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Gerryshopping

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ABSTRACT

State courts are under attack from an emerging practice that endangers their independence. Legislatures are increasingly manipulating the structure, jurisdiction, and personnel of state judiciaries to produce favorable outcomes in cases they care about. Unlike conventional court curbing, which disempowers judges, gerryshopping enables lawmakers to harness judicial power to maximize their own. Legislators might expand or narrow jurisdiction over particular claims, make new courts to hear politically valuable cases, modify term limits to keep favorable judges on the bench longer, and more. I refer to this practice as gerryshopping.

This Article identifies and defines gerryshopping, offering a theoretical and descriptive account of the tactic. Gerryshopping is designed to manipulate case outcomes, striking at the core of judicial independence. However, unlike the terse, open-ended language in Article III of the federal constitution, state constitutions include a constellation of rich, detailed provisions that articulate a distinct account of court autonomy. Relying on an original fifty-state survey of these provisions, this Article constructs the first comprehensive account of state judicial independence, surfacing its underlying logics embedded in the text, history, and structure of state charters.

That theory helps explain why gerryshopping is a problem. As the Article details, it violates several core commitments rooted in state judicial articles, like courts' ability to manage their workload, their responsibility to provide a certain level of access, and their role in

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maintaining the integrity of the judicial system. The Article’s structural theory of judicial independence provides several doctrinal tools to counter gerryschopping, but gerryschopping is not just a legal problem—it’s also a political one. The Article thus provides two pathways, tracking both of these dimensions, for courts to resist the tactic.

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INTRODUCTION

In early 2025, Montana’s Republican-majority legislature introduced a bill creating a “claims court” that would have near exclusive jurisdiction over all constitutional claims, staffed with judges selected by the Republican governor and confirmed by the senate, rather than elected like the state’s other trial court judges.¹ In 2023, North Carolina’s Republican-majority legislature created new trial judgeships to be filled by appointment rather than election, gave the Republican chief justice discretion to assign these new judges to hear election cases, and extended the retirement age for appellate judges to ensure the then-incoming Democratic governor could not replace him.² In the same year, in Illinois, where judges are also elected, the Democratically-

¹ S.B. 385, 69th Legis., Reg. Sess. (Mont. 2025); Micah Drew, *Claims Court Endorsed By Montana Senate*, Daily Montana (Mar. 7, 2025, 4:22 PM), <https://dailymontanain.com/2025/03/07/claims-court-endorsed-by-montana-senate/>.

² H.B. 259, 2023 Gen. Assemb., Reg. Sess. (N.C. 2023); Shea Denning, *2023 Appropriations Act Enacts Significant Court-Related Changes*, N.C. Crim. L. (Sept. 27, 2023),

controlled legislature passed a bill amending the state’s venue rule to require all suits against the state for injunctive relief be heard in courts in majority Democratic Chicago or Springfield.³

Something that these bills, separated by geography, partisanship, and time, have in common is the political tactic behind each one. Rather than trying to sanction or punish courts for decisions legislative majorities disagree with—the prevailing definition of court curbing⁴—lawmakers were attempting to harness the power of the court system to influence outcomes in highly salient cases. These bills were enacted as the respective state judiciaries were seeing increased litigation concerning reproductive rights, firearm regulations, voting rights, separation of powers, and more.⁵ They provide legislatures with tools to affect results in such litigation by channeling cases towards favorable judges and or away from ones they believe will rule against them.

I refer to this phenomenon as *gerryshopping*. *Gerrymandering* is a political strategy employed by legislators to intentionally manipulate district lines to guarantee an electoral advantage. *Forum shopping* refers to a litigation tactic where parties file suit in a forum they believe is favorable and thus likely to produce a desired result. *Gerryshopping* refers to the practice of state legislatures altering a judiciary’s structure, jurisdiction, or personnel to influence or achieve preferable case outcomes.

Gerryshopping provides legislators with *ex ante* tools to shape where certain cases are heard and which judges decide them. It is distinct from *ex post* actions that disempower courts or strip their authority as retaliation for decisions politicians disagree with.⁶ The tactic offers political advantages of entrenchment and policy insurance. Majorities can manage electoral risk by embedding structural designs in a state’s court system that minimizes the likelihood their legislation will be subject to meaningful judicial review, entrenching policy preferences, and extending influence beyond an electoral loss.

This Article’s central claim is that gerryshopping strikes at the heart of state judicial independence. State constitutions, unlike their federal counterpart, are flush with

<https://nccriminallaw.sog.unc.edu/2023/09/27/2023-appropriations-act-enacts-significant-court-related-changes/>.

³ H.B. 3062, 103rd Gen. Assemb., Reg. Sess. (Ill. 2023); Peter Hancock, *New State Law Limits Venue for Illinois Constitutional Lawsuits to Sangamon, Cook Counties*, WTTW (June 7, 2023, 2:36 PM), <https://news.wttw.com/2023/06/07/new-state-law-limits-venue-illinois-constitutional-lawsuits-sangamon-cook-counties>.

⁴ See *infra* notes 63-70 and accompanying text.

⁵ See, e.g., David W. Chen, ‘Buckle Up’: In Montana, Republican Lawmakers Target the Judiciary, N.Y. Times (Mar. 24, 2025), <https://www.nytimes.com/2025/03/24/us/montana-republican-judicial-legislation.html>; Clayton Henkel, *Appeals Court Sides with NC General Assembly in Latest Lawsuit over Appointment Powers*, NC Newsline (Jan. 7, 2026, 3:00 PM), <https://ncnewsline.com/2026/01/07/appeals-court-sides-with-nc-general-assembly-in-latest-lawsuit-over-appointment-powers/>; Andrew Adamsby, *Supreme Court Considers Legality of Law Banning ‘Venue Shopping’ in Constitutional Challenges*, Cap. News Ill. (Jan. 22, 2025), <https://capitolnewsillinois.com/news/supreme-court-considers-legality-of-law-banning-venue-shopping-in-constitutional-challenges/>.

⁶ See *infra* notes 63-70 and accompanying text.

detailed clauses that sketch the design, composition, operations, and powers of their courts. This constellation of provisions was the result of nationwide reforms to elevate state judiciaries from their subordinate status in the eighteenth century to meaningfully coordinate branches. A close review of the relevant text and context reveals several principles or logics, like the judiciary's responsibility for the integrity of the court system and that they must maintain a certain level of access and availability of remedies.

Based on these principles, we can construct a structural account of state court autonomy that casts gerrys shopping in doubt. Statutes that coopt rulemaking power, direct court staff to transfer cases, mandate use of judiciary resources to support newly created courts, and so on are inconsistent with the logic of independence that's embedded in state charters. But gerrys shopping is not just a legal issue—it's a political one as well. Meaningful responses to the tactic must have both of these dimensions in mind. This Article's structural account of independence provides both doctrinal and rhetorical tools to resist gerrys shopping on both fronts.

To develop this argument, the Article proceeds in four parts. Part I defines gerrys shopping, distinguishes it from court curbing and beneficial court reform, and then offers a typology of the tactic's various forms. In short, legislatures can gerrys shop by altering the judiciary's structure, jurisdiction, and personnel. Borrowing terms and conventions from the gerrymandering literature, the Article identifies gerrys shopping's six forms. *Cracking* and *stacking* is when lawmakers alter where certain cases can be heard. *Making* and *breaking* entails changes to the structure of the judiciary itself, like creating new courts or abolishing existing ones. *Locking* and *blocking* entails influencing who serves on particular courts within the state system.

Whatever the form, gerrys shopping intrudes on the autonomy of state courts. To explain how, Part II draws on an original fifty-state survey to detail the constitutional foundation of state judicial independence. From mandatory jurisdiction provisions and rulemaking powers, to specific selection mechanisms and remedial guarantees, state charters include a system of detailed provisions that form a constitutional perimeter around the design, composition, operations, and powers of their courts. It then turns to the history and doctrinal background of these clauses to develop a series of "structural logics," or metaprinciples that organize them into a coherent whole.

Part III brings these strands together to illustrate how gerrys shopping is inconsistent with state judicial autonomy. As it explains in detail, gerrys shopping undermines a judiciary's ability to manage its own operations and workload, violates the judiciary's responsibility to maintain a certain level of access to the courts and remedies, severs the essential connection between the polity and the courts that serve them, and other core commitments fixed in state charters.

Having identified the phenomenon and shown how it threatens the independence of state courts, Part IV turns to potential responses. Recognizing that gerrys shopping is a problem of both law and politics, approaches to meaningfully resisting the tactic must address both dimensions. Drawing on lessons from law and political science, Part IV

sketches two paths for courts to potentially respond to gerrys shopping: on-the-bench and off-the-bench responses. The key insights in this Part are for courts to recognize that there are options that exist outside of the binary of judicial review and even beyond litigation entirely. Though I do discuss potential ways to resist gerrys shopping, the goal of this Article is not to provide a playbook for courts. Instead, it is to identify this phenomenon, map its contours, and provide a theory of judicial independence to explain why it is a problem.

I. THE CONCEPT OF GERRYSHOPPING

This Part sketches the concept of gerrys shopping and situates it within the public law literature. To build the description, I rely on an original dataset of state legislation implicating state courts filed over the last 20 years in all 50 statehouses. Based on a close review of this legislation, I extract and categorize the ways in which state legislatures try and assert control over the courts.

To further sharpen the definition, I situate gerrys shopping in existing scholarship. While it shares hallmarks with prevailing theories within state and federal public law, it is a distinctive practice that has thus far escaped scholarly analysis. Federal courts scholars have long debated the scope of Congress’s power over the federal judiciary, theorizing different conceptions of judicial independence. However, across its various strands, this literature’s theories of judicial independence and legislative power turn on the U.S. Constitution and in particular Article III. As Part II shows, though, the text, structure, and history of state judicial articles are substantially different. Within state public law, scholars have framed legislative intrusions as means to disempower courts, whereas gerrys shopping is a means of directing—and in some instances increasing—judicial power rather than reducing it. Gerrys shopping thus surfaces an overlooked dimension of interbranch relations, one that invites asking what the structural design of state courts means in terms of their independence.

A. Theory and Practice

This Section unpacks gerrys shopping as a concept and illustrates how it works. To do so, it elaborates on the tactic’s conceptual frame and then details its various forms.

1. Theory

Gerrymandering relates to elections—it’s when legislators intentionally manipulation district lines to dictate electoral outcomes in service of preserving or enhancing their power.⁷ It is the illegitimate use of legitimate means to achieve political ends. Forum shopping is a litigation tactic—it’s strategic venue selection by a party.⁸ It similarly entails achieving preferred outcomes via formally proper authority in ways that conflict with

⁷ See, e.g., Michael Li, *Gerrymandering Explained*, BRENNAN CTR. FOR JUST. (Aug. 9, 2025), <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained>.

⁸ See, e.g., Tejas N. Narechania, Tian Kisch & Delia Scoville, *Forum Crowding*, 112 CALIF. L. REV. 327, 334 (2024).

settled norms or ethics within an adversarial system.⁹ Gerrys shopping is distinct from both gerrymandering and forum shopping but shares conceptual features.

Gerrys shopping is a practice where legislators attempt to influence case outcomes that advance their policy goals by altering a judiciary's jurisdiction, structure, or personnel. This has the effect of insulating the current legislature's policies against legal challenges and entrenching the policies against change. A more comprehensive summary follows, but consider a few examples. Legislators might pass a venue bill directing politically valuable cases—election disputes, challenges to abortion or gun control laws, etc.—away from lower courts or judges they believe will rule against them.¹⁰ They might create a “specialized” tribunal designed to exclusively hear such cases.¹¹ Or lawmakers could extend the mandatory retirement age for a judge who appears to consistently rule in favor of their policy objectives, locking in such outcomes and preventing a change to the court's composition.¹²

Gerrys shopping thus entails a different mix of institutional actors and dynamics, but like its conceptual cousins, its core functional characteristics are predictability and control. Gerrymandering offers legislative majorities a tool to reduce (or eliminate) electoral uncertainty, allowing them to reliably maintain power.¹³ Forum shopping grants a party some control over the substance and procedure that govern their suit and thus a degree of power to dictate case outcomes.¹⁴ Together gerrymandering and forum shopping

⁹ See, e.g., Markus Petsche, *What's Wrong with Forum Shopping - An Attempt to Identify and Assess the Real Issues of a Controversial Practice*, 45 INT'L L. 1005, 1110-15 (2011).

¹⁰ See, e.g., *Illinois' Limits on Where Citizens Can Challenge Unconstitutional State Laws Are Themselves Unconstitutional*, LIB. & JUST. CTR. (Dec. 19, 2025), <https://libertyjusticecenter.org/pressrelease/illinois-limits-on-court-unconstitutional/> (discussing HB 3062, which precludes downstate courts from hearing most constitutional challenges); Michael Milov-Cordoba, *Kentucky Supreme Court Strikes Down Law Meant to Steer Cases Away from 'Liberal' Judges*, STATE CT. REPORT (Nov. 2, 2023), <https://statecourtreport.org/our-work/analysis-opinion/kentucky-supreme-court-strikes-down-law-meant-steer-cases-away-liberal> (discussing a similar Kentucky statute).

¹¹ See, e.g., Melissa Price Kromm, Commentary, *Partisan Budget Proposal Is a Five-Alarm Fire For North Carolina's Courts*, NC NEWSLINE (June 1, 2023, 12:00 pm), <https://ncnewsline.com/2023/06/01/partisan-budget-proposal-is-a-five-alarm-fire-for-north-carolinas-courts/> (discussing creation of three-judge panels to hear constitutional challenges).

¹² See, e.g., CJ Staff, *Bill to Raise Judicial Retirement Age Would Allow Newby to Serve Full Term*, CAROLINA J. (Feb. 9, 2023), <https://www.carolinajournal.com/bill-to-raise-judicial-retirement-age-would-allow-newby-to-serve-full-term/> (“If approved, House Bill 71 could help state Supreme Court Chief Justice Paul Newby serve his full eight-year term. Without action, Newby would be forced to retire no later than May 30, 2027.”).

¹³ See, e.g., Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1434-35 (2020). This is all the more true in a polarized political environment where voter behavior is increasingly certain. See, e.g., Alan I. Abramowitz & Steven W. Webster, *Negative Partisanship: Why Americans Dislike Parties but Behave Like Rabid Partisans*, 39 ADVANCES POL. PSYCH. 119, 130-32 (2018).

¹⁴ See, e.g., Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1678 (1990) (“Forum shopping may give a party some degree of control over the choice of substantive law and of procedural rules. Because a determination by one court competent to decide a case will generally be the only substantive adjudication of the facts, this control can be vital to the outcome.”); Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1507-11 (1995).

provide means to rig the “rules of the game” to achieve desired results.¹⁵ Similarly, gerrys shopping provides legislators a means to more reliably ensure preferred outcomes in politically salient cases by manipulating certain features of the judiciary.¹⁶ Like gerrymandering and forum shopping, it too raises questions of both legitimacy and legality.

Nevertheless, gerrys shopping is a political tool that provides advantages of entrenchment and policy insurance. Scholars have defined institutional entrenchment as tactics that allow actors to “embed[] policy preferences in an institution by designing the institution to be both highly unresponsive to changes in its political environment and highly consistent over time in its policy preferences.”¹⁷ Congress, for instance, has at times taken such an approach to the design of administrative agency structures and processes. Political scientists have explained that, to influence agency policy, such ex ante controls are more effective than ex post tools to reverse bureaucratic decisions.¹⁸

Along these lines, consider some of the examples above—creating a court with selectively appointed judges that reflect a majority’s policy preferences or channeling valuable cases towards judges who reflect such preferences. These tactics maximize chances substantive legislation will be upheld and minimize political accountability of the judges reviewing it by appointing them or sending the cases to judges elected by voters who align with the underlying policy preferences.¹⁹ In these ways, gerrys shopping provides more durability for contentious policies by reducing the availability of meaningful judicial review.²⁰

Gerrys shopping serves the related function of policy insurance by providing a means to extend a majority’s power and influence beyond electoral losses.²¹ On this view, legislators might alter the structure of the courts before enacting controversial policies to reduce the likelihood of invalidation, increasing the possibility their policies will endure in the face of electoral backlash.²² Scholars note political insurance correlates with the level of political competition in a state, suggesting majorities are more likely to manipulate

¹⁵ Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 681-85 (2011); Clermont & Eisenberg, *supra* note 14, at 1507.

¹⁶ See, e.g., Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 L. & Soc. INQ. 91 (2000) (“Since rational politicians want long-term bargains with their constituents, they lack the incentive to support an independent judiciary when their prospects of remaining in office are high.”).

¹⁷ David S. Law, *How to Rig the Federal Courts*, 99 GEO. L.J. 779, 793 (2011).

¹⁸ See, e.g., Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 441 (1970) (describing ex post mechanisms as “cumbersome” and “generally ineffective”).

¹⁹ See, e.g., Edward H. Stiglitz, *Appointment Politics and the Ideological Composition of the Judiciary*, 39 LEGIS. STUD. Q. 27 (2014).

²⁰ Cf. Daryl J. Levinson & Benjamin Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 402 (2015).

²¹ See, e.g., Rosalind Dixon & Tom Ginsburg, *The Forms and Limits of Constitutions as Political Insurance*, 15 INT. J. CONST. L. 988, 997-99 (2017)

²² See, e.g., *id.* at 997-99.

court structure and personnel when they face minimal electoral competition.²³ Whatever its causes, gerrys shopping provides majorities in power a way “to limit the costs” of losing it.²⁴

2. Practice

This Section offers a taxonomy of the tactic’s various forms, to help fill in the picture of what gerrys shopping is. To construct this taxonomy, I reviewed all court-related legislation filed in all 50 statehouses from 2008 to 2025.²⁵ From this close reading of the legislation, I extracted gerrys shopping’s various manifestations. Relying on the conceptual overlap with forum shopping and gerrymandering, I framed the categories around the predictability and control each tool affords legislatures.²⁶ To enrich the classifications, I borrow familiar terms from the redistricting and forum shopping literatures.²⁷ In short, legislators *crack* and *stack* the judiciary’s jurisdiction, *make* and *break* its structure, and *lock* and *block* its personnel. These are not necessarily the only forms of gerrys shopping but are certainly the most common and thus demonstrative of the practice’s metes and bounds.

²³ See, e.g., Jay Krehbiel, *The Politics of Panel Systems: Political Insurance*, 21 EURO. POL. SCI. 522, 524-26 (2022) (overviewing the literature). This framing relies on a game theoretic account of interbranch relations. See J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUDS. 721, 721-23 (1994).

²⁴ Krehbiel, *supra* note 23, at 525.

