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Original Discrimination: How the Supreme Court Disadvantages Plaintiff States

*Heather Elliott**

ABSTRACT: The U.S. Supreme Court is famously the nation's top appellate court, but Article III also makes the Court a trial court, giving it original jurisdiction over several categories of cases. One of those categories—suits by states against other states—remains exclusive. Thus, when Texas sought to overturn the 2020 presidential election by suing four swing states, it had only one court in which to sue. The Court properly rebuffed Texas's claim for lack of standing, but the Justices give even meritorious claims by state plaintiffs short shrift. They have made clear that these suits detract from the Court's appellate role and are better resolved elsewhere, including in the political realm.

The Court uses several discretionary doctrines to avoid hearing these claims. Plaintiff states must seek leave even to file suit, which the Court usually denies without explanation; must meet an injury-in-fact test more demanding than that imposed on ordinary federal plaintiffs; and, in many cases, must show that a proposed judgment will not be too harmful for the defendant state to satisfy. The Court implements this discretion aggressively. A plaintiff state may thus be denied a forum even when the prospective defendant state has caused significant, but not significant-enough, injury; a plaintiff state may be denied all relief even if it has proven its case on the merits. No other plaintiff in federal court is required to clear such high hurdles.

As many have suggested, the Court's use of discretion in the context of its exclusive jurisdiction potentially violates Article III and the relevant federal

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This Article is part of a larger project on the Court's original jurisdiction over state-versus-state cases. I welcome (at helliott@law.ua.edu) not only comments on this Article but thoughts on larger issues you may see lurking.

jurisdictional statute. But few have noticed the disconcertingly ad hoc nature of the Court's discretionary decisions. Even more troubling, no one has seen that these doctrines systematically disadvantage state plaintiffs to the benefit of state defendants, and that these disadvantages fall more heavily on certain groups of states, such as downstream states who seek to sue upstream states over crucial water supplies. The Court has stressed that the states must be treated equally as litigants before it, yet its discretionary approach to interstate disputes treats states unequally. The Court's discrimination against state plaintiffs may also make political solutions less likely by creating disincentives for negotiation and by undercutting enforcement of agreements.

The Court has good reasons for avoiding these cases, however. Instead of suggesting doctrinal change to address this original discrimination, I recommend that Congress give the lower courts concurrent jurisdiction over these disputes. Making the lower courts open to these suits gives the Court a principled reason to decline jurisdiction, provides a more accessible forum for state plaintiffs, and, as a result, restores incentives for the political resolution of at least some state-versus-state disputes.

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INTRODUCTION

On December 7, 2020, Texas filed a motion asking the United States Supreme Court to accept its complaint against Georgia, Michigan, Wisconsin, and Pennsylvania.¹ Claiming that state officials had “usurped their legislatures’ authority and unconstitutionally revised” state election laws,² Texas sought to have the four states’ electoral votes excluded,³ thus throwing the election to Donald Trump.⁴ Four days later, the Court denied the motion, squelching the lawsuit and bringing the matter to an abrupt end.⁵

1. Motion for Leave to File Bill of Complaint at 1, *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (mem.) (U.S. Orig. No. 155), 2020 WL 7229714, at *II.

2. *Id.* at *1.

3. *Id.* at *39–40.

4. Adam Liptak, *Texas Files an Audacious Suit with the Supreme Court Challenging the Election Results*, N.Y. TIMES (Dec. 11, 2020), <https://www.nytimes.com/2020/12/08/us/politics/texas-files-an-audacious-suit-with-the-supreme-court-challenging-the-election-results.html> [https://perma.cc/BXK7-7JVE].

5. *Texas*, 141 S. Ct. at 1230 (denying leave to file on the ground that Texas lacked standing to proceed). Justices Alito and Thomas would have granted leave to file but then summarily rejected Texas’s case. *Id.* As discussed below, *see infra* Part III, Alito and Thomas have questioned the constitutionality of the leave-to-file procedure in original jurisdiction cases.

Although Texas's stillborn lawsuit was described as "outlandish,"⁶ and "beyond meritless,"⁷ it illuminated a neglected aspect of federal jurisdiction: The U.S. Supreme Court is not only the court of last resort on issues of federal law, but also the court of *first* resort for states wishing to sue other states in federal court. The Constitution puts such state-versus-state cases within the Court's original jurisdiction, making the Court the trial court for these disputes,⁸ and by statute that jurisdiction has long been exclusive.⁹ A state wishing to sue another state, then, *must* proceed in the Court.¹⁰ And states have numerous conflicts with one another,¹¹ many of which give rise to litigation.¹²

Nevertheless, the Court resists hearing state-versus-state disputes for both principled and pragmatic reasons. Inter-state disputes often involve highly political questions which the Justices, as members of the judicial branch, feel they *should not* answer, suggesting instead that states solve their differences politically.¹³ More practically, the Court is not suited to hearing evidence and finding facts, especially in complicated disputes.¹⁴ Even with the use of appointed "special masters,"¹⁵ trial-type proceedings take

6. Liptak, *supra* note 4; see also *id.* ("It looks like we have a new leader in the 'craziest lawsuit filed to purportedly challenge the election' category" (quoting Stephen I. Vladeck (@Steve_Vladeck), TWITTER (Dec. 8, 2020, 8:11 AM), https://twitter.com/steve_vladeck/status/1336312379408322560?s=20 [<https://perma.cc/U5BD-2ZGJ>])).

7. Amy Howe, *Texas Tries Hail Mary to Block Election Outcome (Updated)*, SCOTUSBLOG (Dec. 8, 2020, 1:20 PM) (quoting Josh Shapiro (@PAArtorneyGen), TWITTER (Dec. 8, 2020, 10:15 AM), <https://twitter.com/PAArtorneyGen/status/1336343774906241031> [<https://perma.cc/H5RZ-YSBE>]), <https://www.scotusblog.com/2020/12/texas-tries-hail-mary-to-block-election-outcome> [<https://perma.cc/Q9M6-ZVW2>]; see also Jeremy W. Peters & Maggie Haberman, *17 Republican Attorneys General Back Trump in Far-Fetched Election Lawsuit*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/2020/12/09/us/politics/trump-texas-supreme-court-lawsuit.html> [<https://perma.cc/5RDF-MKDT>] (describing the suit's allegations as "baseless").

8. U.S. CONST. art. III, § 2.

9. 28 U.S.C. § 1251(a) (2018). Congress has made every other head of the Court's original jurisdiction nonexclusive. *Id.* § 1251(b). It has given the lower federal courts jurisdiction over most but not all such cases, leaving state courts as fora when jurisdiction is nonexclusive but not conferred on the lower federal courts. See *infra* Section III.A.

10. A few inter-state cases have proceeded in the Federal Courts of Appeal under very questionable interpretations of section 1251(a). See *infra* note 89.

11. See Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 513–29 (2008) (describing eight general "sources of interstate friction," including border disputes, externalities, "race[] to the bottom" spirals, disagreements on policies such as divorce and gambling, laws that give preference to in-state economic interests, and regulatory efforts that have extra-territorial effects).

12. See *infra* Part I.

13. See *infra* Section II.A.

14. See *infra* Section II.B.

15. As discussed below, see *infra* notes 112–17 and accompanying text, special masters are appointed by the Court to act similarly to a trial judge by managing the progress of the case, ruling on motions, receiving evidence, building a record, and making a recommendation regarding disposition to the Court. The Justices, however, remain the ultimate fact-finders and judges.

disproportionate judicial time and effort, interfering with the Court's primary role as the Nation's highest federal appellate court.¹⁶

These concerns find voice in prudential doctrines that limit the Court's exercise of inter-state jurisdiction. As many have observed, the Court's exercise of discretion in this area may be inconsistent with Article III and Congress's statutory allocation of jurisdiction.¹⁷ A few critics have noted the Court's inconsistent exercise of this discretion and its regular failure even to provide reasoning when it declines jurisdiction.¹⁸ But no one has thoroughly explored these two problems, nor has anyone noticed a further disturbing problem: The Court's discretionary control of its original docket systematically disadvantages plaintiff states to the benefit of prospective defendant states.¹⁹ I term this phenomenon "original discrimination."

Under original discrimination, plaintiff states must clear high hurdles even to initiate a lawsuit. They must also meet heavy burdens when they are permitted to proceed, making it difficult to start lawsuits against—much less obtain relief from—defendant states.²⁰

16. See *infra* Section II.B. For comprehensive discussions of original jurisdiction cases and the Court's handling of them, see generally Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185 (1993) (listing and annotating every original jurisdiction case filed from October 1, 1961, through April 25, 1993); and Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665 (1959) (listing and annotating every original jurisdiction case that produced at least one written opinion between 1791–1958); see also James G. Mandilk, Note, *The Modification of Decrees in the Original Jurisdiction of the Supreme Court*, 125 YALE L.J. 1880 (2016) (listing all activity in original-jurisdiction cases from April 15, 1993, to December 31, 2015).

17. See *infra* notes 178, 212, 224–25 and accompanying text.

18. See *infra* note 176.

19. I find no cases, articles, or books recognizing the systematic disadvantages that the Court's prudential original-jurisdiction doctrines impose on plaintiff states. The leading treatise on practicing before the Court notes the heightened standard of injury, see *infra* Section III.B, and questions whether it "is consistently applied in all cases" but goes no further, see STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, *SUPREME COURT PRACTICE* 10-39 n.49 (11th ed. 2019), and most commentators merely describe the doctrines uncritically, see, e.g., JOSEPH F. ZIMMERMAN, *INTERSTATE DISPUTES: THE SUPREME COURT'S ORIGINAL JURISDICTION* 25–42, 156–57 (2006); see also *infra* notes 178–81 (collecting literature). Scholars of water resources law have noticed problems with the Court's equitable apportionment doctrine in inter-state water disputes, see *infra* note 181, but have not recognized the more general problem with the Court's discretionary doctrines. I also have found no briefs noting this problem, although the databases are not complete.

Some have proffered versions of the *solution* I suggest (concurrent jurisdiction in the lower courts), but for different reasons. See Catherine Danley, *Water Wars: Solving Interstate Water Disputes Through Concurrent Federal Jurisdiction*, 47 ENV'T L. REP. NEWS & ANALYSIS 10980, 10980 (2017); ZIMMERMAN, *supra*, at 157–61; James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 657 (1994).

20. See *Maryland v. Louisiana*, 451 U.S. 725, 765 (1981) (Rehnquist, J., dissenting) ("[W]e not only must look to the nature of the interests of the complaining State—the essential quality of the right asserted—but we must also inquire whether recourse to that jurisdiction . . . is necessary for the State's protection." (alteration in original) (quoting *Massachusetts v. Missouri*, 308 U.S. 1, 18 (1939))); *infra* Part III.

First, the Court requires that a state plaintiff seek leave even to file a complaint.²¹ The motion arises from historic equity practice,²² but no other court—state or federal—now requires such motions from all plaintiffs.²³ Nor is filing such a motion *pro forma*: The Justices commonly deny leave,²⁴ even when a case is within the Court’s exclusive original jurisdiction.²⁵ From 1976 (the first year the Court denied leave to file in a case within its *exclusive* original jurisdiction)²⁶ to this writing, states have filed sixty-four motions for leave to file complaints against other states.²⁷ Removing one filing that was then dismissed at the instance of the parties,²⁸ the Court has denied 44.4 percent of the remaining sixty-three motions.²⁹ What began in equity, then, has become a stringent docket-control mechanism, preventing access to the states’ exclusive forum for judicial resolution of inter-state disputes.³⁰

In addition, the Court almost never explains its denials of motions for leave to file, leaving states (and the rest of us) to guess why a particular complaint could not proceed.³¹ Although sometimes those guesses are

21. SUP. CT. R. 17; *see infra* Section III.A.

22. According to the Court, inter-state disputes typically sound in equity. *Kansas v. Nebraska*, 574 U.S. 445, 453 (2015) (“Proceedings under that grant of jurisdiction are ‘basically equitable in nature.’” (quoting *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973))).

23. *See infra* notes 186–87 and accompanying text. As explained there, those labeled vexatious litigants must seek leave to file, but otherwise federal and state courts use early dismissals to cull cases.

24. *See infra* notes 195–96 and accompanying text.

25. *E.g.*, *Arizona v. New Mexico*, 425 U.S. 794, 798–99 (1976) (Stevens, J., concurring) (agreeing with the majority in denying Arizona’s motion for leave to file against New Mexico, but for reasons of standing, and stating “I do not believe the comments which the Court has previously made about its nonexclusive original jurisdiction adequately support an order denying a State leave to file a complaint against another State”).

26. *See supra* note 25 and accompanying text.

27. *See Docket Search*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/docket/docket.aspx> [<https://perma.cc/7MSN-62QB>]; McKusick, *supra* note 16, at 216–42; Mandilk, *supra* note 16, at 1925–38. The Court has provided online dockets for all original cases since 2002, whether the plaintiff state is permitted to proceed or not. The Court’s website also gives access to the dockets of several additional original cases where the plaintiff was permitted to proceed. Because of limitations imposed by the global COVID-19 pandemic, I have not been able to review offline dockets. Data on the remaining original proceedings come from the Court’s orders and opinions, where available on internet databases, from Chief Justice McKusick’s article, McKusick, *supra* note 16, at 216–42, describing the dockets of every original case from October 1, 1961, through April 25, 1993, and from Mandilk, *supra* note 16, at 1925–33, cataloguing all filings in original-jurisdiction cases from April 25, 1993, through December 31, 2015. I have collected my analysis of these sources in a spreadsheet (on file with author) and have noted below where lacunae remain.

28. *See Texas v. Louisiana*, 515 U.S. 1184, 1184 (1995) (mem.).

29. *See* sources cited *supra* note 27 (showing that the Court has denied twenty-eight motions for leave to file).

30. *See infra* Section III.A.

31. Although sometimes the reason is relatively easy to guess (for example, when the Solicitor General’s office is asked to file an amicus brief and exhaustively explains why the case

relatively easy to make, the failure to give reasons is troubling, both because the Court's exclusive jurisdiction means no other court will weigh in, and because, in the larger context of judicial decision-making, we ordinarily expect courts to give reasons for their actions.³² The absence of reasons may also cause practical problems: At least in those cases where the reasons for the Court's rejection of a case cannot be discerned, states cannot know what, if anything, might cause the Court to accept or reject a similar case in the future.³³

Second, the Court demands that a plaintiff state show, by clear and convincing evidence, an injury of "serious magnitude."³⁴ All plaintiffs in federal court must show they have standing,³⁵ but the Article III test requires only an injury, not a serious one.³⁶ By contrast, a plaintiff state cannot proceed if it shows an injury, but not a "substantial" one, or if it shows substantial injury only by a preponderance.³⁷ This means that a prospective defendant state can cause even substantial harm and yet evade responsibility, leaving the plaintiff state without redress.³⁸

Third, even if a plaintiff state is granted leave to file and survives a threshold challenge to its standing, and even if it then wins on the merits, it may nevertheless be denied relief.³⁹ The Court may find that the plaintiff's injury was not substantial enough after all⁴⁰; may find it inequitable to award a judgment⁴¹; and, in some cases, may refuse to award a judgment given the harm the defendant state would suffer from enforcement of the judgment.⁴² Accordingly, *proven* state wrongdoers may nevertheless suffer no consequences.

The burdens imposed by the Court's original discrimination diverge dramatically from those imposed on ordinary litigants. To demonstrate

does not meet the Court's precedent for accepting a case), sometimes no reason can be discerned. *See infra* notes 226–29 and accompanying text.

32. *See infra* notes 230–43 and accompanying text.

33. *See infra* notes 243–44 and accompanying text.

34. *E.g.*, Florida v. Georgia, 138 S. Ct. 2502, 2514 (2018). *See infra* Section III.B. The Court sometimes puts the test as a requirement that plaintiff states show "the seriousness and dignity of the[ir] claim[s]," Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972), language that sounds in the more general *parens patriae* restriction on state litigation. *See infra* note 258.

35. *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (describing the required elements of injury, causation, and redressability).

36. *See infra* notes 270–71 and accompanying text.

37. *See infra* Section III.B.

38. *See infra* Section III.B.

39. *See infra* Section III.C.

40. *See infra* Section III.B.

41. *See infra* Section III.C.

42. *E.g.*, Florida v. Georgia, 138 S. Ct. 2502, 2514 (2018). *See infra* Section III.C.

standing, a typical federal plaintiff only needs to show minimal injury⁴³; if the court proceeds to the merits, the plaintiff must (in most cases) prove her claim only by a preponderance of the evidence.⁴⁴ Certainly, we do not bar a private plaintiff from recovering damages simply because the remedy is too painful for the defendant to bear.⁴⁵ (Imagine winning a \$1 million jury verdict to remedy extensive harm and being told that “it just hurts the defendant too much to pay.”)

Moreover, in litigating before the Court, “[e]ach state stands on the same level with all the rest.”⁴⁶ The Court has called this a “cardinal rule,”⁴⁷ and yet, given original discrimination, the Court denies plaintiff states access to the *only* forum empowered to hear their cases. What’s more, even where it permits a plaintiff state to proceed, the Court puts a thumb on the scale in favor of the defendant state.⁴⁸ These strenuous efforts to avoid state-versus-state cases disadvantage plaintiff states vis-à-vis defendant states, because defendants can usually expect to win—or at least not to lose—in an inter-state case.⁴⁹

Even worse, this discrimination falls unequally: Some states are much more likely to be plaintiffs than others.⁵⁰ Downstream states, permanently vulnerable to their upstream neighbors, provide the clearest example. The Court’s discretionary rules protect upstream states—almost always defendants—from judgment.⁵¹ Similarly, refusal to hear a case over the breach of an inter-state agreement leaves wronged states with no judicial recourse.⁵² Although any state that is party to an agreement can violate it, the Court’s discretion systematically favors state violators over state victims and, in doing so, makes negotiating and then enforcing such agreements more difficult.⁵³ The obstacles interposed by the Court thus serve not only to advantage defendant states generally but to protect certain categories of states in particular.

43. *E.g.*, *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) (“For standing purposes, a loss of even a small amount of money is ordinarily an ‘injury.’” (citing *McGowan v. Maryland*, 366 U.S. 420, 430–31 (1961))).

44. 21B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5122 (2d ed. 1990) (“The normal burden of persuasion in a civil case requires only that party prove the fact by a ‘preponderance of the evidence.’”).

45. 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2807 (3d ed. 2018) (discussing bases for a new trial based on an excessive jury verdict, which do not include ability of the defendant to pay).

46. *Kansas v. Colorado*, 206 U.S. 46, 97 (1907).

47. *Id.*

48. *See infra* Sections III.B–D.

49. *See infra* Part III.

50. *See infra* Section III.D.

51. *See infra* Section III.D.

52. *See infra* Section III.A.

53. *See infra* Section IV.B.

To be sure, the Court has legitimate reasons to reject some claims made by state plaintiffs.⁵⁴ For example, when a coalition of agricultural states seeks to sue California over its humane-egg-production law,⁵⁵ the Court might sensibly expect egg producers directly affected by the law to challenge California's law in the lower courts, rendering the Court's involvement as a trial court unnecessary.⁵⁶ After all, a state challenge to such laws on behalf of the egg industry presumably violates the *parens patriae* doctrine by representing private rather than state interests.⁵⁷ Indeed, the suit might be more of a political gesture against a law unpopular with agricultural-industry donors and constituents than a legitimate legal claim.⁵⁸ Even with such cases, however, the Court's *means* of rejection are troubling. If, as the argument usually goes,⁵⁹ the Founders gave the Court original jurisdiction over state-versus-state disputes to respect their dignity as co-equal sovereigns,⁶⁰ it seems contradictory for the Court to treat the states as vexatious litigants who must seek permission even to file a lawsuit.⁶¹

Despite the discrimination that results from the Court's discretionary doctrines, I do not ask the Court to alter its path. The Justices resist hearing original-jurisdiction cases for good reasons and are unlikely to—and should not—change course.⁶² Fortunately, a better solution exists: Congress can grant the lower courts concurrent jurisdiction over some or all inter-state suits.⁶³ Doing so is constitutionally permitted and allows the Court to continue avoiding these troublesome cases.⁶⁴

54. See *infra* Section II.A.

55. Motion for Leave to File Bill of Complaint, Bill of Complaint, and Brief in Support at 7–10, *Missouri v. California*, 139 S. Ct. 859 (2019) (mem.) (U.S. Orig. No. 148). The Court denied Missouri's motion. *Missouri*, 139 S. Ct. at 859.

56. See *infra* Section II.B.

57. See *infra* Section V.D.

58. David A. Lieb, *US Supreme Court Declines Involvement in State Egg Law Cases*, AP (Jan. 8, 2019), <https://apnews.com/article/fccd9468bdd24801bb24adb2foao4716> [<https://perma.cc/Y2LR-QHT3>] (“The . . . lawsuit against California was led by former Missouri Attorney General Josh Hawley, a Republican who won election as a U.S. senator in November. He was replaced as attorney general last week by former state treasurer Eric Schmitt, a fellow Republican who pledged Tuesday to continue the fight to protect farmers and consumers from ‘burdensome regulations.’”); see also Jillian Hishaw, *Piling It on Thick: An Overview of Arkansas Poultry Litter Regulation*, 11 *DRAKE J. AGRIC. L.* 225, 249 (2006) (noting the Oklahoma Governor's description of an original suit by Arkansas: “[I]t's politics, and . . . it stinks for the AG to be carrying water for corporate polluters” (quoting Robert J. Smith, *Oklahoma Water Suit Crosses Line, Beebe Says*, *ARK. DEMOCRAT-GAZETTE*, Nov. 4, 2005, at 1B.)).

59. *But see* Pfander, *supra* note 19, at 558–59.

60. See *infra* Section I.B.

61. See *infra* Section III.A.

62. See *infra* Part II and Section IV.C.

63. *Cf.* 28 U.S.C. § 1251 (b) (discussing the situations in which “[t]he Supreme Court shall have original but not exclusive jurisdiction”).

64. See *infra* Part V.

Such a move could not remove the Court's jurisdiction over these cases,⁶⁵ meaning that some state plaintiffs might file in the Court regardless. But concurrent jurisdiction gives the Court a rock-solid basis for refusing to hear those cases, by guaranteeing states a true alternative forum in the lower courts. State plaintiffs who actually wished to litigate a case (rather than simply to grandstand) would presumably file in the lower courts, and the availability of that forum would, in at least some categories of cases, restore state incentives to reach negotiated solutions to their inter-state problems.⁶⁶ A plaintiff state that attempted to bypass the lower courts could count on the Court's denying its motion for leave to file.⁶⁷

In addition to permitting the Court to continue to avoid these cases, concurrent jurisdiction also addresses the original discrimination that plaintiff states currently suffer.⁶⁸ Lower courts have no structural reasons to avoid these cases and thus have no need to apply the discriminatory doctrines I criticize here.⁶⁹ A lower court would still apply Article III standing doctrine: Although there is considerable debate about what standing should be required of state plaintiffs, particularly when states sue the federal government,⁷⁰ I am not aware of anyone who argues that states must always show substantial injury by clear and convincing evidence. Lower courts would also apply the *parens patriae* doctrine, as is required in any suit by a state plaintiff.⁷¹ But, unlike the Supreme Court, which jealously guards its bandwidth for appellate work, the district courts exist as trial courts and would have no need to contort themselves to avoid these cases.⁷²

Congress should provide special procedures to address likely state concerns.⁷³ First, Congress should require some mechanism to guarantee a neutral forum—most fundamentally, a forum having no connection to any of the states involved in the litigation. Congress has several options in seeking to ensure the provision of a neutral forum. The plaintiff state could be permitted to choose an initial venue, and the defendant state could be given a change-of-venue mechanism.⁷⁴ Congress could designate the Federal District for the District of Columbia as the default venue⁷⁵ or could require the Chief Justice⁷⁶

65. See *infra* Section V.C.

66. See *infra* Section V.A.1.

67. See *infra* note 427 and accompanying text.

68. See *infra* Section V.D.

69. See *infra* note 369–70 and accompanying text.

70. See *infra* note 429 and accompanying text.

71. See *infra* note 258 and accompanying text.

72. See *infra* Part V.

73. See *infra* Section V.B.

74. See *infra* notes 401–04 and accompanying text.

75. See *infra* notes 405–07 and accompanying text.

76. See *infra* notes 408–11 and accompanying text.

or the Judicial Panel on Multidistrict Litigation⁷⁷ to assign the case to a suitable district. Congress could even establish a national district court to hear these and other suitable cases.⁷⁸

Second, Congress should make special provisions for appeal, again to insure a neutral arbiter. One option is to provide for appeal to the D.C. Circuit or the Federal Circuit rather than to the regional courts of appeal.⁷⁹ Alternatively, Congress could require the Chief Justice to assign the case to a regional court of appeals with the requisite neutrality.⁸⁰ A statute correcting original discrimination could even provide appeal as of right to the Supreme Court, although, as I discuss below, the Court might discriminate against state *appellants* just as it currently discriminates against state plaintiffs.⁸¹

Adopting a statute that provides concurrent jurisdiction over inter-state cases—whatever the details—would relieve the Court of a docket it finds burdensome and, accordingly, of the need to warp doctrine to the detriment of sovereign states. Such a statute would, in turn, remedy the discrimination that state plaintiffs currently face in the Supreme Court, provide a neutral forum for inter-state litigation, and restore incentives for states to seek political solutions to many of their differences.

The Article proceeds in five Parts. Part I limns the Court's original inter-state jurisdiction and the reasons given for it. Part II explains the Court's dislike of this jurisdiction. Part III reviews the discretionary doctrines the Court has adopted to avoid inter-state disputes and demonstrates how they result in original discrimination against state plaintiffs in general and certain categories of state plaintiffs in particular. Part IV considers, and ultimately rejects, several doctrinal options for curing the problems caused by original discrimination. Part V then calls upon Congress to solve original discrimination by extending inter-state jurisdiction to the lower courts.

I. ORIGINAL JURISDICTION OVER INTER-STATE DISPUTES

Article III of the Constitution gives the Supreme Court jurisdiction over “controversies between two or more states” and provides that “[i]n all cases . . . in which a state shall be party, the Supreme Court shall have original jurisdiction.”⁸² Congress, in turn, has stated that “[t]he Supreme Court shall have original *and exclusive* jurisdiction of all controversies between two or more States.”⁸³ In this Part, I review the basics of the Court's inter-state jurisdiction and what theories are given to explain the Founders' assignment of this jurisdiction.

77. See *infra* note 412 and accompanying text.

78. See *infra* note 407 and accompanying text.

79. See *infra* notes 413–16 and accompanying text.

80. See *infra* notes 417–19 and accompanying text.

81. See *infra* notes 420–23 and accompanying text.

82. U.S. CONST. art. III, § 2.

83. 28 U.S.C. § 1251 (a) (emphasis added).

