

[**Dear Readers:** This is a true first draft; as you'll see, there are large chunks that still need to be written, and we haven't even attempted to footnote responsibly yet. The project is an outgrowth of a presentation that my co-author and I did this summer for the annual meeting of the National Association of Attorneys General. We're still trying to figure out if there's a paper here, and—if so—what it's about, and whether we agree on the basic takeaway. Your input will be a huge help. Many thanks in advance for reading at this early stage.]

STATE PUBLIC LAW LITIGATION IN AN AGE OF POLARIZATION

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This essay explores two highly salient phenomena in American politics and seeks to better understand the relationship between them. The first is the advent, largely over the past few decades, of high profile public law litigation by state attorneys general (AGs) acting on behalf of state governments and citizens—the sort of thing that Texas Attorney General Greg Abbott meant when he described a typical workday as “I go into the office, I sue the federal government and I go home.”¹ Such cases include “red-state” challenges to the Affordable Care Act and the Obama Administration’s Deferred Action for Parents of Americans program (DAPA), and “blue-state” challenges to Bush Administration environmental policies and the Trump Administration’s travel bans. Yet state AGs’ influence over national (or nationwide) policy extends beyond those well-known examples. It also includes significant increases in *amicus curiae* filings by state governments, multistate litigation by groups of AGs working together to combat questionable business practices, as well as state efforts to enforce *federal* law in ways that may deviate from the national Executive’s priorities. State AGs are playing a pivotal role in some of the most important national political debates of the day, and they are doing so largely through entrepreneurial litigation.

The second phenomenon is political polarization. Americans are more ideologically divided today than they have been for some time. This polarization has important consequences for governance, rendering national politics unusually contentious and often undermining our capacity for self-governance.

State public law litigation, especially in its most recent manifestations, seems at first glance to be a symptom of the broader polarization in national politics. For much of the last decade, for example, coalitions of blue states committed to stricter environmental safeguards have litigated to prod the federal Environmental Protection Agency to more stringently regulate emissions of greenhouse gases. Over the same period, red-state coalitions have likewise litigated to prevent such regulation. Similarly, red and blue-state coalitions confronted one another over the

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¹ Sue Owen, *Greg Abbott says he has sued Obama Administration 25 times*, Politifact, May 10, 2013, <http://www.politifact.com/texas/statements/2013/may/10/greg-abbott/greg-abbott-says-he-has-sued-obama-administration-/>.

constitutionality of the Affordable Care Act’s individual mandate and Medicaid expansion. And state *amicus curiae* filings in the same-sex marriage litigation likewise reflect a passionate red/blue divide over the pace of social change with respect to sexual orientation and family relationships. There can be no doubt that, in many instances, state public law litigation is a vehicle for the expression of the same divisions that convulse American politics generally.

As state litigation has grown in volume and prominence, it has drawn more attention in both the academic literature and popular press. Much of that attention has been negative. AGs, critics argue, are abandoning their traditional role “as representatives of their states,” in which the goal of litigation was to vindicate the long-term, institutional interests of states *qua* states.² Rather than focusing on threats to state autonomy, AGs today can be found pushing for *more* federal regulation,³ or supporting claims “of individuals as opposed to the states themselves.”⁴ And, as noted, they often are doing so in partisan clusters rather than banding together *as states* to promote state interests in a politically neutral manner.

We have some sympathy for those critiques, but we think the picture is far more complicated—in part because the concept of “state interests” is itself complicated. To understand state litigation, we argue, it helps to situate it within broader theories of federalism. When most people think of federalism, they imagine “vertical” conflicts between the states and the federal government, conflicts in which states typically are resisting assertions of federal power so as to maximize their own regulatory autonomy. But our federal system also serves to address “horizontal” conflicts in which powerful states (or groups of states) attempt to impose their will on others. Vertical conflicts are, for the most part, about *who* decides—the states or the federal government. Horizontal conflicts are about *what* policies will prevail.

Viewed from this perspective, the critiques of state litigation are easy to understand. When states challenge federal policy in “vertical” cases, they are performing their traditional role in a federal system, throwing off the federal yoke so that they can govern themselves. To the extent that state AGs argue in favor of federal law in such cases, they look like traitors to the cause. “Horizontal” cases, similarly, appear to be at odds with the states’ shared interest in autonomy. When states argue in favor of individual claims of constitutional right, for example, or use federal law to reform widespread business practices, they seem to be vindicating their own short-term regulatory interests—interests that may well track partisan divisions—at a cost to the interests of the states as such.

The difficulty with this vision is that the line between vertical and horizontal conflicts—and between states’ institutional and regulatory interests—is often fuzzy and contested. As we explain, many seemingly vertical conflicts have horizontal aspects, and vice versa. For regulatory challenges that cannot be solved without collective action—environmental issues are the easiest, but by no means only, example—states that favor a pro-regulatory approach have little choice but to push for federal, or nationwide, solutions. In such circumstances, states’ institutional and regulatory interests merge, and the best (perhaps the only) way pro-regulatory states can exercise their “sovereignty” is by appealing to federal power. Naturally, things look different to anti-regulatory states, and those disagreements will often play out along partisan lines. It does not

² Nolette book 200. .

³ *Id.* at 30-31.

⁴ *Id.* at 200.

follow, however, that the state AGs on either side of the case are putting politics before state interests.

Our exploration of the relationship between state public law litigation and political polarization proceeds in three parts. Part I offers a sketch of polarization in the federal and state governments, tracing the relationship between polarization, national policymaking, and policy autonomy at the state level. Part II then turns to state litigation. It seeks to explain the rise in state litigation by reference to the institutional development of state AGs' offices and the expansion of doctrinal and statutory rights to sue. The consequence of these developments is that state AGs have emerged as a particularly powerful group of lawyers, and Part II maps the different sorts of claims that states can (and do) use to shape national policy. Finally, Part III turns to the relationship between state litigation and polarization. Few scholars have sought to study polarization in the work of state AGs, but the available evidence suggests that state litigation is indeed becoming more "political," in the sense that Democratic and Republican AGs increasingly are pursuing different causes, or lining up on opposite sides of the same cases. Part III offers a normative assessment.

I. POLARIZATION AND FEDERALISM

Contemporary American politics displays a level of political polarization that, while hardly unprecedented, is significantly greater than anything in recent memory. For decades, American political scientists lamented the lack of clear programmatic differences between the major political parties; that state of affairs, they complained, deprived American voters of a meaningful choice at election time. The present era thus plays out the old adage, "Be careful what you wish for." (Alternatively, it embodies the Chinese curse: "May you live in interesting times.") American politics—and the underlying society—finds itself divided between quite different conceptions of the good life, with strong and contrary implications for government regulation, fiscal policy, and individual rights.⁵ The temperature of political debate has called into question the basic capacity of our national political institutions to mediate and resolve these conflicts. And these changes in political climate have affected the weather at the U.S. Supreme Court, influencing both the sorts of cases brought before the Justices and the types of parties that bring them.

For students of American federalism, there is a certain irony to all this. A decade ago, prominent voices in the federalism literature took the position that American federalism is meaningless and unnecessary because American society lacks the kind of basic divisions that make federalism necessary in, say, Canada or Iraq.⁶ This line of thought surely represented the conventional wisdom in terms of its basic assumptions even if not everyone accepted the conclusion that American federal structure could safely be junked.⁷ Scholars looking to defend federal structures were left searching for glimmers and vestiges of state identity that might sustain

⁵ It may also be the case that participants in American political debate are less willing to bracket disagreements about the nature of the good life than they once were. The rights-based liberalism of John Rawls and Ronald Dworkin – which was committed, in principle at least, to bracketing such disagreements – seems far less ascendant on the American Left than it was. The traditional Right, of course, was never committed to this sort of bracketing, although the rise of libertarianism on the contemporary Right may amount to a move in that direction.

⁶ See MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: NATIONAL IDENTITY AND TRAGIC COMPROMISE* (2008).

⁷ See, e.g., ROBERT SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* __ (2009); Jessica Bulman-Pozen, *Partisan Federalism* 127 Harv. L. Rev. 1077, __ (2014).

autonomous subnational institutions.⁸ The question *now*, by contrast, sometimes seems to be whether Americans can find sufficient common ground to move forward together on common problems. Federalism, we suggest, can help.

A. Polarization in Congress

The Democratic and Republican Parties are more polarized today than they have been in decades—maybe more than a century, according to some measures.⁹ What that means, in part, is that the contemporary Congress is marked by high levels of *partisan sorting*: Members are more easily sorted by party today than they were in the past.¹⁰ There are fewer conservative Democrats, and fewer liberal Republicans.¹¹ As a result, there is little or no overlap between members of the different parties.¹² Second, and closely related, is the notion of *ideological divergence*, which refers to the distance between the party medians. That distance today is greater than at any time since the end of Reconstruction.¹³

Polarization translates into sharp and sustained disagreement and a refusal to compromise across party lines. When the House and Senate are controlled by different parties, the probable effect is gridlock—an inability to get things done, because there’s no common ground for consensus. The same is often true when one party controls both houses of Congress and the other party controls the White House. Unless the dominant party in Congress has a veto-proof majority, the President can block major legislation.

The consequences are well known: Gridlock means that Congress is likely to produce less federal legislation; and the bills that do emerge are likely to be less consequential. Rather than addressing big, contentious questions, a gridlocked Congress will tend to enact symbolic legislation, or to leave the critical choices to agencies.

Things look different under unified government, of course. When the same party controls both houses of Congress and the Presidency, it can—in theory at least—accomplish quite a lot. That was the case during the last four years of the George W. Bush administration, and the first two years of the Obama Administration, and it is the situation today. In times of unified government, the consequence of polarization should be more *extreme* legislation.¹⁴ In that sense,

⁸ See, e.g., Ernest A. Young, *The Volk of New Jersey?* (perennially unpublished manuscript).

⁹ See, e.g., Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics* (2015) (using roll-call votes to measure polarization and concluding that “[p]olarization of the Democratic and Republican Parties is higher than at any time since the end of the Civil War”).

¹⁰ Cynthia Farina [cite].

¹¹ Hare & Poole Fig. 1 (showing ideological dispersion of the parties in Congress from 1879-2013).

¹² Farina, *supra* note __, at 1694. According to the *National Journal*’s ideological rankings of Members of Congress, for example, the number of Representatives located between the most liberal Republican and the most conservative Democrat in the House dropped from 344 in 1982 to four in 2013. In the Senate, there were 58 senators in this overlap-space in 1982; by 2013, none. *Id.* (citing Chris Cillizza, *The Ideological Middle Is Dead in Congress. Really Dead.*, Wash. Post: The Fix (Apr. 10, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/04/10/theideological-middle-is-dead-in-congress-really-dead/>).

¹³ https://legacy.voteview.com/political_polarization_2014.htm; see David W. Brady & Hahrie Han, *An Extended Historical View of Congressional Party Polarization* (2004).