²⁵ See Adam B. Sopko, Fifty-State Survey of Court-Related Legislation (on file with author). I drew these data from the National Center for State Courts’s *Gavel To Gavel* dashboard. See *Legislative Updates*, NAT. CTR. FOR STATE CTS. (last visited Dec. 30, 2025), <https://www.ncsc.org/resources-courts/legislative-updates>. However, that database was incomplete, missing legislation from 2021 and 2022. Email from Bill Raftery, Snr. Knowledge Mgmt. Analyst, Nat. Ctr. for State Cts., to Adam Sopko, Associate Professor of L., Univ. Colo. L. Sch. (on file with author). As noted above, this account of gerrys shopping is focused on legislation because that is overwhelmingly how the tactic is implemented. This sets to the side referred and initiated amendments. The choice to exclude constitutional amendments from my definition is based in black letter state constitutional law. To be sure, a constitutional amendment altering judicial structure does not necessarily present the same degree of doctrinal problems as a statutory attempt might. However, that does not mean gerrys shopping is per se permissible via constitutional amendment. Basic state constitutional principles tell us certain constitutional amendments can themselves be *unconstitutional*. E.g., JESSICA BULMAN-POZEN & MIRIAM SEIFTER, *STATE CONSTITUTIONAL LAW: CASES AND PRINCIPLES* 478-80 (2025). Indeed, attempts to amend state constitutions that are “so far reaching” as to alter their basic character have been held invalid—including where actors have sought to substantially modify features of judicial power. See, e.g., *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990) (invalidating an initiated amendment that sought to alter several features of judicial power related to criminal cases). The upshot of this is that state charters possess explicit and implicit limitations on the amendment power. Manoj Mate, *State Constitutions and the Basic Structure Doctrine*, 45 COLUM. HUM. RTS. L. REV. 441, 447 (2014) (arguing state courts should invalidate amendments that abrogate basic features of the state constitution).

²⁶ See *supra* notes 13-16 and accompanying text.

²⁷ See Robert M. Yablon, *Gerry laundering*, 97 N.Y.U. L. REV. 985, 988 (2022) (discussing recurring terms within the redistricting literature and introducing new ones); Zachary D. Clopton & Katherine Shaw, *Public Law Litigation and Electoral Time*, 2023 WIS. L. REV. 1513, 1532-35 (2023) (discussing the use of “temporal forum shopping” to “lock in” or “block” various political outcomes).

Jurisdiction. Legislators frequently want to alter where certain kinds of claims can be heard. These measures increase the certainty that a specific judge or court will or will not decide particular cases.

Lawmakers *stack* when they narrow or limit the fora where parties can file certain claims or limit the possibilities for transfer or removal. For example, Montana policymakers recently introduced a bill that would limit venue in cases challenging statutes to trial courts in counties represented by the legislators who sponsored the challenged law.²⁸ In Alabama, Republican lawmakers attempted to move all redistricting litigation away from the state’s capital, where most judges are Democrats, to require such claims be heard by three-judge panels selected by the chief justice, a Republican.²⁹ The Missouri General Assembly is trying to mandate all challenges to state laws regarding reproductive healthcare be filed in Cole County, where a judge had previously sided with anti-abortion lawmakers in prior abortion litigation.³⁰ Stacking decreases a plaintiff’s choice in forum and increase the predictability as to the court or judge that will decide the underlying class of cases, like claims against the government or all state constitutional litigation.

Cracking is the opposite—legislatures expand fora options or create concurrent jurisdiction over particular claims, thus providing more opportunities for a case to be heard in a favorable forum. For example, in 2018, Kentucky passed a statute relaxing existing venue rules for suits against the state that authorized defendants to transfer cases to be heard anywhere, not just the state capital.³¹ Republican lawmakers in Wisconsin recently introduced a comparable bill that would route public law cases out of deep-blue Dane County to any other county in the state, explaining they simply want to avoid Democratic judges.³² And where concurrent jurisdiction exists, some states expand opportunities for transfer or removal, providing state defendants with a tool to move cases to another, likely more favorable, court.³³

Structure. Beyond jurisdiction and venue, lawmakers attempt to assert more control over cases by changing the structure and design of the judiciary itself. Legislatures *make* new

²⁸ S.B. 385, 69th Legis., Reg. Sess. (Mont. 2025).

²⁹ S.B. 190, 2022 Legis. Reg. Sess. (Ala. 2022).

³⁰ See Anna Sporre, *Missouri Republicans Move To Change Venue For Major Court Cases Following Recent Abortion Rulings*, MO. INDEP. (Feb. 2, 2026, 8:00 AM), <https://missouriindependent.com/2026/02/02/missouri-republicans-legislation-reroute-major-appeals-court-cases-cole-county-abortion/>.

³¹ H.B. 515, 2018 Gen. Assemb., Reg. Sess. (Ky. 2018); Liam Niemeyer, *Legislature Approves ‘Random’ Venue Changes for Kentuckians Challenging State Laws, Decisions*, WKMS (Mar. 20, 2023, 10:23 AM), <https://www.wkms.org/term/news-0/2023-03-20/legislature-approves-random-venue-changes-for-kentuckians-challenging-state-laws-decisions> (reporting that the bill was designed to circumvent unfavorable judicial review).

³² See L.R.B. 0282/1, 2025 Legis., Reg. Sess. (Wis. 2025); Henry Redman, *Republican legislators introduce bill to move lawsuits out of Dane County*, Wis. Examiner (Feb. 12, 2025, 5:30 AM), <https://wisconsinexaminer.com/2025/02/12/republican-legislators-introduce-bill-to-move-lawsuits-out-of-dane-county/>.

³³ See, e.g., H.B. 1359, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); S.B. 5225, 67th Legis., 2021 Reg. Sess. (Wash. 2021); S.B. 3889, 2019 Gen. Assemb., Reg. Sess. (N.Y. 2019).

courts when they create novel tribunals, often styled as subject-matter specific courts that tread on expertise. For example, several states, including Texas, have recently created standalone business courts with more capacious definitions of “business” that seem to include conventional commercial disputes but also climate suits against oil companies.³⁴ Lawmakers in Pennsylvania introduced plans to create a separate court system with exclusive jurisdiction over medical malpractice claims and limited oversight from the Pennsylvania Supreme Court.³⁵ A related feature of *making* such courts is further altering the judiciary’s structure by providing judicial selection methods for these tribunals that differ from the state’s ordinary process. For instance, in North Carolina, where essentially all trial judges are elected, most constitutional claims are now heard by three-judge panels composed by the Chief Justice, consisting of judges selected by the legislature. Mississippi created a special court in one of its largest counties, with exclusive jurisdiction over cases implicating the state, with a similar selection method.³⁶

Conversely, states *break* their judiciary’s structure when they eliminate or consolidate existing courts, necessitating certain cases be heard by other judges or tribunals. For instance, Missouri’s House Speaker recently introduced a bill to eliminate the seat of a judge who had issued several high-profile decisions against the state concerning voting and reproductive rights, explaining the judge’s “politics aren’t well in line with” the Republican Party’s.³⁷ Breaking can also alter a court’s composition. For example, Texas legislators have considered consolidating the state’s (roughly) evenly divided intermediate appellate court from fourteen districts down to seven.³⁸ One analysis suggested such a move would shift the partisan balance of the court from parity to a strong Republican majority.³⁹ *Making* and *breaking* afford legislatures with additional tools to dictate where certain claims are adjudicated or to ensure that particular cases are *not* heard by certain courts or judges.

Personnel. Deciding who serves on state courts is considered by scholar and judge alike to be among the most effective means of controlling the judiciary.⁴⁰ A central function of

³⁴ See Ellen Bardash, *A Look at the Wild West of Business Court Constitutionality*, AM. L. LITIG. DAILY (Dec. 4, 2025, 07:30 AM), <https://www.law.com/litigationdaily/2025/12/04/a-look-at-the-wild-west-of-business-court-constitutionality/?slreturn=20260130180826>.

³⁵ S.B. 469, 2015 Gen. Assemb., Reg. Sess. (Pa. 2015).

³⁶ See, e.g., Bobby Harrison, *Mississippi’s Racial Divides Were on Full Display as HB 1020 Got Its Final Debate and Passing Vote*, MISS. TODAY (Mar. 31, 2023), <https://mississippitoday.org/2023/03/31/mississippi-racial-divides-house-bill-1020/>.

³⁷ See Rudi Keller, *Missouri House Bill Targets Republican Judge in Cole County over Controversial Rulings*, MO. INDEP. (Feb. 14, 2025, 10:01 AM), <https://missouriindependent.com/2025/02/14/missouri-house-bill-targets-republican-judge-in-cole-county-over-controversial-rulings/>.

³⁸ S.B. 11, 2021 Legis., Reg. Sess. (Tex. 2021).

³⁹ See Patrick Berry, Alicia Bannon & Douglas Keith, *Legislative Assaults on State Courts — December 2021 Update*, BRENNAN CTR. FOR JUST. (Dec. 14, 2021), <https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-december-2021-update>.

⁴⁰ See, e.g., JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 70, 73 (2021) (noting that “[j]udicial review and judicial selection are inseparable,” creating incentives for political actors “to obtain greater control over the power to select and to remove judges”); G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES 68-70 (2012) (similar).

political parties is to place decision-makers who align with the party's preferences into positions of power to make party-aligned policy.⁴¹ Courts play a central role in state policymaking, touching most of the state's economic, social, and political levers.⁴² Thus there are substantial incentives to influence—if not control—who is on the bench, which legislators respond to by *locking* and *blocking*.

Locking refers to lawmakers' efforts to assert more control over these aspects of court composition. Consistent with the overarching logic of gerrymandering, more influence over those wielding judicial power reduces the uncertainty that politically salient cases will be decided by a judge aligned with party preferences.⁴³ For example, several states have introduced legislation to switch from statewide supreme and appellate court elections to district-based elections, or from nonpartisan elections to partisan contests⁴⁴ — modifications that would almost certainly increase partisan control of such courts.⁴⁵ Raising or lowering thresholds for term limits and mandatory retirement provide additional instruments to assert control over court composition. In 2023, North Carolina lawmakers raised the retirement age for appellate court judges by four years, ensuring that Republican Chief Justice Newby—who has reportedly used his power and office to benefit the legislative majority⁴⁶—would not be forced to retire and thus be replaced by Governor Cooper, a Democrat. Alternatively, legislators might tighten existing term limits to prompt turnover and thus provide such an opportunity.⁴⁷

More subtly, *blocking* is when legislators increase uncertainty over who will decide important cases by randomizing or eliminating competing sources of control. For instance, Kansas legislators have introduced bills to remove assignment power from the court system's chief judges in public school funding cases, shifting to random panel assignments instead.⁴⁸ In Arizona, Republican lawmakers are trying to modify the state's retention

⁴¹ See Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSP. POL. 571 (2012); JOHN H. ALDRICH, *WHY PARTIES?: THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* (1995).

⁴² See, e.g., MARY CORNELIA ALDIS PORTER & G. ALAN TARR, *STATE SUPREME COURTS IN STATE AND NATION* (1990); Laura Langer & Paul Brace, *The Preemptive Power of State Supreme Courts: Adoption of Abortion and Death Penalty Legislation*, 33 POL'Y STUDS. J. 317 (2005).

⁴³ See Michael A. Catalano, *Ex Ante and Ex Post Control over Courts in the US States: Court Curbing and Political Party Influence*, 43 JUST. SYS. J. 503, 509-10 (2022).

⁴⁴ S.B. 800, 2018 Legis., Reg. Sess. (N.C. 2018); H.B. 374, 2013 Legis., Reg. Sess. (Mo. 2013); S.B. 2247, 2012 Legis., Reg. Sess. (Minn. 2012); S.J.R. 1144, 2018 Legis. Reg. Sess. (Pa. 2018).

⁴⁵ Empirical literature suggests moves to partisan elections enhances the influence of political parties over selection. See, e.g., Craig M. Burnett & Lydia Tiede, *Party Labels and Vote Choice in Judicial Elections*, 43 AM. POL. RSCH. 232, 246 (2014) (concluding party labels provide a “cognitive shortcut” for voters). Such influence increases further with district elections and further still with primaries. See, e.g., Catalano, *supra* note 43, at 520-21.

⁴⁶ Doug Bock Clark, *How Paul Newby Made North Carolina a Blueprint for Conservative Courts*, PROPUBLICA (Oct. 30, 2025, 6:00 AM), <https://www.propublica.org/article/paul-newby-north-carolina-supreme-court>.

⁴⁷ See, e.g., Lawrence Friedman, *Why Massachusetts Was Right to Reject Judicial Term Limits – Again*, COMMONWEALTH BEACON (May 26, 2019), <https://commonwealthbeacon.org/opinion/why-massachusetts-was-right-to-reject-judicial-term-limits-again/>.

⁴⁸ H.B. 2741, 2016 Legis., Reg. Sess. (Kan. 2016).

elections for appellate judges from a districted to a statewide model, which would reportedly decrease the likelihood of majority Democratic representation on the courts.⁴⁹ Lawmakers in several states are pursuing the removal of various judges by expanding existing recall mechanisms.⁵⁰ To be sure, blocking is less direct than locking but it nevertheless grants legislatures indirect control by increasing the likelihood that a particular court or judge will *not* hear particular cases—even if it is unclear which forum *will* hear it.

B. Gerrys shopping and Public Law Theory

Despite implicating two evergreen topics within public law scholarship—judicial independence and separation of powers—existing scholarship has overlooked this phenomenon.

Within federal public law scholarship, scholars have long debated Congress’s power over the federal judiciary. A prominent strand of this literature asserts Congress has “plenary” authority over the shape and jurisdiction of the federal judiciary.⁵¹ It can create, limit, and abolish lower federal courts as it sees fit and determine the reach of the Supreme Court’s jurisdiction.⁵² An equally important but competing strand recognizes Congress’s power over the courts but argues Article III’s text—namely life tenure and salary protections—as well as structure and history impose limits on congressional authority.⁵³

Whatever the scope of Congress’s power, a parallel literature has explored how lawmakers have used it to advance normative policy goals. In particular, scholars have documented Congress’s increased use of venue provisions that “channel” particular cases to specific courts.⁵⁴ Empirical studies of such measures have found them limited almost

⁴⁹ See H.B. 2757, 56th Legis., Reg. Sess. (Ariz. 2023); see also Howard Fischer, *AZ Group Wants Judicial Elections to Change*, KAWC (July 23, 2024, 1:22 AM), <https://www.kawc.org/news/2024-07-23/az-group-wants-judicial-elections-to-change>.

⁵⁰ See, e.g., S.B. 18, 2012 Legis., Reg. Sess. (Ala. 2012); H.B. 455, 213 Legis., Reg. Sess. (Miss. 2013); S.C.A. 18, 2018 Legis. Reg. Sess. (Cal. 2018).

⁵¹ See, e.g., Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1637 (1990); Raoul Berger, *Insulation of Judicial Usurpation: A Comment on Lawrence Sager’s “Court-Stripping” Polemic*, 44 OHIO ST. L.J. 611, 614 (1983); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 204 (1997); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965).

⁵² See, e.g., Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 48 (1981); Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030-31, 1038 (1982); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 901 (1984).

⁵³ See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 230 (1985); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 754, 762 (1984); Sager, *supra* note 52, at 66.

⁵⁴ See Amy L. Stein, *Administrative Forum Shopping*, 93 FORDHAM L. REV. 1667 (2025); Paul R. Gugliuzza, *Procedure, Substance, and Judge Shopping*, 174 U. PA. L. REV. (forthcoming 2026); Rosa Hayes, *Venue*

entirely to administrative agency claims and are designed to expedite or avoid Supreme Court review based on the court's prevailing view towards the administrative state.⁵⁵ On the theory side, scholars have argued such efforts by Congress implicate the legitimacy of the judiciary and ethics of litigation, as they undermine the normative ideals of objectivity and fair play that are said to guide adjudication.⁵⁶

At an institutional level, these literatures share similarities with gerrymandering, as it documents Congress's attempts to achieve policy objectives through their power over the courts. At the descriptive level, though, the scope of these interbranch showdowns is narrowly focused on venue. Further, the assumption across these literatures is that Article III furnishes some level of protection for the federal judiciary from Congressional intrusion,⁵⁷ thus the corresponding theories of judicial independence scholars debate within federal public law rely on the text, structure, history, and politics of the federal courts. As we shall see, state constitutions differ across each of these variables, pointing towards a unique theory of state judicial independence and thus raising distinctive normative puzzles and possibilities.⁵⁸

Scholars of state public law, for their part, have examined how legislatures have used their power over other branches to shape and dictate policy outcomes. Miriam Seifter has explored state-level agency independence and documented the ways in which legislatures can and do modify executive oversight of administrative agencies, often in pursuit of policy objectives.⁵⁹ Others have explored legislative attempts to capture direct democracy processes and thus rein in the people's policymaking power.⁶⁰ This literature dovetails with emerging scholarship on state-level entrenchment.⁶¹ These scholars examine how legislatures use legitimate power to insulate their policies from change and their authority from challenge, raising questions of democracy and institutional design. This work has focused on tools like gerrymandering, administrative agency structure, and unrepeatable statutes—overlooked in this literature is how courts might serve as entrenching devices.

To be sure, relations between courts and legislatures are well covered across law and political science. However, a significant portion of that literature consists of singular studies of threats to judicial independence—e.g., removing judicial rulemaking power—

Diversion, 2025 WIS. L. REV. 147; Jennifer L. Selin & Pamela J. Clouser McCann, *The First Branch: How Congress Manipulates Judicial Review of Administrative Action*, 111 IOWA L. REV. (forthcoming 2026).

⁵⁵ Selin & McCann, *supra* note 54 (manuscript at 37).

⁵⁶ See Hayes, *supra* note 54, at 206-14; Gugliuzza, *supra* note 54, at 55-58; Stein, *supra* note 54, at 1717-19.

⁵⁷ *But see, e.g.*, Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 874-87 (2011) (arguing democratic politics and the structural requirements of lawmaking serve as the judiciary's primary safeguards against congressional control).

⁵⁸ See *infra* Part II.

⁵⁹ See generally Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537 (2019).

⁶⁰ See, e.g., Jonathan L. Marshfield, *Against the Single-Subject Rule for the Citizen Initiative*, IOWA L. REV. (forthcoming 2026); Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J.F. 191, 206-16 (2024).

⁶¹ See, e.g., Krehbiel, *supra* note 24, at 524-26.

rather than conceptualizing the constellation of legislative intrusions as a broader phenomenon. For example, scholars of law and social science have examined how legislative majorities wield their power to defund courts in the face of perceived judicial activism,⁶² pack and unpack high courts,⁶³ and usurp the judiciary’s rulemaking authority.⁶⁴ And the work that has examined the full menu of intrusions on judicial power have explored the implications for legislatures rather than courts. Within the literature on state legislatures, scholars have offered positive models explaining why legislatures “attack” their courts and predicting where we can expect such efforts to arise.⁶⁵ Another strand has framed such intrusions on state courts as efforts to “curb” or “sanction” courts, which they define as “remov[ing]” or “limit[ing]” judicial power.⁶⁶

Further, this literature frames these legislative interventions as *ex post* actions limiting court power in response to judicial decisions contrary to legislative preference. For example, scholars have studied legislative responses cutting judicial budgets, thus diminishing their capacity, following decisions ordering the legislature to increase education funding levels.⁶⁷ Scholars have similarly documented legislative efforts to narrow judicial power following high-profile cases concerning social issues, like marriage equality or abortion.⁶⁸

⁶² See, e.g., Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979 (2004); David J. Barron, *Judicial Independence and the State Court Funding Crisis Symposium on State Court Funding*, 100 KY. L.J. 755 (2011); James W. Douglas & Roger E. Hartley, *The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?*, 63 PUB. ADMIN. REV. 441 (2003).

⁶³ See, e.g., Marin K. Levy, *Packing and Unpacking State Courts*, 61 WM. & MARY L. REV. 1121 (2020); Simon Zschirnt, *Packing State Supreme Courts: Analyzing the Dynamics of State Supreme Court Expansion*, 25 STATE POL. & POL’Y Q. 44 (2025).

