# Texas Law Review

## Articles



## Essay



## Book Review



## Note




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# Congressional Power to Strip State Courts of Jurisdiction

Michael C. Dorf*

*The very substantial literature on the scope of congressional power to strip courts of jurisdiction contains a gap: it does not discuss the source of the affirmative power of Congress to strip state courts of their jurisdiction. Laws granting exclusive federal court jurisdiction over some category of cases are necessary and proper to the exercise of the power to ordain and establish lower federal courts, but what power does Congress exercise when it strips both state and federal courts of jurisdiction? The answer depends on the nature of the case. In stripping all courts of the power to hear federal statutory claims and challenges to federal statutes, Congress exercises whatever affirmative power authorizes the substantive statute. However, Congress lacks affirmative power to strip all courts of jurisdiction to hear constitutional challenges to state laws. That conclusion is important in its own right but also complements views about the scope and limits of congressional power under the Exceptions Clause of Article III—such as Henry Hart's contention that the Supreme Court must have such jurisdiction as necessary to play its "essential role" in our constitutional system. The limit on affirmative congressional power to strip state courts of jurisdiction to hear constitutional challenges to state laws ensures that there will be cases over which the Supreme Court can exercise its appellate jurisdiction in order to play its essential role.*

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*Robert S. Stevens Professor of Law, Cornell Law School. I am grateful to Josh Blackman, Kevin Clermont, Zachary Clopton, Sherry Colb, Richard Fallon, Henry Monaghan, James Pfander, and Sidney Tarrow for very helpful comments and suggestions. Tyler Hammond provided excellent research assistance.

## I. Introduction

Thirty-five years ago, Professor William Van Alstyne characterized the scholarly literature on the power of Congress to strip courts of jurisdiction as "choking on redundancy,"[1] and there has been no shortage of additional high-quality commentary on the subject in the intervening years.[2] Yet for all of the writing on jurisdiction stripping, virtually no scholarship addresses the question of what *affirmative power* Congress exercises when it strips the jurisdiction of *state* courts.

This Article fills the gap. It argues that Congress has affirmative power to strip state courts of jurisdiction to hear federal claims[3] in most but not all circumstances. It distinguishes among four categories of state court jurisdiction stripping.

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1. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 897 n.9 (1984) (quoting a letter from William Van Alstyne, Professor of Law, Duke Law School, to Gerald Gunther, Professor of Law, Stanford Law School (Feb. 28, 1983)).

2. *See, e.g.*, Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1048–53 (2010) (reexamining Congress's power to strip federal courts of jurisdiction in the wake of *Boumediene v. Bush*, 553 U.S. 723 (2008), which held that a statute framed as stripping a federal court of jurisdiction violated the Suspension Clause); Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 252 (2012) (arguing that the executive branch has an incentive to use its enforcement power to oppose congressional jurisdiction-stripping measures).

3. For brevity throughout this Article, I generally use the term "claim" to encompass both claims and defenses. Whether an issue arises by way of claim or defense may matter for statutory jurisdiction but, with one possible exception discussed below, *see infra* note 86, not for purposes of Article III.

*A.*

When Congress vests exclusive original jurisdiction over some class of federal claims in the lower federal courts (as it has done with respect to intellectual property claims,[4] for example), it exercises its power to "ordain and establish" lower federal courts under Article III[5] and, with respect to claims under or regarding federal statutes, whatever enumerated power authorizes the adoption of the statute. Congress can, if it chooses, divest state courts of jurisdiction over such claims in order to steer litigation into federal courts. Legislation vesting exclusive jurisdiction in federal court is so uncontroversial as not to register as "jurisdiction stripping" at all. Accordingly, all of the interesting cases involving congressional stripping of jurisdiction from state courts involve *simultaneous* stripping of jurisdiction from federal courts (as indicated in the mere parenthetical references to federal courts in the next three categories of jurisdiction stripping).

*B.*

When Congress divests state (and federal) courts of jurisdiction to hear claims arising under federal statutes, it exercises whatever congressional power authorizes the federal statute itself. The greater power not to have enacted the statute in the first place includes the lesser power to enact a statute that does not give rise to statutory claims justiciable in state (or federal) courts. This class of jurisdiction stripping might be thought to raise concerns related to the doctrine of procedural due process: if Congress purports to grant substantive rights, there could be limits on its ability to deny those rights via procedural limits, including limits on state court jurisdiction. However, given recent trends, that objection would likely fail if litigated.[6]

*C.*

When Congress divests state (and federal) courts of original jurisdiction to hear *constitutional* challenges to *federal* laws, it exercises whatever power warrants the substantive provisions of those federal laws. For example, the provision of the Portal-to-Portal Act that barred all courts from hearing constitutional challenges to the substantive provisions of the Act[7] was necessary and proper to the exercise of the Commerce power, which authorized the substantive provisions of the Act. To be sure, a jurisdiction-

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4. *See* 28 U.S.C. § 1338(a) (2012). The statutory text provides in relevant part:
   The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights.

*Id.*

5. U.S. CONST. art. III, § 1.
6. *See infra* subpart III(B).
7. 29 U.S.C. § 252(d) (2012).

stripping provision might violate due process or some other so-called external limit. Much of the voluminous literature on jurisdiction stripping addresses the nature and scope of such limits, typically by focusing on the lonely real-world example of the Portal-to-Portal Act.[8] But the questions raised in this branch of the jurisdiction-stripping literature are best understood as concerning issues other than Congress's affirmative power.

*D.*

Thus we come to a category of jurisdiction stripping that warrants, but has not received, special attention. When Congress divests state (and federal) courts of jurisdiction to hear constitutional challenges to *state* (and local) laws (and policies), it acts beyond its enumerated powers. Because such a jurisdiction-stripping measure does not protect the jurisdiction of the lower federal courts, it cannot plausibly be described as necessary and proper to ordaining and establishing those courts—by contrast with the measures described in category A. And because constitutional challenges to state laws involve neither the application nor the validity of any federal statute, such a jurisdiction-stripping provision cannot plausibly be described as necessary and proper to the exercise of any federal power that could be said to warrant such a statute—by contrast with the measures described in categories B and C. As there is no other viable candidate for the affirmative power that Congress might be exercising in this fourth category, such laws are accordingly void.

This seemingly modest conclusion nonetheless has potentially important consequences because in modern times jurisdiction-stripping provisions have been most likely to be proposed for cases involving "cultural" issues—such as desegregation, abortion, the Pledge of Allegiance, and same-sex marriage[9]—where local regulations and state laws reflecting local, state, or regional cultural differences are more likely to resist national norms than are federal laws. To be sure, challenges to *federal* statutes on such issues also sometimes generate important constitutional decisions,[10] but the landmark rulings tend to come in cases that challenge state or local laws and policies.[11] As Professor Michael Klarman has explained, the Supreme Court

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8. *See* Battaglia v. Gen. Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948) (stating in dicta, in considering a challenge to the Portal-to-Portal Act, that Congress may not strip jurisdiction in such a way as to offend due process requirements under the Fifth Amendment).

9. *See infra* note 87.

10. *See, e.g.*, United States v. Windsor, 570 U.S. 744, 775 (2013) (invalidating § 3 of the federal Defense of Marriage Act); Gonzales v. Carhart, 550 U.S. 124, 168 (2007) (upholding federal Partial-Birth Abortion Ban Act).

11. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015) (invalidating state laws that barred same-sex couples from marrying); Lawrence v. Texas, 539 U.S. 558, 562 (2003) (invalidating a Texas statute forbidding same-sex intimate relations); Roe v. Wade, 410 U.S. 113, 116–18 (1973) (invalidating Texas statutes that criminalized abortions); Loving v. Virginia, 388 U.S. 1, 2 (1967) (invalidating a Virginia law forbidding interracial marriage); Griswold v.

is less of a countermajoritarian institution than commonly assumed; rather, it tends to impose an emerging national consensus on laggard states and regions.[12]

Does the conclusion that Congress lacks the power to strip state courts of jurisdiction to entertain federal constitutional challenges to state laws really matter? One might think not. After all, the very forces that make the substantive laws of a state an outlier will likely be felt in the state's *courts* as well. Accordingly, the right to challenge a restrictive South Carolina abortion law only in the South Carolina courts or to challenge a restrictive Massachusetts gun-control law only in the Massachusetts courts may not be worth very much. Why should we care about Congress exceeding the bounds of its affirmative power by eliminating state court jurisdiction to hear federal constitutional challenges to state laws if state courts were not going to give a sympathetic hearing to such challenges anyway?

The short answer is that this objection is overstated. For one thing, state courts often take seriously their role as guarantors of federal constitutional rights, even in controversial cultural cases and even at potential professional cost to the state judges.[13]

Moreover, the limit identified here on Congress's affirmative power to strip state courts of jurisdiction to hear federal constitutional challenges interacts with other possible limits on jurisdiction stripping. As explained in greater detail below,[14] the least controversial of the various theories that deny Congress an absolute power to strip federal courts of jurisdiction holds that the Supreme Court must retain so much of its power as to perform its essential role of ensuring the supremacy and uniformity of federal law.[15] The so-called essential functions theory—which, by contrast with some of the more sweeping proposals for limits on congressional jurisdiction-stripping power, is not much embarrassed by the Judiciary Act of 1789—would require that the Supreme Court be permitted to review state court judgments rejecting

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Connecticut, 381 U.S. 479, 480 (1965) (invalidating Connecticut statutes banning contraceptive use as applied to doctors providing contraceptives to married couples); Brown v. Bd. of Educ., 347 U.S. 483, 486–88 (1953) (invalidating de jure racial segregation in public schools).

12. Michael Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 191–92 (1998).

13. *See infra* notes 95–107 and accompanying text.

14. *See infra* Part IV.

15. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (contending that Congress may not use its power to make exceptions to the Supreme Court's appellate jurisdiction in a way that "will destroy the essential role of the Supreme Court in the constitutional plan"); *see also* James E. Pfander, *Jurisdiction Stripping and the Supreme Court's Power to Supervise*, 78 TEXAS L. REV. 1433, 1435 (2000) (making a similar argument based on the need for the Supreme Court to maintain "supervisory" control of the lower federal courts); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of Federal Courts*, 95 HARV. L. REV. 17, 43 (1981) (offering "a narrowed form of the 'essential function' view of the Supreme Court's appellate jurisdiction").

constitutional challenges to state laws. Accordingly, the conclusion that Congress lacks the affirmative power to strip state (along with federal) courts of the power to hear federal constitutional challenges to state laws could have real and important consequences by preserving access to the U.S. Supreme Court for such challenges.

That conclusion could take on greater urgency in our current era of political polarization, because the norms that have generally stopped Congress from flexing its muscles under Article III have been breaking down. Consider court packing. Although scholars continue to debate whether the Supreme Court's so-called "switch in time" led to the defeat of President Roosevelt's court-packing plan,[16] since that episode, most politicians have understood court packing to be beyond the pale. Lately, however, court-packing proposals have emerged both from the right[17] and the left.[18] Political actors who deem court packing thinkable will have little reason to hesitate to consider jurisdiction stripping as well. Tracing the outer limits on congressional power over the federal courts could well become an exercise with important practical consequences.

Yet even if no practical consequences were to follow, the exercise undertaken in this Article would have analytical value. The stakes of the debate over jurisdiction stripping have never been primarily practical. The very high ratio of scholarly articles on jurisdiction stripping to actual instances of jurisdiction stripping shows that the issue has theoretical importance that goes beyond its immediate practical consequences. Clarifying the nature and scope of the limits on Congress's power to allocate decision-making authority among the state and federal courts helps to clarify the nature and scope of the broader role of the courts in our constitutional system.

The balance of this Article proceeds in four parts. Part II surveys the relevant legal landscape by providing a much condensed overview of the jurisdiction-stripping literature. It does so with an eye towards distinguishing the subject matter of prior theories from the distinct question of affirmative congressional power. Part III expounds the four categories of congressional stripping of state court jurisdiction identified above. Part IV identifies

16. For an excellent account of the scholarly debate, see generally Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165 (1999).

17. *See* Memorandum on the Proposed Judgeship Bill from Steven G. Calabresi, Professor Nw. Pritzker Sch. of Law, & Shams Hirji, J.D. 2017 Nw. Pritzker Sch. of Law, to the Senate and the House of Representatives (Nov. 7, 2017), https://thinkprogress.org/wpcontent/uploads/2017/11/calabresi-court-packing-memo.pdf [https://perma.cc/BA7E-6G9S] (writing to Congress to propose an increase in the number of lower federal court judgeships with the pretext of addressing workload issues but with the real goal of "undoing the judicial legacy of President Barack Obama").