¹⁴ Some theorists say that unified government can expose fissures in the majority party, producing something reminiscent of gridlock under divided government. The first year of the Trump administration seemed to bear out that hypothesis, as the Republicans failed to move major legislation (including the much-promised repeal of the Affordable

polarization raises the stakes of control of the national government: If one party can win control of both Congress and the Presidency, it can dictate policy on virtually every issue people might care about, and without much in the way of compromise with the minority party. Indeed, some political scientists argue that polarization is likely to produce legislation that is more extreme than many of the majority party's own constituents would want—and, thus, inconsistent with the preferences of the majority of voters.

B. Polarization and the States

In circumstances like this, federalism can operate as an important safety valve, lowering the temperature on contentious policy debates and creating opportunities for the kind of bipartisanship that may be impossible at the national level. To begin with, the patterns of polarization that define national politics today are not replicated in all of the states. In Massachusetts, for example, Democrats and Republicans can agree on a generous level of social provision and broadly libertarian social policies, while Texas Republicans and Democrats tend to share a broad commitment to a low-tax, small government model.

What this suggests is that party identity varies across states: It means something different to be a Republican in Massachusetts than it does to be a Republican in Texas. In other words, partisan sorting is not as clear-cut at the state level as it is in Washington, D.C. Whereas there is vanishingly little overlap between the *national* representatives of the two parties, the picture looks different if one focuses on state legislators. Democrats elected to state office in Mississippi, Louisiana, and Arkansas, for example, are in some cases more conservative than Republicans in Delaware, Illinois, New Jersey, Rhode Island, Hawaii, Connecticut, New York, and Massachusetts.¹⁵

Ideological divergence is also muted—or at least more mixed—at the state level. A leading 2011 study of polarization in state legislatures found that the distance between party medians varied significantly from one state to the next. California boasted the most polarized state legislature, leading a group of fifteen states in which ideological divergence was more pronounced than in Congress. The majority of state legislatures, however, were less polarized than Congress.¹⁶

One way that federalism can mitigate the effects of political polarization, then, is by offering alternative policymaking venues in which the hope of consensus politics is more plausible. Even in more polarized states, there is some reason to think that the unique pressures of state politics—the need to balance a budget each year, and the direct responsibility for practical things like roads, schools, and the like—may impose some discipline on the grandstanding that plagues Washington, D.C. We come from North Carolina—deep purple and closely divided. We just had a particularly nasty gubernatorial election and a fractious legislative session. But even in states like ours, the prevalence of pragmatic concerns like fixing potholes and reducing crime may moderate polarization's effects somewhat. States have to get certain things done, and a lot of those things aren't particularly ideological. Their balanced-budget requirements constrain them from the

Care Act) through Congress. By the end of the year, however, the gigantic tax overhaul had changed the picture substantially.

¹⁵ Boris Shor & Nolan McCarty, *The Ideological Mapping of State Legislatures*, 105 Am. Pol. Sci. Rev. 530, 540 Fig. 7 (2011).

¹⁶ *Id.* at 546 Fig. 15.

worst kinds of obstruction and kicking the can down the road. Unlike in Washington, D.C., state politicians can't spend all their time grandstanding and posturing on symbolic issues.

And where bipartisanship fails, unified government might step in to fill the breach. As of 2015, only twelve states had divided government. That number climbed to eighteen after the 2016 elections, then slipped back to seventeen after West Virginia Governor Jim Justice switched to the Republican party. Thus, even those state legislatures with relatively high levels of polarization may be capable of avoiding gridlock and getting things done.

To be sure, the same risks that exist at the federal level are present in the states: The combination of polarization and unified government can produce less compromise and more extreme policy. But the stakes are lower for statewide, as compared to nationwide, solutions. At the very least, devolving decisionmaking authority to the states opens up opportunities for policy variation—not only among states, but also between the states and Congress. A flourishing federal system means that Democrats currently out of power in Washington, D.C. don't just have to give up or focus on rearguard actions at the federal level; they can govern at the state level.¹⁷ Especially when state government is unified, those Democrats can pursue a very different set of policies than those originating in Washington, D.C. The consequence may not be compromise, exactly, but it does offer a way to serve the preferences of people who identify with the minority party in Congress.¹⁸

In order for states to play these roles, however, the federal government must leave them room to maneuver. If polarization plus unified government at the national level enables more federal overreaching—statutes that trench on state interests, or that are more broadly preemptive in scope—then states may find they have less space to act.

Divided government at the federal level can also hold threats to state autonomy, though the reason is less intuitive. At first blush, polarization plus divided government may seem like a boon for federalism: The less Congress is able to do, the more that's left for the states.¹⁹ But congressional gridlock may also produce more unilateral action by the federal executive, in the form of executive orders and guidance, gentle and not-so-gentle nudges directed at agencies, and so on. This dynamic was reflected in President Obama's "We Can't Wait" campaign, for example. The campaign started with a speech in which the President said, "we can't wait for an increasingly dysfunctional Congress to do its job. Where they won't act, I will." And it became a year-long theme in the lead-up to the 2012 election cycle. In one year alone, the President announced more than forty executive actions packaged under the "We Can't Wait" brand.²⁰

¹⁷ See, e.g., Heather K. Gerken, *Dissenting by Deciding*, 56 Stan. L. Rev. 1745 (2005); Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 Brooklyn L. Rev. 1277 (2004).

¹⁸ See, e.g., Bulman-Pozen, *Partisan Federalism*, *supra* note ____.

¹⁹ See, e.g., Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 69 (describing the "Legal Process" model of federalism, under which "[w]hat is 'reserved' to the States . . . is regulatory authority over matters upon which Congress has been unwilling or unable to legislate"); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 525-35 (1954) (developing this view).

²⁰ See Kenneth S. Lowande & Sidney M. Milkis, *"We Can't Wait: Barack Obama, Partisan Polarization and the Administrative Presidency*, 12 The Forum 3 (2014). One of the tools Obama used was the conditional waiver—allowing states to avoid requirements of federal law, such as No Child Left Behind, only if they adopted new standards prescribed by the Obama Administration. [cite]

From a federalism perspective, there's a lot not to like about unilateral executive action. Most obviously, it's a whole lot easier to do than running formal legislation through two chambers of Congress and the President. Many people believe that state interests are protected in the national political process, through the close ties between national and state parties and politicians and the representation of states through their congressional delegations. Others emphasize the many “veto-gates” in Congress that stand in the way of legislation. These are the so-called political and procedural safeguards of federalism. And, to the extent that states get protection in the *legislative* process, one might worry about federal policy being made in a far more streamlined fashion, centered in the executive branch, where states have no special voice.²¹ Granted, states may find considerable freedom to shape federal policy in its bureaucratic interstices, proposing innovative means of implementing federal mandates or dragging their feet on locally unpopular requirements.²² But despite the practical importance of such implementation authority, the leeway afforded is unlikely to be broad enough to accommodate the basic ideological conflicts that often characterize our polarized national debates.

This brings us to a second way in which states can mitigate the effects of polarization—not through legislation and regulation, but through litigation.²³ Like private litigants, states can challenge federal action that arguably goes too far. As we explain below, however, considerations of expertise, institutional capacity, and democratic accountability suggest that states may be particularly well-situated to spearhead such litigation. And, indeed, states have been at the forefront of some of the most consequential challenges to federal policy in recent years, including not only the constitutional challenge to the Affordable Care Act (aka Obamacare), but also more recent challenges to the Trump Administration's travel bans. Those examples are merely the tip of the state-litigation iceberg, but they capture a feature that has drawn significant attention in popular commentary: The states' challenges to the ACA and the Trump travel bans have been decidedly partisan affairs. The ACA litigation was led by “red” states; the ongoing travel-ban litigation is dominated by “blue” states.

One might well wonder, therefore, whether state litigation mitigates polarization or instead exacerbates it. The remainder of this essay is devoted to that question. We begin by surveying the landscape of state litigation, mapping the many different ways that state AGs can shape national policy, and describing some of the institutional and doctrinal changes that have caused such litigation to flourish. We then examine how the various categories of state litigation relate to polarization at both the federal and state levels.

II. THE FLOWERING OF STATE PUBLIC LAW LITIGATION

In recent decades, state AGs have emerged as a uniquely powerful cadre of lawyers. As the chief legal officers for their respective states, AGs are responsible for enforcing state law and

²¹ See generally Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321 (2001); Ernest A. Young, *Executive Preemption*, 102 Nw. U. L. Rev. 869 (2008). Some have argued that federal administrative law significantly protects state autonomy, see, e.g., Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 Duke L. J. 2023 (2008), but that view is subject to serious difficulties, see, e.g., Stuart M. Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 Duke L. J. 2111 (2008).

²² See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L. J. 1256 (2009);

²³ See, e.g., Daniel Francis, *Litigation as a Political Safeguard of Federalism*, 49 Ariz. St. L. J. 1023 (2017).

defending the state against legal challenges; in many areas, they also share responsibility with federal agencies for enforcing federal law. Independently elected in forty-three states, AGs stand at the top of organizational hierarchies that operate alongside—and sometimes in opposition to—other institutions for state policymaking.²⁴ Their work first grabbed the national spotlight in the 1990s, when AGs from different states banded together to take on Big Tobacco. Although AGs were by no means the first lawyers to sue the tobacco companies, they succeeded where others had failed, securing a settlement that required substantial changes in tobacco marketing and payments to the states totaling more than \$206 billion. In more recent years, AGs have targeted, and ultimately disrupted, settled industry practices by paint producers, toy manufacturers, pharmaceutical companies, and auto manufacturers—among others. As one corporate lobbyist put it, “[i]n some ways, [AGs are] more powerful than governors. They don’t need a legislature to approve what they do. Their legislature is a jury. That’s what makes them frightening[.]”²⁵ That quote captures an important truth, but it is misleading in at least one respect: Virtually no cases make it to a jury. Most settle before trial, transforming lawyers into lawmakers in a very real sense. To critics, the consequence is “regulation by litigation.”

State AGs also can reshape the law itself by raising legal challenges to federal (and sometimes other states’) laws. During the Obama Administration, many Republican AGs made names for themselves by suing the federal government; that pattern is now being reversed as Democratic AGs take aim at President Trump’s policies. As noted, blue-state AGs are currently at the forefront of litigation over the federal travel ban, as well as possible Emoluments Clause violations, so-called “sanctuary cities,” and more.²⁶

As these examples suggest, state litigation is not just significant as a practical matter; it is also politically salient. Perhaps not surprisingly, as AGs have become increasingly active and entrepreneurial, they have also attracted criticism from various quarters—including from other AGs. Critiques often center on a claim that state litigation is driven by partisan ambitions rather than a desire to vindicate the interests of the states *qua* states. We take up those critiques in the Part III. Our goal in this Part is to provide a positive account of what state public law litigation *is*, and what makes it possible.

We use the term “state public law litigation” because we want to address a particular subset of the litigation that State AGs undertake. We do not focus, for example, on government contracts

²⁴ Interesting questions arise when a given state itself has divided government. In North Carolina, for example, the Republican-dominated legislature has jostled with the Democratic governor for control over litigation on behalf of the state. [cites] Those sorts of problems are not without analogs at the federal level, as when the Republican-controlled House of Representatives sought to defend the federal Defense of Marriage Act after the Obama Administration announced that it was unwilling to do so. *See United States v. Windsor*, [cite]. But because most states lack a unitary executive, it is also not uncommon for the state governor and attorney general to be from different parties. [cites] This creates thorny state separation of powers problems on which federal practice can provide little guidance. We do not explore those problems further here, other than to suggest that a non-unitary executive may make it easier for voters to weigh in on the litigation decisions of a state government, simply because those decisions are not folded into a simple up or down vote on the performance of the entire executive branch.