⁶⁴ See, e.g., Thomas A. Bishop, *Evidence Rulemaking: Balancing the Separation of Powers*, 43 CONN. L. REV. 265, 292-301 (2010); Austin A. King, Note, *A Problematic Procedure: The Struggle for Control of Procedural Rulemaking Power*, 67 ARK. L. REV. 759, 760-69 (2014).

⁶⁵ See, e.g., Keith Blackley, *Court Curbing in the State House: Why State Legislators Attack Their Courts*, 40 JUST. SYS. J. 269 (2019); Meghan E. Leonard, *New Data on Court Curbing by State Legislatures*, 22 STATE POL. & POL’Y Q. 483 (2022); Meghan E. Leonard, *State Legislatures, State High Courts, and Judicial Independence: An Examination of Court-Curbing Legislation in the States*, 37 JUST. SYS. J. 53 (2016) [hereinafter Leonard, *Judicial Independence*]; Meghan E. Leonard, Hayley Munir & Michael Anthony Catalano, *Court Curbing Lower State Courts in the United States*, STATE POL. & POL’Y Q. (forthcoming 2026).

⁶⁶ Political scientists frequently adopt Tom Clark’s definition, which defines court curbing as attempts to “restrict, remove, or otherwise limit” judicial power. TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* 19 (2011); see, e.g., sources cited note 65 *supra*; see also LAURA LANGER, *JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY* (2002).

⁶⁷ See, e.g., James W. Douglas & Roger E. Hartley, *State Court Strategies and Politics during the Appropriations Process*, 21 PUB. BUDGETING & FIN. 35 (2002); Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Powers*, 52 MD. L. REV. 217 (1999); sources cited note 62 *supra*; see also Lincoln Caplan, *The Political War Against the Kansas Supreme Court*, NEW YORKER (Feb. 5, 2016), <https://www.newyorker.com/news/news-desk/the-political-war-against-the-kansas-supreme-court>.

⁶⁸ See, e.g., Jeong Hyun Kim, Anna Gunderson, Elizabeth A. Lane & Nichole M. Bauer, *State Courts, State Legislatures, and Setting Abortion Policy*, 48 J. HEALTH POL. POL’Y & L. 569 (2023); Leonard, Munir & Catalano, *supra* note 65.

Gerryshopping differs from these practices. As detailed above, legislators are not trying to narrow or limit the judiciary's power—i.e., court curbing—but instead are trying to harness or capture it. Gerryshopping's various forms provide legislators with tools to assert control over when and how judicial power is exercised, extending their influence over case outcomes and, with it, the state's policy environment.

The tactic implicates different incentives for lawmakers than court curbing. Rather than encouraging retribution *ex post* for invalidating a statute, lawmakers are incentivized to assert control over courts *ex ante*, maintaining or *expanding* court power, and enhancing their own authority by minimizing the possibility of invalidation in the first place.⁶⁹

In these ways, gerryshopping perhaps supplements a legislature's intrabranch toolkit. The judicial politics literature has suggested court curbing, especially as a means of communicating disagreement with judicial decisions, is typically unsuccessful as a way of sanctioning or reining courts in.⁷⁰ Gerryshopping's primary benefit, then, is to enhance the efficacy of meddling with the judiciary.⁷¹

The shared premise within the court curbing literature is that the legislative tactics they study intrude on the independence of state courts. But on what theory? As debates among federal courts scholars demonstrate, positive and normative claims concerning Congress's regulatory power over the judiciary turn, at least in part, on what the U.S. Constitution allows.⁷² Whereas there is much work along these lines, scholarship exploring how constitutions conceptualize a comparable relationship at the state level is lacking. Gerryshopping provides an opportunity to confront that question and take initial steps towards answering it.

C. Court Reform and Interbranch Showdowns

While gerryshopping and court curbing are distinct practices, they are both situated within a larger tradition of interbranch relations. They refer to adversarial dynamics between the judiciary and its coordinate peers. But interbranch relations are not exclusively defined by showdowns and conflict.⁷³ Both executives and legislatures are important—in some ways necessary—partners for state judiciaries to help improve their

⁶⁹ Recent work in political science provides a foundation for this framing. Studies have found that as *ex ante* control over courts decreases, the likelihood of *ex post* court constraining or power-limiting measures increases. See, e.g., Catalano, *supra* note 43; Jonathan S. Hack, *Why Do Lawmakers Seek to Sanction State Courts?*, 28 J. LEGIS. STUDS. 278 (2022).

⁷⁰ See, e.g., Meghan E. Leonard, *State High Courts and Horizontal Constraints*, in RESEARCH HANDBOOK ON JUDICIAL POLITICS 205-06 (Fix & Montgomery eds. 2024) (reviewing this literature).

⁷¹ This invites subsequent empirical work to compare and contrast the efficacy of gerryshopping versus more conventional forms of meddling. However, existing work suggests such the former is a more effective means of controlling case outcomes. See Catalano, *supra* note 43, at 519-21.

⁷² Compare, e.g., Harrison, *supra* note 51, with, e.g., Richard H. Fallon, *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043 (2010).

⁷³ See, e.g., Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 993-1002 (2008); see also Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 DUKE L.J. 545 (2023) (rejecting traditional models of state separation of powers that frame interbranch relations around contestation).

operations and expand the provision of justice. This other side of the coin refers to ways other branches modify the courts to achieve socially beneficial objectives. This Section helps us draw the line between good-faith court reform and problematic gerrymandering.

These forms of interbranch dynamics—contestation and cooperation—are part of states’ separation of powers constructs. Their approaches to evaluating separation-of-powers disputes are varied and variegated,⁷⁴ including familiar theories of “formalism” and “functionalism.”⁷⁵ Regardless of doctrinal style, though, a shared metatheory across states is a commitment to “pragmatic, consequentialist review,” or what Richard Pildes calls “institutional realism.”⁷⁶ On this view, courts look beyond idealized, “myth[ical]” conceptions of the branches to “how [they] actually function in, and over, time.”⁷⁷ State separation-of-powers doctrine is thus sensitive to the capacity of such institutions as well as the incentives they face.

We can find examples of this pragmatic or realist approach across a variety of jurisprudential contexts. For example, scholars have documented the consequentialist approach to resolving interbranch disputes over fiscal issues, where local governments and legislatures try to draw and spend public money in the face of relatively explicit limitations on such powers. Courts generally view these questions as “matters of ordinary politics, not constitutional principle.”⁷⁸ Thus, the corresponding analysis typically redounds to how obvious the attempts to evade or manipulate the constitution were.⁷⁹ Similarly, in cases implicating executive control over administrative agencies, we see an emphasis on narrow, shallow rulings that elevate consequences over theory.⁸⁰ And jurisprudence around single-subject rules has been described similarly.⁸¹ Political scientists have argued such elasticity in the doctrine is designed to allow courts to

⁷⁴ See, e.g., Miriam Seifter, *Democracy and the State Distribution of Powers*, 76 RUTGERS U.L. REV. 863, 873-75 nn. 39-43 (2024) (surveying relevant doctrine).

⁷⁵ *Id.* at 875.

⁷⁶ *Id.* at 871 (citing Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1 (2013)); Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248-51 (1972).

⁷⁷ Pildes, *supra* note 76, at 2, at 2; Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1738 (2021).

⁷⁸ Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 942 (2003).

⁷⁹ Richard C. Schragger, *Democracy and Debt*, 121 YALE L.J. 860, 870-71 (2012) (“Courts have taken a realist position when it comes to the fiscal constitution, often reading constitutional restraints narrowly in order to allow the government to function, though not so narrowly as to obviate legislatures’ need to think creatively.”)

⁸⁰ See generally Seifter, *supra* note 59 (reviewing state case law on executive-legislative disputes over agency control and concluding courts design doctrine that is “heavily contingent” on the state’s political dynamic).

⁸¹ Jonathan L. Marshfield, *The Single-Subject Rule and the Politics of Constitutional Amendment in Initiative States*, 101 NEB. L. REV. 71, 85 (2022) (“[C]ritics note that courts apply the rule inconsistently across time and jurisdiction, which suggests that courts are not guided by a meaningful legal standard.”); Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALB. L. REV. 1629, 1639 (2019) (similar).

navigate the vagaries and shifting demands of legislative politics.⁸² In sum, across a variety of disputes concerning the powers of coordinate branches and local governments as well, state courts can and do resolve such issues with an analytical frame that is sensitive to the underlying consequences and politics.

This approach provides conceptual tools to help differentiate gerrys shopping from other forms of legislative action. Specifically, a realist frame would focus on the motivations behind a piece of legislation to distinguish between gerrys shopping and good-faith court reform. Motive is an important factor when analyzing the behavior of political institutions.⁸³ Further, such an analytical frame is particularly helpful when evaluating official acts driven by pernicious intent that can readily be masked by describing the acts in a neutral register.

Of course, the possibility of mixed motives can present analytical challenges. For example, a legislature might draw district maps to both limit the influence of racial minorities (impermissible under the Fourteenth Amendment) and entrench the majority party's power (permissible under the Fourteenth Amendment). In such circumstances, one approach to a motive inquiry asks which was the *primary* motivation. Framed this way, a legislature that wants to violate the Constitution can do so as long as they were mostly trying to comply with it. For good reasons, scholars have criticized this standard on conceptual grounds.⁸⁴ Instead, many courts apply a *single* motive standard—i.e., an “iota” of impermissible motive violates the standard.⁸⁵ It is the presence—rather than the magnitude—of the impermissible motive that deems it unlawful.

This approach is common among state courts. For example, motive plays a central role in challenging racial preremptory strikes, where “many courts—particularly state courts” have adopted single-motive tests.⁸⁶ Closer still to gerrys shopping's context, courts have

⁸² See, e.g., John G. Matsusaka & Richard L. Hasen, *Aggressive Enforcement of the Single Subject Rule*, 9 ELECTION L.J. 399 (2010). To be sure there is disagreement on this point. See, e.g., Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 843 (2010) (arguing single-subject rule doctrine is driven by law rather than politics); but see Richard L. Hasen & John G. Matsusaka, *Some Skepticism About the “Separable Preferences” Approach to the Single Subject Rule: A Comment on Cooter & Gilbert*, 110 COLUM. L. REV. SIDEBAR 35 (2010) (refuting their claims).

⁸³ See, e.g., Aziz Z. Huq, *Separation of Powers Metatheory*, 118 COLUM. L. REV. 1517, 1552–53 (2018). Courts, governors, and legislatures are singular institutions that act through individual officials. Thus, the basis for an institution's actions relies, at least in part, on the motivations of its individual members. For canonical motive-based studies of legislative policymaking, see DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (2d ed. 2004) and RICHARD F. FENNO, CONGRESSMEN IN COMMITTEES (1973). A focus on motive is also important to institutionalist approaches to public law, e.g., James W. Caesar, *Reconstructing Political Science*, in A NEW CONSTITUTIONALISM: DESIGNING POLITICAL INSTITUTIONS FOR A GOOD SOCIETY 43-60 (Elkin & Soltan eds. 1993), the perspective closest to the one I bring to this study.

⁸⁴ See, e.g., Andrew Verstein, *The Failure of Mixed-Motives Jurisprudence*, 86 U. CHI. L. REV. 725, 792 (2019). This “primary” motive approach also presents methodological and practical challenges for courts. See Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1161-62 (2018).

⁸⁵ *Id.* at 1116.

⁸⁶ *Hart v. State*, 310 A.3d 1157, 1171 (Md. App. 2024) (collecting cases).

relied on such a standard in traditionally fraught cases. For example, with one exception, all high courts that have held partisan gerrymandering claims justiciable under the state constitution have evaluated such claims under a single-motive standard.⁸⁷ And in single-subject rule litigation, where legislators are typically accused of trying to evade electoral accountability, courts review otherwise lawful legislation for evidence of impermissible logrolling.⁸⁸

For gerrymandering, the impermissible motive is to modify or restructure courts to influence case outcomes or insulate policies from meaningful judicial review. In some instances, such a motive is explicit. For example, surrounding a series of cases striking down limits on abortion and gender affirming care, majority leaders in Montana introduced a package of structural changes to the state's judiciary with a statement warning the courts to "buckle up."⁸⁹ Missouri's House Speaker introduced a bill to defund the seat of a judge that had issued several high-profile decisions recently, explaining the judge's "politics aren't well in line with" the Republican Party's.⁹⁰

Of course, such motivations might be less explicit and thus illuminated by context, like proximity to controversial rulings or elections that shift partisan control of government. For instance, following a string of cases where Illinois trial judges who initially ran as Republicans enjoined important legislation passed by the state's Democratic supermajority, Democrats enacted a venue rule that mandated such cases be heard in majority Democratic jurisdictions.⁹¹ Following the election of a Democratic governor, North Carolina's Republican legislative supermajority altered the chief justice's mandatory retirement age to prevent the incoming governor from replacing him, appointed new judges to a special "court" to hear separation-of-power disputes, and authorized the chief justice to choose which judges hear such cases.⁹²

⁸⁷ See Harry Isaiah Black, *Explainer: Status of Partisan Gerrymandering Claims Across the Country*, State Democracy Research Initiative (July 26, 2024), <https://statedemocracy.law.wisc.edu/explainer-status-of-partisan-gerrymandering-claims-across-the-country/> (collecting citations for the ten states that have done so).

⁸⁸ See, e.g., *Coop. Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571, 580 (Mo. 2017); *Leach v. Com.*, 141 A.3d 426, 434-35 (Pa. 2016); *Douglas v. Cox Retirement Properties, Inc.*, 302 P.3d 789 (Okla. 2013). To be sure, single-subject rule jurisprudence is not without its critics. See, e.g., Briffault, *supra* note 81, at 1639.

⁸⁹ See, e.g., Chen, *supra* note 5.

⁹⁰ See Rudi Keller, *Missouri House Bill Targets Republican Judge in Cole County over Controversial Rulings*, MO. INDEP. (Feb. 14, 2025, 10:01 AM), <https://missouriindependent.com/2025/02/14/missouri-house-bill-targets-republican-judge-in-cole-county-over-controversial-rulings/>.

⁹¹ The legislative history is clear that the bill was a response to a series of lawsuits filed in recent years in courthouses throughout the state challenging key policies, like Gov. Pritzker's COVID-19 mitigation orders, a law that would end cash bail, and, most recently, the state's ban on assault-style weapons and large-capacity magazines. Peter Hancock, *New State Law Limits Venue for Illinois Constitutional Lawsuits to Sangamon, Cook Counties*, CAP. NEWS. ILL. (June 7, 2023, 2:36 PM), <https://news.wttw.com/2023/06/07/new-state-law-limits-venue-illinois-constitutional-lawsuits-sangamon-cook-counties>. As the bill's sponsor described it, the bill "is a simple effort to make sure that all important, critical constitutional questions end up in the right venue." *Id.*

⁹² See Denning, *supra* note 2.

To be sure, distinguishing genuine court reform from gerrys shopping is not an exact formula or algorithm. This Article, though, is more modestly focused on the egregious or obvious examples, recognizing edge cases are possible. However, “we can often identify what is troublingly unfair, unequal, or wrong without a precise standard of what is optimally fair, equal, or right.”¹⁵ This premise underlies the pragmatic strand of doctrine that guides much of states’ separation-of-powers jurisprudence and similarly aids courts in distinguishing between legislation designed to limit their autonomy and that designed to improve their operations.

II. A STRUCTURAL ACCOUNT OF STATE JUDICIAL INDEPENDENCE

Gerrys shopping alters how state courts operate and wield their power—their “institutional independence.”⁹³ As Charles Geyh has explained, the line between the autonomy of individual judges and the judiciary as a whole is perhaps “conceptually distinct but often blur[red] in application.”⁹⁴ Threats to judges “as an institution can manipulate” outcomes of the cases they decide.⁹⁵ In these ways, gerrys shopping strikes at the “core” of judicial independence.⁹⁶

For all the debate around the scope and content of the federal judiciary’s independence, Article III does not have much to say on the matter. As one scholar put it, Article III is “maddeningly terse, vague, and open-ended.”⁹⁷ Yet the federal courts literature is flush with competing accounts of whether and to what extent Article III affords the federal judiciary protection, as an institution, from political incursions.⁹⁸

Our understanding of state courts is the opposite. As this Part shows in detail, state constitutions are packed with provisions that speak to the independence of their court systems. Yet state public law lacks a rich institutional account of state court independence. This Part takes a first cut at this question by teasing out the constitutional features that provide for such autonomy. It’s not to say that judicial independence is purely a legal question, but the structural account here enriches our understanding of the concept by problematizing gerrys shopping and informing how courts might respond.

A. Structures of State Judicial Independence

This Section highlights the primary constitutional provisions shared among states that speak to the autonomy of state courts. It serves as a foundation, rather than definitive statement, for understanding how state charters conceptualize judicial independence.

⁹³ Charles Gardner Geyh, *Judicial Independence as an Organizing Principle*, 10 ANN. REV. L. & SOC. SCI. 185, 191-93 (2014).

⁹⁴ *Id.* at 192.

⁹⁵ *Id.*

⁹⁶ See Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 325 (1999).

⁹⁷ Wythe Holt, “To Establish Justice”: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L.J. 1421, 1423 (1989).

⁹⁸ See *supra* notes 51-57 and accompanying text.

Jurisdictional mandates. Scholars have long noted the jurisdiction of federal courts, with minor exceptions, is defined by Congress and thus subject to legislative prerogative.⁹⁹ By contrast, in 38 states, the judiciary’s jurisdiction is preserved in the constitution. These provisions include general jurisdictional mandates that maintain the “original jurisdiction of all justiciable matters” of trial courts or the “statewide appellate jurisdiction” of courts of review.¹⁰⁰ They also include grants of specific jurisdiction, like review of capital appeals or original jurisdiction of redistricting claims.¹⁰¹

Within these states, fifteen expressly provide the means by which a court’s jurisdiction can be changed—most commonly by constitutional amendment,¹⁰² but in some instances only by the courts themselves via rulemaking.¹⁰³

Structuring the branch. Every state constitution has something to say about the structure or design of the judicial branch. Each state’s charter expressly provides for its highest court, and almost every state constitution similarly enumerates a general trial court.¹⁰⁴ Of the 42 states with intermediate appellate tribunals, most of these courts are included in their constitutions as well.¹⁰⁵ And several states explicitly provide for certain local and

⁹⁹ See sources cited notes 51 & 53 *supra*.

¹⁰⁰ Ala. Const. art. VI, §§ 143, 144; Alaska Const. art. IV, § 3; Ark. Const. art. 80 §§ 2, 5-7; Colo. Const. art. VI, § 2(2); Del. Const. art. IV, §§ 7, 11, 16; Fla. Const. art. V, § 3; Ga. Const. art. VI, ¶ 3; Idaho Const. art. V, § 9; Ill. Const. art. VI, § 9; La. Const. art. V, § 5; Mich. Const. art. VI, § 4; Minn. Const. art. VI, § 5; Miss. Const. §§ 156, 160, 161; Mo. Const. art. V, §§ 3, 14; Mont. Const. art. VII, § 2; Nev. Const. art. VI, §§ 4, 6; N.J. Const. art. VI, §§ 2, 5; N.D. art. VI, § 2; Okla. Const. art. VI, § 4; R.I. Const. art. X, § 2; S.C. Const. art. V, § 11; S.D. Const. art. V, § 5; Tex. Const. art. V, §§ 3, 5; Utah Const. art. VIII, § 5; Wyo. Const. art. V, §§ 2, 10; Vt. Const. ch 2, § 30; Wash. Const. art. IV, § 4.

