbers: forty-two states have constitutional provisions, and thirty-six states have statutory provisions addressing original jurisdiction, including thirty-four with both.¹⁴⁴

Second, states vary on the question whether the legislature can authorize original jurisdiction. The Texas Constitution, for example, provides that “[t]he Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as

¹⁴⁰ WASH. REV. CODE § 29A.68.013 (2016):

Any justice of the supreme court, judge of the court of appeals, or judge of the superior court in the proper county shall, by order, require any person charged with error, wrongful act, or neglect to forthwith correct the error, desist from the wrongful act, or perform the duty and to do as the court orders or to show cause forthwith why the error should not be corrected, the wrongful act desisted from, or the duty or order not performed

The Washington Supreme Court also has concurrent jurisdiction over challenges to audits of long-term, in-home care programs. WASH. REV. CODE § 74.39A.800 (2012). In Oklahoma, the high court has concurrent jurisdiction over ouster proceedings. OKLA. STAT. tit. 51, § 92 (1917).

¹⁴¹ See, e.g., S.C. APP. CT. R. 245(a) (“The Supreme Court will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties.”); WYO. R. APP. P. 13.01(d):

In any petition made to the supreme court for a writ to be issued in the exercise of its original jurisdiction and for which an application might have been lawfully made to some other court, the petition shall set forth the circumstances why, in the opinion of the petitioner, the writ should issue originally from the supreme court and not from such other court.

MICH. CT. R. 3.301(A)(1) (“[A]n original action may not be commenced in the Supreme Court . . . if the circuit court would have jurisdiction of an action seeking that relief.”).

¹⁴² *State ex rel. Boe*, 578 P.2d at 1248.

¹⁴³ See U.S. CONST. art. III, § 2; 28 U.S.C § 1251.

¹⁴⁴ See Appendix.

against the Governor of the State.”¹⁴⁵ The constitutions of Maryland, Pennsylvania, Rhode Island, and Vermont also expressly provide for jurisdiction as prescribed by law.¹⁴⁶

Unsurprisingly, some state courts have rejected legislative attempts to limit constitutionally provided original jurisdiction.¹⁴⁷ Meanwhile, some state courts have held that legislation also may not expand original jurisdiction, striking down legislatures’ attempts to provide new bases of original jurisdiction.¹⁴⁸ For example, the New Jersey Supreme Court invalidated a state statute providing for original jurisdiction over redistricting challenges,¹⁴⁹ though the state later added a similar provision through a constitutional amendment.¹⁵⁰

F. Summary

To summarize, the constitutions or statutes of forty-four states authorize some form of original jurisdiction. Common grants include the power to issue writs and to superintend certain aspects of elections, though there is wide variation in the scope of these authorities. One commonality is that most grants implicate government parties in one way or another. These various grants are a mix of mandatory or discretionary and exclusive or concurrent. As described in more detail below, these features of original jurisdiction are important in understanding how this form of jurisdiction allocates authority within a state.¹⁵¹

II. RECENT CASES

The foregoing survey of state original jurisdiction law is not of mere academic interest but instead informs many lawsuits on important issues of the day. The Supreme Court of the United States rarely decides original jurisdiction matters, and when it does, they tend to be fairly mundane disputes between U.S.

¹⁴⁵ TEX. CONST. art. V, § 3(a).

¹⁴⁶ PA. CONST. art. V, § 2; R.I. CONST. art. X, § 2; MD. CONST. art. IV, pt. 2, § 14; VT. CONST. ch. II, § 30.

¹⁴⁷ *E.g.*, *McLinko v. Dep’t of State*, 279 A.3d 539, 564 (Pa. 2022).

¹⁴⁸ *See, e.g.*, *ProgressOhio.org, Inc. v. Kasich*, 953 N.E.2d 329, 331 (Ohio 2011) (per curiam); *Brady v. N.J. Redistricting Comm’n*, 622 A.2d 843, 848 (N.J. 1992); *Smith v. State*, 222 S.E.2d 412, 429 (N.C. 1976); *Brown v. Cox*, 387 P.3d 1040, 1043 (Utah 2017).

¹⁴⁹ *Brady*, 622 A.2d at 848. The Utah Supreme Court also held unconstitutional a statute that purported to provide original jurisdiction over multicounty election disputes. *Brown*, 387 P.3d at 1043.

¹⁵⁰ N.J. CONST. art II, § 2, ¶ 7.

¹⁵¹ *See infra* Part V.

states.¹⁵² State high courts, meanwhile, have routinely heard original jurisdiction cases in larger numbers and with much more fanfare. The Courts Statistics Project, for example, reports that state high courts hear thousands of original actions per year,¹⁵³ though their definitions of original actions are broader than that used in this Article.¹⁵⁴

Rather than seeking to identify every state original jurisdiction case, this Part reviews recent cases on three important topics: elections, COVID-19, and abortion. These issues merit special attention because of their public importance. Further, elections and COVID-19 involve various public and private actions that are susceptible to litigation, while abortion appears to be an area in which original jurisdiction is gaining attention. Surveying this pool of cases provides context for the descriptive and normative analyses to follow.

Cases were identified first with a simple query on Westlaw, and then supplemented with outside research using a variety of sources. A full list of surveyed cases is provided in the Appendix.¹⁵⁵

For the period of January 2020 to December 2022, these methods revealed seventy-five original jurisdiction cases related to elections and twenty-three related to COVID-19, including eight related to both (e.g., changes to election administration in response to COVID-19). Extending the period through the first half of 2023 brings in eight cases related to abortion. These numbers alone merit attention: on these important issues of public policy, dozens of cases sought to step outside the textbook form of civil litigation and instead invoked the original jurisdiction of state supreme courts.

The balance of this Part surveys these cases, focusing on the issues raised, parties involved, and authorities invoked. Note that the emphasis on recent cases is not meant to suggest that original

¹⁵² See generally, e.g., *Mississippi v. Tennessee*, 595 U.S. 15 (2021) (deciding a water rights dispute between Mississippi and Tennessee).

¹⁵³ *CSP STAT Original Proceedings & Other Appellate Matters*, CT. STAT. PROJECT (July 2022), <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-third-row/csp-stat-original-proceedings-and-other-appellate-matters>.

¹⁵⁴ CONF. OF STATE CT. ADM'RS & NAT'L CTR. FOR STATE CTS., STATE COURT GUIDE TO STATISTICAL REPORTING 48 (2023) (defining "original proceeding" as "an action that comes to the appellate court in the first instance").

¹⁵⁵ See Appendix.

jurisdiction litigation is entirely a product of this time. For example, though not analyzed below, I was able to locate thirty-three original jurisdiction cases related to elections from the roughly analogous period of 2000 to 2002.¹⁵⁶

A. Election Cases

Seventy-five original jurisdiction cases addressed elections from 2020 to 2022.¹⁵⁷ These cases arose in many contexts.

Perhaps the highest-profile cases involved challenges to the 2020 presidential election. Five such cases were filed directly in state high courts. Three cases were filed in the Wisconsin Supreme Court challenging various aspects of the election, including absentee voting and voter drop boxes, and requesting, among

¹⁵⁶ See generally Advisory Op. to Att’y Gen. *re* Amend. to Bar Gov’t from Treating People Differently Based on Race in Pub. Educ., 778 So.2d 888 (Fla. 2000) (per curiam); Advisory Op. to Att’y Gen. *re* Right to Treatment and Rehab., 818 So.2d 491 (Fla. 2002); Advisory Op. to the Att’y Gen. *re* Voluntary Universal Pre-Kindergarten Educ., 824 So.2d 161 (Fla. 2002) (per curiam); *Beaubien v. Ryan*, 762 N.E.2d 501 (Ill. 2001); *Below v. Gardner*, 963 A.2d 785 (N.H. 2002) (per curiam); *Burling v. Chandler*, 804 A.2d 471 (N.H. 2002) (per curiam); *Cole v. State ex rel. Brown*, 42 P.3d 760 (Mont. 2002); *Gallivan v. Walker*, 54 P.3d 1069 (Utah 2002); *Gibbons v. Cenarrusa*, 92 P.3d 1063 (Idaho 2002); *Grimes v. City of Oklahoma City*, 49 P.3d 719 (Okla. 2002); *Hartung v. Bradbury*, 33 P.3d 972 (Or. 2001); Advisory Op. to Att’y Gen. *re* Authorization for Cnty. Voters to Approve or Disapprove Slot Machs. Within Existing Pari-Mutuel Facilities, 813 So.2d 98 (Fla. 2002) (mem.) (per curiam); Advisory Op. to Gov. *re* Appointment or Election of Judges, 824 So.2d 132 (Fla. 2002); *In re* Op. of the Justs., 815 A.2d 791 (Me. 2002); *In re* Legis. Districting of State, 805 A.2d 292 (Md. 2002); *In re* Reapportionment of Colo. Gen. Assemb., 45 P.3d 1237 (Colo. 2002) (en banc); *Jensen v. Wis. Elections Bd.*, 639 N.W.2d 537 (Wis. 2002) (per curiam); *Kain v. Myers*, 41 P.3d 416 (Or. 2002) (en banc); *Kainen v. Harris*, 769 So.2d 1029 (Fla. 2000) (per curiam); *Kelsh v. Jaeger*, 641 N.W.2d 100 (N.D. 2002) (per curiam); *Morgan v. Daxon*, 49 P.3d 687 (Okla. 2001); *Nev. Mining Ass’n v. Erdoes*, 26 P.3d 753 (Nev. 2001); *Op. of the Justs. to the Acting Gov.*, 780 N.E.2d 1232 (Mass. 2002); *Op. of the Justs.*, 825 So.2d 109 (Ala. 2002); *Smith v. Idaho Comm’n on Redistricting*, 38 P.3d 121 (Idaho 2001); *Stilley v. Priest*, 16 S.W.3d 251 (Ark. 2000); *Toliver v. Thompson*, 17 P.3d 464 (Okla. 2000); *Van Valkenburgh v. Citizens for Term Limits*, 15 P.3d 1129 (Idaho 2000); *Ward v. Priest*, 86 S.W.3d 884 (Ark. 2002); *White v. Priest*, 73 S.W.3d 572 (Ark. 2002); *Whitehouse v. Moran*, 808 A.2d 626 (R.I. 2002) (per curiam); *Winters v. Kiffmeyer*, 650 N.W.2d 167 (Minn. 2002).

¹⁵⁷ Again, a full list of cases appears in the Appendix. This list does not include “extraordinary jurisdiction” actions in the Pennsylvania Supreme Court, since those cases were first filed in lower courts. See *supra* note 85. For completeness, four such cases addressed elections during this period. See generally *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020) (per curiam); *Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020) (unpublished table decision); *Carter v. Chapman*, 273 A.3d 1 (Pa. 2022) (per curiam) (unpublished table decision); *Gressman v. Degraffenreid*, 271 A.3d 378 (Pa. 2022) (per curiam) (unpublished table decision).

other relief, a court order that the state legislature select presidential electors for the state.¹⁵⁸ The state supreme court denied the petitions in all three cases, noting in two of them that the cases should have been filed in another court first.¹⁵⁹ Those two cases were four-to-three splits, with Justice Brian Hagedorn joining the liberal justices to reject the challenges.¹⁶⁰ The supreme courts in Minnesota and Michigan also denied petitions to delay certification of their respective state's presidential election results.¹⁶¹

In addition to these postelection suits, various cases were filed in advance of the election related to election administration, including challenges seeking to expand or contract early and absentee voting. Republicans in Texas and Wisconsin asked their high courts to restrict voting,¹⁶² while Democrats in South Carolina unsuccessfully asked their supreme court to declare that all registered voters should be able to vote by mail during the COVID-19 pandemic.¹⁶³ The New Mexico Supreme Court held that the state could not send absentee ballots to voters without a request, but it could send unsolicited absentee ballot applications.¹⁶⁴

Reapportionment and redistricting issues were also common in original jurisdiction actions. Twenty-two original jurisdiction decisions during this period addressed questions related to reapportionment and redistricting.¹⁶⁵ Most frequently, parties sought

¹⁵⁸ See generally *Trump v. Evers*, No. 2020AP1971-OA (Wis. Dec. 3, 2020); *Wis. Voters All. v. Wis. Elections Comm'n*, No. 2020AP1930-OA (Wis. Dec. 4, 2020); *Mueller v. Jacobs*, No. 2020AP1958-OA (Wis. Dec. 3, 2020).

¹⁵⁹ *Trump v. Evers*, No. 2020AP1971-OA, at 2 (Wis. Dec. 3, 2020) (denying original jurisdiction for a challenge to election decisions because the case involved factual disputes that would be better managed by a lower court); *Wis. Voters All. v. Wis. Elections Comm'n*, No. 2020AP1930-OA, at 2 (Wis. Dec. 4, 2020) (same).

¹⁶⁰ See generally *Trump v. Evers*, No. 2020AP1971-OA (Wis. Dec. 3, 2020); *Wis. Voters All. v. Wis. Elections Comm'n*, No. 2020AP1930-OA (Wis. Dec. 4, 2020).

¹⁶¹ See *Kistner v. Simon*, No. A20-1486, at 5 (Minn. Dec. 4, 2020); *Johnson v. Sec'y of State*, 951 N.W.2d 310, 310 (Mich. 2020) (mem.).

¹⁶² *In re Hotze*, 627 S.W.3d 642, 643–44 (Tex. 2020); *Jefferson v. Dane County*, 951 N.W.2d 556, 558–60 (Wis. 2020).

¹⁶³ *Bailey v. S.C. State Election Comm'n*, 844 S.E.2d 390, 392–94 (S.C. 2020).

¹⁶⁴ *State ex rel. Riddle v. Oliver*, 487 P.3d 815, 830–31 (N.M. 2021).

¹⁶⁵ *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 192 N.E.3d 379, 384 (Ohio 2022); *Detroit Caucus v. Indep. Citizens Redistricting Comm'n*, 969 N.W.2d 331, 331 (Mich. 2022); *Pentico v. Idaho Comm'n for Reapportionment*, 504 P.3d 376, 378 (Idaho 2022); *Carter v. Chapman*, 270 A.3d 444, 450 (Pa. 2022); *Durst v. Idaho Comm'n for Reapportionment*, 505 P.3d 324, 866 (Idaho 2022); *Schwab v. Klapper*, 505 P.3d 345, 347 (Kan. 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 198 N.E.3d 812, 814 (Ohio 2022) (per curiam); *League of Women Voters of Ohio v. Ohio Redistricting*

high court review of proposed election maps,¹⁶⁶ sometimes asking high courts to substitute their own maps. Indeed, the Supreme Court of Wisconsin did just that,¹⁶⁷ before being reversed by the U.S. Supreme Court on the shadow docket.¹⁶⁸

Various other election issues appeared in original jurisdiction cases. For example, during this period, high courts heard at least thirty-one actions about initiatives and referenda,¹⁶⁹ including

Comm'n, 185 N.E.3d 92, 92 (Ohio 2022) (unpublished table decision); *Johnson v. Wis. Elections Comm'n*, 972 N.W.2d 559, 565 (Wis. 2022); *Hicks v. 2021 Haw. Reapportionment Comm'n*, 511 P.3d 216, (Haw. 2022); *Sheehan v. Or. Legis. Assemb.*, 499 P.3d 1267, 1269 (Or. 2021); *Johnson v. Wis. Elections Comm'n*, 971 N.W.2d 402, 405–07 (Wis. 2022), *rev'd on other grounds sub nom.* *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398 (2022); *In re Interrogatories on Senate Bill 21-247 Submitted by the Colo. Gen. Assemb.*, 488 P.3d 1008, 1011 (Colo. 2021) (en banc); *State ex rel. Kotek v. Fagan*, 484 P.3d 1058, 1059–60 (Or. 2021) (en banc); *Advisory Op. to Gov. re Whether Art. III, Sec. 20(A) of the Fla. Const. Requires the Retention of a Dist. in N. Fla.*, 333 So.3d 1106, 1107–08 (Fla. 2022) (per curiam); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 200 N.E.3d 197, 199 (Ohio 2022) (per curiam); *In re Validity of Senate Bill 563*, 512 P.3d 220, 223 (Kan. 2022); *Neiman v. LaRose*, 207 N.E.3d 607, 609 (Ohio 2022) (per curiam); *Norelli v. Sec'y of State*, 2022 WL 1749182 (N.H. May 27, 2022); *In re Cong. Dists. by N.J. Redistricting Comm'n*, 268 A.3d 299, 302 (N.J. 2022); *Covert v. 2021 Pa. Legis. Reapportionment Comm'n*, 278 A.3d 296, 296 (Pa. 2022) (per curiam) (unpublished table decision); *In re Senate Joint Resol. of Legis. Apportionment 100*, 334 So.3d 1282, 1285 (Fla. 2022).

¹⁶⁶ See *In re Senate Joint Resol.*, 334 So.3d at 1285. The Supreme Court of Florida also denied a request for an advisory opinion on apportionment. *Advisory Opinion to Gov. re Art. III, Sec. 20(A)*, 333 So.3d at 1108.

¹⁶⁷ *Johnson*, 971 N.W.2d at 419.

¹⁶⁸ *Wis. Legislature*, 595 U.S. at 406. See generally VLADECK, *supra* note 42.

