

PUBLIC LAW LITIGATION AND ELECTORAL TIME

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Public law litigation is often politics by other means. Yet scholars and practitioners have failed to appreciate how public law litigation intersects with an important aspect of politics—electoral time. This Essay identifies three temporal dimensions of public law litigation. First, the electoral time of government litigants—measured by the fixed terms of state and federal executive officials—may affect their conduct in litigation, such as when they engage in *midnight litigation* in the run-up to and aftermath of their election. Second, the electoral time of state courts—measured by the fixed terms of state judges—creates openings for strategic behavior among litigants (both public and private), such as when they engage in *temporal forum shopping* between the court before and after judicial elections. Third, state judges may pursue their preferences in light of their own electoral time, such as when they choose to pursue *midnight adjudication*. This Essay suggests reasons to be concerned with these time-motivated behaviors, especially when they seek to entrench policies and to counteract the results of democratic elections. How courts, policymakers, and the public will respond to these concerns, only time will tell.

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INTRODUCTION

In all litigation, timing is critical. Disputes are won and lost on when to file, when to reply, and when a judgment is rendered.

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In public law litigation,¹ parties and courts also confront the electoral dimensions of time. The fixed terms of federal and state executive officials, marked by elections, complicate usual litigation timelines. The fixed terms of state judges, also often marked by elections, contribute an additional temporal element to litigation in state courts.

Using analogies to other aspects of litigation and regulation, this Essay identifies the interaction of electoral time with public law litigation along at least three dimensions.² First, the electoral time of government litigants—measured by the fixed terms of state and federal executive officials—may affect their conduct in litigation, both in the run-up to and following an election. Second, the electoral time of state courts—measured by the fixed terms of state judges—creates openings for strategic behavior among litigants (both public and private). Third, state judges themselves may pursue their preferences in light of their own electoral time.³

Electoral time is particularly significant at or near the end of a fixed term in office, with a potential (or certain) change in personnel looming. During this period, litigants might make choices in an effort to entrench certain positions in light of the potential (or imminent) change—moves we term *midnight litigation*. These choices might include filing cases or accelerating decisions in politically charged cases, or reaching politically charged settlements, before an election occurs. Judges, too, might engage in *midnight adjudication* at the end of their fixed terms, with similar entrenching effects. And responding to potential changes in court personnel, litigants might consider *temporal forum shopping* between the

1. We use “public law litigation” to mean, broadly speaking, lawsuits whose object is “the vindication of constitutional or statutory policies.” Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976). But “public law” is a category with notoriously porous borders—see, for example, Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 884–88 (1991)—encompassing various aspects of the relationship between government and individuals, potentially including criminal as well as civil matters. And there is no question that electoral time looms large in many high-profile criminal cases, including the numerous pending criminal cases against former President Donald Trump. But because timing in criminal cases raises a host of distinct constitutional, statutory, and ethical questions, we mostly focus on civil litigation here.

2. Though we use the term “electoral time,” we acknowledge that some executive and judicial actors are appointed, not elected. But “electoral time” best captures the themes of this Essay, and we think that the timing effects we discuss are most prominent in the context of elected officials.

3. In other important work, Professors Kang and Shepherd explore the relationship among judicial elections, campaign finance, and judicial behavior in business cases. See Michael S. Kang & Joanna Shepherd, *Judicial Campaign Finance and Election Timing*, 2021 WIS. L. REV. 1487. That topic is highly related, but beyond our scope here.

court as constituted before and after an election, depending on which court is more likely to give them their preferred result.

The period of time around an election also opens the door to moves to capture electoral benefits—what some have called the “political business cycle.”⁴ Such moves could include *litigation credit claiming*, in which officials take litigation-related action in the run-up to an election in order to capture electoral benefits, or *litigation buck passing*, in which government litigants might delay such steps to shift potentially unpopular moves to their successors. And again, parallel options are available to judges: judges with fixed terms can delay potentially controversial decisions until after an election, or accelerate decisions for political gain.

A particular application of these insights—and one that raises heightened normative concerns—arises in what is often described as a lame duck period. This period encompasses the time after an election but before the formal transfer of power, when government actors have a definite and fixed term remaining. During that period, such actors typically possess their full formal powers but with a reduced (or at least complex) democratic mandate. Actions taken during this period may be the most troubling—particularly where outgoing officials seek to lock in positions at odds with recent expressions of popular will.

In one sense, it is entirely unsurprising that litigation and electoral time should intersect. Litigants are always looking for an advantage; elected officials act with elections in mind. But focusing on the interaction between the two suggests that certain sorts of strategic behavior raise specific concerns, and might call for certain kinds of responses.

One set of concerns involves entrenchment—that is, parties or courts speeding up operations to reach a decision that might constrain future decisionmakers or insulate that decision from review. When entrenchment is the concern, responses might look for ways to make such decisions easier to unwind. When government litigation decisions are rushed out at the end of a fixed term, future administrations might reduce their normative commitment to litigation continuity. Because of the risk of an administration using a midnight settlement or uncontested judgment to legally entrench a policy position, perhaps settlements and consent judgments should be subject to revision at the start of the next administration—taking a page from the Congressional Review Act.⁵

4. See, e.g., Andrew Dyke, *Electoral Cycles in the Administration of Criminal Justice*, 133 PUB. CHOICE 417, 419 (2007); Carissa Byrne Hessick, *Prosecutors and Voters*, in OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 399, 403 (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., Oxford University Press 2021).

5. Congressional Review Act, 5 U.S.C. §§ 801–08.

Meanwhile, when court decisions are rushed out at the end of a fixed term, future courts might reduce those decisions' precedential effect.

Concerns about entrenchment, though, necessarily interact with other normative values, and this Essay does not suggest that entrenchment is always equally problematic. For example, concerns with entrenchment resonate with democratic values, so efforts to entrench anti-democratic rules (*e.g.*, locking in political gerrymanders) should be viewed more skeptically than efforts to entrench democratic ones (*e.g.*, locking in longer polling hours). Similarly, whether the entrenchment is the product of other norm-breaking might further the case against it.⁶

More generally, acknowledging that public law litigation creates opportunities for strategic behavior may be more important than changing any associated legal rules. Courts should not bury their heads in the sand about political timing, and executive officials should acknowledge the role of timing in their decisions. Especially in high-salience cases, the politics may be more important than the law. And in the court of public opinion, it might matter whether courts and executive officials manipulated timing to entrench results and subvert democratic values.

I. THE ELECTORAL TIME OF GOVERNMENT LITIGANTS

This Part considers the electoral time of federal and state executive officials with fixed terms.⁷ The key idea is that federal and state executive officials might change their behavior as their terms come to a close. We suggest here that those behavioral changes come in two forms: decisions accelerated at the end of the term (midnight litigation) and decisions either rushed or delayed in light of an election (litigation credit claiming and buck passing).