¹⁰¹ Ark. Const. art. VII, § 28; Conn. Const. art. III, § 6; Ga. Const. art. VI, ¶¶ 1, 2; Idaho Const. art. V, § 9; Ill. Const. art. VI, § 4; Ind. Const. art. III, § 36, art. VII, § 4; Ky. Const. § 110; La. Const. art. V, §§ 5, 16; Me. Const. art. IX, § 24; Minn. Const. art. VI, § 3; Mo. Const. art. V, § 3; N.J. Const. art. VI, § 5, ¶ 1, § 2, ¶ 7; N.M. Const. art. VI, § 2; Neb. Const. art. V, § 2; N.Y. Const. art. VI, §§ 3, 11-13, 15; Ohio Const. art. IV, § 2, art. XI, § 9; S.C. Const. art. V, § 5; Tex. Const. art. V, § 5; Va. Const. art. VI, § 1; W. Va. Const. art. VIII, § 3; Wash. Const. art. IV, § 4. For a comprehensive review of original jurisdiction, see generally Zachary D. Clopton, *Power and Politics in Original Jurisdiction*, 91 U. CHI. L. REV. 83 (2024).

¹⁰² Ark. Const. art. 80, § 2; Colo. Const. art. VI, § 9; Ga. Const. art. VI, ¶ 1; La. Const. art. V, § 5; La. Const. art. V, § 10; Miss. Const. § 156; N.J. Const. art. VI, § 2, ¶ 2; N.M. Const. art. VI, § 13; Okla. Const. art. VII, § 7; Tex. Const. art. V, § 3; Va. Const. art. VI, § 1.

¹⁰³ Ill. Const. art. VI, §§ 4, 6; Ind. Const. art. VII, §§ 4, 6; Ky. Const. §§ 110, 111; Mich. Const. art. VI, § 4; Nev. Const. art. VI, § 4; N.J. Const. art. VI, § 3, ¶ 1.

¹⁰⁴ Forty-four states so provide. Ala. Const. art. VI, § 143; Alaska Const. art. IV, § 3; Ark. Const. art. 80, § 6; Cal. Const. art. VI, § 1; Colo. Const. art. VI, § 9; Conn. Const. art. V, § 1; Del. Const. art. IV, § 7; Fla. Const. art. V, § 5; Ga. Const. art. VI, ¶ 1; Hawaii Const. art. VI, § 1; Idaho Const. art. V, § 11; Ill. Const. art. VI, § 9; Ind. Const. art. V, § 6; Iowa Const. art. V, § 1; Kan. Const. art. III, § 6; Ky. Const. § 112; La. Const. art. V, § 16; Md. Const. art. IV, § 1; Mich. Const. art. IV, § 1; Mo. Const. art. V, § 1; Minn. Const. art. VI, § 3; Miss. Const. § 156; Mont. Const. art. VII, § 1; Neb. Const. art. V, § 9; Nev. Const. art. VI, § 6; N.H. Const. pt. 2, art. 72a; N.J. Const. art. VI, § 3, ¶ 2; N.M. Const. art. VI, § 13; N.Y. Const. art. VI, § 1; N.C. Const. art. IV, § 2; N.D. Const. art. VI, § 1; Ohio Const. art. IV, § 4; Okla. Const. art. VII, § 1; Ore. Const. art. VII, § 1; Pa. Const. art. V, §§ 3-5; S.C. Const. art. V, § 11; S.D. Const. art. V, § 1; Tex. Const. art. V, § 1; Utah Const. art. VIII, § 1; Vt. Const. ch. 2, § 4; Wash. Const. art. IV, § 1; W. Va. Const. art. VIII, § 1; Wis. Const. art. VII, § 2; Wyo. Const. art. V, § 1.

¹⁰⁵ Ariz. Const. art. VI, § 30; Ark. Const. art. 80, § 5; Cal. Const. art. VI, § 1; Conn. Const. art. XX, §§ 1, 2; FL Const. art. 5, § 4; GA Const. art. VI, § 2; Ill. Const. art. VI, § 6; Ind. Const. art. 7, § 6; KY Const. art. 111; La. Const. art. V,

specialty courts, like Georgia's statewide business court and West Virginia's family court system.¹⁰⁶

In approximately half of the states, the constitution explicitly refers to the judiciary as a "unified" or "integrated" court system.¹⁰⁷ These clauses were part of a suite of amendments enacted during the twentieth century's court-reform movement to empower state judiciaries to operate as an independent branch.¹⁰⁸

A similar number of state charters narrow the legislature's authority to modify these structures by creating or abolishing courts. Limitations might be a bar on such changes,¹⁰⁹ or through less direct means, like imposing supermajority requirements on the legislature or geographic limitations on such legislation.¹¹⁰ And nearly one dozen state constitutions impose uniformity requirements on all legislation affecting the courts, narrowing legislative discretion to create special "courts" within the existing tiers of the judiciary.¹¹¹

Administrative and supervisory powers. Every state constitution vests the judiciary with control over administering their branch and oversight of practice and procedure in the court system. The supreme court in each state has a supervisory power to oversee and manage the judicial branch.¹¹² This power is a broad source of authority that provides high courts with means to manage the branch's day-to-day operations, as well as the exigencies that justice may require, like issuing a moratorium on eviction proceedings during the Covid-19 pandemic.¹¹³

MI Const. art. VI, § 1; Mo. Const. art. V, § 13; Neb. Const.; Nev. Const. art. VI, § 3a; N.J. Const. art. VI, §§ 2-3; N.M. Const. art. VI, § 29; N.Y. Const. art. VI, § 4; N.C. Const. art. IV, § 7; Ohio Const. art. IV, § 6; Penn. Const. art. V § 3; S.C. Const. art. V, § 7; Tex. Const. art. V, § 6; Wash. Const. art. IV § 30.

¹⁰⁶ See W.Va. Const. art. VIII, § 16; Ala. Const. art. VI, § 144; Ark. Const. art. VII, § 28; Colo. Const. art. VI, §§ 15-17; Idaho Const. art. V, § 14; Mass. Const. pt. 2, art. IV; *id.* cl. 3, art. IV; Mich. Const. art. VI, § 15; Neb. Const. art. V, § 27; N.H. Const. pt. 2, art. 80; N.M. Const. art. VI, § 23; N.Y. Const. art. VI, § 12; Pa. Const. art. V, § 6; Wyo. Const. art. V, § 29.

¹⁰⁷ See William Raftery, *How Many States Are "Unified"? There Is No Definitive Answer Because There Is No Definitive Definition*, NAT. CTR. FOR STATE CTS. (Feb. 24, 2021), <https://ncsc.contentdm.oclc.org/digital/api/collection/ctadmin/id/2502/download> (collecting citations).

¹⁰⁸ See Adam B. Sopko, *The Supervisory Power of State Supreme Courts*, 98 S. CAL. L. REV. 1543, 1558-64 (2025)

¹⁰⁹ Ala. Const. § 37-2.40; Colo. Const. art. VI, § 1; Fla. Const. art 5, § 1; Ill. Const. art 6, § 1; Idaho Const. art. V, § 13; Ind. Const. art 7, § 1; La. Const. art V, §§ 15, 16, 21, art. VI, § 25; Md. Const. art 4, § 1; Minn. Const. art 6, §§ 1, 5; N.Y. Const. art. VI, § 17; N.C. art 4, § 1; Tenn. Const. art 6, § 1; Tex. Const. art 5, § 1; Wis. Const. art 7, § 2.

¹¹⁰ Del. Const. art. IV, § 1; Ga. Const. art 6, ¶¶ 7, 10; Me. Const. Pt 2, cl. 1, § 1, art. 3; Mich. Const. art. VI, § 1; N.Y. Const. art 6, § 15; Ohio Const. art 4, § 15.

¹¹¹ Ala. Const. art. VI, § 143; Colo. Const. art. VI, § 16; Fla. Const. art. V, § 5; Ga. Const. art. VI, § 3, ¶ 1; Idaho Const. art. V, § 26; La. Const. art. V, § 15; Md. Const. art. IV, § 41A; N.Y. Const. art. VI, § 17; Neb. Const. art. V, § 19; S.C. Const. art. V, § 1; Wis. Const. art. VII, § 2.

¹¹² See Sopko, *supra* note 108, at 1554-55 (collecting citations). In the remaining two states, the courts have not been clear as to whether their supervisory power is purely statutory is also vested by the state constitution. See *id.*

¹¹³ See, e.g., *id.* at 1577-79.

State constitutions contain more specific forms of administrative power, as well. For example, a majority of constitutions preserve the judiciary’s control over its own workload by vesting power to transfer judges¹¹⁴ and cases¹¹⁵ with the courts themselves. West Virginia’s constitution, for instance, reserves for the chief justice the power to “assign a judge . . . for temporary service” within any tier of the state’s court system.¹¹⁶ Georgia’s constitution requires “[a]ny court” to “transfer to the appropriate court in the state any civil case in which it determines that jurisdiction or venue lies elsewhere.”¹¹⁷

To implement these powers, a similar number of constitutions provide courts with appointment powers to name chief judges and judicial administrators to facilitate the daily operations, like collecting court fees and managing efilings systems, as well as broader operational priorities, via local rulemaking.¹¹⁸

Every state’s constitution provides the judiciary with a degree of regulatory power. In almost half of the states this is power to make procedural rules for the state’s judicial system.¹¹⁹ Arizona’s constitution vests the supreme court with “[p]ower to make rules relative to all procedural matters in any court,” and the North Dakota Constitution provides “[t]he supreme court shall have authority to promulgate rules of procedure, including appellate procedure, to be followed by all the courts of this state.” This regulatory power also includes authority to oversee the practice of law. In almost every state, the high court is charged with managing attorney licensing and discipline.¹²⁰

¹¹⁴ Ala. Const. art. VI, § 149; Alaska Const. art. IV, § 16; Ark. Const. art. 80 §§ 6, 7; Colo. Const. art. VI, § 5; Ga. Const. art. VI, ¶ 3; Ill. Const. art. VI, § 16; Ky. Const. § 110; Hawaii Const. art. VI, § 6; Kan. Const. art. III, § 6; La. Const. art. V, § 5; Md. Const. art. IV, § 18; Mont. Const. art. VII, § 63; N.J. Const. art. VI, § 2; N.Y. Const. art. VI, § 4(d); N.C. Const. art. IV, §; Neb. Const. art. V, § 2; N.D. Const. art. VI, § 3; Ohio Const. art. IV, § 5; Okla. Const. art. VII, § 6; Pa. Const. art. V, § 10; W. Va. Const. art. VIII, § 3.

¹¹⁵ Cal. Const. art. VI, § 12; Ga. Const. art. VI, ¶ 8; W. Va. Const. art. VIII, § 5; Wis. Const. art. VII, § 2.

¹¹⁶ W. Va. Const. art. VIII, § 3.

¹¹⁷ Ga. Const. art. VI, ¶ VIII.

¹¹⁸ Ariz. Const. art. 6, § 11; Colo. Const. art. 6, § 5; Ill. Const. art. 6, § 7; Ky. Const. § 113; La. Const. art. 5, § 17; Md. Const. art. 4, §§ 41E, 41F; Mo. Const. art. 5, § 15; Neb. Const. art. 5, § 2; Nev. Const. art. 6, § 3a; N.M. Const. art. 6, § 38; N.J. Const. art. VI, § 1; N.Y. Const. art. VI, § 28; Okla. Const. art. 7-A, § 3, art. 7, § 10; Pa. Const. art. 5, § 10; S.D. Const. art. 5, § 11.

¹¹⁹ In fifteen states, the constitution is explicit. Ariz. Const. art. VI, § 5; Ark. Const. art. 80, § 3; Colo. Const. art. VI, § 21; Del. Const. art. IV, § 13; Hawaii Const. art. VI, § 7; Ill. Const. art. VI, § 16; Ky. Const. § 116; Mich. Const. art. VI, § 5; N.H. Const. pt. 2, art. 73-A; N.J. Const. art. VI, § 2(3); N.D. Const. art. VI, § 3; Okla. Const. art. VII, § 6; Pa. Const. art. V, § 10(c); W. Va. Const. art. VIII, § 3; Wis. Const. art. VII, § 4(3). In another eight states, the constitution uses more general language. Conn. Const. art. II; Kan. Const. art. III, § 1; Idaho Const. art. II, § 1; Ind. Const. art. VII; Minn. Const. art. III, § 1; Miss. Const. art. VI; N.M. Const. art. III, § 1, art. 6, § 3; Wash. Const. art. IV, § 1.

¹²⁰ In 46 states, the judiciary is authorized to oversee the practice of law. Ark. Const. art. 28; Alaska Const. art. IV, § 1; Ariz. Const. art. VI, § 5; Cal. Const. art. VI, § 1; Colo. Const. art. VI, § 1; Conn. Const. art. II; Del. Const. art. 4, § 37; Fla. Const. art. V, § 15; Ga. Const. art. VI, § I, ¶ I; *id.* art. I, § 1, ¶ 23; Hawaii Const. art. VI, § 7; Idaho Const. art. II, § 1, art. V, § 13; Ill. Const. art. VI, § 1; Ind. Const. art. VII, § 4; Kan. Const. art. III, § 1; Ky. Const. § 116; La. Const. art. II, art. V, §§ 5(B, D); Me. Const. art. VI, § 1; Md. Const. Decl. of Rts. art. 8; Mass. Const. pt. 1, art. 30; Mich. Const. art. III, § 2, art. VI, § 5; Minn. Const. art. III, § 1; Miss. Const. § 146; Mo. Const. art. V, § 3; Mont. Const. art. VII, § 2; Neb. Const. art. II, § 1, art. V, § 1; N.H. Const. art. 72-a; N.J. Const. art. VI, § II, ¶ 3; N.M. Const. art. III, § 1; N.C. Const. art. IV, § 1; N.D. Const. art. VI, § 3, art. XI, § 26;

Courts cannot function properly without adequate funding to maintain their operations. Recognizing this, nearly a dozen state constitutions impose limits on the other branches' appropriation authority over the judiciary's budget and funding.¹²¹ Michigan's constitution, for instance, provides for supreme court "control of the preparation of its budget recommendations and the expenditure of moneys appropriated for any purpose pertaining to" its operations, and New York's constitution directs the judiciary transmit "estimates of [its] financial needs . . . to the governor . . . for inclusion in the budget without revision." Others expressly limit executive and legislative authority over judicial budgets. For example, Hawaii's constitution exempts the judiciary's budget from the governor's item veto power, and West Virginia's charter limits year-to-year reductions of judiciary appropriations while imposing supermajority requirements for such changes.¹²²

Access to justice—courts and remedies. From Montana to Maine, state constitutions address access to justice through the availability of court access and remedies. Forty state constitutions mandate their courts be "open"¹²³ and individuals have access to "remed[ies]."¹²⁴ Most constitutions provide for both.¹²⁵ The two most common formulations of these clauses mandate the state's courts "be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay" or that courts be "open, and every person, for an injury done him in his person, property or reputation, shall have remedy by the due course of the law."¹²⁶

In addition to open courts and remedies, state constitutions generally preserve courts' power of judicial review. While only Missouri's constitution provides explicitly for "direct

Okla. Const. art. IV, § 1; Ohio Const. art. IV, § 2(B)(1)(g); Or. Const. art. III, § 1; Pa. Const. art. V, § 10; R.I. Const. art. V; S.C. Const. art. V, § 4; S.D. Const. art. V, § 12; Tenn. Const. art. VI, § 1; Tex. Const. art. II, § 1; Utah Const. art. VIII, §§ 1, 4; Vt. Const. ch. 2, § 30; Va. Const. art. III, § 1; Wash. Const. art. IV, § 1; W. Va. Const. art. VIII, § 1; Wis. Const. art. VII, § 2. The Iowa Supreme Court's regulatory power is seemingly inherent. *E.g.*, *Comm. on Pro. Ethics & Conduct of Iowa State Bar Ass'n v. Bromwell*, 221 N.W.2d 777, 780 (Iowa 1974). Similarly, in Alabama and Nevada, it is unclear whether the judiciary's regulatory is provided or recognized by statute. New York and Wyoming judiciaries appear to rely on a statute for their authority to oversee the bar.

¹²¹ Ala. Const. art. VI, § 149; Hawaii Const. art. 3, § 16; Ky. Const. § 110; Md. Const. art. III, § 52; Mich. Const. art. VI, § 7; Neb. Const. art. V, § 8; N.Y. Const. art. VII, § 1; N.C. Const. art. IV, § 20; S.D. Const. art. V, § 11; W. Va. Const. art. V, § 1, art. VIII, § 1; Wis. Const. art. VII, §§ 2, 4.

¹²² Hawaii Const. art. VII, § 8; W. Va. Const. art. VI, § 51.

¹²³ Ariz. Const. art. II, § 11; Fla. Const. art. I, § 21; Miss. Const. art. III § 25; Wash. Const. art. I § 10; Wyo. Const. art. I, § 8.

¹²⁴ Ill. Const. art. I, § 12; Kan. Bill of Rights § 18; Mass. Const. pt. I, art. XI; Md. Const. art. 19; Me. Const. art. I, § 19; Minn. Const. art. I, § 8; N.H. Const. pt. I, art. 14; RI Const. art. I, § 5; S.D. Const. art. VI, § 20.

¹²⁵ Ala. Const. art. I, § 13; Ark. Const. art. II, § 13; Colo. Const. art. II, § 6; Conn. Const. art. I, § 10; Del. Const. art. I, § 9; Idaho Const. art. I, § 18; Ind. Const. art. I, § 12; Ky. Const. § 14; La. Const. art. I, § 22; Miss. Const. art. III, § 24; Mo. Const. art. I, § 14; Mont. Const. art. II, § 16; N.C. Const. art. I, § 18; N.D. Const. art. I, § 9; Neb. Const. art. I, § 13; Ohio Const. art. I, § 16; Okla. Const. art. II, § 6; Or. Const. art. I, § 10; Pa. Const. art. I, § 11; S.C. Const. art. I, § 9; Tenn. Const. art. I, § 17; Tex. Const. art. I, § 13; Utah Const. art. I, § 11; Vt. Const. ch. I, art. IV; W. Va. Const. art. III, § 17.

¹²⁶ See Marcus Alexander Gadson, *Theseus in the Labyrinth: How State Constitutions Can Slay the Procedural Minotaur*, 98 WASH. L. REV. 1, 9–10 (2023).

review by the courts,”¹²⁷ the constitutions of forty-two other states maintain their courts’ powers to issue all writs or orders “necessary” or “appropriate” to protect their jurisdiction and enforce their judgments.¹²⁸ Florida’s document is illustrative, guaranteeing its courts have “the power to issue . . . all writs necessary or proper to the complete exercise of their jurisdiction.”¹²⁹ Some provisions are more expansive, like Iowa’s, which preserves its high court’s power to “to issue all writs and process necessary to secure justice to parties.” These provisions codified prerogative writ practice, especially its uses to restrain unlawful government action.¹³⁰ Perhaps more importantly, they were also designed to maintain a level of judicial power for the state’s courts to act, notwithstanding other statutory or constitutional provisions.¹³¹

Judicial selection. State constitutions articulate a more specific structure for how judges are selected, retained, and removed than the federal charter. Start first with selection. In each state, the method of judicial selection be it election,¹³² legislative selection,¹³³ merit selection,¹³⁴ or appointment,¹³⁵ is provided in the constitution.