18. *See* Bob Bauer, *Don't Pack the Courts*, ATLANTIC (July 6, 2018), https://www.theatlantic.com/politics/archive/2018/07/dont-pack-the-courts/564479/ [https://perma.cc/SR2T-87AJ] (seeking to rebut "[p]rogressives responding to Supreme Court Justice Anthony Kennedy's retirement with a proposal for court packing").

practical and theoretical consequences by exploring the relation between the limit on affirmative congressional power and the limits proposed in the voluminous scholarly literature. Part V concludes.

## II. The Jurisdiction-Stripping Landscape

The sparse case law and voluminous academic literature on jurisdiction stripping largely neglect the question of affirmative congressional power to limit the jurisdiction of state courts. The next Part addresses that question directly. This Part considers where the affirmative power question fits into the ongoing debate over jurisdiction stripping. We can usefully frame that debate against a default view that posits no limits at all on congressional power to strip federal courts of jurisdiction in the sorts of cases that we care about most.

The Supreme Court has never squarely rejected the default view, but it is difficult to reconcile with the Court's interpretation of the Suspension Clause as guaranteeing an affirmative right to habeas (absent a valid suspension) in *Boumediene v. Bush*.[19] Because state courts lack competence to issue writs of habeas corpus in favor of persons in federal detention,[20] *Boumediene* implies that Congress must, at a minimum, make a federal judicial forum available in habeas cases. Whether *Boumediene* should be conceptualized as undermining the default view as a general matter or simply allowing that the default view must accommodate the Suspension Clause is a question far afield from the main subject of this Article, so I shall simply note it and move on to theories of jurisdiction stripping that posit additional departures from the default view.

The main body of academic literature rejecting the default view includes theories positing two kinds of constitutional limits on jurisdiction stripping: limits *internal* to Article III and limits *external* to Article III. We have just seen an example of the latter. The Suspension Clause is an external limit. As I shall explain momentarily, external-limits theories rely on many other constitutional provisions as well.

Theories of *internal* limits—such as the view articulated by Justice Joseph Story in *Martin v. Hunter's Lessee*[21] and recast in modern times by Professor Akhil Amar,[22] as well as variants on Professor Henry Hart's notion that the Supreme Court must be permitted to serve its essential role in our

19. 553 U.S. 723, 745 (2008).

20. *Tarble's Case*, 80 U.S. (1 Wall.) 397, 409 (1871).

21. 14 U.S. (1 Wheat.) 304, 335 (1816).

22. *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 208–09 (1985) [hereinafter Amar, *A Neo-Federalist View*] (building on Justice Story's interpretation of Article III); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1516 (1990) [hereinafter Amar, *The Two-Tiered Structure*] (contending that the Judiciary Act of 1789 "validates the main tenets of Story's two-tier thesis").

constitutional system[23]—identify Article III itself as an obstacle to some versions of jurisdiction stripping. Whatever their functional justifications, such views can be understood as construing the scope of congressional power to constitute the lower federal courts and to make exceptions to the Supreme Court's appellate jurisdiction. Internal-limits theories that build on Story's view draw textual support from the repeated use of the term "all cases" in Article III, Section Two.[24] Internal-limits theories that build on Hart's view draw on broader structural notions of the judicial role in constitutional democracy.[25]

A second class of theories (which need not be mutually exclusive of the first) posits the existence of limits external to Article III. Least controversially, a statute that selectively strips jurisdiction according to an illicit criterion (such as the race, sex, or religion of a party) would violate the constitutional norm rendering that criterion illicit (in the foregoing examples, respectively, the equal-protection component of the Fifth Amendment's Due Process Clause for race- and sex-based jurisdiction stripping, and the First Amendment's Religion Clauses for religion-based jurisdiction stripping). External limits of this sort should be conceptualized as applications of the underlying constitutional provisions that render the particular criteria illicit rather than as affirmative limits on jurisdiction stripping as such. Put differently, one does not need anything so grand as a "theory of constitutional limits on jurisdiction stripping" to say that a law that denies jurisdiction to the federal courts to entertain habeas corpus petitions from Muslims but not from persons of other faiths would be unconstitutional.

More controversially, some scholars argue that Congress may not eliminate jurisdiction over any category of constitutional cases without violating the constitutional norms thereby removed from judicial cognizance, even where the jurisdiction-stripping provision does not itself deploy an illicit classification.[26] For example, under this approach, a law forbidding courts

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23. Hart, *supra* note 15; *see also* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 7–34 (1980) (arguing that due process concerns limit Congress's jurisdiction-stripping power); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 506 (1974) (arguing that the national judiciary was intended to, above all else, "hear and do justice"); Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 165–67 (1961) (arguing that a review of early Supreme Court jurisprudence establishes the existence of certain indispensable functions); Sager, *supra* note 15, at 43 (offering a narrow version of Hart's "essential function" theory).

24. *See* Amar, *The Two-Tiered Structure*, *supra* note 22, at 1501–02 (parsing the language of Article III, Section Two with a particular emphasis on the "shall" and "all" language within); *Hunter's Lessee*, 14 U.S. at 329–33, 336 (discussing the effect of "shall" on Article III, Section Two).

25. *See infra* section IV(B)(2).

26. *See, e.g.*, Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 141–46 (1981) (characterizing the removal of jurisdiction over a class of constitutional claims or defenses as the removal of protection for

from entertaining Establishment Clause challenges to the Pledge of Allegiance[27] would violate the Establishment Clause, a law forbidding courts from entertaining challenges to laws restricting abortion would violate the right to abortion, and so forth. Such theories could be seen as emanating from the underlying constitutional limits themselves (and thus could be assimilated to the first, uncontroversial category of external limits), but it is not clear why they should be—at least not as a general matter. A line of cases that made that sort of connection, albeit in a different context not having to do with jurisdiction, has in recent years been more or less repudiated.[28] Perhaps a sounder basis for this sort of external limit would be that Congress may not, in a constitutional case, use jurisdictional tools as a means of directing a particular outcome.[29] However, recent Supreme Court cases indicate that this

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constitutional rights and thus an impermissible burden on the underlying constitutional rights); *see also* Lea Brilmayer & Stefan Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 VA. L. REV. 819, 821 (1983) (describing Tribe's argument as seeming "too subtle" and "too daring," but justifying the same conclusion on the ground that, based on choice-of-law principles, "[j]urisdictional bills that discriminate without sufficient reason against causes of action that the legislature did not create are unconstitutional").

27. *See, e.g.*, Pledge Protection Act of 2007, H.R. 699, 110th Cong. § 1632 (2007) (proposed bill stating that no federal court has jurisdiction to hear or decide any question pertaining to the interpretation or validity of the Pledge of Allegiance).

28. In *Hunter v. Erickson*, 393 U.S. 385, 392–93 (1969), the Supreme Court articulated what later became known as the "political-process" theory. There the Court invalidated an Akron, Ohio amendment to the city charter that required a referendum vote in order to enact any housing antidiscrimination ordinance. *Id.* at 387, 393. In *Washington v. Seattle School District No. 1*, 458 U.S. 457, 470 (1982), the Court relied on the political-process theory to invalidate a successful Washington state ballot initiative that forbade race-based busing except as ordered by a court in constitutional litigation. In neither *Hunter* nor *Seattle* did the invalidated provision itself use a racial criterion, but the political-process theory condemned each one nonetheless because each imposed special obstacles to citizens seeking legal change to benefit racial minorities. The political-process theory can thus serve as a rough analogy for the more ambitious theories of external limits on jurisdiction stripping. Under the political-process theory, new state procedures that make it difficult for an identifiable group to obtain legal reforms that benefit the group may violate the equal protection rights of group members; likewise, one could argue that laws eliminating jurisdiction over some category of constitutional cases violates the rights of litigants who would otherwise bring those cases. The analogy was a good one so long as the political-process theory had bite, but the Court has recently all but eliminated the political-process theory. *See* Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1638 (2014) (plurality opinion) (upholding Michigan ban on affirmative action by public primary, secondary, and post-secondary educational institutions against a political-process-theory challenge); *id.* at 1634 ("The broad language used in *Seattle*, . . . went well beyond the analysis needed to resolve the case."); *id.* at 1640 (Scalia, J., joined by Thomas, J., concurring in the judgment) ("I agree with those parts of the plurality opinion that repudiate th[e political-process] doctrine."). Not surprisingly, Professor Tribe's approach relied on a powerful analogy to the then-robust political-process doctrine. *See* Tribe, *supra* note 26, at 149–50 (expounding the implications of *Hunter*).

29. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 227–28 (1995) (holding that a statute requiring the reopening of final court judgments was unconstitutional on separation-of-powers grounds); United States v. Klein, 80 U.S. (13 Wall.) 128, 134, 147–48 (1871) (invalidating a statute requiring the Court to dismiss certain post-Civil War claims for want of jurisdiction in "all cases where judgment shall have been heretofore rendered in the Court of Claims in favor of any claimant"

limit is relatively easy for Congress to circumvent through clever drafting.[30]

The Portal-to-Portal Act[31] was the closest Congress ever came to enacting a real-life example of "jurisdictional gerrymandering" (in Professor Laurence Tribe's memorable phrase),[32] resulting in the judicial articulation of this more controversial kind of external limit. The Act stripped all state and federal courts of jurisdiction to entertain due process challenges to the substantive provisions of the Act (which defined compensable working time for purposes of the Fair Labor Standards Act in a way that arguably disturbed vested rights under earlier judicial decisions).[33] The Second Circuit declared in *Battaglia v. General Motors*[34] that the jurisdiction-stripping provision would be invalid if the underlying substantive provision violated due process, but because the court found no substantive infirmity, it did not invalidate the jurisdiction-stripping provision either.[35] The Supreme Court has never directly addressed the issue that the Second Circuit addressed in what is best described as dicta.

Due to the dearth of other statutes and decided cases, in the seven decades since *Battaglia* was decided, scholars have repeatedly returned to it in order to frame questions for theories of external limits on jurisdiction stripping. Are due process claims unique? If not, are they among a small class of claims—including, in addition, takings claims—for which the substantive constitutional right also guarantees access to a court with jurisdiction in which to make the claim? Or, per the Blackstonian maxim *for every right a remedy*, does every substantive constitutional right carry with it a right to court access? Can theories built on the Blackstonian maxim be reconciled with immunity doctrines that sometimes block any remedy?[36] Or was the *Battaglia* court simply wrong to suggest that there are any external limits on

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based on a pardon on both jurisdictional and separation-of-power grounds).

30. *See* Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) (plurality opinion) (describing a federal statute stripping federal courts of jurisdiction over disputes relating to a particular parcel of land at issue in a pending case as a permissible change in the law and thus "well within Congress' authority"); Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 438–40 (1992) (upholding a statute that referred to two pending cases by name and that plainly dictated the outcome of those cases, reasoning that the statute simply used a shorthand to change the applicable law).

31. Portal-to-Portal Act of 1947, Pub. L. No. 49, ch. 52, § 2(d), 61 Stat. 84, 86 (1947) (codified in relevant part at 29 U.S.C. § 252(d) (2012)).

32. *See* Tribe, *supra* note 26.

33. The jurisdiction-stripping provision was § 2(d) of the Portal-to-Portal Act, which was set forth in *Battaglia v. General Motors Corp.*, 169 F.2d 254, 256 n.3 (2d Cir. 1948).

34. 169 F.2d 254 (2d Cir. 1948).

35. *Id.* at 257, 259. Readers who are new to the subject might wonder how the court could even say that much, in light of the jurisdiction-stripping provision. The court held at the threshold that it at least had jurisdiction to determine its own jurisdiction. *Id.* at 256–57.

36. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1784–85 (1991) (concluding, after surveying "[m]odern [immunity] doctrines," that "beyond any peradventure, [they] depart decisively from the notion that the Constitution requires effective remedies for all victims of constitutional violations").

jurisdiction stripping beyond the use of illicit criteria in the jurisdictional provisions themselves (as in the uncontroversial race, sex, and religion examples)?

As the large body of high-quality scholarship on both internal and external limits on jurisdiction stripping indicates, these are fascinating questions. But I have promised that this is not yet another article about internal or external limits, at least not exactly. Rather, this Article asks an antecedent question—What is the source of Congress's affirmative power to strip jurisdiction in the first place?