A. “Midnight Litigation”

Imagine an executive branch official getting close to the end of an administration, perhaps because of term limits or because they foresee a reasonable probability of electoral defeat. Such an official might fast track various executive actions to make sure that they happen,

6. Cf. Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2263 (2018) (“When courts respond to . . . norm breaching, even indirectly . . . [t]hey may stake out and, in turn, entrench a position that remains contested”); Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430 (2018).

7. This discussion is primarily focused on executive officials as litigants, although some of the same dynamics may be present in cases in which legislatures (or individual legislators) are the litigants. See, *e.g.*, *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191 (2022); *Karcher v. May*, 484 U.S. 72 (1987).

entrenching those policies in ways that might be difficult for their successor to undo. This behavior is often called “midnight regulation.”⁸

In the same way, the waning terms of executive officials might motivate litigation behavior. An executive official might file cases early in hopes that their successor might feel an obligation to continue the litigation. Similarly, an official might accelerate the taking of a litigation position—including declining to defend a law⁹—in hope of entrenching that result. This Essay calls these tactics *midnight litigation*.

One way midnight litigation can entrench results is when executive officials follow a norm of continuity across administrations, such that future officials find it difficult to change announced positions. This norm largely—though not invariably—holds in the federal Department of Justice.¹⁰

But, importantly, other tools are available to entrench administration positions through litigation even without such a norm. Settlements and judgments are binding across administrations. So, for example, government lawyers might choose to settle cases on terms that would be unacceptable to future administrations, including entering into non-prosecution agreements that would seemingly stymie future litigation.¹¹ Government actors also might enter into consent judgments, such as consent decrees, that could bind their successors.¹²

8. See, e.g., Anne Joseph O’Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 472 (2011); Edward H. Stiglitz, *Unaccountable Midnight Rulemaking? A Normatively Informative Assessment*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 137 (2014); Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 557 (2003) (describing “midnight” rulemaking and late-term hiring and promotion in the executive branch as “agency burrowing”).

9. See Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213, 223 (2014).

10. See Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1186 (2012) (describing “the virtues of institutional continuity within the executive branch,” including in litigation). For examples of recent exceptions to this continuity norm, see *Terry v. United States*, 141 S. Ct. 1858, 1862 (2021); Letter from Edwin S. Kneedler, Deputy Solic. Gen., U.S. Dep’t of Just., to Scott S. Harris, Clerk, U.S. Sup. Ct. (Feb. 10, 2021) (explaining the Justice Department’s change in position in the litigation resulting in *California v. Texas*, 141 S. Ct. 2104 (2021)). See also Cristina M. Rodríguez, *The Supreme Court, 2020 Term—Foreword: Regime Change*, 135 HARV. L. REV. 1, 4–7 (2021) (discussing changes in litigation positions).

11. Although they do not involve litigation, presidential pardons also operate by design to bind future administrations, whatever those later administrations might make of the culpability of the pardoned conduct.

12. This concern with lock-in was raised in prior decades in the context of institutional reform litigation. See, e.g., Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 298 (“[C]onsent decrees circumvent democratic change by precluding subsequent

A particularly macabre illustration of this behavior comes from a recent sequence of events involving the federal death penalty. From March 2003 until July 2020, there were no federal executions.¹³ But in what came to be the final six months of the Trump Administration, the federal government executed thirteen people, including six after the 2020 election (*i.e.*, during the administration's lame duck period), with the last execution occurring just four days before President Biden's inauguration.¹⁴ As the administration pressed ahead with its aggressive execution timelines, Justice Department lawyers crafted arguments resisting various statutory and constitutional challenges to the executions.¹⁵ In each of these cases, the administration appeared to proceed with one eye on the clock, well aware that the federal executions were unlikely to occur after a change in the Oval Office,¹⁶ and making aggressive use of the Supreme Court's "shadow docket" to pursue accelerated judicial review.¹⁷ And the strategy worked: in each of these cases, the Supreme Court sided with the administration, sometimes reversing lower courts that would have stayed executions.¹⁸ This meant

Presidents from changing policies set, through consent decree, by a previous Administration . . .").

13. Barbara Campbell & Suzanne Nuyen, *U.S. Executes Dustin Higgs in 13th and Final Execution Under Trump Administration*, NPR (Jan. 16, 2021, 1:51 AM), <https://www.npr.org/2021/01/16/957559566/u-s-executes-dustin-higgs-in-13thand-final-execution-under-trump-administration> [https://perma.cc/YHN7-PH4D] ("The Supreme Court declined to stop the execution, . . . noting that . . . it had been 17 years since a federal execution had been carried out.").

14. See generally Lee Kovarsky, *The Trump Executions*, 100 TEX. L. REV. 621 (2022). See also Campbell & Nuyen, *supra* note 13; Madeline Carlisle, *What Happens to the Federal Death Penalty in a Biden Administration?*, TIME (Jan. 25, 2021, 11:39 AM), <https://time.com/5932811/death-penalty-abolition-joe-biden/> [https://perma.cc/KE8Z-5NPT] ("Six of the [executions] came after Biden's win in the 2020 election, the most executions during a presidential transition period in U.S. history.").

15. See Kovarsky, *supra* note 14, at 638–53. These included challenges to the federal death penalty drug protocol and to federal executions in states that abolished the death penalty, as well as various COVID-19 related claims regarding execution protocols. *Id.* at 639–46 (describing lethal injection challenges); *id.* at 649–50 (describing challenges to the federal designation power to impose death penalty in abolitionist states); *id.* at 654–55 (describing COVID-19 challenges).

16. Indeed, within six months of inauguration, the Biden Administration announced a moratorium on the federal death penalty. See Sarah N. Lynch & Eric Beech, *U.S. Attorney General Imposes Moratorium on Federal Executions*, REUTERS (July 1, 2021, 7:28 PM), [https://www.reuters.com/world/us/us-attorney-general-imposes-moratorium-federal-executions-2021-07-01/#:~:text=WASHINGTON%2C%20July%201%20\(Reuters\),department%20said%20in%20a%20statement](https://www.reuters.com/world/us/us-attorney-general-imposes-moratorium-federal-executions-2021-07-01/#:~:text=WASHINGTON%2C%20July%201%20(Reuters),department%20said%20in%20a%20statement) [https://perma.cc/6LWG-AGQW].