In the states that elect judges, about half rely on districted rather than at-large elections for at least one level of the judiciary. Of these states, sixteen limit the legislature’s power

¹²⁷ Mo. Const. art. V, § 22.

¹²⁸ Ark. Const. art. 80, § 2; Cal. Const. art. VI, § 10; Colo. Const. art. VI, § 3; Del. Const. art. IV, § 11; Fla. Const. art. V, § 3; Idaho Const. art. V, § 9; Kan. Const. art. III, § 3; Mo. Const. art. V, § 4; N.J. Const. art. VI, § 5, ¶ 4; Or. Const. art. VII, § 2; S.C. Const. art. V, § 5; Ala. Const. art. VI, § 142; Ark. Const. art. 80, § 2; Fla. Const. art. V, § 5; Ga. Const. art. VI, ¶ 4; Idaho Const. art. V, § 9; Ill. Const. art. VI, §§ 4, 6; Ind. Const. art. VII, § 4; Iowa Const. art. V, § 4; Ky. Const. §§ 110, 111; La. Const. art. V, § 2; Mont. Const. art. VII, § 4; Nev. Const. art. VI, § 4; N.J. Const. art. VI, § 5, ¶ 3; *id.* § 3, ¶ 4; N.M. Const. art. VI, § 3; N.C. Const. art. IV, § 12; N.D. Const. art. VI, § 2; Ohio Const. art. IV, §§ 2, 3; Okla. Const. art. VII, § 4; Pa. Const. art. V, § 10; R.I. Const. art. X, § 2; S.D. Const. art. V, § 5; Tex. Const. art. V, §§ 3, 5, 8; Utah Const. art. VIII, § 3; Vt. Const. ch. 2, § 30; Wash. Const. art. IV, § 4; W. Va. Const. art. VIII, § 3; Wis. Const. art. VII, § 8; Wyo. Const. art. V, § 3.

¹²⁹ Fla. Const. art. V, § 5.

¹³⁰ *See, e.g.,* Louis L. Jaffe, *The Right to Judicial Review II*, 71 HARV. L. REV. 769, 795-800 (1958). These provisions were also designed to streamline the existing writ practice prominent reformers like Arthur Vanderbilt and Roscoe Pound decried in the 20th century as overly formal.

¹³¹ *See id.* at 796-97; *see also, e.g.,* 2 PENNSYLVANIA CONSTITUTIONAL CONVENTION 1967-1968 JOURNAL, 841-46 (1968); *Florida Senate v. Graham*, 412 So.2d 360 (Fla. 1982); *People ex rel. Graves v. District Court of the Second Judicial Dist.*, 86 P. 87 (Colo. 1906); *Fischer v. Bedminster Twp., Somerset Cnty.*, 76 A.2d 673, 676 (N.J. 1950); *Petition of Bell*, 152 A.2d 731, 734 (Pa. 1959); *Brooks v. State ex rel. Richards*, 79 A. 790 (Del. 1911); *Lamb v. State*, 107 So. 535 (Fla. 1926); *State ex rel. Swan v. Elections Bd.*, 394 N.W.2d 732, 733 (Wis. 1986) (*per curiam*); *Ex parte Nice*, 407 So. 2d 874, 878 (Ala. 1981); *People v. Goodrich*, 149 N.Y.S. 406 (N.Y. App. Div. 1914).

¹³² Ala. Const. art. VI, § 152; Ark. Const. art. 80, §§ 17, 18; Ga. Const. art. VI, § 7, ¶ 1; Idaho Const. art. V, § 6; Ill. Const. art. VI; Iowa Const. art. V, § 17; Ky. Const. § 117; Mich. Const. art. VI, § 2; Minn. Const. art. VI, § 7; Miss. Const. §§ 145, 153, 171; Mont. Const. art. VII, § 8; Nev. Const. art. VI, §§ 3, 3A, 5; N.Y. Const. art. VI, § 6; N.C. Const. art. IV, § 16; N.D. Const. art. VI, §§ 7, 9; Ohio Const. art. IV, §§ 6, 15; Okla. Const. art. VII, §§ 3, 9; Or. Const. art. VII, § 1; Pa. Const. art. V, § 13; Tenn. Const. art. VI, § 4; Tex. Const. art. V, § 2, 4, 7; Wash. Const. art. IV, §§ 3, 5; W. Va. Const. art. VIII, § 5; Wis. Const. art. VII, §§ 5, 7.

¹³³ S.C. Const. art. V, §§ 3, 8; Va. Const. art. VI, § 7.

¹³⁴ Colo. Const. art. VI, § 24; N.D. Const. art. VI, § 13.

¹³⁵ Conn. Const. art. V, § 2; Del. Const. art. IV, § 3; Hawaii Const. art. VI, § 3; Kan. Const. art. IV, § 5; N.J. Const. art. VI, § 6, ¶ 1; N.Y. Const. art. VI, § 9.

to draw or modify judicial district lines. The constitutions prescribe the districts explicitly,¹³⁶ limit when the lines can be changed,¹³⁷ impose contiguity requirements,¹³⁸ mandate supreme court approval of such changes,¹³⁹ or prohibit the removal of judges via redistricting.¹⁴⁰ Further, about half of the constitutions in judicial election states include express representation requirements, mandating supreme court justices be elected or appointed from each district.¹⁴¹

Most state charters lay out the qualifications, mandatory retirement, term limits, and salary protections applicable to the state’s judges, as well. Over forty constitutions provide the criteria required for someone to legally serve as a judge or justice.¹⁴² In most states, judges must have resided in the jurisdiction and been licensed to practice law for a certain number of years, but some impose a minimum age, and Delaware’s constitution requires its judges to be “learned in the law.” In all but one state, the constitution provides for term limits,¹⁴³ mandatory retirement at a particular age,¹⁴⁴ or both. And in a majority of states, the constitution places limits on the legislature’s power to determine judicial

¹³⁶ Ill. Const. art. VI, § 2; Nev. Const. art. VI, § 5; N.Y. Const. art. VI, § 6; Tex. Const. art. V, § 6.

¹³⁷ Miss. Const. art. XIV, § 260; Neb. Const. art. V, § 5; Ky. Const. §§ 112, 113; N.M. Const. art. VI, § 16; N.Y. Const. art. VI, § 6.

¹³⁸ S.C. Const. art. V, § 13; Wis. Const. art. VII, § 6.

¹³⁹ Ala. Const. art. VI, § 151; Pa. Const. art. V, § 11.

¹⁴⁰ Ky. Const. § 119; Miss. Const. § 145; Neb. Const. art. V, § 11.

¹⁴¹ Fla. Const. art. V, § 3; Ill. Const. art. VI, § 3; Ky. Const. § 117; Md. Const. art. IV, § 14; Miss. Const. § 145; Nev. Const. art. VI, § 5; N.M. Const. art. VI, § 14; N.Y. Const. art. VI, § 6; N.C. Const. art. IV, § 9; N.C. Const. art. VI, § 16; N.D. Const. art. VI, § 9; Okla. Const. art. VII, § 7.

¹⁴² Ala. Const. art. VI, § 146; Alaska Const. art. IV, § 4; Ark. Const. art. 80, § 16; Ariz. Const. art. VI, § 6; Cal. Const. art. VI, § 15; Colo. Const. art. VI, §§ 8, 11, 14-16; Del. Const. art. IV, § 2; Fla. Const. art. V, § 8; Ga. Const. art. VI, § 6, ¶ 1; Hawaii Const. art. VI, § 3; Idaho Const. art. V, § 23; Ill. Const. art. VI, § 11; Iowa Const. art. V, § 18; Kan. Const. art. III, § 7; Ky. Const. § 122; La. Const. art. V, § 24; Md. Const. art. VI, pt 1, § 2; Mich. Const. art. VI, § 19; Minn. Const. art. VI, § 5; Miss. Const. art. VI, § 171; Mo. Const. art. V, § 21; Mont. Const. art. VII, § 9; Neb. Const. art. V, ¶ 7; Nev. Const. art. VI, § 8; N.J. Const. art. VI, § 6, ¶ 2; N.M. Const. art. VI, §§ 8, 14, 28; N.Y. Const. art. VI, § 20; N.C. Const. art. IV, § 22; N.D. Const. art. VI, § 10; Okla. Const. art. VII, § 2; Ore. Const. art. VII, § 2; Pa. Const. art. V, § 12; S.C. Const. art. V, § 15; S.D. Const. art. V, § 6; Tenn. Const. art. VI, §§ 3, 4; Tex. Const. art. V, § 2; Utah Const. art. VIII, § 7; Va. Const. sched. § 4; W. Va. Const. art. VIII, § 7; Wis. Const. art. VII, § 10; Wyo. Const. art. V, § 8.

¹⁴³ Ala. Const. art. VI, § 154; Ariz. Const. art. VI, § 4; Cal. Const. art. VI, § 16; Colo. Const. art. VI, § 16; Conn. Const. art. V, § 2; Del. Const. art. IV, § 3; Ga. Const. art. VI, § 7, ¶ 1; Idaho Const. art. V, § 6; Ill. Const. art. VI, § 10; Ky. Const. § 119; La. Const. art. V, § 3; Md. Const. art. IV, § 14; Mich. Const. art. VI, §§ 2, 9; Minn. Const. art. VI, § 7; Miss. Const. §§ 149, 153; Mo. Const. art. V, § 19; Nev. Const. art. VI, §§ 3, 3A, 5; N.J. Const. art. VI, § 6, ¶¶ 2, 3; N.Y. Const. art. VI, §§ 6, 12, 13, 15; N.Y. Const. art. VI, §§ 6, 12, 13, 15; N.C. Const. art. IV, § 16; N.D. Const. art. VI, §§ 7, 9; Ohio Const. art. IV, § 6; Okla. Const. art. VII, § 2; Or. Const. art. VII, § 1; S.C. Const. art. 5, §§ 3, 8, 13; Tex. Const. art. V, §§ 6, 7; Vt. Const. ch. 2, § 34; Wis. Const. art. VII, §§ 4, 7; W. Va. Const. art. VIII, § 5; Wyo. Const. art. V, § 4.

¹⁴⁴ La. Const. art. V, § 23; N.J. Const. art. VI, § 6, ¶ 3; Wash. Const. art. IV, § 3(a); Wis. Const. art. VII, § 5; Wyo. Const. art. V, § 5.

salaries. Most provisions prevent lawmakers from reducing salaries during a judge's term,¹⁴⁵ but in others the legislature is prevented from reducing salaries at all.¹⁴⁶

Nearly every state's constitution limits the legislature's power to expand or contract the size of its courts. Thirty-two state charters limit the size of their highest courts.¹⁴⁷ These limits include lower courts, as well. In 13 states, the constitution restricts the legislature's power to create or remove new judgeships via voting thresholds, conditions precedent, only authorizing the creation of judgeships, and more.¹⁴⁸ In five states, the legislature can only add new judgeships with the supreme court's consent.¹⁴⁹ Kentucky's high court must certify a finding of "necessity" authorizing the statehouse to act and South Dakota's justices have plenary power to add new judgeships by court rule.

B. Logics of State Judicial Independence

These provisions provide a window into how state constitutions structure the independence of their judiciaries. Most of the provisions above were drafted and added to their respective charters during the 19th and 20th centuries. They followed the conceptual shift in how states viewed judicial independence. Early state constitutions framed judicial independence as a concept vested in individual judges rather than protection for the courts as a whole.¹⁵⁰ The institutional concept of independence represented in state constitutions today was largely a product of the 20th century, when, as Robert Tobin put it, state judiciaries "came alive."¹⁵¹ Before then, "the state judicial branch . . . existed mostly in concept, not in operational reality."¹⁵²

In these ways, the many provisions outlined above were deliberately added to state charters for the specific purpose of enhancing the independence of the court system. But

¹⁴⁵ Ariz. Const. art. VI, § 33; Ark. Const. art. 80, § 16; Cal. Const. art. III, § 4; Colo. Const. art. VI, § 18; Hawaii Const. art. XVI, § 3.5; Ill. Const. art. VI, § 14; Ind. Const. art. VII, § 19; Kan. Const. art. III, § 13; Md. Const. art. IV, § 41H; Minn. Const. art. VI, § 5; Mo. Const. art. V, § 20; Mont. Const. art. VII, § 7; N.H. Const. pt. 1, art. 35; N.J. Const. art. VI, § 6, ¶ 6; N.C. Const. art. IV, § 21; N.D. Const. art. VI, § 9; Nev. Const. art. VI, § 15; N.M. Const. art. VI, § 11; Okla. Const. art. VII, § 11; R.I. Const. art. X, § 6; Utah Const. art. VIII, § 14; Va. Const. art. VI, § 9; W. Va. Const. art. VIII, § 7; Wyo. Const. art. V, § 17.

¹⁴⁶ Mass. Const. pt. 2, cl. 2, § 1, art. 13; Wash. Const. art. IV, § 14.

¹⁴⁷ In 18 states, the number of judges is fixed. Ark. Const. art. 80 § 2; Fla. Const. art. V, § 3; Idaho art. V, § 6; Ill. Const. art. VI, § 3; Ky. Const. § 110; La. Const. art. V, § 3; Minn. Const. art. VI, § 2; N.D. Const. art. VI, § 2; Miss. Const. § 145B; Mo. Const. art. V, § 2; Neb. Const. art. V, § 2; N.M. Const. art. VI, § 4; S.C. Const. art. V, § 2; Tenn. Const. art. VI, § 2; Tex. Const. art. V, §§ 2, 4; Vt. Const. ch. 2, § 29; Wash. Const. art. IV, § 2; Wis. Const. art. VII, § 4. In the other fourteen, the constitution sets a minimum, maximum, or both.

¹⁴⁸ Ala. Const. art. VI, § 154; Ariz. Const. art. VI, §§ 10, 33; Ill. Const. art. VI, § 12; Ky. Const. § 119; Minn. Const. art. VI, § 4; Neb. Const. art. V, § 11; N.M. Const. art. VI, § 16; N.Y. Const. art. § 6; Ohio Const. art. IV, § 3, 15; S.C. Const. art. V, § 13; Utah Const. art. VIII, §§ 2, 6; Va. Const. art. VI, § 2.

¹⁴⁹ Ala. Const. art. VI, § 151; *id.* art. IV, § 2; Colo. Const. art. VI, § 7; Fla. Const. art. V, § 9; Ky. Const. §§ 112, 113; S.D. Const. art. V, § 3.

¹⁵⁰ See MICHAEL L. BUENGER & PAUL J. DE MUNIZ, AMERICAN JUDICIAL POWER: THE STATE COURT PERSPECTIVE 35-36 (2016); TARR *supra* note 40, at 8-67.

¹⁵¹ ROBERT W. TOBIN, CREATING THE JUDICIAL BRANCH: THE UNFINISHED REFORM 4-5, 119(1999).

¹⁵² *Id.* at vii.

text alone cannot explain judicial independence.¹⁵³ The constellation of provisions is a product of certain historical, political, and doctrinal contexts that operate with the shared objective of maintaining the independence of state judiciaries. A more complete account of state judicial independence is within reach when we consider how these many provisions cohere towards that goal. To that end, this Section develops a set of “structural logics”—analytical frames linking doctrine, institutional design, and politics—that synthesize constitutional text and structure, as well as the corresponding history and background principles that, together, inform constitutional meaning and content.¹⁵⁴

I identify five logics that underscore that state constitutions support the judiciary as a coordinate branch, include detailed structures to prevent legislative mischief, require the availability of a certain level of court access and judicial relief, obligate the judiciary to maintain a certain level of integrity in the court system, and establish a close connection between the courts and the people they serve. These logics overlap, but we should think of them as conceptually distinct yet mutually enforcing towards the same objective of preserving the judiciary’s independence.

To be sure, these logics flow from a collection of provisions in state constitutions that were drafted, amended, and adopted by different people at different times. But, as Section II.A demonstrates, state charters contain many of the same provisions and as scholars have documented, when writing their constitutions, they borrowed from one another, often in response to common political, social, and economic developments.¹⁵⁵ For these reasons, state constitutionalists have argued that it is possible to extract meaningful accounts of state charters by recognizing the inevitability of state-by-state variation, but focusing on the “tradition[s],” “theor[ies],” and “principle[s]” they share.¹⁵⁶ This Section proceeds in a similar vein.

1. The judiciary is an independent, coordinate branch

Before state courts “came alive” as an independent branch of government during the twentieth century, judicial function was shared among all three branches.¹⁵⁷ Court systems consisted of a diffused series of tribunals rather than the centralized systems we

¹⁵³ See, e.g., Aziz Z. Huq, *Why Judicial Independence Fails*, 115 NW. U. L. REV. 1055, 1065 (2021) (observing that judicial independence “cannot be a matter of textual exegesis alone”).

¹⁵⁴ See, e.g., Aziz Z. Huq, *Structural Logics of Presidential Disqualification*, 135 HARV. L. REV. 172 (2024); Aziz Z. Huq, *Structural Logics of Presidential Immunity*, 75 DUKE L.J. 565 (2026). I am not the first scholar to rely on this method in the context of state public law. See Sarah L. Swan, *Tort Logics for State Constitutional Injuries*, 2025 WIS. L. REV. 1405 (looking to history, doctrine, and institutional incentives to extract the “logics” that distinguish ordinary from state constitutional torts).

¹⁵⁵ See, e.g., G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 152-53 (1998); JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 3-5, 7-11 (2006).

¹⁵⁶ See, e.g., DINAN, *supra* note 155, at 5; Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 301 (1998); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 865-68 (2021).

¹⁵⁷ TOBIN, *supra* note 151, at 4-5.

have today.¹⁵⁸ State court systems were largely run by the other branches: rulemaking, administrative policies, workload decisions, and more were largely decided by the executive and legislative branches.¹⁵⁹ This proved unworkable. The other branches lacked sufficient expertise with the demands of judges and litigants and were too focused on using their control over the courts for political advantage. Into the nineteenth centuries, most state courts withered into poorly run, overly politicized institutions.¹⁶⁰ This changed in the twentieth century, motivated by “popular dissatisfaction” with the status quo, as state judiciaries were reimagined nationwide.¹⁶¹

The primary goal behind these reforms was constructing an independent, third branch of government. A signal feature of such efforts was establishing operational and administrative independence: without control of their own business, reformers reasoned, “then the judiciary does not deserve to be called a third branch of government.”¹⁶² The provisions that best instantiate this logic are those dealing with general administrative oversight, rulemaking, and budgetary control, though, as this discussion suggests, we should understand them as a cohesive whole.

Administrative control. Ensuring judiciaries had administrative oversight over their own courts and personnel was arguably the defining feature of the court reform movement.¹⁶³ Scholars and policymakers had long recognized the linkage between judicial administration and independence,¹⁶⁴ but because of the growth in size and complexity of state judiciaries over the twentieth century, reformers saw the connection as paramount to their primary goal of elevating state court systems to coordinate status as the other branches.¹⁶⁵ Thus, reformers vested state courts with administrative authority and supervisory power.¹⁶⁶ They also codified the creation of administrative offices,¹⁶⁷ separate bureaucratic entities that provide managerial and technical support for the courts, among other provisions focused on court operations.¹⁶⁸ The various provisions vesting broad administrative power to more explicit actions, like authority to transfer

¹⁵⁸ R. Stanley Lowe, *Unified Courts in America: The Legacy of Roscoe Pound*, 56 JUDICATURE 316, 317–18 (1973); Buenger, *supra* note 62, at 1012–13.