With respect to *federal* courts, the answer is clear and taken for granted in the internal limits literature: Article III. Pursuant to the Madisonian Compromise, Article III empowers Congress to "ordain and establish" lower federal courts.[37] It is possible to imagine that this power might only have been exercised on an all-or-nothing basis, in which case Congress would have to choose between creating no lower federal courts at all or creating them and vesting them with some minimum of jurisdiction to be determined by Article III. However, more or less since the enactment of the Judiciary Act of 1789, it has been understood that Congress's greater power to create no lower federal courts includes the lesser power to create lower federal courts and vest in them only some of the jurisdiction that could be vested in them consistent with Article III, Section Two.[38] Thus, according to the conventional wisdom (which in its strongest form reduces to the default view described above) Congress's power to strip the lower federal courts of jurisdiction is just the *nonexercise* of its power to create and vest jurisdiction in lower federal courts.

So far as the Supreme Court is concerned, Congress strips jurisdiction when it makes "Exceptions" to and "Regulations" of the appellate jurisdiction that the Court would otherwise have.[39] Since the Judiciary Act of

37. U.S. CONST. art. III, § 1.

38. For example, the 1789 Act did not vest general federal question jurisdiction in the lower federal courts that the Act created. Act to Establish the Judicial Courts of the United States, ch. 20, § 25, 1 Stat. 73, 85–87 (1789). Indeed, Congress has *never* vested all of the jurisdiction that it might vest in the lower federal courts. Today, for example, cases that present a federal question within the meaning of Article III, but in which the question does not appear on the face of the well-pleaded complaint, fall outside the scope of the jurisdiction granted by 28 U.S.C. § 1331 (2012), *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 153–54 (1908), while diversity cases, in which there is not complete diversity or in which the amount in controversy is below $75,000, fall outside the scope of the jurisdiction granted by 28 U.S.C. § 1332 (2012). The Supreme Court expressly endorsed the proposition that Congress can create lower courts without vesting in them all of the jurisdiction that could be vested consistent with Article III, Section Two in *Sheldon v. Sill*, 49 U.S. 441, 448–49 (1850); *see also* The "Francis Wright," 105 U.S. 381, 385–86 (1881) ("[T]he rule . . . that while the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. . . . What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control.").

39. U.S. CONST. art. III, § 2.

1789, Congress has exercised this power as well. Thus, under § 25 of the original Act, federal questions could only be heard by the Court by writ of error to state courts where the latter had ruled against the party staking his, her, or its case on federal law.[40] And since 1988, nearly the entirety of the Court's appellate docket has been filled with a small number of cases that the Court chooses by exercising the discretionary power to grant petitions for a writ of certiorari.[41] As a practical matter, the vast majority of cases that could fall within the appellate jurisdiction as laid out in Article III are thus excepted from the Court's exercise of jurisdiction—unless one is prepared to say that the Court exercises appellate jurisdiction when it denies a petition for a writ of certiorari.

Various theories of internal limits on the scope of congressional power to strip federal courts of jurisdiction may add substantial qualifications to the foregoing accounts. In other words, theories of internal limits take for granted that Article III gives Congress the affirmative power to strip *some* or even *most* jurisdiction from both the lower federal courts and the Supreme Court. Such theories simply posit that this jurisdiction-stripping power is itself limited by Article III as properly construed.

So much for the extant literature. The previously unexamined question this Article addresses is the source of congressional power to strip *state* courts of their jurisdiction. State courts are creatures of state constitutions and state law, not Article III. So, even if we set aside all theories of external limits, why can Congress strip state courts of any of their jurisdiction?

To understand the nature of the question, consider an analogy. Suppose Congress enacted a statute forbidding all flag burning. Such a law would violate the First Amendment,[42] which is an external limit. But it might also be deemed unconstitutional on the ground that nothing in Article I, Section Eight nor any other part of the Constitution confers on Congress the affirmative power to regulate flag burning.

Or, depending on how it were worded, the flag-burning prohibition might fall within congressional power after all. A law that forbade the burning of flags that had moved in interstate commerce would fall within Congress's affirmative power (although it would still violate the First Amendment), but a blanket prohibition without any such "jurisdictional element" would be vulnerable to a challenge of the sort that felled the Gun

40. An Act to Establish the Judicial Courts of the United States, ch. 20, § 25, 1 Stat. 73, 85–86 (1789).

41. *See* Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, § 1257, 102 Stat. 662, 662 (1988) (giving the Court the discretionary power to review decisions by state high courts by writs of certiorari).

42. *See* United States v. Eichman, 496 U.S. 310, 318 (1990) (invalidating a federal ban on flag burning); Texas v. Johnson, 491 U.S. 397, 416–20 (1989) (invalidating a state ban on flag burning as applied to politically motivated flag burning).

Free School Zones Act in *United States v. Lopez*[43] and the civil remedy provision of the Violence Against Women Act in *United States v. Morrison*.[44]

Likewise, a law stripping state and federal courts of jurisdiction to hear some category of cases might violate an external limit of the sort explored in *Battaglia* and the commentary on *Battaglia*, but even if an external-limit challenge fails—and even if one accepts the default view with respect to congressional power over the jurisdiction of the federal courts—for the law to be valid there must be affirmative power to strip state courts of their jurisdiction.

Does Congress have the affirmative power to strip state courts of jurisdiction they could otherwise exercise? The next Part answers that question.

## III. A Typology of Congressional Control Over State Court Cases

This Part asks what power(s) Congress exercises when it divests state courts of jurisdiction. As summarized above in the Introduction, the answer differs based on whether Congress also strips federal courts of jurisdiction over the same class of questions or cases.

### *A. Exclusive Federal Jurisdiction*

The Supreme Court has long applied a presumption that the vesting of jurisdiction over a class of claims in federal court leaves state courts with concurrent jurisdiction over the same class of claims.[45] Congress has concluded that in the mine-run of federal question cases, a right to file in federal court,[46] coupled with a defendant's right to remove to federal court if the plaintiff files in state court,[47] suffices to protect federal interests. One could disagree with that judgment on the ground that it denies defendants to state law actions the power to remove to federal court where the federal issue arises only by way of defense (because the removal statute only permits removal where the complaint satisfies the well-pleaded complaint rule).

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43. 514 U.S. 549, 561–62 (1995).

44. 529 U.S. 598, 611–19 (2000).

45. *See* Tafflin v. Levitt, 493 U.S. 455, 458–59 (1990) (citing Houston v. Moore, 18 U.S. (5 Wheat.) 1, 25–28 (1820) (describing presumption as a product of "our federal system," in which "the States possess sovereignty concurrent with that of the Federal Government"); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477–78 (1981) (acknowledging that state courts maintain concurrent jurisdiction absent a provision to the contrary); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507–08 (1962) ("[C]oncurrent jurisdiction has been a common phenomenon in our judicial history . . . ."); Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 517 (1898) (explaining that, had Congress intended to strip state courts of concurrent jurisdiction, it would have done so clearly); Claflin v. Houseman, 93 U.S. 130, 136–37 (1876) (holding that "State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it").

46. 28 U.S.C. § 1331 (2012).

47. 28 U.S.C. § 1441(a) (2012).

However, no one doubts that Congress could, if it chose, broaden removal in order to accommodate this and various other objections.

Given the possibility of expanding the class of removable cases in order to afford a federal forum for the resolution of federal questions (or for that matter, state law questions in diversity cases), Congress can provide a federal forum for any case that falls within the permissible scope of the jurisdiction of the lower federal courts whenever any party prefers federal court. That possibility then raises the question of what legitimate interest Congress advances by divesting state courts of jurisdiction over cases in which all parties prefer state court. How can a law stripping state courts of jurisdiction be necessary and proper to vesting jurisdiction in lower federal courts if no interested party desires to have the case heard in federal court?

Nothing in the text of the Constitution expressly answers this question. Indeed, at least with respect to federal questions, one might think that the text of the Supremacy Clause counts against congressional power to vest exclusive jurisdiction in federal courts. After all, in *Testa v. Katt*,[48] the Supreme Court held that the Supremacy Clause is not merely a priority rule that state courts must observe in determining the validity of state laws, but imposes an affirmative obligation on state courts to exercise jurisdiction over federal cases on a nondiscriminatory basis.[49] If the Supremacy Clause itself obligates state courts to exercise jurisdiction over federal claims, how can Congress override that obligation?

We might respond by construing the obligation imposed by *Testa* and related cases as a mere default rule that applies only absent congressional action: just as the case law presumes that state courts have concurrent jurisdiction with federal courts absent action by Congress, so we might say that the state courts have an obligation to entertain federal claims but only absent action by Congress. The *Testa* obligation, in this account, would be similar to the obligation of the states under the Dormant Commerce Clause: rooted in the Constitution but excusable by Congress.[50]

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48. 330 U.S. 386 (1947).

49. *Id.* at 393–94; *see also* Haywood v. Drown, 556 U.S. 729, 740–42 (2009) (invalidating a refusal by a state court to hear a federal cause of action, even when the refusal was based on a nondiscriminatory jurisdictional rule). *But see* Josh Blackman, *State Judicial Sovereignty*, 2016 U. ILL. L. REV. 2033, 2059–61 (arguing that *Haywood* disregarded a longstanding limit under which Congress could only require state courts of competent jurisdiction—as established by state law—to entertain federal claims).

50. The Dormant Commerce Clause forbids states from enacting laws that discriminate against or unduly burden interstate commerce, but because the doctrine is a judicial inference from Congress's Article I, Section Eight power, Congress may authorize state laws that, absent such authorization, would violate the Dormant Commerce Clause. *See* W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652 (1981) ("Congress may 'confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.'" (quoting Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 44 (1980))); *see also* Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1480–85 (2007) (defending the principle that Congress may lift the restrictions of the Dormant Commerce Clause).

Although *Testa* thus does not stand in the way of the conclusion that Congress has the power to confer exclusive federal jurisdiction on the federal courts in some class of federal question cases, we still have not encountered a plausible justification for Congress's doing so. Yet the shape of such a justification is plain enough. Even if the *parties* might all prefer that some case be adjudicated in state court, Congress might reasonably conclude that systemic interests in the development of federal law by Article III judges justify exclusive federal court jurisdiction. After all, as noted in the Introduction, cases involving the application or the validity of federal statutes implicate not only Congress's power to ordain and establish lower federal courts, but also whatever affirmative powers authorize the adoption of the relevant statutes.[51] At least with respect to those cases—which account for the lion's share of exclusive federal jurisdiction—Congress could plausibly decide that exclusive federal jurisdiction better serves the statutory policy than concurrent state and federal court jurisdiction, regardless of the parties' wishes in any particular dispute.

More broadly, whether involving federal statutes or not, adjudication resolves disputes, but it also creates a public good, namely legal doctrine.[52] Congress could decide that dialogue between state and federal courts provides the best means of creating that public good in some or most cases (as it has decided) but that it prefers exclusive federal court adjudication in some special categories of cases (as it has also decided). Perhaps Congress believes that federal court judges have greater expertise than state court judges in some relatively technical area (such as intellectual property cases). Or perhaps Congress believes that bias against some conception of the national interest—even though acceptable to all of the parties in some particular cases—justifies sending a category of cases exclusively to federal court.

Whatever the precise justification, there is no real doubt that the Madisonian Compromise entitles Congress to vest exclusive original jurisdiction in federal courts—and thus to divest state courts of jurisdiction—in some cases in which state courts would be obligated to exercise jurisdiction absent congressional action.[53]

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51. *See supra* text accompanying note 3.

52. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–90 (1984) (contrasting the public role of the judicial system with more private forms of dispute resolution).

53. I pass over interesting questions of the scope of this power. Exclusive jurisdiction over some subclass of federal question cases seems uncontroversial. An attempt by Congress to vest exclusive jurisdiction in the federal courts to hear diversity cases—especially if coupled with a requirement of mere minimal diversity—would be potentially problematic on federalism grounds. Notably, Congress has never attempted anything of the sort. Even when it has vastly expanded diversity jurisdiction, it has still allowed for state court jurisdiction where all parties prefer a state forum. For example, the Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 1711, 119 Stat. 4, 4–5 (2005), amended the U.S. Code to allow, *inter alia*, removal of high-dollar-value class actions arising under state law where there is minimal diversity, *see* 28 U.S.C. § 1332(d)(2) (2012), but at least one

### *B. Federal Statutory Claims*

When Congress creates statutory rights and duties, it sometimes creates corresponding judicial remedies, either through private rights of action or by authorizing the executive branch to bring civil or criminal enforcement actions. However, Congress need not make any particular right or duty enforceable through any judicial mechanism. Congress can, if it chooses, provide for exclusively administrative enforcement subject only to whatever modicum of judicial review the Constitution requires.[54] The failure to provide for a full judicial remedy—in the sense of a freestanding cause of action cognizable in state or federal court, as opposed to judicial review of an administrative remedy—can be understood as a kind of jurisdiction stripping. It is an exercise, or perhaps more accurately, a withholding of the exercise, of whatever affirmative power authorizes Congress to enact the statute with only administrative remedies.