²⁵ Greenblatt, *Avengers General*.

²⁶ *See also*, e.g., Mark Moore & Kirstan Conley, *Dem governors considering lawsuit against GOP tax bill*, N.Y. Post, Dec. 4, 2017, available at <https://nypost.com/2017/12/04/cuomo-considers-lawsuit-against-gop-tax-bill/> (discussing possible state suits against elimination of federal tax deduction for state and local taxes). We hope that it goes without saying that our general good opinion of state public law litigation should not be taken to reflect an endorsement of any particular legal theory or claim.

litigation involving the state, ordinary civil enforcement of state regulatory laws, or most individual criminal prosecutions. Rather, our subject is more like the category of “impact litigation” undertaken by public interest lawyers. Just as broad “public rights” cases brought by non-governmental organizations seeking broad reforms became an increasingly salient category of litigation in the late twentieth century, requiring courts and scholars to rethink a litigation model predicated on the enforcement of “private rights,”²⁷ so too the litigation activity of state governments has increasingly taken on a public law cast.

That said, the category remains a fuzzy one. Although one can identify widely-recognized examples of “state public law litigation,” such as the state lawsuits challenging the Affordable Care Act or the Trump travel bans, its delimiting principles are considerably less obvious. Scholars have noted that the very term “public law” can be used in a number of distinct senses.²⁸ Because our interest is primarily in the practical impact of state litigation on American politics and our federal system, we want to define the relevant category fairly loosely. What we are interested in is (1) litigation activity (not only filing lawsuits but also defending them and participating in other ways, such as by *amicus* filings) (2) by states (including not only state AGs but also other state actors and, sometimes, actions by membership organizations representing states) that is (3) intended to have a legal and/or political impact that transcends the individual case and the individual jurisdiction in which the action takes place.

A. The Engines of Expanding State Public Litigation

Prior to the 1980s, most state AG offices were small, sleepy outposts.²⁹ Things changed dramatically over the next few decades. The “New Federalism” of the Reagan Administration resulted in the devolution of countless regulatory and administrative responsibilities from the federal government to the states.³⁰ As the workload of state agencies increased, so too did their litigation exposure—with the burden of defense falling on state AGs.

Recognizing their AGs’ significant new responsibilities, states allocated more resources to them.³¹ Higher budgets and greater responsibilities, in turn, drew a new breed of attorney to the

²⁷ See generally RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 73-78 (7th ed. 2015) (describing the shift from a “private dispute resolution” model to a “public rights” or “law declaration” model of the judicial function).

²⁸ See, e.g., Randy E. Barnett, *Four Senses of the Public Law-Private Law Distinction*, 9 Harv. J. L. & Pub. Pol’y 267 (1986).

²⁹ See Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 526 (1994) (describing AGs’ offices as “placid and reactive” prior to 1980); Thomas R. Morris, *States Before the U.S. Supreme Court: State Attorneys General as Amicus Curiae*, 70 JUDICATURE 298, 299 (1987) (observing that “state attorneys general tended to look upon their role as being merely ministerial functionaries of the state administration; they were in office to do the bidding of other political executives and defend the state establishment from legal attacks”). In 1950 the average AG’s office had a staff of roughly 19 attorneys; the median budget hovered just under \$104,000. ERIC N. WALTEBURG & BILL SWINFORD, *LITIGATING FEDERALISM: THE STATES BEFORE THE U.S. SUPREME COURT* 45 (1999). By 1970, the average staff had grown to 51, and the median budget to \$612,089. *Id.*

³⁰ Waltenburg & Swinford, *supra* note 29, at 45.

³¹ During the 1970s and early 1980s, AGs’ budgets expanded at rates that outpaced general government spending in every state. Cornell W. Clayton & Jack McGuire, *State Litigation Strategies and Policymaking in the U.S. Supreme Court*, 11 KAN. J.L. & PUB. POL’Y 17, 18 (2001). By 1989 the mean number of attorneys was more than 148, and the median budget \$9.9 million. WALTEBURG & SWINFORD, *supra* note 29, at 45.

AG's office. Increasingly, the "state's law firm" was staffed with "a younger, better educated, and more ambitious caliber of attorney."³²

As institutional capacity expanded, so too did the opportunities to use it. When federal agencies decreased their enforcement activities in the 1980s, state-level enforcers rushed in to fill the void.³³ Areas like antitrust and consumer protection, once dominated by the federal government, became enclaves of aggressive state enforcement.³⁴ State litigation was facilitated by new provisions of federal law that authorized state AGs to participate in the enforcement of federal statutes, often by suing as *parens patriae* to protect the rights of state citizens.³⁵ The common law doctrine of *parens patriae* dates back to early English practice, in which the King exercised certain royal prerogatives as "father of the country." In its more modern form, the doctrine allows states to sue to vindicate sovereign or quasi-sovereign interests, including an "interest in the health and well-being . . . of [their] residents in general."³⁶ Today, many state and federal statutes explicitly authorize states to sue as *parens patriae*.³⁷ Others can be read to authorize state suits implicitly, by creating broad rights of action for citizens whom the states can represent.³⁸ And even in the absence of specific statutory authorization, state AGs may (depending on state law) have common law or constitutional authority to litigate as *parens patriae* on behalf of state citizens.³⁹

{Here we will describe the tobacco litigation of the 1990s, which demonstrated that state litigation could be powerful indeed, particularly when states banded together. We'll also discuss increased cooperation among states, facilitated in part by NAAG. Among other things, the tobacco litigation highlighted how lucrative state suits could be—not just for state government generally, or for state citizens, but for state AG offices specifically. We'll discuss revolving-fund

³² Clayton, *supra* note **Error! Bookmark not defined.**, at 538.

³³ See William L. Webster, *The Emerging Role of State Attorneys General and the New Federalism*, 30 WASHBURN L.J. 1, 5 (1990) ("In short order the states asserted themselves in dramatic fashion. . . . Attorneys general were called 'fifty regulatory Rambos' by one individual.").

³⁴ *Id.*; see also Clayton, *supra* note 29, at 535-36 (describing states' efforts to secure regulatory and enforcement authority in areas including antitrust and consumer protection).

³⁵ See, e.g., Hart-Scott-Rodino Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976), codified at 15 U.S.C. § 15(c) (authorizing states to sue as *parens patriae* in federal court on behalf of their citizens to secure treble damages for a variety of federal antitrust violations); see also Lemos [SEFL] at 712 ("As state attorneys general assumed new prominence, provisions for state enforcement began to proliferate in Congress. New provisions have been enacted by virtually every Congress in the last two decades.").

³⁶ *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982).

³⁷ [cites]

³⁸ See, e.g., *EEOC v. Fed. Express Corp.*, 268 F. Supp. 2d 192, 197 (E.D.N.Y. 2003) (citing *Physicians Health Servs. of Conn.*, 287 F.3d at 121) ("[S]tanding provisions in many . . . statutes implicitly authorize[] *parens patriae* standing by using language that permits any 'person' who is 'aggrieved' or 'injured' to bring suit."); see also *Massachusetts v. Bull HN Info. Sys., Inc.*, 16 F. Supp. 2d 90, 103 (D. Mass. 1998) (reasoning that state attorney general has statutory standing to sue under Age Discrimination in Employment Act as "'legal representative' of the people of the [state] for purposes of this action" (quoting 29 U.S.C. § 630(a) (2006))); *Minnesota v. Standard Oil Co.*, 568 F. Supp. 556, 563-66 (D. Minn. 1983) (permitting state to sue as *parens patriae* under Section 210 of Economic Stabilization Act of 1970, which permitted suit by any "person," because "when a state acts in its quasi-sovereign capacity in a *parens patriae* action, . . . [a] harm to the individual citizens becomes an injury to the state, and the state in turn becomes the plaintiff").

³⁹ [cites]

arrangements that allow AGs to keep the proceeds from certain types of litigation, and that have proven to be important funding sources in some states. Finally, the tobacco litigation demonstrated the value of cooperation between state AGs and the private bar—including arrangements in which AG offices hire private lawyers to work on a contingent-fee basis, which has the effect of increasing (sometimes vastly) the litigation resources available to the AG’s office.}

Courts—state and federal—have also played a role in the growth of state AG litigation. Perhaps most importantly, they have taken an expansive view of state standing. In *Massachusetts v. EPA*, the Supreme Court cited Massachusetts’ “stake in protecting its quasi-sovereign interests” as a reason for “special solicitude” in the standing analysis. Long before those words were uttered, lower federal courts had held that states can sue as *parens patriae* to vindicate their citizens’ rights under the federal constitution, even in circumstances in which the citizens themselves would lack standing. For instance, whereas the rule of *City of Los Angeles v. Lyons* makes it difficult for private parties to seek injunctive relief from sporadic instances of official misconduct,⁴⁰ courts have permitted states to sue as *parens patriae* in equivalent cases.⁴¹ Similarly, in the multistate tobacco litigation, courts recognized states’ standing to sue the tobacco companies to recoup the expenses they had incurred as a result of smoking-related illnesses suffered by their citizens.⁴² When private organizations (such as unions and health maintenance organizations) asserted similar claims, however, courts ruled that their injuries were too remote to establish standing.⁴³

Representative suits by states also enjoy a raft of other procedural advantages over their private analogs—class actions. Whereas private class actions are governed by a complex set of procedural requirements designed to promote judicial economy and protect the interests of absent class members, courts have declined to apply those rules to similar suits by states—even as they have tightened up the requirements for private suits. Courts have likewise refused to subject AG *parens patriae* suits to the jurisdictional requirements of the Class Action Fairness Act, or to mandatory arbitration clauses. When faced with simultaneous suits by states and by private class counsel, courts have often denied certification to the private class action on the ground that the state suit is the “superior” method of adjudication. As one court put it, “the State should be the preferred representative” of its citizens.