¹⁶⁹ *In re State Question No. 813, Initiative Petition No. 429*, 476 P.3d 471, 472 (Okla. 2020); *In re Initiative Petition No. 425, State Question No. 809*, 470 P.3d 284, 286 (Okla. 2020); *State ex rel. Nauth v. Dirham*, 163 N.E.3d 526, 528 (Ohio 2020) (per curiam); *Cottonwood Env'tl. L. Ctr. v. Knudsen*, 505 P.3d 837, 839 (Mont. 2022); *In re State Question No. 820, Initiative Petition No. 434*, 507 P.3d 1251, 1252 (Okla. 2022); *Reclaim Idaho v. Denney*, 497 P.3d 160, 166 (Idaho 2021); *In re State Question No. 807, Initiative Petition No. 423*, 468 P.3d 383, 386 (Okla. 2020), *as corrected* (June 25, 2020); *Arkansans for Healthy Eyes v. Thurston*, 606 S.W.3d 582, 583 (Ark. 2020); *State ex rel. McNally v. Evnen*, 948 N.W.2d 463, 469 (Neb. 2020); *Haugen v. Jaeger*, 948 N.W.2d 1, 3 (N.D. 2020) (per curiam); *Miller v. Thurston*, 605 S.W.3d 255, 256 (Ark. 2020); *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 471 P.3d 607, 612 (Ariz. 2020); *Armstrong v. Thurston*, 652 S.W.3d 167, 171 (Ark. 2022); *Hendrix v. Jaeger*, 979 N.W.2d 918, 920 (N.D. 2022); *In re Titles, Ballot Titles & Submission Clauses for Proposed Initiatives 2021–2022 No. 67, No. 115, & No. 128*, 526 P.3d 927, 928–29 (Colo. 2022); *Meyer v. Knudsen*, 510 P.3d 1246, 1248 (Mont. 2022); *Nichols v. Ziriaux*, 518 P.3d 883, 884 (Okla. 2022); *Salsgiver v. Rosenblum*, 510 P.3d 205, 206 (Or. 2022) (en banc); *State ex rel. Ofsink v. Fagan*, 505 P.3d 973, 974–75 (Or. 2022) (en banc) (per curiam); *In re Title, Ballot Title and Submission Clause for 2019–2020 No. 74*, 455 P.3d 759, 760 (Colo. 2020) (en banc); *In re Title, Ballot Title and Submission Clause for 2019–2020 No. 293*, 466 P.3d 392, 392–93 (Colo. 2020) (en banc); *In re Title, Ballot Title & Submission Clause for 2019–2020 No. 315*, 500 P.3d 363, 365 (Colo. 2020) (en banc); *In re Title, Ballot Title & Submission Clause for 2021–2022 No. 16*, 489 P.3d 1217, 1219 (Colo. 2021) (en banc); *Reprod. Freedom for All v. Bd. of State Canvassers*, 978 N.W.2d 854, 854–55 (Mich. 2022).

seven requests for advisory opinions in the Florida Supreme Court.¹⁷⁰ High courts also heard seven cases about placing candidates on the ballot.¹⁷¹

Sometimes these election-related cases relied on specific grants of jurisdiction related to elections.¹⁷² Others invoked more general authorities,¹⁷³ typically the authority to issue extraordinary writs.¹⁷⁴ Virtually all the election cases involved litigation against government actors, including some with government parties on both sides.¹⁷⁵ Candidates and political parties were also common litigants.¹⁷⁶ And virtually all of these cases were resolved on the basis of state law (in whole or in part),¹⁷⁷ thus insulating the state supreme courts' decisions from U.S. Supreme Court review.¹⁷⁸

Courts in these election-related cases frequently discussed whether original jurisdiction was appropriate. Courts finding original jurisdiction often referred to the exceptional importance

¹⁷⁰ Advisory Op. to Att'y Gen. *re* Prohibits Possession of Defined Assault Weapons, 296 So.3d 376, 378 (Fla. 2020) (per curiam); Advisory Op. to Att'y Gen. *re* Adult Use of Marijuana, 315 So.3d 1176, 1177 (Fla. 2021) (per curiam); Advisory Op. to Att'y Gen. *re* Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing & Other Restrictions, 320 So.3d 657, 658 (Fla. 2021) (per curiam); Advisory Op. to Gov. *re* Implementation of Amend. 4, The Voting Restoration Amend., 288 So.3d 1070, 1072 (Fla. 2020) (per curiam); Advisory Op. to the Att'y Gen. *re* All Voters Vote in Primary Elections for State Legislature, Gov. & Cabinet, 291 So.3d 901, 903 (Fla. 2020) (per curiam); Advisory Op. to the Att'y Gen. *re* Citizenship Requirement to Vote in Fla., 288 So.3d 524, 526 (Fla. 2020) (per curiam); Advisory Op. to the Att'y Gen. *re* Voter Approval of Const. Amendments, 290 So.3d 837, 837–38 (Fla. 2020) (per curiam).

¹⁷¹ *Burgum v. Jaeger*, 951 N.W.2d 380, 382 (N.D. 2020), *as amended* (Jan. 25, 2021); *Mont. Republican Party v. Graybill*, 2020 WL 4669446, at *1 (Mont. Aug. 11, 2020); *Hawkins v. Wis. Elections Comm'n*, 948 N.W.2d 877, 878 (Wis. 2020); *Onstad v. Jaeger*, 949 N.W.2d 214, 216 (N.D. 2020) (per curiam); *In re* Tex. House Republican Caucus PAC, 630 S.W.3d 28, 29 (Tex. 2020) (per curiam); *Berg v. Jaeger*, 948 N.W.2d 4, 6 (N.D. 2020) (per curiam); *State ex rel. DeMora v. LaRose*, 217 N.E.3d 715, 717–18 (Ohio 2022) (per curiam); *In re* Self, 652 S.W.3d 829, 829 (Tex. 2022) (per curiam); *Utah Democratic Party v. Henderson*, 523 P.3d 180, 182 (Utah 2022) (per curiam).

¹⁷² *See, e.g., League of Women Voters of Ohio*, 198 N.E.3d at 823 (relying on OHIO CONST. art. XI, § 9).

¹⁷³ *See, e.g., Johnson*, 972 N.W.2d at 585 (relying on WIS. CONST. art. IV, § 4).

¹⁷⁴ *See, e.g., Schwab*, 505 P.3d at 348 (relying on KAN. CONST. art. 3, § 3).

¹⁷⁵ *See* Appendix.

¹⁷⁶ *See, e.g., Jefferson*, 951 N.W.2d at 558; *Hawkins*, 948 N.W.2d at 877; *Mont. Republican Party*, 2020 WL 4669446, at *1.

¹⁷⁷ My best reading is that only two of the election-related cases raised issues solely of federal law.

¹⁷⁸ *See* 28 U.S.C. § 1257; *see also, e.g., Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976) (“We are, of course, bound to accept the interpretation of [state] law by the highest court of the State.”); *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945) (explaining that the Supreme Court may not review state court decisions on federal law that are also based on “adequate and independent state grounds”).

of, and public interest in, these disputes.¹⁷⁹ Sometimes, though, courts would decline to hear these cases in favor of a lower court,¹⁸⁰ or for another reason.¹⁸¹

B. COVID-19 Cases

Lawsuits challenging COVID-19 mitigation measures also invoked the original jurisdiction of state supreme courts. The Appendix includes citations to twenty-three such cases from this less-than-three-year period.¹⁸²

Sometimes, original jurisdiction would be invoked to address intergovernmental conflicts over COVID-19-related questions. This could involve questions of executive-versus-legislative authority,¹⁸³ challenges to judicial administration¹⁸⁴ or legislative procedure,¹⁸⁵ or requests for an advisory opinion about legislative power.¹⁸⁶

Other times, private parties challenging restrictions would sue state actors in the high court. For example, private plaintiffs sought to undo COVID-19-related restrictions in the supreme courts of New Hampshire, Texas, and Wisconsin,¹⁸⁷ and others asked the Ohio Supreme Court to order the legislature to address the alleged intrusions of COVID-19 mitigation.¹⁸⁸ Political parties, candidates, and other political groups used original jurisdiction to challenge COVID-19-related election policies.¹⁸⁹ There also

¹⁷⁹ See, e.g., *Bailey*, 844 S.E.2d at 392; *Johnson*, 972 N.W.2d at 569; *In re Interrogatories on Senate Bill 21-247 Submitted by the Colo. Gen. Assemb.*, 488 P.3d at 1016–17; *Berg*, 948 N.W.2d at 7; *In re Interrogatory on House Joint Resol. 20-1006*, 500 P.3d 1053, 1061 (Colo. 2020) (en banc).

¹⁸⁰ See *supra* note 158 (citing Wisconsin cases).

¹⁸¹ See, e.g., *Hawkins*, 948 N.W.2d at 880 (declining to exercise original jurisdiction due to insufficient time to grant parties relief).

¹⁸² See Appendix.

¹⁸³ E.g., *Kelly v. Legis. Coordinating Council*, 460 P.3d 832, 834 (Kan. 2020) (per curiam); *Wis. Legislature v. Palm*, 942 N.W.2d 900, 905 (Wis. 2020).

¹⁸⁴ E.g., *People v. Lucy*, 467 P.3d 332, 334 (Colo. 2020) (en banc).

¹⁸⁵ See e.g., *Pirtle v. Legis. Council Comm. of N.M. Legislature*, 492 P.3d 586, 588 (N.M. 2021); *Op. of the Justs.*, 247 A.3d 831, 833–34 (N.H. 2020).

¹⁸⁶ See, e.g., *In re Interrogatory on H.J. Res. 20-1006*, 500 P.3d at 1056.

¹⁸⁷ *In re Whitman Operating Co.*, 265 A.3d 1229, 1233 (N.H. 2021); *In re Hotze*, 629 S.W.3d 146, 147 (Tex. 2020); *James v. Heinrich*, 960 N.W.2d 350, 355 (Wis. 2021).

¹⁸⁸ *State ex rel. Johnson v. Ohio State Senate*, 200 N.E.3d 1077, 1079 (Ohio 2022) (per curiam); *State ex rel. Jones v. Ohio State H.R.*, 200 N.E.3d 1071, 1073 (Ohio 2022) (per curiam).

¹⁸⁹ *In re Hotze*, 627 S.W.3d at 643–44; *Jefferson*, 951 N.W.2d at 558; *Bailey*, 844 S.E.2d at 391; *Arizonans for Second Chances, Rehab., & Pub. Safety*, 471 P.3d at 612–13.

were original jurisdiction cases related to prison conditions: requests by individual inmates in Hawaii were denied,¹⁹⁰ as was a suit by the Pennsylvania Prison Society,¹⁹¹ but an action filed by public defenders on behalf of Hawaii inmates was partially successful.¹⁹²

Most COVID-19-related cases invoked original jurisdiction to issue extraordinary writs or other general grants of authority.¹⁹³ As with the election cases, courts routinely determined that these COVID-19-related actions merited the exercise of discretionary jurisdiction,¹⁹⁴ though courts occasionally exercised their discretion to decline jurisdiction.¹⁹⁵ And, again, these cases turned on questions of state law.¹⁹⁶

C. Abortion

Finally, state high courts have used their original jurisdiction to address abortion and reproductive freedom.

To study abortion cases, I expanded the search window beginning in January 2020 through August 2023. The simple reason is that the Supreme Court's *Dobbs* decision, announced in June 2022,¹⁹⁷ set off a series of litigations that spilled into 2023, and these cases are sufficiently important to the modern uses of original jurisdiction to be included here.

My search identified eleven abortion-related original actions,¹⁹⁸ falling into two categories. First, as mentioned in the

¹⁹⁰ *Jones v. State*, 2020 WL 5821004, at *1 (Haw. Sept. 30, 2020); *Mahuiki v. State*, 2020 WL 5821002, at *1 (Haw. Sept. 30, 2020).

¹⁹¹ *In re Pa. Prison Soc'y*, 228 A.3d 885, 887 (Pa. 2020) (per curiam) (rejecting a petition seeking the release of certain classes of prisoners to prevent the spread of COVID-19).

¹⁹² *In re Individuals in Custody of State*, 2021 WL 4762901, at *1, *8 (Haw. Oct. 12, 2021).

¹⁹³ See, e.g., *Kelly*, 460 P.3d at 837; *Arizonans for Second Chances, Rehab., & Pub. Safety*, 471 P.3d at 616. Two actions arose from requests for advisory opinions. See *In re Interrogatory on H.J. Res. 20-1006*, 500 P.3d at 1069; *Op. of the Justs.*, 247 A.3d at 833–34.

¹⁹⁴ See, e.g., *In re Interrogatory on H.J. Res. 20-1006*, 500 P.3d at 1056; *Wis. Legislature*, 942 N.W.2d at 907; *Bailey*, 844 S.E.2d at 391.

¹⁹⁵ See, e.g., *Mahuiki*, 2020 WL 5821002, at *1.

¹⁹⁶ See *supra* note 177 and accompanying text. None of the COVID-19 cases appears to have raised exclusively federal law issues.

¹⁹⁷ See generally *Dobbs*, 142 S. Ct. 2228.

¹⁹⁸ *Planned Parenthood S. Atl. v. State*, 882 S.E.2d 770, 774 (S.C. 2023); *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1147 (Idaho 2023); *Okla. Call for Reprod. Just. v. Drummond*, 526 P.3d 1123, 1126–27 (Okla. 2023) (per curiam); *Okla. Call for Reprod. Just. v. State*, 531 P.3d 117, 122 (Okla. 2023) (per curiam); *State ex rel. Preterm-Cleveland v. Yost*, 194 N.E.3d 375, 375 (Ohio 2022) (unpublished table decision); *In re*

Introduction, four state supreme courts (in six cases) received requests for original jurisdiction related to abortion.¹⁹⁹ Five of the six cases were filed entirely after *Dobbs*; in Idaho, the Supreme Court consolidated three writ petitions related to abortion, one of which was filed before *Dobbs* and two of which were filed after. Five of these cases involved petitions for writs, with the second South Carolina case being a general original matter. The courts reached various conclusions: Oklahoma protecting reproductive freedom; Idaho upholding a state law limiting it; South Carolina doing both, in short succession; and Ohio declining jurisdiction.

Of particular note, while the Ohio Supreme Court declined jurisdiction, the Oklahoma Supreme Court went out of its way to explain why it took the case:

This Court has discretion in determining whether to assume jurisdiction over a controversy in which both this Court and the district courts have concurrent jurisdiction. Two themes run through most cases where original jurisdiction has been assumed: 1) the matter concerns the public interest, i.e., the case is *publici juris* in nature; and 2) there must be some urgency or pressing need for an early decision. Here there is no question whether the matter is *publici juris* in nature, dealing as it does with laws that affect the right of a woman to terminate a pregnancy. We also believe there is a pressing need to rule on this matter as soon as possible due to the many challenges to laws which affect abortion following the recent *Dobbs* opinion and their effects on the people of this state. The Oklahoma Constitution gives the Supreme Court the authority to determine jurisdiction and such determination is final. Original jurisdiction is assumed.²⁰⁰

The explanation of relevant factors is consistent with the practice of other state courts described above, and the court's approach expressly links the exercise of discretion to the court's concurrent jurisdiction.²⁰¹

Morris, 663 S.W.3d 589, 591 (Tex. 2023); *Reprod. Freedom for All*, 978 N.W.2d at 854–55; State *ex rel.* DeBlase v. Ohio Ballot Bd., 2023 WL 3749300, at *7–8 (Ohio June 1, 2023) (per curiam); Planned Parenthood S. Atl. v. State, 892 S.E.2d 121, 125 (S.C. 2023).

¹⁹⁹ *Planned Parenthood S. Atl.*, 882 S.E.2d at 775; *Planned Parenthood Great Nw.*, 522 P.3d at 1157; *Drummond*, 526 P.3d at 1127; *Okla. Call for Reprod. Just.*, 531 P.3d at 123; State *ex rel. Preterm-Cleveland*, 194 N.E.3d at 375.

²⁰⁰ *Drummond*, 526 P.3d at 1127 (citations omitted).

²⁰¹ See *supra* Part I.C–I.D.

The other five cases related to abortion also postdate *Dobbs*, and they address issues related to elections.²⁰² In a number of states, abortion-rights advocates have taken to the ballot box to protect reproductive freedom. In four cases, opponents have asked the supreme court, in its original jurisdiction, to keep abortion off the ballot. In Michigan, opponents of a ballot initiative sought to keep it off the ballot because the petition circulated did not include sufficient space between the words.²⁰³ In Ohio, opponents claimed the proposal violated the single-subject rule,²⁰⁴ and separately claimed that the initiative failed to properly specify the existing language that would be amended.²⁰⁵ And in Texas, a proposed amendment to the San Antonio city charter that sought, among other legal changes, to limit prosecutions related to abortion was challenged on various procedural grounds.²⁰⁶ The supreme courts in all of these cases rejected the challenges. Finally, in a fifth case, proponents of an Ohio abortion-rights amendment brought an original action in the state supreme court challenging the ballot language adopted by the state Ballot Board as misleading.²⁰⁷ The court ordered modest changes to the ballot language but otherwise rejected the request.²⁰⁸

III. RECENT LEGISLATION

Not only is the law of original jurisdiction frequently invoked by litigants, but it is also the frequent subject of legislative attention across the country. This Part reviews those efforts, after first describing the wider context of court curbing legislation.

²⁰² *In re Morris*, 663 S.W.3d at 591–92; *Reprod. Freedom for All*, 978 N.W.2d at 854; *State ex rel. DeBlase*, 2023 WL 3749300, at *1. Because two of these cases fall outside of the 2020–2022 window, they are not counted in the total of “elections” cases above.

²⁰³ *Reprod. Freedom for All*, 978 N.W.2d at 854. Chief Justice Bridget Mary McCormack referred to the challenge as “a game of gotcha gone very bad” and lamented, “[w]hat a sad marker of the times.” *Id.* at 856 (McCormack, C.J., concurring). For further commentary, see Leah Litman, *It’s Not Just Abortion Rights. Michigan Republicans Are Undermining Democracy*, SLATE (Sept. 1, 2022), <https://perma.cc/VDA7-X7ZR>.

²⁰⁴ *State ex rel. DeBlase*, 2023 WL 3749300, at *5.

²⁰⁵ *Giroux v. Comm. Representing the Petitioners with Respect to the Initiative Pet. Proposing an Amend. to the Ohio Const. Entitled the Right to Reprod. Freedom with Prots. for Health & Safety*, 2023 WL 5163291, at *2 (Ohio Aug. 11, 2023) (per curiam).

²⁰⁶ *In re Morris*, 663 S.W.3d at 592.

²⁰⁷ Complaint of Relators at *1, *State ex rel. Ohioans United for Reprod. Rights v. Ohio Ballot Bd.*, 2023 WL 5575590 (Ohio Aug. 28, 2023) (No. 2023-1088).

²⁰⁸ *State ex rel. Ohioans United for Reprod. Rights v. Ohio Ballot Bd.*, 2023 WL 6120070 (Ohio Sept. 19, 2023).