Congress also can be said to engage in jurisdiction stripping if it enacts a law that has no remedies at all. Congress undoubtedly has the power to enact legislation that creates no substantive rights or duties, as when it declares this, that, or the other national commemorative day, week, or month.[55] But Congress can also enact hortatory laws that seem to create

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defendant must still seek removal for the case to wind up in federal court. For an insightful critique of some of the more expansive views of congressional power over state court jurisdiction, see Blackman, *supra* note 49, at 2104–07. For present purposes, it suffices to note that even Professor Blackman believes that "existing grants of exclusive jurisdiction are long-standing, uncontroversial, and well-accepted . . . ." *Id.* at 2125.

54. Over three-and-a-half decades ago, then-Justice Rehnquist wondered whether the Court's case law governing the power of Congress to assign adjudicatory responsibility to non-Article III bodies, and by extension, to preclude judicial review of their rulings, were mere "landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night," *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (1982) (Rehnquist, J., joined by O'Connor, J., concurring in the judgment) (alluding to but not citing MATTHEW ARNOLD, *Dover Beach* (1851), POETRY FOUNDATION, https://www.poetryfoundation.org/poems/43588/dover-beach [https://perma.cc/H53N-M5M7]), and the subsequent precedents have done little to clarify the constitutional guideposts. *See* Stern v. Marshall, 564 U.S. 462, 487–501 (2011) (following, but not expanding, the *Northern Pipeline* analysis in holding that bankruptcy courts do not have constitutional authority to adjudicate a debtor's state law counterclaim); Granfinanciera v. Nordberg, 492 U.S. 33, 55–56 (1989) (applying *Northern Pipeline* in determining that a bankruptcy trustee's statutory right to recover a fraudulent conveyance is a private right); Commodities Future Trading Comm'n v. Schor, 478 U.S. 833, 857 (1986) (recognizing the lack of broad principles applicable to Article III inquiries and adopting a fact-intensive balancing analysis); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 584–88 (1985) ("The enduring lesson of *Crowell* [*v. Benson*, 285 U.S. 22 (1932)] is that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III."). We need not struggle with these mysteries here because, as the text immediately following this footnote explains, Congress undoubtedly has the power to enact statutes that are purely hortatory.

55. *See, e.g.*, Zach Bergson, *Congress Recognizes Wide-Ranging Issues in 'Day of,' 'Week of,' 'Month of' Resolutions*, THE HILL (June 20, 2012), http://thehill.com/capital-living/cover-stories/233687-congress-recognizes-wide-ranging-issues-in-day-of-week-of-month-of-resolutions [https://perma.cc/K2HJ-K63J] ("In the 99th Congress (1985-86), the height of commemorative proposals, lawmakers sponsored 275 of these resolutions — approximately 41 percent of public

substantive rights and duties but provide no mechanism—not even a purely administrative mechanism—for their enforcement.[56]

Why would Congress enact a law that purports to recognize some right or duty but provides no remedy for violations? One answer is that such a law could be said to affect *moral* rights and duties, which in turn could have substantial consequences. Many people believe that they have a duty to obey the law regardless of any sanctions for failing to do so; they are not, to use a phrase made famous by Oliver Wendell Holmes, Jr. in *The Path of the Law*, "bad m[e]n" whose only concern is to avoid legal sanctions.[57] The declaration by Congress of legally unenforceable rights and duties can affect the conduct of such "good" men and women.

In any event, however effective or ineffective any particular law with no enforcement mechanism might be, such a law falls within the affirmative power of Congress because Congress does not need any affirmative power *not* to legislate. Thus, Congress has all of the affirmative power it needs (which is to say none) to "strip jurisdiction" from state and federal courts by enacting laws that purport to create rights and duties but have no enforcement mechanism.

Now suppose that Congress enacts a statute that purports to create rights and duties and that also purports to create causes of action (and, where appropriate, defenses) that enable litigants to invoke these rights and duties in court but also strips state and federal courts of jurisdiction to entertain such

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laws during that session.").

56. For example, § 11081 of the tax legislation that Congress enacted in late 2017 effectively eliminated any penalty for a taxpayer's failure to obtain minimally adequate health insurance coverage beginning in 2019 by substituting a tax rate of zero percent for the prior rate of 2.5 percent and substituting a fixed sum of $0 for the prior $695. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017). Yet the obligation to obtain such coverage, codified at 26 U.S.C. § 5000A, remains technically in effect because the 2017 law did not repeal it. Granted, at no point did Congress simultaneously vote for both the so-called individual mandate and the no-penalty option. It is doubtful that any member of Congress wished for this particular combination. Rather, this oddity resulted from the fact that proceeding via "reconciliation" in order to circumvent the need for sixty votes in the Senate for cloture limited the kind of legislation that could be enacted. *See* 2 U.S.C. § 641 (2013). The example nonetheless illustrates the conceptual possibility of a substantive obligation with no enforcement mechanism. It will continue to serve that illustrative purpose at the conceptual level, regardless of the fate of a pending lawsuit by twenty states arguing that when Congress effectively eliminated the tax, it rendered the mandate unconstitutional, because the mandate was valid only as an exercise of congressional power to tax. *See* Complaint, Texas v. United States, No. 4:18-cv-00167-0 (N.D. Tex. filed Feb. 26, 2018), https://www.texasattorneygeneral.gov/sites/default/files/files/press/Texas_Wisconsin_et_al_v._U.S._et_al_-_ACA_Complaint_(02-26-18).pdf. Even read for all it is worth, that lawsuit poses no threat to Congress's power to enact hortatory legislation when acting within the scope of its enumerated powers.

57. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (contending that "a bad man has as much reason as a good one for wishing to avoid an encounter with the public force . . . [because a] man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can").

cases. Put aside for the moment the question why Congress would want to do such an odd thing. Does the affirmative power to not create any rights and duties in the first place carry with it the power to create nominally judicially enforceable rights and duties but to strip courts of jurisdiction to hear cases involving these rights and duties?

To answer that question in the affirmative, we need to accept two propositions. First, we need to accept that not creating a legal right or duty—which, as we have just seen, Congress has the undoubted affirmative power to "do" (with the quotation marks reflecting the fact that not doing something is an odd kind of doing)—is the functional equivalent of purporting to create a right or duty while providing no mechanism for enforcing that right or duty. And second, we need to accept that this, in turn, is the functional equivalent of purporting to create rights and duties as well as judicial enforcement mechanisms (such as a private right of action), but then neutering those enforcement mechanisms by withholding jurisdiction from any state or federal judicial forum.

Moral duties and unenforceable legal duties aside, in this context jurisdiction stripping with respect to statutory rights and duties appears to be *functionally* equivalent to not enacting a statute in the first place. But to say that is not necessarily to resolve the matter entirely. After all, the law sometimes elevates form over function. There might be some reason to think that congressional power not to enact legislation recognizing a right X or duty Y is not *legally* equivalent to the congressional power to create a seeming right X or duty Y but then to withhold any remedy. Or maybe there is some reason to think that the nonenactment of legislation recognizing a right X or duty Y is not legally equivalent to legislation recognizing a seeming right X or duty Y and conferring a judicial remedy for violations of X or Y but withholding jurisdiction from any court to provide that remedy. What sorts of reasons might lead one to conclude that these measures, though functionally equivalent, are not legally equivalent?

The most promising line of attack would be rooted in, or proceed by close analogy to, procedural due process. If a law creates a property or liberty interest, then the government may not deprive someone of that property or liberty interest without fair procedures.[58] Individual justices have sometimes argued that "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet."[59] Under this approach, a law seeming to create substantive rights or duties but simultaneously denying a remedy or jurisdiction would be unobjectionable.

58. *See* Mathews v. Eldridge, 424 U.S. 319, 332–35 (1976) (discussing the procedures required to terminate social security disability benefits).

59. Arnett v. Kennedy, 416 U.S. 134, 153–54 (1974) (plurality opinion).

Yet case law rejects the bitter-with-the-sweet view, at least in some contexts.[60]

Accordingly, we have the conceptual tools to construct a constitutional rule under which the greater power of Congress not to create a substantive entitlement in the first place would not necessarily include the ostensibly lesser power to purport to create substantive entitlements but defeat them by failing to provide for enforcement mechanisms or jurisdiction. Indeed, one might even think that procedural due process itself forbids Congress from creating substantive rights that rise to the level of liberty or property but then withholding a remedy or jurisdiction.

Such a putative constitutional rule—whether conceived as an application of procedural due process itself or as a limitation modeled on the procedural due process doctrine but rooted elsewhere—would serve at least two purposes. First, it would vindicate a personal interest of those individuals who reasonably relied on congressional creation of a seeming right (or a duty respecting that right imposed on others) in their conduct. To be sure, one might say that no one could reasonably rely on a purported right that comes without an adequate enforcement mechanism, but this sort of meta-observation, if taken seriously, would defeat all reliance-based claims. The law protects reliance (where it does) partly because of a background normative judgment that people ought to be able to rely on the law.

That idea bears some relation to the second reason why the Constitution might be understood to forbid Congress from establishing seeming rights that are then defeated through the absence of any effective enforcement mechanism or jurisdiction: such a constitutional limit would give effect to a principle that government ought to be honest. A legislature ought not to appear to give rights (or assign duties) with one hand while taking them away with the other. Dissenting from the decision upholding the power of Congress to adopt the so-called individual mandate in the Affordable Care Act, four justices relied on something like this general principle, arguing, *inter alia*, that the obligation to purchase health insurance could not be sustained under the Taxing Power because the statute did not call the mandate a tax.[61]

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60. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982). Where state law creates a substantive entitlement, the Court explained:

> Each of our due process cases has recognized, either explicitly or implicitly, that because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action."

*Id.* (quoting Vitek v. Jones, 445 U.S. 480, 491 (1980)) (brackets in original).

61. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 661–68 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (arguing that the government should be estopped from invoking congressional power to tax, because statutory text and structure indicate that the challenged provision is a mandate with a penalty, not a tax).

But to state the obvious, that was a dissent. A majority in the *Affordable Care Act Case* invoked the principle that what a law actually does matters more than labels.[62]

More directly to the present point, although I have just sketched plausible *normative* grounds for concluding that Congress's greater power not to create rights and duties in the first place does not include the lesser powers to create purported rights and duties while withholding causes of action or jurisdiction to enforce them, no such conclusion appears justified as a *description* of the current law. Indeed, any effort to construct such a greater-does-not-include-the-lesser rule in this context swims against a very strong tide.

Consider the question of when an act of Congress gives rise to a private right of action to enforce the act. Although there was a time when the doctrine regarded courts as junior partners of Congress tasked with filling in enforcement gaps,[63] that time has passed. The current case law more or less requires a clear statement in the law to create a private right of action.[64] And even those justices who do not go so far in presuming that acts of Congress do not give rise to judicial remedies absent a textual declaration to that effect acknowledge that Congress has the power to create what appear to be rights and duties without thereby creating causes of action.

The cases denying implied rights of action do not involve the manipulation of jurisdiction, of course, but *Marbury v. Madison*[65] itself appears to affirm the power of Congress to create rights with one hand that it defeats with the other by withholding jurisdiction. The Court treated President Adams's signing of Marbury's commission, as a District of Columbia justice of the peace in accordance with a February 1801 law, as creating a right in Marbury to receive the commission.[66] Invoking the Blackstonian maxim "that every right, when withheld, must have a remedy," the Court concluded that Marbury was entitled to sue for a writ of mandamus in a court with proper jurisdiction;[67] however, because, in the Court's view, § 13 of the Judiciary Act of 1789 conferred original jurisdiction on the

62. *See id.* at 562, 564–70 (rejecting the dissent's argument that Congress's framing of the payment required for not purchasing insurance as a "penalty" rather than as a tax determined the issue as inconsistent with established precedent).

63. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 431–34 (1964) (recognizing the existence of an implied right of action under § 14(a) of 15 U.S.C. § 78(n) as necessary in order to effectuate the legislation's purpose).

64. *See* Alexander v. Sandoval, 532 U.S. 275, 287–88 (2001) (treating text as mostly dispositive of whether to find a private right to enforce a statute). For a useful summary of the path of the Court's approach to implied rights of action, see generally *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854–58 (2017) (describing the evolution of *Bivens* actions to enforce constitutional rights by reference to evolution of doctrine governing implied rights of action under statutes).