A. THE BASICS OF INTER-STATE JURISDICTION

Article III, section 2 defines the jurisdiction of the judicial branch⁸⁴ and, in the Distribution Clause, grants the Supreme Court original jurisdiction over “all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.”⁸⁵ The first Congress addressed that jurisdiction in section 13 of the Judiciary Act of 1789, keeping only some heads of jurisdiction exclusive. Suits between states and between the United States and a state were exclusively for the Court, but the lower courts had concurrent jurisdiction over suits “between a state and citizens of other states, or aliens.”⁸⁶ Suits *against* ambassadors and “other public ministers” were also kept exclusively within the Court’s jurisdiction, but the lower courts were given concurrent jurisdiction over suits brought *by* ambassadors and over all suits to which consuls were parties.⁸⁷ Congress has since removed the exclusivity of the Court’s jurisdiction over the remaining suits involving ambassadors, as well as all “controversies between the United States and a State.”⁸⁸

Today, only suits between states remain in the Court’s exclusive original jurisdiction.⁸⁹ In an inter-state dispute, as the Court stated in 1838, the case

84. U.S. CONST. art. III, § 2.

85. *Id.* art. III, § 2, cl. 2. To fall within the Court’s original jurisdiction, a case must also satisfy Article III’s definition of the judicial power of the *United States*. *Duhne v. New Jersey*, 251 U.S. 311, 314 (1920) (“[T]he distribution which the clause makes relates solely to the grounds of federal jurisdiction previously conferred.”).

86. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80–81 (1789). Congressional action is not required for the Court to exercise its original jurisdiction, which is self-executing. *E.g.*, *California v. Arizona*, 440 U.S. 59, 65 (1979); *see also* 17 WRIGHT & MILLER, *supra* note 44, § 4043 & nn.17–24 (describing and citing Supreme Court cases holding that “original jurisdiction conferred by the Constitution can be exercised even without any statutory confirmation”); Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 981 (2013) (“Congress has little to no power over the Supreme Court’s original jurisdiction . . .”); Pfander, *supra* note 19, at 558 & n.12 (“The Court and commentators alike have tended to agree that the mandatory character of the Original Jurisdiction Clause imposes some limits on the power of Congress to restrict the scope of the Court’s original jurisdiction.”). *But see* *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 432 (1793) (stating that original jurisdiction “cannot be effectuated without the intervention of the Legislative authority”).

Moreover, Congress is assumed to have no power to deprive the Court of any portion of its original jurisdiction. *E.g.*, *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 300 (1888) (*dicta*); *see also* 17 WRIGHT & MILLER, *supra* note 44, § 4043 & nn.25–27 (citing cases and commentary to conclude that “Congress lacks any power of withdrawal”). *But see* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 254 n.160 (1985) (“Congress may abolish all federal jurisdiction over [cases in which a state is a party]—including Supreme Court original jurisdiction.”).

87. Judiciary Act § 13.

88. 28 U.S.C. § 1251 (b) (2). As discussed in Section V.A, the Court has always held that the Constitution permits Congress to take these steps. *E.g.*, *California*, 440 U.S. at 64–66.

89. 28 U.S.C. § 1251 (a). Despite the text of § 1251 (a), a few lower courts have held they may proceed even when a defendant state is the real party in interest, as long as the “sovereign interests” raised in the dispute do not rise to the level needed for Supreme Court jurisdiction.

involves “two states of this Union, sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other for all but federal purposes.”⁹⁰ The Court has long exercised discretion to decline cases within its original jurisdiction,⁹¹ even in cases over which it has *exclusive* original jurisdiction.⁹²

The Court has interpreted the phrase “controversies between two or more states” fairly narrowly,⁹³ so that an inter-state dispute does not fall within the exclusive jurisdiction of section 1251 simply because one state sues the political subdivision of another state.⁹⁴ Thus a suit by Louisiana against Texas over the actions of a state health officer did not fall within the exclusive jurisdiction of section 1251(a) when the health officer’s actions were allegedly *ultra vires*.⁹⁵ The Court has, however, taken original jurisdiction when an officer was acting precisely as the state had intended: In *Missouri v. Illinois*, an Illinois state agency, rather than acting *ultra vires*, was established as

See Connecticut v. Cahill, 217 F.3d 93, 99–100 (2d Cir. 2000) (“[A] State whose officers’ action is challenged must be considered the real party in interest—and thus must be named as a defendant—where (1) the alleged injury was caused by actions specifically authorized by State law, and (2) the suit implicates the State’s core sovereign interests.”); *see also* *Univ. of Utah v. Max-Planck-Gesellschaft zur Forderung der Wissenschaften E.V.*, 734 F.3d 1315, 1323–24 (Fed. Cir. 2013) (holding that the case did not implicate a “core sovereign interest”); *Dep’t of Transp. ex rel. Oregon v. Heavy Vehicle Elec. License Plate, Inc.*, 157 F. Supp. 2d 1158, 1164 (D. Or. 2001) (same). Then-Judge Sotomayor dissented in *Cahill*, rejecting “the majority’s interpretation of § 1251 (a) [as] contrary to the plain meaning of the statute . . . and depend[ing] upon a questionable reading of Supreme Court precedent.” *Cahill*, 217 F.3d at 105 (Sotomayor, J., dissenting); *see also Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 913 (10th Cir. 2017) (adopting Sotomayor’s reasoning).

90. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838).

91. *See generally* 17 WRIGHT & MILLER, *supra* note 44, § 4053. Some reasons would apply in any court, such as refusal to exercise equitable jurisdiction when legal remedies were available, *id.* (citing *California v. Latimer*, 305 U.S. 255 (1938)), or an insistence on following statutory procedures for review, *id.* § 4043 (citing *North Dakota ex rel. Lemke v. Chicago & N.W. Ry.*, 257 U.S. 485 (1922)). Others involve the Court’s jealous protection of its docket capacity, *see infra* Section III.B, so that the Court will decline jurisdiction if another forum is available, 17 WRIGHT & MILLER, *supra* note 44, § 4053.

92. *Arizona v. New Mexico*, 425 U.S. 794, 797–98 (1976). This refusal to hear cases within the Court’s exclusive jurisdiction has been criticized. *See, e.g.*, 17 WRIGHT & MILLER, *supra* note 44, § 4053 (noting that the Court has declined to accept jurisdiction of inter-state cases so long as an alternative forum for the issues existed, but that, when no alternative forum exists, “[s]uch litigation should continue to command disposition on the merits according to whatever lofty standards of persuasion on law and fact the Court may impose”).

93. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 98 (1972), *disapproved of on other grounds sub nom.* *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).

94. *Id.* at 94, 98 (“[T]he actions of public entities might, under appropriate pleadings, be attributed to a State so as to warrant a joinder of the State as party defendant. . . . [But] the term ‘States’ as used in 28 U.S.C. § 1251 (a) (1) should not be read to include their political subdivisions.”).

95. *Louisiana v. Texas*, 176 U.S. 1, 22 (1900) (“[A]cts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state.”).

“an agency . . . to do the very things which [Missouri objected to]. It is state action and its results that are complained of.”⁹⁶

Cases within the Court’s inter-state jurisdiction sometimes involve additional parties, including private parties,⁹⁷ other governmental entities such as municipal or state agencies,⁹⁸ and the United States.⁹⁹ Indeed, the Court has been described as developing “a form of supplemental jurisdiction” for some such parties.¹⁰⁰

The Court’s procedures for inter-state disputes differ from procedure in the lower courts. The Supreme Court does not permit a state to file a complaint; the state must move the Court for leave to file.¹⁰¹ As discussed below, the defendant state is not required to respond to such a motion,¹⁰²

96. *Missouri v. Illinois*, 180 U.S. 208, 242 (1901).

97. *E.g.*, *South Carolina v. North Carolina*, 558 U.S. 256, 271–73 (2010) (allowing a private energy company to intervene as a party); *Wyoming v. Colorado*, 259 U.S. 419, 468 (1922) (allowing Wyoming to sue two Coloradoan corporate defendants since Wyoming’s interests were “indissolubly linked with the rights of the [private corporations]”).

98. *E.g.*, *Mississippi v. Tennessee*, 142 S. Ct. 31, 40 (2021) (involving a suit by Mississippi against not only Tennessee but also the City of Memphis and the Memphis Light, Gas & Water Division).

99. *E.g.*, *Oklahoma v. Texas*, 252 U.S. 372 (1920) (granting motion of the United States to intervene as trustee of Indian allottees). The United States remains immune to suit in the Supreme Court, as it does in other courts unless Congress has waived that immunity. *See, e.g.*, *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Accordingly, the United States cannot be made an involuntary party to cases within the Court’s inter-state jurisdiction. *See* Sandra B. Zellmer, *Waiving Federal Sovereign Immunity in Original Actions Between States*, 53 U. MICH. J.L. REFORM 447, 456–60, 481 (2019) (demonstrating that “the United States cannot be forced to participate in state versus state actions before the U.S. Supreme Court”). The United States sometimes intervenes, *see Oklahoma*, 252 U.S. at 372, and, at other times, it participates in the case as something like a super-amicus, *see, e.g.*, United States’ Statement of Participation at 3, *Florida v. Georgia*, 138 S. Ct. 2502 (2018) (U.S. Orig. No. 142) (stating that the United States would participate as an amicus, noting that the case management plan as written would allow “[o]nly parties [to] participate in status conferences and other case proceedings,” and asking “that the United States receive notice and the opportunity to attend status conferences and other proceedings concerning th[e] case” (first alteration in original)). Significant problems arise when the United States’ presence as a party is necessary for an effective decree and yet the United States refuses to join. *See generally* Zellmer, *supra* (studying the complications caused by federal participation, or lack thereof, in interstate water disputes).

100. SHAPIRO ET AL., *supra* note 19, at 10–12.

101. SUP. CT. R. 17(3) (“The initial pleading shall be preceded by a motion for leave to file . . .”). As discussed in more detail below, this requirement originally arises from equity practice. *See infra* Section III.A. When the plaintiff files its “motion for leave to file” a bill of complaint, it attaches its complaint and may also include a brief in support of the motion. SUP. CT. R. 17(3). Supreme Court Rule 29 governs service on the governor and the attorney general of the defendant state. *Id.* The defendant may file a brief arguing that leave should be denied or may waive its right to file; upon filing of a brief (or waiver), or when sixty days have passed, the Clerk of the Court circulates the motion and any opposition. SUP. CT. R. 17(5). For a detailed discussion of the procedures before the Court, *see* SHAPIRO ET AL., *supra* note 19, at 10–26 to 10–44.

102. *See infra* notes 198–99 and accompanying text.

although in practice the defendant seems to do so.¹⁰³ The Court may hold a hearing on the motion¹⁰⁴ and often invites the United States to weigh in.¹⁰⁵

If the Court denies the motion for leave to file, the plaintiff state's lawsuit dies aborning (though the Court may deny without prejudice to a future effort to file again).¹⁰⁶ If the Court grants the motion for leave to file, it states a deadline for the answer¹⁰⁷; the order sometimes suggests that the defendant make a particular motion to dismiss,¹⁰⁸ and it may also make clear that granting the motion implies no conclusion on whether the plaintiff has actually stated a claim.¹⁰⁹ The Court relies on—but is not bound by¹¹⁰—the Federal Rules of Civil Procedure (“FRCP”) for “[t]he form of pleadings and motions” and identifies both the FRCP and the Federal Rules of Evidence as guides “in other respects.”¹¹¹

Once the pleadings are complete, the Court often appoints a special master, who supervises the proceedings, receives evidence, holds hearings, and

103. See sources cited *supra* note 27 (showing that, at least since 2002, when the Court started providing online dockets of all original cases, defendant states have filed responses to plaintiff states' motions for leave to file complaints in all cases).

104. SUP. CT. R. 17(3). See, e.g., *Virginia v. Maryland*, 355 U.S. 269, 269 (1957) (mem.) (entering order granting Virginia leave to file her complaint and noting that the decision was made after oral argument on the motion); see also *Connecticut v. New Hampshire*, 502 U.S. 1069, 1069 (1992) (mem.) (“The Chief Justice and Justice Scalia would set the motion for oral argument.”).

105. E.g., *Arizona v. California*, 139 S. Ct. 2765, 2765 (2019) (mem.) (calling for the views of the Solicitor General on Arizona's motion for leave to file a bill of complaint against California for allegedly unconstitutional extraterritorial tax assessments and resulting seizures of assets). The Solicitor General conducts virtually all U.S. participation before the Supreme Court. See 28 U.S.C. § 505 (creating the position of Solicitor General within the Department of Justice); 28 C.F.R. § 0.20(a) (2022) (assigning to the Solicitor General the responsibility for representing the United States in the Supreme Court); see also *About the Office*, U.S. DEP'T OF JUST. (May 24, 2021), <https://www.justice.gov/osg/about-office> [<https://perma.cc/MNA5-RTBS>] (“The task of the Office of the Solicitor General is to supervise and conduct government litigation in the United States Supreme Court. Virtually all such litigation is channeled through the Office of the Solicitor General and is actively conducted by the Office. The United States is involved in approximately two-thirds of all the cases the U.S. Supreme Court decides on the merits each year.”).

106. See, e.g., *Mississippi v. City of Memphis*, 559 U.S. 901, 901 (2010) (mem.) (“Motion for leave to file a bill of complaint denied without prejudice.”).

107. E.g., *Florida v. Georgia*, 574 U.S. 972, 972 (2014) (mem.) (“Motion for leave to file a bill of complaint granted. Defendant is allowed 30 days within which to file an answer.”).

108. E.g., *Texas v. New Mexico*, 571 U.S. 1173, 1173 (2014) (mem.) (suggesting that New Mexico “file a motion . . . in the nature of a motion under Rule 12(b)(6)”; *New Hampshire v. Maine*, 530 U.S. 1272, 1272 (2000) (mem.) (suggesting that Maine “file a motion to dismiss on *res judicata* grounds”).

109. *Idaho ex rel. Andrus v. Oregon*, 429 U.S. 163, 164 (1976) (per curiam) (“This order is not a judgment that the bill of complaint, to the extent that permission to file is granted, states a claim upon which relief may be granted.”).

110. *Alabama v. North Carolina*, 560 U.S. 330, 344 (2010) (“[W]e are not technically bound by the Federal Rules of Civil Procedure . . .”).

111. SUP. CT. R. 17(2).

ultimately makes a report and recommendation to the Court.¹¹² The use of the special master in some ways puts the Court into an appellate role.¹¹³ Although “the Master’s findings . . . deserve respect and a tacit presumption of correctness, [the Court has] the ultimate responsibility” for fact-finding.¹¹⁴ The Court may also resolve the case on the pleadings, if there is no disputed

112. See SHAPIRO ET AL., *supra* note 19, at 10-40 to 10-44. Professor Carstens gives a nice history of the use of special masters and (as they were called in the nineteenth century cases) commissioners. Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court’s Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 641-55 (2002). “[C]ommentators ha[ve] observed that the standard appointment order for a Special Master authorizes ‘fairly extensive powers,’ including broad discretion in ‘conduct[ing] the proceedings.’” Kristin A. Linsley, *Original Intent: Understanding the Supreme Court’s Original Jurisdiction in Controversies Between States*, 18 J. APP. PRAC. & PROCESS 21, 52 n.170 (2017) (third alteration in original) (quoting Jeffrey L. Bleich, Michelle Friedland, David Han & Aimee Feinberg, *Supreme Court Watch: Very Special Masters—Handling the Supreme Court’s Original Jurisdiction Cases*, 35 S.F. ATTY 45, 47 (2009)). The *ad hoc* appointment of special masters has been severely criticized, especially because special masters have often been private citizens. See Carstens, *supra*, at 668-77; Danley, *supra* note 19, at 10987. I share these concerns, and it is possible that the Court does, too: The last three special masters the Court has appointed are federal circuit judges. See *Florida v. Georgia*, 140 S. Ct. 2626, 2626 (2018) (mem.) (appointing Senior Judge Paul J. Kelly Jr. of the Tenth Circuit); *Arkansas v. Delaware*, 137 S. Ct. 1431, 1431 (2017) (mem.) (appointing Judge Pierre N. Leval of the Second Circuit); *Mississippi v. Tennessee*, 577 U.S. 981, 981 (2015) (mem.) (appointing Senior Judge Eugene E. Siler, Jr. of the Sixth Circuit). As of this writing, the Court has not said whether it will appoint a special master in *New York v. New Jersey*, an original case filed with the Court’s permission in June 2022. See *New York v. New Jersey*, U.S. Orig. No. 156 (motion for leave to file a bill of complaint filed Mar. 14, 2022). Using federal judges had been the practice of the Court at an earlier time, but “the workload in the lower federal courts had induced the Court not to appoint such senior judges.” SHAPIRO ET AL., *supra* note 19, at 10-43.

While the modern Court has relied exclusively on special masters, the early Court is known to have used a jury for original jurisdiction cases in its first years, but not since. See SHAPIRO ET AL., *supra* note 19, at 10-44 n.53 (citing *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794) and two other jury cases in the Court’s original jurisdiction near the Founding). The Court has said “[p]roceedings under th[e] grant of [original] jurisdiction are ‘basically equitable in nature[.]’” *Kansas v. Nebraska*, 574 U.S. 445, 453 (2015) (quoting *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973)), so that no right to a jury trial attaches; but a case at common law could arise, thus requiring a jury, see U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”). In addition, a special master, or even the Court itself, could empanel an advisory jury, as provided for trial courts in FRCP 39(c).

113. *Wyoming v. Oklahoma*, 502 U.S. 437, 463 (1992) (Scalia, J., dissenting) (“Almost all other litigants must go through at least two other courts before their case receives our attention.”); *Maryland v. Louisiana*, 451 U.S. 725, 765 (1981) (Rehnquist, J., dissenting) (noting “the appellate-type review which this Court necessarily gives to [the master’s] findings and recommendations”); see also McKusick, *supra* note 16, at 193 (“[S]ubsequent proceedings . . . on . . . [the special master’s] report involve the same kind of briefing and oral argument that a case on appeal involves.”).

114. *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984).

issue of material fact.¹¹⁵ But it errs on the side of “allowing full development of the facts.”¹¹⁶ States usually split the costs of the special master.¹¹⁷

A state is not immune to suit by another state in the Supreme Court: The Court’s original jurisdiction includes “a suit by one State against another State,” which “necessarily operates regardless of the consent of the defendant State.”¹¹⁸ The Court may involuntarily join a state as a party¹¹⁹ and long ago suggested that it would enter a default judgment against a state that refused to appear¹²⁰ (although, as discussed below, a default could presumably occur

115. *E.g., Maryland*, 451 U.S. at 751 (naming a master to handle pre-trial matters, rejecting the master’s suggestion that further evidence be taken, and resolving the case on the pleadings).

116. *United States v. Texas*, 339 U.S. 707, 715 (1950) (first citing *Oklahoma v. Texas*, 253 U.S. 465, 471 (1920); then citing *Kansas v. Colorado*, 185 U.S. 125, 144, 145 (1902); and then citing *United States v. Texas*, 162 U.S. 1, 16 (1896)).

117. *E.g., Texas v. New Mexico*, 138 S. Ct. 2017, 2017 (2018) (mem.) (allocating the special master’s costs to Texas (37.5 percent), New Mexico (37.5 percent), the United States (20 percent), and Colorado (5 percent)). The costs include a variety of fees and expenses, especially when the master is a private citizen. *See, e.g., Order in Pending Case at 1, South Carolina v. North Carolina*, 552 U.S. 1160 (2008) (U.S. Orig. No. 138) (listing “[t]he compensation of the Special Master, the allowances to her, the compensation paid to her legal, technical, stenographic and clerical assistants, the cost of printing her Reports, and all other proper expenses, including travel expenses”). As with any cost-splitting exercise, the parties can disagree over the legitimacy of fees and costs. *E.g., Missouri v. Iowa*, 165 U.S. 118, 118 (1897) (noting disagreement over “certain allowances to be included in the expenses”). When the Court appoints a federal judge as the master, the parties pay less, but still more than any litigant in the lower courts: State parties pay for printing the master’s reports and other similar costs and also for travel expenses and any costs for legal assistants. *See Florida v. Georgia*, 139 S. Ct. 51, 51 (2018) (mem.) (authorizing Senior Judge Kelly, appointed as special master, to charge for the costs associated with having a legal assistant).

118. *Monaco v. Mississippi*, 292 U.S. 313, 328 (1934). Indeed, the Court initially construed this waiver wrought by the Original Jurisdiction clause so broadly that unconsenting states could be sued by citizens of other states. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 428 (1793). The Eleventh Amendment was promptly enacted to restore the states’ immunity to suit by citizens of other states. *See Hans v. Louisiana*, 134 U.S. 1, 11 (1890) (noting that *Chisholm* “created such a shock of surprise throughout the country that, at the first meeting of congress thereafter, the eleventh amendment to the constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the states”). Post Eleventh Amendment, the Court has held that sovereign immunity in inter-state cases is not violated by the presence of other parties, as long as those parties seek relief no different from that sought by the plaintiff state. *See Alabama v. North Carolina*, 560 U.S. 330, 355–56 (2010); *Arizona v. California*, 460 U.S. 605, 614 (1983). Conversely, as discussed in Section IV.A, private individuals cannot get around the limits of the Eleventh Amendment by convincing a state to bring suit on their behalf; if the private individuals are the real plaintiffs in interest, making the case really one of a private party against a state, the Eleventh Amendment bars the suit.

119. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 97 (1972), *disapproved of on other grounds sub nom.* *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).

120. *See Chisholm*, 2 U.S. at 479 (“[U]nless the said state shall either in due form appear, or show cause to the contrary in this court, by the first day of the next Term, judgment by default shall be entered against the said State.”); *New Jersey v. New York*, 30 U.S. (5 Pet.) 284, 291 (1831) (“If upon being served with a copy of [a subpoena to appear], the [state] shall still fail to appear or to show cause to the contrary, this court will . . . proceed to a final hearing and decision thereof.”); *Oswald v. New York*, 2 U.S. (2 Dall.) 415, 415 (1793) (mem.) (compelling New York to appear).

only once a complaint was accepted for filing¹²¹). Moreover, the Court has taken steps to have a judgment enforced when a losing state was recalcitrant.¹²²

The cases fall into three general categories: disputes over compacts that the states have already negotiated (where the Court's "effort is relatively simple and focuses upon 'declar[ing] rights under the Compact and enforc[ing] its terms'"¹²³)¹²⁴; those involving property (for example, allocating an interstate resource, determining a boundary, or determining which state is entitled to escheated property) or nuisance claims (for example, determining liability for water pollution)¹²⁵; and those involving Commerce Clause or other constitutional challenges to legislation or disputes over taxes.¹²⁶

The property and nuisance cases are considerably more fact-intensive than the others. For example, in water-resources disputes not governed by compacts, the Court equitably apportions the disputed water resource, an intensely fact-based inquiry.¹²⁷ A boundary dispute between states can likewise involve voluminous fact-finding and expert testimony,¹²⁸ and fact-finding in cases involving pollution can be "formidable."¹²⁹

In addition, the Court's involvement in a complicated inter-state dispute can continue for decades. The dispute between Arizona and California regarding the lower Colorado River has been before the Court at least nine times since

121. See *infra* notes 198–202 and accompanying text.

122. See *Wisconsin v. Illinois*, 289 U.S. 395, 411 (1933) (ordering Illinois to raise the funds necessary to comply with an earlier decree, to notify the Court of its compliance, and to pay all costs, including those of the special master, incurred to force compliance); *Virginia v. West Virginia*, 246 U.S. 565, 603–05 (1918) (concluding that a writ of mandamus could issue to force West Virginia to pay the judgment entered years earlier by the Court, but holding the case over to the next term in hopes of a political solution).

123. *Florida v. Georgia*, 138 S. Ct. 2502, 2525 (2018) (alterations in original) (quoting *Kansas v. Nebraska*, 574 U.S. 445, 455 (2015)). *Bul see* *Texas v. New Mexico*, 462 U.S. 554, 557–64 (1983) (detailing how the states' poorly drafted compact led to years' worth of proceedings).

124. See sources cited *supra* note 27 (showing that, since 1976, five compacts have been brought before the Court for adjudication within the inter-state jurisdiction; an additional two cases involve contract disputes, which involve similar "enforce[ment of] terms").

125. See sources cited *supra* note 27 (showing that, since 1976, twenty-seven boundary and water resources disputes have been brought before the Court for adjudication within the inter-state jurisdiction, as well as three escheat disputes, two probate disputes, and three nuisance disputes).

126. See sources cited *supra* note 27 (showing that, since 1976, twenty-one constitutional law or tax disputes have been brought before the Court for adjudication within the inter-state jurisdiction).

127. See *infra* notes 164–67 and accompanying text.

128. *E.g.*, *Louisiana v. Mississippi*, 466 U.S. 96, 98–106 (1984).

129. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 503 (1971); see also *New York v. New Jersey*, 256 U.S. 296, 313 (1921) ("[T]he grave problem of sewage disposal presented . . . is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court however constituted.").

1934.¹³⁰ More than a few special masters have passed away while working on an inter-state case.¹³¹

As discussed in more detail below, being allowed to proceed is no guarantee of a final judgment according relief.¹³² The Court, like any other court, will not grant relief if the plaintiff loses on the merits; in inter-state cases, however, winning on the merits often means meeting a stringent “clear and convincing” evidentiary standard.¹³³ The Court has also declined to give judgment for a state plaintiff for prudential reasons: In *Texas v. New Mexico*, the Court declined to reform a state compact that was poorly written on the ground that the states had created their own mess.¹³⁴

B. THE PURPOSES OF INTER-STATE JURISDICTION

The Court, the Founders, and scholars have proffered a number of justifications for inter-state jurisdiction, almost all of which emphasize the states’ sovereign status.¹³⁵ First, in joining the Union, states gave up their rights to “the diplomatic settlement of controversies between sovereigns and a possible resort to force.”¹³⁶ The Court’s original jurisdiction thus provides

130. *E.g.*, *Arizona v. California*, 292 U.S. 341, 344 (1934); *Arizona v. California*, 298 U.S. 558, 599 (1936); *Arizona v. California*, 373 U.S. 546, 551 (1963); *Arizona v. California*, 376 U.S. 340, 340 (1964); *Arizona v. California*, 383 U.S. 268, 269 (1966) (mem.); *Arizona v. California*, 439 U.S. 419, 420 (1979); *Arizona v. California*, 460 U.S. 605, 608 (1983); *Arizona v. California*, 466 U.S. 144, 145 (1984); *Arizona v. California*, 531 U.S. 1, 1 (2000).

131. *Arizona v. California*, 498 U.S. 964, 964 (1990) (mem.) (appointing a new special master upon the death of the prior one); *Illinois v. Kentucky*, 487 U.S. 1215, 1215 (1988) (mem.) (same); *New Jersey v. Nevada*, 484 U.S. 920, 920 (1987) (mem.) (same); *Kansas v. Colorado*, 484 U.S. 910, 910 (1987) (mem.) (same); *United States v. Florida*, 423 U.S. 1011, 1011 (1975) (mem.) (same); *Arizona v. California*, 350 U.S. 812, 812 (1955) (mem.) (same).

132. *See infra* Section III.C.