A. Court Curbing Context

“Court curbing” describes legislative efforts to reduce the power of courts.²⁰⁹ It includes efforts to change the makeup of courts (such as court-packing),²¹⁰ to remove cases from their jurisdiction (“jurisdiction stripping”),²¹¹ or to limit how they decide cases (such as prohibiting citations to foreign law).²¹²

A recent study by political scientist Meghan Leonard identified more than 1,200 state court-curbing bills from 2008 to 2016.²¹³ Leonard observed that this trend is of particular importance because of the “often undemocratic or anti-judicial independence nature of the legislation,”²¹⁴ though she suggested that many of these proposals are more about signaling and position taking than actually making law.²¹⁵ Where such laws were adopted, Leonard suggested that state legislatures changed the law for political reasons, that is, “to ensure policy outcomes are closer to their preferences.”²¹⁶

B. Original Jurisdiction Legislation

Leonard’s dataset does not include bills related to original jurisdiction,²¹⁷ even though, for reasons described below, these bills might be seen as reducing court authority. Therefore, this Article collects recently proposed and enacted state laws related to original jurisdiction. Laws were collected using multiple Westlaw databases and additional sources.²¹⁸ I relied on Westlaw’s database of enacted laws from 2010 to the present; for proposed but not enacted laws, Westlaw’s results go back to 2020.

This study identified fifty proposed or enacted laws.²¹⁹ A full list of such laws is provided in the Appendix. The fifty laws include twenty that were adopted and thirty that were proposed but

²⁰⁹ See generally, e.g., Leonard, *supra* note 51 (collecting sources); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465 (2018).

²¹⁰ Grove, *supra* note 209, at 505.

²¹¹ *Id.* at 517–18.

²¹² Leonard, *supra* note 51, at 488.

²¹³ *Id.* at 483–85.

²¹⁴ *Id.* at 484.

²¹⁵ *Id.* at 486, 497.

²¹⁶ *Id.* at 498.

²¹⁷ See generally Leonard, *supra* note 43. I confirmed this result by reviewing Leonard’s dataset and emailing directly with Leonard. Email from Prof. Meghan Leonard to Prof. Zachary Clopton (Aug. 18, 2022) (on file with author).

²¹⁸ Of particular use were various Westlaw databases under the heading Proposed & Enacted Legislation.

²¹⁹ See Appendix.

not adopted.²²⁰ This number, it should be noted, is a small fraction of Leonard's dataset, though given the low salience of original jurisdiction, it is hard to say whether this is more or less than one might predict.

In any event, the fifty proposed or enacted laws come from twenty-three different states: Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Kansas, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, and Washington.²²¹

These laws addressed a wide range of topics. As above, elections were quite common. Twenty-seven laws, more than half of the results, related to election issues. Sixteen provided original jurisdiction for challenges to reapportionment or redistricting,²²² with three more providing original jurisdiction for actions to remove a member of a redistricting commission.²²³ Five related to ballots, referenda, or initiatives.²²⁴

Two other categories appeared regularly. Four laws related to bonds,²²⁵ and five laws provided for original jurisdiction for challenges to the constitutionality of the act being adopted.²²⁶

A few other proposed or enacted laws stood out. A proposal for cap-and-trade regulations in Oregon included original jurisdiction for challenges to those rules.²²⁷ In 2019, Arkansas adopted a law providing for original jurisdiction over state law challenges to the drugs used in lethal injections.²²⁸ Two proposals in Texas would have interjected the high court in interbranch disputes, providing original jurisdiction for actions brought by legislators challenging the governor's declaration of an emergency²²⁹ or the governor's election-related actions.²³⁰ In South Carolina, the legislature proposed and later adopted a law allowing the President of the Senate or Speaker of the House to bring an action on behalf

²²⁰ *See id.*

²²¹ *See id.*

²²² *See id.*

²²³ *See id.*

²²⁴ *See* Appendix.

²²⁵ MINN. STAT. § 16A.965 (2013); MINN. STAT. § 16A.99 (2011); MINN. STAT. § 16A.96 (2012) (repealed 2023); OKLA. STAT. tit. 74, § 9079 (2021).

²²⁶ TEX. REV. CIV. STAT. ANN art. 6243a-1; H.B. 1875, 87th Leg. (Tex. 2021); 24 PA. STAT. § 20-2013-B; 72 PA. STAT. § 8712-G.1; 72 PA. STAT. § 8713-F.

²²⁷ S.B. 56, 81st Leg., 2021 Reg. Sess. (Or. 2021).

²²⁸ ARK. CODE ANN. § 5-4-617.

²²⁹ S.J. Res. 45, 87th Leg. (Tex. 2021).

²³⁰ S.J. Res. 60, 87th Leg. (Tex. 2021).

of their legislative chamber against an election official or for removal of an election commission member.²³¹ In Connecticut, a proposal called for original jurisdiction to pass on decisions by the state General Assembly reviewing election-related actions by the Attorney General, but only in the final ninety days before an election.²³²

More unusually, in 2021, a New York legislator proposed a bill dividing New York into three autonomous regions and providing original jurisdiction for disputes among the new regional governors or regions.²³³ In 2022, a Texas legislator proposed a bill giving jurisdiction to any court in the state, including the state supreme court, to hear actions seeking a declaration that a federal action violates the “plain meaning of the text of the United States Constitution and any applicable constitutional doctrine as understood by the framers of the constitution.”²³⁴

Two further themes merit attention. First, as above, virtually all of the proposed or enacted laws anticipated lawsuits involving government parties—as plaintiffs, as defendants, or as both.²³⁵ Some were even limited to government parties, such as the laws permitting legislative suits mentioned above.²³⁶

Second, only one of fifty laws restricted original jurisdiction: Ohio adopted a law repealing then-existing original jurisdiction over constitutional challenges related to video lottery terminals.²³⁷ Every other proposed or enacted law called for the expansion of original jurisdiction.²³⁸

Finally, though not technically proposed or enacted *legislation*, a recent episode in Wisconsin merits attention. Redistricting in Wisconsin is often contentious and often involves litigation. After the 2000 Census, lawsuits were filed in state and federal courts, including an original action in the state supreme court

²³¹ S.B. 236, 124th Gen. Assemb. Sess. (S.C. 2022) (proposed law); 2022 S.C. Acts 150 (codified in scattered sections of the S.C. CODE).

²³² H.B. 5540, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021).

²³³ Assemb. Con. Res. 4446, 2021–2022 Reg. Sess. (N.Y. 2021); S. Con. Res. 4541, 2021–2022 Reg. Sess. (N.Y. 2021).

²³⁴ H.B. 384, 88th Leg. (Tex. 2022).

²³⁵ See Appendix.

²³⁶ See *supra* notes 229–31 and accompanying text.

²³⁷ 2012 Ohio Laws 126 (Am. Sub. H.B. 386) (codified at OHIO REV. CODE ANN. § 3770.21).

²³⁸ See Appendix.

filed by Republican legislative leaders.²³⁹ The state supreme court ultimately denied the petition, deferring to the federal court.²⁴⁰ In anticipation of the 2020 redistricting, and in hopes of encouraging the state supreme court to handle any judicial challenge, one of those lawmakers (now retired) filed a petition in the state supreme court to adopt rules of procedure to govern original actions on redistricting.²⁴¹ The court, though, denied the petition—there would be no special rules for original redistricting actions.²⁴²

IV. FUNCTIONAL ANALYSIS

Original jurisdiction exists in most states, is invoked in important cases, and has been the subject of recent legislative attention. What, then, should we make of original jurisdiction in the states?

As noted in the Introduction, none of the theories of original jurisdiction in the U.S. Supreme Court has much purchase on state original jurisdiction.²⁴³ Instead, a more functional account is appropriate. This Part offers such an account in two steps. It first considers the more neutral, procedural effects of original jurisdiction. It then turns to the more dynamic, political effects of original jurisdiction. This review demonstrates the important ways that original and appellate jurisdiction differ. In other words, it shows that, even if the same case reaches a state's supreme court, it matters how it gets there.

A. Procedural Effects

First regarding the procedural account, a switch from hierarchical litigation to original jurisdiction has implications for three aspects of the legal process: fact-finding, appellate review, and speed.

²³⁹ *Jensen v. Wis. Elections Bd.*, 639 N.W.2d 537, 542–43 (Wis. 2002) (per curiam) (declining jurisdiction in part because of a pending federal case). *See also generally* Baumgart v. Wendelberger, 2002 WL 34127471 (E.D. Wis. July 11, 2002) (per curiam).

²⁴⁰ *Jensen*, 639 N.W.2d at 542–43.

²⁴¹ Petition from Scott Jensen and Wisconsin Institute for Law & Liberty at 2, *In re* Petition for Proposed Rule to Amend Wis. Stat. § 809.70 (Relating to Original Actions), No. 20-03 (Wis. June 2, 2020) [hereinafter *Jensen* Petition].

²⁴² *In re* Pet. for Proposed Rule to Amend Wis. Stat. § 809.70 (Relating to Redistricting), No. 20-03, at 5 (Wis. May 14, 2021).

²⁴³ *See supra* note 27 and accompanying text.

1. Fact-finding.

In the typical litigation, fact-finding is the province of trial courts. Trial courts have rules of procedure tailored to fact-finding.²⁴⁴ Trial judges have experience managing fact-finding and ruling on discovery and evidentiary issues.²⁴⁵ And trial judges (presumably) have reasonable expectations, grounded in experience, about the speed and scope of appropriate fact-finding.

Supreme courts have none of these. Supreme courts typically lack rules for fact-finding or experience with it. As the U.S. Supreme Court explained: “This Court is [] structured to perform as an appellate tribunal, ill-equipped for the task of factfinding.”²⁴⁶ These cases also pose thorny questions about the jury right in original actions.²⁴⁷ The same is true in the states. And as long as original jurisdiction remains exceptional, we should expect that supreme courts will be less well equipped than trial courts to conduct fact-finding.²⁴⁸

This is the first key procedural difference in original jurisdiction: original jurisdiction shifts fact-finding from experienced trial courts to less-experienced supreme courts.²⁴⁹

That said, high courts can mitigate some of these results by delegating fact-finding to special masters or other judicial adjuncts.²⁵⁰ These fact finders could be trial judges themselves. The Wyoming court rules, for example, provide that its supreme court

²⁴⁴ See generally, e.g., FED. R. CIV. P.

²⁴⁵ See generally Kevin M. Clermont, *A Theory of Factfinding: The Logic for Processing Evidence*, 104 MARQ. L. REV. 351 (2020) (offering a theory on how judges should find facts, and collecting sources).

²⁴⁶ *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971).

²⁴⁷ Cf. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 17 FEDERAL PRACTICE & PROCEDURE § 4054 (3d ed. 2023) [hereinafter WRIGHT & MILLER, 17 FEDERAL PRACTICE] (citations omitted):

Jury trial remains a theoretical possibility in original actions [in the U.S. Supreme Court] Jury trials were in fact held in three eighteenth century cases, only one of which is reported The Court has also provided a few scattered references to jury trial, and an ambiguous statement suggesting doubts as to the extent of the right to jury trial. The prospect of a jury trial conducted by nine justices at the expense of other cases is appalling.

²⁴⁸ Despite the numerous examples above, I think it is fair to say that original jurisdiction is exceptional.

²⁴⁹ The same could be said about some uses of the so-called shadow docket, well covered in the U.S. Supreme Court but only recently gaining notice in the states. See Adam Sopko, *Invisible Adjudication in State Supreme Courts*, 102 N.C. L. REV. (forthcoming 2024) (manuscript at 6) (on file with author).

²⁵⁰ See, e.g., CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 9C FEDERAL PRACTICE & PROCEDURE §§ 2601–15 (3d ed. 2023) [hereinafter WRIGHT & MILLER, 9C FEDERAL PRACTICE].

sitting in original jurisdiction may direct a district judge to hold a hearing to make findings of fact.²⁵¹ In a few of the election and COVID-19 cases described above, high courts outsourced fact-finding to another judge, special master, or other judicial adjunct.²⁵² There are costs to delegating the judicial function,²⁵³ but it should be acknowledged that high courts can choose to enlist more experienced fact finders.

It is also important to acknowledge that fact-finding is not equally important in every case. There may be cases that pose purely legal questions, where the finding of facts is not relevant.²⁵⁴ Perhaps this is what legislators had in mind when approving original jurisdiction for advisory opinions.²⁵⁵ And some courts seem to exercise their discretion in original actions in light of whether extensive fact-finding is required.²⁵⁶

Further, even when fact-finding is required to resolve an individual case, those facts might be less relevant to courts' so-called "law declaration" function.²⁵⁷ If, as some argue, high courts are less interested in resolving cases than declaring what the law

²⁵¹ WYO. R. APP. P. 20. The proposed Wisconsin court rule on original jurisdiction for redistricting cases also provided for the use of special masters. Jensen Petition at 3.

²⁵² See, e.g., *Miller v. Thurston*, 605 S.W.3d 255, 258 (Ark. 2020); *Arkansans for Healthy Eyes v. Thurston*, 606 S.W.3d 582, 584 (Ark. 2020); *Berg v. Jaeger*, 948 N.W.2d 4, 7 (N.D. 2020) (per curiam); *Onstad v. Jaeger*, 949 N.W.2d 214, 216 (N.D. 2020) (per curiam); *Norelli v. Sec'y of State*, 2022 WL 1749182, at *1 (N.H. May 27, 2022).

²⁵³ See, e.g., *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 815 (7th Cir. 1942) ("[L]itigants prefer, and are entitled to, the decision of the judge of the court before whom the suit is brought. Greater confidence in the outcome of the contest and more respect for the judgment of the court arise when the trial is by the judge."); see also WRIGHT & MILLER, 9C FEDERAL PRACTICE, *supra* note 250, § 2603.

²⁵⁴ See, e.g., *Brown v. Gianforte*, 488 P.3d 548, 556 (Mont. 2021) (explaining that original jurisdiction is appropriate for purely legal questions).

²⁵⁵ See *supra* Part I.B.

²⁵⁶ See, e.g., *State ex rel. Peterson v. Shively*, 963 N.W.2d 508, 520 (Neb. 2021) (denying a motion for leave to commence an original action after the parties were unable to reach a complete stipulation of the facts); *Green for Wis. v. State Elections Bd.*, 723 N.W.2d 418, 419 (Wis. 2006) ("Because this court is not a fact-finding tribunal, it generally will not exercise its original jurisdiction in matters involving contested issues of fact."); *People ex rel. Jones v. Robinson*, 101 N.E.2d 100, 101 (Ill. 1951) ("[T]his court will not assume jurisdiction of an original action if the pleadings present an issue of fact.").

²⁵⁷ See generally Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401 (2013); Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49 (2010).

is,²⁵⁸ then the accuracy of facts presented is perhaps less significant to the courts' outputs.²⁵⁹ These statements might be cold comfort to litigants before a law-declaring court, but they are certainly relevant to the designers of the legal system. This emphasis on law declaration, too, coheres with the grants of original jurisdiction that look more like advisory opinion requests than disputes between particular parties.²⁶⁰

In short, then, original jurisdiction can relocate fact-finding to supreme courts. Whether this matters will depend on the nature of the dispute and the purpose that jurisdiction is meant to serve.

2. Appellate review.

Original jurisdiction not only imposes on high courts the duty to find facts, but it also may take away the ability of the high court—or any court—to engage in appellate review.

Regardless of debates about the value of appellate review, it is descriptively accurate to say that high courts review judgments when sitting in their appellate jurisdiction but not in their original jurisdiction.²⁶¹ The availability of special masters means that some original jurisdiction cases will involve some aspects of appellate review.²⁶² But not all cases have those masters, and when

²⁵⁸ See, e.g., Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 499–508 (2009) (defending actions by judges that raise legal claims and arguments as consistent with law pronouncements and adversary theory); Monaghan, *supra* note 39, at 679–85.

²⁵⁹ See, e.g., Eric Berger, *When Facts Don't Matter*, 2017 BYU L. REV. 525, 561–81.

²⁶⁰ See *supra* Part I.B.

²⁶¹ Many original jurisdiction cases will not be candidates for U.S. Supreme Court review, so the state high court is the last stop. See *supra* note 178 and accompanying text. For more on the U.S. Supreme Court, see *infra* Part IV.B.3.

Interestingly, at the New York State ratifying convention, Lansing proposed an amendment to the U.S. Constitution providing a version of appellate review for the U.S. Supreme Court's original jurisdiction:

That persons aggrieved by any judgment, sentence, or decree, of the Supreme Court of the United States, in any cause in which that court has original Jurisdiction, with such exceptions, and under such regulations, as the Congress shall make concerning the same, shall, upon application, have a commission, to be issued by the President of the United States to such men learned in the law as he shall nominate, and by and with the advice and consent of the Senate appoint, not less than seven, authorizing such commissioners, or any seven or more of them, to correct the errors in such judgment, or to review such sentence and decree, as the case may be, and to do justice to the parties in the premises.

See *Commission to Revise Judgement of Supreme Court*, AMENDS. PROJECT, <https://perma.cc/GFP3-4VDR>.

²⁶² See *supra* notes 252–53 and accompanying text.

they do, many special masters are not ruling on every issue (including on dispositive issues of law).²⁶³

The lack of appellate review presents at least two process consequences. First, and perhaps most obviously, the lack of appellate review means there is no second opinion.²⁶⁴ Classic justifications of appellate review focus on the advantages of being the second set of eyes on a case, double-checking the findings of the lower court.²⁶⁵ With original jurisdiction, these benefits—if they exist—are lost.²⁶⁶

Second, the lack of appellate review means that there is less opportunity for “percolation” on common questions.²⁶⁷ The Supreme Court of the United States, for example, routinely waits until there is a circuit split before granting certiorari.²⁶⁸ The idea is that allowing multiple courts to address an issue will help ensure that it is fully ventilated and that all relevant arguments are presented.²⁶⁹

One potential countervailing force is the presence of amici curiae.²⁷⁰ In the context of the U.S. Supreme Court, a robust “amicus

²⁶³ See, e.g., *Onstad*, 949 N.W.2d at 216 (discussing the use of a trial judge to find facts only relating to how long a candidate had been a resident of the state).

²⁶⁴ See, e.g., Oldfather, *supra* note 257, at 49–50; Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 416–17 (1987); Levy, *supra* note 257, at 427 (“Appellate review” bears its name precisely because the expectation is that the courts will review, and then correct if necessary, the work of lower courts and agencies.”). See generally Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435 (2011).

²⁶⁵ Cf. Vermeule, *supra* note 264, at 1449–57.