65. 5 U.S. (1 Cranch) 137 (1803).

66. *Id.* at 167–68.

67. *Id.* at 163.

Supreme Court in violation of Article III, Marbury could not obtain the relief he sought. I recap this story—that should be familiar to anyone who has sat through the first week of a constitutional law course—to note what does not appear to concern Chief Justice John Marshall at all: when the case was decided, there might not have been *any* court in which Marbury could have sued James Madison (or anyone else) for his commission.

No lower federal court would have had jurisdiction because the federal district courts were not given original jurisdiction in federal question cases until 1875.[68] And Marbury could not sue Madison in state court because, on supremacy grounds, state courts lack the authority to issue writs of mandamus against federal officers.[69]

To be fair, Marshall might have assumed that Marbury could sue in state court (presumably in either Maryland or Virginia) because state courts sometimes granted writs of habeas corpus and other forms of injunctive relief against federal officers in the pre-Civil War period.[70] Only after *Tarble's Case*[71] in 1872 was that avenue clearly foreclosed.[72] But it is hard to see why, if Marshall thought the assumption that state courts could hear Marbury's petition was critical to the outcome of the case, he said nothing at all about alternative venues. As written, the opinion in *Marbury* strongly suggests that Congress can confer a right that entitles the right holder to a remedy, even as it fails to provide any court with jurisdiction to vindicate that right.

To recap the argument of this subpart: (1) Congressional power not to create rights and duties in the first place includes the power to create statutory rights and duties that cannot be enforced in court, either because Congress does not create a cause of action or because no court has jurisdiction to entertain an otherwise proper cause of action; (2) one might object on procedural due process or similar grounds that Congress should not be permitted to purport to confer rights that it defeats by failing to authorize a judicial remedy or jurisdiction in any court; but (3) no such objection, whatever its normative merits, finds support in the case law, which appears to take for granted the basic proposition of (1). It thus follows that Congress

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68. Act of Mar. 3, 1875, ch. 137 § 1, 18 Stat. 470, 470 (1875).

69. *See* McClung v. Silliman, 19 U.S. (1 Wheat.) 598, 604 (1821) (treating as essentially unthinkable, on the authority of *Marbury*, the notion that state courts have power to issue writs of mandamus against federal officers). *But see* N. Pac. Ry. Co. v. North Dakota *ex rel.* Langer, 250 U.S. 135, 141–42, 151–52 (1919) (reaching the merits on the same issue before ultimately denying the writ).

70. *See* Todd E. Pettys, *State Habeas Relief for Federal Extrajudicial Detainees*, 92 MINN. L. REV. 265, 270–81 (2007) (chronicling nineteenth century state court cases that decided habeas petitions brought by persons detained by the federal government); Charles Warren, *Federal & State Court Interference*, 43 HARV. L. REV. 345, 353 (1930) (claiming that for roughly eighty years, state courts issued writs of habeas corpus in federal detention cases).

71. 80 U.S. (13 Wall.) 397 (1871).

72. *See id.* at 410–11 (holding that claims for habeas relief are within the purview of "the courts or judicial officers of the United States, and those courts or officers alone").

has the affirmative power to strip both state and federal courts of jurisdiction to hear federal statutory claims.

### C. *Constitutional Challenges to Federal Laws*

In § 2 of the Portal-to-Portal Act, Congress forbade both state and federal courts from exercising jurisdiction to entertain challenges to the substantive provisions of the Act. What power did Congress exercise when it enacted § 2? The most straightforward answer—which I shall tentatively defend in this subpart—is that the same power that authorized the Act's substantive provisions also authorized § 2. And as the Second Circuit recognized matter-of-factly in *Battaglia v. General Motors Corp.*, the substantive provisions of "[t]he Portal-to-Portal Act, like the Fair Labor Standards Act," which it amended, were "passed as an exercise of the power to regulate commerce" among the states.[73]

Suppose that § 2 had stripped state but not federal courts of their jurisdiction to hear constitutional challenges to the substantive provisions of the Portal-to-Portal Act. We might then conceptualize the enactment as falling into what I have called category A: the law stripping state courts of jurisdiction to hear any category of federal claims would be understood as necessary and proper to carrying out congressional power, under the Madisonian Compromise, to vest exclusive jurisdiction in federal courts.

But that would not be the only way to understand such a law. Where, as in my hypothetical variation on § 2 of the Portal-to-Portal Act, Congress eliminates jurisdiction over state court actions that seek to invalidate a substantive congressional enactment, we might also ascribe to Congress another purpose: Congress seeks to prevent state courts from interfering with the substantive provisions of the Act. If that is the goal of Congress, then, in addition to whatever power it has to carry out the Madisonian Compromise, it could also fairly be said to be exercising the Commerce Clause power. The law stripping state courts of their power to hear challenges to substantive provisions that exercise the Commerce Clause power is thus necessary and proper to the exercise of the Commerce Clause power.

I take the foregoing logic to be unassailable where—as in my hypothetical variation on § 2 of the Portal-to-Portal Act—Congress authorizes (or leaves in place the general authorization for) jurisdiction in federal court. After all, Congress could have various legitimate reasons for not wanting state courts to invalidate acts of Congress, such as concerns about expertise, speed of implementation, or even state hostility to federal policy. But if the power to close the state courthouse door is necessary and proper to the exercise of the Commerce Clause power (which in turn authorizes the Act's substantive provisions) as a means of preventing state

73. 169 F.2d 254, 259 (2d Cir. 1948).

court interference with the Act's substantive provisions when the federal courthouse door remains open, it is hard to see why Congress would lack the affirmative power to close the state courthouse door on the same theory when it also closes the door to the federal courthouse. Either preventing state court interference with the carrying out of a federal statute is an exercise of the Commerce Clause power or it is not—and we have already seen that it is. Put simply, where Congress closes *both* state and federal courts to constitutional challenges to a substantive federal statute enacted pursuant to congressional power X, it aims to prevent *all* judicial interference with the federal statute, so that the jurisdiction-stripping provision is also an exercise of power X. That, at any rate, is what I regard as the straightforward argument for congressional state-courthouse-door-closing authority, even when Congress also closes the federal courthouse door to constitutional challenges to federal statutes.

One might object that the goal of preventing judicial interference with the substantive provisions of the Act is not a "proper" means of exercising the Commerce Clause power or any other affirmative power of Congress. Why might that be? Let us consider several possibilities.

Quoting the Supreme Court's landmark ruling in *McCulloch v. Maryland*, in the *Affordable Care Act Case*, Chief Justice Roberts argued that no "great substantive and independent power[]" can be deemed necessary and proper to the carrying out of some other, enumerated power because such great and independent powers must be granted in terms.[74] Might stripping jurisdiction over constitutional challenges to some substantive statute—from both state and federal courts in order to prevent judicial interference with that statute—be one of the "great substantive and independent power[s]" that Congress lacks because it is not expressly enumerated?[75]

The short answer is no. Whatever one makes of the Chief Justice's conclusion that imposing affirmative purchase mandates is such a "great substantive and independent power[]," there is no reason to think that stripping courts of jurisdiction is.[76] After all, if it were, then Congress would not even be able to strip state courts of jurisdiction when it vests jurisdiction in federal courts. Thus, this first potential limit fails.

A second kind of objection works by analogy to other instances of contingently valid exercises of congressional power. Stripping state courts of jurisdiction to entertain challenges to federal statutes is only proper, according to this objection, where federal courts remain open, because the propriety of such an action is contingent.

As an elaboration of this objection, consider commandeering. Congress

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74. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 559–61 (2012) (opinion of Roberts, C.J.) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411 (1819)).

75. *Id.* at 559.

76. *Id.*

may direct state legislatures to enact laws or state executive officials to enforce federal law, but only if Congress gives the states a choice whether to do so or to take some other action, such as decline federal funds or submit to conditional federal preemption.[77] The anti-commandeering cases, this objection goes, show that whether an action falls within congressional power can depend on some other action Congress does or does not take.

Upon inspection, however, this objection mischaracterizes the anti-commandeering doctrine. Under that doctrine, Congress has *no* power to commandeer state legislatures or executives. Thus, when Congress gives the states a choice whether to forgo federal funds or to accept federal preemption, it is not exercising a "commandeering power," contingent or otherwise. Rather, Congress is exercising the Spending power or preempting pursuant to whatever affirmative power authorizes the preemptive federal statute. The anti-commandeering doctrine does not provide a useful analogy after all.

In rejecting the anti-commandeering analogy, I do not mean to deny the conceptual possibility of a power that is contingently valid. After all, other branches of constitutional law encompass contingency. For instance, a content-neutral law that regulates the time, place, or manner of speech is valid if, but only if, it "leave[s] open ample alternative channels for communication."[78] A municipality with two public parks could be thought to act constitutionally if it denies a permit for a rally in Park 1 on content-neutral grounds if it simultaneously offers a permit for the rally in Park 2 (or vice-versa), but the municipality would act unconstitutionally if it made neither park available. The constitutionality of closing Park 1 to a rally depends on whether Park 2 remains open.

Are courts like parks? They *could* be. There certainly would be nothing illogical about a doctrine under which some law is deemed necessary and proper to the carrying out of an enumerated power where the government also acts (or refrains from acting) in some other way, but not so deemed where the government fails to act (or acts) in that other way. Yet, while such contingency is conceptually possible, we still would need some reason for thinking that this is the right way to understand enumerated powers when it comes to jurisdiction stripping. But the only plausible objections to jurisdiction stripping of this sort sound either in the rights of individuals to a day in court or in a general structural requirement (not connected to the limits of enumerated powers) that aims, in the words of Professors Fallon and Meltzer, "to keep government within the bounds of law."[79]

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77. Printz v. United States, 521 U.S. 898, 925–33 (1997) (forbidding commandeering of state and local executive officials); New York v. United States, 505 U.S. 144, 174–77 (1992) (forbidding commandeering of state legislatures).

78. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

79. Fallon & Meltzer, *supra* note 36, at 1736.

To say that Congress has the affirmative power to strip both state and federal courts of jurisdiction to hear constitutional challenges to some substantive federal statute in order to prevent judicial interference with the policy of that statute is not to say that all or even any exercises of that power are constitutional. Such jurisdiction stripping might well violate some other constitutional norm. But it is nonetheless useful to distinguish the kind of constitutional norm at issue.

Suppose that Congress passed a law forbidding the movement across state lines of cars bearing bumper stickers critical of the President. Such a law would clearly violate the First Amendment. But would it also fall outside the enumerated power of Congress under the Commerce Clause? Conventional doctrine would say no. The problem with the law is not that it regulates a subject matter that is not interstate commerce; the problem is that it censors speech. That is a First Amendment problem, not an enumerated powers problem.

To be sure, it is possible to build the First Amendment objection into the enumerated powers analysis. Under an analogy to such an approach, a law stripping state and federal courts of jurisdiction to entertain constitutional challenges to the substance of a federal law would not be "proper" to the exercise of any power because (let us suppose) there is a constitutional right to a judicial forum to challenge a law's constitutionality. This approach might be modeled on Professor Randy Barnett's view that affirmative powers stop where rights begin. Barnett contends that "[a] 'proper' exercise of power is one that[,]" among other things, "does not violate the rights retained by the people."[80]

Yet Barnett's approach, while offered as a restoration of the original understanding, is, in the contemporary context, a reform proposal. As the bumper-sticker example illustrates, under modern doctrine, individual rights operate as external constraints on the exercise of enumerated powers, but they are not incorporated within such powers as internal limits.

This may seem like a mere semantic point, but it is more. As I have noted, there is a substantial body of literature addressing the question whether jurisdiction stripping violates a constitutional right to a judicial forum. The present inquiry aims to answer a different question—Under what circumstances does Congress have the affirmative power to strip state courts of jurisdiction? If the only basis for concluding that Congress lacks such power in some context is that state court jurisdiction stripping violates a right to a judicial forum, then we will have simply incorporated the prior debate into the affirmative powers question.

In so doing, we will have sown unnecessary confusion, because the affirmative power inquiry, as I have described it, focuses on different

80. RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 274 (2004).

considerations from the inquiry into whether there is a right to a judicial forum. A court that would conclude that there is a constitutional right to a judicial forum will invalidate an act that strips jurisdiction in violation thereof, regardless of what that court concludes with respect to affirmative power. If such a court then incorporates its conclusion that a jurisdiction-stripping measure violates a constitutional right into the affirmative power analysis (per something like Barnett's general approach to rights), that will make no difference to the bottom line. The inquiry that can make a difference asks whether Congress lacks affirmative power to engage in jurisdiction stripping in some context in which, by hypothesis, doing so would violate no rights.