¹⁵⁹ See Marin K. Levy, *The Invention of the Judicial Administrative State*, 123 MICH. L. REV. 1051 (2025).

¹⁶⁰ See, e.g., TOBIN, *supra* note 151, at 25–80, 146 (documenting this history); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 116–20 (4th ed. 2019); LARRY BERKSON & SUSAN CARBON, COURT UNIFICATION: HISTORY, POLITICS AND IMPLEMENTATION 1–2 (1978).

¹⁶¹ TARR, *supra* note 155, at 136–72; TOBIN, *supra* note 151, at 119–34.

¹⁶² TOBIN, *supra* note 151, at 23.

¹⁶³ See generally, e.g., TOBIN, *supra* note 151; RUSSELL R. WHEELER, JUDICIAL ADMINISTRATION: ITS RELATION TO JUDICIAL INDEPENDENCE (1988); Buenger, *supra* note 62.

¹⁶⁴ See, e.g., WHEELER, *supra* note 163; BUENGER & DE MUNIZ, *supra* note 150, at 33–40.

¹⁶⁵ See, e.g., BUENGER & DE MUNIZ, *supra* note 150, at 45–95 (discussing the expansion of the judicial role).

¹⁶⁶ See, e.g., Del. Const. art. IV, § 13; Ill. Const. art. VI, § 16; Pa. Const. art. V, § 10.

¹⁶⁷ Mich. Const. art. VI, § 3; Mo. Const. art. V, § 4; N.D. Const. art. VI, § 3.

¹⁶⁸ See, e.g., BUENGER & DE MUNIZ, *supra* note 150, at 33–40 (discussing other amendments).

cases or judges within the courts or oversee probation officers, were understood as instantiating control over “all facets of the internal management of [the] courts.”¹⁶⁹

The premise behind these structural changes was that institutional independence was not possible if the executive and legislative departments could dictate how courts perform their core adjudicative function. The need for a robust administrative function grew with the increased size and complexity of state court systems in the 20th century. There were more cases and judges, and increasingly more policy areas peripheral to their judgments housed within the courts—like probation and various social services.¹⁷⁰ Leading voices behind the reforms that prompted this expansion in court business recognized the efficacy of courts would turn on the strength of their administration.¹⁷¹ In these ways, the administrative authority reserved to the courts is so fundamental to the institution itself that it is often understood as inseparable from the existence of state judiciaries themselves.¹⁷²

Rulemaking. A crucial element to ensuring judiciaries had total operational control of the court system was vesting them with rulemaking power. Procedural and evidentiary rules determine what constitutes a dispute for purposes of resolution and dictate a court’s capacity to resolve it — control over procedure is control of the judicial power. Freed from the notion that only the legislature makes positive law, contemporary state constitutions understood legislative participation in rulemaking as “interference with what ought to be left to the courts.”¹⁷³

In nearly forty states, the constitution explicitly vests such power in the courts. Several others locate rulemaking authority in more general text, like a separation of powers clause, or as an inherent power.¹⁷⁴ Thus, even in some states where the constitution reserves some role for the legislature in the rulemaking process, there are implied limits that maintain a degree of ultimate authority over procedure to the judiciary.¹⁷⁵

¹⁶⁹ See, e.g., *Passaic Cnty. Prob. Officers’ Ass’n v. Passaic Cnty.*, 374 A.2d 449, 451, 451 n.3 (1977) (quoting Arthur Lewis, a delegate to New Jersey’s Constitutional Convention of 1947, and subsequently an appellate judge in the newly created state court system).

¹⁷⁰ See, e.g., Buenger, *supra* note 62, at 1028; BUENGER & DE MUNIZ, *supra* note 150, at 73-95.

¹⁷¹ See generally, e.g., Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395 (1906); ARTHUR T. VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* (1949).

¹⁷² See, e.g., *Jud. Att’ys Ass’n v. State*, 586 N.W.2d 894, 897 (Mich. 1998); *In re “Sunshine Law,”* 255 N.W.2d 635 (Pa. 1977); see also A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 30 (1958).

¹⁷³ See Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599 (1926); John H. Wigmore, *All Legislative Rules For Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1928).

¹⁷⁴ See Bill Raftery, *What Is The Rulemaking Authority For State Courts of Last Resort?*, NTL. CTR. STATE CTS. (Nov. 21, 2024).

¹⁷⁵ See, e.g., *State v. Second Jud. Dist. Ct. ex rel. Cnty. of Washoe*, 11 P.3d 1209 (Nev. 2000); *OATL v. Sheward*, 86 Ohio St.3d 451, 478–479 (Ohio); *Rockey v. 84 Lumber Co.*, 611 N.E.2d 789 (Ohio 1993); *Maxfield v. Gary Herbert*, 284 P.3d 647 (Utah 2012).

As discussed above, this was a marked change from much of the country's history, but vesting such responsibility with legislators proved to be a poor institutional fit.¹⁷⁶ As judiciaries grew more complex and technical, procedure increasingly had to account for the judiciary's internal administrative processes, of which legislatures typically have little knowledge.¹⁷⁷ And unlike the executive and judicial branches, legislators are part-time government actors, typically meeting for a few weeks each year, where time and attention are often scarce. Thus, legislatures were seen as too slow to respond and lacking sufficient expertise to wield such power.¹⁷⁸

The institutional incentives also differed. Legislatures had shown themselves to be "utterly careless of the public welfare," and, in many states, a "hopelessly corrupt" institution.¹⁷⁹ Eighteenth-century court procedure often reflected the "importunings of special interest groups," rather than evolving demands of litigation and legal practice.¹⁸⁰ For these reasons most states reallocated rulemaking authority to the judiciary, recognizing both these specific risks and a broader conceptual shift away from legislative supremacy toward an expanding theory of the judicial role. Vesting this power with the courts follows directly from the reform movement's broader goal of establishing the judiciary as a truly coordinate branch, since both the executive and legislative departments maintain the power "to determine the rules of [their own] proceedings."¹⁸¹

Budgetary authority. Like all governance institutions, courts need money to exist and function properly.¹⁸² Thus, as with rulemaking and administrative powers, control over courts' fiscal levers creates opportunities to control the courts themselves.¹⁸³ Over time judicial budgets have swelled and with them courts' reliance on consistent revenue streams.¹⁸⁴

The primary questions surrounding judicial budgets are the questions of where the revenue comes from—state versus local funding models—and the level of control courts have crafting their own budgets. For much of their history, state courts were funded locally, and the judiciary played almost no role in determining its operating budget.¹⁸⁵ Beginning in the 1940s, states started moving their court systems to state-level funding, in part to minimize "judicial localism."¹⁸⁶ And in the 1970s, states sought to increase

¹⁷⁶ BERKSON & CARBON, *supra* note 160, at 10.

¹⁷⁷ Levin & Amsterdam, *supra* note 172.

¹⁷⁸ TOBIN, *supra* note 151, at 16.

¹⁷⁹ Charles Chauncey Binney, *Restrictions Upon Local and Special Legislation in the United States*, 41 U. PA. L. REV. 613, 621 (1893).

¹⁸⁰ Glenn S. Koppel, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 PEPP. L. REV. 455, 466 (1997); TOBIN, *supra* note 151, at 146.

¹⁸¹ *E.g.*, Pa. Const. art. II, § 11.

¹⁸² For the foundational work on the politics of state court finance, see generally CARL BAAR, *SEPARATE BUT SUBSERVIENT: COURT BUDGETING IN THE AMERICAN STATES* (1975) and Buenger, *supra* note 62.

¹⁸³ *See, e.g.*, James W. Douglas & Roger E. Hartley, *The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?*, 63 PUB. ADMIN. REV. 441 (2003).

¹⁸⁴ BAAR, *supra* note 182, at 1.

¹⁸⁵ *See, e.g.*, Buenger, *supra* note 62, at 1011-12.

¹⁸⁶ TOBIN, *supra* note 151, at 59-63.

judicial autonomy over their finances through constitutional, statutory, and political developments.¹⁸⁷ Both developments, but especially granting the courts more budgetary control, were designed to minimize political leverage over the judiciary and further increase their autonomy as a coordinate branch.

Throughout the twentieth century, as states redesigned their court systems, vesting administrative control in their highest courts, they imposed an obligation on the judiciary to “be alert to the needs and requirements of the court system” and “to see that the public interest is fully served by the proper functioning of [the branch].”¹⁸⁸ That obligation necessarily implicates a judiciary’s funding and thus is perhaps as much a product of a judiciary’s structure as it is an express provision within the constitution.¹⁸⁹ For example, as the Wisconsin Supreme Court explained, the 1977 revision of its judiciary article “created a court system as autonomous administratively as it had always been in adjudication,” and though the revised constitution did not explicitly provide for budgeting responsibilities, the court recognized that maintaining the branch’s newly enacted structural independence necessarily assumed a certain level of control over its budget and finances.¹⁹⁰

Though it is true that the appropriation process rests primarily with the executive and legislative branches, state constitutions’ distinctive separation-of-powers tradition¹⁹¹ imposes limits on what is occasionally framed as a “plenary power.”¹⁹² Courts have long recognized “there must be a reasonable and proper exercise of power by each branch.”¹⁹³ For example, “a state legislature cannot appropriate another branch of government out of business.”¹⁹⁴ At the same time, courts have generally recognized limits to their power to control and, more often, compel funding for their branch.¹⁹⁵

2. Constitutions maintain a certain level of court access and availability of remedies

¹⁸⁷ See generally BAAR, *supra* note 182, at 35-94 (documenting these developments across changes to positive law and unwritten norms).

¹⁸⁸ *Passaic Cnty. Prob. Officers’ Ass’n v. Passaic Cnty.*, 73 N.J. 247, 253, 374 A.2d 449, 452, 452 n.4 (1977) (citing 5 ROSCOE POUND, JURISPRUDENCE 408-09 (1959)); *State ex rel. Bagley v. Blankenship*, 246 S.E.2d 99, 107 (W. Va. 1978); see also Buenger, *supra* note 62, at 1016-21.

¹⁸⁹ See *supra* notes 182-187 and accompanying text; Buenger, *supra* note 62, at 1011-27 (collecting cases and discussing similar arguments); see also *People ex rel. Bier v. Scholz*, 394 N.E.2d 1157, 1159 (Ill. 1979).

¹⁹⁰ *State ex rel. Moran v. Dep’t of Admin.*, 307 N.W.2d 658, 662 (Wis. 1981).

¹⁹¹ See Marshfield, *supra* note 73.

¹⁹² See, e.g., *State ex rel. King v. Morton*, 955 So. 2d 1012, 1018 (Ala. 2006) (“[The] Legislature’s power over appropriations is plenary.”); but see, e.g., *Colo. Gen. Assembly v. Lamm*, 704 P.2d 1371, 1380 (Colo. 1985) (“With respect to appropriations, the power of the legislature is plenary, subject only to constitutional limitations.”).

¹⁹³ *Dist. Judges of 188th Jud. Dist. v. Cnty. Judge Gregg Cnty.*, Tex., 657 S.W.2d 908, 909 (Tex. App. 1983), writ refused NRE (Jan. 25, 1984).

¹⁹⁴ Buenger, *supra* note 62, at 1031; see also, e.g., *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193, 199 (Pa. 1971) (“Unless the legislature can be compelled by the courts to provide the money which is reasonably necessary for the proper administration of the Courts, our entire Judicial system could be extirpated, and by the Legislature could make a mockery of our form of Government . . .”).

¹⁹⁵ See Buenger, *supra* note 62, at 1034-42.

State constitutions talk in detail about court access and the availability of relief. To be sure, such clauses maintain court fora for private disputes, but an important purpose of preserving access to judicial remedies was to check unlawful government action. State legislatures exercise the police power, open-ended authority that is only legally constrained by the state and federal constitutions.¹⁹⁶ And as experience in eighteenth and nineteenth centuries showed, the limited checks on such power proved problematic.

Part of the ascendance of state courts during the twentieth century included the normalization of the judiciary's role as a check on abuses by the legislature.¹⁹⁷ Coordinate branches, in turn, stood to benefit from "intermeddling . . . to alter the outcome of lawsuits," thus undermining this institutional function of the judiciary.¹⁹⁸ Learning from experience, almost every state included in their constitutions tools to maintain such independence.¹⁹⁹ Open courts clauses place limits on the legislature's power to abolish causes of action and eliminate the judiciary's capacity to review potentially unlawful acts. Remedies clauses and all writs provisions limited legislative control over the availability of important remedies, including prerogative writs—the most important forms of relief for ultra vires acts. In these ways, state charters speak not only of preserving access to courts and remedies for *parties*, but they also provide tools so *courts* can enforce their judgments—a central element of judicial independence—and with them a "duty" to do just that.²⁰⁰

Open Courts & Remedies Clauses. As scholars have explained, Open Courts and Remedies Clauses owe their existence to Magna Carta. Jonathan Hoffman has argued that these clauses instantiate constitutional protections for "the administration of common-law justice from improper outside interference."²⁰¹

¹⁹⁶ See generally DANIEL B. RODRIGUEZ, GOOD GOVERNING: THE POLICE POWER IN THE AMERICAN STATES 237-60 (2024).

¹⁹⁷ See TARR, *supra* note 155, at 122-24, 162-65 (2006); see also, e.g., *Hotel Casey Co. v. Ross*, 23 A.2d 737 (Pa. 1942).

¹⁹⁸ Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 Or. L. Rev. 1279, 1312 (1995).

¹⁹⁹ See, e.g., *id.* at 1311-16 (discussing relevant history).

²⁰⁰ BUENGER & DE MUNIZ, *supra* note 150, at 176; see also, e.g., *Davis v. Ballard*, 1 I.J.J.Marsh. 563, 568 (Ky. App. 1829) (construing the Commonwealth's open courts clause and concluding that if "it shall occur that the right of the citizen has been invaded contrary to the constitution, it is the duty of the judiciary to shield him from oppression"); *Fishers Negroes v. Dabbs*, 14 Tenn. 119 (Tenn. 1834) (similar).

²⁰¹ Hoffman, *supra* note 198, at 1296. The description above does not include the rich literature that understands these provisions as closer to a positive rights guarantee. See, e.g., Gadson, *supra* note 126; Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. (2012). Others have offered narrower accounts that understand these provisions imposing narrow limits on the courts, legislatures, or both. See, e.g., David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197 (1992); Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970); BUENGER & DE MUNIZ, *supra* note 150, at 199-203 (discussing other theories). However, Hoffman critiques these theories as insufficiently grounded in the historical context in which Coke wrote his *Institutions* and early constitution drafters adopted his gloss. See Hoffman, *supra* note 198, at 1289-90.

Early state court understandings were in accord.²⁰² For instance, in one of the first reported interpretations of such clauses, Tennessee's high court enjoined the legislature from narrowing the scope of a cause of action, explaining "[i]f the legislature . . . be permitted to . . . control the action of the judges within their peculiar sphere, the liberty of the citizens, under the government of good legislators, would be in imminent peril, and under bad ones would be entirely destroyed."²⁰³

The literature on these clauses documents the significant variation within and among courts as to their scope, reach, and application.²⁰⁴ A stronger formulation of this jurisprudence takes a skeptical view of the legislature's role in defining legal injuries and available remedies.²⁰⁵ Consistent with broader themes in state constitutional development, legislatures have demonstrated "majoritarian indifference and even hostility" to court access, and thus, resort to "normal political processes" was no solution to ensuring the people's courts remained open and remedies available.²⁰⁶ On this view, remedies clauses were placed in constitutions "to bar sovereign power, whether kingly, parliamentary, or legislative, from undermining an independent judiciary and arbitrarily abolishing remedies that protect . . . each individual."²⁰⁷

Courts taking a narrower view of these provisions understand them as "mandate[s] to the judiciary . . . rather than [] limitation[s] on the legislature."²⁰⁸ These approaches rest on certain assumptions concerning the reach of a court's common lawmaking power versus the scope of the legislature's authority.²⁰⁹ Yet even such deferential conceptions of remedies clauses recognize they prevent the legislature from "completely depriv[ing] citizens of the right to seek a remedy," as that would impermissibly intrude on the judiciary's independent role to provide relief.²¹⁰ Thus, despite the varied conceptions of these clauses, a shared premise is their connectivity to the judiciary's institutional independence.

Power to issue "All Writs." Among their objectives, twentieth century court reformers wanted to simplify state court practice, namely by reinventing the wooden, complex prerogative and ancillary writ practices inherited from England.²¹¹ The existing regime led

²⁰² See Thomas R. Phillips, *The Constitutional Right to A Remedy*, 78 N.Y.U. L. REV. 1309, 1326-31 (2003) (documenting early interpretations in the states).

²⁰³ *Fisher's Negroes v. Dabbs*, 14 Tenn. 119, 137-38 (1834).

²⁰⁴ See, e.g., 1 JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS CLAIMS AND DEFENSES* § 6.02 (4th ed.).

²⁰⁵ *Id.*

²⁰⁶ *Lyon v. Burton*, 5 P.3d 616, 625 (Utah 2000); *Condemarin v. University Hosp.*, 775 P.2d 348, 367 (Utah 1989).

²⁰⁷ *Craftsman*, 974 P.2d 1194 (Stewart, J., concurring).

²⁰⁸ *Crier v. Whitecloud*, 496 So. 2d 305, 310 (La. 1986).

²⁰⁹ See, e.g., *Adams v. Iten Biscuit Co.*, 162 P. 938, 942-46 (Okla. 1917).

²¹⁰ *Whitecloud*, 496 So. at 310; *Johnson v. Scott*, 702 P.2d 56, 58 (Okla. 1985) (similar reasoning).

²¹¹ See, e.g., FRIEDMAN, *supra* note 160, at 116-20; see also *Monks v. New Jersey State Parole Bd.*, 58 N.J. 238, 248-49, 277 A.2d 193, 198 (N.J. 1971) ("When our 1947 Constitution was prepared, pains were taken to insure not only that the court's prerogative writ jurisdiction would remain intact, but also that the manner of its exercise would be greatly simplified.").

to incredibly slow and unpredictable litigation that few attorneys could understand, let alone unrepresented litigants.²¹² A common solution was the “all writs” clause, present in almost every state’s charter, which expressly grants courts the power to issue “all writs necessary” to aid their jurisdiction.²¹³

At the same time, these clauses expanded courts’ authority to review the actions of the other branches and rein in unlawful conduct. Consistent with their expanded role vis a vis the other branches, all writs provisions enhanced the power of state courts to monitor the legislature and executive by constitutionalizing the primary tools to enjoin state action, remove individuals from office, and more.²¹⁴

Consolidating the multiple writs into a single action in some states made it easier for parties to seek such relief by eliminating the many technical and distinctive requirements associated with each particular remedy. The clauses were part of the Poundian paradigm that sought to move courts away from “spending more time . . . maneuvering through procedural bypaths than in applying the substantive law.”²¹⁵

Further, all writs clauses made their way into many state charters at a time of changing norms around the institutional identity of state courts. Namely, the view that judicial review is a primary check on the other branches and whether they are continuing to “serve[] the public welfare or [are] merely promot[ing]” special interests are judicial questions.²¹⁶ Delegates to New Jersey’s 1947 constitutional convention, for instance, recognized that such remedies were necessary for courts to prevent “injustice” and so had to remain “free and exempt from any legislative interference.”²¹⁷ This view echoed in other states, as well.²¹⁸ Drawing from their constitutions’ text, states from Massachusetts to Montana often provide relief where it is either “necessary” or “proper” to prevent an unjust result and invalidate legislative attempts to narrow such remedies.²¹⁹ All writs clauses thus maintain the means for courts to review and enjoin illegal government actions and shield that prerogative from legislative override.