{ We will probably do more to build out this section—adding some discussion of nationwide injunctions, for example, and buttressing the discussion of state standing. We’re not entirely sure how much to stress this, but one of the takeaways may be that state litigation is not just powerful today, but that states are able to bring issues to the courts that wouldn’t otherwise get there (because of limitations on private class actions or standing for private plaintiffs, e.g.) }

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⁴¹ [cite] Courts have reasoned that, because the state represents all of its citizens, and because those citizens are a diverse group, it will typically have little trouble establishing that a harm that has occurred in the past will likely befall some citizens in the future. [cite]

⁴²

⁴³ [cites] {Note that emoluments clause case by a liberal private gov’t watchdog group has been thrown out for lack of standing while state suits by MD and DC are going forward. The TX immigration case is another example: it’s not obvious who else had standing to enforce the separation of powers limitation on unilateral executive action. Standing for Congress—the most obviously injured party—remains highly controversial.}

Given all this, it is not surprising that state litigation activity has seen marked increases in both volume and visibility in recent decades. For example, the number of Supreme Court cases in which states are parties has shot up since the 1980s—spurred in part by the creation in 1982 of the National Association of Attorneys General (NAAG) Supreme Court Project.⁴⁴ The Project (now known as the Center for Supreme Court Advocacy) helps coordinate state litigation efforts, and provides various forms of support (including organizing moot arguments and the like) for AGs with cases before the Court.⁴⁵ Even more notable is the increase in states’ filings as amici. Such filings are not command performances, but represent AGs’ discretionary decisions to devote limited resources to Supreme Court advocacy.⁴⁶ The most comprehensive study of state litigation in the Supreme Court, a book-length treatment by Eric Waltenburg and Bill Swinford, reports that by 1989 states had “become exceptionally active amicus curiae participants. They account[ed] for 20 percent of all *certiorari* petitions accompanied by an amicus brief and 18 percent of the *amicus* briefs on the merits.”⁴⁷ Today, states’ participation in the Supreme Court—both as direct parties and as *amici*—is second only to that of the federal government.⁴⁸

The Supreme Court may be most prominent venue for state litigation, but it is hardly the only one. {*Brief sketch of how state litigation has ramped up generally.*}

B. Mapping State Litigation

We know states are doing *more* litigation, but the aggregate numbers can only tell us so much. Although discussion of high-profile state litigation sometimes treats it as a unitary category, that perspective obscures important variation within the genre. This section maps state litigation into several discrete types, based on the nature of the claims asserted. We begin with the kinds of cases observers typically associate with state public law litigation—cases in which states are pitted against the federal government. These include (1) claims that federal government action exceeds the limits of national regulatory authority, as in the state challenges to the Affordable Care Act;

⁴⁴ See Douglas Ross, *Safeguarding Our Federalism: Lessons for the States from the Supreme Court*, 45 PUB. ADMIN. REV. 723, 727-28 (1985) (describing NAAG’s genesis and functions). Another significant institutional response was the creation of the State and Local Legal Center (SLLC), which files amicus briefs on behalf of member associations. *Id.* at 728.

⁴⁵ See NAAG CENTER FOR SUPREME COURT ADVOCACY, www.naag.org/naag/about_naag/center-supreme-court.php (describing the Center’s functions); Clayton & McGuire, *supra* note 31, at 23-25 (same).

⁴⁶ See Clayton, *supra* note 29, at 544 (“Unlike when states are party to a suit, the decision to participate as *amicus curiae* is determined largely by the personal interests and felt political pressures on individual attorneys general. Changes in the institutional role of the office should therefore be reflected by trends in state *amicus* activity.”).

⁴⁷ WALTENBURG & SWINFORD, *supra* note 29, at 48. If anything, the number of state briefs filed understates the level of state activity. Thanks in large part to NAAG’s coordination efforts, states frequently band together on amicus briefs. A study of merits-stage state amicus briefs found that the average number of joining states jumped from 2.4 in the 1970s to 13.9 in the 1990s. Clayton & McGuire, *supra* note 31, at 24-25; see also WALTENBURG & SWINFORD, *supra* note 29, at 48 (“NAAG’s focus on the coordination of state *amicus* activity has resulted in substantial levels of joining behavior. Accordingly, where it is rare to find more than two *amici* joining together on a *pre-certiorari* amicus brief, on average six states coalesce”). A more recent study of state amicus filings reveals similar joining behavior at the certiorari stage: Using data on state certiorari filings compiled by Dan Schweitzer at NAAG, Greg Goelzhauser and Nicole Vouvalis report that “[d]uring the 2001-2009 terms, state-sponsored amicus briefs urging review in state-filed cases were joined by an average of about 18 states, and only 5 of the 88 briefs filed were signed by a single state.” Goelzhauser & Vouvalis, *supra* note __, at 825.

⁴⁸ Lemos & Quinn, *supra* note __, at 1235.

(2) claims that federal government action violates aspects of the national separation of powers, as in state challenges to President Obama’s immigration policies; and (3) claims that federal government action violates individual federal rights, as in the state lawsuits against President Trump’s travel bans. It bears emphasis, however, that states can also shape policy outside their borders by targeting primary behavior directly, in suits against private actors alleging violations of either (4) state or (5) federal law. Examples include, respectively, state tort litigation against the tobacco industry and state AGs’ enforcement of the environmental or immigration laws more aggressively than federal agencies choose to do.

To be sure, many prominent lawsuits will fall within more than one of these categories. For example, challenges to President Trump’s travel bans have sometimes included both claims that the bans violate individual rights and claims that the President has exceeded the scope of his lawful executive authority.⁴⁹ And state amicus briefs concerning the validity of the federal Defense of Marriage Act raised both federalism and individual rights arguments.⁵⁰

There is, moreover, important diversity within categories. As we discuss further below, the relevant legal constraints in each of the first three categories—federalism and separation of powers principles, or individual rights—may be either constitutional or statutory in character. We do not distinguish between constitutional and statutory claims, at least at our first cut, because we think that both constitutional and statutory norms serve similar constitutive functions in many instances.⁵¹ Each category also includes legal claims and arguments asserted by states in a variety of settings—including, for example, not only lawsuits but also *amicus* filings by state attorneys general. It is the legal claim asserted, not the form in which that claim is advanced, that defines our categories for present purposes. And, while we have framed our categories as challenges to the legality of either federal governmental or private action, we also include within those categories state assertion of arguments—often in opposition to arguments by other states—affirming the legality of these actions.⁵²

{Readers: we still have a lot of work to do in this section, to fill out the discussion of state litigation in each of these categories with concrete (and, we hope, interesting) examples.}

1. Federal Power Claims

This category contains claims that federal governmental action exceeds the legal limits of national authority. The classic example would be claims about the reach of Congress’s enumerated

⁴⁹ [cites]

⁵⁰ See Brief Addressing the Merits of the State of Indiana and 16 Other States in Support of the Bipartisan Legal Advocacy Group of the U.S. House of Representatives in No. 12-307, *United States v. Windsor* (Jan. 29, 2013), available at https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-307_resp_amcu_merits_soi-et-al.authcheckdam.pdf [hereinafter “*Windsor* Pro-DOMA States’ Brief”]; Brief on the Merits of the States of New York, Massachusetts, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia, as *Amici Curiae* in Support of Respondent Edith Schlain Windsor in No. 12-307, *United States v. Windsor* (March 1, 2013), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/03/Amicus-Brief-of-States-on-Merits-for-Windsor.pdf> [hereinafter *Windsor* Anti-DOMA States’ Brief].

⁵¹ See generally Ernest A. Young, *The Constitution Outside the Constitution*, 117 Yale L. J. 408, __ (2007) (discussing the constitutive role of statutory and other non-entrenched norms in structuring the government and identifying individual rights).

⁵² See, e.g., *Windsor* Pro-DOMA States’ Brief, *supra* note 50.

powers.⁵³ One of the claims in the Affordable Care Act litigation, of course, was that Congress lacked power under the Commerce Clause to require individuals to buy health insurance.⁵⁴ Sometimes states raise these sorts of claims as a preemptive strike on federal legislation, as in the ACA case. Perhaps more often, these issues are raised by individuals as defenses to the imposition of federal requirements or penalties. In *United States v. Lopez*,⁵⁵ for example, a criminal defendant prosecuted for possessing a firearm within 1000 feet of a school argued (successfully) that the federal prohibition did not regulate interstate commerce. In *United States v. Morrison*,⁵⁶ on the other hand, an individual defendant in a civil case argued that or in suits for a declaratory judgment or injunction seeking to bar enforcement of federal law, as in *Raich*. States then come in as *amici*—sometimes on both sides of the case.⁵⁷

These cases are high visibility but, we want to suggest, of limited practical importance. They're just not very promising, given how broadly even the Rehnquist and Roberts Courts have interpreted national enumerated powers. The Commerce Clause is very, very broad—and even where it's not broad enough, there is the Necessary and Proper Clause to fill most gaps.⁵⁸ (In the healthcare case, of course, the Taxing Clause swooped in and saved the day for the ACA.⁵⁹) We may see occasional wins for states here, but they're likely—as in *Lopez*—to be mostly symbolic in their importance.⁶⁰

The more important class of cases are those in which Congress seeks to enlist state officials to implement federal law but arguably lacks power to do so. *Most* federal programs rely on state and local officials to some degree for enforcement and implementation. Polarization makes states

⁵³ These claims almost always concern the Commerce Clause – the catch-all, default power that sustains most federal legislation. But occasionally they involve other powers, such as Congress's power to enforce the Reconstruction Amendments, *see, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997). *Boerne* was a private claim brought against a local government by church officials under the federal Religious Freedom Restoration Act (RFRA). But the case drew state *amici* filings on both sides, *see* Brief of the States of Maryland, Connecticut, Massachusetts, and New York as *Amici Curiae* in Support of Respondent in No. 95-2074, *City of Boerne v. Flores*, 1996 WL 10282 (Jan. 10, 1997); Brief for *Amici* States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, the Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam, and the Virgin Islands in Support of Petitioner in No. 95-2074, *City of Boerne v. Flores*, 1996 WL 695519 (Nov. 29, 1996), and Ohio Solicitor Jeffrey Sutton was given oral argument time to argue against the RFRA's constitutionality.

⁵⁴ *See NFIB v. Sebelius*, 567 U.S. 519, 547-61 (2012) (opinion of Roberts, CJ).

⁵⁵ 514 U.S. 549 (1995).

⁵⁶ 529 U.S. 598 (1999).

⁵⁷ In *Lopez*, several states filed in support of the Gun Free School Zones Act. *See* Brief for the States of Ohio and New York and the District of Columbia as *Amici Curiae* in Support of Petitioner in No. 93-1260, *United States v. Lopez*, 1994 WL 16007793 (June 2, 1994). No state filed in support of Mr. Lopez, but he did get a brief filed by several national organizations representing state and local governments. *See* Brief of the National Conference of State Legislatures, National Governors' Association, National League of Cities, National Association of Counties, International City/County Management Association, and National Institute of Municipal Law Officers, Joined by the National School Boards Association, as *Amici Curiae* in Support of Respondent in No. 93-1260, *United States v. Lopez*, 1994 WL 16007619 (July 19, 1994).

⁵⁸ *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 34-42 (2005) (Scalia, J., concurring in the judgment).

⁵⁹ *See* 567 U.S. at 567-74.

