

Boston University School of Law

## Scholarly Commons at Boston University School of Law

---

Faculty Scholarship

---

2012

### The First Ever (Maybe) Original Jurisdiction Standings

Jay D. Wexler

*Boston University School of Law*

David Hatton

*Boston University School of Law*

Follow this and additional works at: [https://scholarship.law.bu.edu/faculty\\_scholarship](https://scholarship.law.bu.edu/faculty_scholarship)



Part of the [Jurisdiction Commons](#)

---

#### Recommended Citation

Jay D. Wexler & David Hatton, *The First Ever (Maybe) Original Jurisdiction Standings*, in 1 *Journal of Legal Metrics* 19 (2012).

Available at: [https://scholarship.law.bu.edu/faculty\\_scholarship/41](https://scholarship.law.bu.edu/faculty_scholarship/41)

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact [lawlessa@bu.edu](mailto:lawlessa@bu.edu).



**THE FIRST EVER  
(MAYBE)  
ORIGINAL JURISDICTION  
STANDINGS**

2 JOURNAL OF LAW (1 J. LEGAL METRICS) 19 (2012)  
Boston University School of Law Working Paper No. 12-05  
(February 10, 2012)

David Hatton & Jay Wexler

This paper can be downloaded without charge at:

<http://www.bu.edu/law/faculty/scholarship/workingpapers/2012.html>

# THE FIRST EVER (MAYBE) ORIGINAL JURISDICTION STANDINGS

*David Hatton & Jay Wexler<sup>†</sup>*

One of the quirkiest and most interesting provisions in the U.S. Constitution is the so-called Original Jurisdiction Clause of Article III, which says that “In all cases affecting Ambassadors, other public Ministers and consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction.”<sup>1</sup> Usually (by which we mean almost always, maybe 99.3% of the time), the Supreme Court hears cases under its appellate jurisdiction, which means that it hears a case that has already been heard by lower courts, and its role consists of reviewing the decisions of those courts. But when the Supreme Court exercises its original jurisdiction, it is the first and only court to hear the case. This is very strange, because the Supreme Court is not set up, as is a trial court, to hear evidence and witnesses and make factual determinations and the like; usually the Court confines itself to deciding purely legal issues.

Although the Constitution provides for a few different kinds of cases that the Court can hear in its original jurisdiction, Congress has provided by statute that almost all of these kinds of cases can

---

<sup>†</sup> David Hatton is a J.D. Candidate at the Boston University School of Law. Jay Wexler is a Professor of Law at the Boston University School of Law.

<sup>1</sup> U.S. Const., Art. III, sec. 2. For more on the Original Jurisdiction Clause, see JAY WEXLER, *THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS* Chapter 4 (2011).

also be heard by the federal trial courts.<sup>2</sup> As a result, even almost all of the cases that would fall under the Court's original jurisdiction end up being heard in the first instance by a lower court. As it turns out, then, pretty much the only cases that the Supreme Court ever considers in its original jurisdiction are cases in which one state sues another state (or states). For these state versus state cases, the Supreme Court is the only court that has the objectivity necessary to provide for a fair hearing to both states.<sup>3</sup> If Nebraska were to sue Iowa, for instance, over where their border should be drawn, where else would it sue? It wouldn't want to sue in Iowa. And Iowa wouldn't want it to be able to sue in Nebraska. The framers understood this problem, and so they gave the Supreme Court original jurisdiction over these difficult cases to prevent interstate conflict and even war, which at least at the time of the founding, was by no means an impossibility.

Every year the Supreme Court hears somewhere between zero and three of these cases; the cases do not, in other words, make up much of the Court's docket. In the 2010-2011 term, for instance, the Court decided one case, a water rights dispute between Montana and Wyoming.<sup>4</sup> The most notable thing about the opinions in that case was Justice Scalia's attempt to rename the people of Wyoming.<sup>5</sup>

Most original jurisdiction cases involve some type of border or water rights dispute. Some involve tax issues of some sort of another. A few involve interstate pollution issues, like when Missouri sued Illinois at the turn of the 20th century, claiming that Illinois' decision to reverse the flow of the Chicago River had spread disease

---

<sup>2</sup> See 28 U.S.C. § 1251.

<sup>3</sup> The most comprehensive source of information on these types of cases is JOSEPH F. ZIMMERMAN, *INTERSTATE DISPUTES: THE SUPREME COURT'S ORIGINAL JURISDICTION* (2006).

<sup>4</sup> *Montana v. Wyoming*, 131 S.Ct. 1765 (2011).