3. Constitutionalizing judicial structure is designed to prevent legislative meddling.

²¹² See FRIEDMAN, *supra* note 160, at 116.

²¹³ See *supra* note 31 and accompanying text.

²¹⁴ See Sopko, *supra* note 108, at 1559-60; Howell, “Purely the Creature of the Inventive Genius of the Court”: *State Ex Rel. Whiteside and the Creation and Evolution of the Montana Supreme Court’s Unique and Controversial Writ of Supervisory Control*, 69 MONT. L. REV. 1, 58-68 (2008)

²¹⁵ See Robert L. Hausser, *The Original Jurisdiction of the Ohio Supreme Court*, 7 OHIO ST. U.L.J. 27 (1941); Roscoe Pound, *Principles and Outline of a Modern Unified Court Organization*, 23 J. AM. JUDICATURE SOC’Y. 225, 230-31 (1940).

²¹⁶ See TARR, *supra* note 155, at 121-24.

²¹⁷ See IV STATE OF N.J., CONSTITUTIONAL CONVENTION OF 1947, at 94 (1948); *id.* at 179 (statement of Hon. William J. Brennan); see also Ronald K. Chen, *How Two Constitutional Reforms Gave New Jersey Government More Streamlined Authority and Judicial Review*, N.J. LAW., Oct. 2022, at 51-54 (discussing this history).

²¹⁸ See Sopko, *supra* note 108, at 1559-61.

²¹⁹ See, e.g., *State v. Allen*, 615 S.E.2d 256, 260 (N.C. 2005), opinion withdrawn on unrelated grounds, 635 S.E.2d 899 (2006); *Fischer v. Bedminster Twp., Somerset Cnty.*, 5 N.J. 534, 539, 76 A.2d 673, 675 (1950); *Shore v. District Court* (Colo. 1953); *Clark v. Utilities Comm’n* (Colo. 1903).

The length and detail with which state constitutions discuss their judiciaries casts Article III's 369 words into stark contrast. For the first 150 years of U.S. history, state court systems were largely local institutions. Local judges decided most cases, were selected and paid by local entities, and even courts with state jurisdiction were functionally local because local governments funded them, giving municipalities significant power over court operations and, in some instances, case outcomes.²²⁰

As already noted, early state constitutions included judiciary articles, leaving legislatures substantial discretion over courts' personnel, structure, and operations. Such control was both a check on local abuses and consistent with the then-prevailing idea of the supreme legislature, authorizing lawmakers to select judges, oversee administration, draft procedural rules, and use tools like “ripper bills” to eliminate courts entirely in response to unfavorable decisions.²²¹

By the mid-nineteenth century, however, concerns about patronage and corruption had migrated to statehouses. Economic crises and legislative non-responsiveness engendered widespread belief that “legislatures are by nature utterly careless of the public welfare.”²²² States responded by constitutionalizing limitations on legislative power and rewriting their charters with detailed prescriptions reflecting “important principles of governance.”²²³ Though sometimes pejoratively called “statutory,” these meticulous provisions leveraged state constitutions as a “political technology” to entrench allocations of power against ordinary politics.²²⁴

The constitutionalization of state judiciaries proceeded against this backdrop, minimizing legislative control over courts. Detailed judicial structures, selection mechanisms, and qualifications reflect an evolving skepticism of legislative power. That logic shapes how courts interpret structural provisions today: such provisions are typically read exclusively, so that the absence of an explicit grant to the legislature functions as a limit on its power, preserving fidelity to both separation-of-powers principles and the historical distrust of legislative control that animates modern state charters.

Structural durability. The structural design of most state constitutions provides for particular courts, distributes judicial power to them, and vests them with jurisdiction. The particularity behind such design features constrains legislative authority to alter the court system, even under constitutions that expressly provide some legislative role in judicial structure, jurisdiction, or procedure.

²²⁰ See TOBIN, *supra* note 151, at 66-70; BERKSON & CARBON, *supra* note 160, at 17 (“Politics and patronage characterized local justice.”).

²²¹ See, e.g., GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 161 (1998); JOHN PHILLIP REID, LEGISLATING THE COURTS: JUDICIAL DEPENDENCE IN EARLY NATIONAL NEW HAMPSHIRE 13 (2009); G. Alan Tarr, *Contesting the Judicial Power in the States*, 35 HARV. J. L. PUB. POL’Y 643, 644-51 (2012).

²²² Binney, *supra* note 179, at 621.

²²³ See EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES 19 (2013).

²²⁴ See Donald S. Lutz, *The Purposes of American State Constitutions*, 12 PUBLIUS 27, 31-36 (Winter 1982); TARR, *supra* note 155, at 126.

State judicial articles establish a structural baseline that courts use to evaluate legislative attempts to modify the judiciary.²²⁵ The enumeration of specific court tiers (county courts, district courts, etc.) restrains the legislature's power to create new levels or abolish existing ones.²²⁶ Similarly, jurisdictional mandates are typically phrased in universal terms,²²⁷ which courts construe to limit the legislature's capacity to create special courts within an existing tier.

To be sure, some state charters expressly authorize the legislature to modify judicial design or jurisdiction, but such clauses remain subject to constitutional limits. In Texas, for example, the legislature can "establish such other courts as it may deem necessary," but it cannot vest new courts with jurisdiction "specifically granted" to constitutionally enumerated courts,²²⁸ since a contrary understanding would allow lawmakers to functionally "destroy" the judiciary's fundamental design.²²⁹ Similarly, courts have relied on the non-delegation doctrine to cabin the legislature's ability to delegate judicial power outside of the courts as an end-run around their constitutional jurisdiction.²³⁰ In other words, courts often understand the explicit judicial blueprint in their charters to constitute a basic structure or form that cannot be changed by statute.²³¹

Personnel protections. Judicial selection has long been at the heart of judicial independence.²³² A central objective of shifting from legislative selection to popular elections and merit selection was to limit legislative control and partisan influence on the courts.²³³ Critics of judicial elections noted it placed courts more squarely in the province of politics, but for many states, popular control was worth such a cost.²³⁴ Reflecting the politics that drove many of these choices, a delegate to Illinois's 1847 convention observed it was better to have judges act as "weather-cocks of public sentiment" than as "instruments of power . . . registering the mandates of the Legislature."²³⁵ In a similar vein, the movement to adopt merit selection was animated by an aversion to partisan influence

²²⁵ See, e.g., *In re Contest of Election for Offs. of Governor & Lieutenant Governor Held at Gen. Election on Nov. 2, 1982*, 93 Ill. 2d 463, 472, 444 N.E.2d 170, 173 (1983); *Ex parte Towles*, 48 Tex. 413 (1877) ("It was certainly the object of the framers of the Constitution to mark out a complete judicial system, by defining generally the province of each of the courts, by reference to the objects confided to the action of each, and the relation of each to the others.").

²²⁶ See, e.g., *Simmons v. Faust*, 358 So. 2d 1358, 1359 (Fla. 1978) ("The Florida Constitution provides for only four types of courts and the Legislature may create no others.").

²²⁷ See *supra* notes 100-103 and accompanying text.

²²⁸ *Kelly v. State*, 724 S.W.2d 42, 46 (Tex. Crim. App. 1987).

²²⁹ *Coombs v. State* 44 S.W. 854 (Tex. Crim. App. 1898).

²³⁰ See, e.g., *Holmberg v. Holmberg*, 588 N.W.2d 720, 723 (Minn. 1999).

²³¹ See, e.g., *In re Contest of Election for Offs. of Governor & Lieutenant Governor Held at Gen. Election on Nov. 2, 1982*, 444 N.E.2d 170, 173-74 (Ill. 1983); *People ex rel. Rice v. Cunningham*, 336 N.E.2d 1, 5 (Ill. 1975); see also Curtis Bradley & Neil Siegel, *Court-Stripping, Court-Packing, and Court Defying: Revisiting the Supreme Court's Essential Functions*, 104 TEX. L. REV. 1159 (2026).

²³² See generally TARR, *supra* note 40.

²³³ TARR, *supra* note 40, at 48.

²³⁴ See SHUGARMAN, *supra* note 239, at 103-14; TARR, *supra* note 40, at 48-49.

²³⁵ 2 ILL. CONSTITUTIONAL SERIES: THE CONSTITUTIONAL DEBATES OF 1847 at 462 (Alvord ed. 1919).

over state judiciaries and sought to minimize the power of political parties to capture courts.²³⁶

The provision of judicial selection methods in a constitution overlaps with the qualifications for such offices. Every state's constitution provides some basic level of qualification for judicial officers, and many are quite detailed.²³⁷ In the nineteenth century, drafters codified such requirements to reduce the role of political patronage and partisan influence over who served as judges.²³⁸ In the twentieth century, reformers added additional requirements to underscore the judiciary's professionalism.

As Alan Tarr and Jed Shugarman have suggested, this political context helps us understand the meaning of corresponding constitutional provisions and their content.²³⁹ For example, in striking the creation of a particular local court in Wisconsin in which lawmakers selected the judge, the state's high court recognized the legislature was attempting to assert substantial influence over the particular court—functionally a “legislative appointment”—which was inconsistent with the particular “system” of separately elected courts.²⁴⁰ Or when Montana's legislature attempted to convert its statewide supreme court elections into districted elections by creating residency requirements for justices, the supreme court looked to the constitution's text and history, observing the linkage between judicial qualifications and the court's constitutional structure.²⁴¹ The detailed provisions in state judicial articles capture both a historical skepticism of legislative meddling as well as a vision of judicial autonomy that rests on such textual resources working together.

4. Judiciaries are responsible for the integrity and reliability in the administration of justice.

Courts, and high courts in particular, understand their role to include maintaining the legitimacy and integrity of the state's court system. This role is most often implemented through regulatory power over the practice of law and disciplinary control over judges. Some state constitutions make such roles explicit, authorizing the supreme court or chief justice to make rules governing the practice of law²⁴² or to sanction and remove judges for unethical behavior.²⁴³ In others, “the responsibility to protect and preserve the judicial system” and “maintain public confidence in [the] court[s]” flow from the judiciary's

²³⁶ See generally SHUGARMAN, *supra* note 239, at 218-40 (documenting the success and failure of merit plan adoption in several states).

²³⁷ See *supra* notes 141-146 and accompanying text.

²³⁸ See, e.g., TOBIN, *supra* note 151, at vii-viii; SHUGARMAN, *supra* note 239.

²³⁹ See, e.g., TARR, *supra* note 40, at 45; JED HANDELSMAN SHUGARMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* (2012).

²⁴⁰ *State ex rel. Pierce v. Kundert*, 90 N.W.2d 628, 631 (Wis. 1958).

²⁴¹ *Reichert v. State ex rel. McCulloch*, 278 P.3d 455, 477, 481 (Mont. 2012).

²⁴² See *supra* note 120 and accompanying text.

²⁴³ See, e.g., Fla. Const. art. V, § 12; MI CONST Art. 6, § 30; W. Va. Const. art. VIII, § 8.

centralized structure and the constitution's provision of administrative control in the highest court.²⁴⁴

As with the evolution of selection methods, changes to attorney licensing and judicial oversight were designed to further institutionalize independence of state judiciaries. What little attorney regulation existed before the late nineteenth century was legislative.²⁴⁵ That changed with the prevalence of bar associations, reform of state courts, and growing legislative skepticism.²⁴⁶ There is a similar story for judges, as reformers recognized the need to professionalize state courts included formalizing rules of judicial conduct.²⁴⁷ Without control of ethical judicial behavior, they reasoned judiciaries could not hold maintain public confidence and thus function effectively, especially when issuing unpopular decisions. At the same time, vesting control over these aspects of the legal system with the courts minimized risks of politicization from other branches while aligning proper institutional incentives.²⁴⁸

Whether such roles are implicit or explicit, there is correspondence between the judiciary's obligation to the public and the vesting of "judicial power." The two primary levers for wielding such power are attorneys and judges. As Chief Judge Cardozo once put it, as officers of the court, they, "like the court itself," are "instrument[s] or agenc[ies] to advance the ends of justice."²⁴⁹ Indeed, both are "charged with upholding the law and administering the judicial system."²⁵⁰ The authority to define what constitutes the practice of law and the proper conduct of lawyers and judges engaged in it is "inexorably connected" with a judiciary's power to oversee its own business and control its proceedings.²⁵¹ This regulatory authority strikes at the power to define the contours of the judiciary itself.²⁵² In these ways, there is a meaningful connection between control over attorney and judicial conduct and control over court power in its own right.

²⁴⁴ *Matter of Ferguson*, 403 S.E.2d 628, 630 (S.C. 1991); *Matter of Atkinson*, 456 S.E.2d 202, 204 (W.Va. 1995); *In re Opinion of the Justices*, 180 N. E. 725, 727 (Mass.).

²⁴⁵ See BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 105-12 (2011) (noting that legislatures "led the way" in attorney regulation for the first part of the country's history).

²⁴⁶ See *id.* at 105-21 (documenting this history).

²⁴⁷ See TOBIN, *supra* note 151, at 126-27; Edward J. Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.-KENT L. REV. 1, 18-22 (1977).

²⁴⁸ See, e.g., Schoenbaum, *supra* note 246, at 19.

²⁴⁹ *People ex rel. Karlin v. Culkin*, 162 N.E. 487, 489 (N.Y. 1928).

²⁵⁰ *In re McKenna*, 110 A.3d 1126, 1148 (R.I. 2015); *Bd. of Overseers of The Bar v. Lee*, 422 A.2d 998, 1002 (Me. 1980) ("Attorneys are officers of the court and as such constitute an important part of the judicial system.").

²⁵¹ See, e.g., *In re Integration of Bar*, 5 Wis.2d 618, 622, 93 N.W.2d 601 (1958); *Op. of the Justices*, 180 N.E. at 727 ("Without such attorneys at law the judicial department of government would be hampered in the performance of its duties. . . . It is an inherent power of such a department of government ultimately to determine the qualifications of those to be admitted to practice in its courts, for assisting in its work, and to protect itself in this respect from the unfit, those *610 lacking in sufficient learning, and those not possessing good moral character.").

²⁵² See, e.g., *In re Integration of Neb. State Bar Ass'n*, 275 N.W. 265, 268 (Neb. 1937) ("The practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department

5. State constitutions maintain judiciaries created by and for the people

Scholars have well documented democracy's pride of place within state constitutions.²⁵³ As Bulman-Pozen and Seifter have argued, state charters possess "powerful democratic commitments" to fundamentals, like majority rule and popular sovereignty.²⁵⁴ They have argued state constitutions possess deep commitments to "popular self-rule."²⁵⁵ In a similar vein, Jon Marshfield has suggested state constitutional structure emphasizes majoritarianism and participatory governance.²⁵⁶ This commitment to ensuring state government remains for the people includes the courts as well.

Some of the most significant reforms to state court systems over the last two centuries were designed to center the interests of the people they served within the judiciary's structure and operations. Perhaps the most prominent example is the advent of judicial elections. As part of a larger "anti-legislative agenda," judicial elections spread across the country.²⁵⁷ Reformers were channeling years of outrage at legislative incompetence and rank corruption, but more broadly, judicial elections were responding to "a concern about the inadequacy of legislative representation."²⁵⁸

Legislatures could not be trusted to wield substantial power over the courts after demonstrating for decades a proclivity to mismanage or politicize the judiciary. Rather than answering to representatives, reformers wanted to align the judiciary's incentives with the interests of the people they served. As Shugerman puts it, "responsibility to the other branches was the problem, and responsiveness to the people was the solution."²⁵⁹ These developments prompted granting numerous accountability tools directly to the people. Beyond judicial elections, limited tenure, recall provisions, and expanded constitutional amendment to override judicial decisions were consistent with the

of our state government."); *State v. Shumaker*, 164 N.E. 408, 409 (Ind. 1928) ("The participation of members of the legislative branch in the highly sensitive area of judicial discipline has the distinct possibility of embarrassing the judicial branch by interjecting the potential of partisan influence in the disciplinary process, with the potential effect of altering the thinking and actions of judges in cases over which they preside."); see also Bryna Godar, *The Quiet, Terrifying Weaponization of State Judicial Conduct Commissions*, HILL (Nov. 1, 2024, 8:30 AM), <https://thehill.com/opinion/4964171-partisan-control-state-judicial-conduct-commissions/> ("Giving the legislature or governor significant control over [judicial disciplinary] commission membership and decision-making raises serious concerns about [judicial] independence.").

²⁵³ See, e.g., Bulman-Pozen & Seifter, *supra* note 156; Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014); Marshfield, *supra* note 73.

²⁵⁴ Bulman-Pozen & Seifter, *supra* note 156, at 862.

²⁵⁵ *Id.*

²⁵⁶ Jonathan L. Marshfield, *Popular Accountability and State Constitutional Law*, VAND. L. REV. (forthcoming 2026).

²⁵⁷ SHUGERMAN, *supra* note 239, at 105 (noting that "[o]ver time, . . . have particularly reflected a concern about the inadequacy of legislative representation."

²⁵⁸ Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1340-42.

²⁵⁹ SHUGERMAN, *supra* note 239, at 99; see also Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 212-13 (1993).

objective of minimizing the legislature’s ability to coerce the judiciary while preserving means of popular accountability.²⁶⁰

Courts have turned to these various structural features to zealously guard the relationship between state courts and the people they serve. For example, Montana’s high court invalidated a legislative attempt to convert statewide supreme court elections into districted races, a self-described effort by lawmakers to elect jurists with a particular perspective and produce “a court that will uphold” certain legislation.²⁶¹ Following an extensive review of the constitution’s structure and history, the court’s analysis focused on the fact that the charter conceives of voters’ connection to court through a single, statewide interest in a fair and impartial justice system rather than as a representative body with regional constituencies.²⁶² Mississippi’s high court reached a similar result when it invalidated appointed judgeships the legislature created for the state’s most populated county, where locally elected judges were perceived as insufficiently punitive — concluding that while the legislature may create inferior courts, their judges must be chosen by the people.²⁶³

Beyond particular cases, we see courts explicitly invoking the “public interest” to bend justiciability rules, exercise supervisory power, create specialty courts, revise procedural rules, and more.²⁶⁴ The breadth of these examples helps emphasize that state politics created court systems, vesting them with a range of powers, to serve their interests, and established accountability methods to ensure they remain so focused.

III. REVISITING GERRYSHOPPING’S PATHOLOGIES

This Part demonstrates how gerryschopping is inconsistent with the structural account of judicial independence outlined above. Recognizing interbranch disputes are often complex and state-specific, the discussion is illustrative and highlights how some courts have operationalized these logics to confront intrusions on their autonomy.