17. Kovarsky, *supra* note 14, at 659–67.

18. *Id.* at 660, 663.

that the administration, with the assistance of the Supreme Court, was able to lock in its positions in the most high-stakes—and irreversible—conceivable context.¹⁹

These capital cases are not the only examples. At the end of his term, then-Kansas Attorney General Phill Kline filed high-profile criminal charges against George Tiller related to his performance of abortions.²⁰ Outgoing Arkansas Attorney General Dustin McDaniel was accused of rushing litigation related to a pipeline spill at the end of his time in office.²¹ Meanwhile, after her election, newly-elected Michigan Attorney General Dana Nessel withdrew the state from almost two dozen controversial cases that her Republican predecessor had joined.²² And state Attorneys General often issue binding legal interpretations on their way out the door.²³

B. Credit Claiming and Buck Passing

Political scientists have long studied efforts by political leaders to claim credit for positive developments, including by taking popular decisions in the run-up to elections and avoiding difficult decisions by passing the buck to future administrations.²⁴ These effects have been explored, with mixed results, in the context of elected criminal

19. See *id.* at 660, 663, 679.

20. Robin Abcarian, *Eager for Tiller Case to Progress*, L.A. TIMES (Mar. 15, 2009, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2009-mar-15-na-kansas-abortion-trial15-story.html> [<https://perma.cc/W8WE-RJX2>]. The state supreme court eventually suspended Kline's law license indefinitely for his conduct in abortion-related cases. *In re Kline*, 311 P.3d 321, 399 (Kan. 2013).

21. *Arkansas Tar Sands Oil Spill Update*, LIVING ON EARTH (June 21, 2013), <https://www.loe.org/shows/segments.html?programID=13-P13-00025&segmentID=2> [<https://perma.cc/FMH3-BWPG>] (“Now, some have said that this is rather quick, just three months after an incident, to be headed to court with a formal lawsuit; usually these things are negotiated for some time. What’s the hurry here?”).

22. See Kathleen Gray, *Nessel Reversing 16 Years of GOP Ideology in Attorney General's Office*, DETROIT FREE PRESS, <https://www.freep.com/story/news/politics/2019/02/24/attorney-general-dananessel/2942416002> [<https://perma.cc/6MCD-QZ4P>] (Feb. 24, 2019, 8:28 AM).

23. See, e.g., Okla. Att’y Gen. Op. 2022-7 (Dec. 1, 2022), https://nondoc.com/wp-content/uploads/2022/12/AG_Opinion_Charter_Schools.pdf [<https://perma.cc/E7D2-AYKH>]; Mich. Att’y Gen. Op. No. 7306 (Dec. 3, 2018), <https://www.ag.state.mi.us/opinion/datafiles/2010s/op10385.htm> [<https://perma.cc/49PH-JCMS?type=image>].

24. The literature is too voluminous to catalog here. Among the important works see, for example, DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 52–61 (1st ed. 1974) (discussing “credit claiming”), Hessick, *supra* note 4, at 403–04 (collecting sources).

prosecutors, but less attention has been paid outside of the criminal context.²⁵

Civil litigation is just another opportunity for credit claiming and buck passing. Especially in the context of high-profile cases, executive officials might see political wins and losses in litigation decisions. For example, it might be politically advantageous to file an expressive lawsuit against a locally unpopular policy, entity, or individual. Lawsuits by red states against Democratic presidents, or blue states against Republican ones, might fit this bill.²⁶ Filing such suits in advance of an election might have signal value independent of the litigation strategy.

On the other hand, litigation can present difficult or unpopular choices. Should a good case against a popular figure be brought? Should the government enforce its laws against a major employer who could shift operations to another state? These are difficult questions for political leaders who oversee litigation. The nature of electoral time may allow a way out, either delaying the decision until after the election or passing the buck entirely by leaving the decision to a future administration.

Credit claiming and buck passing do not have the same entrenchment effect as other time-sensitive moves. So, as elaborated below, they may call out less for intervention. But, at a minimum, they reflect a central theme of this Essay: public law litigation involves political calculations that entail considerations of the political dimensions of time.

II. THE ELECTORAL TIME OF COURTS

Part I above addressed how executive officials think about their own electoral time. Parts II and III turn to the electoral time of courts, beginning with how the composition of courts—the product of political choices in political time—affects litigant behavior.

Although the composition of the Supreme Court of the United States is not static, its personnel does not change on anything close to a regular schedule.²⁷ In contrast, state supreme courts typically follow a regular turnover schedule. The high courts of forty-six states have fixed terms,

25. See Hessick, *supra* note 4 (collecting sources).

26. For a valuable database of state attorney general litigation, see *An Overview of State AG Activities*, STATE LITIG. & AG ACTIVITY DATABASE, <https://attorneysgeneral.org> [<https://perma.cc/Y9SS-365W>]. See also Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 43 (2018) (describing how “‘red’ states have challenged the Affordable Care Act and President Obama’s immigration orders,” while “‘blue’ states have challenged President Trump’s travel bans and attempts to roll back environmental policies”).

27. See Kevin Costello, Note, *Supreme Court Politics and Life Tenure: A Comparative Inquiry*, 71 HASTINGS L.J. 1153, 1161 (2020).

and some also impose term limits or mandatory retirement ages.²⁸ The supreme court of only one state (Rhode Island) lacks fixed terms or a mandatory retirement age.²⁹

The predictable turnover of state supreme court justices introduces an element of electoral time into state court litigation.³⁰ For example, in a state with elected justices, the state supreme court before an election might look very different than the state supreme court after that election. And that difference might have predictable consequences for how cases might turn out.

It does not take a fancy law degree to figure out how litigants might react to judges with fixed terms: they will ask themselves, within the constraints of the law, whether they would prefer to litigate in front of the court as currently constituted or in front of the court as it will be constituted in a future term. Choosing between today's supreme court and tomorrow's is what this Essay calls *temporal forum shopping*.

A simple definition of forum shopping is "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard."³¹ Although many scholars and commentators use forum shopping as a pejorative, a more nuanced view is that forum shopping can have both positive and negative effects.³² Consistent with that more nuanced view, the law does not attempt to completely prohibit litigants from considering strategic objectives when making decisions about where to litigate.³³

Temporal forum shopping is the practice of choosing the most favorable jurisdiction or court in which a claim might be heard *across*

28. 52 THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 193 (2020). See also JAMES L. GIBSON, ELECTING JUDGES (2012).

29. R.I. CONST. art. X, § 5 ("Justices of the supreme court shall hold office during good behavior.").

30. Although our focus here is on state high courts, the same dynamics may be present on any state court whose members have fixed terms. This Essay focuses on state supreme courts because that is where important state public law cases often end up.

31. *Forum Shopping*, BLACK'S LAW DICTIONARY (11th ed. 2019).