Accordingly, at least for the purposes about which we care, the straightforward answer with which this subpart began holds: when Congress strips state and federal courts of jurisdiction to entertain constitutional challenges to the substantive provisions of some federal act, it exercises whatever affirmative power authorizes the enactment of those substantive provisions.

Before moving to our last category, I want to underscore that the analysis of this subpart does not entail that provisions like § 2 of the Portal-to-Portal Act are constitutional. Acceptance of the foregoing line of reasoning only means that a successful argument for the unconstitutionality of such enactments should rest on something other than a lack of affirmative power.

One might think that due process (or some other constitutional principle) creates a constitutional right to some judicial forum to entertain constitutional challenges to federal law. That was the conclusion that the Second Circuit reached in dicta, at least with respect to due process and takings claims.[81]

Or one might think that constitutional structure (in the sense that Professor Charles Black used the term, to refer to the relations of the institutions recognized and created by the Constitution)[82] limits the otherwise valid exercise by Congress of any of its powers in a way that aggrandizes those powers.[83] This view might be understood as extending Henry Hart's claim that Congress may not exercise its power under the Exceptions Clause of Article III (about which more will be said in Part IV) in such a way as to undermine the "essential role" of the Supreme Court to courts of first

81. *See* Battaglia v. Gen. Motors Corp., 169 F.2d 254, 257 (2d Cir. 1984) ("[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.").

82. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7, 67 (1969).

83. *Cf.* Fallon & Meltzer, *supra* note 36, at 1736 (proposing that the Constitution should be understood to contain a relatively "absolute principle [that] demands a general structure of constitutional remedies adequate to keep government within the bounds of law").

instance. The view I am imagining restricts otherwise valid exercises of the power to make laws necessary and proper to ordaining and establishing lower federal courts, as well as otherwise valid exercises of the Commerce Clause (or other Article I, Section Eight) power with respect to state courts. We might awkwardly call this a limit rooted in the "essential role of lower courts."

Or one might think that when Congress allows for judicial enforcement of a federal statute, it must accept judicial review of that same statute as a necessary ingredient of the courts' law-application role. Citing *Marbury*, the Supreme Court said something very much like this when it invalidated on First Amendment grounds a law that restricted the ability of publicly funded lawyers to challenge the constitutionality of welfare laws that were otherwise the subject of litigation. Speaking for the Court and citing *Marbury*, in *Legal Services Corp. v. Velazquez*,[84] Justice Kennedy wrote that "Congress cannot wrest the law from the Constitution which is its source."[85] That principle might allow Congress to strip state and federal courts of jurisdiction to hear freestanding constitutional challenges to federal law, while obligating Congress to leave such courts open to entertaining and acting upon arguments against the constitutionality of any laws that are otherwise properly before them.[86]

In mentioning these potential limits, I do not mean to take a position on the strength of the arguments for or against any of them. Rather, I simply wish to underscore the limited scope of the conclusion of this subpart: there might be good reasons to conclude that Congress may not simultaneously strip state and federal courts of jurisdiction to entertain constitutional challenges to federal laws in some or even in all contexts, but those reasons support what would best be conceptualized as external limits on Congress's affirmative powers. All things considered, Congress has the affirmative power to simultaneously strip state and federal courts of jurisdiction to entertain constitutional challenges to federal laws.

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84. 531 U.S. 533 (2001).

85. *Id.* at 545 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803)).

86. Throughout this Article, I use the term constitutional "challenge" to encompass both constitutional claims by plaintiffs and constitutional defenses by defendants because Congress has no greater or lesser *affirmative power* to strip courts of jurisdiction over constitutional claims than it has over constitutional defenses. However, if one finds the *Velazquez*-based argument set forth in the text persuasive, that might supply a reason to think that, quite apart from limits on Congress's affirmative power, stripping state (or, for that matter, federal) courts of jurisdiction to hear a federal constitutional defense, while not otherwise tinkering with the courts' jurisdiction to hear some category of cases, would be problematic in a way that jurisdiction stripping with respect to constitutional claims is not.

### *D. Constitutional Challenges to State Laws*

Suppose Congress enacts a statute stripping both state and federal courts of jurisdiction to entertain federal constitutional challenges to *state* laws in some category of cases—challenges to abortion restrictions, say.[87] With respect to the federal courts, such a statute exercises (or, more precisely, refrains from exercising) the Article III power to ordain and establish lower federal courts. But what power could Congress be exercising in stripping state courts of jurisdiction in such cases? The short answer is none.

We can see why that is so by examining the powers available to Congress. As potentially relevant here, Congress has powers to organize the courts under Article III and substantive regulatory powers, mostly listed in Article I, Section Eight.

We can dispense with the latter category first. Unlike the jurisdiction-stripping laws discussed above in subparts III(B) and III(C), a law stripping state courts of jurisdiction to hear federal constitutional challenges to state laws could not be said to carry into effect any substantive regulatory power, because it does not accompany any substantive federal regulatory enactment. When Congress attaches conditions to the exercise of its Spending power but bars state and federal court jurisdiction to entertain lawsuits alleging that a recipient of federal funds failed to comply with one or more of those conditions, we can conceptualize the jurisdiction-stripping provision as itself connected to the exercise (or rather, the partial withholding of the exercise) of the Spending power. When Congress regulates pursuant to the Commerce Clause but bars state and federal court jurisdiction to challenge the substantive regulatory provisions, we can conceptualize the jurisdiction-stripping provision as likewise connected to the exercise of the Commerce power. However, when Congress simply bars federal constitutional challenges to state laws, there is no substantive law even in the vicinity, so to

87. In recent decades, members of Congress have shown special interest in stripping courts of jurisdiction in cases involving divisive social issues. *See generally, e.g.*, Pledge Protection Act of 2007, H.R. 699, 110th Cong. (2007) (amending Title 28 with respect to jurisdiction over cases regarding the Pledge of Allegiance); Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. (2004) (removing federal jurisdiction over certain claims by state officers regarding religion); Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (2004) (limiting jurisdiction over questions under the Defense of Marriage Act); Life-Protecting Judicial Limitation Act of 2003, H.R. 1546, 108th Cong. (2003) (eliminating federal court jurisdiction over any "abortion-related case"); H.R. 761, 97th Cong. (1981) (eliminating federal court jurisdiction over forced school attendance); Voluntary Prayer in Public Schools and Buildings Act, H.R. 4756, 97th Cong. (1981) (limiting jurisdiction in cases involving voluntary prayer in public schools or buildings); 101 CONG. REC. S8700 (daily ed. June 26, 1990) (statement of Sen. Helms) (proposing amendment to later unenacted bill limiting jurisdiction in cases regarding flag burning). Although bills such as those just listed (none of which was ultimately enacted) typically would leave state courts open, it is not difficult to imagine that the same forces that produce bills stripping federal courts of jurisdiction would sometimes produce bills stripping all courts of jurisdiction. For a review of proposed jurisdiction-stripping legislation introduced during and opposed by presidential administrations from the second President Roosevelt through the second President Bush, see generally Grove, *supra* note 2.

speak, and so we cannot plausibly describe the jurisdiction-stripping provision as connected to any substantive power.

At first blush, it would appear that the power to ordain and establish the lower federal courts cannot be the basis for stripping state courts of jurisdiction to entertain federal constitutional challenges to state laws. And indeed, I shall ultimately reach the conclusion that it does not confer any such power. However, before coming to that conclusion, I must address a superficially appealing argument by analogy to a point I made in the previous subpart.

In subpart III(C), I reasoned that because Congress undoubtedly could close state courts to federal constitutional challenges to some class of federal statutes if it left the federal courts open, it can likewise do so even when it closes the federal courts—at least, so far as an affirmative power like the Commerce power is concerned. Well, it might be asked, Why doesn't the same logic apply to federal constitutional challenges to state laws? After all, Congress undoubtedly could close state courts to federal constitutional challenges to some class of state statutes if it left the federal courts open. So, wouldn't the same logic I applied above indicate that Congress can also close the state courts as to these cases even when it closes the federal courts?

In a word, no. In subpart III(C), my argument rested entirely on the fact that Congress was exercising a power *in addition to* the power to ordain and establish lower federal courts when it closed state courts to prevent state court interference with a federal substantive enactment—namely, whatever power Congress was exercising in the substantive enactment. However, in either context—whether Congress is closing state courts to challenges to federal laws or to state laws—its power to ordain and establish lower federal courts only has any bearing when Congress leaves federal courts open. Why? Because closing state courts to some category of claims can only plausibly be seen as necessary and proper to ordaining and establishing lower federal courts when the state-court-closing measure is part of a scheme to vest exclusive jurisdiction in federal courts. If Congress closes *both* state and federal courts, then the act that does so cannot plausibly be tied to its power to ordain and establish the lower federal courts.

Thus, neither the power to ordain and establish lower federal courts nor any of Congress's substantive powers found in Article I, Section Eight or elsewhere provides Congress with the affirmative power to close state as well as federal courts to federal constitutional challenges to state laws. In short, Congress lacks such a power.

* * *

Some readers may find the juxtaposition of the conclusions in subparts III(C) and III(D) odd or even perverse. After all, as a normative matter it could be argued that Congress should have *less* power to strip courts of jurisdiction to hear constitutional challenges to federal laws than to state laws, because when Congress strips courts of power to review the validity of

federal laws, it engages in a form of self-dealing. And yet, I have concluded that Congress has the affirmative power to strip state and federal courts of jurisdiction to hear constitutional challenges to its own laws while it lacks that power with respect to state laws.

That result is less anomalous than it might at first appear for three reasons. First, to repeat a point with which readers by now may have grown weary, to the extent that one thinks that there is a pressing need for constitutional review of federal, as well as state statutes, that need may factor into an argument for some other kind of limit on jurisdiction stripping. The conclusion that Congress has the affirmative power to strip state and federal courts of such power does not imply that the exercise of such power survives constitutional scrutiny under other theories.

Second, although Congress has almost never passed legislation stripping both state and federal courts of jurisdiction over a class of constitutional claims,[88] it has frequently considered bills that would limit the jurisdiction of various courts to hear constitutional challenges. In recent decades, such bills have frequently targeted hot-button social issues such as busing, abortion, flag burning, school prayer, and same-sex marriage—areas where state law has regulatory primacy.[89] Because resistance to the Court's decisions tends to vary by region, and thus by state, the greater threat to constitutional values may come from state legislatures rather than from Congress,[90] a conclusion broadly consistent with James Madison's fears about the relative threat of tyranny in small versus large polities expressed in *The Federalist No. 10*.[91]

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88. The Portal-to-Portal Act is a notable exception. So is § 7 of the Military Commissions Act of 2006, which was held to violate the Suspension Clause in *Boumediene v. Bush*, 553 U.S. 723, 733 (2008). The text of that provision was sufficiently encompassing to bar jurisdiction in state as well as federal courts. When *Boumediene* was decided, the statutory text provided, as it does now:

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

*Id.* at 736. *See* 28 U.S.C. § 2241(e)(1) (2012). Because state courts lack the power to grant writs of habeas corpus to federal prisoners, *see* Tarble's Case, 80 U.S. 397, 411–12 (1871), even if the statute were construed as only stripping federal courts of jurisdiction, the result would be to leave no court—state or federal—with jurisdiction in the specified class of cases.

89. *See supra* note 87 and accompanying text (giving examples of bills that would strip courts of jurisdiction in cases involving divisive social issues).

90. *Cf.* Richard A. Primus, Bolling *Alone*, 104 COLUM. L. REV. 975, 1000–01 (2004) (noting "that the constitutional prohibition on racial discrimination has had a greater impact on state governments" than on the federal government, while noting also that with respect to this particular issue "regional differences have diminished with time").

91. THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961). Madison explained:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.

Thus, in order to maintain the supremacy of federal constitutional law, the need for judicial review of state laws may be greater than the need for judicial review of federal laws.

Third, the need for constitutional review may be greater in cases challenging state rather than federal laws because of the interest in uniformity. Echoing the decisive rationale for Justice Story's opinion for the Court in *Martin v. Hunter's Lessee*,[92] Justice Holmes famously remarked: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."[93]

To be sure, Holmes was discussing judicial review by the Supreme Court, not by state courts or lower federal courts, and without review by a single body such as the Supreme Court, uniformity cannot be readily maintained because different state courts could provide different interpretations of the Constitution. Thus, the conclusion that Congress lacks the affirmative power to strip all courts of jurisdiction over constitutional challenges to state laws does not, standing alone, ensure uniformity.