<sup>5</sup> *Id.* at 1779 & n. \* (Scalia, J., dissenting) (referring to the people of Wyoming as "Wyomans" and stating that: "The dictionary-approved term is 'Wyomingite,' which is also the name of a type of lava, see Webster's New International Dictionary 2961 (2d ed.1957). I believe the people of Wyoming deserve better.").

downstream to St. Louis (Missouri lost).<sup>6</sup> The most famous recent original jurisdiction case involved New York and New Jersey arguing over who owns Ellis Island. The Court, much to the dismay of many New Yorkers, held for New Jersey.<sup>7</sup>

Although the Supreme Court could, if it wished, hold actual trials in these cases, in which presumably the justices would decide as a group on the thousand nitty-gritty issues of evidence and whatnot that come up during your average trial,<sup>8</sup> it pretty much never does this. Instead it appoints somebody called a “Special Master” – generally some big law firm partner or a past Supreme Court justice or some other member of the elite bar – to sort through the evidence, hold a trial, and issue a report that makes recommendations about what the Court should do. The Court then reviews those recommendations and decides whether to adopt them.<sup>9</sup>

One thing we love about these state versus state cases is how their names (Oklahoma v. Texas, Arizona v. California, etc.) make the cases sound like college football games. Thinking about the cases in this way led us to wonder how well the different states have fared in original jurisdiction cases. We searched (not hard, granted, but a little) to see if anyone had previously compiled a set of Original Jurisdiction Standings, but alas, we found nothing. Presented with this gaping hole in empirical legal scholarship, we did what any self-respecting scholars would do – we<sup>10</sup> hit the books and filled the gap. Specifically, we looked at every original jurisdiction state versus

---

<sup>6</sup> Missouri v. Illinois, 200 U.S. 496 (1906).

<sup>7</sup> New Jersey v. New York, 523 U.S. 767 (1998).

<sup>8</sup> It’s unclear how this would work. Would each justice have his or her own gavel, or what? See Robert A. James, *Instructions in Supreme Court Jury Trials*, 1 GREEN BAG 2D 377, 378 (1998) (“[S]ome might be surprised to learn that there have been Supreme Court jury trials—at least three, in fact. The last reported trial occurred in the eighteenth century, but near-brushes occurred in 1876 and again in 1950.”).

<sup>9</sup> For more on Special Masters, see Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court’s Original Jurisdiction*, 86 MINN. L. REV. 625 (2001).

<sup>10</sup> And by “we” we mean Dave, who actually did all the work; Jay provided little more than haphazard and oft-distracted distant supervision.

state case decided since 1900 (we had to leave some further research to those who follow in our scholarly footsteps) and came up with the win-loss records of each state.

Before we get to the data, a disclaimer. Some of these cases are hard to call, and reasonable minds may differ as to who won and who lost. We simply made the best judgment we could without wiping ourselves out too much.

And now, without any further ado, we present the following two lists – the first is an alphabetical list of all the states with their win-loss records, and the second is a list of all states judged to have participated in five or more cases, in order of their winning percentages. As you’ll see, the big winners here are Minnesota and Michigan. The states that have fared the worst are Tennessee and Louisiana. Here is the first list:

<u>State</u>	<u>Record</u>
Alabama	1-2
Alaska	no cases
Arizona	2-6
Arkansas	1-5
California	6-3
Colorado	8-9
Connecticut	0-1
Delaware	3-0
Florida	1-3
Georgia	0-1
Hawaii	no cases
Idaho	2-1
Illinois	3-6
Indiana	1-1
Iowa	2-0
Kansas	4-4
Kentucky	2-4
Louisiana	2-7
Maine	0-1
Maryland	2-1
Massachusetts	3-2
Michigan	6-1
Minnesota	5-0
Mississippi	3-5

## ORIGINAL JURISDICTION STANDINGS

<u>State</u>	<u>Record</u>
Missouri	2-4
Montana	1-2
Nebraska	4-2
Nevada	3-2
New Hampshire	1-1
New Jersey	3-3
New Mexico	7-3
New York	7-4
North Carolina	3-1
North Dakota	1-1
Ohio	4-1
Oklahoma	3-4
Oregon	1-1
Pennsylvania	5-3
Rhode Island	1-0
South Carolina	1-1
South Dakota	1-0
Tennessee	0-5
Texas	6-8
Utah	3-0
Vermont	1-2
Virginia	4-4
Washington	1-1
West Virginia	3-5
Wisconsin	5-2
Wyoming	7-5

And here is the second list:

<u>State</u>	<u>Record</u>	<u>Winning %</u>
Minnesota	5-0	100%
Michigan	6-1	86%
Ohio	4-1	80%
Wisconsin	5-2	71%
New Mexico	7-3	70%
California	6-3	67%
Nebraska	6-3	67%
New York	7-4	64%
Pennsylvania	5-3	63%
Massachusetts	3-2	60%
Nevada	3-2	60%
Wyoming	7-5	58%

<u>State</u>	<u>Record</u>	<u>Winning %</u>
Kansas	4-4	50%
New Jersey	3-3	50%
Virginia	4-4	50%
Colorado	8-9	47%
Oklahoma	3-4	43%
Texas	6-8	43%
Mississippi	3-5	38%
Washington	3-5	38%
Illinois	3-6	33%
Kentucky	2-4	33%
Missouri	2-4	33%
Arizona	2-6	25%
Louisiana	2-7	22%
Arkansas	1-5	17%
Tennessee	0-5	0%

There you have it, folks. The first ever, as far as we know, original jurisdiction standings. Of course, there is a lot more that could be done with this data, for those so inclined – like maybe breaking up the analysis into how well states do when they are plaintiffs as opposed to defendants, for example, or devising a board game called “State Versus State” where the goal is to successfully sue as many states as possible to increase your borders, access the most water, and get the most tax revenues. In any event, we are happy to take questions on how we got these numbers if anyone cares, and we are definitely happy to adjust the numbers if it turns out we have mischaracterized a decision or missed a decision or whatever. Until then, enjoy.

# # #