32. Compare, e.g., Stephen I. Vladeck, Opinion, *Don't Let Republican 'Judge Shoppers' Thwart the Will of Voters*, N.Y. TIMES (Feb. 5, 2023), <https://www.nytimes.com/2023/02/05/opinion/republicans-judges-biden.html>, with Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579 (2016).

33. See Bookman, *supra* note 32, at 613 ("[I]t is commonplace for venue statutes to limit plaintiffs' choice of forum, but they often also give plaintiffs multiple options for where to sue in cases that cross state borders."). For a view on why the law ignores litigant motivations, such as spite, see Nadav Shoked, *Two Hundred Years of Spite*, 110 NW. U. L. REV. 357, 402–20 (2016).

time.³⁴ If today's judges are preferable, then litigants should rush to file and litigate. If the probability of victory would be greater in the next term, then litigants should stall for time. To be sure, not every case is amenable to temporal forum shopping. A challenge to changes in election administration must be filed before the relevant election takes place, and sometimes immediate action is needed to avoid irreparable harm. A range of jurisdictional rules and doctrines also operate to place some constraints on when claims may be brought. But many cases are candidates for temporal forum shopping, and this Essay addresses those cases.

Finding litigants who admit that they engaged in temporal forum shopping is difficult—such an admission would only work to their detriment—but a little speculation never hurt anyone. One such example comes from North Carolina. The state supreme court, with a Democratic majority, rejected a congressional map adopted by the Republican-controlled state legislature as an unconstitutional partisan gerrymander.³⁵ The Republican legislature successfully petitioned the U.S. Supreme Court for certiorari on the grounds that the state supreme court decision had improperly invaded the state legislature's authority under the federal Constitution's Elections Clause.³⁶ While that case, *Moore v. Harper*,³⁷ was pending in the U.S. Supreme Court, the 2022 election resulted in the state supreme court flipping from a Democratic to a Republican majority.³⁸ Once the new majority was seated, the state legislature quickly filed a request to reconsider the prior decision, and the newly constituted court granted that request.³⁹ It seems fair to assume that the

34. This definition is intended to focus on the way that the court changes over time. Other aspects of timing, of course, affect the favorability of litigation. Mootness and ripeness are legal constraints on timing choices, and Part III of this Essay considers timing with respect to who represents the government. But these effects are not included in this definition.

35. *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022), *reh'g granted* (Feb. 3, 2023), *cert. granted sub nom. Moore v. Harper*, 142 S. Ct. 2901 (2022), *affirmed*, 143 S. Ct. 2065 (2023) (finding that voters' rights groups stated a justiciable claim under North Carolina's Free Elections Clause and that the maps violated the "fundamental right to substantially equal voting power" under the state constitution's equal protection clause).

36. *Moore v. Harper*, 142 S. Ct. 2901 (2022) (granting cert); U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . ."). See also Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235, 1238.

37. 143 S. Ct. 2065 (2023).

38. Hanna Schoenbaum, *Republicans Retake Control of North Carolina Supreme Court*, AP (Nov. 9, 2022, 11:59 AM), <https://apnews.com/article/north-carolina-state-courts-supreme-court-government-and-politics-176517442f012865f93d56e9c2827755> [<https://perma.cc/J25G-MSBP>].

39. *Harper v. Hall*, 886 S.E.2d 393, 409 (N.C. 2023).

request to reconsider reflected the legislature's judgment about the changed composition of the court. And indeed, that assumption was vindicated when the state court reversed course and overruled its prior decision, concluding that challenges to partisan gerrymanders are nonjusticiable under the North Carolina Constitution.⁴⁰ In any event, even without smoking-gun examples, it is fair to assume that litigants routinely make such calculations.

As with the more familiar geographic forum shopping, temporal forum shopping is most effective when the predictions about the court are most certain. There is a reason, for example, that conservative litigants have filed case after case in the Amarillo Division of the Northern District of Texas, where a single judge sits and where litigants accordingly know exactly who will decide their case.⁴¹ Temporal forum shoppers, by contrast, face a challenge in anticipating the composition of the state supreme court.⁴² Litigation can drag on in the lower courts, potentially long enough that the high court will turn over. But what if there were a way to file directly in a favorable state supreme court?

There is: original jurisdiction. In the federal system, the original jurisdiction of the U.S. Supreme Court is narrow and rarely invoked in high-profile cases.⁴³ But the original jurisdiction of state supreme courts is often quite broad and frequently invoked in high-profile, politically salient cases.⁴⁴ An example of this is currently playing out in Wisconsin, where a number of groups filed an original action challenging the state's legislative maps the day after Justice Janet Protasiewicz was sworn in.⁴⁵ Justice Protasiewicz's 2023 election to the Wisconsin Supreme Court

40. *Id.* at 401 (overruling *Harper v. Hall*, 881 S.E.2d 156 (N.C. 2022)).

41. *See generally* Alex Botoman, *Divisional Judge Shopping*, 49 COLUM. HUM. RTS. L. REV. 297 (2018).

42. Unlike traditional forum shopping, some exercises of temporal forum shopping are not choices between time X and Y, but between now and some indefinite time in the future—call it temporal window shopping. But even this less precise mode of shopping shares many of the features we describe here.

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

44. Zachary D. Clopton, *Power and Politics in Original Jurisdiction*, U. CHI. L. REV. (forthcoming Jan. 2024) (manuscript at 4, 11–19), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4375231.

45. *Clarke v. Wis. Elections Comm'n*, No. 2023AP001399 (Wis. filed Aug. 2, 2023); Shawn Johnson, *Justice Janet Protasiewicz Is Sworn In, Giving Liberals Control of Wisconsin Supreme Court*, WIS. PUB. RADIO (Aug. 1, 2023, 7:30 PM), <https://www.wpr.org/justice-janet-protasiewicz-sworn-giving-liberals-control-wisconsin-supreme-court#:~:text=Promising%20to%20ensure%20justice%20and,the%20first%20time%20since%202008> [<https://perma.cc/Z6CB-GBN5>].

flipped the court to a liberal majority after fifteen years of conservative control.⁴⁶

The potential availability of original jurisdiction means that litigants that prefer today's supreme court do not have worry about lower courts (and their opponents) delaying litigation until it is too late for the current supreme court to rule. Instead, the litigant can file directly in the supreme court, and perhaps even encourage that court to move quickly in light of electoral time.

Nothing in this description is meant to suggest that there is anything inherently wrong with litigants filing original actions shortly before the end of a fixed term (although some such moves may raise concerns, particularly where they seek entrench positions in tension with popular will). The same is true for lawsuits filed immediately following a change in judicial personnel. But the broader point is that the fixed terms of state high courts predictably create incentives for this sort of strategic behavior.