²⁶⁶ See, e.g., *Wis. Legislature v. Palm*, 942 N.W.2d 900, 972 (Wis. 2020) (Hagedorn, J., dissenting) (“We risk serious error when we issue broad rulings based on legal rationales that have not been tested through the crucible of adversarial litigation. When accepting an original action, this danger is even greater.”).

²⁶⁷ See, e.g., Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 719 (1984):

A managerial conception of the Court’s role embraces lower court percolation as an affirmative value. The views of the lower courts on a particular legal issue provide the Supreme Court with a means of identifying significant rulings as well as an experimental base and a set of doctrinal materials with which to fashion sound binding law.

But see, e.g., Paul M. Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 689 (1990) (“First, we must always remember that perpetuating uncertainty and instability during a process of percolation exacts important and painful costs.” (emphasis in original)).

²⁶⁸ See SUP. CT. R. 10(a) (listing among the factors arguing in favor of certiorari that “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter”).

²⁶⁹ See *supra* note 267 (collecting sources).

²⁷⁰ See generally Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963); Joseph D. Kearney & Thomas W. Merrill, *The Influence of*

machine” may substitute for percolation in lower courts.²⁷¹ Amici can help develop arguments the parties do not make, thus substituting for the multiple prior adjudications that percolation provides.²⁷²

Whether amici are good substitutes for percolation in the states is an open question. One data point is that high courts acknowledged amicus participation in less than half of the recent cases surveyed above.²⁷³ It is fair to say, therefore, that amici participate in some but not all state original jurisdiction cases.

Amicus Curiae Briefs on the Supreme Court, 148 U. PA. L. REV. 743 (2000); Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901 (2016).

²⁷¹ Larsen & Devins, *supra* note 270, at 1901.

²⁷² *Id.* But see Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1784–1802 (2014).

²⁷³ Twenty-four cases acknowledged participation of amici curiae. See *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 471 P.3d 607, 612 (Ariz. 2020); *Arkansans for Healthy Eyes*, 606 S.W.3d at 583; *Bailey v. S.C. State Election Comm’n*, 844 S.E.2d 390, 391 (S.C. 2020); *Burgum v. Jaeger*, 951 N.W.2d 380, 381 (N.D. 2020), *as amended* (Jan. 25, 2021); *Carter v. Chapman*, 270 A.3d 444, 453 (Pa. 2022); *Cottonwood Env’tl. L. Ctr. v. Knudsen*, 505 P.3d 837, 838 (Mont. 2022); *Haugen v. Jaeger*, 948 N.W.2d 1, 1 (N.D. 2020) (per curiam); *In re Hotze*, 627 S.W.3d 642, 643 (Tex. 2020); *In re Tex. H. Republican Caucus PAC*, 630 S.W.3d 28, 28 (Tex. 2020) (per curiam); *James v. Heinrich*, 960 N.W.2d 350, 353 (Wis. 2021); *Jefferson v. Dane County*, 951 N.W.2d 556, 557 (Wis. 2020); *Johnson v. Wis. Elections Comm’n*, 971 N.W.2d 402, 404 (Wis. 2022), *rev’d on other grounds sub nom.* *Wis. Legislature v. Wis. Elections Comm’n*, 595 U.S. 398 (2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, 192 N.E.3d 379, 383 (Ohio 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, 200 N.E.3d 197, 198 (Ohio 2022) (per curiam); *In re Individuals in Custody of State*, 2021 WL 4762901, at *27 n.27 (Haw. Oct. 12, 2021); *Neiman v. LaRose*, 207 N.E.3d 607, 608 (Ohio 2022) (per curiam); *Nichols v. Ziriach*, 518 P.3d 883, 884 (Okla. 2022); *Norelli*, 2022 WL 1749182, at *1; *State ex rel. Franchini v. Oliver*, 516 P.3d 156, 157 (N.M. 2022); *State ex rel. McNally v. Ebben*, 948 N.W.2d 463, 468 (Neb. 2020); *State ex rel. Riddle v. Oliver*, 487 P.3d 815, 818 (N.M. 2021); *Trump v. Evers*, No. 2020AP1971-OA, at 1 (Wis. Dec. 3, 2020); *Wis. Legislature*, 942 N.W.2d at 903 (Wis. 2020); *Wis. Voters All. v. Wis. Elections Comm’n*, No. 2020AP1930-OA, at 1 (Wis. Dec. 4, 2020).

Another ten advisory opinion requests acknowledged briefs that are functionally equivalent to amicus briefs. See *Advisory Op. to Att’y Gen. re Prohibits Possession of Defined Assault Weapons*, 296 So.3d 376, 378 (Fla. 2020) (per curiam); *Advisory Op. to Att’y Gen. re Adult Use of Marijuana*, 315 So.3d 1176, 1178 (Fla. 2021) (per curiam); *Advisory Op. to Att’y Gen. re Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing & Other Restrictions*, 320 So.3d 657, 658 (Fla. 2021) (per curiam); *Advisory Op. to Gov. re Implementation of Amend. 4, The Voting Restoration Amend.*, 288 So.3d 1070, 1074 n.1 (Fla. 2020) (per curiam); *Advisory Op. to Gov. re Whether Art. III, Section 20(A) of the Fla. Const. Requires the Retention of a Dist. in N. Fla.*, 333 So.3d 1106, 1107 (per curiam) (Fla. 2022); *Advisory Op. to the Att’y Gen. re All Voters Vote in Primary Elections for State Legislature, Gov., and Cabinet*, 291 So.3d 901, 904 (Fla. 2020) (per curiam); *Advisory Op. to the Att’y Gen. re Citizenship Requirement to Vote in Fla.*, 288 So.3d 524, 526–27 (Fla. 2020) (per curiam); *Advisory Op. to the Att’y Gen. re Voter Approval of Const. Amends.*, 290 So.3d 837, 838 (Fla. 2020) (per curiam); *In re Interrogatory on H.J. Res. 20-1006*, 500 P.3d 1053, 1059 (Colo. 2020) (en banc); *Op. of the Justs.*, 247 A.3d 831, 835 (N.H. 2020).

3. Timing.

Finally, original jurisdiction may affect the speed with which a high court decision can be obtained.²⁷⁴

At first glance, original jurisdiction should provide for swifter final adjudication. The high court can resolve the case without waiting for the trial and intermediate courts to weigh in before reviewing the case on appeal.

Admittedly, it is at least possible that the high court's fact-finding process will be slower than that of the lower courts—especially because the high court is relatively inexperienced in this endeavor.²⁷⁵ For example, the interstate water dispute between Florida and Georgia filed in the original jurisdiction of the U.S. Supreme Court on September 30, 2013, was not resolved until April 1, 2021—seven and a half years later.²⁷⁶ High courts also could choose to sit on their hands and delay judgment in an original action, perhaps in light of an upcoming election.²⁷⁷

Perhaps a better formulation, then, is that original jurisdiction gives the supreme court the *ability* to provide faster resolution. Further, I think it is fair to assume that lawmakers contemplating original jurisdiction likely imagine that the supreme court will provide faster resolution. This implies that original jurisdiction might be more justified when time is of the essence.

4. Review.

Based on these three factors, one might distill a single principle: the case for original jurisdiction becomes stronger as the case approaches a high-profile advisory opinion for which time is of the essence. Advisory opinions pose questions of law, negating the concern with fact-finding.²⁷⁸ The high salience of a case might induce amicus participation, mitigating concerns with the lack of appellate review and percolation.²⁷⁹ And time being of the essence puts a thumb on the scale for the quickest possible route to resolution.²⁸⁰ These cases also likely avoid thorny questions such as whether the jury right extends to original actions.²⁸¹

²⁷⁴ Here, too, there are similarities to the shadow docket. *See supra* note 249.

²⁷⁵ *See supra* Part IV.A.1.

²⁷⁶ *Florida v. Georgia*, 141 S. Ct. 1175 (2021).

²⁷⁷ *See infra* Part V.B.1 (discussing “avoidance”).

²⁷⁸ *See supra* Part IV.A.1.

²⁷⁹ *See supra* Part IV.A.2.

²⁸⁰ *See supra* Part IV.A.3.

²⁸¹ *See supra* note 247.

These ideas play out in practice. Various high courts have policies to exercise discretion to hear original actions in light of the urgency of the matter and when the questions posed are purely legal.²⁸² Some courts have relied on amici, intervenors, and special masters to mitigate the problems related to fact-finding and the lack of percolation.

A concrete example comes from New Mexico. In March of 2020, in light of the COVID-19 pandemic, twenty-seven county clerks filed an original action seeking to compel the state to mail absentee ballots for the June 2020 primary election to all registered voters.²⁸³ The court allowed the intervention of the state Republican Party, a group of state legislators, and other county clerks, and then requested responses from the governor, the legislature, the state Democratic Party, and the state Libertarian Party.²⁸⁴ The court also received amicus briefs from University of New Mexico law professors, a group of voters, the Navajo Nation, and a collection of civil rights organizations.²⁸⁵ In April, the court heard oral argument and then ruled from the bench to issue an emergency writ to compel the state to mail absentee ballot applications (but not absentee ballots themselves).²⁸⁶ This case involved purely legal questions, for which immediate and final resolution was desirable, and in which multiple additional parties participated.

So, again, original jurisdiction might be most justified for legal questions of urgency.²⁸⁷ Although this iron law of original jurisdiction is appealing in its parsimony, unfortunately it is incomplete. These factors are important—potentially even dispositive in some cases. But the strategic interactions of parties and courts significantly complicate the story.

B. Dynamic Effects

Original jurisdiction has dynamic effects. The key insight is that even if the same dispute could get to the high court via appellate or original jurisdiction, it might not get there in the same

²⁸² See *supra* notes 105–16 and accompanying text.

²⁸³ *State ex rel. Riddle*, 487 P.3d at 822.

²⁸⁴ *Id.* at 818–19.

²⁸⁵ *Id.* at 819.

²⁸⁶ *Id.* at 830–31.

²⁸⁷ There is also a cynical version of this idea: legal questions of urgency, such as decisions about elections, are exactly the sort of situation where the cover of neutral principles is most valuable.

form. The frictions in and around lower court litigation can have real consequences on the high court's agenda.

1. Intralitigation friction.

It almost goes without saying that lower court litigation affects cases and parties.

First, lower court litigation affects the issues ultimately presented to the supreme court. Lower court judges make decisions that affect how the case proceeds. Issues can be waived or forfeited.²⁸⁸ Evidence can be allowed or disallowed, making certain issues more or less consequential.²⁸⁹ In this way, lower courts have a substantial say on the issues the high court hears and the ways they are presented on appeal. They can, to use the expression, "bulletproof" their decisions.²⁹⁰ Original jurisdiction avoids, or at least reduces, these frictions.

Second, lower court litigation also may impose costs on parties. These include not only the monetary and time costs of litigation, but also other burdens that come with litigation. Parties might be compelled to disclose unflattering information, judges might order preliminary relief, and unfavorable decisions might cast parties in a negative light. These effects are sometimes the product of so-called managerial judging,²⁹¹ and they are well established in both public and private law cases.²⁹² In original jurisdiction, the only frictions imposed are those the high court chooses.

These effects may be magnified where lower court judges have different preferences than the high court, including in highly ideological cases. In such cases, it is possible that lower court judges might use their managerial powers to affect the course of litigation in ways that would not happen if the case went directly to the high court. This type of friction was common in high-profile disputes with President Trump's administration. As Professor Z.

²⁸⁸ See, e.g., Monaghan, *supra* note 39, at 693 ("The extent to which the Court's treatment of litigant concessions, stipulations, waivers, and procedural defaults (collectively, 'forfeiture rules') operates to give the Court (not the litigants) control over issue selection may be underappreciated.").

²⁸⁹ See, e.g., *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

²⁹⁰ Cf. Nielson & Stancil, *supra* note 31, at 1143 (describing how lower courts can "cert-proof" their decisions).

²⁹¹ See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

²⁹² See *id.* (public and private); Ahdout, *supra* note 32, at 960 (public); Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1288 (2017) (private).

Payvand Ahdout explained, “[t]hrough routine orders issued mainly by district court judges—concerning everything from discovery, to ordinary case management, to the appointment of defenders—courts have demonstrated the extraordinary ability to force legal and public accountability onto the Executive in suits challenging enforcement lawmaking.”²⁹³ More on this below.²⁹⁴ The point here is that the frictions of lower court litigation matter.

2. Extralitigation developments.

In addition to the ways that lower court litigation changes the case that gets to the high court, what happens outside the courts can change the case as well.

As cases linger in the lower courts, parties may acquire new information that affects their view of the case, its stakes, and its potential resolution.²⁹⁵ Parties acquire information from their opponents through discovery.²⁹⁶ Parties also may acquire information from themselves—when parties are vast organizations, the collection and analysis of information is likely to be an iterative process.²⁹⁷

Extralegal information that may influence the potential for resolution, for example political pressure, also might develop during litigation. The longer the case is in the public eye, the greater the opportunity for such pressure to develop. Indeed, preliminary developments in the lower courts can generate public responses that feed back into the parties’ decision-making.²⁹⁸ The government, for example, might prefer to abandon a case rather than subject an important official to a deposition that could reveal politically damaging information.²⁹⁹ Or a series of lower court losses might create political costs that the sitting administration would prefer to avoid.³⁰⁰

²⁹³ Ahdout, *supra* note 32, at 942.

²⁹⁴ See *infra* Part V.D.2.

²⁹⁵ See generally Bruce L. Hay, *Effort, Information, Settlement, Trial*, 24 J. LEGAL STUD. 29 (1995).

²⁹⁶ See FED. R. CIV. P. 26–37.

²⁹⁷ For example, a lawsuit against a state government might implicate dozens of state agencies. So while the Office of the Attorney General might have notice of the complaint, it takes time for career staff at the Department of Transportation (for example) to appreciate the way their work could be affected by the outcome of the case.

²⁹⁸ See *supra* Part IV.B.1.

²⁹⁹ See Ahdout, *supra* note 32, at 962–93.

³⁰⁰ See *supra* Part IV.B.1.

These possibilities might discourage some parties from filing cases in the lower courts but not in original actions. They also could provide settlement leverage in filed cases, as mounting friction might encourage parties to settle. So by reducing frictions, original jurisdiction may reduce settlements and permit more litigation.³⁰¹

3. Federal courts.

Finally, the choice of original jurisdiction in the states may have effects on the role of federal courts in the same dispute. Two merit attention here.³⁰²

First, state original jurisdiction connects to opportunities for U.S. Supreme Court review. Unlike for federal cases, the U.S. Supreme Court's jurisdiction over state cases is limited to final judgments of state high courts.³⁰³ So if original jurisdiction results in a faster resolution of an issue for which U.S. Supreme Court review is possible, then state original jurisdiction might be a way to hasten U.S. Supreme Court review.³⁰⁴

³⁰¹ Original jurisdiction might further reduce settlement opportunities because of its speed—it simply takes time to negotiate a private resolution. And it might reduce settlement opportunities because parties can avoid the settlement push common in the lower courts. See FED. R. CIV. P. 16; Resnik, *supra* note 291, at 376–77; Diane P. Wood & Zachary D. Clopton, *Managerial Judging in the Courts of Appeals*, 42 REV. LITIG. 87 (2023).

³⁰² A third potential effect has to do with the power to remove cases. Under 28 U.S.C. § 1441, a defendant may remove a “civil action brought in a State court” if the federal district court would have jurisdiction. An original action in the state supreme court could be a civil action brought in a state court, so nothing in the text of the removal statute would seem to prohibit removal in these cases. At least a couple of federal courts have questioned the propriety of removal of cases pending in state appellate courts, though none of these cases address original actions. See, e.g., *Fed. Sav. & Loan Ins. Corp. v. Templeton*, 700 F. Supp. 456, 457–58 (S.D. Ind. 1988) (remanding a case removed from a state court of appeals because the state trial court judgment was *res judicata* and on the bases of federalism and comity); *Fed. Deposit Ins. Corp. v. Sellards*, 731 F. Supp. 1300, 1301 (N.D. Tex. 1990) (collecting cases both ways). *But see* *Fed. Deposit Ins. Corp. v. Ritchie*, 646 F. Supp. 1581, 1584 (D. Neb. 1986) (upholding removal in an appeal to the Nebraska Supreme Court).

³⁰³ Compare 28 U.S.C. § 1257(a) (“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . .”), with *id.* § 1254 (“Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.”).

³⁰⁴ Pfander has suggested a similar maneuver might be available using the state high court's power to issue a writ of prohibition. See James E. Pfander, *Judicial Review of Unconventional Enforcement Regimes*, 102 TEX. L. REV. (forthcoming 2024) (manuscript at 5) (on file with author).

For example, challengers to Wisconsin's redistricting maps sued first in an original action in the state supreme court.³⁰⁵ They lost, but then they appealed their defeat directly to the U.S. Supreme Court, with the Court reversing the state court on the shadow docket.³⁰⁶ The time from oral argument in the state supreme court to U.S. Supreme Court decision was two months.³⁰⁷ That said, my review of state original jurisdiction decisions suggests that a large proportion may be outside the jurisdiction of the U.S. Supreme Court.³⁰⁸

Second, original jurisdiction also has consequences for federal courts when federal and state courts have concurrent jurisdiction.³⁰⁹ Particularly on high-salience topics such as elections or emergency powers, there may be multiple parties seeking to sue, and those parties might elect to proceed in federal and state courts simultaneously.³¹⁰ Because original jurisdiction can be faster than traditional litigation, it might allow the state court system to win any race to judgment.³¹¹ So when the Pennsylvania Secretary of State sought extraordinary jurisdiction in the state supreme court in a mail-in ballots case, one motivation appears

³⁰⁵ *Johnson*, 971 N.W.2d at 419.

³⁰⁶ *Wis. Legislature*, 595 U.S. at 401.

³⁰⁷ *See Johnson*, 971 N.W.2d at 402 (oral argument held on January 19, 2022); *Wis. Legislature*, 595 U.S. at 398 (decision released on March 23, 2022). For another potential example, see *Durst v. Idaho Comm'n for Reapportionment*, 505 P.3d 324 (Idaho 2022), *cert. denied*, 143 S. Ct. 208 (2022).

³⁰⁸ *See supra* notes 177–78, 196 and accompanying text.