⁶⁰ *See, e.g., Ernest A. Young, Two Cheers for Process Federalism*, 46 Vill. L. Rev. 1349, 1374-75 (2001).

governed by the party that is out of power in Washington particularly likely to want to opt out of federal programs. Under the Commandeering Doctrine, Congress can't *require* state officials to implement federal policy.⁶¹ Congress rarely tries to do this; instead, it typically conditions federal benefits (usually federal money) on state cooperation. So the cases that arise typically ask whether federal spending conditions are sufficiently clear or amount to federal coercion, as in the Medicaid Expansion portion of the healthcare case⁶² or in the current challenges to the Trump Administration order on sanctuary cities.⁶³ Alternatively, states' claims may focus on whether certain federal requirements really amount to commandeering.⁶⁴

This latter class of cases operates within a cooperative federalism context rather than a model of federalism where states have their own exclusive sphere of regulatory jurisdiction outside of federal authority.⁶⁵ But rather than seeking to control the content of federal policy, these cases generally try to preserve states' ability to opt out. The *Printz* litigation that established the anti-commandeering principle for state executive officers did not try to strike down the federal Brady Act; it simply protected the right of state and local officials not to participate in its enforcement. Likewise the Medicaid expansion decision simply preserved an opt-out right for states.⁶⁶

Finally, an important class of federal power claims involve state immunities from federal regulation. These claims arise defensively, typically in response to claims by individual litigants.⁶⁷ For a brief period during the late 1970s and early 1980s, state and local governments asserted immunities from federal regulation itself under the now-defunct *National League of Cities* doctrine.⁶⁸ More enduring principles shield state governments from certain judicial remedies when they violate federal requirements. A line of cases stretching back over a century – but intensifying under the Rehnquist Court – recognized a broad principle of state sovereign immunity shielding

⁶¹ See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

⁶² See *NFIB v. Sebelius*, 567 U.S. 519, 575-85 (2012).

⁶³ See, e.g., *Cty. of Santa Clara v. Trump*, 2017 WL 1459081 (N.D. Cal. April 25, 2017).

⁶⁴ For example, a thorny question in the sanctuary cities litigation is the extent to which local officials are simply being asked to cooperate with federal law enforcement in the same way any private citizen would have to do, or are instead being “commandeered” into enforcing federal immigration policy.

⁶⁵ See, e.g., Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001); MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 26 (1995) (contrasting “dual” and “cooperative” federalism).

⁶⁶ [Caveat: in some circumstances a robust opt-out right could kill a federal scheme that required cooperation; and at that extreme the difference between trying to control the content of federal policy and preserving a right of opt-out dissolves.]

⁶⁷ The convoluted saga of attempts to avoid state sovereign immunity also includes cases in which individuals with financial claims against states enlist various other sovereign entities, including state governments, to prosecute those claims on the individuals' behalf. These efforts have *not* generally had much success. See, e.g., *New Hampshire v. Louisiana*, 108 U.S. 76 (1883) (holding that New Hampshire could not pursue financial claims against another state where New Hampshire had no interest of its own).

⁶⁸ See *National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that, at least in some circumstances, Congress may not regulate state governmental entities performing traditional governmental functions), *overruled by* *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1985). See also Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 Sup. Ct. Rev. 1, — (discussing claims under *National League of Cities* as a species of “immunity federalism”).

states from damages claims brought by individuals for violations of federal law.⁶⁹ A more recent line of cases has constricted federal civil rights claims against state and local officers for violations of federal statutory requirements.⁷⁰ States have participated in these cases as both party defendants and extensively as *amici* (again, often on both sides).⁷¹

These immunity cases differ from most of our examples of state public litigation in that they arise defensively – they are not, as it were, examples of AGs like Texas’s Greg Abbott going into work and filing lawsuits against the federal government. Nonetheless, these cases do seem part of a systematic effort by state Attorneys General to expand protections for state and local governments under federal law. It seems fair to view Jeffrey Sutton’s successful advocacy of an expansive view of state sovereign immunity in cases like *University of Alabama v. Garrett*⁷² and *Kimel v. Florida Board of Regents*,⁷³ for example, as an extension of his entrepreneurial tenure as State Solicitor of Ohio.⁷⁴

2. Federal Separation of Powers Claims

It’s less intuitive to think of States making separation of powers arguments than federalism arguments, but that has been the tendency in much state public law litigation over the past decade or so. As we’ve noted, polarization tends to cause gridlock, even with nominally unified government in Washington. And gridlock encourages the President to reach for his “pen and phone” to get things done unilaterally.⁷⁵ So we get challenges that sound in separation of powers, not federalism. But the litigation is motivated by states that are either seeking to protect their own autonomy or to find a way to participate in the national lawmaking process, which has shifted from Congress to the Executive Branch.

U.S. v. Texas—the immigration case—is a good example.⁷⁶ When President Obama extended “lawful presence” to millions of additional undocumented aliens, it was hard to argue that the “deferred-action” programs (DAPA and DACA) fell outside the authority of the national government as a whole. But it was relatively easy to argue that the President lacked the authority

⁶⁹ See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Hans v. Louisiana*, 134 U.S. 1 (1890).

⁷⁰ See, e.g., *Gonzaga University v. Doe*, 536 U.S. 273 (2003) (Federal Educational Rights and Privacy Act (FERPA) does not create enforceable rights under 42 U.S.C. § 1983); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (no implied right of action for disparate impact discrimination under Title VI).

⁷¹ See, e.g., Brief of Amicus Curiae States of California, Washington, Alabama, Arizona, Arkansas, Colorado, Connecticut, Hawaii, Idaho, Kansas, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia and West Virginia Supporting the State of Florida, et al., in No. 94-12, *Seminole Tribe v. Florida*, 1995 WL 17008502 (May 3, 1995).

⁷² 531 U.S. 356 (2001).

⁷³ 528 U.S. 62 (2000). Judge Sutton, then in private practice at Jones Day, argued both *Garrett* and *Kimel* on behalf of the state defendants.

⁷⁴ See also *Alexander v. Sandoval*, 532 U.S. 275 (2001), in which Judge Sutton, in private practice, appeared as counsel of record on behalf of the State of Alabama successfully opposing recognition of a private right of action for disparate impact discrimination under Title VI of the Civil Rights Act of 1964.

⁷⁵ See *Obama-I’ve Got a Pen and a Phone*, YouTube, https://www.youtube.com/watch?v=G6tOgF_w-yI (visited Aug. 19, 2017).

⁷⁶ See *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

to—as Obama himself put it—“change the law” without going to Congress. As was clear to all involved, Congress’s general intransigence on the immigration issue meant that a decision against *executive* authority would be—for all intents and purposes—a decision against *federal* authority more generally.

A separate set of process arguments operates at the statutory level but serves a constitutional purpose. Again, the immigration case is a good example. Texas’s successful argument in the district court on the merits was simply that Obama’s immigration policy change had failed to comply with the Administrative Procedure Act because it had not gone through notice and comment. Notice and comment isn’t an insurmountable hurdle for agency lawmaking, but it does delay implementation of national policy. More important, it allows states—like anybody else—to insist on direct input into the federal lawmaking process. It allows states to be heard at the agency just as they are supposedly heard in Congress, although without any special status vis-à-vis other participants. Provisions in the APA for notice and comment, as well as for judicial review of process failures at the agency, effectively operate as separation of powers-type constraints on the new lawmaking process of the administrative state.

The separation of powers principle that Congress—not the President—makes the law also gives rise to a second kind of challenge to federal action. That challenge argues that executive action—like the immigration order or the travel ban or the EPA’s clean power plan—is substantively inconsistent with the underlying statute.⁷⁷ Again, polarization can cause such claims to multiply. The longer gridlock persists, the more likely that new executive initiatives will stray from the obvious purview of the original legislation. So, for example, states challenged the Obama administration’s transgender bathroom guidance on the ground that its definition of gender discrimination is radically different from that of the Congress that enacted Title IX of the Civil Rights Act.⁷⁸

Defeat of the bathroom guidance would have left States free to go their own way on transgender issues (or simply to leave the matter up to localities)—at least until a less divided Congress could step in and resolve the matter by statute.⁷⁹ But much statutory litigation challenging federal executive action does more than that, seeking to impose a particular national policy on the whole country. The Texas immigration case is an arguable example, given the federal government’s plenary power over immigration matters.⁸⁰ Similarly, the *Massachusetts v. EPA* litigation sought to force the federal EPA to regulate greenhouse gases as pollutants, while challenges to the Obama Clean Power Plan would return us to a considerably more deregulatory

⁷⁷ See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (challenge by 23 states to EPA rule regulating air pollutants on ground that agency did not consider costs of regulation as required by statute).

⁷⁸ See *Texas v. United States*, No. 7:16-cv-00054-O (N.D. Tex. Aug. 21, 2016) (granting preliminary injunction on behalf of 13 states and other plaintiffs) (available at [https://www.texasattorneygeneral.gov/files/epress/Texas_et_al_v._U.S._et_al_-_Nationwide_PI_\(08-21-16\).pdf](https://www.texasattorneygeneral.gov/files/epress/Texas_et_al_v._U.S._et_al_-_Nationwide_PI_(08-21-16).pdf)).

⁷⁹ One could also imagine states taking the position—most likely through amicus briefs but perhaps in a *parens patriae* suit to enforce their citizens’ rights against a federal agency—that the Equal Protection Clause of the national Constitution *requires* something like the federal bathroom guidance. That sort of case would fall in the *next* section.

⁸⁰ We say “arguable” because, to the extent that DAPA was an effort to centralize the discretionary judgment about whom to deport in the White House or Main Justice, the defeat of that policy might simply return us to a regime of more decentralized discretionary judgments. Those judgments would not belong to the *states*—they would be made by federal agency officials—but they might not result in any sort of centralized policy.

policy. (And lest deregulation seem to leave the issue open to state experimentation, industry and sometimes the federal government have argued that lax federal standards often preempt more rigorous ones at the state level.) These sorts of claims thus often involve conflict among states over the control and content of national policy rather than carving out space for state policy diversity.

3. Federal Rights Cases

Some state challenges to federal action rely not just on structural principles but also on individual rights arguments. We see this in the travel ban cases, for instance. In these cases, state governments may be asserting *parens patriae* standing to raise the rights of their citizens. Sometimes one can find a state interest that is adversely affected; some of the state plaintiffs in the travel ban cases, for instance, argued that their state universities had been deprived of faculty and students from abroad.⁸¹ And sometimes the states participate as *amici* to express a view on the scope of federal rights, as in the same-sex marriage cases.

It's important to recognize that this category also includes state litigation activity *defending* against the invocation of federal rights. For example, numerous states have participated as *amici* opposing equal protection challenges to affirmative action in state universities. It is even more common to see states opposing the invocation of rights claims by criminal defendants.⁸² Similarly, states also play defense against federal civil rights claims brought by private litigants. (These two categories are often related, as many federal civil rights claims involve allegations of improper actions by state or local law enforcement.) In this latter set of cases, state governments are often the defendants; even where they are not (in the many cases against municipalities and their officers, for instance) they may well play a prominent role as *amici*.⁸³

As we discuss in more detail in the following Part, these rights cases create the potential for horizontal conflicts among states. Whenever state AGs support claims of constitutional right, they are—in a very real sense—arguing against their own state's power. More than that, they are seeking to impose a particular rule on *all* states. Like the statutory challenges described above, then, individual-rights cases often involve interstate conflicts over control of federal policy. Those conflicts, moreover, can often be coded as “red” versus “blue.”

4. State Enforcement of State Law that Creates National Regulation

As we have already noted, the tobacco litigation of the 1990s was a critical watershed for state public law litigation. To be sure, states have sought to enforce their own laws in ways that affect conditions outside their jurisdiction for a very long time.⁸⁴ But most observers seem to agree

⁸¹ See *Hawaii v. Trump*, 859 F.3d 741, 765 (9th Cir. 2017).