Finally, it is worth observing that temporal forum shopping matters not only for the case at hand, but also for the law going forward. There is no doubt that parties temporally shopping are trying to win their own cases. But in the context of public law litigation, they also are temporally shopping to create precedent that could have long lasting effects. One reason to rush a case to the current court is the hope that it will produce a decision that is resistant to future court revision. This potential entrenchment is a key feature of these cases, taken up in more detail below.

III. THE ELECTORAL TIME OF JUDGES

The preceding parts consider how litigants react to their own electoral time and to the electoral time of courts. One additional permutation, taken up here, is when electoral time has consequences for the behavior of judges themselves. While the behaviors we describe here may be undertaken by judges at all levels, we focus for simplicity on high court judges, because state high courts are the sites at which many of the most important public law cases are decided.

Judges and justices typically have substantial discretion about when to issue decisions. Nowhere is this truer than the United States Supreme Court, where the justices exercise virtually unlimited control over not

46. Alice Herman & Sam Levine, *Liberal Judge Wins Wisconsin Supreme Court Election, Flipping Ideological Balance*, GUARDIAN (Apr. 4, 2023, 10:26 PM), <https://www.theguardian.com/us-news/2023/apr/04/wisconsin-supreme-court-election-results> [<https://perma.cc/CAF7-ELHE>].

only whether to take up certain questions,⁴⁷ but also when to exercise their discretionary authority to review and to issue the decisions that result.⁴⁸ And it is not a coincidence that the U.S. Supreme Court announces high-profile decisions at the end of each term.⁴⁹

Most state high courts similarly exercise considerable discretion over the timing of their decisions. There are exceptions: In California, for example, a constitutional provision has been interpreted to require the Supreme Court to issue decisions within ninety days of oral argument.⁵⁰ In several other states, constitutional or statutory provisions require state courts to decide cases in general, or particular categories of cases, expeditiously or within prescribed timeframes.⁵¹ But the general rule is that judges control the timing of their decisions.

In states with fixed judicial terms, it almost must be true that—at least on occasion—state judges make decisions about timing in light of electoral time, in ways that track the behavior of litigants described in the previous part.⁵² Sometimes judges might want to pass tough cases to future judges, or they might want to hold off on decisions until after an

47. See, e.g., 28 U.S.C. § 1254(1) (2018) (federal cases “may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree”); 28 U.S.C. § 1257(a) (providing for Supreme Court review of state cases presenting federal questions).

48. See generally STEPHEN VLADECK, *THE SHADOW DOCKET* 27–60 (2023); H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991).

49. Lee Epstein, William M. Landes & Richard A. Posner, *The Best for Last: The Timing of U.S. Supreme Court Decisions*, 64 DUKE L.J. 991, 993 (2015).

50. CAL. CONST. art. VI, § 19 (“A judge of a court of record may not receive the salary for the judicial office held by the judge while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision.”). See also Daniel J. Bussel, *Opinions First—Argument Afterwards*, 61 UCLA L. REV. 1194, 1199–205 (2014) (discussing ninety-day rule).

51. See, e.g., MD. CONST. art. IV, § 15 (“In every case an opinion, in writing, shall be filed within three months after the argument or submission of the cause”); ALASKA STAT. § 22.05.140(b) (2022) (“A salary disbursement may not be issued to a justice of the supreme court until the justice has filed with the state officer designated to issue salary disbursements an affidavit that no matter referred to the justice for opinion or decision has been uncompleted or undecided by the justice for a period of more than six months.”); OR. REV. STAT. § 758.017(5) (2021) (requiring that the state supreme court “give priority on its docket to a petition for review under this section and render a decision within six months of the filing of the petition for review” for cases involving grants or denials by the Public Utility Commission regarding transmission line applications). See also Clopton, *supra* note 44, at 11–19 (collecting states’ rules on original actions).

52. For more on judges conforming behaviors to voter preferences, see, for example, Joanna M. Shepherd, *The Influence of Retention Politics on Judges’ Voting*, 38 J. LEGAL STUD. 169 (2009) and Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623 (2009).

election or reappointment (buck passing). Other times they might want to announce a ruling in advance of an election or reappointment decision (credit claiming). And just as litigants might engage in midnight litigation at the end of their terms, judges might want to ensure that an issue is not passed to future judges, either resolving the case completely or making certain decisions (such as findings of fact) that might be hard to overturn (midnight adjudication).⁵³

Original jurisdiction, again, adds potency to some of these options. Original jurisdiction is often discretionary, especially with respect to the broadest grants of original jurisdiction, such as the power to issue writs.⁵⁴ Parties seeking a resolution from the current court might file an original action. If the court—typically a majority of the court—prefers to provide that immediate resolution, they can take the case.⁵⁵ If the court prefers to delay, then discretionary original jurisdiction gives cover to simply decline to hear the case at that time. And, importantly, courts can decline original jurisdiction with a reasonable degree of confidence that the case will return to the high court after litigation in the lower courts. So judges making choices about original jurisdiction can use their discretion to shop between today’s court and a future one.

Nothing here is meant to suggest that this behavior is common or routine, just that it is possible. Here, again, direct examples are challenging, but a potential recent illustration comes from Texas. In 2018, Democratic candidates made major gains in judicial elections.⁵⁶ In the wake of those results, but before the judgeships turned over, the *Texas Tribune* reported that some Republican appellate judges were rushing through decisions before leaving office.⁵⁷ A few years later, the North Carolina Supreme Court, with a Democratic majority—the same majority that had struck down the state’s congressional map⁵⁸—held that

53. Professor Taylor observed the parallel phenomenon of midnight agency adjudication when the U.S. Attorney General reviews decisions of the Board of Immigration Appeals in the waning days of an administration. Margaret H. Taylor, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions*, 102 IOWA L. REV. ONLINE 18 (2016), <https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2023-01/Taylor.pdf> [<https://perma.cc/UL6S-9FRU>].

54. See Clopton, *supra* note 44, at 11–16.

55. See WIS. CONST. art. VII, § 3 (“The supreme court . . . may hear original actions and proceedings. The supreme court may issue all writs necessary in aid of its jurisdiction.”).

56. See, e.g., Emma Platoff, *Texas Democrats’ Biggest Win on Election Night May Have Been the Courts*, TEX. TRIB. (Nov. 8, 2018, 12:00 PM), <https://www.texastribune.org/2018/11/08/texas-courts-appeals-2018-midterms-beto-orourke/> [<https://perma.cc/TJ3N-63WN>].