133. *See Missouri v. Illinois*, 200 U.S. 496, 522 (1906) (“Where . . . the plaintiff has sovereign powers [and commits the same acts it accuses the defendant of] . . . it not only offers a standard to which the defendant has the right to appeal, but . . . it warrants the defendant in demanding the strictest proof that the plaintiff’s own conduct does not produce the result, or at least so conduce to it, that courts should not be curious to apportion the blame.”); *Florida v. Georgia*, 141 S. Ct. 1175, 1181–83 (2021) (holding that Florida had not shown by clear and convincing evidence that Georgia had caused the collapse of the oyster fisheries in the Apalachicola Bay).

134. *Texas v. New Mexico*, 462 U.S. 554, 575–76 (1983) (declining to reform an inter-state compact).

135. Professor Pfander convincingly argues that the Court’s original jurisdiction was “at the center of the framers’ plan to secure the effective enforcement of federal law against the states,” which would require that the Original Jurisdiction Clause be read “to encompass all state-party cases, including federal question and admiralty cases, and not simply the diverse-party controversies.” Pfander, *supra* note 19, at 558, 560–61. Here, I focus on the more common justifications given for original jurisdiction.

136. *North Dakota v. Minnesota*, 263 U.S. 365, 372–73 (1923); *see also* *Virginia v. Tennessee*, 148 U.S. 503, 504 (1893) (“[I]n [having inter-state jurisdiction], the judicial department of our government . . . draw[s] to itself by the ordinary modes of peaceful procedure the settlement of questions . . . which otherwise might be the fruitful cause of prolonged and harassing conflicts.”); *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (“Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population

an avenue for redress when states face what would, if they were sovereign nation-states, be a *casus belli*, or cause for war.¹³⁷ In 1918, Chief Justice White wrote for the Court, saying “the rights of all the states” cannot be preserved if “any one state may destroy the rights of any other without any power to redress or cure the resulting grievance.”¹³⁸

Second, jurisdiction in the highest court is thought to befit the dignity of the states. Alexander Hamilton wrote in Federalist 81 that “[i]n cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal.”¹³⁹ The Court has subsequently said that “exclusive jurisdiction was given to this court because it best comported with the dignity of a state that a case in which it was a party should be determined in the highest, rather than in a subordinate, judicial tribunal of the nation.”¹⁴⁰ In its appellate jurisdiction, the Court has noted that states can be entitled to “special solicitude” given their “stake in protecting [their] quasi-sovereign interests.”¹⁴¹

Third, the Court’s jurisdiction provides a neutral forum for states. As Alexander Hamilton wrote, original inter-state jurisdiction permitted suit in “that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.”¹⁴² The Court likewise has noted “the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the

and when the alternative to settlement is war. In a less degree, perhaps, the same is [true] of the quasi-sovereignties bound together in the Union.”).

137. See *Texas*, 462 U.S. at 571 n.18 (“The model case for invocation of this Court’s original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign.”). At least one inter-state dispute *has* involved the use of force: In 1934, the Arizona National Guard was mobilized against California in a dispute over the Colorado River. JACK L. AUGUST, JR., *DIVIDING WESTERN WATERS: MARK WILMER AND ARIZONA V. CALIFORNIA* 46 (2007). Original jurisdiction cases have also *prompted* threats of violence; in the wake of the Court’s decision in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)—Georgia threatened to hang anyone who complied with the Court’s ruling. See ROBERT JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 13–14 (1941). Use of force was recently bruited in state legislatures over an inter-state border dispute. *New Jersey v. Delaware*, 552 U.S. 597, 607–08 (2008) (“Delaware considered authorizing the National Guard to protect its border from encroachment. One New Jersey legislator looked into recommissioning the museum-piece battleship U.S.S. *New Jersey*, in the event that the vessel might be needed to repel an armed invasion by Delaware.” (citation omitted)).

138. *Virginia v. West Virginia*, 246 U.S. 565, 596–97 (1918).

139. THE FEDERALIST NO. 81 (Alexander Hamilton).

140. *United States v. Texas*, 143 U.S. 621, 643 (1892). For an excellent criticism of this justification for original jurisdiction, which I will return to in Part IV, see Pfander, *supra* note 19, at 564–67 (arguing that Congress’s authority enables it to “routinely exercise[]” the power of “assign[ing] matters otherwise within the Court’s original jurisdiction to the lower federal courts”).

141. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

142. THE FEDERALIST NO. 80 (Alexander Hamilton).

reality, of partiality to one's own."¹⁴³ Similarly, the Court has said that "[o]ne cardinal rule" applies to its inter-state jurisdiction: "Each state stands on the same level with all the rest."¹⁴⁴ When it hears an inter-state case, the Court must "recognize the equal rights of both [states] and at the same time establish justice between them."¹⁴⁵

* * *

When the Founders conferred original inter-state jurisdiction on the Court, when the First Congress made that jurisdiction exclusive, and when subsequent Congresses retained that exclusivity, they all apparently believed they were providing the States with a dignified and neutral forum to resolve disputes that, prior to the Union, would have required diplomatic or even military solutions. As the next Part shows, however, the Court has resisted hearing these cases for both principled and practical reasons.

II. THE COURT DISLIKES EXERCISING ITS INTER-STATE JURISDICTION

Despite these important justifications for giving the Court original jurisdiction over state-versus-state disputes, the Court has repeatedly expressed its disinclination to resolve them. As I discuss in the remainder of this Part, some of that resistance derives from other principles of constitutional law; some of it arises from the Justices' institutional concerns.

A. THE COURT HAS PRINCIPLED REASONS TO DECLINE INTER-STATE CASES

The Court is aware that original jurisdiction cases cause it to trench on the prerogatives of sovereign states, something it will not do lightly.¹⁴⁶ The Court has described its jurisdiction over these cases as one that "should be invoked sparingly,"¹⁴⁷ or, even more stringently, that it "is of so delicate and grave a character that it was not contemplated that it would be exercised

143. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 500 (1971); *see also Texas v. California*, 141 S. Ct. 1469, 1472 (2021) (mem.) (Alito, J., joined by Thomas, J., dissenting from denial of leave to file a bill of complaint) ("[W]e are not tied to any region or State and were therefore entrusted with the responsibility of adjudicating cases where the suspicion of local bias may run high."). Professor Amar has invoked this justification, *see Akhil Reed Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 476–77 (1989), and Professor Pfander has rejected it, *see Pfander, supra* note 19, at 569–72.

144. *Kansas v. Colorado*, 206 U.S. 46, 97 (1907).

145. *Id.* at 98.

146. *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995) (Thomas, J., concurring) ("Federal courts should pause before using their inherent equitable powers to intrude into the proper sphere of the States."); *see also Note, supra* note 16, at 682–83, 682 n.116 (arguing that the Court's use of federal common law in inter-state disputes, despite *Erie*, arises from sovereignty concerns, as it is unfair to choose one or the other state's law in resolving a dispute between the two (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938))).

147. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) (quoting *Utah v. United States*, 394 U.S. 89, 95 (1969)).

save when the necessity was absolute.”¹⁴⁸ Justice Rehnquist warned that “indiscriminate use of our original jurisdiction . . . risks the creation of an entirely separate system for litigation” that will “tempt[] to[o] many interests . . . to ‘start at the top’, so to speak,”¹⁴⁹ thus upsetting the structural balance of the federal judiciary.

In a slightly different argument, many of the concerns that animate the political-question doctrine have been invoked in original jurisdiction cases.¹⁵⁰ Again, the idea is that the Court *should not* resolve the case, even if the case is within its jurisdiction. Thus, in *Georgia v. Stanton*, the Court declined to take jurisdiction over a suit by Georgia challenging Reconstruction¹⁵¹; in *Massachusetts v. Laird*, the Court refused Massachusetts’s complaint challenging the war in Vietnam.¹⁵²

Finally, the Court has also expressed concern with its role as both the *sole* and the *final* arbiter of these disputes and hesitates to take them unless the need for a judicial resolution is manifest. As the Court stated in *Missouri v. Illinois*, its decisions in state-versus-state disputes (at least in areas where Congress lacks the power to change the result legislatively) are “irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States, sanctioned by the legislature of the United States.”¹⁵³

The Court thus encourages states to settle their disputes, if they can, without the Court’s intervention: “[Inter-state] controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the federal Constitution.”¹⁵⁴ Although less likely to resolve disputes involving

148. *Louisiana v. Texas*, 176 U.S. 1, 15 (1900); *see also* *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 505 (1971) (noting that original jurisdiction can be exercised only on “the strictest necessity”); *Washington v. Oregon*, 297 U.S. 517, 523 (1936) (refusing to enter a decree for Washington because the “barren right” it asserted “is not the high equity that moves the conscience of the court in giving judgment between states”).

149. *Maryland v. Louisiana*, 451 U.S. 725, 765 (1981) (Rehnquist, J., dissenting).

150. “[Under] the political question doctrine[,] . . . courts should abstain from resolving constitutional issues that are better left to other departments of government, mainly the national political branches . . .” Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1458 (2005) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803)).

151. *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 77 (1867) (refusing the case because “[n]o case . . . in a judicial form” was presented by the complaint). *But see* *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 743 (1838) (suggesting that the Court’s inter-state jurisdiction is mandatory).

152. *Massachusetts v. Laird*, 400 U.S. 886, 886 (1970) (mem.) (denying motion for leave to file bill of complaint; *id.* at 891–900 (1970) (Douglas, J., dissenting) (“Today we deny a hearing to a State which attempts to determine whether it is constitutional to require its citizens to fight in a foreign war absent a congressional declaration of war. . . . The question of an unconstitutional war is neither academic nor ‘political.’ These cases have raised the question in adversary settings. It should be settled here and now.”).

153. *Missouri v. Illinois*, 200 U.S. 496, 520 (1906).

154. *Florida v. Georgia*, 138 S. Ct. 2502, 2509 (2018) (alteration in original) (quoting *Colorado v. Kansas*, 320 U.S. 383, 392 (1943)); *see also* *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 105 (1938) (“[R]esort to the judicial remedy is never essential to

conflict over state policy (such as Dormant Commerce Clause challenges to state regulation of commodities),¹⁵⁵ such negotiation has frequently resolved disputes over boundaries and water resources.¹⁵⁶ In those cases, in particular, members of the Court have noted that the complexities of the underlying dispute are ill-suited to resolution by adjudication and are better suited to political actors.¹⁵⁷ Negotiated solutions are desirable for other reasons—as one scholar has noted, “allocations set by the agreement of the parties are likely to be more efficient than those set by the court.”¹⁵⁸

Even where the Court issues a judgment, it may still urge the party-states to resolve remaining differences through negotiation. In *Virginia v. West Virginia*, for example, where the Court was asked to apportion debts between the two states,¹⁵⁹ it allocated the principal but noted that the question of interest remained open.¹⁶⁰ The Court urged the states to come to a mutual agreement: “Great states have a temper superior to that of private litigants, and it is to be

the adjustment of interstate controversies, unless the States are unable to agree upon the terms of a compact, or Congress refuses its consent.”).

155. See *supra* notes 55–58 and accompanying text.

156. States have negotiated compacts in a wide variety of contexts. For examples, see generally *Chart of Interstate Compacts*, BALLOTOPEDIA, https://ballotpedia.org/Chart_of_interstate_compacts [<https://perma.cc/QBZ8-XHLS>]. Many compacts assist in the functioning of the interstate system rather than resolving disputes. See, e.g., *Text of Interstate Compact on the Placement of Children*, AM. PUB. HUM. SERVS. ASS'N, https://aphsa.org/AAICPC/AAICPC/text_icpc.aspx [<https://perma.cc/MXH8-PZZZ>] (detailing a 1963 compact between states concerning the protection of children when crossing state lines). But many represent an adjustment of interests between or among states that might otherwise have led to litigation. Compare, e.g., DELAWARE RIVER BASIN COMMISSION, DELAWARE RIVER BASIN COMPACT 5 (1961) (establishing a commission for the management of the Delaware River), with *Florida v. Georgia*, 141 S. Ct. 1175, 1181–83 (2021) (declining to grant Florida relief in dispute with Georgia over the waters of the Chattahoochee River), and *In re MDL-1824 Tri-State Water Rts. Litig.*, 644 F.3d 1160, 1175 (11th Cir. 2011) (describing the failure of a multiyear effort by Alabama, Florida, and Georgia to negotiate a division of the waters of the Chattahoochee).

157. *Texas v. Florida*, 306 U.S. 398, 428 (1939) (Frankfurter, J., dissenting) (“[T]here are practical limits to the efficacy of the adjudicatory process in the adjustment of interstate controversies. The limitations of litigation—its episodic character, its necessarily restricted scope of inquiry, its confined regard for considerations of policy, its dependence on the contingencies of a particular record, and other circumscribing factors—often denature and even mutilate the actualities of a problem”); *New York v. New Jersey*, 256 U.S. 296, 313 (1921) (“We cannot withhold the suggestion . . . that the grave problem . . . presented by [this case] is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the states”).

158. Robert D. Cheren, *Environmental Controversies “Between Two or More States,”* 31 PACE ENV'T. L. REV. 105, 130 (2014).

159. *Virginia v. West Virginia*, 220 U.S. 1, 3 (1911). When Virginia seceded from the Union in 1861, the northwest counties seceded from Virginia to remain in the Union, creating West Virginia. See *Virginia v. West Virginia*, 78 U.S. (11 Wall.) 39, 56–59 (1870). Virginia later sought to have West Virginia assume debt that had been issued to the benefit of the counties that had become West Virginia. See *Virginia*, 220 U.S. at 22–23.

160. *Virginia*, 220 U.S. at 34–36.

hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring [the litigation] to an end."¹⁶¹

B. INTER-STATE JURISDICTION INTERFERES PRACTICALLY WITH THE COURT'S WORK

The Court has noted a number of practical problems arising from its exercise of inter-state jurisdiction. First, because the jurisdiction is original, the Court is the *trial* court: It must not only apply the law, but it must also find the facts of the case.¹⁶² But the "Court is . . . structured to perform as an appellate tribunal, ill[-]equipped for the task of fact[-]finding."¹⁶³ In water-resource and boundary disputes, for example, the evidence is often dense, complicated, and difficult to parse, although the Court has acknowledged that these complexities may not give "a convincing 'justification for us to refuse to perform the important function entrusted to us by the Constitution.'"¹⁶⁴ The use of special masters does not fully address these concerns, as a master's report and recommendation are merely advisory.¹⁶⁵ The Court often gives considerable deference to facts found by masters,¹⁶⁶ given that the Justices appear to choose at least some masters for their subject-matter expertise.¹⁶⁷

Even if the Court were skilled at fact-finding, it would resent these inter-state disputes.¹⁶⁸ Opinions repeatedly emphasize that appellate review of federal-law questions is the Court's most important function.¹⁶⁹ Because trials

161. *Id.* at 36. The two states proved not so temperate, refusing to come to an agreement, and the Court later imposed an apportionment of the interest between the two. *Virginia v. West Virginia*, 238 U.S. 202, 242 (1915).

162. *See Colorado v. New Mexico*, 467 U.S. 310, 317 (1984) ("Though the Master's findings on these issues deserve respect and a tacit presumption of correctness, the ultimate responsibility for deciding what are correct findings of fact remains with us.").

163. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971); *Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983) (explaining that given an alternative forum, "[t]he need for burdensome original jurisdiction litigation, which prevents this Court from attending to its appellate docket, would seem slight."). Indeed, Justice Rehnquist stated flatly, "[o]f course this Court cannot sit to receive evidence or conduct trials." *Maryland v. Louisiana*, 451 U.S. 725, 763 (1981) (Rehnquist, J., dissenting).

164. *Florida v. Georgia*, 138 S. Ct. 2502, 2526 (2018) (quoting *Idaho ex rel. Evans v. Oregon*, 444 U.S. 380, 390 n.7 (1980)).

165. *See supra* notes 112–14 and accompanying text; *see also* Mandilk, *supra* note 16, at 1894 (noting that the burden of fact-finding is often delegated to special masters and stating that "the Court's opinion in *New Jersey v. New York* conjures up a mental image of The Nine peering over one another's shoulders as they scrutinize hoary maps").

166. Mandilk, *supra* note 16, at 1894; *Iowa v. Illinois*, 147 U.S. 1, 13–14 (1893) (appointing a commission to determine the boundary between the two states). The Court has described itself as delegating fact-finding entirely to the commission in *Iowa v. Illinois*, *see Texas*, 462 U.S. at 566 n.11, but it appears to have been at the consent of the parties, *see Iowa*, 147 U.S. at 13–14.

167. *See Carstens, supra* note 112, at 647–48 (noting that some masters were apparently appointed because they had "demonstrated specialized expertise with respect to the issues central to the dispute").

168. *See Wyandotte*, 401 U.S. at 498.

169. *See, e.g., id.*

can be time-consuming and resource intensive, inter-state jurisdiction cases therefore also “intru[de] on society’s interest in our most deliberate and considerate performance of our paramount role as the supreme federal appellate court.”¹⁷⁰ Accordingly, “[w]e exercise that discretion [to reject cases within our original jurisdiction] with an eye to promoting the most effective functioning of this Court within the overall federal system.”¹⁷¹ And the number of cases over which the Court has potential appellate jurisdiction has expanded dramatically over the years, due to both population growth and expansion of federal law into new areas.¹⁷² Moreover, the number of disputes over which the Court potentially has inter-state jurisdiction has also increased markedly.¹⁷³ At the same time, however, the modern Court handles far fewer cases on the merits than its predecessors,¹⁷⁴ especially since the

170. *Id.* at 505; *see also* *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 113 (1972) (“The breadth of the constitutional grant of this Court’s original jurisdiction dictates that we be able to exercise discretion over the cases we hear under this jurisdictional head, lest our ability to administer our appellate docket be impaired.”); *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939) (taking Massachusetts’s complaint “might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it”).

171. *Texas*, 462 U.S. at 570; *see also* *Connecticut v. Cahill*, 217 F.3d 93, 105 (2d Cir. 2000) (Sotomayor, J., dissenting) (criticizing the majority’s decision to proceed in an inter-state dispute despite the Court’s exclusive jurisdiction, noting that she “do[es] not disagree that this creative approach to § 1251(a) makes the resolution of seemingly less weighty disputes between States more efficient, faster, and thus likely more desirable for the States and, perhaps, the busy Supreme Court as well”).

172. Two key reasons exist for the expansion of the Court’s work. First, the federal administrative state has expanded dramatically over the last 150 years, *see generally* Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 150 *DAEDALUS* 33 (2021) (outlining the history of the U.S. administrative state), creating a wide variety of statutory protections for the American public and a concomitant expansion of litigation to enforce those protections, *see* Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 *MINN. L. REV.* 1, 5 (1984) (citing the Civil Rights Act of 1964 and the Voting Rights Act of 1965 as causing civil-rights litigation to increase “by a factor of more than twenty-five between 1960 and 1972” and stating that “[t]he same societal forces that fueled the civil rights movement also impelled Congress to respond to other demands for justice, and new statutory rights of action became available in the environmental, consumer, political rights, and safety fields,” leading to even further litigation). Second, the Court has incorporated most of the Bill of Rights into the Fourteenth Amendment, giving a vastly wider array of federal rights to American citizens, *see generally* Roger A. Fairfax, Jr., *Interrogating the Nonincorporation of the Grand Jury Clause*, 43 *CARDOZO L. REV.* 855 (2022) (detailing the near-total incorporation of federal criminal procedure rights through the Fourteenth Amendment), and accordingly generating more cases involving federal law, *see* Miller, *supra*, at 6.

173. The number of inter-state disputes generated when there are thirteen states with four million inhabitants is obviously much fewer than when there are fifty states with 330 million inhabitants.

174. In the 2019 Term, the Court heard oral argument in seventy-three cases and issued full opinions in sixty-nine of them. *See* U.S. CTS., SUPREME COURT OF THE UNITED STATES—CASES ON DOCKET, DISPOSED OF, AND REMAINING ON DOCKET AT CONCLUSION OF OCTOBER TERMS, 2015 THROUGH 2019, at 1 (2020), https://www.uscourts.gov/sites/default/files/data_tables/supcourt_a1_0930.2020.pdf [<https://perma.cc/TY2Y-URDH>]. In the 1932 term, by contrast, the Court appears to have issued 940 full opinions. WESTLAW EDGE, [https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=\(sc.Default\)](https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default)) (select “United States Supreme

mandatory appellate docket was shifted almost entirely to the certiorari process in the 1980s.¹⁷⁵

* * *

Despite the importance accorded to original inter-state jurisdiction by the Founders and subsequent Congresses, the Court has avoided the exercise of that jurisdiction. Original-jurisdiction cases can involve sensitive issues the Justices believe are better left to political processes, especially because the Court's decisions are essentially unreviewable. These cases also require the Court to divert its attention from its favored appellate docket to engage in mundane yet difficult fact-finding. As the next Part demonstrates, however, the Court's efforts to duck these cases impose significant costs on plaintiff states, resulting in original discrimination.

III. THE COURT SEVERELY DISADVANTAGES PLAINTIFF STATES

States face daunting challenges in trying to sue other states. State courts cannot hear inter-state cases unless the defendant state consents to waive its sovereign immunity,¹⁷⁶ the *only* federal court with jurisdiction over these claims is the Supreme Court,¹⁷⁷ and the Court does its best to avoid resolving these cases. As I explain in this Part, the Court prevents many plaintiff states from even filing their lawsuits, requires state plaintiffs to meet a significantly heightened test of injury in fact, and, in many cases, refuses to grant relief to state plaintiffs using a particularly harsh application of equitable balancing. Although some Justices and critics have questioned some of these discretionary

Court" in the dropdown to the right of the search bar; then search "advanced: opinion & DA (aft 09-30-1932 & bef 10-01-1933)").

175. See generally Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81 (1988) (discussing the evolution of the Court's mandatory appeal jurisdiction and its eventual and almost total abolishment).

176. *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1492, 148–99 (2019) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)) ("In light of our constitutional structure, the historical understanding of state immunity, and the swift enactment of the Eleventh Amendment . . . '[i]t is not rational to suppose that the sovereign power should be dragged before a court.'" (quoting 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (Jonathan Elliot ed. 1827))).

177. See *supra* Part I.

hurdles,¹⁷⁸ others have embraced them (or at least seem to do so),¹⁷⁹ and most merely note their existence.¹⁸⁰ No Justice or scholar has recognized that

178. *Texas v. California*, 141 S. Ct. 1469, 1469–70 (2021) (mem.) (Alito, J., joined by Thomas, J., dissenting from denial of leave to file a bill of complaint); *Texas v. Pennsylvania*, 141 S. Ct. 1230, 1230 (2020) (mem.) (Alito, J., joined by Thomas, J., dissenting from denial of leave to file a bill of complaint); *Arizona v. California*, 140 S. Ct. 684, 684–85 (2020) (mem.) (Thomas, J., joined by Alito, J., dissenting from denial of leave to file a bill of complaint); *Nebraska v. Colorado*, 577 U.S. 1211, 1211 (2016) (mem.) (Thomas, J., joined by Alito, J., dissenting from denial of leave to file a bill of complaint); *Louisiana v. Mississippi*, 488 U.S. 990, 990 (1988) (mem.) (White, J., dissenting from denial of leave to file a bill of complaint) (“[T]his is no way to treat a sovereign State that wants its dispute with another State settled in this Court.”); *California v. West Virginia*, 454 U.S. 1027, 1027–28 (1981) (mem.) (Stevens, J., dissenting from denial of leave to file a bill of complaint); *Arizona v. New Mexico*, 425 U.S. 794, 798–99 (1976) (Stevens, J., concurring in order denying leave to file a bill of complaint); *see also, e.g.*, Jamison E. Colburn, *Rethinking the Supreme Court’s Interstate Waters Jurisprudence*, 33 GEO. ENV’T L. REV. 233, 237, 248–49 (2021) (describing the Court’s use of the motion for leave to file as similar to the petition for certiorari, making state plaintiffs “contestants in a lottery they are unlikely to win”); SHAPIRO ET AL., *supra* note 19, at 10–39 n.49 (“Whether this ‘rule[.]’ [requiring a showing of substantial injury by clear and convincing evidence] . . . is consistently applied in all cases is questionable.”); Lochlan F. Shelfer, *Intergovernmental Federalism Disputes*, 52 GA. L. REV. 831, 847–48 (2018) (noting that the Court’s decisions on its jurisdiction over inter-state disputes “reflect a deep inconsistency regarding which intergovernmental disputes it may hear and whether its jurisdiction is historically legitimate”); Robert Haskell Abrams, *Broadening Narrow Perspectives and Nuisance Law: Protecting Ecosystem Services in the ACF Basin*, 22 J. LAND USE & ENV’T L. 243, 262–65 (2007) (criticizing the balance-of-harms test discussed in Section III.C); Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court’s Theory That Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1330 n.200 (2005) (expressing surprise that the Court has declined cases within its exclusive jurisdiction on the ground that those cases “raise trivial issues and/or that another forum would be more convenient”); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 561 (1985) (finding “unanswerable” Justice Steven’s argument against denying leave to file in *California*, 454 U.S. at 1027); Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891, 1896 (2004) (noting “the peculiar tradition of treating Congress’s grant of original Supreme Court jurisdiction in suits between two states as discretionary”); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1712 (2000) (describing the Court’s discretion as going to an “embarrassing extreme” when it refused to hear a case within its exclusive inter-state jurisdiction); *cf.* Note, *supra* note 16, at 699–700 (likening the Court’s limits on these cases to the doctrine of *forum non conveniens*, except that the consideration is the Court’s, not the parties’, convenience); George William Sherk, *Equitable Apportionment After Vermejo: The Demise of a Doctrine*, 29 NAT. RES. J. 565, 579 (1989) (“By establishing prerequisites focusing both on clear and convincing evidence and on real and substantial injury or harm, the Court appears to be expressing its displeasure with its role in resolving interstate water conflicts.”).

179. *E.g.*, 17 WRIGHT & MILLER, *supra* note 44, § 4054 (stating the motion for leave to file is a “departure from models of district court procedure [that] is well justified” (emphasis added)); Jonathan Horne, *On Not Resolving Interstate Disputes*, 6 N.Y.U. J.L. & LIBERTY 95, 103 (2011) (contending that the Court’s decisions to hear certain inter-state disputes causes problems); Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court’s Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1767–76 (2004) (recommending the exercise of original and exclusive jurisdiction over suits by foreign nations against states and the use of discretion in taking such cases); Pfander, *supra* note 19, at 655–56 (recommending that Congress give the lower courts concurrent jurisdiction over inter-state disputes and stating that “[t]he Court would retain

the Court applies these doctrines in ways that systematically disadvantage plaintiff states to the benefit of (prospective) defendant states or that these burdens fall more heavily on some groups of states.¹⁸¹

A. *THE COURT REQUIRES A STATE TO SEEK LEAVE TO EVEN FILE A LAWSUIT*

FRCP 3 provides: “A civil action is commenced by filing a complaint with the court.”¹⁸² But the Supreme Court is not bound by the Federal Rules of Civil Procedure,¹⁸³ and the Court does not permit the unilateral filing of complaints in its original jurisdiction. Instead, under Supreme Court Rule 17, plaintiffs must move the Court for permission to file a complaint,¹⁸⁴ and many prospective inter-state jurisdiction cases are cut short when the Court denies leave to file.¹⁸⁵ As I show in this Section, the Court’s decision-making under Supreme Court Rule 17 is distressingly opaque. Moreover, this

discretionary control over its original docket” and that “relatively straightforward rules govern the Court’s willingness to exercise its discretion to hear such claims”).