⁸² Note that Lemos & Quinn found that these cases tended to be lopsidedly Republican—Dem AGs tended to sit them out.

⁸³ See, e.g., *City of West Covina v. Perkins*, 525 U.S. 234 (1999) (Ohio SG Jeffrey Sutton, who had filed an *amicus* brief on behalf of 29 states, arguing on the city's behalf by leave of court).

⁸⁴ See, e.g., *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (state of Georgia sued copper companies in Tennessee to stop discharge of noxious gases that crossed the border into Georgia). Justice Holmes' opinion in *Tennessee Copper* was vague as to the source of the law upon which Georgia's claim rested. But after *Erie* we think it make sense to understand the common law nuisance principles asserted in that case as ordinarily grounded in state law.

that the tobacco litigation of the late 1990s ushered in a new era of state activism that then spread to other regulatory areas and types of litigation.⁸⁵

The tobacco litigation and its contemporary analogs share two related features that differentiate them from ordinary state enforcement of state law against private parties. The first is that rather than a single state suing a defendant within its jurisdiction for torts that harmed its citizens, the tobacco litigation featured a broad coalition of states – ultimately including *all* the states as well as Puerto Rico, the District of Columbia, and the Virgin Islands. And the Master Settlement Agreement that ended the litigation eventually came to include nearly all manufacturers of tobacco in the American market. The litigation thus aimed at global peace – that is, a comprehensive settlement among all the relevant players.

The second point is that, as Paul Nolette has noted, the tobacco settlement essentially created a nation-wide regulatory regime governing cigarettes.⁸⁶ It includes, for example, not only payments by the defendants for past harms but also agreements to strengthen warning labels and restrictions on advertising. This was achieved not through federal legislation but rather through a comprehensive settlement agreement by the parties to the litigation.⁸⁷ But because it applies throughout the United States, and governs the activities of virtually all tobacco companies doing business here, one could fairly say that it might as well be a federal law.⁸⁸

Similar multi-state litigation efforts have imposed similar quasi-regulatory regimes via comprehensive settlements with major industry players in the pharmaceutical and other industries. We expect this phenomenon will continue. In the fall of 2017, for example, the Commonwealth of Massachusetts sued the credit-reporting company Equifax following announcement of a data breach that allegedly affected over 140 million consumers.⁸⁹ Massachusetts brought the suit under its own data privacy statute as well as a more general consumer protection statute. If other states and credit reporting firms are drawn into this litigation, one might well see another comprehensive settlement with terms that would effectively act as, and possibly obviate, national regulation.

{ We may add some discussion here of circumstances in which “ordinary” enforcement of state law—that is, by a single state within its borders—can have similar effects. NY’s enforcement of the all-powerful Martin Act against Wall Street is an example. }

5. State Enforcement of Federal Law

State enforcement of federal law is pervasive, from antitrust to consumer protection to environmental law.⁹⁰ The interesting instances for our purposes are those where state enforcement reflects a disagreement with national enforcement policy. The most salient recent example was

⁸⁵ See, e.g., NOLETTE [cite]

⁸⁶ [cite]

⁸⁷ The tobacco companies, along with the National Association of Attorneys General, petitioned Congress for a national legislative settlement, but no such legislation was ever enacted.

⁸⁸ Professor Nolette thus argues that the tobacco settlement was a problematic circumvention of the national legislative process. We address that argument in Part III, *infra*.

⁸⁹ See Sarah T. Reise, *State and Local Governments Move Swiftly to Sue Equifax*, Ballard Spahr Consumer Finance Monitor, Oct. 3, 2017, available at <https://www.consumerfinancemonitor.com/2017/10/03/state-and-local-governments-move-swiftly-to-sue-equifax/>.

⁹⁰ See Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. Rev. 698 (2011).

Arizona’s effort to ramp up enforcement of federal immigration laws in response to what it saw as an abdication by federal authorities. Another example, with a different political valence, would be Eliot Spitzer’s effort in NY to more aggressively enforce federal environmental laws because NY thought the federal regulatory agencies were too lax.⁹¹

As we explained above, state enforcement of federal law can happen either through statutory authorization or through states simply relying on more general private rights of action, often asserting *parens patriae* standing to sue on behalf of their citizens.

{ We need to fill in this section with more examples that show how states can use their authority to enforce federal law as a way of responding to cuts in enforcement by the feds. We also need to think about whether state enforcement of state “mirror statutes” (state laws that largely track federal statutes) falls within this category or the previous one. }

Like the multistate cases described above, state enforcement of federal law can create the equivalent of regulatory policy nationwide. Given the interconnectedness of the national market, it is hard to confine the effects of state enforcement within a particular state’s borders. If New York aggressively pursues Microsoft, Washington may feel aggrieved. And if pro-environment states severely undermine the fortunes of big oil companies, the oil producing states may be moved to retaliate. We see a little of this in the reactions by oil-producing states to investigations by other state AGs of Exxon’s role in the climate debate.⁹²

III. STATE LITIGATION, POLITICS, AND POLARIZATION

The rise in state litigation has drawn national attention to state AGs—dollars, too. *{ We need to add a bit here on the increase in money flowing into AG races, including—often—money from national organizations rather than in-state sources. }*

But the attention has not all been positive. As state litigation, and state AGs, have gained prominence, they have also attracted critics. A common theme in the critiques is that state litigation has moved away from its traditional core of defending “state interests,” and into an uncertain new realm dominated by politics, partisanship, and policy debates.⁹³ Indeed, such critiques sparked the creation of a dissident AG organization, the Republican Attorneys General Association (RAGA) in 1999, as a way to “stop what they called ‘government lawsuit abuse’ and redirect state legal efforts away from national tort cases and back to traditional crime fighting.”⁹⁴ The creation of RAGA didn’t do much to stem state litigation, but it did help balance the political membership of AGs’ offices. AGs used to be overwhelmingly Democratic; now there is a much closer mix of Democrats and Republicans—due in part to aggressive campaign contributions and ads by the

⁹¹ See *id.* at 743-44.

⁹² See, e.g., Barbara Hollingsworth, *11 State Attorneys General Side with ExxonMobil in Climate Change Case*, CNSnews.com, Sept. 9, 2016, <http://www.cnsnews.com/news/article/barbara-hollingsworth/11-state-attorneys-general-side-exxonmobil-climate-change-case>. [Need to think about whether this example works, given the state-law source of the MA/NY investigations.]

⁹³ See, e.g., Nolette book at 200 (“The long-term effect of the federal government’s invitation for AGs to influence national policy has been to encourage AGs to define state interests much differently than in the past. A crucial element of this shift is that while AGs have traditionally acted as representatives of their states, they have increasingly claimed the ability to represent a broader range of interests. This includes representing the interests of individuals as opposed to the states themselves.”).

⁹⁴ Greenblatt *Avengers General*.

Chamber of Commerce and similar groups. Many of those newly elected Republican AGs have themselves become active litigants, particularly during the Obama administration.

The consequence is that it's easy to paint state litigation as a partisan affair, with blue-state AGs challenging national policies, or business practices, that are defended by their red-state counterparts—or vice versa. Viewed from that perspective, the work of AGs seems destined to exacerbate, rather than ameliorate, the trends toward polarization that define our national politics.

We think the picture is considerably more complicated than that, as this Part explains. We begin by surveying what we know about partisanship and polarization in the work of state AGs, and then address the normative question that animates this Essay: to the extent that state litigation is “political,” what should we make of that fact?

A. Evidence of Polarized State Litigation

State litigation has unquestionably ramped up since the 1980s, but not all states have participated equally. For example, some states file, and join, far more *amicus* briefs than others.⁹⁵ More importantly for present purposes, existing research indicates that AGs from different states increasingly articulate opposing interests. Writing in 1987, Thomas Morris reported that states appeared on opposite sides of only 2% of the cases argued before the Supreme Court.⁹⁶ Such findings reinforced the view that the political developments of the 1980s and early 1990s “helped forge a new sense of shared interest between the states in each others’ legal policymaking and litigation. . . . [N]ot only have state attorneys general become more active, they have increasingly sought to influence policy qua states in the collective sense rather than as individual state actors.”⁹⁷

That sense of shared interest may have eroded in recent years, however. A 2014 study by Paul Nolette found significantly more interstate conflict, particularly during the Obama Administration. Focusing on cases decided by the Supreme Court between 1993 and 2013, Nolette examined instances in which multiple AGs filed briefs, either as amici or parties, at the cert or merits stage. He found a “large spike” in interstate conflicts during the last four years of the sample.⁹⁸ In 35% of the cases during that period, states either squared off against each other or collaborated on briefs with a strong partisan slant.⁹⁹

⁹⁵ See, e.g., Morris, *supra* note __, at 304 (finding variation among the states in the level of amicus activity between 1974 and 1983, with California and New York leading the pack); WALTEBURG & SWINFORD, *supra* note 29, at 66 (finding the nation’s most populous states tend to be most active as parties in the Supreme Court, whereas states that are less populous but “rich in natural resources and/or containing large tracts of land area owned by the federal government” tended to be the most active amici).

⁹⁶ Morris, *supra* note __, at 302 (“Most of the divisions did not consist of a significant number of states on either side, but rather one or two states on either side or one or two dissenters from an otherwise large number of states.”). Perhaps not surprisingly, Morris found that dormant Commerce Clause cases were the most common sites of interstate conflict. *Id.*

⁹⁷ Clayton, *supra* note 29, at 539.

⁹⁸ Paul Nolette, *State Litigation during the Obama Administration: Diverging Agendas in an Era of Polarized Politics*, 44 *PUBLIUS* 451, 456 (2014).

⁹⁹ See *id.* at 455–56 (defining as “partisan” cases in which Republican or Democratic AGs constituted at least 80% of participating AGs). Another study—as yet, unpublished—takes up the partisanship question in the specific context of federalism cases. Sarah Esty, a Yale law student, examined state amicus and cert briefs from 2004–2005 and 2012–2013, focusing on cases that implicated state-federal relations. Sarah Esty, *State Federalism Preferences Under Bush and Obama: An Empirical Assessment of Partisan Federalism* (unpublished manuscript) (on file with authors). She

In other work, Professor Nolette also documented partisan patterns in multistate litigation in the lower federal courts. Whereas state suits against corporations have been largely bipartisan affairs, Nolette found “wide partisan splits among AGs” in what he calls “policy-forcing” suits—cases in which states have “attempted to force [federal agencies] to take a more active regulatory approach.”¹⁰⁰ He found partisanship to be playing a dominant role in “policy-blocking” litigation as well—a category of litigation that he defines as “state challenges to regulatory actions by federal policymakers”¹⁰¹—though the roles were reversed. Whereas Democratic AGs had taken the lead in “policy-forcing” litigation since the George W. Bush Administration, Republican AGs were at the forefront of “policy-blocking” litigation under President Obama.