³⁰⁹ Federal jurisdiction works on an assumption of concurrent jurisdiction, with federal and state courts open to hearing claims under federal and state law. *See Tafflin v. Levitt*, 493 U.S. 455, 458–59 (1990) (discussing the “deeply rooted presumption in favor of concurrent state court jurisdiction”); *Testa v. Katt*, 330 U.S. 386, 391 (1947).

³¹⁰ This could involve identical claims or simply related ones.

³¹¹ Formally, under the laws of *res judicata*, the first judgment will have claim- and issue-preclusive effect in the later proceedings. *See, e.g., Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507–08 (2001); 28 U.S.C. § 1738 (full faith and credit statute). *See generally* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986). So if original jurisdiction is faster than trial court litigation, then it increases the chances that the state judgment will be preclusive.

Even when *res judicata* does not apply, principles of comity might lead federal or state courts to defer to a prior decision. *See, e.g., Jensen v. Wis. Elections Bd.*, 639 N.W.2d 537, 542 (2002) (per curiam) (“Accepting original jurisdiction would undermine principles of cooperative federalism and federal-state comity . . .”). Again, to the extent original jurisdiction leads to faster judgments, then it increases the chances of deference. Indeed, original jurisdiction decisions might be particularly likely to generate deference. Although I cannot prove this proposition empirically, I think there is reason to suspect that federal courts might be more willing to defer to a state supreme court than to a state trial court.

to have been to get ahead of a parallel case in federal court filed by the Trump campaign.³¹²

4. Review.

Imagine the key question in a dispute is whether the governor has the power to take a certain action. If the parties were forced to take the dispute through the litigation process, then they would have to navigate through the lower courts. For reasons described above, the lower court process might affect how the question looks when it gets to the high court—if it gets there at all. But with original jurisdiction, the party initiating the action can pose that question directly to the high court. The question is clearly presented and free from “vehicle problems,”³¹³ unadulterated by lower court frictions or things that happen outside of court while the case is winding its way through the system. Any frictions come from the high court itself. And if there is a parallel federal action, the original-jurisdiction state case has a better chance of finishing first.

All of this suggests a second principle of original jurisdiction: original jurisdiction presents cleaner questions to the high court than appellate jurisdiction, and thus the case for original jurisdiction is stronger for those who want the high court to answer clean questions as soon as possible.

V. INSTITUTIONAL ANALYSIS

As previewed in the Introduction, the foregoing analysis distilled two principles regarding original jurisdiction. First, the case for original jurisdiction is stronger for important legal questions for which time is of the essence.³¹⁴ Second, original jurisdiction favors those actors who want the high court to answer clean questions.³¹⁵

This Part explores how these principles interact with the relevant institutional players: parties, courts, and legislatures. To build out this institutional model, this Part begins with an analysis of parties (Section A) and courts (Section B). For each of these actors, I explain how their preferences interact with original jurisdiction, and then I discuss how the respective actors exercise

³¹² See *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 352 n.3 (Pa. 2020) (describing a suit in the Western District of Pennsylvania filed by Republican Party organizations).

³¹³ See, e.g., Bert I. Huang, *A Court of Two Minds*, 122 COLUM. L. REV. F. 90, 95 (2022).

³¹⁴ See *supra* Part IV.A.

³¹⁵ See *supra* Part IV.B.

choice under certain versions of original jurisdiction. More precisely, I discuss how party preferences interact with exclusive versus concurrent jurisdiction and how judicial preferences interact with mandatory versus discretionary jurisdiction. This analysis describes courts and parties playing the game once the rules are set.

For many issues in many states, this is enough; no one is changing some generic state constitutional provision that has been on the books for two centuries.³¹⁶ But as demonstrated above,³¹⁷ on some issues, legislators are willing to consider changes—to rewrite the rules of the game. While this rewriting may reflect some neutral principles about the ideal distribution of judicial work,³¹⁸ Section C explores the institutional preferences of legislatures and then considers how those preferences interact with different design features of original jurisdiction.

This Part's approach is one of positive political theory. It explains how institutional interests interact with the law and practice of original jurisdiction. It does not permit facile, normative judgments, such as the argument that states are better off with no original jurisdiction, just as we cannot confidently say that any particular institutional arrangement is always preferable. But this analysis does surface the interests and stakes that could inform normative assessments of individual cases and laws.

A. Parties

The first part of the institutional analysis focuses on parties: When will parties prefer original jurisdiction and how do these preferences interact with exclusive versus concurrent jurisdiction?

1. Party preferences.

To put it simply, original jurisdiction should favor any party who wants clear answers from the high court.

This preference for high court answers has two aspects. First, parties typically want *favorable* answers. So, presumably, parties will benefit from original jurisdiction when the high court is likely

³¹⁶ See *supra* Part I.A; Appendix.

³¹⁷ See *supra* Part III.

³¹⁸ See *supra* Part IV.A.

to side with them. In highly partisan cases, this means that parties will favor original jurisdiction when they are ideologically aligned with the high court.³¹⁹

Second, parties may want quick answers. Parties who are confident they will win in the high court likely will prefer to get there as soon as possible. The idea is simple: Why waste the time and money, and why risk the friction in lower courts, when you can get what you want straight from the high court?³²⁰ Moreover, in states with fixed judicial terms, parties might opt for original jurisdiction when they prefer the current high court to the one looming on the horizon after the next election.³²¹

Conversely, parties that want to avoid or delay high court resolution should prefer the usual litigation hierarchy. When the high court is hostile, parties might hope that the frictions of the lower courts will shape the case in ways that make it harder for the high court to rule against them.³²² Or they may hope that those frictions impose sufficient costs on their opponents such that settlement becomes plausible.³²³ Even if the state supreme court will ultimately rule against them, a party might still benefit from a few months of protection from a trial court's preliminary injunction.³²⁴

So, preference for (or against) original jurisdiction is determined not only by the parties' views of the high court, but also by their relative view of the high court and the lower courts. The more parties prefer high courts to lower courts, the more they will prefer original jurisdiction.

Lower and high court judges may be especially likely to diverge in states where they are selected in different ways or to represent different constituencies.³²⁵ In many states, lower court

³¹⁹ There is a further timing aspect, exacerbated by original jurisdiction, in that parties might make decisions about whether to sue before or after a judicial election in light of the likely composition of the court. See generally Zachary D. Clopton & Katherine Shaw, *Public Law Litigation and Electoral Time*, 2023 WIS. L. REV. 1513.

³²⁰ See *supra* Part IV (discussing how original jurisdiction achieves these ends). Similarly, parties seeking to expedite U.S. Supreme Court review might prefer the speed of original jurisdiction, even if they lose in state court. See *supra* Part IV.B.3.

³²¹ Information on judicial selection in the states is maintained by the Brennan Center for Justice. *Judicial Selection: An Interactive Map*, BRENNAN CTR. JUST. (Oct. 11, 2022), <https://perma.cc/58F6-Y4YZ>.

³²² See *supra* Part IV.B.

³²³ *Id.*

³²⁴ This is why, for example, litigants may pursue so-called universal injunctions against government actions in friendly lower courts, even when the U.S. Supreme Court is likely to reverse the injunction. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2406 (2018).

³²⁵ See *Judicial Selection*, *supra* note 321.

judges are elected locally while high court judges are elected statewide.³²⁶ This is true in Texas and Wisconsin, for example.³²⁷ In some states, entirely different methods are used. For example, in New York and Florida, lower court judges are elected, while high court judges are appointed by the governor and then subject to retention elections.³²⁸ These variations are likely to produce even greater divergence between the state high court and some lower court judges.

These effects are magnified by forum shopping.³²⁹ Forum shopping is defined as “[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard.”³³⁰ Parties disfavored by the high court not only benefit from going to a lower court, but they also likely benefit from being able to shop for the most favorable lower court.³³¹ This might mean, for example, the lower court most eager to provide those frictions that original jurisdiction avoids.³³²

To be sure, jurisdictional and venue rules may limit where plaintiffs may file cases,³³³ but such limits will not always be effective in restricting forum shopping. In big cases,³³⁴ many different plaintiffs are possible, so it is often quite easy for plaintiff-side interests to find a case to satisfy the jurisdictional and venue requirements of their preferred court. For example, in a dispute about absentee ballot access, a voter from any part of the state could be the lead plaintiff, and they might be able to sue an election official located in their district.³³⁵ In other words, many high-profile cases permit essentially boundless forum shopping—unless they are funneled directly to the high court in its original jurisdiction.

³²⁶ For a discussion about the division of authority in states in complex cases, see Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 NW. U. L. REV. 1649, 1655 (2021).

³²⁷ See *Judicial Selection*, *supra* note 321.

³²⁸ See *id.*

³²⁹ See, e.g., Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, 583, 587 (2016) (highlighting “unappreciated virtues” of forum shopping, and collecting related sources).

³³⁰ *Forum-shopping*, BLACK’S LAW DICTIONARY (11th ed. 2019).

³³¹ In federal courts, for example, Democrat-appointed lower court judges created friction for President Trump’s administration in the shadow of a Supreme Court likely to side with the government. See, e.g., Ahdout, *supra* note 32, at 991 (collecting cases).

³³² See *supra* Part IV.B.

³³³ See, e.g., Zachary D. Clopton, *Long Arm “Statutes,”* 23 GREEN BAG 2D 89, 94–95 (2020) (collecting state jurisdictional statutes).

³³⁴ See, e.g., Part II.

³³⁵ See *supra* Part I.A (collecting laws).

2. Party choice: exclusive versus concurrent.

Party preferences for original jurisdiction interact with the question whether the high court's jurisdiction is exclusive or concurrent.

If original jurisdiction is exclusive,³³⁶ then parties have no ability to forum shop. It is the high court or the highway. If original jurisdiction is nonexclusive (i.e., concurrent with the lower courts'),³³⁷ then parties filing lawsuits can choose where to file their cases. They can choose whether to sue in the high court or the trial court, and if the latter, they can choose among lower courts. This ability to forum shop allows initiating parties to make decisions in light of the different judicial-selection methods mentioned above.³³⁸

So, parties that may want to litigate in the lower courts would prefer nonexclusive jurisdiction—leaving open the possibility of going straight to the high court, but also retaining the ability to go somewhere else first. This logic applies to parties who are likely to be plaintiffs in potential actions. Meanwhile, parties that want clear answers from the high court would prefer original jurisdiction, and within original jurisdiction they would prefer it to be exclusive—that way, there is no risk of lower court frictions.

B. Courts

Courts, too, have preferences about original jurisdiction.

The effect of original jurisdiction on the lower courts is straightforward, so I treat it briefly here. The exercise of original jurisdiction disempowers lower court judges because they lose their ability to affect the outcome of litigation either through final judgments or through their management of the case.³³⁹ Losing this influence is presumably more significant when the lower courts diverge from the high court. Indeed, legislatures might be especially attuned to this loss of influence when they are worried about their ideological opponents in the lower courts. More on this below.³⁴⁰

More complex is the effect of original jurisdiction on high courts. The balance of this Section considers the preferences of

³³⁶ See *supra* Part I.D.

³³⁷ See *id.*

³³⁸ See *supra* notes 320–27, 288–91, and accompanying text.

³³⁹ See *supra* Part IV.B.1.

³⁴⁰ See *infra* Part V.D.

high courts and then how mandatory versus discretionary jurisdiction interacts with those preferences.

1. Court preferences.

Reflexively, a grant of jurisdiction would appear to empower high courts because it moves cases into their ambit. This reflex explains why jurisdiction stripping is the quintessential example of court curbing.³⁴¹

Oftentimes this intuition will be correct. High courts may want important cases right away, and they may want clean questions so they can deliver clear answers quickly. This also explains the frequent observation that the U.S. Supreme Court looks for good vehicles to answer important questions on certiorari.³⁴²

So when high courts want to give clear answers, original jurisdiction is empowering. But sometimes high courts do not want to give clear answers. It is well known that courts engage in avoidance maneuvers in order to not decide certain questions,³⁴³ for example because they are too socially or politically controversial.³⁴⁴ Similarly, when courts review issues on appeal, deferential standards of review permit judges to shift responsibility by deferring to lower courts.³⁴⁵ And though not avoidance per se, the ability of some high courts to craft questions presented on appeal gives them further control over their agenda.³⁴⁶

The frictions of lower court litigation often provide high court judges with ready opportunities for these avoidance maneuvers.³⁴⁷ Or to say it another way, original jurisdiction's ability to

³⁴¹ See *supra* Part III.A.

³⁴² See, e.g., H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 265 (1991).

³⁴³ See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1554–55 (2000).

³⁴⁴ See, e.g., PERRY, *supra* note 342, at 253–60; Mark Tushnet, *The Warren Court as History: An Interpretation*, in THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 1, 5 (Mark Tushnet ed., 1993) (describing a certiorari denial in a challenge to Virginia's ban on interracial marriage).

³⁴⁵ See Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, 2012 UTAH L. REV. 1, 43 (offering a theoretical account of the strategic use of standards of review, though finding no effect in the article's dataset).

³⁴⁶ See generally Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793 (2022).

³⁴⁷ To be sure, an unreconstructed legal realist might say that all of this is irrelevant. Speaking about the U.S. Supreme Court, Justice William Brennan said that the most important rule was the “rule of five”—if you had five votes, you could do whatever you wanted. See, e.g., Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV.

present high courts with good vehicles to resolve questions makes it more difficult to decline to answer hard questions. High courts interested in avoidance, therefore, are actually *disempowered* by original jurisdiction, as original jurisdiction at least strains options for avoidance that would be available on appeal.³⁴⁸

To give a simple example, consider the question of whether *Griswold v. Connecticut*³⁴⁹ is still good law after *Dobbs*.³⁵⁰ If the U.S. Supreme Court could hear an original action or advisory opinion request, then members of Congress could simply put the question to the Court: Is there a constitutional right to privacy and, if so, does it prevent states from criminalizing the use of contraception by married people? I suspect there are some Justices on the U.S. Supreme Court who would welcome the opportunity to answer. But other Justices might prefer to avoid this question. If the Court could only address this issue on appeal, then whatever case presented the issue—assuming certiorari was granted—could still be resolved narrowly while passing on the broader questions.

In short, high courts that want to answer should prefer original jurisdiction to appellate jurisdiction. High courts that want to avoid should prefer appellate jurisdiction to original jurisdiction.

748, 763 (1995). But even most legal realists (not to mention legal formalists) acknowledge that legal norms have some effect. And for the reasons just described, the legal norms around appellate review seem to give courts more optionality than in original jurisdiction.

³⁴⁸ I briefly would add that there may be a discontinuity between the effects of original jurisdiction on the court that wants to answer and the court that does not. High courts seeking to avoid questions prefer appellate jurisdiction for the same reason they disfavor original jurisdiction—it is symmetrical. But the inverse is less true. High courts that want to answer questions prefer original jurisdiction, but for them appellate jurisdiction is not so bad—the high court ultimately will have the opportunity to give an answer on appeal. The intuition is that high courts can more easily set the agenda on appeal than in original jurisdiction. And the reason for that asymmetry is that the friction of lower court litigation means that cases on appeal give the high court more to work with—for dodging questions but also for finding them. See Monaghan, *supra* note 39, at 689–711 (demonstrating the various tools that allow the U.S. Supreme Court to set its own agenda in appellate cases). Thus, appellate jurisdiction gives high courts significantly more freedom to choose what questions to answer than original jurisdiction would.

³⁴⁹ 381 U.S. 479 (1965).

³⁵⁰ *Dobbs*, 142 S. Ct. at 2242 (overruling *Roe v. Wade*, 410 U.S. 113 (1973), on grounds that could implicate *Griswold*).

2. Court choice: mandatory versus discretionary.

Mediating high court preference is whether original jurisdiction is mandatory or discretionary.³⁵¹

Mandatory original jurisdiction means that the court must take cases filed. When the court wants to answer, mandatory jurisdiction is fine enough; but when the court wants to avoid, or even wants to retain some flexibility in crafting an answer, then mandatory jurisdiction is at least somewhat constraining.³⁵²

I should add, of course, that mandatory original jurisdiction is only invoked when a case is filed, so we might say that mandatory original jurisdiction shifts agenda-setting power to the parties.³⁵³ For at least some types of disputes, though, the legislature authorizing mandatory jurisdiction can reasonably assume *any* viable case will be filed.³⁵⁴ Challenges to district maps, for example, are very likely to be filed because someone's ox is always being gored—at least one political party might think they will lose seats; at least some candidates will get a less favorable district border.³⁵⁵

While mandatory jurisdiction tracks the previous discussion, discretionary jurisdiction expands the analysis.³⁵⁶ Under discretionary jurisdiction, when the court wants to answer, it accepts; when it wants to avoid, it declines. In this way, the court itself can “forum shop” by deciding whether to accept cases in their original jurisdiction. It is the best of both worlds.³⁵⁷

There are all sorts of factors that might go into the high court's management of its agenda. Some decisions may turn on more neutral factors such as the need for fact-finding.³⁵⁸ Others will reflect more political considerations such as the court's interest in addressing or avoiding hot-button topics, or the timing of

³⁵¹ See *supra* Part I.C (collecting examples).

³⁵² Courts may still retain some flexibility, however. See Monaghan, *supra* note 39, at 705–07 (2012) (discussing how it is now often up to judges, rather than litigants, to decide which questions will be decided).

³⁵³ See *supra* Part V.A.1 (discussing party preferences).

³⁵⁴ See *infra* Part V.D.1 (discussing legislative preferences).

³⁵⁵ See *supra* note 88 and accompanying text (collecting examples of redistricting and reapportionment laws); *supra* note 165 and accompanying text (collecting examples of redistricting and reapportionment cases).

³⁵⁶ See *supra* Part I.C (collecting examples).

³⁵⁷ It is conceivable that discretionary original jurisdiction puts some pressure on courts to accept, but its dominant effect is shifting agenda-setting control to the court.

³⁵⁸ See *supra* Part IV.A.1 (collecting examples).

the next judicial election.³⁵⁹ Either way, discretionary jurisdiction empowers high courts to act upon their own values and interests.