180. Citing the literature where the Court’s discretion is merely mentioned would take far more words than it is worth. For a few examples, see generally ZIMMERMAN, *supra* note 19; McKusick, *supra* note 16; and Note, *supra* note 16.

181. Professor Colburn, for example, notes that the Court is willing to enter equitable decrees against states, despite its “considerable inhibitions” against doing so, because “[t]he complainant’s dignity[] mirror[s] that of the defendant(s),” Colburn, *supra* note 178, at 242, but does not notice that the Court’s discretionary refusal to hear cases infringes on that mirrored dignity. Other scholars of water resources law have likewise noticed the inequality in the Court’s actual apportionment of interstate bodies of water but have not noticed the inequality in the Court’s discretion over whether to take a case in the first place. *E.g.*, Josh Patashnik, *Arizona v. California and the Equitable Apportionment of Interstate Waterways*, 56 ARIZ. L. REV. 1, 4 (2014) (asking the Court to “make clear that when states ask the Court to divide waters [or provide any other remedy], they come before it as equals, without regard to the accidents of geography and history—whether a state is upstream or downstream, whether its economy is young or old”).

182. FED. R. CIV. P. 3.

183. *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973) (“Procedures governing the exercise of our original jurisdiction are not invariably governed by common-law precedent or by current rules of civil procedure” (citing SUP. CT. R. 9 (1970))). In fact, even prior to the FRCP’s promulgation, the early Court recognized the need—and its authority—to refrain from adhering to strict equitable rules and principles in inter-state cases. *See Rhode Island v. Massachusetts*, 39 U.S. (14 Pet.) 210, 251 (1840) (“In a controversy [between] two sovereign states[,] . . . it is the duty of the Court to mould the rules of Chancery practice and pleading in such a manner as to bring the case to a final hearing on its merits. It is too important in its character, and the interests concerned too great, to be decided upon the mere technical principles of Chancery pleading.”); *see also* 28 U.S.C. § 2071 (giving the federal courts power to prescribe rules for their conduct and requiring those rules to be consistent with any rules prescribed under section 2702); *id.* § 2702 (authorizing the Supreme Court to prescribe rules for the district courts and the courts of appeals).

184. SUP. CT. R. 17.

185. *See infra* note 219 and accompanying text. The Court also requires states to file motions for leave to reopen an earlier inter-state jurisdiction case and frequently denies those requests as well. *See, e.g.*, *Michigan v. Illinois*, 559 U.S. 1091, 1091 (2010) (mem.) (denying Michigan, Wisconsin, and New York leave to reopen U.S. Orig. Nos. 1, 2, and 3, which dated to 1959; the original decree had limited Illinois’s diversions from Lake Michigan; the 2009 request to reopen involved an invasive species threat to the Great Lakes).

discretionary requirement can prevent prospective plaintiff states from accessing the sole judicial forum for resolution of inter-state disputes, protecting defendant states from liability.

No other state or federal court requires a motion for leave to file a complaint as a matter of course¹⁸⁶; indeed, the only private litigants who must seek leave to file are those deemed vexatious litigants,¹⁸⁷ making the Court's requirement of leave to file curiously at odds with the dignity supposedly accorded to sovereign states.¹⁸⁸ Yet the Court has, in fact, at times appeared to view state plaintiffs as potentially vexatious litigants: "[W]e must recognize 'the need [for] the exercise of a sound discretion in order to protect this

186. 17 WRIGHT & MILLER, *supra* note 44, § 4054 (noting that "[c]ommencement of the action [in the Supreme Court] provides the most obvious departure from familiar civil procedure"). The Court also limits *amendment* of complaints in a way that is at variance with the procedures of the lower courts. As the Court stated in *Nebraska v. Wyoming*, "[o]ur requirement that leave be obtained before a complaint may be filed in an original action serves an important gatekeeping function, and proposed pleading amendments must be scrutinized closely . . . to see whether they would take the litigation beyond what we reasonably anticipated when we granted leave to file. . . ." 515 U.S. 1, 8 (1995) (citation omitted) (citing *Ohio v. Kentucky*, 410 U.S. 641, 644 (1983)). In the lower courts, however, certain amendments can be made as of right, and the court must "freely give leave" for other amendments "when justice so requires." FED. R. CIV. P. 15(a)(2). The Court freely acknowledges that it is refusing to apply the Rule 15 standard: "We have found that the solicitude for liberal amendment of pleadings animating [Rule 15(a)] does not suit cases within this Court's original jurisdiction." *Nebraska*, 515 U.S. at 8 (citations omitted).

187. *E.g.*, *Ringgold-Lockhart v. Cnty. Of L.A.*, 761 F.3d 1057, 1061–62 (9th Cir. 2014) (vacating the district court's vexatious litigant order and discussing the bases and requirements for such orders). Courts may also require leave to file in circumstances unique to a particular case. *E.g.*, *Arnold v. Sec'y of Navy*, No. 19-2755, 2020 WL 1930393, at *10 (D.D.C. Apr. 21, 2020) (citing plaintiff clerics' abusive litigation tactics as a justification for a pre-filing injunction). Otherwise, the lower federal courts, as well as state courts, use early dismissals to control their dockets. For example, California limits small-claims plaintiffs to two filings per year, CAL. CIV. PROC. CODE § 116.231(a) (West 2019), but nevertheless provides that an action is commenced by filing the complaint, *id.* § 116.320(a), and provides for dismissal for lack of subject-matter jurisdiction if the two-claim maximum is violated, *id.* § 116.221. *See generally, e.g.*, Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 SUP. CT. ECON. REV. 39 (2008) (arguing that the early dismissal of cases unlikely to succeed on the merits "offer[s] [economic] benefits to society in comparison to late dismissals" upon, for example, motions for summary judgment).

Congress sometimes requires that certain procedures be followed prior to filing a lawsuit, *see, e.g.*, 33 U.S.C. § 1365 (requiring a notice-to-sue letter as a precondition for a Clean Water Act citizen suit). But no permission is required to file the lawsuit: If the court determines that the procedural prerequisites were not met, it will dismiss. *E.g.*, *Nat'l Env't Found. V. ABC Rail Corp.*, 926 F.2d 1096, 1099 (11th Cir. 1991) (affirming dismissal of a citizen suit because the Clean Water Act's notice requirement had not been satisfied). Similarly, the statute governing filing *in forma pauperis* does not require a plaintiff to seek leave to file her complaint, although it encourages swift dismissal of frivolous claims. *See* 28 U.S.C. § 1915.

188. *See supra* text accompanying notes 60–61, 139–41.

Court from an *abuse* of [states'] opportunity to resort to [the Court's] original jurisdiction"¹⁸⁹

The Court has long required states to seek leave: The practice expressly appears in the Supreme Court Rules starting in 1939¹⁹⁰ but can be found in the cases as far back as 1854.¹⁹¹ The motion has its roots in the equity practice of England's Chancery Courts.¹⁹² Because the Court has held that its exercise of original jurisdiction is essentially always equitable,¹⁹³ requiring leave may continue to find justification in its equity roots. If a state were to file a purely legal claim, however, the resort to equity as a justification would lose

189. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971) (second alteration in original) (emphasis added) (quoting *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939) (Hughes, C.J.)); see also *id.* at 499 (refining "the focus of concern" in Chief Justice Hughes's statement in *Massachusetts* to emphasize that the Court's exercise of discretion not only "shield[s] the Court from noisome, vexatious, or unfamiliar tasks, but also . . . promot[es] and further[s] . . . the enhanced importance of [its] role as the final federal appellate court"). One might argue that states are, in fact, increasingly vexatious as litigants, at least in some contexts, given the rise of politically motivated litigation by state attorneys general and solicitors general. See, e.g., Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1234 (2019) ("The state attorneys general who bring these public actions are ideological litigants. They do not claim a personal right of their own, but instead premise their standing to bring politically controversial and ideologically charged public actions upon financial injuries to the states they represent."). But, as Professors Lemos and Young argue, state attorneys general often "play[] a similar role to the Sierra Club, the ACLU, or class action plaintiffs' lawyers." Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 49 (2018). Notably, we do not make the Sierra Club or the ACLU seek leave to file their lawsuits, nor do we make states seek such leave when they file such lawsuits in the lower courts.

190. SUP. CT. R. 5 (1939) (repealed 1954).

191. See, e.g., *Florida v. Georgia*, 58 U.S. (17 How.) 478, 523 (1854) (granting motion for leave to file). The practice of requiring a motion for leave to file does not seem to be entirely consistent in the early years of the Court. E.g., *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 714 (1838) (referring to Rhode Island as having "filed a bill in equity" rather than having been given permission to file such a bill).

192. See, e.g., *Louisiana v. Texas*, 176 U.S. 1, 22–23 (1900).

193. *Kansas v. Nebraska*, 574 U.S. 445, 453 (2015) ("Proceedings under th[e] grant of [original] jurisdiction are 'basically equitable in nature.'" (quoting *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973))). The Court has addressed at least some of the equitable defenses in inter-state disputes. E.g., *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973) ("[A] claim not technically precluded nonetheless may be foreclosed by acquiescence." (citing *Indiana v. Kentucky*, 136 U.S. 479, 510, 518 (1890))); *Washington v. Oregon*, 297 U.S. 517, 528–29 (1936) ("Laches and abandonment . . . are found in the report. . . . Here surely is not the diligence that equity exacts of the suitor who invokes its distinctive jurisdiction."); *Missouri v. Illinois*, 200 U.S. 496, 522 (1906) (omitting specific mention of the equitable defense of unclean hands, but requiring "the strictest proof that the plaintiff[] [state's] own conduct does not produce the result, or at least so conduce to it, that courts should not be curious to apportion the blame"); *Rhode Island*, 39 U.S. at 257 ("The proceedings in this case will therefore be regulated by the rules and usages of the Court of Chancery. Yet . . . it will be the duty of the Court to mould the rules of Chancery practice and pleading, in such a manner as to bring this case to a final hearing on its real merits. It is too important in its character, and the interests concerned too great, to be decided upon the mere technical principles of Chancery pleading.").

force; I have been yet unable to determine whether any state has ever attempted to proceed purely at law.¹⁹⁴

The imposition of this threshold might not matter if the motion were *pro forma* and ordinarily granted. But the opposite is true. From 1961 to April 1993, the Court denied almost half of all plaintiff states' motions for leave to file.¹⁹⁵ Since then, the Court has denied leave in forty percent of cases within its inter-state jurisdiction: Twenty-seven motions were filed, fifteen were granted, one was voluntarily dismissed, and eleven were denied.¹⁹⁶

Several aspects of the Court's decision-making under this particular practice deserve attention. First, a majority of the Justices must vote to grant leave to file an original-jurisdiction complaint.¹⁹⁷ By contrast, an appellant seeking appellate review by certiorari in the Court must win only four votes.¹⁹⁸ The "Rule of Four" has been justified on the ground that a petitioner, in seeking appellate review, should not have to win over as many Justices to bring her appeal as she needs to win her case on the merits,¹⁹⁹ yet a state plaintiff seeking to file an original-jurisdiction complaint must do just that.

Second, the Court's procedure on these motions has the potential to be quite cursory. Although a private defendant who declines to answer a plaintiff's complaint in the lower courts is ultimately subject to default and a default judgment,²⁰⁰ the Court permits defendant states to decline to appear in the proceedings on a motion for leave to file.²⁰¹ While no state

194. California's suit against West Virginia in 1981 for the University of West Virginia's failure to play San Jose State University presumably sought damages; it is unclear whether California sought further relief. *See* *California v. West Virginia*, 454 U.S. 1027, 1027 (1981) (mem.). The Court has noted that inter-state disputes might arise under the common law. *See* *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939) (stating a state may be able to proceed under the Court's original jurisdiction if it is "asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence").

195. McKusick, *supra* note 16, at 188–89 (finding that the Court denied fifty of 102 motions for leave to file in state-versus-state disputes between October 1961 and April 1993).

196. *See* sources cited *supra* note 27.

197. *Oklahoma ex rel. Williamson v. Woodring*, 309 U.S. 623, 623 (1940) (mem.) ("The motion for leave to file a bill of complaint is denied by an equally divided Court."). *See* 17 WRIGHT & MILLER, *supra* note 44, § 4042 (citing *Oklahoma*, 309 U.S. at 623).

198. SHAPIRO ET AL., *supra* note 19, at 5-14 to 5-19.

199. *Id.* at 5-18 to 5-19 (the Rule of Four serves the "historic power of a substantial minority of Justices to help determine the makeup of the Court's argument docket" and makes it more likely that "an unpopular litigant, or an unpopular issue, will be heard in the country's court of last resort" (quoting John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 21 (1983))).

200. FED. R. CIV. P. 55.

201. *See* SUP. CT. R. 17(5) ("No more than sixty days after receiving the motion for leave to file and the initial pleading, an adverse party shall file forty copies of any brief in opposition to the motion The Clerk will distribute the filed documents to the Court for its consideration upon receiving an express waiver of the right to file a brief in opposition, or, if no waiver or brief is filed, upon the expiration of the time allowed for filing. If a brief in opposition is timely filed, the

has done so recently,²⁰² the possibility remains that the Court could rule on motions for leave to file without the benefit of adversarial briefing. Even with briefing, the Court usually rules on motions for leave to file without oral argument,²⁰³ and it usually issues a bare denial when declining to hear a case.²⁰⁴

To be sure, the Court also denies petitions for certiorari without explanation.²⁰⁵ The certiorari docket and the original docket are quite different, however. These days, the Court receives thousands of petitions for certiorari per year,²⁰⁶ the vast majority of which are denied²⁰⁷; giving reasons in all those cases would be a serious burden on the Court, even assuming some consensus existed on the reasons for the denial.²⁰⁸ By contrast, the Court has never received more than a few motions for leave to file an original jurisdiction complaint in any one year.²⁰⁹ Moreover, the Court's certiorari

Clerk will distribute the filed documents to the Court . . . no less than ten days after the brief in opposition is filed." (emphasis added)).

202. See *supra* note 103 and accompanying text.

203. See sources cited *supra* note 27 (identifying only four examples out of sixty-four since 1976 where the Court has held oral argument before resolving a motion for leave to file).

204. E.g., *New Hampshire v. Massachusetts*, 141 S. Ct. 2848, 2848 (2021) (mem.) ("Motion for leave to file a bill of complaint denied. Justice Thomas and Justice Alito would grant the motion."). See sources cited *supra* note 27 (identifying twenty-two naked denials out of twenty-eight since 1976). Two denials are nearly naked. See *Mississippi v. City of Memphis*, 559 U.S. 901, 901 (2010) (mem.) (naming cases in which one can, presumably, discern the reasons for denial); *Texas v. Pennsylvania*, 141 S. Ct. 1230, 1230 (2020) (mem.) (stating briefly that the denial is for lack of standing). In only two situations (totaling three inter-state disputes) did the Court issue full opinions. See *Pennsylvania v. New Jersey*, 426 U.S. 660, 662–65 (1976) (explaining denial not only of Pennsylvania's motion for leave to file a complaint against New Jersey but also Maine, Massachusetts, and Vermont's against New Hampshire); *Arizona v. New Mexico*, 425 U.S. 794, 794–98 (1976).

205. SHAPIRO ET AL., *supra* note 19, at 5-19 ("Most orders of the Court denying petitions for writs of certiorari do no more than announce the simple fact of denial, without giving any reasons for that result.").

206. *The Statistics*, 135 HARV. L. REV. 491, 498 (2021) (5,257 petitions considered in the 2020 Term); *The Statistics*, 134 HARV. L. REV. 610, 618 (2020) (5,718 petitions considered in the 2019 Term); *The Statistics*, 133 HARV. L. REV. 412, 420 (2019) (6,581 petitions considered in the 2018 Term); *The Statistics*, 132 HARV. L. REV. 447, 455 (2018) (6,229 petitions considered in the 2017 Term); *The Statistics*, 131 HARV. L. REV. 403, 410 (2017) (6,289 petitions considered in the 2016 Term); *The Statistics*, 130 HARV. L. REV. 507, 514 (2016) (6,536 petitions considered in the 2015 Term); *The Statistics*, 129 HARV. L. REV. 381, 389 (2015) (7,038 petitions considered in the 2014 Term); *The Statistics*, 128 HARV. L. REV. 401, 409 (2014) (7,586 petitions considered in the 2013 Term); *The Statistics*, 127 HARV. L. REV. 408, 416 (2013) (7,647 petitions considered in the 2012 Term).

207. SHAPIRO ET AL., *supra* note 19, at 4-5 (noting that, in 2017, 6,315 petitions were filed—1,720 "paid" petitions, all but seventy of which were denied, and 4,595 "in forma pauperis" petitions, all but five of which were denied).

208. *Id.* at 4-6 to 4-74 (reviewing, in more than two dozen separate sections, the considerations for granting or denying certiorari).

209. See sources cited *supra* note 27 (showing that, starting in 1976, when the Court first started denying leave to file in cases within its original jurisdiction, the highest number of original proceedings filed in any one year was five in 1976). In subsequent research, I hope to determine

jurisdiction is purposefully discretionary²¹⁰ and has the approval of Congress.²¹¹ Its original jurisdiction, however, is arguably mandatory,²¹² at least where Congress has kept that jurisdiction exclusive.

And yet the Court denies leave to file even for those disputes where it has *exclusive* original jurisdiction, leaving state plaintiffs with no court in which to sue. Until 1976, the Court had primarily used these denials to avoid cases where its jurisdiction was nonexclusive,²¹³ “prefer[ring] to have disputes within [its] original jurisdiction settled in other fora where possible.”²¹⁴ The Court had considered at least some of its original jurisdiction “obligatory,”²¹⁵ and, accordingly, declining jurisdiction required “the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had.”²¹⁶

But in 1976, in *Arizona v. New Mexico*, the Court denied leave to file in a state-versus-state dispute over which it had *exclusive* jurisdiction.²¹⁷ The Court suggested that there already existed an alternative forum, noting that the *issues* in the case were pending before New Mexico’s courts, and that Arizona had no need to invoke the Court’s original jurisdiction.²¹⁸ But the Court has since denied cases without ascertaining whether the state can obtain resolution of the issues in another way.²¹⁹ While the Court has more recently

whether the apparent decrease in inter-state filings since 1976 is, at least in part, attributable to the Court’s increasing rejection of original inter-state cases.

210. SHAPIRO ET AL., *supra* note 19, at 5-19 (the lack of reason-giving for certiorari denials “reflects the highly discretionary nature of the Court’s certiorari jurisdiction, where each individual Justice is free to cast a negative vote for whatever reason he or she sees fit”).

211. 28 U.S.C. §§ 1254, 1257-1260 (authorizing review by certiorari in various cases).

212. *Arizona v. California*, 140 S. Ct. 684, 684 (2020) (mem.) (Thomas, J., dissenting) (“The Constitution establishes our original jurisdiction in mandatory terms.”). *Cf. Illinois v. City of Milwaukee*, 406 U.S. 91, 98 (1972) (concluding that, because “the named public entities of Wisconsin may . . . be sued by Illinois in a federal district court, our original jurisdiction is not mandatory,” thus implying that, without such an alternate forum, the jurisdiction would be mandatory), *disapproved on other grounds sub nom. City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).

213. *E.g., Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 500 (1971); *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 450-52 (1945); *Massachusetts v. Missouri*, 308 U.S. 1, 18-20 (1939).

214. *Louisiana v. Mississippi*, 488 U.S. 990, 990 (1988) (mem.) (White, J., joined by Stevens and Scalia, J.J., dissenting from denial); *California v. Nevada*, 447 U.S. 125, 133 (1980) (after deciding a boundary dispute between California and Nevada, refusing to continue further because “litigation in other forums seems an entirely appropriate means of resolving whatever questions remain”).

215. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972).

216. *Id.*

217. *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976).

218. *Id.* For a discussion of the problems arising from relegating these cases to the lower courts, see *infra* Part IV.

219. *Louisiana*, 488 U.S. at 990 (denying Louisiana’s motion for leave to file a bill of complaint against Mississippi over a boundary dispute, apparently concluding that the boundary dispute could be resolved in the lower courts); *Mississippi v. Louisiana*, 506 U.S. 73,

granted a motion for leave to file on the ground that the plaintiff state had no alternative forum,²²⁰ it nevertheless routinely denies leave to file in inter-state disputes without determining whether such a forum exists.²²¹

Some Justices have criticized this refusal to hear cases within the Court's exclusive jurisdiction. Justice White wrote in 1988 that "this is no way to treat a sovereign State that wants its dispute with another State settled in this Court."²²² A few years earlier, Justice Stevens had said that "[t]he fact that two sovereign States have been unable to resolve this matter without adding to our burdens does not speak well for the statesmanship of either party but does not, in my opinion, justify our refusal to exercise our exclusive jurisdiction."²²³ Recently, Justices Thomas and Alito have criticized the Court's exercise of discretion, stating "we do not have discretion to deny the filing of a bill of complaint in a case that falls within our original jurisdiction."²²⁴ Indeed, Justice Alito's criticisms have become quite sharp; he recently asked what the Court would do if a *lower* court dismissed a diversity case involving a Texan suing a Californian over a car accident on the ground that diversity jurisdiction was no longer as important as it was at the Founding and because the court needed "the time . . . to deal with more important matters":

77–78 (1992) (holding that the district court had lacked jurisdiction over the boundary dispute between Mississippi and Louisiana because 28 U.S.C. § 1251(a) committed the dispute to the exclusive jurisdiction of the Supreme Court).

220. *Wyoming v. Oklahoma*, 502 U.S. 437, 452 (1992) ("It was proper to entertain this case without assurances, notably absent here, that a State's interests under the Constitution will find a forum for appropriate hearing and full relief.").

221. Since 2017, the Court has denied all but one of the motions for leave to file cases within its exclusive jurisdiction, and all those denials gave no reasons for the denial (such as the availability of an alternative forum). *See* *New Hampshire v. Massachusetts*, 141 S. Ct. 2848, 2848 (2021) (mem.) (denying motion for leave to file a bill of complaint); *Montana v. Washington*, 141 S. Ct. 2848, 2848 (2021) (mem.) (same); *Texas v. California*, 141 S. Ct. 1469, 1469 (2021) (mem.) (same); *Texas v. Pennsylvania*, 141 S. Ct. 1230, 1230 (2020) (mem.) (same); *Arizona v. California*, 140 S. Ct. 684, 684 (2020) (mem.) (same); *Missouri v. California*, 139 S. Ct. 859, 859 (2019) (mem.) (same); *Indiana v. Massachusetts*, 139 S. Ct. 859, 859 (2019) (mem.) (same); *New Mexico v. Colorado*, 137 S. Ct. 2319, 2319 (2017) (mem.) (same). *But see* *New York v. New Jersey*, 142 S. Ct. 2856, 2856 (2022) (mem.) (granting New York's motion to file a bill of complaint against New Jersey over the Port Authority compact).

222. *Louisiana*, 488 U.S. at 990 (White, J., joined by Stevens and Scalia, JJ., dissenting from denial of leave to file a bill of complaint).

223. *California v. West Virginia*, 454 U.S. 1027, 1028 (1981) (mem.) (Stevens, J., dissenting from denial of leave to file a bill of complaint). *See* *Arizona v. New Mexico*, 425 U.S. 794, 798–99 (1976) (Stevens, J., concurring in order denying leave to file a bill of complaint).

224. *Texas v. Pennsylvania*, 141 S. Ct. 1230, 1230 (2020) (mem.) (Alito, J., joined by Thomas, J., dissenting from denial of motion for leave to file). *See id.* (stating that the Court probably lacked the authority to refuse Texas's complaint but then stating the complaint should then be summarily dismissed for lack of standing); *Texas v. California*, 141 S. Ct. 1469, 1469 (2021) (mem.) (Alito, J., joined by Thomas, J., dissenting from denial of leave to file a bill of complaint); *Arizona*, 140 S. Ct. at 684 (Thomas, J., joined by Alito, J., dissenting from order denying leave to file complaint); *Nebraska v. Colorado*, 136 S. Ct. 1034, 1034–35 (2016) (Thomas, J., dissenting from order denying leave to file complaint).

Suppose a court of appeals affirmed this decision and the case came before us. What would we do?

We would reverse in the blink of an eye. We might also wag a finger at the lower courts and remind them that a federal court's obligation to hear and decide cases within its jurisdiction is "virtually unflagging." We might emphasize that federal courts do not have freewheeling discretion to spurn categories of cases that they don't like.

If this is how we would respond to this imaginary Texan versus Californian tort suit, how can we refuse to allow the filing of the complaint in this case [within our original and exclusive jurisdiction]? . . . It is not easy to see how the refusal to entertain Texas's suit can be justified on that ground—particularly since our rejection of Texas's complaint leaves the State in a more difficult position than our imaginary Texas motorist. That person could at least file suit in a state court, but if our jurisdiction under § 1251 (a) is truly exclusive, the State is left without *any* judicial forum.²²⁵

Nevertheless, the practice is entrenched.

The Court's orders denying leave to file ordinarily state only "Motion for leave to file a bill of complaint denied."²²⁶ Plaintiff states (and the rest of us) are therefore left only to guess at why the Court denied leave to file, what might persuade the Court to change its mind if the same state seeks to file again, and what other states should do to have their motions granted. The Court occasionally suggests its reasons,²²⁷ but often we learn what motivated

225. *Texas v. California*, 141 S. Ct. 1469, 1469–70 (2021) (mem.) (Alito, J., dissenting) (citations omitted).

226. *E.g.*, *New Hampshire v. Massachusetts*, 141 S. Ct. 2848, 2848 (2021) (mem.). *See* discussion *supra* note 204; *see also* *McKusick*, *supra* note 16, at 189–90 (finding that, of fifty denials of leave to file between 1961 and 1993, only nine included "opinions explaining the reasons for [the Court's] denial").

227. *Texas v. Pennsylvania*, 141 S. Ct. 1230, 1230 (2020) (mem.) (stating that the motion was denied for lack of standing); *Mississippi v. City of Memphis*, 559 U.S. 901, 901 (2010) (mem.) (denying leave to file and citing three cases to suggest a different approach to the case that might find more favor); *Alabama v. Arizona*, 291 U.S. 286, 292 (1934) (denying leave to file a complaint seeking an injunction because "not every matter of sufficient moment to warrant resort to equity by one person against another would justify an interference by this court with the action of a state"); *see also* *Alabama v. Texas*, 347 U.S. 272, 273 (1954) (denying Alabama's and Rhode Island's motions for leave to file bills of complaints by stating that the United States clearly had the authority to take the challenged actions); *id.* at 278 (Black, J., dissenting) ("The Court . . . summarily denies Alabama and Rhode Island a right even to file their complaint. This I assume must be done on the ground that the claims they present are so clearly without merit as to be frivolous.").

the Court only if a Justice or Justices issue(s) a rare dissent from the denial,²²⁸ or if some fact about the case makes the reasons for the denial obvious.²²⁹

The Court's failure to provide reasons troubles in three ways. First, *fiats* conflict with ordinary expectations of judicial process.²³⁰ The lower courts often give reasons even when the Federal Rules of Civil Procedure do not require them to; for example, a court's decision to dismiss under Rule 12 or to grant summary judgment need not be explained,²³¹ but the federal courts of appeals have sometimes overridden that exemption,²³² and district courts

228. *E.g.*, *Texas v. California*, 141 S. Ct. 1469, 1469–70 (2021) (mem.) (Alito, J., joined by Thomas, J., dissenting from denial of leave to file a bill of complaint).