However, the limit identified here need not stand alone. As the next Part explores, the proposition that Congress lacks affirmative power to strip both state and lower federal courts of jurisdiction to hear constitutional challenges to state laws has potential implications for the Supreme Court's own jurisdiction because it interacts with other possible limits on congressional power to strip jurisdiction.

## IV. Practical Implications

Part III concluded that Congress lacks the affirmative power to strip state courts of jurisdiction over federal constitutional challenges to state laws when it also closes federal courts to such challenges. That conclusion is important because it does not rest on any of the controversial theories that have hitherto been proposed as limits on the power of Congress to restrict the jurisdiction of state and federal courts. It stands even if one accepts the default view that neither Article III nor any other provision of the Constitution limits the power of Congress to strip federal courts of jurisdiction.

This Part asks how much the limit I have identified really matters, given the possibility that state courts in states that defy federal constitutional norms would themselves be hostile to those constitutional norms. The answer is *at least a little and potentially quite a bit*. After describing a few instances of

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*Id.*

92. 14 U.S. (1 Wheat.) 304, 347–48 (1816).

93. OLIVER WENDELL HOLMES, *Law and the Court: Speech at a Dinner of the Harvard Law School Association of New York on February 15, 1913*, *in* COLLECTED LEGAL PAPERS 291, 295–96 (1920).

heroic actions by state court judges in subpart IV(A), I explain in subparts IV(B) and IV(C) how the limitation on affirmative power interacts with the less controversial of the two main families of such other theories—those that build on Hart's view that Congress may not exercise its power under the Exceptions Clause in a way that undermines the Supreme Court's "essential role."

### *A. State Court Hostility to Federal Constitutional Rights*

As noted above, in modern times, members of Congress have introduced jurisdiction-stripping legislation most frequently when the subject matter concerned what might loosely be called "social" issues—such as busing, abortion, flag burning, school prayer, and same-sex marriage.[94] Public opinion on such questions shows polarization along a number of dimensions, including geography.[95] While much of the geographic polarization reflects different attitudes in urban, suburban, and rural areas,[96] there are also regional differences that are reflected in state legislatures.[97] And although attitudes of state court judges do not necessarily mirror popular attitudes in their respective states precisely, other things being equal, we can expect a correlation. For example, the South Dakota legislature is more likely than the Vermont legislature to enact abortion restrictions,[98] *and* the South Dakota Supreme Court is more likely to uphold any given abortion restriction than the Vermont Supreme Court would be.[99]

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94. *See supra* note 87 and accompanying text (giving examples of bills proposed in Congress that would have stripped courts of jurisdiction in cases involving divisive social issues).

95. *See generally Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/ [https://perma.cc/M3JF-TZ7Z] (describing a general increase in polarization between the two major American political parties); James A. Thompson & Jesse Sussell, *Is Geographic Clustering Driving Political Polarization?*, WASH. POST (Mar. 2, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/02/is-geographic-clustering-driving-political-polarization/?utm_term=.e51659bed9cb [https://perma.cc/K3ME-AWJR] (identifying "geographic clustering" as a primary cause of this polarization).

96. *See* Dante J. Scala & Kenneth M. Johnson, *Political Polarization Along the Rural-Urban Continuum? The Geography of the Presidential Vote, 2000–2016*, 672 ANNALS AM. ACAD. POL. & SOC. SCI. 162, 168 (2017) (documenting varying political attitudes in urban and rural communities in the United States).

97. *See generally State of the States*, GALLUP: NEWS, http://news.gallup.com/poll/125066/state-states.aspx [https://perma.cc/J7CL-L2MU] (providing extensive data regarding average political beliefs by state).

98. *See State Governments*, NARAL PRO-CHOICE AM., https://www.prochoiceamerica.org/laws-policy/state-government/ [https://perma.cc/9M74-EBYY] (providing comparative data regarding abortion legislation for all fifty states, and rating Vermont's legislature as strongly supportive of abortion rights and South Dakota's as strongly opposed).

99. Adam Bonica & Michael J. Woodruff, *A Common-Space Measure of State Supreme Court Ideology*, 31 J. L. ECON. & ORG. 472, 487–88, 490 (2015) (comparing various state court ideological compositions, including charts depicting the South Dakota Supreme Court as historically conservative and the Vermont Supreme Court as traditionally liberal).

Accordingly, the lack of affirmative congressional power to close state courts to federal constitutional challenges to state laws does not leave plaintiffs who would bring such challenges with much reassurance that they will succeed—even if they have good claims on the merits. To continue the foregoing example, suppose Congress strips state and federal courts of the authority to hear challenges to abortion restrictions. South Dakota responds by enacting a law that would be invalidated by the federal courts applying existing precedent, but that, by hypothesis, they lack jurisdiction to consider. Under the analysis set forth in Part III, the jurisdiction-stripping law is invalid as applied to the state courts, and thus the plaintiffs are able to bring their challenge there. However, because the state judges in South Dakota are substantially less sympathetic to abortion rights than their federal counterparts, they uphold the law.

The scenario just described is entirely plausible, even likely in the sort of circumstances that would produce the enactment of jurisdiction-stripping legislation, but it is not inevitable—at least not in every case. Even state court judges who can be removed by state electoral politics have, on occasion, stood up for principle as they saw it, even on hot-button social issues.

Relying on a combination of state and federal grounds, a liberal majority of the California Supreme Court reversed nearly every death sentence for close to a decade between the late 1970s and the mid-1980s, despite growing popular support in the state for capital punishment during that period.[100] In 2009, the Iowa Supreme Court unanimously rendered a decision making the Hawkeye State only the third in the country to grant legal recognition to same-sex marriage,[101] notwithstanding the fact that a clear majority of Iowans opposed same-sex marriage at the time.[102]

It is easy to read the experiences of the California and Iowa Supreme Courts as cautionary tales. After all, largely in response to their respective rulings on the death penalty and same-sex marriage, the key justices of each court lost their seats when they faced the voters.[103] But it is not clear that their

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100. *See* Scott G. Harper & David P. Hubbard, *The Evidence for Death*, 78 CALIF. L. REV. 973, 978–80 (1990) (recounting growing public opposition to the California Supreme Court's rulings rejecting most death sentences in the 1970s and 1980s).

101. Varnum v. Brien, 763 N.W.2d 862, 907 (Iowa 2009). Massachusetts was the first, also by judicial decision. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969–70 (Mass. 2003). New Hampshire was the second, by legislation. Equal Access to Marriage, N.H. REV. STAT. ANN. tit. XLIII. Domestic Relations, § 457:1–a (2018) (effective date Jan. 1, 2010).

102. *Iowa Polls Show Shifting Attitudes on Same-Sex Marriage*, DES MOINES REG. (Apr. 28, 2015, 7:18 PM), http://www.desmoinesregister.com/story/news/politics/iowa-poll/2015/04/28/gay-marriage-iowa-poll-supreme-court/26543751/ [https://perma.cc/8R2P-LMEQ] (reporting 2008 statewide poll that found 62% of respondents opposed and only 32% of respondents in favor of legal same-sex marriage).

103. Robert Lindsey, *The Elections: The Story in Some Key States; Deukmejian and Cranston Win as 3 Judges Are Ousted*, N.Y. TIMES (Nov. 6, 1986), http://www.nytimes.com/1986/11/06/us/elections-story-some-key-states-deukmejian-cranston-win-3-judges-are-ousted.html [https://perma.cc/NXW7-EJXV]; A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*,

willingness to act in a countermajoritarian manner should thus be judged as a failure.

The California Supreme Court's skeptical attitude towards the death penalty has largely persisted long after the state's voters relieved its initial champions of their responsibilities. In the nearly four decades since the 1978 ascension and subsequent removal of the court's anti-death penalty majority, California has executed exactly thirteen prisoners.[104] By comparison, during that same period, Texas, with a smaller population, has executed over five hundred.[105] Of course, to death penalty opponents, even thirteen executions is thirteen too many, but it is worth recalling that the anti-death penalty majority on the California Supreme Court never invalidated the death penalty per se.[106]

Meanwhile, although a majority of the Iowa justices who found a state constitutional right to same-sex marriage were ousted from the state high court, the precedent persisted. Same-sex marriage remained legal in Iowa, and the ruling making it so was later listed in an appendix in the U.S. Supreme Court's decision finding a federal constitutional right to same-sex marriage—invoked by the majority as evidence of growing support for the institution.[107] In both California and Iowa, the individual justices who stood up for principle (as they saw it) no doubt suffered professional consequences for taking a stand, but the principles survived.

Sometimes the U.S. Supreme Court "follows th' iliction returns"[108] but not always. Likewise, even state court judges who face the prospect of direct accountability to the electorate do not always decide cases in accordance with popular opinion, even on hot-button social issues. Accordingly, assuming arguendo that the limit on affirmative congressional power is the only limit the Constitution places on jurisdiction stripping, that limit is worth something, because state judges will occasionally buck popular opinion in their state.

That said, there can be little doubt that a constitutional right that can

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N.Y. TIMES (Nov. 3, 2010), http://www.nytimes.com/2010/11/04/us/politics/04judges.html [https://perma.cc/YAV4-F7GP].

104. *Inmates Executed, 1978 to Present*, CAL. DEP'T CORRECTIONS & REHABILITATION, http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html [https://perma.cc/2KW7-49DW] (last updated Oct. 2, 2015).

105. *Death Row Since 1974*, TEX. EXECUTION INFO. CTR., http://www.txexecutions.org/statistics.asp [https://perma.cc/HM5V-PVRH].

106. *See* People v. Easley, 654 P.2d 1272, 1292 (Cal. 1982), *vacated and rev'd on other grounds*, 671 P.2d 813 (1983) (upholding a capital conviction and, in a portion of the opinion that was not subsequently vacated, explicitly rejecting the argument that the death penalty was categorically unconstitutional).

107. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015) ("[T]he highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions."); *id.* app. A at 2610 (listing Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)).

108. FINLEY P. DUNNE, MR. DOOLEY'S OPINIONS 26 (1901).

only be enforced against a state alleged to be violating it in the courts of that very state is *less* valuable than a right that can be enforced in some federal court as well. The next two subparts explain how a relatively modest limit on congressional jurisdiction-stripping authority, in addition to the limit on affirmative power, combines with that affirmative-power limit to ensure access to the Supreme Court to challenge the constitutionality of state legislation.

### *B. Story-Based Theories Versus Hart-Based Theories*

The leading academic theories positing limits on the power of Congress to enact jurisdiction-stripping legislation can be grouped into two broad families, which I shall associate with Justice Joseph Story and Professor Henry Hart, respectively. Story's theory—articulated in *Martin v. Hunter's Lessee* by Story and refined into a number of variations by modern scholars, most notably Professor Akhil Amar[109]—is grounded in the text of Article III. Hart's theory—as well as its various permutations—aims for consistency with the text but does not purport to be derived from it. My aim here is not to show that either or both are correct or incorrect. Rather, I want to show that Hart-based "essential role" theories are more modest than Story-based theories. For the sake of simplicity, if not perfect accuracy, I shall refer to each family of theories by reference to its respective founder, glossing over important differences of nuance among the followers of each school of thought.

*1. Story's View.*—Story-based theories emphasize the text of Article III, Section Two, which states that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under" federal law.[110] To oversimplify, Story-based theories construe this language to mean that some federal court must have jurisdiction to entertain every case arising under federal law.[111] Such theories thus operate as internal limits on the scope of congressional power under a combination of the Madisonian Compromise (of Article III, Section One) and the Exceptions Clause (of Article III,

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109. *See generally* Amar, *A Neo-Federalist View*, *supra* note 22, at 206 (building on elements of a view most closely associated with Justice Story to argue that Article III requires some federal court to be open to federal question cases, but agreeing with Hart that the Framers "did not intend to require the creation of lower federal courts"); Amar, *The Two-Tiered Structure*, *supra* note 22, at 1501 (asserting that while Justice Story's theory is "not without flaws," it "deserves especially close attention").

110. U.S. CONST., art. III, § 2. Article III, Section Two also uses the "all Cases" language with respect "to all Cases affecting Ambassadors, other public Ministers and Consuls" and "to all Cases of admiralty and maritime Jurisdiction," but these need not concern us here.

111. *See, e.g.*, Akhil Reed Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 479 (1989) ("Congress may except such cases from the Supreme Court's appellate docket only if Congress simultaneously authorizes some other Article III court(s) to hear, at least on appeal, all excepted cases.").

Section Two). Congress can limit the jurisdiction of the lower federal courts, and it can limit the jurisdiction of the Supreme Court; however, according to Story-based theories, it cannot simultaneously limit both sets of courts if the result would be that no federal court has jurisdiction over some subset of cases arising under federal law.