57. *Id.*

58. See *supra* notes 36–41 and accompanying text.

the state's voter ID law violated the state constitution just days before the end of the term.⁵⁹ This timing mattered because North Carolina voters had flipped the court to Republican control between oral argument and the decision. And once the new justices took office, the court reversed its decision, calling attention to electoral time in its description of the prior proceeding.⁶⁰

This politically conscious behavior is at least consistent with U.S. Supreme Court justices making strategic decisions about certiorari. Scholars of the cert process suggest that justices' votes involve a combination of legal and strategic considerations.⁶¹ The former include factors such as the presence of a circuit split; the latter include factors such as how the justice expects the case to turn out on the merits.⁶² It is strategic considerations, then, that explain so called "defensive denials," where justices vote against granting cert to protect against a bad outcome on the merits.⁶³ Strategic considerations also explain why the Court as an institution might prefer to avoid a difficult case, as it seems the Warren Court did when it dodged an early challenge to a state ban on interracial marriage.⁶⁴ This behavior at the cert stage is consistent with suggestions in this Part that judges may behave strategically with respect to the timing of decisions.

Finally, it is worth noting the ways that the various forms of strategic behavior interact with one another. On the one hand, judicial agenda setting might blunt attempts at temporal forum shopping—litigants seeking a quick resolution before an election might run into a

59. *Holmes v. Moore*, 881 S.E.2d 486, 510 (N.C. 2022). *See also* Schoenbaum, *supra* note 38 ("The judicial elections come in the final months of a tumultuous court term distinguished by several split decisions favoring the Democratic majority.").

60. *Holmes v. Moore*, 886 S.E.2d 120, 127 (N.C. 2023) ("In December 2022, after an election that would change the composition of this Court, but prior to the expiration of the terms of two outgoing justices, the majority—half of which was composed of those two justices—issued an opinion affirming the lower court's issuance of the injunction.").

61. *See generally* Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923 (2022). *See also, e.g.*, Aaron L. Nielson & Paul Stancil, *Gaming Certiorari*, 170 U. PA. L. REV. 1129, 1142 (2022).

62. Narechania, *supra* note 61, at 925; Nielson & Stancil, *supra* note 61.

63. Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 414 (2004).

64. *See generally* Memorandum from Felix Frankfurter on *Naim v. Naim*, reprinted in Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 95 (1979) [hereinafter Frankfurter Memo]. A similar dynamic may have been at work in the Court's decision to dismiss on jurisdictional grounds a constitutional challenge to a state ban on same-sex marriage in *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

court that is uncomfortable with this behavior, for legal or strategic reasons. On the other hand, litigants and courts could work together to achieve a result at their preferred time. One could imagine executive officials and judges, both at the ends of their terms, coming together for a midnight ruling, locking in a result at odds with the preferences of the incoming executive and judiciary—and presumably the voters.⁶⁵

IV. LAME DUCKS

We suggested above that as their terms wane, executive and judicial officials will make decisions in light of electoral time. When considering the positive and normative aspects of these decisions, we think there is an important distinction between the period preceding an election or other change, and the period following such an event, often called the “lame duck” period. This period between an election and the formal transfer of power and authority heightens many of the dynamics we describe above.⁶⁶

Lame duck periods vary, although periods in the United States tend to be quite long in comparative context.⁶⁷ Under the original U.S. Constitution and statutes passed by the first Congress, nearly a six-month period separated November elections from March transfers of power for both Congress and the President.⁶⁸ The Twentieth Amendment shifted the congressional term’s start to January 3 and the presidential start to

65. Another possibility involves the legislature. Prior work on original jurisdiction revealed that state legislatures will occasionally include in a statute a provision requiring that challenges to the statute’s constitutionality be filed as original actions in the state supreme court. Clopton, *supra* note 44. Thus a legislature with a friendly supreme court might be inclined to use such a provision to accelerate judicial review before the court turns over. Similarly, in states that permit advisory opinions, a legislature might decide to seek an advisory opinion when the court is ideologically aligned. For examples of such states, see *id.* at 14.

66. Because our focus is on litigation timing, we mostly do not consider state legislatures, although legislatures have been the site of high-stakes lame-duck power plays in recent years. See Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217, 1224 (2019) (discussing episodes in which, “[i]n the wake of elections in which members of the opposing party won executive-branch offices, state legislatures in North Carolina, Wisconsin, and Michigan held sessions in which they removed, or attempted to remove, substantial power from newly elected governors and attorneys general”).

67. Rivka Weill, *Constitutional Transitions: The Role of Lame Ducks and Caretakers*, 2011 UTAH L. REV. 1087, 1089–90; See also Peter L. Strauss & Gillian E. Metzger, *Power Transitions in a Troubled Democracy*, in LIBER AMICORUM PER MARCO D’ALBERTI 74, 86–89 (G. Giappichelli ed., 2022).

68. Edward J. Larson, *The Constitutionality of Lame-Duck Lawmaking: The Text, History, Intent, and Original Meaning of the Twentieth Amendment*, 2012 UTAH L. REV. 707, 710.

January 20, but still left a considerable span of time between selection (by statute in early November⁶⁹) and taking office.⁷⁰ The timeline for the turnover of state executive officials is generally similar, with election in November and turnover in January, subject to a handful of exceptions where the transition happens considerably faster.⁷¹ And state judicial turnover is generally similar, subject to some exceptions—like Wisconsin, where a period of nearly four months separates the April judicial election from the August swearing-in.⁷²

When it comes to the federal courts, judges might announce their retirement contingent upon the confirmation of a successor, as Justice O'Connor⁷³ and Justice Breyer⁷⁴ did; or departing judges may announce an immediately effective retirement or decision to assume senior status. Either way, the fact of multi-member panels in the federal appeals courts and the generally lengthy timespan of federal litigation means that seeking to time litigation in response to federal court composition is usually a long game.

But for state or federal executive branch officials operating in the period between an election and the transfer of power, and for state judges in the same position, things look considerably different. Lame duck periods are highly predictable and regular features of these offices.

69. 2 U.S.C. §§ 1, 7.

70. U.S. CONST. amend. XX. See John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470, 477–78 (1997) (noting broad consensus that the purpose of the Twentieth Amendment was to abolish lame-duck sessions of Congress); Larson, *supra* note 68, at 739–44; Michael Herz & Katherine Shaw, *Transition Administration*, 106 MINN. L. REV. 607, 609–10 (2021).

71. See e.g., ALASKA CONST. art. III, § 4 (“The term of office of the governor is four years, beginning at noon on the first Monday in December following his election and ending at noon on the first Monday in December four years later.”); HAW. CONST. art. V, § 1 (same timeline as Alaska); KY. CONST. § 73 (term begins fifth Tuesday following election); N.D. CONST. art. V, § 5 (term begins December 15th following the election).