Studies like Nolette’s are illuminating, but they beg important questions about how to measure partisanship and polarization in the litigation context. One might try to code the substantive positions advanced by AG briefs as liberal or conservative, and then determine the partisan affiliation of the AGs who sign each brief. The difficulty, of course, is devising a system for coding substantive positions that is both valid and reliable.¹⁰² Instead, most researchers have focused on the identity of the AGs who participate in the relevant case or brief. Nolette identifies partisanship by a simple head-count of participating AGs.¹⁰³ That approach avoids the difficulties of categorization that bedevil attempts to code positions by ideology, but it has its own problems: It is insensitive to the ratio of Democratic and Republican AGs in office, and (relatedly) focuses on the AGs who participate in a given case rather than the AGs who opt to sit it out. The upshot is

coded each brief as liberal or conservative using the Supreme Court Database issue direction coding, and as pro- or anti-federalism based on “whether [the brief] called for greater state or federal control over laws, courts, or agencies.” *Id.* at 7. Esty also separately coded each state’s partisan identity based on Presidential vote share, governor’s party, and Attorney General’s party. *Id.* at 8. She found that 16% of state briefs advanced an anti-federalism (pro-federal government) position. *Id.* at 11. Esty concluded, moreover, that states were more likely to support federal power when doing so “aligned with the state’s ideological preferences. Almost two-thirds of the time (62%) that Democratic states advocated anti-federalism positions, they did so to promote a liberal policy outcome When Republican states urged anti-federalism results, over three quarters of the time (77%) it was in service of achieving a conservative outcome” *Id.* at 16 (footnote omitted). For Esty, those results “suggest a strong empirical basis for partisan federalism[]” *Id.* at 20. Yet her data also suggest that a state’s assertion of pro- or anti-federalism results does not follow directly from the state’s (or its AG’s) political orientation as compared to that of the President. As Esty explains, “[a]nti-Obama states were not statistically significantly more likely to take a pro-federalism stance than pro-Obama states.” *Id.* at 17.

¹⁰⁰ NOLETTE, *supra* note ___, at 30. Specifically, Nolette argues that “[s]ince the George W. Bush administration, policy-forcing litigation has chiefly been an avenue for Democratic AGs to expand national regulation beyond the level preferred by Congress or federal agencies.” *Id.*

¹⁰¹ *Id.* at 32.

¹⁰² For literature discussing the problems with efforts to code judicial decisions as “liberal” or “conservative,” see Anna Harvey & Michael J. Woodruff, Confirmation Bias in the United States Supreme Court Judicial Database, 29 J.L. ECON. & ORG. 414, 415 (2013) (finding that the labeling of cases depended more on the preferences of the Court than on the disposition of the case); William M. Landes & Richard A. Posner, Rational Judicial Behavior: A Statistical Study, 1 J. LEGAL ANALYSIS 775, 776–78, 780–81 (2009) (explaining the numerous variables involved in classifying a decision); Ernest A. Young, Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After *Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 11–12 (noting that the inconsistent nature of these classifications poses a significant problem in accurate coding).

¹⁰³ In his study of amicus briefs, for example, he defines cases with a “strong partisan slant” as those in which Republican or Democratic AGs constituted at least 80% of participating AGs. Nolette, *supra* note 98, at ___. Nolette does not specify how he identifies polarization in multistate litigation.

that a brief signed by 20 Democrats and five Republicans registers the same way regardless of whether there are 20 Democratic AGs in office or 45.

A different approach is to code polarization based on the number of (say) Republican AGs participating in a case compared to the number of Republicans then in office, as a means of calculating whether the coalition of AGs was more Republican than would be expected by chance. A recent study by one of us (together with Kevin Quinn) took that approach, focusing on the coalitions of AGs who joined, or opposed each other, in amicus briefs filed in the Supreme Court between 1980 and 2013.¹⁰⁴ If state amicus activity were partisan, one would expect co-signers to be from the same party, and opposing briefs to be filed by AGs from different parties. We found some partisan clustering (meaning that the group of AGs joining, or opposing, a brief was significantly more or less Republican than would be expected from a random draw of AGs then in office), but only in recent years, and—for the most part—only in cases in which groups of AGs weighed in on both sides. When AGs appeared as *amici* on only one side of a case, they tended to do so in bipartisan coalitions. (There were a number of years, however, in which there were significantly polarized Republican coalitions—mostly in criminal procedure cases in which Republican AGs joined an *amicus* brief and Democratic AGs did not participate at all.)

Partisan patterns do not, of course, prove that partisanship is *causing* AGs to act. Virtually no researchers have sought to tease out different drivers for state litigation. The leading exception is Colon Provost, whose studies of state consumer-protection litigation have controlled for factors such as the magnitude of harm caused to state citizens by the defendant's conduct, the presence of consumer groups in the state, citizen ideology, median income, and more. His findings are too complicated to summarize briefly here, but they underscore the need for caution before drawing conclusions about the motivations for state litigation. Provost found, for example, that AGs' own party affiliation did not have a significant effect on the probability of their joining a consumer-protection lawsuit, but that the number of consumer groups in the state did—as did the ideology of state citizens, but only in cases involving Fortune 500 companies.

{ We'll add more here on existing studies of polarization/partisanship in state litigation, but there's not much. }

Taken together, the existing studies suggest two important points for our purposes. First, context matters: The extent to which state litigation reflects polarization among AGs depends on the kind of litigation at issue. For example, state litigation against business interests tends to be more bipartisan than state litigation against the federal government.

Second, AGs' own partisanship may interact with other considerations in ways that are difficult—if not impossible—to tease out from the data alone. For example, Professor Nolette's finding that state litigation against corporations tends to be bipartisan might reflect the fact that some suits are more “political” than others. But (as Nolette acknowledges) the pattern also may be explained by more prosaic concerns: When a major company is already settling with a large group of states, and when the only tangible consequence of non-participation is exclusion from the settlement proceeds, other state AGs may see little advantage to sitting it out.¹⁰⁵

¹⁰⁴ Lemos & Quinn, *supra* note ____.

¹⁰⁵ See, e.g., Nolette at 28 (“Policy-creating litigation is largely a bipartisan endeavor because the settlements often require corporations to pay substantial fines, but only to the states signing the settlement. When a regulatory settlement

As Provost's study indicates, moreover, AGs' own partisan affiliations may be less significant in some cases than the ideological commitments of the state's citizens—or, perhaps, of other state officials.¹⁰⁶ It follows that we might expect to see different behavior from a Democratic AG in an otherwise heavily Republican state than from a Democratic AG in a resoundingly “blue” state. And, as more states become more solidly “red” or “blue,” we might expect AGs to act in an increasingly partisan manner—as some of the data suggest.

In sum, the mere fact of partisan versus bipartisan coalitions can only tell us so much about the causes and effects of state litigation, or whether AGs are “playing politics” rather than seeking to vindicate the interests of their states. In order to make those kinds of assessments, we need a better understanding of how state litigation interacts with state interests—both institutional and regulatory. We also need a better understanding of when, and why, “politics” should matter. Should a normative assessment of state litigation turn on whether the participants seem to have been *motivated* by partisan politics? Or should it focus only on the *effects* of the suit? We take up those questions in the next section.

B. Horizontal and Vertical Litigation

{Readers: This section is woefully incomplete, and there's a good chance my co-author and I disagree on the fundamental takeaways. Your comments and suggestions will be especially helpful here.}

In assessing the impact of state public litigation on polarized political debates, it will help to distinguish between two types of conflict in federal systems.¹⁰⁷ The classic conflict—which is what most people think of when we talk about federalism—is a vertical struggle between the national government and the states. When the national government tries to extend the reach of its Commerce or Spending powers, or when states band together to oppose the practice of “unfunded mandates,” these disputes qualify as predominantly vertical in character.

Our federal system was originally concocted, however, to keep a lid on a different sort of conflict—that is, horizontal conflict among states (or groups of states). Powerful groups of states frequently try to impose their preferences on other states. Creating a national government limited this conflict somewhat, but it also created a powerful new weapon for states to use against one another. That weapon was the national government itself, which one group of states may use as an instrument to impose their preferences on a dissenting minority group of states. A classic example here is the Fugitive Slave Law, which the slaveholding states that dominated the national government before the Civil War enacted to force the Abolitionist North to go along with slavery.¹⁰⁸

Vertical conflict is primarily about each state's right to go its own way on particular questions. When Alphonso Lopez successfully challenged Congress's authority, under the

will occur regardless of whether or not a particular AG participates, most AGs are likely to participate in order to get a share of the settlement proceeds even if they disagree with the underlying legal theories in the threatened lawsuit.”).

¹⁰⁶ [Cite] See also Lemos & Quinn, *supra* note __, at 1263-65, 1266 (making this point and using the states' briefing in *District of Columbia v. Heller* as an example).

¹⁰⁷ See generally Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 Duke L. J. 75, 109-10 (2001).

¹⁰⁸ See *id.* at 121-24.

Commerce Clause, to restrict guns in schools,¹⁰⁹ that didn't affect Texas's own right to decide whether to permit them (it doesn't). But it did leave the decision up to Texas. And it certainly didn't prejudice the right of *other* states to restrict guns in schools.

Horizontal conflict, on the other hand, now mostly takes the form of fights for the right to control *national* policy. In *Massachusetts v. EPA*,¹¹⁰ for instance, one group of states¹¹¹ thought that the national EPA should regulate greenhouse gases as air pollutants under the Clean Air Act; another group¹¹² thought it should not. Both were trying to make policy for the whole country—and still are, in related litigation concerning President Trump's repeal of President Obama's "clean power plan."

Although one can always find exceptions and odd cases, we think we can safely say that, generally speaking, vertical conflicts are about who decides, while horizontal conflicts are about what is to be decided. If that's right, then the state interests at stake in vertical cases are likely to be institutional ones. Those interests may cash out in either a liberal or conservative direction in any given situation, but the interests *themselves*—the preference for state-level autonomy rather than top-down direction from the federal government—are politically neutral. The interests in horizontal cases—where the parties dispute what the uniform federal rule should be—are more likely to be shorter-term regulatory interests with an identifiable political valence.

To the extent that this observation is true, it suggests several normative propositions—propositions that, we believe, are implicit in many critiques of state litigation today, though they are rarely made explicit. The first is that in vertical conflicts, we ought to see more cooperation among states across partisan lines to defend the institutional interests of state governments. One terrific example is then-Alabama SG Kevin Newsom's amicus brief on behalf of Alabama, Louisiana, and Mississippi, supporting the pot-smokers in *Gonzales v. Raich*.¹¹³ Here's how Newsom led off that brief:

The Court should make no mistake: The States . . . do not appear here to champion . . . the public policies underlying California's so-called "compassionate [marijuana] use" law. As a matter of drug-control policy, the amici States are basically with the Federal Government on this one. . . .

From the amici States' perspective, however, this is not a case about drug-control policy This is a case about "our federalism" Whether California and the other compassionate-use States are "courageous" – or instead profoundly misguided – is not the point. The point is that, as a sovereign member of the federal union, California is entitled to make for itself the tough policy choices that affect its citizens. . . .

¹⁰⁹ *United States v. Lopez*, 514 U.S. 549 (1995).

¹¹⁰ 549 U.S. 497 (2007).

¹¹¹ California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.

¹¹² Alaska, Idaho, Kansas, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Texas, and Utah.