This choice set recalls, but expands on, the literature on agenda setting and certiorari.³⁶⁰ Legal scholars and political scientists have long discussed the certiorari process, arguing about the relative importance of legalistic and strategic considerations.³⁶¹ Legalist considerations include formal rules and informal norms, such as the U.S. Supreme Court's preference for resolving circuit splits.³⁶² On the strategic side, the idea is that Justices vote on certiorari, in light of their policy preferences, on the merits, taking cases that provide good vehicles for changing the law in their preferred direction while avoiding cases that might make bad law.³⁶³

Discretionary original jurisdiction shares many features with the discretionary certiorari practice, but it can be even more powerful. Accepting original jurisdiction can be more powerful than granting certiorari because it almost guarantees a good vehicle.³⁶⁴ Declining original jurisdiction can be more powerful than denying certiorari because it gives the high court a third option: it can choose to pass the buck, while still retaining the discretion to grant or deny certiorari later, when the case comes up on ap-

³⁵⁹ See *supra* Part V.B.1 (discussing court preferences).

³⁶⁰ See generally, e.g., Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. POL. 1062 (2009); Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389 (2004); PERRY, *supra* note 342; Narechania, *supra* note 39; Nielson & Stancil, *supra* note 31.

³⁶¹ See generally, e.g., Black & Owens, *supra* note 360; Cordray & Cordray, *supra* note 360; PERRY, *supra* note 342; Narechania, *supra* note 39; Nielson & Stancil, *supra* note 31.

³⁶² See, e.g., PERRY, *supra* note 342, at 246 ("Without a doubt, the single most important generalizable factor in assessing certworthiness is the existence of a conflict or 'split' in the circuits."); Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1631–32 (2008) ("[T]he presence of a conflict remains by far the most important criteria in the Court's case selection."); see also SUP. CT. R. 10.

³⁶³ See, e.g., Black & Owens, *supra* note 360, at 1073 ("Justices have nearly total discretion to decide which cases the Court will hear, meaning they have freedom to pursue their raw policy goals . . ."). The latter practice is referred to as a "defensive denial." See generally Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995).

³⁶⁴ See *supra* Part IV.B.

peal. This optionality presumably works to the high court’s benefit, since the court decides which path to take based on its own preferences.³⁶⁵

It is interesting to observe that many of the most intensely political original actions come to the high courts on petitions for extraordinary writs,³⁶⁶ and high courts typically interpret their writ-based jurisdiction as discretionary.³⁶⁷ Though I have no evidence that this was intended, the result is that high courts often have the option to decide whether to weigh in on politically charged cases and interbranch conflicts. And, indeed, in many of the election-related and COVID-19 cases, courts exercised their option to decide whether to proceed.³⁶⁸ This included, for example, the Wisconsin Supreme Court declining to hear the Trump campaign’s challenges to the 2020 election.³⁶⁹ Perhaps it was easier for some of the elected justices to pass on an original action in favor of another court than to rule against President Trump and his allies on the merits.

C. Court and Party Summary

The options of exclusive versus concurrent jurisdiction and mandatory versus discretionary jurisdiction create a set of four possible designs. As displayed in the following table, these choices distribute forum-shopping (or agenda-setting) power to courts, parties, both, or neither.

TABLE 1: FORUM-SHOPPING POWER

	Exclusive	Nonexclusive
Discretionary	High Court	Parties Then High Court
Mandatory	Neither (party decides only whether to file)	Parties

³⁶⁵ The other major difference is that a denial of certiorari leaves a known lower court decision in place, while there is no prior decision in a denial of original jurisdiction. That, too, might present desirable optionality for the high court.

³⁶⁶ *See supra* Part II (collecting cases).

³⁶⁷ *See supra* Parts I.A and I.C (collecting examples).

³⁶⁸ *See supra* Part II.A and II.B (collecting cases).

³⁶⁹ *See supra* notes 158–59 and accompanying text.

Two options empower judges *or* parties. Discretionary and exclusive jurisdiction empowers the courts, including giving the courts the option to end the case completely. Many statutes authorizing requests for advisory opinions fit this model.³⁷⁰ Either the high court answers the question, or no court does.

Mandatory and nonexclusive jurisdiction, meanwhile, empowers parties to shop vertically and horizontally, while giving the high court no choice once a party files a case. None of the statutes surveyed, on their face, provides mandatory but nonexclusive jurisdiction, though it is possible that claims within mandatory jurisdiction could be pleaded in ways that engage the lower courts.

One option, discretionary and nonexclusive jurisdiction, essentially requires the agreement of both parties and courts. Parties first decide whether to give the high court the option to take the case, and then the high court can choose whether to exercise that option. So parties set the agenda, but high courts can “veto” it. Petitions for writs often fall into this category.³⁷¹

Finally, mandatory and exclusive jurisdiction means that neither the judges nor the parties have any choice where the case will be heard—if it will be anywhere, it will be in the high court. This alignment is common for statutes regulating the review of election-related decisions, such as ballot language or redistricting maps.³⁷² In these cases, legislatures are essentially requiring that the high court weigh in if the case is filed. And for reasons explained above, legislatures often can fairly assume that someone will file such cases.³⁷³ So while technically parties retain some agenda-setting power in this alignment because cases must be filed, there is good reason to think that someone will choose to file rather than sitting out judicial review altogether.

D. Legislatures

Original jurisdiction is typically the product of legislation.³⁷⁴ Even when some aspects of original jurisdiction are enshrined in state constitutions,³⁷⁵ legislatures often have some ability to

³⁷⁰ See *supra* Part I.B.

³⁷¹ See *supra* notes 113, 139, and accompanying text.

³⁷² See *supra* Part I.C and I.D.

³⁷³ See *supra* notes 354–55 and accompanying text.

³⁷⁴ See *supra* Part I.E.

³⁷⁵ *Id.*

amend the constitution or to affect its implementation through ordinary legislation.³⁷⁶

As described above, in recent years legislatures have considered and sometimes acted upon this authority to authorize original jurisdiction in certain classes of cases.³⁷⁷ This Section offers a framework to assess those choices by considering how legislative preferences might affect decisions about when and how to authorize original jurisdiction.

1. Legislative preferences.

Legislatures presumably opt for original jurisdiction when it is consistent with their preferences.

Legislators could have principled views about fact-finding, appellate review, and timing,³⁷⁸ and they could have principled views about lower court frictions and settlements.³⁷⁹ These preferences, for example, might explain the default of no original jurisdiction³⁸⁰ and the lack of substantial numbers of original jurisdiction grants for more run-of-the-mill litigation topics.³⁸¹ The need for immediate resolution also might be an important factor where legislatures can identify classes of cases where time is of the essence.³⁸² Election law decisions right before fixed election days, for example, might require immediate and definitive resolution.³⁸³ And, indeed, a proposed Connecticut bill called for original jurisdiction for review of certain election decisions within ninety days of an election.³⁸⁴

Legislatures also have substantive policy preferences.³⁸⁵ In other words, legislatures care about outcomes. Especially when the stakes are high, it is reasonable to expect legislative policy preferences to dominate. Indeed, much of the recent activity around original jurisdiction has been in areas where legislatures

³⁷⁶ *Id.* State constitutions also tend to be much easier to amend than the U.S. Constitution. See Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1672–77 (2014).

³⁷⁷ See *supra* Part III.

³⁷⁸ See *supra* Part IV.A.

³⁷⁹ See *supra* Part IV.B.

³⁸⁰ Despite the extensive list of original jurisdiction bases, it remains exceptional.

³⁸¹ See *supra* Part I.A; see also Appendix.

³⁸² See *supra* Part IV.A.3.

³⁸³ See *supra* Part I.A (collecting examples).

³⁸⁴ H.B. 5540, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021).

³⁸⁵ This is a core feature of public-choice or rational-choice accounts of legislation. See, e.g., Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1058–63 (2006).

likely have strong policy preferences. It is about regulating (or overturning) election results³⁸⁶ and managing a pandemic.³⁸⁷ It is about expanding original jurisdiction to address redistricting or to police gubernatorial authority.³⁸⁸

Legislatures can use original jurisdiction to achieve policy outcomes when their views align with the high court's. For example, imagine an aggressively partisan legislature and an equally partisan supreme court (both partisan in the same direction).³⁸⁹ In this situation, a legislature might want to funnel highly partisan disputes to the supreme court.³⁹⁰ This move would help ensure the outcomes they want, avoiding the frictions of the lower courts.³⁹¹ And it would help ensure those outcomes arrive quickly, which is valuable to legislators who want to reap the benefits of those decisions as soon as possible, and who want to insulate the outcomes from federal court interference.³⁹²

This account is consistent with the broader observation in law and political science that legislators “judicialize” policy areas when courts are ideologically aligned with them.³⁹³ The logic is simple: legislatures essentially delegate to courts when they expect courts to give them the outcomes they prefer.³⁹⁴ Indeed, judicialization may be better for legislatures than directly enacting legislative preferences for at least two reasons. First, judicialization might “launder” legislative preferences through popular and

³⁸⁶ See *supra* Part II.A (collecting cases).

³⁸⁷ See *supra* Part II.B (collecting cases).

³⁸⁸ See *supra* Part III.B (collecting recent laws).

³⁸⁹ Legislators might think about the composition of the current high court, or they might be able to make reasonable predictions regarding its future composition given the manner in which high court justices are selected.

³⁹⁰ Cf. Levy, *supra* note 49, at 1131–45 (discussing legislative attempts at court packing in the states).

³⁹¹ See *supra* Part IV.B.1.

³⁹² See *supra* Part IV.A.3 and IV.B.3.

³⁹³ This literature is too extensive to fully report here. Among the sources consulted for this project were SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004); GEORGE I. LOVELL, *LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY* (2003); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511 (2002); Graber, *supra* note 52.

³⁹⁴ Gillman, *supra* note 393, at 512–13.

seemingly neutral courts.³⁹⁵ In the words of Professor Mark Graber, “mainstream politicians may facilitate judicial policymaking in part because they have good reason to believe that the courts will announce those policies they privately favor but cannot openly endorse without endangering their political support.”³⁹⁶ Second, judicialization can entrench legislative preferences beyond the lifespan of a legislative majority if ideologically aligned judges are more likely to remain in office.³⁹⁷ Under either theory,³⁹⁸ a key feature is that the legislature views the courts as ideological fellow travelers—“judicial friendliness,” in the words of one leading scholar.³⁹⁹ So legislatures should prefer original jurisdiction when the high court is friendly, or at least when it is friendlier than the lower courts.

In sum, legislatures should prefer original jurisdiction when it aligns with their procedural preferences or when legislatures can expect friendly policy treatment from the high court. The higher the stakes, the more likely that policy preferences trump procedural ones.

³⁹⁵ See Zachary D. Clopton, *Catch and Kill Jurisdiction*, 121 MICH. L. REV. 171, 205–10 (2022) (collecting sources); Josh Chafetz, *Governing and Deciding Who Governs*, 2015 U. CHI. LEGAL F. 73, 90–98.

³⁹⁶ Graber, *supra* note 52, at 43.

³⁹⁷ See generally, e.g., HIRSCHL, *supra* note 393; Gillman, *supra* note 393. See also McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 180–82 (1999) (showing a similar phenomenon in administrative law with the Administrative Procedures Act).

³⁹⁸ A third possibility, also consistent with the rational pursuit of legislative preferences, is that legislatures delegate to courts to serve their own interests in legitimacy, not necessarily their pure policy preferences. Professor Edward Stiglitz recently offered such an account of modern administrative law. See generally EDWARD H. STIGLITZ, *THE REASONING STATE* (2022). I think this account may cohere with many of the lower-stakes decisions about original jurisdiction, but my suspicion is that when stakes are the highest, policy preferences win out.

³⁹⁹ See FARHANG, *supra* note 393, at 51–52. As noted above, the court curbing literature suggests that another explanation might be signaling or position taking. See *supra* Part III.A. A legislator might propose a bill banning the use of sharia law in judicial opinions in order to signal to their constituents a set of political preferences. The fact that many court-curbing bills receive little legislative attention after their introduction is seen as evidence that they serve these purposes. Although it is true that many of the bills addressing original jurisdiction did not pass, I will admit I am dubious that they are sufficiently salient to be useful for signaling. Original jurisdiction is arcane and technical, and it is not clear what signal an original jurisdiction provision would send to voters that an appellate jurisdiction provision would not. So, again, I think signaling is likely not the primary explanation for original jurisdiction legislation.

2. Legislative choices.

These legislative preferences inform legislative choices about exclusive versus nonexclusive jurisdiction and mandatory versus discretionary jurisdiction.

a) *Exclusive versus concurrent.* The choice between exclusive and concurrent jurisdiction is essentially a choice about whether parties will be able to forum shop.⁴⁰⁰ Concurrent jurisdiction is a license to forum shop. Legislatures might make this choice to further some procedural value, or they might make this choice because they believe the parties bringing suits are likely to act in the legislature's interest.⁴⁰¹ For example, when Republican state legislatures adopt antiabortion laws,⁴⁰² they can rightly assume that plaintiffs will oppose abortion. In original jurisdiction, some legislatures have taken steps to be even more certain that plaintiffs will adhere to the legislature's preferences by providing that only the legislature itself may be the plaintiff.⁴⁰³

But in most situations, legislatures cannot control who is going to sue—they write rules equally applicable to friends and foes. Indeed, in the highly partisan disputes that are often at the center of original jurisdiction,⁴⁰⁴ there almost always will be potential parties on both sides of the partisan divide. In these circumstances, a legislature might opt for exclusive original jurisdiction when they want to channel plaintiffs into a friendly high court (and away from the unfriendliest lower courts). So the greater the alignment between the legislature and the high court, the more incentive there is for the legislature to opt for exclusive original jurisdiction.⁴⁰⁵

⁴⁰⁰ See *supra* Part V.A.2.

⁴⁰¹ For example, products liability cases are typically brought by individuals against corporations. This asymmetry is the justification for aggregation on the plaintiffs' side in products liability cases. See, e.g., J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1162–65 (2012).

⁴⁰² See, e.g., TEX. HEALTH & SAFETY CODE § 171.201 (2021) (codifying S.B. 8, which prohibited abortions under certain conditions and providing a private right of action to enforce its provisions).

⁴⁰³ See, e.g., S.J. Res. 45, 87th Leg. (Tex. 2021); S.J. Res. 60, 87th Leg. (Tex. 2021); S.B. 236, 124th Gen. Assemb. Sess. (S.C. 2022).

⁴⁰⁴ See *supra* Part II.

⁴⁰⁵ More precisely (and more clumsily), the greater the alignment between the legislature and the high court minus the alignment between the legislature and the least friendly available lower court, the more incentive there is for the legislature to opt for exclusive original jurisdiction.

Descriptively, election-specific grants tend to be exclusive.⁴⁰⁶ Among the recent proposals, eleven election-related laws expressly provided for exclusive original jurisdiction.⁴⁰⁷ It is possible that the election-related provisions reflect legislatures' desires for quick resolution of legal questions, akin to advisory opinion requests.⁴⁰⁸ But it is also possible that legislatures understand election-related actions to be particularly partisan, and when the high court is politically friendly, the legislature might prefer to funnel these partisan issues to allies on the high court and avoid costly developments in the lower courts.⁴⁰⁹

b) Mandatory versus discretionary. Legislatures also can choose between mandatory and discretionary jurisdiction.⁴¹⁰ This optionality adds another dimension to the notion that legislatures are likely to opt for original jurisdiction when they expect high courts to vote in line with legislative preferences.⁴¹¹

The more the legislature trusts the high court, the more the legislature can defer to the high court's judgment, not only on the merits, but also on accepting or rejecting the case at the outset. So, for example, perfect alignment of interests might predict discretionary original jurisdiction, allowing the high court to decide when original jurisdiction is or is not its interests—which, by stipulation, is consistent with when original jurisdiction is or is not in the legislature's interest.

Alternatively, when the legislature views the high court as less well aligned but still preferable to the lower courts, then mandatory original jurisdiction makes more sense. Similarly, if the legislature views the high court as fairly well aligned but a little

⁴⁰⁶ See *supra* Part I.D.

⁴⁰⁷ H.B. 236, 151st Gen. Assemb. (Del. 2021); S.B. 283, 122d Gen. Assemb., 1st Reg. Sess. (Ind. 2021); H. Con. Res. 39, 2022 Reg. Sess. (Miss. 2022); S. Con. Res. 37, 220th Leg. (N.J. 2022); 2013 Ohio Laws 3 (Sub. S.B. 47) (codified at OHIO REV. CODE ANN. § 3519.16); OHIO CONST. art. II, § 1e (2015 OHIO LAWS STATEWIDE ISSUE 2 (STATEWIDE ISSUE 2) (H.J.R. 4)); OHIO CONST. art. XIX, § 3 (2018 OHIO LAWS STATEWIDE ISSUE 2018 STATEWIDE ISSUE NO. 1 (MAY ELECTION) (SUB. S.J.R. 5)); 2012 Ohio Laws 2 (Statewide Issue 2); S.B. 585, 2021 Sess. (Pa. 2021); S.J. Res. 864, 2021 Gen. Assemb., Jan. Sess. (R.I. 2021); S.J. Res. 12, 87th Leg. (Tex. 2021).

⁴⁰⁸ See *supra* Parts I.B and IV.A.3.

⁴⁰⁹ Indeed, in most states, the high courts and legislative majorities are politically aligned. See State Supreme Courts, ALL JUST., <https://perma.cc/9Z88-YEPY>. In the states where this is not the case (Vermont, Rhode Island, Pennsylvania, Montana, Michigan, Massachusetts, Maryland, and Kansas), the political alignment between the high court and legislative majority is very close, and the legislative majority is also divided between the two houses of the legislature. *Id.*

⁴¹⁰ See *supra* Part I.C.

⁴¹¹ See *supra* Part V.D.1.

squeamish about entering the political fray, mandatory jurisdiction can extract the answers the legislature is hoping for. This is one of those situations where a grant of original jurisdiction is disempowering, compelling the high court to participate when it would rather defer.⁴¹²

Descriptively, although many recent proposals are ambiguous on this dimension, at least a few have included mandatory language.⁴¹³ For example, though not expressly mandatory, Texas’s proposed law allowing the legislature to challenge the governor’s election-related actions provides that the supreme court “shall give preference to such a suit.”⁴¹⁴ Perhaps this language was meant to tie the high court’s hands.

3. Design as delegation.

One way to conceptualize the different models of original jurisdiction is as different ways the legislature can delegate power, though not (necessarily) legislative power.⁴¹⁵ The following table translates the two-by-two matrix of forum shopping into the language of delegation.