72. See WIS. STAT. § 5.02(21) (2021–22) (setting first Tuesday in April for judicial elections); WIS. CONST. art. VII, § 4(1) (providing that terms of Supreme Court justices are to begin on August 1 following April election).

73. Letter from Justice Sandra Day O'Connor to President George W. Bush (July 1, 2005), <https://www.supremecourt.gov/publicinfo/press/oconnor070105.pdf> [https://perma.cc/ZB9L-ZAVG] (“This is to inform you of my decision to retire from my position as an Associate Justice of the Supreme Court of the United States effective upon the nomination and confirmation of my successor.”).

74. Letter from Justice Stephen Breyer to President Joe Biden (Jan. 27, 2022), https://www.supremecourt.gov/publicinfo/press/Letter_to_President_January-27-2022.pdf [https://perma.cc/7HR6-F3T8] (“I intend this decision to take effect when the Court rises for the summer recess this year . . . assuming that by then my successor has been nominated and confirmed.”).

That predictability and frequency demand further attention. For better or worse, lame duck officials typically possess the full formal authority of their offices until the end of their terms. In the context of the presidency, some have argued that this is a fundamental flaw in our system.⁷⁵ But whatever the merits of that position, there is surely something troubling about allowing an outgoing official—in particular one who may have been repudiated at the polls—to exercise the authority of the office in a way that will impede their successor’s ability to act in ways that are responsive to popular will.

So consider again the various litigation and adjudication moves described above, but now placed in the lame duck period. We began with a discussion of elected officials making decisions in light of their own fixed terms, including midnight litigation. The same litigation decisions—filing cases, taking positions, reaching settlements—can happen during the lame duck period, as it did with some of the Trump executions and the Kline prosecution of Dr. Tiller.⁷⁶ Lame duck litigation may raise more serious concerns than other sorts of late-term decisions by lame duck officials both (1) because litigation timelines are frequently so protracted and (2) because litigation, by its nature, involves an institution—courts—which typically adheres to principles of continuity and stability. This means that a new administration’s decision to change course in litigation may be viewed skeptically by courts; it also means that to the extent late-initiated litigation reaches resolution, that resolution may prove difficult for a successor to undo.

Similarly, lame duck judges may have different incentives than judges in the normal course. On the one hand, empirical studies have found that lame duck judges are less influenced by campaign contributions than judges who may sit for reelection.⁷⁷ On the other hand, when judges weigh in on disputes because of who their successors will be, there is rightly cause for concern. Judges accelerating adjudication timelines to entrench positions, either through binding judgments or through the making of precedent, are playing with time. The North Carolina voter ID case and the Texas appellate cases might fit this bill.⁷⁸ For a historical example, consider *Chavez v. Hockenhull*,⁷⁹ in which the

75. Sanford Levinson, *Presidential Elections and Constitutional Stupidities*, 12 CONST. COMMENT. 183, 184–85 (1995) (“[T]here is something profoundly troubling, . . . in allowing repudiated Presidents to continue to exercise the prerogatives of what is usually called the ‘most powerful political office in the world.’”).

76. See *supra* notes 14–20 and accompanying text.

77. See, e.g., Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1443, 1447 (2016).

78. See *supra* notes 57–59 and accompanying text.

79. 39 P.2d 1027 (N.M. 1934).

New Mexico Supreme Court resolved a disputed U.S. Senate election in favor of a Republican candidate the day before the state supreme court was to turn over from Republican control.⁸⁰ Also, as above, lame duck executives and lame duck judges might come together to entrench their preferred outcome before their replacements get in the door. This collusion, to use a loaded term, should present serious democratic concern.

V. ANALYSIS AND RECOMMENDATIONS

The preceding discussion described a range of ways that litigants and judges make decisions informed by electoral time. This is not necessarily a bad thing. Litigants make all sorts of strategic choices about litigation, including choices that we might call forum shopping. Not only are such choices ubiquitous, they are also not without merit. As Pamela Bookman has readily explained, there are “unsung virtues” of forum shopping that should not be ignored.⁸¹

Similarly, judges, for better or worse, make strategic decisions about litigation. And similarly, these choices are not going away, and they too may have some merit—as when then the U.S. Supreme Court decided to pass on an early interracial marriage case in hopes of avoiding backlash to desegregation efforts.⁸²

So if getting rid of temporal forum shopping or midnight litigation is too hard and too harsh, what should our responses be?

One key theme in this Essay’s discussion of electoral time has been the possibility of entrenchment. Depending on the circumstances, temporal forum shopping and midnight litigation in particular can be used by executive officials to lock in their preferences before the end of a term. Midnight adjudication offers the same option for judges. The concern with the entrenchment described here is that it runs counter to the democratic process and that it makes future governance more difficult. And despite a scholarly focus on entrenchment as profoundly incompatible with basic premises of democracy,⁸³ litigation as a site of antidemocratic entrenchment has gone largely unnoticed in the literature.

80. *Id.* See John Copeland Nagle, *The Lame Ducks of Marbury*, 20 CONST. COMMENT. 317, 337 n.95 (2003).

81. Bookman, *supra* note 32, at 613–28.

82. See Frankfurter Memo, *supra* note 64, at 95–96.

83. See, e.g., Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 406 (2015); Michel J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 509 (1997). Cf. Aziz Z. Huq, *The Supreme Court and the Dynamics of Democratic Backsliding*, 699 ANNALS AM. ACAD. POL. & SOC. SCI., 50, 54–55, 60–61 (2022).

The incentives to use litigation to entrench positions near the end of a term or during a lame duck period may increase as the gulf between public opinion and the positions being pursued in litigation grows. Where officials wish to pursue or entrench unpopular policies, litigation may be especially attractive because many of the key steps in litigation—filing briefs, presenting oral argument—have not typically been subject to significant public scrutiny. Although it was not ultimately successful, the recent effort out of Michigan to use litigation to block a reproductive justice ballot initiative on the basis of alleged typesetting errors may have been driven in part by an assessment that the Michigan Supreme Court as then constituted might be receptive to that effort—and, significantly, more receptive than the court after the election.⁸⁴

Once again, we do not mean here to suggest that every decision or every step taken in litigation at the end of a term is suspect. Indeed, sometimes cases require immediate action that does not conveniently line up with the electoral calendar. But if a commitment to democracy entails accepting, even celebrating, a new administration's "willingness to use the forms of action available to it to usher in a new legal and political order,"⁸⁵ a natural corollary would seem to be instituting limits on the ability of an outgoing administration to insulate its actions from revision by successors in the ordinary course.

One straightforward response is to limit opportunities for entrenchment. Reducing lame duck periods where possible, for example, might have this effect. High courts might end their terms before an election, to restart them after the lame duck period ends, unless an emergency session is needed. And state legislatures might impose limits on what state attorneys general can do in the final weeks of a term.