229. When the Court denied leave for several Great Lakes states seeking to force Illinois to close the diversion gates between Chicago and Lake Michigan over fears that rapacious Asian carp were close to invading the Lake, an important factor was likely Solicitor General Elena Kagan's arguments that the United States was handling the problem. *See* Brief for the United States in Opposition at 4, *Wisconsin v. Illinois*, *Michigan v. Illinois*, *New York v. Illinois*, 559 U.S. 1091 (2010) (mem.) (U.S. Orig. Nos. 1, 2 & 3) (stating that federal agencies were "working actively" to prevent the carp from entering the Great Lakes and citing earlier briefs filed in opposition to the plaintiff states' motions for preliminary injunctive relief that "discussed th[e] federal agencies' efforts in detail").

230. *See, e.g.*, Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 708 (2014) (arguing for a reason-giving approach rather than a strict rule-based approach for some aspects of judicial procedure and noting "insofar as much of the visible output of the judiciary comes in the form of written, justificatory opinions, it might already seem that reason giving is a central function of the trial judge").

231. FED. R. CIV. P. 52(a)(3). This rule has also been read, appropriately, to exempt judgments as a matter of law from the reason-giving requirement. *See* 9C WRIGHT & MILLER, *supra* note 44, § 2575 & n.11. The Federal Rules of Civil Procedure do explicitly require that a court "find the facts specially and state its conclusions of law separately" when "granting or refusing an interlocutory injunction." FED. R. CIV. P. 52(a)(1)–(2). This rule also applies to decisions to grant or refuse a temporary restraining order. *See* 9C WRIGHT & MILLER, *supra* note 44, § 2576. The Court, not bound by the Rules, has failed to explain denials of preliminary injunctions. *E.g.*, *South Carolina v. North Carolina*, 552 U.S. 804, 804 (2007) (mem.).

232. *E.g.*, *Regalado ex rel. Regalado v. City of Commerce City*, 20 F.3d 1104, 1108 n.1 (10th Cir. 1994) ("[I]f the district court's 'underlying holdings would otherwise be ambiguous or inascertainable,' the reasons for entering summary judgment should be stated somewhere in the record." (quoting *Hanson v. Aetna Life & Cas.*, 625 F.2d 573, 575 (5th Cir. 1980))); *Couveau v. Am. Airlines, Inc.*, 218 F.3d 1078, 1081 (9th Cir. 2000) ("[T]his court has held that when multiple grounds are presented by the movant and the reasons for the district court's decision are not otherwise clear from the record, it may vacate a summary judgment and remand for a statement of reasons."); *see also Raz v. United States*, 217 F. App'x 820, 822 (10th Cir. 2007) ("[T]his logic applies with equal force in the context of motions to dismiss under [Rule] 12(b). Simply put, a dismissal order 'that fails to disclose the district court's reasons runs contrary to the interest of judicial efficiency by compelling the appellate court to scour the record. . . . It also increases the danger that litigants . . . will perceive the judicial process to be arbitrary and capricious.'" (quoting *Couveau*, 218 F.3d at 1081)).

do issue opinions when dismissing cases.²³³ And, magistrate judges, for structural reasons, are required to give reasons virtually in triplicate.²³⁴

The Court is not governed by the FRCP.²³⁵ Nevertheless, just as the lower courts have decided to give reasons in certain contexts, even though the Rules do not require them to, one might think the Court would decide to give reasons, even if such reasons are not mandatory, when sovereign states seek to invoke the jurisdiction of the only court that can hear their cases.²³⁶

In addition, repeated unexplained decisions seem almost certain to lead to *ad hocery*.²³⁷ Even if it is true that the considerations governing the Court's decision-making in this context are "relatively straightforward,"²³⁸ the Court's failure to give reasons makes it very difficult to determine which factors apply to particular cases and whether those factors are being applied consistently across similar cases.²³⁹ Yet "[t]he law of precedent teaches that like cases should generally be treated alike."²⁴⁰ Or—what is the other side of the same coin—the Court cannot fairly "extend[] the original jurisdiction to one State's claim" on a particular theory and then, "in the exercise of discretion, refuse to entertain future disputes based on the same theory. That would be the exercise not of discretion, but of caprice."²⁴¹

Finally, sometimes the Court states "Motion for leave to file a bill of complaint denied without prejudice"²⁴² without giving any reason. Denials without prejudice allow the plaintiff to return to the Court "should the posture of the litigation change in a manner that presents a more substantial basis for the exercise of [its] original jurisdiction."²⁴³ When no reasons are

233. *E.g.*, *Mulkey v. RoundPoint Mortg. Servicing Corp.*, No. 21-cv-01058, 2021 WL 5804575, *1–5 (N.D. Ohio Dec. 7, 2021); *James v. Borough of Manhattan Cmty. Coll.*, No. 20-cv-10565, 2021 WL 5567848, *1–12 (S.D.N.Y. Nov. 29, 2021); *Dynatemp Int'l, Inc. v. R421A, LLC*, No. 20-cv-142, 2021 WL 3284799, *1–14 (E.D.N.C. July 30, 2021).

234. FED. R. CIV. P. 72(a).

235. *See supra* notes 110, 183 and accompanying text.

236. *See supra* text accompanying note 231.

237. *See infra* notes 264–82 and accompanying text for examples of inconsistency across the Court's decisions to deny leave.

238. Pfander, *supra* note 19, at 656. To be sure, decades ago, when the Court did actually explain its actions in the context of inter-state disputes, it outlined various factors that counsel for or against granting a plaintiff state leave to file a complaint. *See supra* Part II. But since the Court has refused to hear cases within its exclusive jurisdiction, it has issued almost no explanations. *See supra* note 204 and accompanying text.

239. *See, e.g.*, discussions of *Arizona v. California* and *Texas v. California supra* notes 176–81 and accompanying text, and *Michigan v. Illinois supra* note 185. As noted above, some critics have noticed the Court's inconsistency in using threshold tests but have gone no further in their criticisms. *E.g.*, SHAPIRO ET AL., *supra* note 19, at 10–39 n.49; Shaffer, *supra* note 178, at 848; Horne, *supra* note 179, at 167 (noting "the Court's vague procedural and substantive standards, which make decisions more or less impossible to predict").

240. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018).

241. *Wyoming v. Oklahoma*, 502 U.S. 437, 477 (1992) (Thomas, J., dissenting).

242. *E.g.*, *South Dakota v. Nebraska*, 485 U.S. 902, 902 (1988) (mem.).

243. *United States v. Nevada*, 412 U.S. 534, 540 (1973).

given, it may be difficult for plaintiff states to know when the posture of the litigation has sufficiently changed to warrant a new filing. More problematic, that some denials are explicitly without prejudice may imply that all the other denials are *with* prejudice. A denial with prejudice is preclusive of future filings,²⁴⁴ leaving state plaintiffs with no judicial recourse.

244. Preclusion is sensible when the posture of the litigation *cannot* change, as when a state's claim violates the *parens patriae* doctrine, see *infra* note 256, and potentially the Eleventh Amendment, see *supra* note 118. For example, concern that Arizona was suing on behalf of a small group of citizens rather than in *parens patriae* may explain the Court's naked denial of leave to file a complaint challenging a California tax. See Brief for the United States as Amicus Curiae, *Arizona v. California*, 140 S. Ct. 684 (2020) (mem.) (U.S. Orig. No. 150).

But what about disputes resting on facts that *can* change? For example, in 2021, Texas sought to sue California, challenging its ban on official travel to states with anti-LGBTQ laws; the Court issued a naked denial of leave to file over a vigorous dissent from Justices Alito and Thomas. *Texas v. California*, 141 S. Ct. 1469, 1469 (2021) (mem.); *id.* at 1473 (Alito, J., dissenting from denial of leave to file bill of complaint) (explaining bases of Texas's claim). At the time of filing, California had banned official travel to eleven states. Would Texas be able to try again if California's ban had been extended to fifteen states? Eighteen? As of August 15, 2022, California had banned official travel to twenty-one states. CAL. ATT'Y GEN., CAL. DEP'T OF JUST., PROHIBITION ON STATE-FUNDED AND STATE-SPONSORED TRAVEL TO STATES WITH DISCRIMINATORY LAWS (ASSEMBLY BILL NO. 1887), <https://oag.ca.gov/ab1887> [<https://perma.cc/7YCV-ZEW8>].

Or, if a "with prejudice" can be inferred, did the Court's denial imply that the complaint raised a nonjusticiable political question? The Court certainly was justified in refusing to involve itself in the Texas-California dispute, all of which was highly political and involved grandstanding by the attorneys general on both sides. Compare, e.g., Press Release, Ken Paxton, Tex. Att'y Gen., California's Travel Ban Undermines National Unity; Violates U.S. Constitution by Punishing Those Who Respect Religious Liberty (Feb. 10, 2020), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-californias-travel-ban-undermines-national-unity-violates-us-constitution-punishing-those> [<https://perma.cc/595Y-FGQ7>] (detailing Texas's position on California's travel ban), with Press Release, Xavier Becerra, Cal. Att'y Gen., California Will Restrict State-Funded Travel to Idaho (June 22, 2020), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-california-will-restrict-state-funded-travel-idaho> [<https://perma.cc/HWS8-G7JM>] (detailing California's position on the travel ban). But, by failing to explain *why* it denied the motion for leave to file, and by leaving unclear whether the denial was with or without prejudice, the Court leaves uncertain whether Texas could try again under changed circumstances.

Original-jurisdiction procedures give rise to another preclusion concern: What if the Court denies a motion for leave to file, and that unexplained denial appears to be for the plaintiff's failure to state a claim upon which relief can be granted? E.g., *California v. Texas*, 437 U.S. 601, 602 (1978) (mem.) (Stewart, J., concurring, but dissenting from denial of leave to file a bill of complaint) ("The Court today, without explanation of any kind, evidently concludes that California's complaint does not state a claim within our original and exclusive jurisdiction."). According to the Restatement of Judgments, a 12(b)(6)-type dismissal should be preclusive, given "the ease with which pleadings may be amended, normally at least once as a matter of course" and because a defendant should not suffer a second filing "when no appeal has been taken from an erroneous denial of leave to amend." RESTATEMENT (SECOND) OF JUDGMENTS § 19(d) (AM. LAW INST. 1982). But Wright & Miller reach the opposite conclusion: "Notwithstanding the liberal amendment policy of the federal rules, it seems dubious that a Rule 12(b)(6) dismissal should dispose of more than the question whether a particular statement constitutes a claim for relief, especially in courts other than the original forum . . ." 5B WRIGHT & MILLER, *supra* note 44, § 1357 (footnote omitted).

The preclusive effect of a 12(b)(6) dismissal is thus debatable, even where amendment and appeal exist to cure erroneous dismissals. When the Court denies leave to file for failure to state

* * *

The use of the motion for leave to file has been compared to the petition for writ of certiorari in the Court's appellate docket,²⁴⁵ and, to be sure, there are parallels. But parties seeking review on the appellate side of the Court have almost always already had their cases heard by the federal district courts and courts of appeal or by state trial and appellate courts.²⁴⁶ When the Court denies a motion to file a complaint within its inter-state jurisdiction, it denies a forum to the plaintiff state, leaving the state no forum in which to argue its case.²⁴⁷

B. *THE COURT REQUIRES A SIGNIFICANTLY HEIGHTENED SHOWING OF INJURY*

Both when a plaintiff state seeks to file a complaint and in later proceedings (if that state is permitted to proceed), the Court requires the plaintiff to show that its injury warrants the Court's intervention.²⁴⁸ The burden is far more onerous than that imposed on most private litigants in the lower courts. As I demonstrate, the Court sometimes requires the state to show "substantial injury" by "clear and convincing evidence," something akin

a claim, however, a state plaintiff has no complaint to amend; the complaint has never been accepted for filing. And even when a plaintiff state is permitted to file its complaint, the Court does *not* allow amendments as a matter of course, nor does it "freely give leave" to amend as the Federal Rules of Civil Procedure require of the lower courts. *Compare* FED. R. CIV. P. 15(a)(2) (requiring trial court to "freely give leave [to amend] when justice so requires"), *with* *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995) ("Our requirement that leave be obtained before a complaint may be filed in an original action serves an important gatekeeping function, and proposed pleading amendments must be scrutinized closely . . . to see whether they would take the litigation beyond what we reasonably anticipated when we granted leave to file" (citation omitted) (citing *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973))).

Most inter-state cases proceed in equity. *See supra* notes 192–94 and accompanying text (motion for leave to file originates in equity practice); *infra* notes 260–63 and accompanying text (equitable considerations can prevent an award of relief). Accordingly, preclusion may have less force in the context of inter-state original jurisdiction than it would have in cases at law, *e.g.*, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 431–32, (1855). As the Court made clear in *United States v. Swift & Co.*, injunctions and other court judgments with prospective effect are "subject always to adaptation as events may shape the need." 286 U.S. 106, 114 (1932).

245. SHAPIRO ET AL., *supra* note 19, at 10–26 (quoting McKusick, *supra* note 16, at 202).

246. *Id.* at 2–8 to 3–17 (describing the Court's jurisdiction as an appellate court); *id.* at 2–24 (noting that "[d]irect appeals from federal district courts to the Supreme Court are now limited to a few special types of cases": three-judge district courts, and one-judge district courts in certain antitrust cases); *id.* at 3–40 to 30–41 & n. 47 (noting that the Court's jurisdiction over appeals from the states requires a decision "rendered by the highest state court having ultimate jurisdiction over the case," which need not be "the highest court in a state judicial system," and citing direct appeals to the Court from state trial courts).

247. *See supra* note 89 and accompanying text.

248. *See Florida v. Georgia*, 138 S. Ct. 2502, 2535 (2018) (Thomas, J., dissenting) ("Our precedents do not clarify whether [the heightened standard of injury] requirement goes to the case's justiciability, the merits of the complaining State's claim, or the propriety of affording injunctive relief. But they are clear that such a showing must be made to obtain relief." (citation omitted)).

to a “super-standing” inquiry; the Court may also more strenuously examine the plaintiff state’s claims of causation and redressability.

All litigants face some threshold hurdles. Any dispute in federal court can proceed only if it is a “case” or “controversy” under Article III,²⁴⁹ and state-versus-state disputes are no different.²⁵⁰ As the Court put it in *Wyoming v. Oklahoma*, “[i]n order to constitute a proper ‘controversy’ under our original jurisdiction, ‘it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress.’”²⁵¹ This is merely the familiar tripartite standing test.²⁵²

But a plaintiff state in an original action must show much more: It must show “that it has suffered a ‘threatened invasion of rights that is of *serious*

249. Any plaintiff in federal court must show that she has “an injury in fact”; her injury must be “concrete and particularized” and “actual or imminent, not ‘conjunctural’ or ‘hypothetical.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). The plaintiff must also show that the injury is fairly traceable, at least in part, to the actions of the defendant, and that the court can accord relief to redress at least part of that injury. *Id.* at 560–61. The inconsistency with which the Court has developed Article III standing doctrine has been extensively analyzed, as a selection of citations from just the past fifteen years shows. For examples, see generally F. Andrew Hessick, *Standing and Contracts*, 89 GEO. WASH. L. REV. 298 (2021); Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285 (2018); James E. Pfander, *Standing, Litigable Interests, and Article III’s Case-or-Controversy Requirement*, 65 UCLA L. REV. 170 (2018); Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845 (2017); Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061 (2015); Jonathan Remy Nash, *Standing’s Expected Value*, 111 MICH. L. REV. 1283 (2013); Daniel A. Farber, *Standing on Hot Air: American Electric Power and the Bankruptcy of Standing Doctrine*, 121 YALE L.J. Online 121 (2011); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131 (2009); Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008); and Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73 (2007).

Congress has wide latitude to control who has access to the federal courts. See 13 WRIGHT & MILLER, *supra* note 44, § 3526 (“Certainly, there has never been a serious challenge to the basic idea that Congress has wide power to regulate the jurisdiction of the lower federal courts.”). In the past, such congressionally imposed limits have sometimes been described as imposing a higher standing threshold on plaintiffs. See, e.g., *Air Courier Conf. of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 524–26 (1991) (holding that postal employees lacked standing because they were not within the zone of interests Congress intended to protect with the Postal Express Statutes). As the Court pointed out in *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, however, this question is not really one of standing but of cause of action. 572 U.S. 118, 127 (2014). (“Whether a plaintiff comes within ‘the “zone of interests”’ is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.” (quoting *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 97 (1998))).

250. E.g., *Texas v. Pennsylvania*, 141 S. Ct. 1230, 1230 (2020) (mem.) (“The State of Texas’s motion for leave to file a bill of complaint is denied for lack of standing under Article III of the Constitution.”).

251. *Wyoming v. Oklahoma*, 502 U.S. 437, 447 (1992) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 735–36, (1981)).

252. See discussion *supra* note 249.

magnitude.”²⁵³ This showing must be made by clear and convincing evidence.²⁵⁴ A private litigant need only show her injury by a preponderance of the evidence²⁵⁵—showing that, more likely than not, she has been injured. By contrast, a plaintiff state must produce evidence creating an “abiding conviction” that the party’s facts are “highly probable” so that the evidence “instantly tilt[s] the evidentiary scales” for the party.²⁵⁶ The Court has also described this burden of proof as putting a thumb on the scale in favor of the defendant state: “[T]he principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side.”²⁵⁷

This higher burden is sometimes articulated in a different and fuzzier way: The Court uses a two-step inquiry that asks first whether there is a justiciable controversy and then evaluates whether the exercise of original jurisdiction would be appropriate based on “the seriousness and dignity of the claim.”²⁵⁸ At least one opinion implies that such seriousness and dignity is

253. *Florida*, 138 S. Ct. at 2514 (emphasis added) (internal quotation marks omitted) (quoting *Washington v. Oregon*, 297 U.S. 517, 522 (1936)); see also *Alabama v. Arizona*, 291 U.S. 286, 292 (1934) (“Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent.”); *New York v. New Jersey*, 256 U.S. 296, 309 (1921) (“Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.”). States can also simply fail the ordinary standing test that applies to private parties. In 1929, the Court denied *Florida* leave to file because its asserted injury was “purely speculative, and, at most, only remote and indirect.” *Florida v. Mellon*, 273 U.S. 12, 18 (1927); see also *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1028 (1983) (“[The evidence does] not demonstrate that Oregon and Washington are now injuring Idaho . . . or that they will do so in the future.”); *Connecticut v. Massachusetts*, 282 U.S. 660, 673 (1931) (stating that “[a]t most there is a mere possibility that at some undisclosed time” the harm will occur). These are ordinary applications of Article III standing doctrine. See *supra* note 249 and accompanying text.

254. *Florida*, 138 S. Ct. at 2514; *Washington v. Oregon*, 297 U.S. 517, 522 (1936) (collecting cases).

255. *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (noting that “the ordinary civil case . . . typically is judged by a ‘preponderance of the evidence’ standard”). One especially notable example of the difference between private suits and inter-state original-jurisdiction suits is *California v. West Virginia*, where the Court denied leave to file a complaint for breach of contract. *California v. West Virginia*, 454 U.S. 1027, 1027 (1981) (mem.). California wanted redress for West Virginia’s cancellation of two football games that the University of West Virginia was to play at San Jose State. AP, *Supreme Court Rejects Suit on Canceled Games*, N.Y. TIMES, Nov. 10, 1981, at B20, <https://www.nytimes.com/1981/11/10/sports/supreme-court-rejects-suit-on-canceled-games.html> [<https://perma.cc/EQ2T-7B5E>]. Any private litigant would be able to proceed with such a breach-of-contract claim.

256. *Colorado*, 467 U.S. at 315–16.

257. *Missouri v. Illinois*, 200 U.S. 496, 521 (1906).

258. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972). See, e.g., *Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992); *Maryland v. Louisiana*, 451 U.S. 725, 740 (1981). Some of the cases using the “seriousness and dignity” language, rather than analyzing the state’s alleged injury, are asking whether the *parens patriae* doctrine is satisfied. The Court has repeatedly held that the state plaintiff must sue *as a sovereign* (and not as a proxy for private interests). *Pennsylvania v. New*

present only when “the nature of the interest of the complaining State” gives rise to “a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign.”²⁵⁹

In earlier cases, the Court seems to have required a strong showing of injury as, in part, an issue of equity: “The case comes down to this: The court is asked upon uncertain evidence of prior right and still more uncertain evidence of damage to destroy possessory interests enjoyed without challenge for over half a century.”²⁶⁰ The burden on the state seems to have increased over time²⁶¹ and now appears to function as much as a docket control measure as an equitable requirement, in part to recognize the respect owed to “the high contending parties whose interests are involved”²⁶² and in part to implement the Court’s own concerns and interests.²⁶³

Jersey, 426 U.S. 660, 665 (1976) (per curiam) (“[A] State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens.”). A state must thus sue on its own account or in *parens patriae*, and the Court has rejected some inter-state disputes for failing this requirement.

A state sues on its own account when it alleges a direct harm to its own interests. A state that brings a boundary claim against another state is suing on its own account, *see* Louisiana v. Mississippi, 488 U.S. 990, 990 (1988) (mem.), as is a state alleging that it has been deprived of tax revenues, *see* Pennsylvania v. New Jersey, 426 U.S. 660, 663–65 (1976).

The *parens patriae* doctrine allows the federal and state governments to sue on behalf of their citizens when a sufficiently broad swath of citizens is harmed and the government sues to protect their health and welfare. *See Parens Patriae*, BLACK’S LAW DICTIONARY (11th ed. 2019); 13B WRIGHT & MILLER, *supra* note 44, § 3531.11.1 (describing Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982), as the leading case on state *parens patriae*). *See generally* F. Andrew Hessick, *Quasi-Sovereign Standing*, 94 NOTRE DAME L. REV. 1927 (2019) [hereinafter Hessick, *Quasi-Sovereign Standing*] (criticizing the Court’s use of standing doctrine to deny a federal forum to states who wish, as quasi-sovereigns suing in *parens patriae*, to challenge violations of federal law). A state, for example, may bring an original jurisdiction claim to protect its citizens from pollution.

A state does not sue on its own account or in *parens patriae* when it brings a suit that is really meant to benefit a small section of its citizenry. Thus, the Court dismissed an original jurisdiction case where New Hampshire sued to recover debts owed to some of its citizens. New Hampshire v. Louisiana, 108 U.S. 76, 89–91 (1883). *See generally* Illinois v. Michigan, 409 U.S. 36 (1972) (describing a suit between states as equivalent to one between private parties); Pennsylvania v. Kleppe, 533 F.2d 668 (D.C. Cir. 1976) (finding *parens patriae* standing lacking when a state was merely an assignee of private claims). This logic may have been behind the Court’s refusal to allow Missouri and twelve other states challenging California’s animal-welfare limitations on egg sales. *See* Missouri v. California, 139 S. Ct. 859, 859 (2019) (mem.).

259. Mississippi v. Louisiana, 506 U.S. 73, 77 (1992) (quoting Texas v. New Mexico, 462 U.S. 554, 571 n.18 (1983)).

260. Washington v. Oregon, 297 U.S. 517, 529 (1936); *see also* California v. Latimer, 305 U.S. 255, 259–61 (1938) (dismissing suit for lack of the irreparable injury required to justify an injunction).

261. *See* Sherk, *supra* note 178, at 578 (“It is difficult to escape the conclusion that the quantum of evidence needed to be clear and convincing is substantially greater after the *Vermejo* decisions than it was before those decisions were rendered.” (emphasis omitted)).

262. *Washington*, 297 U.S. at 524; *see supra* Section I.B.

263. Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 500 (1971); *see supra* Part II.

Justices have disagreed over what claims rise to the requisite level. In *Maryland v. Louisiana*, for example, the Court found that the case could proceed,²⁶⁴ but Justice Rehnquist criticized the majority for “not even purport[ing] to consider the nature or essential quality of the States’ claim or whether it is of sufficient ‘seriousness and dignity’ to justify invoking [its] ‘delicate and grave’ original jurisdiction.”²⁶⁵ He argued that the Court’s “original jurisdiction should not be trivialized and open to run-of-the-mill claims simply because they are brought by a State.”²⁶⁶

These disagreements also occur across cases, with the Court granting and denying motions in inconsistent ways. States can be injured in various ways, some peculiar to states and others not. As the rest of this Section demonstrates, while some types of injury generally meet the Court’s requirements, others are contested.

The Court is especially likely to find the requisite injury in cases involving property (usually boundaries between states or disputes over shared water resources). The Court stated in 1838 that “[c]ontroversies about boundary, are more serious in their consequences upon the contending states, and their relations to the Union and governments, than compacts and agreements.”²⁶⁷ In *Nebraska v. Colorado*, which challenged Colorado’s out-of-priority diversions from the North Platte, the Court invoked the view that disputes over interstate waters are precisely the kind of disputes that, among nation states, would lead to war.²⁶⁸ The Court has refused to hear at least one case involving a boundary dispute, but likely because a case was proceeding in the lower courts involving the issue.²⁶⁹

States obviously can be harmed financially. In the lower courts, a mere peppercorn suffices to show a financial injury in fact.²⁷⁰ In inter-state disputes,

264. *Maryland v. Louisiana*, 451 U.S. 725, 739–45 (1981).

265. *Id.* at 764 (Rehnquist, J., dissenting).

266. *Id.* at 766; *see also* *Wyoming v. Oklahoma*, 502 U.S. 437, 476 (1992) (Thomas, J., dissenting) (“[I]t is also critical to examine the extent to which the sovereigns actually have clashed.”).

267. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838).

268. *Nebraska v. Wyoming*, 325 U.S. 589, 608 (1945) (“The dry cycle which has continued over a decade has precipitated a clash of interests which between sovereign powers could be traditionally settled only by diplomacy or war.”). Thus, even though “[t]he various statistics with which the record abounds *are inconclusive* in showing the existence or extent of actual damage to Nebraska,” *id.* at 610 (emphasis added), the Court concluded that “deprivation of water in arid or semiarid regions cannot help but be injurious” and proceeded with the case, *id.*

269. *Louisiana v. Mississippi*, 488 U.S. 990, 990 (1988) (mem.) (denying Louisiana’s motion to file a bill of complaint). *See infra* notes 322–24 and accompanying text for a discussion of this saga.

270. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) (“For standing purposes, a loss of even a small amount of money is ordinarily an ‘injury.’” (citing *McGowan v. Maryland*, 366 U.S. 420, 430–31 (1961))); *see also* *McGowan*, 366 U.S. at 430–31 (finding that appellants fined \$5 plus costs had standing to assert an Establishment Clause challenge).

however, peppercorns may not suffice.²⁷¹ Although, as noted above,²⁷² the Court is usually silent when it declines to take an inter-state case, some denials of jurisdiction have involved significant claims of financial harm,²⁷³ and at least some denials of leave to file appear to arise in part from the Court's belief that the plaintiff state's claimed financial injury was insufficient.²⁷⁴ The Court has also granted leave to file in cases that do not appear to involve financial harm of "serious magnitude."²⁷⁵

In *Wyoming v. Oklahoma*, for example, the Court "decline[d] any invitation to key the exercise of [its] original jurisdiction on the amount in controversy" and went on to find that \$500,000 per year was sufficient injury for Wyoming to proceed.²⁷⁶ Dissenters accused the majority of ignoring its precedent on injuries of substantial magnitude.²⁷⁷ Similarly, in *Maryland v. Louisiana*, the

271. *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (noting, in deciding the case, that millions of dollars were at stake). In perhaps the most interesting example of an inter-state financial dispute, the Court allocated to West Virginia debt that had been incurred by Virginia before her secession from the Union; at that time, counties of Virginia had rejoined the Union as West Virginia, which promised to pay the portion of Virginia's debts expended on the former counties. *Virginia v. West Virginia*, 220 U.S. 1, 36 (1911); see *supra* notes 159–61 and accompanying text.

272. See *supra* Section III.A.

273. *Alabama v. Arizona*, 291 U.S. 286, 292 (1934) (denying Alabama leave to file against several states for their bans on sales of prison-made goods, despite allegations that nearly \$2 million was at stake—about \$40 million today—because "[t]he facts alleged are not sufficient to warrant a finding that the enforcement of the statutes of any defendant would cause Alabama to suffer great loss or any serious injury").

274. See *Arizona v. California*, 140 S. Ct. 684, 684 (2020) (mem.) (denying leave to challenge of a California tax with an allegedly extraterritorial effect). The Court also denied thirteen states' collective motion to file a complaint against Massachusetts, see *Indiana v. Massachusetts*, 139 S. Ct. 859, 859 (2019) (mem.), where those states sought to challenge "Massachusetts's attempt to impose regulatory standards on farmers from every other state by dictating conditions of housing for poultry, hogs, and calves when their products will be offered for sale in Massachusetts." Bill of Complaint at 1, *Indiana*, 139 S. Ct. 859 (U.S. Orig. No. 149); see also *Missouri v. California*, 139 S. Ct. 859, 859 (2019) (mem.) (denying thirteen states leave to file a challenge to a California regulation that allegedly had nationwide extraterritorial effects); *New Jersey v. New York*, 390 U.S. 1000, 1000 (1968) (mem.) (denying leave in a case over the compensation owed for the taking of a failing rail system).

275. *Montana v. Wyoming*, 552 U.S. 1175, 1175 (2008) (mem.) (granting Montana leave to file a complaint regarding the Yellowstone River Compact but suggesting that Wyoming "file a motion to dismiss[] in the nature of a [12(b)(6)] motion"); *Montana v. Wyoming*, 574 U.S. 1150, 1150 (2015) (mem.) (questioning whether the case involved injury of a sufficient magnitude to warrant continuing).

276. *Wyoming v. Oklahoma*, 502 U.S. 437, 445, 453 & n.11 (1992) (holding that losses in tax revenue "of \$535,886 in 1987, \$542,352 in 1988, and \$87,130 in the first four months of 1989" constituted sufficient injury). The Court stated, "Wyoming approaches this case viewing such a drain on its tax base year after year, and it aptly paraphrases a famous statement of Senator Everett Dirksen: '[A] half million dollars here and a half million dollars there, and pretty soon real money is involved.'" *Id.* at 453 n.11 (alteration in original).

277. See *id.* at 476 (Thomas, J., dissenting) ("[A]n entirely derivative injury of the type alleged by Wyoming here—even if it met minimal standing requirements—would not justify the exercise of discretionary original jurisdiction.").

Court decided a suit against Louisiana because the state plaintiffs were consumers of the natural gas that Louisiana was taxing.²⁷⁸ Dissenting, Justice Rehnquist asked “why a tax of seven cents per thousand cubic feet of gas is an injury of ‘serious magnitude.’”²⁷⁹

States also suffer other kinds of injury. Quite sensibly, the Court found that a West Virginia statute that would cut off natural gas supplies to other states created an imminent risk of serious harm.²⁸⁰ In *Missouri v. Illinois*, by contrast, Missouri alleged that Chicago’s discharge of sewage in the Des Plaines River had caused an increase in deaths from typhoid fever—which Illinois disputed—and the Court declined to enter judgment, citing “the great and serious caution with which it is necessary to approach the question whether a case is proved.”²⁸¹ Similarly, in *New York v. New Jersey*, the Court held that New York had not shown “by the convincing evidence which the law requires” that it deserved an injunction against New Jersey’s sewage effluent.²⁸²

Despite the Court’s assertions to the contrary,²⁸³ the Court has also sometimes required states to show more on causation and redress than ordinary litigants in the federal courts must. The lower federal courts often permit a plaintiff’s arguments on causation to be quite attenuated.²⁸⁴ At least some of the Court’s cases within its inter-state jurisdiction, however, seem to impose a higher causation standard.²⁸⁵ For example, in *Kansas v. Colorado*, the Court implicitly found that, given other contributing causes, Colorado’s irrigation diversions were not sufficiently a cause of Kansas’s injury to warrant the Court’s interference.²⁸⁶ Compare this analysis to that of *Massachusetts v.*

278. *Maryland v. Louisiana*, 451 U.S. 725, 756–60 (1981).

279. *Id.* at 766 n.3 (Rehnquist, J., dissenting).

280. *Pennsylvania v. West Virginia*, 262 U.S. 553, 618–20 (1923).

281. *Missouri v. Illinois*, 200 U.S. 496, 520 (1906).

282. *New York v. New Jersey*, 256 U.S. 296, 312 (1921).

283. See *Florida v. Georgia*, 138 S. Ct. 2502, 2517 (2018) (“[O]ur cases, while referring to the use of a ‘clear and convincing’ evidentiary standard in respect to an initial showing of ‘invasion of rights’ and ‘substantial injury,’ have never referred to that standard in respect to a showing of ‘remedy’ or ‘redressability.’”).

284. *E.g.*, *Pub. Int. Rsch. Grp. Of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 87 (3d Cir. 1990) (Aldisert, J., concurring) (agreeing with the majority that the plaintiff had standing to pursue the lawsuit but describing the plaintiff’s causation argument as “gossamer”).

285. Sometimes states fail abjectly to show causation. See *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (denying leave to file on the ground that the plaintiffs states’ injuries were “self-inflicted” and in no way caused by the defendant New Jersey); *North Dakota v. Minnesota*, 263 U.S. 365, 388 (1923) (“Minnesota is not responsible for the floods of which complaint is made.”).

286. *Kansas v. Colorado*, 206 U.S. 46, 112–13 (1907) (noting that Kansas plausibly attributed its injuries—the loss of population and economic growth in the Arkansas River Valley—to Colorado’s irrigation diversions from the River, but suggesting that other causes, such as an economic depression prior to 1890 and the opening of Oklahoma to settlement in 1889, were also plausible causes for those injuries).

EPA, in which the Court, in its appellate jurisdiction, allowed Massachusetts to proceed on a very slender causation argument.²⁸⁷

The obligation of the state to show that it has suffered *substantial* injury by *clear and convincing* evidence continues to the end of the case.²⁸⁸ As Justice Scalia frequently emphasized, any plaintiff must satisfy the standing inquiry at each stage of a case: The three elements of standing “are not mere pleading requirements but rather an indispensable part of the plaintiff’s case,” so that “each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.”²⁸⁹ But because plaintiff states must clear such a high bar, they face unique challenges.

Under the Court’s approach, a plaintiff state logically faces two unpalatable scenarios. First, the state may prove by clear and convincing evidence an injury that is significant but not of serious magnitude, so that, even though that state has clearly proven it was harmed by the defendant, the Court will refuse to confer relief. Second, the plaintiff state may prove that it suffered substantial injury, but only by a preponderance. The court will thus refuse to give the plaintiff state a judgment in its favor, even though the plaintiff state, more likely than not, has suffered a substantial injury.²⁹⁰

287. *Massachusetts v. EPA*, 549 U.S. 497, 523–25 (2007) (rejecting the EPA’s argument that its failure to regulate greenhouse gases “contribute[d] so insignificantly to petitioners’ injuries that [it] cannot be haled into federal court to answer for them”).

288. *E.g.*, *Montana v. Wyoming*, 574 U.S. 1150, 1150 (2015) (mem.) (“The Court notes that the Master has twice directed the parties to address whether the amount of damages at stake justifies further proceedings. The Master’s Report and submissions of parties indicate that fees and expenses could well exceed any recovery. Parties are therefore directed to consider carefully whether it is appropriate for them to continue invoking the jurisdiction of this Court.”).

289. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A conceptual tension exists in the way that Justice Scalia states the ongoing requirement of standing. *See id.* Article III standing is necessary for the Court’s jurisdiction. What if the plaintiff loses on the merits because she sued the wrong defendant? Under the tripartite standing test, the plaintiff must show that her injury is fairly traceable to the defendant, and we now know that the defendant did not cause the plaintiff’s injury. We would not conclude that the trial court now lacked jurisdiction over the case—for one, such a conclusion would prevent the judgment from having any preclusive effect.

In *Laidlaw*, the Court arguably lessened the continuing obligation the *Lujan* opinion describes. *See Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (“[T]here are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.”).

290. While the Court appears in most cases to conclude that the failure to prove injury by clear and convincing evidence also means that the state has, essentially, shown insufficient or even no injury, *see, e.g.*, *Florida v. Georgia*, 141 S. Ct. 1175, 1183 (2021), the clear-and-convincing burden obviously implies that proof by a preponderance will not suffice.

C. THE COURT IMPOSES DISCRETIONARY BARRIERS TO REMEDY

Even if a plaintiff state prevails at every stage in this judicial gauntlet—even if it obtains leave to file its complaint, survives the strict standing inquiry, and wins its case on the merits—even then, the plaintiff can in many cases obtain relief only if it persuades the Court that it sufficiently *deserves* relief. While the Court has sometimes denied relief to plaintiff states for good reasons,²⁹¹ in other cases the Court has denied relief to plaintiffs who, in any lower court, would be entitled to a favorable judgment.²⁹² The Court's discretion to grant or withhold relief thus provides another benefit to defendant states at the expense of plaintiff states. Indeed, because in this circumstance the defendant is a proven wrong-doer, the Court's discretion is especially problematic.

The Court sometimes frames the burden on the plaintiff state in terms of the remedial powers of the courts: “[I]t must appear that the complaining State . . . is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence.”²⁹³ In particular, the Court frames this inquiry in terms of equity.²⁹⁴

At the turn of the twentieth century, as others have noted,²⁹⁵ the Court took a more equality-focused and less utilitarian approach to its equity powers. In *Georgia v. Tennessee Copper Co.*, for example, where the defendant copper companies suggested that Georgia be paid damages for a nuisance rather than receiving an injunction against the companies' polluting activities, the Court emphasized that the state “is not lightly to be required to give up quasi-sovereign rights for pay.”²⁹⁶ Instead, the plaintiff state could seek the relief it preferred: “[A]part from the difficulty of valuing such rights in money, if that

291. In *Vermont v. New York*, the Court refused to enter the decree suggested by the special master in a dispute over pollution in Lake Champlain on the ground that the operation of the decree (which contemplated empowering a Lake Master to oversee the implementation of the decree) would lead the Court to exceed its Article III powers. *Vermont v. New York*, 417 U.S. 270, 277 (1974) (“Insofar as we would be supervising the execution of the Consent Decree, we would be acting more in an arbitral rather than a judicial manner.”).

292. *Kansas v. Colorado*, 206 U.S. 46, 112–13 (1907).

293. *Maryland v. Louisiana*, 451 U.S. 725, 735 (1981) (quoting *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939)).

294. *E.g.*, *Texas v. New Mexico*, 482 U.S. 124, 130–34 (1987) (holding that damages could substitute for a compact's remedy of repayment in water where latter would be inequitable). The Court has also addressed at least some of the equitable defenses in interstate disputes. *See* discussion *supra* note 193.

295. *See, e.g.*, Robert Haskell Abrams, *Interstate Water Allocation: A Contemporary Primer for Eastern States*, 25 U. ARK. LITTLE ROCK L. REV. 155, 165–66 (2002); Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 421–22 (2006).

296. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907).

be its choice [the state] may insist that an infraction of them shall be stopped.”²⁹⁷ As the Court emphasized,

[t]he states, by entering the Union, did not sink to the position of private owners, subject to one system of private law. This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power.²⁹⁸

Perhaps because of this lack of freedom, by 1936, the Court had made clear that the plaintiff state faces a *heavier* burden than a private litigant seeking equitable relief. In *Washington v. Oregon*, the Court said “the burden of proof falls heavily on complainant, more heavily, . . . than in a suit for an injunction where states are not involved.”²⁹⁹ The Court declined to enter a judgment for Washington because “[t]o restrain [Oregon’s water] diversion . . . would bring distress and even ruin to a long-established settlement of tillers of the soil for no other or better purpose than to vindicate a barren right.”³⁰⁰ “This,” the Court said, “is not the high equity that moves the conscience of the court in giving judgment between states.”³⁰¹

In certain categories of cases, the Court is even more reluctant to enter judgment for a plaintiff state who wins on the merits. The Court has stated that “it is proper to weigh the harms and benefits to competing states” in deciding whether to apportion interstate resources.³⁰² This “balance-of-harms” test is appropriate because, in the Court’s view, “[t]he harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed [allocation] may be speculative and remote.”³⁰³ Thus, to obtain a decree apportioning the resource, the plaintiff state must demonstrate by clear and convincing evidence “that ‘the benefits of the [apportionment] substantially outweigh the harm that might result.’”³⁰⁴ Only if it satisfies the balance-of-harms test can the plaintiff state obtain relief.

297. *Id.*

298. *Id.* at 237–38.

299. *Washington v. Oregon*, 297 U.S. 517, 524 (1936).

300. *Id.* at 523. As the Court found, water resources law did not support the claims of Washington to the water involved. *Id.* at 527–29. Thus, to describe even a “barren right” is probably an overstatement, for Washington water users actually had no rights at all.

301. *Id.*

302. *Colorado v. New Mexico*, 459 U.S. 176, 186 (1982).

303. *Id.* at 187.

304. *Florida v. Georgia*, 138 S. Ct. 2502, 2527 (2018) (alteration in original) (quoting *Colorado v. New Mexico*, 459 U.S. 176, 187 (1982)); *see also id.* at 2528 (Thomas, J., dissenting) (“To prevail . . . Florida must present clear and convincing evidence that its proposed cap will benefit Florida more than it harms Georgia.”). *See, e.g., Colorado v. New Mexico*, 467 U.S. 310, 323 (1984); *Kansas v. Colorado*, 206 U.S. 46, 117 (1907).

The Court acknowledges that the balance-of-harms test favors defendant states over plaintiff states: “We recognize that the equities supporting the protection of existing economies will usually be compelling. The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote.”³⁰⁵

Plaintiff states suing in the Court’s inter-state jurisdiction thus cannot obtain relief, *even after they have proven their case on the merits*, if they cannot satisfy the balance-of-harms test. In other words, the plaintiff state cannot win if it would be too painful for the defendant state to provide relief—a burden imposed on sovereign entities but not, in the lower courts, on ordinary people.³⁰⁶ Imagine if Chris sued Lee for negligence, and the trial court said Chris could only proceed by showing a *substantial* injury.³⁰⁷ And imagine if Chris showed substantial injury, but the trial court refused to award relief, because it would hurt Lee more than it would benefit Chris to award relief.³⁰⁸ Certainly we could structure a judicial system with such barriers to suit and relief, but we have intentionally chosen not to.³⁰⁹

D. THE COURT’S DOCTRINES MAKE CERTAIN CATEGORIES OF STATES WORSE OFF

All of these burdens run directly counter to the Court’s own principle that states are equal to one another, at least when they litigate against each

305. *Colorado v. New Mexico*, 459 U.S. 176, 187 (1982).

306. 11 WRIGHT & MILLER, *supra* note 44, § 2807 (discussing bases for a new trial based on an excessive jury verdict, which do not include ability of the defendant to pay).

307. Congress has long imposed a substantiality requirement of a sort on diversity-jurisdiction cases, which currently must involve an amount in controversy that exceeds \$75,000. See 28 U.S.C. § 1332(a). But Congress abandoned an amount-in-controversy requirement for federal-question cases forty years ago, see Federal Question Jurisdictional Amendments Act of 1980, Pub. L. 96-486, 94 Stat 2369, and states regularly provide forums for plaintiffs with even very small claims, 20 AM. JUR. 2D *Courts* § 13 (1962) (“While some states have established small claims courts, others have instead established a small-claims procedure within an already existing court. Small claims court may be an informal court that is part of the civil court.” (footnotes omitted)).

308. Even if many defendants are essentially judgment-proof, *e.g.*, Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 607–08 (2006), we do not say to the plaintiff, “you may not obtain a judgment against Lee because such a judgment would cause too much harm to Lee.”

309. See, *e.g.*, Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325, 1349 n.106, 1349–50 (1995) (describing the original role of Rule 1—that the FRCP “shall be construed to secure the just, speedy, and inexpensive determination of every action”—in leading district courts “to require a ‘liberal’ interpretation of the Rules so as to simplify procedure, facilitate resolution of disputes on the merits, and break with procedural complexities and technicalities that had developed under common law systems and equity practice” (emphasis omitted)). Congress has amended Rule 1 to encourage judges to avoid cost and delay in resolving disputes, see 151 F.R.D. 145 (1993), and the Court has issued opinions that run counter to the liberal construction Rule 1 has usually demanded, see, *e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 684–87 (2009), but none of this rises to the level of the burdens placed on plaintiff states.

other before the Court.³¹⁰ “One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest.”³¹¹ Doctrines that lead to discrimination against plaintiff states in favor of defendant states seem to violate this cardinal rule.

But the Court’s discretionary doctrines do not evenly burden all states who might be plaintiffs in the Court; instead, certain groups of plaintiff states are essentially barred by the Court. As Professor McKusick’s useful article on the Court’s original jurisdiction demonstrates, the Court refuses to hear some categories of disputes far more often than others.³¹² From 1961 to 1993, he identified only one boundary complaint denied, out of twenty-three; only two water complaints refused, out of sixteen; and noted that all three escheat complaints were accepted.³¹³ Yet seven tax complaints of ten were refused; one of two pollution complaints was denied; six of eight challenges to another state’s regulation were declined; and all three contract-enforcement complaints were rejected, as were all four cases he could not fit into the existing categories.³¹⁴

Since 1993, the Court has continued to accept boundary cases (four), water disputes (five of six), and compact disputes (four), but it has denied leave to file two of two pollution complaints, two of two tax complaints, and four of four challenges to allegedly extraterritorial regulations.³¹⁵ Thus the Court’s discretionary denials fall, not on plaintiff states in general, but on certain categories of plaintiff states.

And even when the Court accepts a case, it may deny relief. For example, the Court has recently denied relief when asked to apportion a body of water.³¹⁶ Such denials prevent *downstream* states from obtaining relief from

310. See *supra* Section I.B.

311. *Kansas v. Colorado*, 206 U.S. 46, 97 (1907).

312. See McKusick, *supra* note 16, at 207–13.

313. *Id.*

314. *Id.*

315. See sources cited *supra* note 27. Perhaps most interestingly but also most understandably, the Court denied Montana and Wyoming’s motion for leave to file a complaint against Washington for that state’s refusal to grant an environmental permit necessary for the construction of a port that would permit Montana and Wyoming’s coal to be exported to Asia. *Montana v. Washington*, 141 S. Ct. 2848, 2848 (2021) (mem.); see Brief for the United States as Amicus Curiae at 8, *Montana*, 141 S. Ct. 2848 (U.S. Orig. No. 52). Montana and Wyoming alleged that local political opposition to coal had motivated Washington’s denial of the permit, and that the denial violated the Dormant Commerce Clause. Brief for the United States as Amicus Curiae at 8, *Montana*, 141 S. Ct. 2848 (U.S. Orig. No. 52). The companies that were to build the port, however, had petitioned for bankruptcy while the motion for leave to file was pending, *id.* at 6, and the Court denied leave, apparently on the ground that the dispute was moot. See *Montana*, 141 S. Ct. at 2848.

316. See *Mississippi v. Tennessee*, 142 S. Ct. 31, 40 (2021); *Florida v. Georgia*, 141 S. Ct. 1175, 1182–83 (2021). Most of the water disputes filed since 1993 have involved enforcement of an existing interstate compact or an earlier Court decree, where the Court’s job is considerably easier. *E.g.*, *Kansas v. Nebraska*, 574 U.S. 445, 448, 474–75 (2015) (according relief under Republican River Compact); *Montana v. Wyoming*, 138 S. Ct. 758, 758–59 (2018) (mem.)

upstream states. An upstream state can harm its downstream neighbor so long as that harm does not rise to the level of “substantial.”³¹⁷ Even if the upstream state *does* impose “substantial injury” on the downstream state, the balance-of-harms test can insulate that state from a judgment, leaving the downstream state with no remedy.

IV. EXISTING STATE EFFORTS TO SOLVE ORIGINAL DISCRIMINATION FAIL

The Court’s discrimination against plaintiff states is not formalistic: It has real-world consequences that harm plaintiff states and the Court itself. First, states who are harmed by other states in ways that fall short of the Court’s tests must continue to suffer those harms unless they can figure out a workaround, such as suing a proxy entity in the lower courts.³¹⁸ But those workarounds, as I explain below, raise problems of their own for plaintiff states. Second, assuming no workaround can be found, many of an injured state’s efforts to negotiate a solution will be met with indifference from the harming state, which, in many circumstances, will not be required to defend a lawsuit, and, in many others, is unlikely to face a judgment. Third, because the doctrines create disincentives for states to negotiate, the Court shoots itself in the foot: It exercises its discretionary powers to reject inter-state disputes in part because, for both principled and practical reasons, the Justices believe states should reach political solutions, but those rejections actually make it less likely that states will reach negotiated solutions. As a result, the Court arguably faces *more* invocations of its inter-state original jurisdiction than it would if its doctrines were not interfering with state incentives.

A. ORIGINAL DISCRIMINATION CANNOT BE SOLVED BY LOWER-COURT WORKAROUNDS

As noted above, the Court has sometimes justified its refusal of inter-state jurisdiction on the ground that an alternative forum exists.³¹⁹ As I show in this subpart, states also seem to have assumed that the Court is unavailable as a forum and have thus litigated in the lower courts using other entities as proxies for the state they really want to sue. But litigation in the lower federal courts and in the state courts—whether as the Court’s alternative forum or in a proxy lawsuit—fails to address the problems of original discrimination.

(according modest relief under the Yellowstone River Compact); *New Jersey v. Delaware*, 552 U.S. 597, 601–04, 623 (2008) (according relief under the 1905 Compact regarding regulatory authority over Delaware River).

317. See *supra* Section III.B.

318. E.g., *Univ. of Utah v. Max-Planck-Gesellschaft Zur Forderung Der Wissenschaften E.V.*, 734 F.3d 1315, 1320–24 (Fed. Cir. 2013) (noting, upon motion from the University of Massachusetts (“Umass”), which had been named as a defendant, that the lawsuit fell within the exclusive jurisdiction of the Supreme Court, prompting the University of Utah to amend its complaint to name four Umass officials instead; holding that Umass was not the real party in interest, so that the dispute was not between two states, and extensively discussing why).

319. See *supra* notes 215–16 and accompanying text.

First, what the Court perceives as a suitable alternative forum frequently will not be. In *Arizona v. New Mexico*, the Court declined jurisdiction in favor of ongoing litigation in New Mexico's courts,³²⁰ relying in particular on the fact that a state-owned power company was a party to the New Mexico litigation and thus would protect Arizona's interests.³²¹ But the Court has also declined jurisdiction when there was no party to protect the plaintiff state's interests. In *Mississippi v. Louisiana*, for example, the Court turned away a boundary dispute because it was being litigated in federal district court,³²² but then ultimately held that the district court had no jurisdiction over Mississippi's third-party complaint against Louisiana³²³ and that Louisiana could not be forced to comply with the judgment against the private parties.³²⁴

Other problems arise from considering lower federal and state courts as alternative fora. In a case that does not proceed to judgment, non-state parties may settle in a way harmful to a plaintiff state.³²⁵ In either federal or state courts, sovereign immunity may prevent joinder of necessary state parties, given that the Court recently restored states' immunity to suit in the courts of other states.³²⁶ If sovereign immunity prevents joinder, the lower-court or state-court case may be dismissed for failure to join a required party.³²⁷

320. *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (per curiam).

321. *Id.* at 794.

322. *Mississippi v. Louisiana*, 506 U.S. 73, 78 (1992). The Court had previously denied Louisiana's motion for leave to file its complaint. *Louisiana v. Mississippi*, 488 U.S. 990, 990 (1988) (mem.). Three Justices dissented, noting that "Louisiana's complaint against Mississippi is plainly within our original jurisdiction and . . . [is] the very kind of a dispute that countless times the Court has accepted and adjudicated under its original jurisdiction." *Id.* (White, J., joined by Stevens and Scalia, JJ., dissenting from denial of leave to file a bill of complaint). They went on to say that "[p]erhaps denial of leave to file rests on the possibility that the private action will go forward with Louisiana as a party and that a judgment unfavorable to, but binding on, Louisiana will be entered." *Id.*

323. *Mississippi*, 506 U.S. at 78.

324. The district judge adjudicated the border in favor of Mississippi, the Fifth Circuit reversed, *Houston v. Thomas*, 937 F.2d 247, 253–54 (5th Cir. 1991), Mississippi petitioned for certiorari, and the Court granted—and added its own question: "Did the District Court properly assert jurisdiction over respondents' third-party complaint against petitioner State of Mississippi?" *Mississippi v. Louisiana*, 503 U.S. 935, 935 (1992). The Court ultimately held that the jurisdiction had been absent over the third-party complaint, which fell within the Court's exclusive inter-state jurisdiction, and that the judgment against the private parties could not bind a state. *Mississippi*, 506 U.S. at 78. For further discussion of this saga, see *infra* note 351.

325. See *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 406 (1792) (Iredell, J., concurring) ("[T]he claim of the State of Georgia should not be, indirectly, decided, or defeated, by a judgment pronounced between parties, over whom she had no control, and upon a trial, in which she was not allowed to be heard.").

326. *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1492 (2019) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)). Justice Alito has noted that *Hyatt* may pose a problem for inter-state disputes where the Court declines jurisdiction. *Texas v. California*, 141 S. Ct. 1469, 1470 (2021) (mem.) (Alito, J., dissenting).