TABLE 2: ORIGINAL JURISDICTION AS DELEGATION

	Exclusive	Nonexclusive
Discretionary	Legislature Delegates to the High Court	Legislature Delegates to Parties <i>and</i> High Court
Mandatory	Legislature Delegates Only Choice to File	Legislature Delegates to Parties

In discretionary and exclusive jurisdiction, the legislature is fully delegating to the high court. In mandatory and nonexclusive jurisdiction, it is fully delegating to the parties. Nonexclusive and

⁴¹² See *supra* Part V.B.1.

⁴¹³ For example, a proposed law in Indiana would require the supreme court to rule within seven days on a challenge to remove a member of the redistricting commission. See S.B. 283, 122d Gen. Assemb., 1st Reg. Sess. (Ind. 2021).

⁴¹⁴ S.J. Res. 60, 87th Leg. (Tex. 2021).

⁴¹⁵ One might say that the delegation of the power to draw district maps is a delegation of legislative power implicating debates about the nondelegation doctrine. See *supra* note 89.

discretionary jurisdiction means that original jurisdiction invokes the agreement of parties and the court, while mandatory and exclusive jurisdiction leaves no choice to the court once a case is filed.

As above, these choices could be informed by principled positions.⁴¹⁶ The legislature could believe that the need for an immediate answer requires mandatory and exclusive jurisdiction. It could believe that the high court should always be able to manage its docket, or that forum shopping is a four-letter word.

But again, especially in high profile cases, it is fair to suspect that the legislature's choice might be driven by its preference for certain outcomes.⁴¹⁷ For example, when the legislature expects positive outcomes from the high court, then mandatory and exclusive jurisdiction secures those results. More concretely, providing mandatory and exclusive jurisdiction to review redistricting maps almost ensures that high court action. Someone will want to challenge the map,⁴¹⁸ and if they do, only the high court can hear the case. And, in reality, statutes providing for original jurisdiction over redistricting are frequently mandatory and exclusive.⁴¹⁹

Legislative choices also could reflect a mix of procedural and political values. Continuing with the discussion of mandatory and exclusive jurisdiction, there might be situations where the legislature's strategic priority is to avoid lower court litigation (therefore, choosing exclusive jurisdiction). But, for reasons of legalism or legitimacy, the legislature may be uncomfortable with providing discretionary jurisdiction without an alternative forum. In that situation, the best available option might be mandatory and exclusive jurisdiction. Again, these choices reflect rational pursuit of the legislature's preferences, whatever those preferences may be.

CONCLUSION

Original jurisdiction, like so many aspects of procedure and jurisdiction, is simultaneously technical and powerful.⁴²⁰ Original jurisdiction distributes power among the key actors in the legal

⁴¹⁶ See *supra* Part V.D.1.

⁴¹⁷ *Id.*

⁴¹⁸ See *supra* notes 354–55 and accompanying text.

⁴¹⁹ See Appendix.

⁴²⁰ See, e.g., Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1703 (2004).

system, including parties, courts, and legislatures. And it has important consequences for how cases are litigated and how they are ultimately resolved. Original jurisdiction in the states is widespread and significant, and given its capacity to distribute political benefits, there is a good chance that it will become more widespread and more significant in the coming years.

APPENDIX

State Original Jurisdiction Laws

State	Original Jurisdiction (Constitution & Statutes)
Alabama	ALA. CONST. art. VI, § 140 (advisory opinions); ALA. CODE § 12-2-7 (1993) (writs); ALA. CODE § 12-2-10 to -12 (1940) (advisory opinions)
Alaska	No original jurisdiction (ALASKA STAT. § 22.05.010 (2016))
Arizona	ARIZ. CONST. art. VI, § 5 (writs; “causes between counties”; as provided by law); ARIZ. REV. STAT. § 41-194.01 (2021) (attorney general suits on request of a legislator against municipalities for violations of state law)
Arkansas	ARK. CONST. art. VIII, § 5 (writs to compel the Board of Apportionment); ARK. CONST. art. V, § 1 (sufficiency of initiative petitions); ARK. CONST. amend. LXXX, § 2 (legal existence of political corporations; sufficiency of initiative petitions); ARK. CODE ANN. § 5–4–617 (2019) (lethal injection drugs)
California	CAL. CONST. art. VI, § 10 (writs); CAL. CONST. art. XXI, § 3 (redistricting); CAL. PUB. UTILS. CODE §§ 1756(a), (f), 1768(a) (2007) (certain administrative utilities decisions); CAL. PUB. RES. CODE § 25531 (2001) (certain coastal commission decisions); CAL. GOV. CODE § 63049.4(e) (2009) (validity of bonds and contracts)
Colorado	COLO. CONST. art. VI, § 3 (advisory opinions); COLO. REV. STAT. § 1-11-203 (1993) (election contests)
Connecticut	CONN. CONST. art. III, § 6 (reapportionment); CONN. CONST. art. IV, § 18 (transfer of authority on gubernatorial incapacity); CONN. GEN. STAT. § 9-323 (2011) (election contests)
Delaware	DEL. CODE. ANN. tit. 10, § 141 (1995) (advisory opinions)

State	Original Jurisdiction (Constitution & Statutes)
Florida	FLA. CONST. art. III, § 16 (apportionment); FLA. CONST. art. IV, § 1 (advisory opinion); FLA. CONST. art. V, § 3 (public utilities; writs; advisory opinion on apportionment); FLA. STAT. § 350.128 (1980) (public utilities); FLA. STAT. § 364.381 (1990) (same), FLA. STAT. § 366.10 (1980) (same)
Georgia	No original jurisdiction (GA. CONST. art. VI, § 6, ¶ II)
Hawaii	HAW. CONST. art. IV, § 10 (reapportionment); HAW. REV. STAT. § 11-174.5 (2021) (election contests); HAW. REV. STAT. § 602-5 (2016) (writs); Haw. Organic Act § 55 (1900) (reapportionment); HAW. REV. STAT. § 39-93 (1979) (certain state debt actions); HAW. REV. STAT. § 91-14 (2016) (certain administrative actions)
Idaho	IDAHO CONST. art. V, § 9 (writs); IDAHO CONST. art. V, § 10 (claims against state); IDAHO CONST. art. III, § 2 (apportionment); IDAHO CODE § 1-203 (1919) (writs); IDAHO CODE § 19-4202 (1999) (writ of habeas corpus); IDAHO CODE § 72-1510 (2015) (legislative apportionment)
Illinois	ILL. CONST. art. IV, § 3 (redistricting); ILL. CONST. art. VI, § 4 (writs); ILL. CONST. art. V, § 6 (gubernatorial succession); 705 ILL. COMP. STAT. 5/8 (2018) (writs)
Indiana	No original jurisdiction (IND. CONST. art. VII, § 4)
Iowa	IOWA CONST. art. III, § 36 (apportionment); IOWA CODE § 663.3 (1973) (writ of habeas corpus)
Kansas	KAN. CONST. art. III, § 3 (writs); KAN. STAT. ANN. § 60-1501 (2014) (writ of habeas corpus)
Kentucky	No original jurisdiction (KY. CONST. § 110)
Louisiana	LA. CONST. art. V, § 2 (writ of habeas corpus)

State	Original Jurisdiction (Constitution & Statutes)
Maine	ME. CONST. art. VI, § 3 (advisory opinion); ME. CONST. art. IX, § 24 (apportionment); ME. REV. STAT. tit. 14, § 5301 (1967) (writs); ME. REV. STAT. tit. 21-A, § 737-A (2023) (election contests)
Maryland	MD. CONST. art. III, § 5 (redistricting); MD. CONST. art. IV, § 14 (as provided by law); MD. CODE ANN., CTS. & JUD. PROC. § 3-701 (1982) (writ of habeas corpus); MD. CODE ANN., STATE GOV'T § 4-105 (1984) (acting comptroller); MD. CODE ANN., STATE GOV'T § 5-106 (1984) (acting treasurer)
Massachusetts	MASS. CONST. pt. 2, ch. III, art. II, <i>amended by</i> MASS. CONST. art. LXXXV (advisory opinions); MASS. CONST. arts. of amend., art. CI, § 3 (districting); MASS. GEN. LAWS ch. 214, § 1 (1973) (general principles of equity except labor disputes); MASS. GEN. LAWS ch. 249, § 5 (2003) (mandamus)
Michigan	MICH. CONST. art. III, § 8 (advisory opinions); MICH. CONST. art. VI, § 4 (writs); MICH. COMP. LAWS § 4.18 (1964) (apportionment); MICH. COMP. LAWS § 3.71 (2000) (congressional redistricting); MICH. COMP. LAWS § 600.217 (1963) (writs)
Minnesota	MINN. STAT. § 204B.44 (2015) (election errors); MINN. STAT. § 16A.96 (2013); MINN. STAT. § 16A.99 (2011); MINN. STAT. § 16A.965 (2013) (bonds); MINN. STAT. §§ 145.4235 (2012), 145.4249 (2003) (constitutionality of Born Alive Infants Protection Act); MINN. STAT. § 480.04 (1985) (writs); MINN. STAT. § 589.02 (1985) (writ of habeas corpus)
Mississippi	MISS. CONST. art. 6, § 146 (public utility rates); MISS. CODE § 77-3-72 (1984) (same)
Missouri	MO. CONST. art. V, § 4 (writs); MO. CONST. art. VII, § 5 (election contests); MO. CONST. art. X, § 18(e) (elected official tax challenges)

State	Original Jurisdiction (Constitution & Statutes)
Montana	MONT. CONST. art VII, § 2 (writs); MONT. CODE ANN. § 13-27-316 (2009) (ballot statements); MONT. CODE ANN. § 3-2-202 (2007) (writs; ballot statements)
Nebraska	NEB. CONST. art. V, § 2 (revenue; state party; writs; election contests)
Nevada	NEV. CONST. art VI, § 4 (writs); NEV. REV. STAT. § 34.020 (2015) (writ of certiorari); NEV. REV. STAT. § 34.160 (2015) (writ of mandamus); NEV. REV. STAT. § 34.330 (2015) (writ of prohibition); NEV. REV. STAT. § 34.740 (2015) (writ of habeas corpus)
New Hampshire	N.H. CONST. pt. II, art. LXXIV (advisory opinions); N.H. REV. STAT. ANN. § 490:4 (1971) (writs)
New Jersey	N.J. CONST. art II, § 2, ¶ 7 (redistricting)
New Mexico	N.M. CONST. art. VI, § 3 (writs)
New York	No original jurisdiction (N.Y. CONST. art. VI, § 3)
North Carolina	N.C. CONST. art. IV, § 12 (N.C. Utilities Commission)
North Dakota	N.D. CONST. art. III, §§ 6–7 (ballot initiatives); N.D. CONST. art. VI, § 2 (writs); N.D. CENT. CODE § 27-02-04 (1943) (writs); N.D. CENT. CODE § 32-33-01 (1943) (writ of certiorari); N.D. CENT. CODE § 32-35-02 (1943) (writ of prohibition); N.D. CENT. CODE § 32-34-01 (1943) (writ of mandamus)

State	Original Jurisdiction (Constitution & Statutes)
Ohio	OHIO CONST. art. II, § 1e (limits on use of referendum or initiative); OHIO CONST. art. IV, § 2 (writs); OHIO CONST. Art. XI, § 9 (apportionment); OHIO CONST. art. XVI, § 1 (ballot language); OHIO CONST. art. XIX, § 3 (redistricting); OHIO REV. CODE ANN. § 2503.40 (1953) (writs); OHIO REV. CODE ANN. § 3519.01 (2012) (ballot initiatives); OHIO REV. CODE ANN. § 3519.16 (2013) (same)
Oklahoma	OKLA. CONST. art. VII, § 4 (writs); OKLA. CONST. art. V, § 11E (apportionment); OKLA. CONST. SCHED. § 38 (division of county property); OKLA. STAT. tit. 51, § 92 (1917) (ouster); OKLA. STAT. tit. 19, § 87 (1910) (election on location of county seat); OKLA. STAT. tit. 22 § 1003 (1910) (advisory opinion from Criminal Court of Appeals); OKLA. STAT. tit. 19, § 61 (1917) (division of county property); OKLA. STAT. tit. 19, § 64 (1910) (county actions against municipal governments); OKLA. STAT. tit. 20, § 14 (1910) (location of capital or educational or charitable institutions); OKLA. STAT. tit. 34, § 8 (2020) (initiatives); OKLA. STAT. tit. 63, § 3225 (1997) (University Hospitals Trust); OKLA. STAT. tit. 63, § 3291 (2006) (Oklahoma State University Medical Trust); OKLA. STAT. tit. 2, § 3-50.7 (2010); tit. 11, § 24-109 (1981); tit. 19, § 896 (1949); tit. 62, §§ 57.26 (1955), 57.59 (1965), 57.91 (1967), 57.111 (1968), 57.135 (1969), 57.313 (1992), 830 (2001); tit. 63, § 3282 (2006); tit. 70, §§ 23-120 (1971), 821.8 (1947), 2210 (1961), 4011 (1965); tit. 73, § 160 (2002); tit. 74, §§ 856 (1989), 5228 (1999), 9057 (2021), 9079 (2021); tit. 82, § 882 (1957) (various bonds)
Oregon	OR. CONST. art. IV, § 6 (reapportionment); OR. CONST. art. VII, § 2 (writs); OR. REV. STAT. § 34.120 (1999) (writ of mandamus); 2019 Or. Laws ch. 545, § 4(2) (validity of act on city disincorporation)

State	Original Jurisdiction (Constitution & Statutes)
Pennsylvania	PA. CONST. art. V, § 2 (as provided by law); 42 PA. CONS. STAT. ANN. § 721 (1978) (writs to statewide officers); 42 PA. CONS. STAT. ANN. § 502 (1978) (King's Bench); 53 PA. STAT. ANN. § 12720.702 (1991) (constitutionality of Pennsylvania Intergovernmental Cooperation Authority Act for Cities of the First Class); 24 PA. STAT. ANN. § 20-2013-B (2016) (educational tax credits); 4 PA. CONS. STAT. ANN. § 1904 (2004) (constitutionality of Pennsylvania Race Horse Development and Gaming Act)
Rhode Island	R.I. CONST. art. X, § 2 (writs and as prescribed by law); R.I. CONST. art. X, § 3 (advisory opinions); 8 R.I. GEN. LAWS § 8-1-2 (1988) (writs); 10 R.I. GEN. LAWS § 10-14-1 (1956) (writ of quo warranto)
South Carolina	S.C. CONST. art. V, § 5 (writs); S.C. CODE § 7-13-2130 (1975) (ballot explanations); S.C. CODE § 58-15-1950 (1993) (railroad costs administrative appeals)
South Dakota	S.D. CONST., art. V, § 5 (writs; advisory opinions); S.D. CODIFIED LAWS § 15-25-1 (1984) (matters of prerogative, extraordinary, and general concern); S.D. CODIFIED LAWS § 21-32-10 (1939) (claims against state); S.D. CODIFIED LAWS § 21-28-1 (1939) (writs); S.D. CODIFIED LAWS § 12-21-48 (1982) (election contests)
Tennessee	No original jurisdiction (TENN. CONST. art. VI, § 2)
Texas	TEX. CONST. art. V, § 3 (writs as specified by law); TEX. GOV'T CODE § 22.002 (2012) (writs); TEX. ELECTION CODE § 273.061 (2021) (writ of mandamus regarding elections); TEX. LOC. GOV'T CODE § 72.010 (2017) (tax conflicts); TEX. GOV'T CODE § 660.2035 (2011) (peace officer vouchers); TEX. REV. CIV. STAT. ANN. art. 6243a-1 (2023) (constitutionality of act concerning public benefits)
Utah	UTAH CONST. art. VIII, § 3 (writs); UTAH CODE ANN. § 78A-3-102 (West 2009) (writs)

State	Original Jurisdiction (Constitution & Statutes)
Vermont	VT. CONST. ch. II, § 30 (as provided by law); VT. STAT. ANN. tit. 4, § 2 (2010) (writs)
Virginia	VA. CONST. art. VI, § 1 (writs); VA. CODE ANN. § 17.1-309 (2021) (writs)
Washington	WASH. CONST. art. II, § 43 (redistricting); WASH. CONST. art. IV, § 4 (writs); WASH. REV. CODE 29A.68.013 (2016) (election errors); WASH. REV. CODE § 74.39A.800 (2012) (long-term care audits)
West Virginia	W. VA. CONST. art VIII, § 3 (writs); W. VA. CODE § 51-1-3 (1915) (writs)
Wisconsin	WIS. CONST. art. VII, § 3(2) (“may hear original actions and proceedings”)
Wyoming	WYO. CONST. art. 5, § 3 (writs)

State Original Jurisdiction Cases

Elections, COVID-19, or Abortion

Advisory Op. to Att’y Gen. *re* Prohibits Possession of Defined Assault Weapons, 296 So.3d 376 (Fla. 2020) (per curiam) (elections)

Advisory Op. to Att’y Gen. *re* Adult Use of Marijuana, 315 So.3d 1176 (Fla. 2021) (per curiam) (elections)

Advisory Op. to Att’y Gen. *re* Regulate Marijuana in a Manner Similar to Alcohol to Establish Age, Licensing & Other Restrictions, 320 So.3d 657 (per curiam) (Fla. 2021) (elections)

Advisory Op. to Gov. *re* Implementation of Amend. 4, The Voting Restoration Amend., 288 So.3d 1070 (Fla. 2020) (per curiam) (elections)

Advisory Op. to Gov. *re* Whether Art. III, Section 20(A) of the Fla. Const. Requires the Retention of a District in N. Fla., 333 So.3d 1106 (per curiam) (Fla. 2022) (elections)

Advisory Op. to the Att’y Gen. *re* All Voters Vote in Primary Elections for State Legislature, Governor, and Cabinet, 291 So.3d 901 (Fla. 2020) (per curiam) (elections)

Advisory Op. to the Att’y Gen. *re* Citizenship Requirement to Vote in Fla., 288 So.3d 524 (Fla. 2020) (per curiam) (elections)

Advisory Op. to the Att’y Gen. *re* Voter Approval of Const. Amends., 290 So.3d 837(Fla. 2020) (per curiam) (elections)