Other responses look to the back end and the possibility of revision. With respect to judicial decisions, one aspect of entrenchment is stare decisis. Presumably one reason parties or judges may accelerate litigation is to create a favorable precedent that gets the benefit of stare decisis. But the case for stare decisis might be weaker when cases are decided outside of the normal calendar or schedule, so perhaps there should be a norm of weakened stare decisis in cases rushed to judgment.⁸⁶ Such a shift would make it easier for future courts to reverse attempts to entrench

84. See *Reprod. Freedom for All v. Bd. of State Canvassers*, 978 N.W.2d 854 (Mich. 2022).

85. Rodríguez, *supra* note 10, at 60.

86. In the context of state courts, compare Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1940 (2001), with Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754 (2010).

prior outcomes.⁸⁷ Along similar lines, to the extent that executive branch agencies have norms of continuity, those norms might include exceptions for midnight litigation.⁸⁸ If a state attorney general hurried to file a complaint or take a litigation position in the waning days of an administration, perhaps future occupants of that office might feel less compelled to adhere to those decisions.

When the prior determination is locked in via a judgment or settlement, the entrenchment is more formal, and thus more formal tools are needed to reverse it. In the context of midnight regulation, Congress can reverse decisions under the Congressional Review Act.⁸⁹ Perhaps legislatures might consider bills to allow revision—by executives, legislatures, or both—of settlements entered in the final days of an administration.⁹⁰ Similarly, courts entering consent decrees under these circumstances might build in options for reconsideration after the administration turns over. Courts also might consider exceptions to res judicata for judgments that are the product of midnight litigation (*e.g.*, judgments that depend on the government’s decision to decline to defend).⁹¹

We hasten to add that responses to actions such as midnight litigation need not be value neutral, or at least need not be valence neutral. In addition to considerations about the susceptibility to revision that animated our prior discussion, there is also related but broader consideration of whether they operate to facilitate, or rather to thwart, democracy. An example here is illustrative. Midnight litigation designed to establish a constitutional rule against partisan gerrymandering should be evaluated differently from midnight litigation designed to lock in a

87. Some might suggest that stare decisis is constraining on judges, so removing it for lame duck decisions might encourage courts to push the envelope. That is why, as we explore below, our suggestions here need not be value neutral.

88. See generally STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES (Emily Myers ed., 4th ed. 2018).

89. 5 U.S.C. §§ 801–08.

90. Federal law requires the Department of Justice to notify Congress when entering consent decrees that provide relief likely to exceed three years. 28 U.S.C. § 530D(a)(1)(C)(ii). And it limits the length of consent judgments in prison-conditions cases. 18 U.S.C. § 3626(b).

91. Preclusion will be an issue for government litigants at least between the same parties (mutual preclusion) and for states in which the state government is not exempted from nonmutual preclusion, as the federal government is under *United States v. Mendoza*, 464 U.S. 154, 162–63 (1984). See generally 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4464.1 (3d ed. 2017); Note, *Nonmutual Issue Preclusion Against States*, 109 HARV. L. REV. 792 (1996); Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1 (2019). On state decisions not to defend, see Shaw, *supra* note 9.

gerrymandered map.⁹² A midnight adjudication to approve putting a widely supported initiative on the ballot should be evaluated differently than a decision to keep it off the ballot on spurious grounds, like the (ultimately unsuccessful) suit to block the Michigan reproductive freedom ballot initiative on the basis of alleged typesetting errors.⁹³ If our concern with entrenchment is that it is antidemocratic, then it must matter if the entrenched position is itself pro- or anti-democratic.⁹⁴ In addition, under some circumstances, entrenchment of policy positions might raise fewer concerns than entrenchment of politicians themselves. Again, entrenchment and democracy interact in important ways.

We also think that the context around efforts at entrenchment matters. It matters, for example, if the court is close to “midnight” because of intentional delay by litigants or legislators. If midnight adjudication is compelled by other norm-breaking or is a tit-for-tat response, that might lessen the concerns we raised above.

Our observations about entrenchment and the other values with which it intersects bring us to a broader point: public law litigation is often politics by other means. Bringing politics to the fore is important both for what happens inside of courts and outside of them.

Inside of the courts, part of the aim of this Essay is to call out practices that everyone knows—or should know—are happening. Call it transparency or honesty or realism, courts should be clear eyed about the role of politics in litigation. While the law does not rule out forum shopping, courts routinely consider plaintiffs’ motives for selecting a court when deciding whether to transfer the case to another forum.⁹⁵ Similarly, courts might consider temporal motives when deciding whether to grant expedited review or original jurisdiction.

92. See David E. Pozen, *Hardball and/as Anti-Hardball*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 949, 950–51 (2019); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021).

93. See Maggie Astor, *Group Seeks to Block Abortion Vote in Michigan*, *Citing Typography*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/2022/08/19/us/politics/michigan-abortion-amendment.html> (describing anti-abortion groups’ arguments that the proposed amendment’s spacing created “nonexistent words” such as “decisionsaboutallmattersrelatingtopregnancy”).

94. See Pozen, *supra* note 92; Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337; Jennifer Nou, *Constraining Executive Entrenchment*, 135 HARV. L. REV. F. 20, 30 (2021).

95. See, e.g., *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001) (en banc) (“[T]he more it appears that the plaintiff’s choice of a U.S. forum was motivated by forum-shopping reasons . . . the less deference the plaintiff’s choice commands and, consequently, the easier it becomes for the defendant to succeed on a *forum non conveniens* motion by showing that convenience would be better served by litigating in another country’s courts.”).

Outside of the courts, potentially the most important response to temporal forum shopping or midnight litigation is to name and shame. Not all examples of those behaviors are problematic, but presumably the political arguments against them will be most powerful when the behaviors are the most egregious. A last-second consent decree that locks in a position that was at the center of the campaign that ousted the executive official should be criticized more than the decision to settle a non-ideological case on the normal schedule that happens to coincide with the end of an administration. Courts playing games with timing also open themselves up to criticism that simply would not be effective if the timing were not unconventional. A contribution of this Essay, then, is to identify these moves as aspects of politics—subject to the constraints of politics, not just the constraints of law.

CONCLUSION

As we have shown, the electoral time of executive officials and judges influences the conduct and results of public law litigation. Electoral time, we think, is baked into democratic governance. While not all effects of electoral time are problematic, this Essay shows that electoral time may exacerbate the risk of entrenchment and anti-democratic decisionmaking. Legal rules may be able to cleanse these effects, but ultimately it is likely that sunlight will be the best disinfectant.

* * *