327. Cf. FED. R. CIV. P. 19(b). As noted above, see *supra* notes 110, 233–34 and accompanying text, the Court takes the Federal Rules of Civil Procedure only as a guide. However, because Rule

preventing the lower court from serving as an alternative forum. Finally, unless the state that is not a party is in privity with one of the parties, the judgment in such an action would not preclude that state from bringing a later suit.³²⁸

Moreover, recall that one asserted purpose of original jurisdiction is to recognize the seriousness and dignity of the States' interests.³²⁹ Yet the Court denied leave to file in *Arizona v. New Mexico* because the relevant issues were before New Mexico's courts.³³⁰ Having to litigate in its opponent's courts seems at odds with Arizona's dignity.³³¹

Second—perhaps because prospective plaintiff states have realized that the Court is a hostile forum—states have tried to find alternative fora for pursuing their interstate interests. A plaintiff state cannot simply sue the desired defendant state in the lower courts: If such a lawsuit names the opposing state or states as defendants, a lower court will dismiss the inter-state claim for lack of jurisdiction, because such claims are within the Court's original jurisdiction.³³² Instead, plaintiff states try to work around these limitations using what we might call “proxy suits” in the lower courts. For example, in the water-resources area, many states have used suits against the U.S. Army Corps of Engineers (“the Corps”)—which constructs and maintains a large number of the Nation's dams—in an effort to resolve what are really

19 arises in part from due-process concerns, see 7 WRIGHT & MILLER, *supra* note 44, § 1602, the Court does follow the rule in principle, see, e.g., *Florida v. Georgia*, 138 S. Ct. 2502, 2526 (2018) (implying that the U.S. Army Corps of Engineers, which could not be forcibly joined due to sovereign immunity, was not an indispensable party to Florida's water-resources dispute with Georgia).

328. Cf. *Oklahoma v. Texas*, 256 U.S. 70, 92–93 (1921) (finding Oklahoma in privity with the United States and therefore bound by an earlier decree against the United States).

329. See *supra* Section I.B.

330. *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976).

331. The Court betrays its true motivation in the next sentence: “If on appeal the New Mexico Supreme Court should hold the electrical energy tax unconstitutional, Arizona will have been vindicated. If, on the other hand, the tax is held to be constitutional, *the issues raised now may be brought to this Court by way of direct appeal . . .*” *Id.* (emphasis added). See *supra* Section III.A.

332. *Mississippi v. Louisiana*, 506 U.S. 73, 77–78 (1992) (“Mississippi's argument for jurisdiction in the District Court here founders on the uncompromising language of 28 U.S.C. § 1251 (a), which gives to this Court ‘original and *exclusive* jurisdiction of all controversies between two or more States.’ Though phrased in terms of a grant of jurisdiction to this Court, the description of our jurisdiction as ‘exclusive’ necessarily denies jurisdiction of such cases to any other federal court.”).

interstate water-allocation disputes.³³³ States have similarly sued the Corps in at least one interstate nuisance case.³³⁴

One might think that litigation by proxy is better than no litigation at all; proceeding in a lower court against any plausible non-state defendant may well be a more promising way of seeking relief than attempting to run the gantlet of the Court's original-jurisdiction doctrine.³³⁵ But aspects of litigation in the lower courts make such proxy suits problematic. These proxy suits are merely a subcategory of the "alternative fora" just discussed and have the same potential problems. Moreover, states bringing suits against federal agencies also face special obstacles. When a state sues the Corps, for example, the agency receives substantial deference to its interpretation of ambiguous statutory language,³³⁶ to its interpretation of ambiguous regulatory language,³³⁷ and to its decisions in resolving particular issues.³³⁸ Accordingly, plaintiff states in the lower courts face headwinds in obtaining relief from federal agencies, headwinds they would not face in a state-versus-state dispute, where "[e]ach state [is supposed to] stand[] on the same level with all the rest."³³⁹

B. ORIGINAL DISCRIMINATION UNDERMINES NEGOTIATED AGREEMENTS

As I have shown above, the Court criticizes states for failing to negotiate their own solutions to these (often highly political) disputes.³⁴⁰ Indeed, a desire to steer states toward negotiation lies behind many of the Court's prudential doctrines in these cases. But those very doctrines, instead of

333. *In re* Tri-State Water Rts. Litig., 639 F. Supp. 2d 1308, 1310 (M.D. Fla. 2009), *rev'd and vacated sub nom.* *In re* MDL-1824 Tri-State Water Rts. Litig., 644 F.3d 1160 (11th Cir. 2011). No party seems to have raised, and the court did not raise *sua sponte*, the question of jurisdiction, even though Alabama and Florida were aligned against Georgia in the suit against the Corps. *See id.* at 1340–42 (addressing only the jurisdictional issue of whether Alabama and Florida had standing to sue); *see also* South Dakota v. Ubbelohde, 330 F.3d 1014, 1026 (8th Cir. 2003) (holding that, even though states were aligned on opposite sides regarding the Corps' management of the Missouri River, the case was not an inter-state dispute within the exclusive jurisdiction of the Supreme Court: "In this case, the controversy is between each of the states and the Corps").

334. *E.g.*, Michigan v. U.S. Army Corps of Eng'rs, 667 F.3d 765, 768–70 (7th Cir. 2011) (describing a suit by Michigan, Minnesota, Ohio, Pennsylvania, and Wisconsin against the Corps and the Metropolitan Water Reclamation District of Greater Chicago over the threat posed to the Great Lakes by invasive Asian carp).

335. *See supra* Part III.

336. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

337. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2411–12 (2019) (applying *Auer* deference—"a presumption that Congress would generally want the agency to play the primary role in resolving [its own] regulatory ambiguities"). *But see id.* at 2414 ("*Auer* deference is not the answer to every question of interpreting an agency's rules. . . . [It] is just a 'general rule' [and] 'does not apply in all cases.'" (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012))).

338. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415–16 (1971), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

339. Kansas v. Colorado, 206 U.S. 46, 97 (1907).

340. *See supra* notes 154–61 and accompanying text.

encouraging negotiation, have the effect of preventing it.³⁴¹ As a result, the Court undermines its own interests in imposing these heavy burdens on plaintiff states.

The Court recognized this logic in 1838, long before the prudential barriers to inter-state disputes were imposed.³⁴² As Justice Baldwin wrote, “[f]ew [compacts], if any, will be made, when it is left to the pleasure of the state in possession; but when it is known that some tribunal can decide on the right, it is most probable that controversies will be settled by compact.”³⁴³ At least one scholar has also noted this problem: “If some state believes that, notwithstanding the cost and uncertainty of litigation, it could achieve a better outcome in the Supreme Court than at the bargaining table, its incentive to compromise will be weakened.”³⁴⁴

A state that sees itself as a likely defendant will thus not see litigation as a serious threat—that undermines its incentive to negotiate. After all, when a negotiator has almost no credible threat of litigation, the opposing party can quite reasonably respond: “So sue me.”³⁴⁵ Nor does the negotiator have much reason to enter into an agreement it may have difficulty enforcing.³⁴⁶

341. Some scholars contend that particular compacts are explicable precisely because the Court was unavailable. See G. EMLÉN HALL, *HIGH AND DRY: THE TEXAS–NEW MEXICO STRUGGLE FOR THE PECOS RIVER* 4–5 (2002); NORRIS HUNDLEY, JR., *WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER IN THE AMERICAN WEST* 73–82, 105–09, 177–80 (1975) (describing Western states’ disappointment in the Supreme Court’s rulings on Western water disputes and citing views of several negotiators of the Colorado River Compact that litigation would not resolve the states’ differences). One commenter has contended that the Court reduces incentives to negotiate water-resources agreements by *taking* cases to apportion waters. Horne, *supra* note 179, at 157–82. The analysis posits that downstream states are “excessively optimistic” about winning before the Court and thus are unwilling to negotiate, thus leading to the recommendation that, if the Court butts out, negotiation will be forthcoming. *Id.* at 178. As I argue here, the incentives are precisely the reverse: A downstream state—at least one that does not already have a compact or a decree to rely on—has very little reason to be optimistic about winning in the Court, because the Court is likely to reject its claim or to deny relief. The much-reduced threat of an adverse judgment diminishes the incentive a prospective defendant state might otherwise have to negotiate.

342. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 726–31 (1838).

343. *Id.* at 726.

344. Patashnik, *supra* note 181, at 50.

345. See *supra* Part III.

346. See *infra* Section V.C. To be sure, some agreements are negotiated when there is little to no possibility of enforcement: Nation-states enter into treaties even though, in most cases, no international court exists to enforce those treaties. Tseming Yang, *International Treaty Enforcement as a Public Good: Institutional Deterrent Sanctions in International Environmental Agreements*, 27 MICH. J. INT’L L. 1131, 1132 (2006) (“The problem of treaty enforcement is as old as international law itself.”). States may still, therefore, negotiate agreements in some contexts despite the Court’s unavailability. One goal of future research is to attempt to determine the relationship between inter-state original-jurisdiction litigation (or its absence) and the successful negotiation of interstate compacts (or not).

Moreover, when states do try to negotiate compacts,³⁴⁷ they may fail to reach agreement³⁴⁸—something that is, in part, sensibly attributable to the Court's unavailability. At least one likely defendant state recognized the advantage conferred by the Court's discriminatory doctrines: Colorado, which is upstream on seven different rivers, has filed amicus briefs in support of the precedent placing heavy burdens on prospective state plaintiffs.³⁴⁹ Thus, the Court's jurisdictional hurdles, meant in part to give incentives to states to solve their own problems, in fact have the effect of reducing the likelihood of such solutions.

C. DOCTRINAL CHANGES ARE UNLIKELY

Perhaps the Justices, if some were to read this Article, would revisit their discriminatory doctrines. As just noted, making inter-state jurisdiction unavailable undermines precisely what the Court says it desires: political negotiation and compromise to solve inter-state problems.³⁵⁰ Moreover, the Court has sometimes predictably created more work for itself by declining jurisdiction and then having to take a case later anyway.³⁵¹ The Court could abandon its super-standing and balance-of-harms tests, treating states instead

347. A defendant state might, for example, negotiate despite its litigation advantage, because of the high costs of litigating before the Court if the plaintiff state obtains leave to proceed. *See supra* note 117 and accompanying text.

348. Perhaps the clearest example of a failure to reach agreement is the ongoing dispute among Alabama, Florida, and Georgia over the Apalachicola–Chattahoochee–Flint (“ACF”) Basin. In 1997, the three states entered into a compact that created the ACF Basin Commission, composed of the three governors of the states and one non-voting representative of the federal government; the Commission was charged with creating a formula to allocate the waters of the basin among the three states—in other words, the Compact was an agreement setting a framework to negotiate a compact. *In re* MDL-1824 Tri-State Water Rts. Litig., 644 F.3d 1160, 1167–75 (11th Cir. 2011). Initially scheduled to expire on December 31, 1998, the Commission extended the compact multiple times until it finally expired on August 31, 2003, when it could not reach agreement. *Id.* at 1175. The states have never negotiated an agreement to apportion the waters of the ACF. Most recently, the Court denied Florida's request for equitable apportionment of the waters. *Florida v. Georgia*, 141 S. Ct. 1175, 1178 (2021).

Similarly, Michigan for years has been unable to reach agreement with Illinois over the threat posed to the Great Lakes by invasive Asian carp. *See generally* Charles A. Lyons, *Asian Carp, the Chicago Area Water System, and Aquatic Invasive Species Management in the Great Lakes*, 26 HASTINGS ENV'T L.J. 223 (2020) (discussing the ongoing threat).

349. State of Colorado's Brief as Amicus Curiae in Opposition to Florida's Exceptions at 4–6, *Florida v. Georgia*, 141 S. Ct. 1175 (2021) (U.S. Orig. No. 142), 2017 WL 3499372, at *4–6.

350. *See supra* Section IV.B.

351. As noted above, the Court declined jurisdiction over Mississippi's border dispute with Louisiana in favor a case pending in the lower courts, where Mississippi won, but the Court then found (reviewing the lower court's decision on a writ of certiorari) that jurisdiction had been lacking over the inter-state dispute, which was for the Court exclusively. *See supra* notes 322–24 and accompanying text. Louisiana then moved the Court to grant it leave to file a complaint against Mississippi, raising precisely the same issues, and the Court granted leave. *Mississippi v. Louisiana*, 503 U.S. 935, 935 (1992) (mem.). Louisiana then won the original jurisdiction case. *Louisiana v. Mississippi*, 516 U.S. 22, 22–28 (1995).

as the lower courts treat ordinary litigants.³⁵² It could even abandon the procedure by which it requires states to seek leave to file their complaints in the first place, a course that Justice Thomas has argued for,³⁵³ and one that would stop treating plaintiff states as vexatious litigants. Certainly, the Court could explain its reasoning for denying plaintiff states leave to file their complaints,³⁵⁴ although—as the current debate over the “shadow docket” demonstrates—summary decision-making is problematic, even when more explanation is given.³⁵⁵

However, the fundamental problem with recommending fixes to the Court’s discretionary doctrines is that they exist for understandable reasons: The Court does not like sitting as a trial court for the principled and practical reasons discussed in Part II.³⁵⁶ Nor should we want the Court to take more of these cases. These cases *are* time-consuming.³⁵⁷ The Court *is* institutionally unsuited to fact-finding,³⁵⁸ and the use of special masters *is* an imperfect solution.³⁵⁹ These cases *do* detract from the Court’s role as the Nation’s

352. See *supra* notes 182–85, 230–36, 249–57, 270–79, 283–87, 299–301, 306–09 and accompanying text (contrasting Supreme Court’s approach to inter-state cases with procedures in lower courts).

353. See *Arizona v. California*, 140 S. Ct. 684, 684–85 (2020) (mem.) (Thomas, J., dissenting); *Nebraska v. Colorado*, 577 U.S. 1211, 1211 (2016) (mem.) (Thomas, J., dissenting).

354. See *supra* Section III.A.

355. Cf. *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1347–48 (2022) (mem.) (granting, in a 5–4 decision, emergency stay of district court’s decision vacating and remanding the Trump-era Clean Water Act rule); *id.* at 1349 (Kagan, J., dissenting) (“By . . . granting relief, the Court goes astray. It provides a stay pending appeal, and thus signals its view of the merits, even though the applicants have failed to make the irreparable harm showing we have traditionally required. That renders the Court’s emergency docket not for emergencies at all. The docket becomes only another place for merits determinations—except made without full briefing and argument.”). I am grateful to Ed DuMont for connecting these dots.

356. See *supra* Section II.B.

357. Florida’s suit against Georgia, for example, was allowed to proceed in 2014, *Florida v. Georgia*, 574 U.S. 972, 972 (2014) (mem.), and the Court entered a final decision in 2021, *Florida v. Georgia*, 141 S. Ct. 1175, 1180–83 (2021). The Special Master held a month-long hearing that produced nearly five-thousand pages of transcript. *Florida v. Georgia*, No. 142 *Original*, U.S. CT. APPEALS TENTH CIR., <https://www.ca10.uscourts.gov/special-master-142> [<https://perma.cc/XF3P-FCWG>].

It is worth noting that the current Court is considerably less busy than past Courts and has less to complain about in terms of workload than earlier Courts. See Steve Vladeck, *The Supreme Court Is Handing Down Its Fewest Decisions in Decades. Here’s What that Means*, MSNBC (June 4, 2022, 4:35 AM), <https://www.msnbc.com/opinion/msnbc-opinion/supreme-court-no-decision-bad-decision-it-s-happening-too-n1295991> [<https://perma.cc/4UR5-UD74>] (describing a drop from 150 to one-hundred cases per year in late 1980s, to between eighty to ninety cases per year in 1990s and 2000s, to sixty or fewer in the last decade).

358. See *supra* Section II.B.

359. See *supra* notes 112–17 and accompanying text.

highest appellate court for federal law.³⁶⁰ The Court would not be happy accepting more inter-state disputes, and we would not be happy if it did.³⁶¹

V. CONGRESS CAN AND SHOULD OPEN THE DISTRICT COURTS TO THESE SUITS

Prospective plaintiff states suffer under the Court's discretionary doctrines, and yet the Court will not—and should not—alter its approach to these cases. The solution to this impasse lies with Congress. I first demonstrate that concurrent jurisdiction best solves the problems created by the Court's discretionary discrimination and confirm that Congress has the authority to solve this problem legislatively. I then recommend some mechanisms to make the legislative solution appealing to the states.

A. CONGRESS SHOULD GIVE THE LOWER COURTS CONCURRENT JURISDICTION

Congress may remove the exclusivity of the Court's jurisdiction over inter-state disputes, making that jurisdiction concurrent with the lower courts.³⁶² Congress has already done this with the Court's original jurisdiction over cases involving ambassadors and consuls, cases between the United States and a state, and cases by one State against aliens or the citizens of another state.³⁶³ As Section V.A.2 demonstrates, there is no constitutional obstacle to also making jurisdiction over inter-state disputes concurrent,³⁶⁴ and at least one Supreme Court Justice has advocated for it.³⁶⁵ Moreover, making jurisdiction concurrent with the lower courts is the best option for solving the Court's discrimination against state plaintiffs. The lower courts, I demonstrate, have no incentive (or evident power) to impose burdensome prudential limitations on states who seek to be plaintiffs. In the absence of those discriminatory tests, states who have suffered harm can seek to negotiate

360. See *supra* Section II.B.

361. It might be necessary for the Court to adopt some structural changes to its handling of inter-state cases, if Congress chooses not to act on the suggestions I make for concurrent jurisdictions. While those changes are a distant second-best to congressional action, the current polarization of American politics counsels a back-up plan. I am indebted to Jim Pfander for pointing this out.

362. This solution has been suggested by a few other scholars, but for reasons different than those I invoke here. See sources cited *supra* note 19.

363. 28 U.S.C. § 1251. The Judiciary Act of 1789 also made jurisdiction concurrent in the lower courts in suits *against* states by citizens of other states, but that jurisdiction was removed by the Eleventh Amendment in 1795 after *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 466–79 (1793), in which the plaintiff sought to recover a debt from Georgia, Georgia refused to appear, and the Supreme Court held, by a four to one vote, that the Constitution had abrogated the states' sovereign immunity. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

364. See *Ames v. Kansas ex rel. Johnston*, 111 U.S. 449, 469 (1884).

365. *Maryland v. Louisiana*, 451 U.S. 725, 762–63 (1981) (Rehnquist, J., dissenting).

solutions with states who have caused it, because plaintiff states can credibly threaten to sue.

1. Concurrent Jurisdiction Best Addresses Original Discrimination

The Court's inter-state jurisdiction has been exclusive since 1789.³⁶⁶ That history does not justify maintaining the status quo. Concurrent jurisdiction makes sense.

Justice Rehnquist saw this, arguing that making state-versus-state original jurisdiction concurrent with the lower courts was not only constitutional but desirable: "I for one think justice is far better served by trials in the lower courts, with appropriate review, than by trials before a Special Master whose rulings this Court simply cannot consider with the care and attention it should."³⁶⁷ Unlike the Supreme Court, the district courts *are* trial courts and handle factually complex lawsuits every day. Relieving the Court of these cases would allow it to focus on its appellate docket, as it has repeatedly emphasized is the most important of its jobs.³⁶⁸

At the same time, the lower courts lack the incentive to implement doctrines that systematically disadvantage state plaintiffs: They are not balancing an appellate docket of nationwide importance against these inter-state disputes.³⁶⁹ Indeed, the lower courts may lack the power to adopt any such discriminatory doctrines. The Court has repeatedly stated (despite its less rigorous treatment of its own jurisdiction) that the federal courts cannot shy from cases over which they have jurisdiction.³⁷⁰

Concurrent jurisdiction also alleviates the problems caused by the Court's inconsistent and opaque treatment of disputes that fall within its inter-state original jurisdiction. Similar arguments were made—even by the Justices themselves³⁷¹—for Congress abolishing most of the Court's mandatory appellate jurisdiction in favor of the discretionary certiorari process: Mandatory appellate jurisdiction was so burdensome that the Court used

366. See *supra* text accompanying notes 84–89.

367. *Maryland*, 451 U.S. at 763 (Rehnquist, J., dissenting).

368. See *supra* Section II.B.

369. See *supra* notes 169–75 and accompanying text.

370. *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."); see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.").

371. See *Boskey & Gressman*, *supra* note 175, at 93 (quoting a 1982 letter to the House Judiciary Committee, signed by all the Justices, urging Congress to "eliminate or curtail the Court's mandatory jurisdiction" because the Court's summary dispositions "sometimes create more confusion than they seek to resolve").

“confusing” and “amorphous” summary dispositions to avoid plenary review.³⁷² Given that the Court’s doctrine surrounding inter-state jurisdiction is not merely *ad hoc* but, as I have shown, also discriminatory, concurrent jurisdiction is even more desirable.

Importantly, making jurisdiction concurrent with the lower court restores the balance of powers between the states. When states are on equal footing, they are incentivized to enter into compacts as a method for resolving their disputes, arguably making inter-state litigation *less* likely.³⁷³ Where the states still cannot reach political solutions, concern about judicial intrusion on state sovereignty still exists, because any allocation of water, or determination of boundary, or resolution of tax disputes prevents each state from behaving as it pleases. But, as I have argued, the current presumption *against* such suits also harms sovereigns. Indeed, it harms sovereigns in a predictably discriminatory way, by privileging defendant states’ interests over plaintiff states’ interests. That presumption also, ironically, hinders negotiated political solutions to inter-state disputes, even though negotiation is the very thing the Court says it wishes would occur.³⁷⁴ Removing these cases from the Supreme Court’s exclusive original jurisdiction overcomes both of these problems.

2. Congress Is Free to Make Jurisdiction Concurrent

As limned in Section I.A, Article III of the Constitution grants original jurisdiction to the Supreme Court in several different categories of lawsuits, all defined by the parties involved:

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*. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.³⁷⁵

The first Congress made portions of that original jurisdiction concurrent with the lower courts.³⁷⁶ As the Court pointed out in 1884, those legislators

372. *Id.* at 92, 94; *see also* 16B WRIGHT & MILLER, *supra* note 44, § 4003 (“The task of divining the meaning of an unexplained summary disposition was often difficult, and the effect of choking off independent decisions in the lower courts by summary Supreme Court disposition was open to serious challenge. As to the Supreme Court itself, on the other hand, it was recognized that the lack of full consideration reduced the precedential impact of a summary disposition on the Court’s deliberations in subsequent cases.” (footnotes omitted)).

373. *See supra* Section IV.B.

374. *See supra* notes 154–58 and accompanying text.

375. U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

376. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80–81 (1789). For a Distribution Clause case to proceed in the lower courts, Congress must not only remove the Court’s exclusivity but also empower the lower courts to hear the case. So, while Congress has removed the exclusivity

included “many who had been leading and influential members of the convention, and who were familiar with the discussions that preceded the adoption of the constitution by the states.”³⁷⁷ By making some of the Court’s original jurisdiction concurrent with the lower courts, those legislators demonstrated that they “did not understand that the original jurisdiction vested in the [S]upreme [C]ourt was necessarily exclusive.”³⁷⁸

Because of this “practical construction put on this provision of the Constitution by Congress at the very moment of the organization of the government,”³⁷⁹ the Court has continued to hold that Congress may make grants of its original jurisdiction concurrent with the lower courts.³⁸⁰ And Congress has, in fact, gradually made all grants of original jurisdiction, except that over inter-state disputes, concurrent with the lower federal courts.³⁸¹

May Congress take that last step? Some have said not. In 1838, Justice Baldwin wrote that “[t]he states waived their exemption from judicial power . . . by their own grant of its exercise over themselves in such cases, *but which*

of all but inter-state disputes, see 28 U.S.C. § 1251(b) (providing that, for suits “by a State against the citizens of another State or against aliens,” suits brought by an ambassador (and related parties), and all suits involving consuls, the Court’s jurisdiction is “original but not exclusive”), jurisdiction has not actually been conferred on the district courts for all these cases and controversies. Congress has authorized the district courts to hear federal-question cases, 28 U.S.C. § 1331, but the scope of the jurisdictional grant is limited by precedent to cases where the federal question appears on the face of the plaintiff’s well-pleaded complaint, see *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152–54 (1908). Moreover, Congress has not, in the diversity-jurisdiction statute, authorized the district courts to hear controversies between a state and citizens or subjects of another state. See 28 U.S.C. § 1332(a) (authorizing jurisdiction over disputes between citizens of different states, including when such disputes include aliens as parties; suits between states and aliens; and suits where a foreign state sues citizens of a state or states). Thus, while the Supreme Court does not have exclusive jurisdiction over such controversies, they cannot currently be filed in the federal district courts. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n.3 (1971).

377. *Ames v. Kansas ex rel. Johnston*, 111 U.S. 449, 464 (1884).

378. *Id.*; see also *Börs v. Preston*, 111 U.S. 252, 260 (1884) (holding that its original jurisdiction over cases affecting ambassadors and other public ministers was not exclusive). The Court has also held that the Distribution Clause does not divest it of appellate jurisdiction in situations where it has concurrent original jurisdiction, so it can exercise appellate jurisdiction over cases in which a state is a party, despite the Constitution’s provision of original jurisdiction over those cases (for example, a state-court case involving a question of federal law can be appealed to the Court even if a state is a party). See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 397–99 (1821).

379. *Ames*, 111 U.S. at 469.

380. *E.g.*, *California v. Arizona*, 440 U.S. 59, 65 (1979) (“It is . . . clear that the original jurisdiction of this Court is not constitutionally exclusive—that other courts can be awarded concurrent jurisdiction by statute.”).

381. Compare § 1251(a) (“The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.”), with § 1251(b) (“The Supreme Court shall have original but not exclusive jurisdiction of: (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties; (2) All controversies between the United States and a State; (3) All actions or proceedings by a State against the citizens of another State or against aliens.”).

they would not grant to any inferior tribunal.”³⁸² Other cases have reached the same conclusion.³⁸³

This view is in the minority, though. The Court has emphasized that “[C]ongress[,] at the very moment of the organization of the government,” rejected exclusivity.³⁸⁴ Moreover, “from 1789 until now [(1884)] no court of the United States has ever in its actual adjudications determined to the contrary”³⁸⁵ Accordingly, it is “within the power of [C]ongress to grant to the inferior courts of the United States jurisdiction in cases where the [S]upreme [C]ourt has been vested by the [C]onstitution with original jurisdiction.”³⁸⁶ Although there continued to be some equivocation in the early twentieth century,³⁸⁷ the Court has never seriously suggested that Congress lacks the power to make jurisdiction concurrent.³⁸⁸

382. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838) (emphasis added). Also in 1838, however, Chief Justice Taney (riding circuit) said that “the grant of jurisdiction . . . to one court, does not, of itself, imply that that jurisdiction is to be exclusive.” *Gittings v. Crawford*, 10 F. Cas. 447, 450 (C.C.D. Md. 1838). Moreover, Justice Nelson (also riding circuit) pointed out in 1857 that the text of Article III makes no distinction among the heads of original jurisdiction: “[T]he grant . . . is the same in the cases . . . ‘in which a state shall be a party,’ as in the case of a consul. . . . [I]f the grant of original jurisdiction be exclusive in the [S]upreme [C]ourt in the case of a consul, it is equally exclusive in the [case of a state]” *Graham v. Stucken*, 10 F. Cas. 945, 946 (C.C.S.D.N.Y. 1857).