Am. Prop. Cas. Ins. Ass’n v. Kreidler, 520 P.3d 979 (Wash. 2022) (en banc) (COVID-19)

Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs, 471 P.3d 607 (Ariz. 2020) (elections & COVID-19)

Arkansans for Healthy Eyes v. Thurston, 606 S.W.3d 582 (Ark. 2020) (elections)

Armstrong v. Thurston, 652 S.W.3d 167 (Ark. 2022) (elections)

Bailey v. S.C. State Election Comm’n, 844 S.E.2d 390 (S.C. 2020) (elections & COVID-19)

Ball v. Chapman, 284 A.3d 1189 (Pa. 2022) (per curiam) (elections)

Berg v. Jaeger, 948 N.W.2d 4 (N.D. 2020) (per curiam) (elections)

Burgum v. Jaeger, 951 N.W.2d 380 (N.D. 2020), *as amended* (Jan. 25, 2021) (elections)

Carter v. Chapman, 270 A.3d 444 (Pa. 2022) (elections)

Cottonwood Env’tl. L. Ctr. v. Knudsen, 505 P.3d 837 (Mont. 2022) (elections)

Covert v. 2021 Pa. Legis. Reapportionment Comm’n, 278 A.3d 296 (Pa. 2022) (per curiam) (unpublished table decision) (elections)

Cushnie v. Nago, 2022 WL 17686865 (Haw. Dec. 15, 2022) (elections)

Detroit Caucus v. Indep. Citizens Redistricting Comm’n, 969 N.W.2d 331 (Mich. 2022) (elections)

Dicks v. Nago, 2022 WL 17688364 (Haw. Dec. 15, 2022) (elections)

Durst v. Idaho Comm’n for Reapportionment, 505 P.3d 324 (Idaho 2022) (elections)

Giroux v. Comm. Representing the Petitioners with Respect to the Initiative Petition Proposing an Amend. to the Ohio Const. Entitled the Right to Reprod. Freedom with Prots. for Health & Safety, 2023 WL 5163291 (Ohio Aug. 11, 2023) (per curiam) (abortion & elections)

Haugen v. Jaeger, 948 N.W.2d 1 (N.D. 2020) (per curiam) (elections)

Hawkins v. Wis. Elections Comm’n, 948 N.W.2d 877 (Wis. 2020) (elections & COVID-19)

Hendrix v. Jaeger, 979 N.W.2d 918 (N.D. 2022) (elections)

Hicks v. 2021 Haw. Reapportionment Comm'n, 511 P.3d 216 (Haw. 2022) (elections)

In re Cong. Dists. by N.J. Redistricting Comm'n, 268 A.3d 299 (N.J. 2022) (elections)

In re Hotze, 627 S.W.3d 642 (Tex. 2020) (elections & COVID-19)

In re Individuals in Custody of State, 2021 WL 4762901 (Haw. Oct. 12, 2021) (COVID-19)

In re Initiative Petition No. 425, State Question No. 809, 470 P.3d 284 (Okla. 2020) (elections)

In re Interrogatory on House Joint Resol. 20-1006, 2020 WL 1855215 (Colo. 2020) (en banc) (COVID-19)

In re Interrogatories on Senate Bill 21-247 Submitted by the Colo. Gen. Assemb., 488 P.3d 1008 (Colo. 2021) (en banc) (elections & COVID-19)

In re Morris, 663 S.W.3d 589 (Tex. 2023) (abortion & elections)

In re Petition of Pa. Prison Soc'y, 228 A.3d 885 (Pa. 2020) (per curiam) (COVID-19)

In re Self, 652 S.W.3d 829 (Tex. 2022) (per curiam) (elections)

In re Senate Joint Resol. of Legis. Apportionment 100, 334 So.3d 1282 (Fla. 2022) (elections)

In re State Question No. 807, Initiative Petition No. 423, 468 P.3d 383 (Okla. 2020) (elections)

In re State Question No. 813, Initiative Petition No. 429, 476 P.3d 471 (Okla. 2020) (elections)

In re State Question No. 820, Initiative Petition No. 434, 507 P.3d 1251 (Okla. 2022) (elections)

In re Tex. House Republican Caucus PAC, 630 S.W.3d 28 (Tex. 2020) (per curiam) (elections)

In re Title, Ballot Title & Submission Clause for 2019-2020 No. 74, 455 P.3d 759 (Colo. 2020) (en banc) (elections)

In re Title, Ballot Title & Submission Clause for 2019-2020 No. 293, 466 P.3d 392 (Colo. 2020) (en banc) (elections)

In re Title, Ballot Title & Submission Clause for 2019-2020 No. 315, 500 P.3d 363 (Colo. 2020) (en banc) (elections)

In re Title, Ballot Title & Submission Clause for 2021-2022 No. 16, 489 P.3d 1217 (Colo. 2021) (en banc) (elections)

In re Titles, Ballot Titles & Submission Clauses for Proposed Initiatives 2021-2022 No. 67, No. 115, & No. 128, 526 P.3d 927 (Colo. 2022) (en banc) (elections)

In re Validity of Senate Bill 563, 512 P.3d 220 (Kan. 2022) (Elections)

James v. Heinrich, 960 N.W.2d 350 (Wis. 2021) (COVID-19)

Jefferson v. Dane County, 951 N.W.2d 556 (Wis. 2020) (elections & COVID-19)

Johnson v. Sec'y of State, 951 N.W.2d 310 (Mich. 2020) (elections)

Johnson v. Wis. Elections Comm'n, 971 N.W.2d 402 (Wis. 2022) (elections)

Jones v. State, 2020 WL 5821004 (Haw. Sept. 30, 2020) (COVID-19)

Kelly v. Legis. Coordinating Council, 460 P.3d 832 (Kan. 2020) (per curiam) (COVID-19)

Kistner v. Simon, No. A20-1486 (Minn. Dec. 4, 2020) (elections)

League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 200 N.E.3d 197 (Ohio 2022) (per curiam) (elections)

League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 192 N.E.3d 379 (Ohio 2022) (elections)

Mahuiki v. State, 2020 WL 5821002 (Haw. Sept. 30, 2020) (COVID-19)

Meyer v. Knudsen, 510 P.3d 1246 (Mont. 2022) (elections)

Miller v. Thurston, 605 S.W.3d 255 (Ark. 2020) (elections)

Mont. Republican Party v. Graybill, 2020 WL 4669446 (Mont. Aug. 11, 2020) (elections)

Mueller v. Jacobs, No. 2020AP1958-OA (Wis. Dec. 3, 2020) (elections)

Neiman v. LaRose, 207 N.E.3d 607 (Ohio 2022) (per curiam) (elections)

Nichols v. Ziriaux, 518 P.3d 883 (Okla. 2022) (elections)

Norelli v. Sec'y of State, 2022 WL 1749182 (N.H. May 27, 2022) (elections)

Okla. Call for Reprod. Just. v. State, 531 P.3d 117 (Okla. 2023) (per curiam) (abortion)

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

Oliver v. Otero Cnty. Comm'n, No. S-1-SC-39426 (N.M. June 15, 2022) (elections)

Onstad v. Jaeger, 949 N.W.2d 214 (N.D. 2020) (per curiam) (elections)

Op. of the Justs., 247 A.3d 831 (N.H. 2020) (COVID-19)

Pentico v. Idaho Comm'n for Reapportionment, 504 P.3d 376 (Idaho 2022) (elections)

In re Whitman Operating Co., 265 A.3d 1229 (N.H. 2021) (COVID-19)

Pirtle v. Legis. Council Comm. of N.M. Legislature, 492 P.3d 586 (N.M. 2021) (COVID-19)

Planned Parenthood Great Nw. v. State, 522 P.3d 1132 (Idaho 2023) (abortion)

Planned Parenthood S. Atl. v. State, 892 S.E.2d 121 (S.C. 2023) (abortion)

Planned Parenthood S. Atl. v. State, 882 S.E.2d 770 (S.C. 2023) (abortion)

Reclaim Idaho v. Denney, 497 P.3d 160 (Idaho 2021) (elections)

Reprod. Freedom for All v. Bd. of State Canvassers, 978 N.W.2d 854 (Mich. 2022) (abortion & elections)

Salsgiver v. Rosenblum, 510 P.3d 205 (Or. 2022) (en banc) (elections)

Sheehan v. Or. Legis. Assemb., 499 P.3d 1267 (Or. 2021) (elections)

Sierra v. Pa. Dep't of Corr., 266 A.3d 1207 (Pa. 2021) (unpublished table decision) (COVID-19)

State ex rel. DeBlase v. Ohio Ballot Bd., 2023 WL 3749300 (Ohio June 1, 2023) (per curiam) (abortion & elections)

State ex rel. DeMora v. LaRose, 217 N.E.3d 715 (Ohio 2022) (per curiam) (elections)

State ex rel. Franchini v. Oliver, 516 P.3d 156 (N.M. 2022) (elections)

State ex rel. Johnson v. Ohio State Senate, 200 N.E.3d 1077 (Ohio 2022) (per curiam) (COVID-19)

State ex rel. Jones v. Ohio State House of Representatives, 200 N.E.3d 1071 (Ohio 2022) (per curiam) (COVID-19)

State ex rel. King v. Cuyahoga Cnty. Bd. of Elections, 208 N.E.3d 787 (Ohio 2022) (per curiam) (elections)

State ex rel. Kotek v. Fagan, 484 P.3d 1058 (Or. 2021) (en banc) (elections & COVID-19)

State ex rel. Maras v. LaRose, 213 N.E.3d 672 (Ohio 2022) (per curiam) (elections)

State ex rel. McNally v. Evnen, 948 N.W.2d 463 (Neb. 2020) (elections)

State ex rel. Nauth v. Dirham, 163 N.E.3d 526 (Ohio 2020) (per curiam) (elections)

State *ex rel.* Ofsink v. Fagan, 505 P.3d 973 (Or. 2022) (en banc) (per curiam) (elections)

State *ex rel.* Ohioans United for Reprod. Rights v. Ohio Ballot Bd., No. 2023-1088 (Ohio filed Aug. 28, 2023) (abortion & elections)

State *ex rel.* Peterson v. Shively, 963 N.W.2d 508 (Neb. 2021) (elections)

State *ex rel.* Preterm-Cleveland v. Yost, 194 N.E.3d 375 (Ohio 2022) (unpublished table decision) (abortion)

State *ex rel.* Riddle v. Oliver, 487 P.3d 815 (N.M. 2021) (elections & COVID-19)

Trump v. Evers, No. 2020AP1971-OA (Wis. Dec. 3, 2020) (elections)

Utah Democratic Party v. Henderson, 523 P.3d 180 (Utah 2022) (per curiam) (elections)

Wis. Legislature v. Palm, 942 N.W.2d 900 (Wis. 2020) (COVID-19)

Wis. Voters All. v. Wis. Elections Comm'n, No. 2020AP1930-OA (Wis. Dec. 4, 2020) (elections)

Ybarra v. Legislature by Bedke, 466 P.3d 421 (Idaho 2020) (COVID-19)

State Original Jurisdiction Proposed & Enacted Laws

Arkansas: 2019 Ark. Acts 810 (codified as ARK. CODE ANN. § 5-4-617 (drug used in capital punishment) (adopted)

Connecticut: H.B. 5540, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021) (review of General Assembly decision reviewing attorney general election decisions in last ninety days) (proposed)

Delaware: H.B. 236, 151st Gen. Assemb. (Del. 2021) (redistricting) (proposed)

Georgia: H.R. 55, 2021–2022 Reg. Sess. (Ga. 2021) (reapportionment) (proposed)

Idaho: 2015 Idaho Sess. Laws ch. 250 (codified at IDAHO CODE § 72-1510) (reapportionment) (adopted)

Illinois: H.B. 59, 102d Gen. Assemb. (Ill. 2021) (redistricting) (proposed)

Indiana: S.B. 283, 122d Gen. Assemb., 1st Reg. Sess. (Ind. 2021) (removal of redistricting commission member) (proposed)

Kansas: S.B. 84, 2021–2022 Sess. (Kan. 2022) (suits against state related to sports betting) (proposed)

Michigan: 2018 Mich. Legis. Serv. Ref. Meas. 18-2 (Proposal 18-2) (codified at MICH. CONST. art. 4, § 6) (redistricting) (adopted)

Michigan: H.R.J. Res. R, 101st Leg., 2022 Reg. Sess. (Mich. 2022) (redistricting) (proposed)

Minnesota: 2012 Minn. Sess. Law Serv. ch. 293 (codified at MINN. STAT. § 16A.96) (bonds) (adopted)

Minnesota: MINN. STAT. § 16A.965 (2013) (bonds) (adopted)

Minnesota: MINN. STAT. § 16A.99 (2011) (bonds) (adopted)

Mississippi: H.R. Con. Res. 39, 2022 Reg. Sess. (Miss. 2022) (ballot petitions) (proposed)

Mississippi: H.R. Con. Res. 40, 2022 Reg. Sess. (Miss. 2022) (ballot petitions) (proposed)

Mississippi: H.R. Con. Res. 41, 2022 Reg. Sess. (Miss. 2022) (ballot petitions) (proposed)

Missouri: H.R.J. Res. 118, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022) (statewide officer challenges to tax and revenue measures) (proposed)

New Jersey: S. Con. Res. 37, 220th Leg. (N.J. 2022) (redistricting) (proposed)

New Mexico: H.R.J. Res. 9, 55th Leg., 2d Sess. (N.M. 2022) (redistricting) (proposed)

New York: Assemb. Con. Res. 4446, 2021–2022 Reg. Sess. (N.Y. 2021) (disputes among proposed autonomous regions) (proposed)

New York: S. Con. Res. 4541, 2021–2022 Reg. Sess. (N.Y. 2021) (disputes among proposed autonomous regions) (proposed)

Ohio: 2012 Ohio Laws 126 (Am. Sub. H.B. 386), codified at OHIO REV. CODE ANN. § 3770.21) (repeals original jurisdiction over constitutional challenges related to video lottery terminals) (adopted)

Ohio: 2012 Ohio Laws 2 (Statewide Issue 2) (redistricting) (proposed)

Ohio: 2013 Ohio Laws 3 (Sub. S.B. 47) (codified at OHIO REV. CODE ANN. § 3519.16) (ballot petitions) (adopted)

Ohio: 2015 Ohio Laws Statewide Issue 2 (Statewide Issue 2) (H.J.R. 4) (codified at OHIO CONST. art. II, § 1e) (limits on use of referendum and initiative) (adopted)

Ohio: 2018 Ohio Laws Statewide Issue 2018 Statewide Issue No. 1 (May election) (Sub. S.J.R. 5) (codified at Ohio Const. art. XIX, § 3) (redistricting) (adopted)

Oklahoma: H.R.J. Res. 1001, 58th Leg., 1st Extraordinary Sess. (Okla. 2021) (redistricting) (proposed)

Oklahoma: OKLA. STAT. tit. 74, § 9079 (Okla. 2021) (bonds) (adopted)

Oregon: 2019 Or. Laws ch. 545, § 4(2) (validity of act on city disincorporation) (adopted)

Oregon: H.R.J. Res. 204, 81st Leg. Assemb., 2022 Reg. Sess. (Or. 2022) (redistricting) (proposed)

Oregon: S.B. 56, 81st Leg., 2021 Reg. Sess. (Or. 2021) (cap and trade regulations) (proposed)

Pennsylvania: 2012 Pa. Legis. Serv. Act 2012-85 (codified at 72 PA. STAT. § 8712-G.1 (repealed 2014)) (constitutionality of educational tax credit act) (adopted, repealed)

Pennsylvania: 2014 Pa. Legis. Serv. Act 2014-194 (codified at 72 PA. STAT. § 8713-F) (repealed 2016)) (constitutionality of educational tax credit act) (adopted, repealed)

Pennsylvania: 2016 Pa. Legis. Serv. Act 2016-86 (codified at 24 PA. STAT. § 20-2013-B) (constitutionality of educational tax credit act) (adopted)

Pennsylvania: S.J. Res. 585, 2021 Sess. (Pa. 2021) (reapportionment) (proposed)

Rhode Island: S.J. Res. 864, 2021 Jan. Sess. (R.I. 2021) (redistricting) (proposed)

South Carolina: H.B. 4086, 124th Gen. Assemb., 1st Reg. Sess. (S.C. 2021) (sexually violent predator commitment and review) (proposed)

South Carolina: Sexually Violent Predators Act, 2023 S.C. Acts 19 (codified at scattered sections of S.C. CODE) (2023) (sexually violent predator commitment and review) (enacted)

South Carolina: S.C. Sen. Bill No. 108, 124th Gen. Ass. Sess. (S.C. 2022), codified as S.C. Code. Ann. §§ 7-1-110, 7-3-10 (mandamus action by legislature against election official or for removal of election commission member) (adopted)

South Carolina: S.B. 236, 124th Gen. Assemb. Sess. (S.C. 2022) (mandamus action by legislature against election official or for removal of election commission member) (proposed)

Texas: 2011 Tex. Sess. Law Serv. 1st Called Sess. ch. 4 (codified at TEX. GOV'T CODE § 660.2035) (state agency decision on peace officer voucher) (adopted)

Texas: 2017 Tex. Sess. Law Serv. ch. 318 (codified at TEX. REV. CIV. STAT. ANN art. 6243a-1) (constitutionality of benefits adjustment act) (adopted)

Texas: 2017 Tex. Sess. Law Serv. ch. 768 (codified at TEX. LOC. GOV'T CODE § 72.010) (multiple taxation) (adopted)

Texas: H.B. 384, 88th Leg. (Tex. 2022) (constitutionality of federal action) (proposed)

Texas: H.B. 1875, 87th Leg. (Tex. 2021) (constitutionality of business court act) (proposed)

Texas: S.J. Res. 12, 87th Leg. (Tex. 2021) (redistricting) (proposed)

Texas: S.J. Res. 28, 87th Leg. (Tex. 2021) (redistricting) (proposed)

Texas: S.J. Res. 45, 87th Leg. (Tex. 2021) (legislator challenges to governor emergency declaration) (proposed)

Texas: S.J. Res. 60, 87th Leg. (Tex. 2021) (legislator challenges to governor election action) (proposed)

Washington: 2012 Wash. Legis. Serv. ch. 1 (codified at WASH REV. CODE § 74.39A.800) (audits of long-term in-home care programs) (adopted)