Consider first cracking, where legislators attempt to channel valuable cases away from certain courts or judges via venue rules. A principle concern with such legislation arises in the context of a judiciary’s oversight and control of the branch. Where cases must be litigated, intra-court record transfers, and other typical features of venue rules intersect with workload allocation and oversight of judicial staff—core components of an

²⁶⁰ See TARR, *supra* note 40, at 42-50. In some ways, these developments reflected a broader theme of nineteenth century state constitutionalism that questioned the notion that the legislature should be understood as representing the will of the people.

²⁶¹ *Reichert v. State ex rel. McCulloch*, 278 P.3d 455 (Mont. 2012); Associated Press, *Emails Document GOP Leadership Power Struggle*, MISSOULIAN (Jan. 16, 2013), http://missoulain.com/news/state-and-regional/montanalegislatore/emails-document-gop-leadership-power-struggle/article_ce884f7c-5ffd-11e2-96b6-0019bb2963f4.html

²⁶² *Reichert*, 278 P.3d at 475.

²⁶³ *Saunders v. State*, 371 So.3d 604 (Miss. 2023).

²⁶⁴ See Miriam Seifter & Adam B. Sopko, *Standing for Elections in State Courts*, 2024 U. ILL. L. REV. 1571 (2024); Sopko, *supra* note 108, at 1566-79.

independent branch.²⁶⁵ Cracking can also raise jurisdictional concerns. While venue is often considered procedural, aggressive limitations on which courts can adjudicate claims might run headlong into the broad, universal jurisdictional grants characteristic of most state charters.²⁶⁶

Kentucky's high court recently decided a challenge to such a statute along these lines.²⁶⁷ SB 126 authorized parties to unilaterally move almost all constitutional litigation from the filing court to any other court in the state.²⁶⁸ The statute required the moving party to file a special pleading, which, once filed, required the supreme court clerk to reassign the case, by lottery, to another court and the trial court clerk in the original forum to transfer the record to the new venue.²⁶⁹ The state's Republican supermajority passed the statute over the governor's veto following several years of lawmaker criticism of judges in Franklin County, a majority Democratic district and, as the state capital, where most constitutional litigation is filed.²⁷⁰

The Kentucky Supreme Court struck the statute for reasons that resemble the coordinate branch logic outlined above.²⁷¹ It suggested the legislature's proffered reason for the statute—preventing judicial “bias”—was pretextual, observing that all parties can file recusal motions for such concerns and when randomly assigning cases, “the chances of bias are not minimized, they are multiplied.”²⁷² This thin justification thus distinguished the statute from a more genuine attempt at court reform.²⁷³

It then turned to the statute's constitutional defects, beginning with the premise that Kentucky's charter imagines the judiciary as a coordinate branch by vesting it with authority to manage its own operations, including crafting the Commonwealth's rules of practice and procedure. On this framing, the bill was unconstitutional several times over. Unilateral venue transfer intruded on trial courts' inherent authority to control their dockets, creating a new venue pleading for parties to file contravened the supreme court's plenary power over the rules of civil procedure, and requiring clerks to complete

²⁶⁵ See, e.g., *Davis Cnty. v. Purdue Pharma, L.P.*, 463 P.3d 619, 623 (Utah 2020) (suggesting the supreme court's rulemaking power overrides venue statutes).

²⁶⁶ See, e.g., *Arends v. State*, 573 P.3d 906, 910 (Wash. 2025)

²⁶⁷ *Arkk Props. v. Cameron*, 681 S.W.3d 133 (Ky. 2023).

²⁶⁸ *Id.* at 138. The statute applied to “any civil action” that challenges the constitutionality of state statutes, executive orders, administrative regulations, or “[o]rder of any cabinet.” S.B. 126, 2023 Sess., Reg. Sess. (2023).

²⁶⁹ See *Cameron*, 681 S.W.3d at 138.

²⁷⁰ See, e.g., Liam Niemeyer, *Awaiting Supreme Court Hearing, ‘Random’ Change of Venue Law on Hold, Putting Other Cases on Hold*, KY. LANTERN (June 29, 2023), <https://kentuckylantern.com/briefs/awaiting-supreme-court-hearing-random-change-of-venue-law-on-hold-putting-other-cases-on-hold/>; see also Ryland Barton, *Beshear Vetoes Bill Changing Venue For Lawsuits Against The State*, WKMS (Jan. 21, 2021, 10:45 AM), <https://www.wkms.org/government-politics/2021-01-21/beshear-vetoes-bill-changing-venue-for-lawsuits-against-the-state>.

²⁷¹ See *supra* Section II.B.

²⁷² *Cameron*, 681 S.W.3d at 141.

²⁷³ Cf. *supra* notes 83-92.

a random lottery and transfer the record usurped the supreme court’s supervisory power of judiciary personnel.²⁷⁴

When *making* courts, legislatures implicate several of the logics outlined above. However, one recurring theme is one of evasion—lawmakers attempt to skirt constitutional protections by creating a court outside the judicial article. Here is where the constitution’s structural protections might do some work. The judicial power is vested in a specific structure of courts, and the judges who wield that power are subject to particular qualifications, and selected via specific mechanism. The basic point is the creation of novel tribunals triggers a constitution’s various judicial provisions.

In January 2025, Oklahoma’s governor announced the creation of a “business court” to counter anti-business perceptions of the state’s judiciary and “make Oklahoma the most business-friendly state” in the country.²⁷⁵ SB 632 would have created a business court “division” in the two largest of the state’s twenty-six judicial districts.²⁷⁶ Among other things, the statute provided that all judges within the division would be gubernatorial appointees, rather than popularly elected, like all other district court judges.²⁷⁷ The governor’s theory was that these new judges are not “district court” judges that the constitution requires be elected because the business court is not a constitutional “court” but rather a court “division.” The Oklahoma Supreme Court rejected the argument, holding the new court system unconstitutional.²⁷⁸

Adopting the logic emphasizing the constitutional nature of the judiciary’s structure, the court framed the measure as an attempt to evade the constitution’s deliberate allocation of judicial power, selection methods, and appropriate mechanisms for structural change.²⁷⁹ While the legislature did at one time have broad authority to create and abolish courts, mid-century judicial reforms “intentionally limited” that power to discrete circumstances.²⁸⁰ Instead, the constitution allocates judicial power to an enumerated list of “courts,” including district courts, and requires all judges sitting on those courts be popularly elected. The high court further reasoned the business court would rely on the district court’s resources for staff support, clerks, and so on, thus in both form and function, SB 632 was an impermissible creation of a court.

These two examples help us see how courts can extract these logics from their constitutions and apply them to instances of gerrys shopping.²⁸¹ They also help us see how perhaps more subtle examples of gerrys shopping are similarly inconsistent with this

²⁷⁴ See *Cameron*, 681 S.W.3d at 140-43.

²⁷⁵ Hicham Raache, *Oklahoma City Lawyers Sue Gov. Stitt over Business Courts*, OKLA. BUS. VOICE (July 3, 2025), <https://okbusinessvoice.com/2025/07/03/oklahoma-city-lawyers-sue-gov-stitt-over-business-courts/> (reporting Gov. Stitt’s statement).

²⁷⁶ S.B. 632, 60th Legis., Reg. Sess. (Okla. 2025).

²⁷⁷ See *id.*; Okla. Const. art. VII, § 9.

²⁷⁸ *White v. Stitt*, 579 P.3d 636, 646, as corrected (Okla. Oct. 8, 2025).

²⁷⁹ See *id.* at 643-44.

²⁸⁰ *Id.* at 644; see also *supra* notes 221-231, and accompanying text.

²⁸¹ See *supra* Section I.C, I.D & Part II.

Article's structural account of independence. For example, in recent years, lawmakers have attempted to curtail judicial remedies in cases involving abortion restrictions, elections, and firearms laws through bills setting heightened injunction bonds and requiring such securities for relief.²⁸² These statutes likely require judicial staff to request and process payments, intruding on the judiciary's administrative oversight and potentially its supervisory power.²⁸³

Similarly, growing efforts to coerce case outcomes by creating judicial liability for decisions that contravene a majority party's policy preferences may pose problems. For example, a statute creating a "judicial malfeasance" offense, authorizing prosecution of a judge who grants pretrial release to a defendant who subsequently commits a felony.²⁸⁴ As Wisconsin's high court explained in rejecting a comparable civil remedy, permitting such an intrusion on a core judicial task would be "ruinous" to judicial independence, allow "the legislature to usurp constitutionally vested judicial power," and "sabotage[] the judiciary's structural independence."²⁸⁵

IV. RESPONDING TO GERRYSHOPPING

Gerryshopping is a political tactic that threatens the autonomy of state judiciaries and is inconsistent with the structure and underlying logic of the constitutions that establish them. Building on that analysis, this Part identifies potential responses and their tradeoffs.

The framework below rests on three important aspects of gerryshopping. First, resistance must begin with the courts themselves. The literature on judicial resistance recognizes the role of external proxies in interbranch battles, but emphasizes successful efforts often begin with judges rather than their allies.²⁸⁶ Second, as Part I explains, gerryshopping is a problem of both law and politics. Thus, recognizing the obvious point that courts operate within the broader political environment, meaningful responses must account for both aspects of the phenomenon.²⁸⁷ Finally, at the level of implementation, prescribing a proper response to a particular instance of gerryshopping is highly contingent. Whether a particular tactic is the best one depends on a particular court's institutional capacity, relative sociological and institutional legitimacy within the state, the normative and ideological preferences of the judges, and so on.²⁸⁸ The discussion below is intended to highlight the possibilities that exist for courts rather than provide an ideal or one-size-fits all response.

²⁸² See, e.g., H.J.R. 2, 2023 Gen. Sess. (Utah 2023); S.B. 191, 69th Legis., Reg. Sess. (Mont. 2025).

²⁸³ See *supra* notes 157-172; Sopko, *supra* note 108, at 1566-75.

²⁸⁴ See, e.g., S.B. 949, 103rd Gen. Assemb., Reg. Sess. (Mo. 2025).

²⁸⁵ See *Gabler*, 897 N.W.2d at 399-400.

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²⁸⁷ Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1754-59 (2013).

²⁸⁸ See Šipulová, *supra* note at 14 (citing relevant literature).

The concept of judicial independence offered in Part II enables courts to respond to the tactic's legal and political dimensions. Gerrys shopping violates various aspects of state charters but it's also inconsistent with fundamental commitments and deliberate aspects of how states judiciaries deliver justice to litigants, in cases ranging from parking tickets to partisan gerrymandering claims. Assuming most judges take a narrow view of their role and authority, the key insight below is that the framework encourages courts to consider political responses to the phenomenon. With this normative point on the table, this Part is organized around courts' on- and off-bench responses.

A. On-Bench Responses

While courts' traditional role typically means adjudication, and specifically judicial review, state courts have a wider variety of tools available to them to resist gerrys shopping.²⁸⁹

First, strategic avoidance allows courts to navigate threats to their independence while preventing backlash, fostering interbranch dialogue and creating room for extra-judicial remedies.²⁹⁰ It allows for selective confrontation: a court could decline to engage with a statute lowering the retirement age, despite contrary authority, while invalidating a bill reassigning rulemaking power to the legislature.

Second, courts can raise gerrys shopping's political costs or minimize its value without full invalidation. For example, in the face of venue rules channeling cases to a legislature's favored lower court, a supreme court might assign judges from other courts to sit by designation, or in the event of a new court, it might order the administrative office to withhold support of the new tribunal, suspending e filing or preventing access for the judges to case management platforms.

Third, courts can expressly invalidate such measures, drawing on the structural account of independence offered above. Since most state judges are elected, this approach might minimize the "antidemocratic" critique leveled at federal courts, while developing doctrine that emphasizes structural protections and exposing gerrys shopping's manipulative effects to the public through written opinions.

Finally, courts can counterpunch, sanctioning lawmakers for their intrusion and potentially deterring future efforts. They might strike at the legislature's power by invalidating gerrymandered maps, empowering alternative political parties or the executive branch, or strictly enforcing procedural limits on their authority (e.g., single subject rules).

²⁸⁹ Adam Sopko, *The Supervisory Power of State Supreme Courts, Explained*, STATE CT. REPORT (May 27, 2026), <https://statecourtreport.org/our-work/analysis-opinion/supervisory-power-state-supreme-courts-explained-0>.

²⁹⁰ Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 4, 7-12 (2016).

To be sure, each approach has downsides. Strategic avoidance is not uncontroversial: declining to review a plausibly unconstitutional law may reflect “complicity” and minimize the judiciary's legitimacy while the offending law remains—a lose-lose for the courts.²⁹¹ Effective avoidance requires more than simply declining to act; operationalizing passivity is a skill some judges may lack. And *non*-strategic avoidance risks normalizing intrusions on the courts and revealing their weakness for subsequent power plays.²⁹²

Raising gerrymandering's costs is similarly complicated, often requiring calculated means of minimizing its effects without formally striking or reviewing it. Such behavior may further antagonize the legislature, inviting more destructive court curbing, while appearing overly strategic risks undermining public legitimacy rather than safeguarding independence.²⁹³ Invalidation and counterpunching may cohere with the judiciary's traditional role, but they requires a baseline of public legitimacy and political capital courts may lack. And since many legislatures can refer constitutional amendments to voters,²⁹⁴ whatever independence is gleaned may prove short-lived.

B. Off-Bench Responses

Courts have ways to counter gerrymandering outside the courtroom, as well, and existing studies of similar tactics suggest successfully defending judicial autonomy draws more on these seemingly unconventional approaches than on deciding cases alone.²⁹⁵ These tactics draw on a supreme court's apex role in government, a chief justice's bully pulpit, a court's network of allies, and other features that follow from the judiciary's position as a political institution. The primary distinction between them is how public the pushback is.

Starting with more covert tactics, judiciaries can approach the legislature in private to resolve the concerns animating a particular measure. Judicial diplomacy allows branches to reach solutions without litigation, and courts might similarly work with the executive branch or local governments as proxies or sources of leverage. Either path avoids costly public skirmishes and reflects normative theories favoring institutional dialogue.

Courts can resist publicly, too. While judiciaries lack the executive's bully pulpit, the literature on judicial communication highlights examples of courts using media relations to combat threats to their independence.²⁹⁶ High courts in Mexico and Taiwan, for

²⁹¹ Fred O. Smith Jr., *Judicial Bystanding*, 72 U.C.L.A. L. Rev. 1540, 1556-60 (2026).

²⁹² Cf. Trevor W. Morrison & Curtis A. Bradley, *Historical Gloss and the Separation of Powers*, 126 Harv. L. Rev. 411 (2012).

²⁹³ See Catalano, *supra* note 43 (suggesting legislatures engage in ex post court curbing when ex ante strategies fail).

²⁹⁴ ALLIE BOLDT, DIRECT DEMOCRACY IN THE STATES: A 50-STATE SURVEY OF THE JOURNEY TO THE BALLOT 4 (Oct. 2023), <https://statedemocracy.law.wisc.edu/our-work/direct-democracy-in-the-states-a-50-state-survey-of-the-journey-to-the-ballot>.

²⁹⁵ See, e.g., Alexei Trochev & Rachel Ellett, *Judges and Their Allies: Rethinking Judicial Autonomy through the Prism of Off-Bench Resistance*, 2 J. L. & Cts. 67, 71-72 (2022) (citing literature).

²⁹⁶ Katarína Sipulov, *The Light and The Dark Side of Judicial Resistance*, 47 L. & POL'Y 1, 10-14 (2024).

instance, countered institutional attacks through strategic social media and traditional media campaigns, and some state courts have enjoyed similar success.²⁹⁷

Judiciaries can also mobilize coalitions of allies. State courts have traditionally leaned on bar associations to influence politics and policy.²⁹⁸ To be sure, such proxies help judges comply with ethics rules governing judicial advocacy while leveraging extrajudicial networks within business and civil society. Further, coalition-building helps draw more attention to a legislature's unlawful actions, increases support for the judiciary's position, and diversifies the sources of its support.

Off-the-bench tactics carry their own tradeoffs. Private negotiations, if made public, might reduce the judiciary's legitimacy or kill a pending deal with lawmakers. Public engagement can similarly backfire: experimentation with social media and alternative communications may yield underwhelming or even harmful results, particularly if judiciaries are only willing or able to partially invest in such tactics. Reliance on the bar may also have diminishing returns in the current political moment: attorneys have been, and continue to be, standard bearers for some of the most egregious antidemocratic and authoritarian efforts in recent years, so one cannot assume "the bar" would view gerrys shopping as a problem.²⁹⁹ Law firms, too, may avoid political showdowns between the branches for fear of appearing political, alienating clients, or inviting recrimination.³⁰⁰

* * *

As discussed above, this Part does not argue for a singular approach to addressing gerrys shopping. The legal and political issues surrounding it are too complex and contingent to be resolved through one neat trick. However, by expanding the toolkit of responses available to courts beyond the simple binary of judicial review, this Part acknowledges the political reality of gerrys shopping while recognizing the unique structural features that empower most state courts. Taken together, this Part urges courts to think in a similarly expansive fashion, even (or especially) if it challenges norms around what their self-perceived role is.

²⁹⁷ See, e.g., Yu-hsien Sung, *Effective Judicial Communication and Trust in the Judiciary*, 13 J. L. & Cts. 350 (2025); JEFFREY K. STATON, *JUDICIAL POWER AND STRATEGIC COMMUNICATION IN MEXICO* (2010); Lawton R. Nuss, *Do You Like Where this Road Will Lead?*, HUTCHINSON NEWS (Mar. 18, 2014, 7:00 PM), <https://www.hutchnews.com/story/opinion/columns/2014/03/18/do-you-like-where-this/20892304007/>; Lawton R. Nuss, *Justice Selection System Should Remain*, HUTCHINSON NEWS (Feb. 26, 2015, 5:45 PM), <https://www.hutchnews.com/story/opinion/columns/2015/02/26/justice-selection-system-should-remain/20953715007/>; Hon. Stuart Rabner, Chief Justice of N.J., *State of the Judiciary 2022*, N.J. State Bar Assoc. Convention (May 20, 2022), <https://www.njcourts.gov/sites/default/files/stateofthejudiciarynjsba0522text.pdf>.

²⁹⁸ See, e.g., D. Dudley Oldham & Seth S. Andersen, *The Role of the Organized Bar in Promoting an Independent and Accountable Judiciary*, 64 OHIO ST. L.J. 341 (2003).

²⁹⁹ Scott L. Cummings, *Lawyers in Backsliding Democracy*, 112 CALIF. L. REV. 513 (2026); cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

³⁰⁰ See, e.g., Chad de Guzman, *The Law Firms Trump Has Targeted, Why, and How They've Each Responded*, TIME (Mar. 31, 2025, 10:00 PM MT), <https://time.com/7272466/law-firms-trump-wilmerhale-jenner-block-paul-weiss-covington-burling/>.

CONCLUSION

State courts are the heart of our legal system. This Article has shown they are increasingly under threat as legislatures recognize their reach and importance, and look for ways to harness that power to increase their own. The Article has argued that courts and those who depend on them are not without options. State constitutions furnish a comprehensive set of powers and protections designed to minimize legislative intrusion and capture. It provides ways to approach such emerging threats as both legal and political questions for which we can turn to these resources for answers. As state institutions consider increasingly salient issues in the face of federal retrenchment, gerrys shopping is likely to become more prevalent, threatening state courts at a time when their legitimacy and effectiveness are of vital importance.