383. Notably, Chief Justice Marshall stated in *Marbury* that “[i]f [C]ongress remains at liberty to give this [C]ourt appellate jurisdiction, where the [C]onstitution has declared [its] jurisdiction shall be original; and original jurisdiction where the [C]onstitution has declared it shall be appellate; the distribution of jurisdiction, made in the [C]onstitution, is form without substance.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803); see also *Cohens*, 19 U.S. at 324 (“The extent of the judicial power of the United States being fixed by the constitution, it cannot be made exclusive or concurrent, at the will of Congress.”). In *Osborn v. Bank of the U.S.*, Marshall stated, “if a case arise under the [C]onstitution, or a law of the Union, in which an original suit may be sued against a State, the [C]onstitution requires such suit to be brought in the Supreme Court.” *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 761 (1824). Soon thereafter, however, he notes that the Judiciary Act of 1789 vests “all original jurisdiction . . . where a State is a party . . . in the Supreme Court, and, with certain exceptions, in that Court exclusively.” *Id.* at 763 (emphasis added); see also *Davis v. Packard*, 32 U.S. (7 Pet.) 276, 281 (1833) (“By the [C]onstitution, the judicial power of the United States extends to all cases affecting ambassadors, and other public ministers and consuls And the [J]udiciary [A]ct of 1789 gives to the district courts of the United States, exclusively of the courts of the several states, jurisdiction of all suits against consuls and vice-consuls” (citation omitted)).

384. *Ames*, 111 U.S. at 469.

385. *Id.*

386. *Id.* at 469, 472 (affirming removal of the case from state court to a lower federal court on grounds of federal-question jurisdiction, despite the presence of Kansas as a party).

387. See e.g., *Louisiana v. Texas*, 176 U.S. 1, 16 (1900) (“[B]y the Constitution and according to the statute, the original jurisdiction of this [C]ourt is exclusive over suits between states, though not exclusive over those between a state and citizens of another state.” (emphasis added)).

388. *Mississippi v. Louisiana*, 506 U.S. 73, 78 n.1 (1992).

Moreover, state sovereign immunity³⁸⁹ does not apply in suits between states,³⁹⁰ and state dignity is not impaired by lower-court jurisdiction.³⁹¹ States regularly litigate as both plaintiffs and defendants in the lower courts.³⁹² The only current obstruction to hearing inter-state disputes in the lower courts is section 1251's continued provision that such jurisdiction is exclusive to the Court.

The Supreme Court and numerous lower courts have therefore held that Congress is empowered to make the Court's original jurisdiction concurrent with the lower courts, and there appears to be no constitutional objection to Congress's doing so even for inter-state disputes.³⁹³ Only a departure from more than two centuries worth of precedent—a departure holding that inter-state disputes are somehow different, despite the language of the Constitution—would forbid Congress to take this step.³⁹⁴

B. A NEW JURISDICTIONAL STATUTE CAN ADDRESS SOVEREIGNTY CONCERNS

Congress can and should shape the statute granting concurrent jurisdiction to address sovereignty concerns. At a minimum, states could worry about concurrency if: (1) it increases the possibility of frivolous lawsuits filed for political reasons; (2) cases might be heard by biased decision-makers; and (3) the Supreme Court could avoid hearing appeals through the certiorari process. All of these concerns can be addressed by a carefully crafted statute.

1. Congress Can Mitigate the Possibility of Frivolous Lawsuits

First, any worry about a flood of lawsuits is likely overblown. States seem unlikely to be vexatious litigants—and only vexatious litigants are made to seek leave to file in the lower courts.³⁹⁵ It is true that some inter-state litigation is politically motivated³⁹⁶; how concurrent jurisdiction might affect political

389. U.S. CONST. amend. XI. See generally Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001) (summarizing and criticizing the development of sovereign immunity jurisprudence in the late twentieth century).

390. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 731 (1838).

391. E.g., *United States v. West Virginia*, 537 F. Supp. 388, 391–94 (S.D.W. Va. 1982).

392. See, e.g., *Davis*, *supra* note 189, at 1232–36. See also generally Jonathan R. Siegel, *Congress's Power to Authorize Suits Against States*, 68 GEO. WASH. L. REV. 44 (1999) (suggesting avenues through which Congress might subject states to suit, notwithstanding then-recent cases that reinvigorated state sovereign immunity to suit under federal law).

393. As discussed below, see *infra* Section V.C, there may be *practical* or *policy* objections to such a move by Congress.

394. Perhaps it is too cynical to mention that the Court would be the ultimate arbiter of this question, and the Justices have very little incentive to interpret the Distribution Clause in a way that prevents Congress from making inter-state jurisdiction concurrent with the lower courts.

395. See *supra* notes 186–87 and accompanying text.

396. See *supra* note 58 and accompanying text.

incentives is difficult to predict.³⁹⁷ If frivolous lawsuits are truly a worry, Congress should consider imposing a heightened pleading standard on state complaints as it has in other areas of the law,³⁹⁸ though one might ask whether such a burden is consistent with equalizing the treatment of the states in inter-state litigation.

2. Congress Must Provide a Neutral Trial Court

Congress should guarantee a neutral forum—most fundamentally, a forum having no connection to any of the states involved in the litigation. After all, the Founders put these cases in the original jurisdiction of the Court in part because “that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens.”³⁹⁹ A state defendant would have valid concerns if a state plaintiff could file in a federal district court within the plaintiff’s own boundaries.⁴⁰⁰

Congress has several options in seeking to ensure the provision of a neutral forum. One option is to permit the plaintiff state to choose an initial venue and to give the defendant state a change-of-venue mechanism.⁴⁰¹ Rather than authorizing a flexible approach to change of venue, as Congress has for the district courts,⁴⁰² the defendant in an inter-state case should be allowed a change of venue only if it persuades the judge that the plaintiff’s chosen venue is unfair. This approach permits the defendant state to challenge the venue of a biased court, while ensuring that the plaintiff state

397. On the one hand, concurrent jurisdiction, with the associated likelihood that more cases would proceed past the threshold, see *supra* notes 182–85, 230–36, 249–57, 270–79, 283–87, and accompanying text (contrasting Supreme Court’s high thresholds in inter-state cases with less stringent thresholds in lower courts), might create incentives for more political inter-state litigation. On the other hand, filing in the Supreme Court has a cachet not present in a district court filing, see, e.g., Gene Policinski, *Setting the Docket: News Media Coverage of Our Courts—Past, Present and an Uncertain Future*, 79 MO. L. REV. 1007, 1007 (2014) (contrasting high coverage of Supreme Court litigation with waning coverage of the lower courts), which might remove some incentives for politically driven inter-state suits.

398. See, e.g., Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 101, 109 Stat. 737, 747 (codified as amended in scattered sections of 15 U.S.C.).

399. THE FEDERALIST NO. 80 (Alexander Hamilton).

400. Professor Carstens, who raises legitimate concerns about special masters’ involvement in original jurisdiction cases, considered concurrency, so that these cases would be heard by Article III judges; she rejected this solution because “state boundaries are coterminous with federal district boundaries. Concurrent original jurisdiction exercised by the federal district courts, therefore, could create interstate tensions between adjudicator and litigant.” Carstens, *supra* note 112, at 630. This ignores Congress’s power to provide for the appointment of clearly unaffiliated judges.

401. E.g., 28 U.S.C. §§ 1402(a)(2), 1404(a), 1406(a), 1631; FED. R. BANKR. P. 1014(a)(1); FED. R. CIV. P. (SUPP. AMCR. F(9)) (venue in admiralty proceedings).

402. § 1404(a) (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”).

retains its choice if it has chosen well—thus also creating an incentive for a plaintiff state to opt for a neutral forum.

In structuring such a change-of-venue process, Congress could specify that the judge in the initial venue consider various factors relating to the neutrality of the plaintiff's venue, such as proximity of the district court to the plaintiff and defendant states; location of those states with respect to the regional court of appeal that would ordinarily hear appeals from the plaintiff's chosen court; and effect of any judgment in the case on territory embraced by the boundaries of the district court and the regional court of appeals. Congress could additionally require the district court to consider territory beyond its boundaries if relevant to the evaluation.⁴⁰³ Congress could also refer to the Code of Conduct for United States Judges and cases decided thereunder for additional factors historically considered to guarantee a neutral arbiter.⁴⁰⁴

Rather than leaving venue to the party states, Congress could instead designate the Federal District for the District of Columbia ("D.D.C.") as the default venue except in circumstances where the District of Columbia had an interest in the litigation.⁴⁰⁵ While the D.D.C. does exist in a geographic space, that space is not a state but is instead the seat of the federal government⁴⁰⁶ and thus generally a neutral forum. If Congress finds the D.D.C. insufficiently neutral, it could establish a national district court to hear these and other suitable cases.⁴⁰⁷

403. Cf. FED. R. CIV. P. 4(k)(1)(B) (authorizing so-called "bulge jurisdiction," which permits service on parties outside a relevant state if they are within one hundred miles of the courthouse and are being joined under Rules 14 or 19).

404. U.S. CTS., CODE OF CONDUCT FOR UNITED STATES JUDGES 8 (2019) [hereinafter Code of Conduct, Canon 3(C)(1)], https://www.uscourts.gov/sites/default/files/code_of_conduct_or_united_states_judges_effective_march_12_2019.pdf [<https://perma.cc/3N92-4MJG>] ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."). *E.g.*, Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 466–67 (1952) (Frankfurter, J., concurring) (recusing himself from the judgement and noting: "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as [to] be so in fact").

405. The D.D.C. is, for example, the venue for actions over nuclear incidents that occur outside the United States, see 42 U.S.C. § 2210(n)(2), and it is the fallback venue for certain employment actions against the United States, see 28 U.S.C. § 1413. The D.D.C. was also formerly the default district for certain patent actions. See 35 U.S.C. § 293 (1975), Pub. L. 93-596, § 1, 88 Stat. 1949 (prior to 2011 amendment, now providing venue in the Eastern District of Virginia).

406. See U.S. CONST. art. I, § 8, cl. 17 ("The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may . . . become the Seat of the Government of the United States . . ."); Residence Act § 1, 1 Stat. 130 (1790) (establishing the District of Columbia as the "permanent seat of the government of the United States").

407. As discussed in more detail below, see *infra* notes 413–16 and accompanying text, Congress has established *appeals* courts with nationwide jurisdiction in certain areas. Likewise, there are some specialized lower courts with national jurisdiction. The Court of International Trade ("CIT") is an Article III court with nationwide jurisdiction, albeit limited subject-matter jurisdiction. See 28 U.S.C. § 251 (establishing the CIT as an Article III court with its offices in New

Alternatively, Congress could require the Chief Justice or the Judicial Panel on Multidistrict Litigation (“JPML”) to assign the case to a suitable district. There is, for example, ample precedent for having the Chief Justice appoint an appropriate trial judge⁴⁰⁸ or a three-judge panel.⁴⁰⁹ Congress could identify criteria for the Chief Justice’s appointments: It could require that the judge(s) have no significant connection to any of the state parties by residence and past history and could impose a heightened version of the factors that are generally applied to judicial recusal.⁴¹⁰ If there happened to be a suit among

York City); *id.* § 256(a) (authorizing the CIT to sit at “any port or . . . any place within the jurisdiction of the United States”). The Court of Federal Claims and the Tax Court, while Article I courts, likewise have essentially nationwide jurisdiction: Both courts have their homes in the District of Columbia but may sit anywhere nationwide to “secur[e] reasonable opportunity to [citizens] to appear . . . with as little inconvenience and expense to [citizens] as is practicable.” 26 U.S.C. § 7446 (Tax Court); 28 U.S.C. § 173 (Court of Federal Claims). The idea of a national district court of general jurisdiction has arisen from time to time. *E.g.*, Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935, 1973 (1991) (“The personal jurisdiction of the federal courts is, by and large, restricted to the personal jurisdiction of the state courts. Of course, Congress could change all that by creating a single national district court, or some variation thereon, but it has not done so.” (footnote omitted)). More common is the suggestion of nationwide personal jurisdiction exercised by the existing geographic district courts. *E.g.*, Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1315–16 (2014). The latter approach does not address the need to establish a neutral forum for inter-state disputes.

408. The Chief Justice already designates district judges to sit on the immigration removal court, 8 U.S.C. § 1532(a); district or circuit judges to “perform the duties of judge of the United States Court of Appeals for the Armed Forces” under certain circumstances, 10 U.S.C. § 942(f); circuit judges or justices to appoint independent counsels, 28 U.S.C. § 49(a), (d); circuit judges to sit temporarily as judges on other circuits, *id.* § 291(a), and to sit as district judges within their circuits, *id.* § 291(b); district court judges to sit as circuit judges or district judges in other circuits, if requested by the chief judge or circuit justice of a circuit, and on the CIT, if requested by the CIT’s chief judge, *id.* § 292; judges of the CIT to sit as circuit or district court judges in any circuit, *id.* § 293; retired justices to sit as circuit judges or serve as circuit justices, *id.* § 294(a); senior circuit and district court judges to “perform such judicial duties as [they are] willing and able to undertake,” with certain restrictions, *id.* § 294(d); “any circuit, district, magistrate, or territorial judge of a court of the Ninth Circuit” to sit as a judge on any court in the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau, *id.* § 297 (“freely associated compact states” defined in 48 U.S.C. § 1901); a district court judge to preside over certain proceedings under the Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2168; district court judges to sit by turns on the Foreign Intelligence Surveillance Court (“FISC”), as well as district and/or circuit judges to sit on a panel to review challenges to a FISC judge’s decisions, 50 U.S.C. § 1803; magistrate judges to hear applications for pen-register and trap-and-trace warrants for foreign intelligence and international terrorism investigations, *id.* § 1842; and district and circuit judges to sit on the JPML, 28 U.S.C. § 1407(d).

409. 28 U.S.C. § 2284.

410. See Code of Conduct, Canon 3(C)(1), *supra* note 404, at 8 (requiring judges to disqualify themselves when “the judge’s impartiality might reasonably be questioned,” including for reasons related to the involvement of the judge, her extended family, or her former practice in the matter in controversy; for reasons related to the judge’s or her extended family’s involvement with the parties to the proceeding; and for reasons involving the personal interests of the judge and her extended family).

all fifty states and territories, Congress might provide that *that* case be heard by the Supreme Court in its original jurisdiction.⁴¹¹

Congress could instead turn to the JPML, which is already required to designate a judge under 28 U.S.C. § 1407 when it consolidates cases from different courts in front of one transferee court.⁴¹² As with selection by the Chief Justice, Congress would need to provide to the JPML criteria for selecting a neutral judge.

3. Congress Must Provide a Neutral Appeals Court

Just as it should make special provisions to ensure a neutral trial court, Congress should ensure a neutral appellate court. Several options exist. Congress could, for example, provide for appeal to the U.S. Court of Appeals for the District of Columbia Circuit⁴¹³ or the Federal Circuit,⁴¹⁴ rather than to the regional courts of appeal. Both courts already have specialized nationwide jurisdiction—the D.C. Circuit over much of the federal administrative state⁴¹⁵ and the Federal Circuit over a variety of subjects.⁴¹⁶

Congress could instead require the Chief Justice to assign the case to a regional court of appeals with the requisite neutrality.⁴¹⁷ Alternatively, Congress could require the Chief Justice to empanel a special nationwide appeals court, as has occurred in the past.⁴¹⁸ Congress could even establish a new court of

411. Indeed, in at least one original-jurisdiction cases, the Court invited amicus briefs from all fifty states. *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966) (“Recognizing that the questions presented [regarding the Voting Rights Act of 1965] were of urgent concern to the entire country, we invited all of the States to participate in this proceeding as friends of the Court.”).

412. *See generally* *About the Panel*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., <https://www.jpml.uscourts.gov/about-panel> [<https://perma.cc/32AQ-BCRZ>] (describing the role of the panel is to “centralize” and “consolidate” civil actions by assigning judges).

413. 28 U.S.C. § 41 (constituting the D.C. Circuit).

414. *Id.* (constituting the Federal Circuit).

415. U.S. CT. APPEALS FOR D.C. CIR., HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES 13 (2021) (“The Court reviews final orders of many federal administrative agencies, as well as the Tax Court of the United States. In these cases, the Court’s jurisdiction often depends on whether the petitioner or appellant resides, maintains its principal place of business, or does business within the Circuit. Moreover, the statutes providing for judicial review of certain agency decisions also may specify this Circuit as an alternative or a special forum, even where the petitioner or appellant has no contacts with the District of Columbia.”).

416. *Court Jurisdiction*, U.S. CT. APPEALS FOR FED. CIR. (Aug. 1, 2022, 6:03 PM), <https://cafc.uscourts.gov/home/the-court/about-the-court/court-jurisdiction> [<https://perma.cc/2E7E-2THF>] (“The U.S. Court of Appeals for the Federal Circuit is unique among the thirteen circuit courts of appeals. It has nationwide jurisdiction in a variety of subject areas, including international trade, government contracts, patents, trademarks, certain monetary claims against the United States government, federal personnel, veterans’ benefits, and public safety officers’ benefits claims.”).

417. As noted above, the Chief Justice already appoints circuit judges to varying roles within the federal judiciary. *See* discussion *supra* note 408.

418. *See* Emergency Price Control Act of 1942, § 204(c), 56 Stat. 23, 32 (establishing Emergency Court of Appeals (“ECA”) to review price controls established during World War II

appeals with nationwide jurisdiction to hear these and other cases, something that observers of the federal court system have considered at various points.⁴¹⁹

In a move that states might consider the most protective of their dignity as sovereigns, Congress could provide that inter-state cases be appealed as of right to the Supreme Court rather than be governed by the certiorari process.⁴²⁰ Although the Court has not loved having mandatory appellate jurisdiction in the past,⁴²¹ it would presumably gladly trade *original* jurisdiction for mandatory *appellate* jurisdiction over disputes between or among states. Appellate jurisdiction, even if mandatory, places the Court in its comfortable appellate role, rather than requiring it to sit as a trial court.

The Court did not behave well when it had mandatory appellate jurisdiction over a larger swath of cases, however, issuing unexplained summary dismissals in the vast majority of those appeals.⁴²² That suggests that the Court might

and providing that the Chief Justice would appoint three or more judges from the district and circuit courts to sit on the ECA).

419. See generally, e.g., Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. 913 (1994) (describing, without recommending, a potential national appeals court); Roman L. Hruska, J. Edward Lumbard & A. Leo Levin, *Commission on Revision of the Federal Court Appellate System Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 208 (1975) ("The Commission recommends the creation of a new national court of appeals, designed to increase the capacity of the federal judicial system for definitive adjudication of issues of national law, subject always to Supreme Court review.").

420. See SHAPIRO ET AL., *supra* note 19, at 2-5 to 2-8 (describing history of Court's mandatory appellate jurisdiction and the shift to almost wholly discretionary jurisdiction under the certiorari process).

A state's right to appeal might even be direct from the trial court to the Supreme Court, rather than after appeal to an intermediate circuit court of appeal; such direct appeals occur with three-judge panels in the district courts. See 28 U.S.C. § 2284(a) ("A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body."); *id.* § 1253 ("Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."). Three-judge panels are usually convened, however, when urgency requires a quick decision. *E.g.*, 17 WRIGHT & MILLER, *supra* note 44, § 4040 ("The purpose of providing direct appeals appears . . . simple. There is little to be gained by delaying important litigation of the sort that initially commands an extraordinary district court of three judges—at least one of them a circuit judge—for review by three other judges on a court of appeals."). Urgency is not a general feature of inter-state cases, rendering the argument for direct appeal in such cases unpersuasive.

421. *E.g.*, Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 751-53 (2001) (noting decline in the number of cases in which the Court issued full opinions from 1983 to 1999 and assessing reasons for and consequences of the decline).

422. 16B WRIGHT & MILLER, *supra* note 44, § 4003 ("Unfortunate consequences flowed from the increasingly discretionary approach to appeal jurisdiction. In theory, however compelling the Court's need to select the most important cases for its necessarily finite docket, the practice seemed inconsistent with the statutory command to decide the merits as a matter of right in any case properly brought on appeal. In implementation, adherence to the theory that the

discriminate against state *appellants* just as it currently discriminates against state plaintiffs. Although the number of inter-state original jurisdiction cases is currently low,⁴²³ that number is presumably at least somewhat depressed due to the Court's discrimination against state plaintiffs. If concurrent jurisdiction in the lower courts were to cause the number of state *appeals* that the Court was required to hear to increase, the Court might use against those mandatory inter-state appeals the very same discriminatory doctrines it currently uses to avoid inter-state trials.

C. CONCURRENT JURISDICTION SHOULD STRUCTURE STATE
INCENTIVES APPROPRIATELY

One unanswerable question is whether plaintiff states would nevertheless file in the Supreme Court, rather than in a lower court. After all, Congress can make inter-state original jurisdiction *concurrent*, but it cannot *remove* the Court's original jurisdiction.⁴²⁴ The Court would therefore remain as a forum, even if concurrently with the lower courts.⁴²⁵ States might therefore continue to file in the Court itself. There are reasons to be confident, however, that the Court would be largely rid of these cases.

First, if I am right about the discriminatory effects of the Court's doctrines—and the evidence amassed above suggests I am—state plaintiffs with legitimate reasons to sue will take advantage of the better forum made available when Congress opens the lower courts to inter-state cases. Such states presumably want to solve their problems and would welcome the availability of courts that will not impose discriminatory doctrines.

Second, states that might prefer to file directly with the Supreme Court—whether because they seek the publicity of filing in the Nation's highest court or because they feel that the district courts are beneath their dignity—are certain to be rebuffed. The Court has long held that the existence of a *real* alternative forum justifies its refusal to take an original-jurisdiction case.⁴²⁶

merits were decided by summary disposition created awkward problems of stare decisis." (footnote omitted)); *see also* *Hogge v. Johnson*, 526 F.2d 833, 836 (4th Cir. 1975) (concurring opinion by retired Justice Tom Clark, sitting by designation) (stating that the treatment of a summary disposition as binding precedent "seem[ed] . . . to fly in the face of the long-established practice of the Court at least during the eighteen Terms in which [he] sat. During that time, appeals from state court decisions received treatment similar to that accorded petitions for certiorari and were given about the same precedential weight").

423. *See* sources cited *supra* note 27 (identifying only sixty-three inter-state disputes brought before the Court since 1976 (after excluding a motion for leave to file dismissed at the instance of the parties)).

424. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–76 (1803).

425. *E.g.*, *Arizona v. Sackler*, 140 S. Ct. 812, 812 (2019) (mem.) (denying Arizona's motion for leave to file a bill of complaint against Purdue Pharma and members of the Sackler family over the opioid epidemic). *See* Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 21–22 (2021) (discussing filings in opioid litigation in lower federal, state, and tribal courts).

426. *See supra* Section III.A.

Concurrent jurisdiction gives the Court a rock-solid basis for refusing to hear those cases by guaranteeing states a true alternative forum in the lower courts. A plaintiff state that attempted to bypass the lower courts could count on the Court's denying its motion for leave to file.⁴²⁷ And, even if the Court accepted the case, it would likely not be a receptive forum.⁴²⁸

D. STATES WOULD NOT BE PRIVILEGED LITIGANTS UNDER THIS PROPOSAL

Providing concurrent jurisdiction in the lower courts addresses the original discrimination currently practiced by the Supreme Court; it does not give states a free pass to bring whatever suits they wish, for whatever reasons. The district courts would still apply Article III standing doctrine, the political question doctrine, and the *parens patriae* doctrine.

With respect to standing doctrine, considerable debate has arisen about what standing should be required of state plaintiffs, particularly when states sue the federal government.⁴²⁹ The district courts, faced with inter-state suits, would need to work through these debates. But they would not, and should not, require state plaintiffs to show substantial injury by clear and convincing evidence, as the Supreme Court's original discrimination currently requires.⁴³⁰

Similarly, lower courts would also apply the *parens patriae* doctrine, as is required in any suit by a state plaintiff.⁴³¹ Admittedly, that doctrine has not been consistently applied by the Court in original jurisdiction cases,⁴³² so the

427. A state might properly seek to bypass the lower courts in an emergency situation, similarly to when a party seeks certiorari before judgment, and such a bypass would presumably be judged by a standard similar for that used for certiorari before judgment. See SUP. CT. R. 11 ("A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.")

428. Cf. 17 WRIGHT & MILLER, *supra* note 44, § 4053 (discussing whether Congress could compel the Court to exercise its original jurisdiction and then suggesting that states would not happily take advantage of such mandatory jurisdiction: "Few states should be anxious for the opportunity to thrust their cases into the bosom of a stubbornly resistant Court").

429. For examples of the various positions taken with regard to state-plaintiff standing, see generally Davis, *supra* note 189; Hessick, *Quasi-Sovereign Standing*, *supra* note 258; Tara Leigh Grove, *Foreword: Some Puzzles of State Standing*, 94 NOTRE DAME L. REV. 1883 (2019); Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893 (2019); Ann Woolhandler & Michael G. Collins, *Reining in State Standing*, 94 NOTRE DAME L. REV. 2015 (2019); Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and "The New Process Federalism,"* 105 CALIF. L. REV. 1739 (2017); Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851 (2016); F. Andrew Hessick & William P. Marshall, *State Standing to Constrain the President*, 21 CHAP. L. REV. 83 (2018); Jonathan Remy Nash, *Sovereign Preemption State Standing*, 112 NW. U. L. REV. 201 (2017); Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637 (2016); Stephen I. Vladeck, *States' Rights and State Standing*, 46 U. RICH. L. REV. 845 (2012); and Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995).

430. See *supra* Section III.B.

431. See *supra* note 258 and accompanying text.

432. 17 WRIGHT & MILLER, *supra* note 44, § 4047.

lower courts may have some difficulty in determining how the doctrine plays out under concurrent jurisdiction. Moreover, a state need not claim the *parens patriae* mantle if it can show direct injury, something states can readily do.⁴³³

CONCLUSION

The Supreme Court has, for both principled and pragmatic reasons, adopted a number of doctrines that help it avoid jurisdiction in inter-state cases. Unfortunately, however, those doctrines advantage prospective defendant states and harm prospective plaintiff states, not only by treating coequal litigants unequally, but also by undermining the Court's expressed preference that states resolve their disputes by negotiation.

The Court is unlikely to abandon these restrictive doctrines. The best solution is to get rid of these doctrines' root causes: Congress should make jurisdiction concurrent with the lower federal courts (with some special adjustments to ensure fairness between and among states), so that the Court need not contort itself—and its doctrines—to avoid these disputes.

433. Cf. Heather Elliott, *Associations and Cities as (Forbidden) Pure Private Attorneys General*, 61 WM. & MARY L. REV. 1329, 1350 (2020) (discussing standing of governmental entities on their own account).