¹¹³ 545 U.S. 1 (2005).

If we view states as a safety valve for polarized national politics—as Part I suggested—then we should celebrate briefs like this, where states put policy disagreements aside to assert their institutional interests in limiting national power.

A second normative proposition is that states should focus less of their time and resources on horizontal conflicts. When states argue in vertical cases that particular disputes should be left up to them, they are carving out space for different jurisdictions to reach different conclusions on our most divisive questions. That lowers the stakes of national politics and mitigates the effects of polarization. But when states argue in horizontal cases that national law must adopt their own political or moral vision and impose it nationwide, they are *participating* in polarized conflict. There may be times when the moral imperative to do that is too strong to resist. But there is a cost, because this sort of state litigation undermines our federal system’s ability to mitigate polarized politics.

We think there is a lot of truth to these propositions—at least as first cuts at normative assessment. But they are not the full story. Indeed, depending on one’s view of national power and the circumstances that justify its use, the line between vertical and horizontal cases may be so hazy that it obscures more than it clarifies.

First, many cases have both vertical and horizontal dimensions. For instance, the Affordable Care Act litigation seemed like a vertical conflict: Congress tried to impose the ACA’s requirements on the states, and the challenger states wanted out. Striking down the ACA would not, on its face, prevent individual states from adopting a similar regime or even a single payer system. But many argued that the interstate healthcare market is so interconnected that no state could feasibly impose these requirements on its own.¹¹⁴ From this perspective, if we were to have an ACA-type regime expanding healthcare coverage for all, it could only be done at the national level. This effectively made the conflict a horizontal one: Blue states favoring such a regime had to use the federal government to achieve it by requiring dissenting states to conform. And by arguing the national government lacked power to enact the ACA, the red states were effectively forcing the blue ones to stick with the prior, less universal regime.

Likewise, cases that look horizontal may have an important vertical dimension. Many state challenges to national policy nowadays rely on separation of powers theories. They concede that the national government has power to act, but argue that it has violated constitutional or statutory principles dividing labor among the branches of the federal government.¹¹⁵ These cases may seem horizontal, because they don’t purport to limit national authority overall and instead just challenge a particular federal policy. But they’re often terribly important in checking the national government’s power to act.¹¹⁶

Second, there can be legitimate disagreement even in clearly vertical cases about where the institutional interests of the states lie. Scholars working in the field of international relations has argued that a key means by which contemporary nations exercise their “sovereignty” is by entering into cooperative arrangements with other nations to address problems, like climate change or the

¹¹⁴ See, e.g., Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 L. & Contemp. Probs. 29 (2012).

¹¹⁵ See, e.g., *United States v. Texas*, 136 S. Ct. 2271 (2016) (challenge to President’s immigration policy based on separation of powers and the Administrative Procedure Act).

¹¹⁶ See generally Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321 (2001).

international drug trade, that cannot be effectively addressed by individual nations acting alone.¹¹⁷ The American states are similarly interdependent, and they have interests that can only be vindicated by national cooperation. If pollution generated in Ohio is causing acid rain in New Hampshire, New Hampshire's autonomy may actually be enhanced by cooperative arrangements that restrict pollution that New Hampshire, acting alone, would be powerless to control. That cooperative arrangement is generally called "the federal government."¹¹⁸ For this reason, states have an *institutional* interest in ensuring that the national government is strong enough—and has broad enough powers—to help them out with regulatory problems they can't effectively address on their own.

The upshot is that we may see conflict among different groups of states over issues—like the scope of the Commerce Clause in *Raich*—that are vertical in their structure, and *both groups of states* may be defending their institutional interests. That will not always be true, of course; it depends on whether the relevant policy challenge could be addressed effectively by state-level regulation, or whether it demands collective action. And that, in turn, is a question on which reasonable minds will often differ.

Legitimate disagreement also exists about whether vertical claims asserting immunities against federal remedies actually further the sort of autonomy that can mitigate national polarization. One of us has argued for many years that the Supreme Court's expansive state sovereign immunity jurisprudence does little for state autonomy, because it simply shields states from certain federal remedies (principally money damages) rather than restricting the scope of federal regulation altogether.¹¹⁹ Cases like *Garrett* and *Kimel*, for example, did not take the potentially contentious issue of disability rights off the national agenda; rather, they simply allowed state institutions to get away with violating federal law without paying money damages.¹²⁰ This argument, however, may under-appreciate the extent to which removing the threat of damages awards makes it more possible for state officials administering federal regulatory regimes to reshape those regimes to conform more closely to states' preferences. To the extent that state sovereign immunity or limits on the scope of § 1983 shield instances of "uncooperative federalism,"¹²¹ immunity claims may play a role similar to other assertions of vertical autonomy rights. We suspect this possibility is minor,¹²² but cannot discount it entirely.

¹¹⁷ See, e.g., Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1998).

¹¹⁸ See, e.g., Neil S. Siegel & Robert D. Cooter, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 Stan. L. Rev. 115 (2010).

¹¹⁹ See, e.g., Young, *Future of Federalism*, *supra* note 68, at __; Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 Tex. L. Rev. 1, __ (2004).

¹²⁰ [cites] States remain subject to federal requirements, however, and plaintiffs can often secure injunctive relief against them and (sometimes) damages from the responsible state officers. See generally Mitchell N. Berman, R. Anthony Reese, & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to "Fix" Florida Prepaid (And How Not To)*, 79 Tex. L. Rev. 1037, __ (2001).

¹²¹ See Bulman-Pozen & Gerken, *supra* note __.

¹²² The § 1983 cases are probably more important than the state sovereign immunity decisions in this regard. Where the state asserts sovereign immunity, individual officers – the "uncooperative federalists" celebrated by Professors Bulman-Pozen and Gerken – may still be liable for money damages. But cases like *Gonzaga* leave state officials who are "uncooperatively" administering federal spending power regimes subject only to the cutoff of federal funds by the

{ We need to add a discussion here of individual-rights cases, which are—in a sense—the hardest ones for us to fit into our framework. On the one hand, by asserting a particular definition of federal rights, a state asserts control not only over its own affairs but over every other community in the nation. For instance, although *U.S. v. Windsor*¹²³ seemed to emphasize the importance of the states’ right to define marriage for themselves and condemned the federal Defense of Marriage Act’s interference with state family law, the Court’s decision in *Obergefell*¹²⁴ imposed a single national answer to the question of same-sex marriage. That resolution left people concentrated in blue states very happy, but imposed a piece of their social vision on an unwilling group of red states. Even if one thinks that justice required the result in *Obergefell*, one might nevertheless acknowledge its significant federalism costs, as well as the polarizing effects of state participation in social conflict.

On the other hand, one of the most important things states do is to define themselves as a moral and political community by taking positions on issues that matter to their citizens. Same-sex marriage is one of those defining questions that affirms a community’s sense of itself as progressive and inclusive, on the one hand, or traditionalist and religious, on the other. And given that *Obergefell* came down to a disagreement about the definition of “marriage,” it was arguably appropriate for the institutions chiefly charged with defining that concept in our system—state governments—to weigh in.¹²⁵ The fact that the pro-rights states were making a statement against interest, to some extent, made their arguments that much more weighty. Perhaps it promotes state interests in the long term for states to be recognized as sources of important insights on questions like this. At the very least, we’re prepared to say that the “cost” to federalism may well be worth paying in important cases—the question is whether it’s possible to say something stronger than that. }

A final question is whether partisan *motivations* for state suits are important, or even relevant, to a normative assessment. We have no doubt that much state litigation is motivated by partisan considerations—either the need to generate partisan support for a particular AG’s future ambitions, or simply the desire to vindicate sincere views about the law that happen to correspond to the positions taken by one’s political party.¹²⁶ Even clearly vertical claims asserting long-term

responsible federal agency. That remedy involves considerable political costs and, as a result, is extremely rarely attempted in practice.

¹²³ 133 S. Ct. 2675, 2691-93 (2013).

¹²⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹²⁵ Cf. Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, 2012-2013 Cato Sup. Ct. Rev. 117, 133-37 (2013) (discussing this aspect of the same-sex marriage debate).

¹²⁶ Empirical research on the law and politics divide has yet to come up with any good way to separate “legal” views about the content of the law from “political” or “partisan” views about how cases should come out. See generally Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival after Gonzales v. Raich*, 2005 Sup. Ct. Rev. 1, 14-15 (2006). Our friends Scot Powe and H.W. Perry have demonstrated, moreover, that each party has a relatively coherent set of views about the content of the law—the reach of the Commerce Clause, say, or the extent of the President’s unilateral authority—that correlate strongly to party but nonetheless represent coherent legal positions. See H.W. Perry, Jr. & L.A. Powe, Jr., *The Political Battle for the Constitution*, 21 Const. Comment. 641 (2004). We are willing to describe a legal view that correlates strongly to party as “partisan” in an important sense, with the caveat that the term should not be pejorative in that context.

institutional interests can be brought for partisan reason—that is, because a particular state (or its AG) is simply opposed to national policy on political grounds and wants to be free of it. We think that’s fine, actually. The objection to partisan motivations for state litigation seems to be that they render that litigation opportunistic. But it is hard to say why this sort of opportunism is necessarily a bad thing. In Federalist 51, Madison says that we’re counting on the selfish interests of particular officials to create incentives to protect the institutional interests of the various parts of the government. Opportunism, in other words, is the foundation of both separation of powers and federalism.¹²⁷ The motivation of state public litigation doesn’t worry us; the critical question is whether that litigation is likely to carve out a sphere of state autonomy or to impose a particular set of policies on other states that may disagree.

{Readers: We’re trying to figure out whether to add another section here (or simply more discussion in this section) that addresses the question of state litigation as compared to what? A lot of the critiques of state litigation focus on the fact that it’s litigation rather than regulation or legislation. We think those critiques are overblown, in large part because a lot of what states are doing could be (in theory) done by private litigants, and there are some reasons to prefer state AGs to private litigants and lawyers. I need to be careful about that claim, though, because my prior work has gone to some pains to emphasize the risks of state-led litigation and to call into question whether periodic elections render AGs are meaningfully accountable to the people they ostensibly represent in court. An additional problem is that—as we’ve begun to sketch in Part II.A—there are some instances (maybe many) in which states are able to pursue, and win, claims that private litigants would lack standing to bring, or would be unable to aggregate their claims in a class action, etc. So, a slightly more nuanced critique of state litigation—one that is not in the literature but perhaps should be—is that it results in more social issues being thrown to the courts. }

CONCLUSION

American federalism can be—and in fact nearly always has been—a safety valve for political and social divisions that might otherwise threaten national unity. The state have contributed to the health of our body politic in a wide variety of ways over the course of our history (and at other times they have undermined it). While it seems unlikely that the Founders envisioned the entrepreneurial state litigation of the past twenty years, there can be little doubt that such litigation has become an important mechanism for state participation in American politics. Like any other institutional feature of our government, that litigation has upsides and downsides. Done right, however, we think state public law litigation can be a force for easing the political polarization that afflicts our national politics.

¹²⁷ See Young, *Dark Side*, *supra* note **Error! Bookmark not defined.**, at 1308-11.