Story-based theories do not rest on text alone, but neither do criticisms of the view.[112] The most compelling criticism may be that, whatever the merits of a Story-based "all means all" theory if one were writing on a blank slate, in all of U.S. history it has never been the law. The Judiciary Act of 1789 did not, except in a few special circumstances, vest federal question jurisdiction in the lower federal courts, nor did it provide access to the Supreme Court in cases in which the party relying on federal law prevailed in state court.[113] When Congress did vest federal question jurisdiction in federal trial courts in 1875, it included an amount-in-controversy minimum that left numerous cases out.[114] Congress did not eliminate the jurisdictional minimum until 1980.[115]

Even today, numerous cases that arise under federal law for Article III purposes do not fall within the original jurisdiction of the federal district courts because the federal question arises as a defense or in response to a defense and, thus, fails to satisfy the well-pleaded complaint rule.[116] Moreover, even if one entertains the dubious assumption that the small possibility of review by the Supreme Court on a writ of certiorari suffices to discharge the ostensible duty of Congress to vest federal court jurisdiction over "all" federal question cases, that *still* leaves the modern jurisdictional framework noncompliant with the Story-based approach.

To see why, suppose a case in which a federal question arises by way of defense, so that it falls outside the original jurisdiction of the federal district courts. Suppose further that the highest court of the state rules in favor of the defendant on alternative grounds: both the federal defense and a state law defense prevail. The Supreme Court cannot hear this case provided that the

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112. For a useful summary of the debate, see RICHARD H. FALLON, JR. ET AL, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 319–22 (7th ed., 2015) [hereinafter HART AND WECHSLER] (discussing Sager, *supra* note 15); Amar, *A Neo-Federalist View*, *supra* note 22, at 229–45; Amar, *The Two-Tiered Structure*, *supra* note 22, at 1501–44; Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1633–34 (1990) (summarizing Professor Amar's theory, which adopts some Story-based views, and criticizing it on both textual and historical grounds).

113. Act to Establish the Judicial Courts of the United States, ch. 20, § 25, 1 Stat. 73, 85–87 (1789).

114. Act of Mar. 3, 1875, ch. 137 § 1, 18 Stat. 470, 470 (1875).

115. Federal Question Jurisdictional Amendments Act of 1980, 96 Pub. L. No. 96-486, § 1, 94 Stat. 2369 (1980).

116. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (holding that jurisdiction is only conferred if "the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution").

state law ground is adequate and independent, as it frequently will be.[117] We thus have a case—really a large class of cases—that arises under federal law but over which no federal court can ever exercise jurisdiction. Accordingly, at no time from the founding through the present has the jurisdictional framework reflected Story's view.

What, then, did the framers and ratifiers mean by preceding some heads of jurisdiction in Article III with the word "all"? Judge William Fletcher makes a powerful argument that by selectively using the word "all," Article III distinguishes between those categories of cases over which Congress may choose to grant some federal court *exclusive* jurisdiction and those categories over which Congress may only confer *concurrent* jurisdiction.[118] With characteristic modesty, Fletcher acknowledges that he has not "found the single right answer to the meaning of 'all' in Article III," but his reading does seem to "make[] the most sense of the available historical materials."[119]

It is, of course, possible to imagine that an approach to understanding the Constitution that was never heretofore accepted could come to be seen as correct. After all, before the Supreme Court recognized a constitutional right to same-sex marriage,[120] the Constitution had never been construed to include such a right (except by lower courts in the brief period leading up to the Supreme Court decision). Thus, if Story-based approaches to Article III were defended as giving effect to an evolving understanding of the role of federal courts in American constitutional democracy, the centuries-old practice to the contrary might be overcome. However, Story-based approaches tend to be defended as a recovery of the original (or at least early) understanding.[121] If there is a good Living-Constitutionalist defense of Story-based theories, it lacks a champion.

I do not wish to leave readers with the impression that Story-based theories are necessarily wrong. I have given only an abbreviated account of a very large and sophisticated literature. My point here is simply that Story-based theories are highly controversial.

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117. Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).

118. *See* William A. Fletcher, *Congressional Power over the Jurisdiction of the Federal Courts: The Meaning of the Word "All" in Article III*, 59 DUKE L.J. 929, 952 (2010).

119. *Id.*

120. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) (holding that the Due Process and Equal Protection clauses of the Fourteenth Amendment protect the right of same-sex couples to marry).

121. *See* Fallon, *supra* note 2, at 1058–59 (criticizing much of the academic literature, including Story-based theories, as resting almost exclusively on a tendentious reconstruction of the original understanding).

*2. Hart's View.*—In his landmark *Dialogue*, Hart argued that congressional power to make exceptions to and regulations of the Supreme Court's appellate jurisdiction carries with it an internal limit: "exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."[122] Hart acknowledged the vagueness of this limit, but thought that an indeterminate limit was preferable to no limit at all, because the latter would authorize "reading the Constitution as authorizing its own destruction[.]"[123] In any event, Hart also thought that "essential role" was no more vague than the tests the courts have adopted to implement other constitutional provisions.[124]

So, what is the Supreme Court's essential role? The Court itself has not had occasion to say. A leading expositor of Hart's theory canvassed the text, structure, history, and precedent to reach the conclusion that any congressional restrictions on the Supreme Court's appellate jurisdiction must preserve its "essential constitutional functions of maintaining the uniformity and supremacy of federal law."[125]

This view is hardly *uncontroversial*. Like the view of Story and his followers, it bucks history.[126] However, by narrowing the essential role view we can make it *substantially less controversial*. As Professor Lawrence Sager has argued, "the essential function claim is strongest when narrowed to Supreme Court review of state court decisions that repudiate federal constitutional claims of right."[127] Sager's argument for such a core to the Court's jurisdiction is rooted chiefly in the history and purpose of the Supreme Court's appellate jurisdiction,[128] but it is also striking that this narrowest, strongest version of the Hartian essential role view is not embarrassed by post-enactment history.

The Judiciary Act of 1789 allowed for Supreme Court review (by writ of error) in just those cases in which state courts rejected a federal claim or defense. Moreover, in modern times, the adequate-and-independent-state-

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122. Hart, *supra* note 15.

123. *Id.*

124. *See id.* ("Ask yourself whether it is any more [indeterminate] than the tests which the Court has evolved to meet other hard situations."). Here I have equated the view of the character "A" in Hart's *Dialogue* with Hart's own view. *See* HART AND WECHSLER, *supra* note 112, at 330–33 (making the same assumption).

125. Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201 (1960).

126. *See* HART AND WECHSLER, *supra* note 112, at 315 (describing jurisdictional gaps as inconsistent with "essential functions" view); *see also id.* at 315–16 (discussing criticisms by Gunther, *supra* note 1, at 896–97, and Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005–06 (1965) (arguing that Story's view is inconsistent with "the plan of the Constitution for the courts" and citing *Marbury* as early precedent to that effect)).

127. Sager, *supra* note 15, at 44.

128. *See id.* at 45–56 (inferring from the structure and history of the Constitution a "firm commitment to federal judicial supervision of the states").

law-ground doctrine is also consistent with the Sager's version of Hart's view. If a state court rules against a party relying on federal law, then there is no state-law-ground bar to Supreme Court review. True, the Court cannot review asserted overprotection of a federal claim or defense where state law provides an adequate and independent state law ground, but such cases fall outside the core.

Notably, Sager's core category ensures neither supremacy nor uniformity in its entirety, but it ensures the intersection of the two. It does not ensure supremacy because—consistent with Holmes's observation—the core includes the *Martin* power but not the *Marbury* power.[129] Nor does the core category ensure uniformity because it leaves states free to over-enforce federal constitutional norms. However, the greater threat to uniformity has always been selective state under-enforcement of federal norms, because the provision of additional layers of protection can already be accomplished via state law.[130]

Before turning to the interaction of the strongest form of Hart's theory with the analysis of affirmative power in Part III, we might pause to identify one further advantage of Hart-based theories over Story-based theories. Insofar as Story-based theories require the creation of lower federal courts, they run squarely into the Madisonian Compromise. By contrast, Hart-based theories construe only the Exceptions Clause. In positing that Congress may not eliminate *all* of the Supreme Court's appellate jurisdiction, they draw support from the very concept of an "exception."

Thus, Hart-based theories are easier to square with the text of Article III than Story-based theories. And as we have seen, Sager's core—reserving to the Supreme Court against interference by Congress the power to review state court decisions that repudiate federal constitutional claims—also squares well with the history of the federal courts' actual jurisdiction.

### C. *The Interaction of Affirmative Power and Hart-Based Theories*

We can now examine how the limit on affirmative congressional power to strip state courts of jurisdiction interacts with the extant theories articulating other limits on jurisdiction stripping.

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129. Sager himself marshaled additional arguments to conclude that, although weaker, the case for including the *Marbury* power within the Court's "essential functions" is nonetheless persuasive. *See id.* at 56–68 (reviewing the judicial independence requirements of Article III in conjunction with the "essential function" view to conclude that "[s]ome effective form of federal judicial review under article III must be available for claims of constitutional right").

130. Put differently, the solo dissent of Justice Stevens in *Michigan v. Long*, 463 U.S. 1032 (1983), was wrong as an interpretation of the Supreme Court's statutory jurisdiction but right in identifying the Court's priorities. *See id.* at 1065–72 (Stevens, J., dissenting) (criticizing the Court's decision to exercise jurisdiction over state courts' decisions that are unclear about whether they rest on federal grounds rather than on independent and adequate state grounds and concluding that "in reviewing the decisions of state courts, the primary role of [the] Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard" (emphasis in original)).

As noted above in subpart IV(A), if one accepts the default view that Congress has plenary power under the Madisonian Compromise and the Exceptions Clause, then the limit identified in subpart III(D) is the *only* limit (save for true external limits of the sort that restrict the criteria Congress may include in any law, including jurisdictional provisions, such as a law selectively closing courthouse doors based on race or sex). As noted above in subpart IV(A), that would mean that persons challenging state laws on federal constitutional grounds would need to rely entirely on state courts to vindicate their claims and defenses. In such circumstances, state courts would not be worthless—because state judges sometimes resist political pressure—but one could not consistently count on the same solicitude for federal constitutional claims and defenses that broader court access would provide.

At the other pole, if one were to adopt one of the theories articulating broad limits on congressional jurisdiction-stripping authority, then my observations in Part III, while of academic interest, would have little practical import. Those theories already treat laws closing both state and federal courts to constitutional challenges to state laws (and much more) as unconstitutional on other grounds. The determination that such laws are also outside of affirmative congressional power would simply add an additional, alternative basis for a conclusion already reached.

However, suppose one rejects both extremes in favor of a modest limit that comports with the history and structure of Article III. Suppose, that is, (1) that one thinks Congress has plenary power under the Madisonian Compromise, but that Professor Hart is correct that Congress may not use its power under the Exceptions Clause so as to destroy the Supreme Court's "central role" in our constitutional system and (2) that one thinks that the essential function of the Supreme Court is the maintenance of the supremacy and uniformity of federal constitutional law, and that Justice Holmes and Professor Sager are right that the power to review state court decisions rejecting federal constitutional challenges to state laws is the core of that essential function of the Supreme Court. If so, then the conclusion of Part III regarding affirmative power perfectly complements this most plausible and modest limit on congressional power under the Exceptions Clause.

To see how the pieces fit together, consider the relevant provisions that ensure that the Supreme Court has the authority to invalidate state laws that conflict with the federal Constitution.

(1) In order to perform its essential function of maintaining the uniformity and supremacy of federal constitutional law, the Supreme Court must have the power to hear cases in which a state court rejects a constitutional challenge to a state law.[131]

131. The Supreme Court cannot perform this function via its own original jurisdiction because Congress may not add to its original jurisdiction. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174–75 (1803).

(2) By virtue of the Supremacy Clause (as construed in *Testa v. Katt*[132]), state courts of general jurisdiction are obligated to entertain federal constitutional questions (and federal questions more broadly).

(3) That obligation is defeasible where Congress vests exclusive jurisdiction in federal courts, but where Congress closes the federal courts to state constitutional claims (exercising its power to do so under the Madisonian Compromise), it lacks the affirmative power to close the state courts as well.

(4) Thus, there will always be a pathway by which a party relying on the federal Constitution to challenge a state law has access to federal court.[133] Either Congress authorizes original jurisdiction in federal court or state courts must be open, and if the state court rejects the federal constitutional challenge, access to the U.S. Supreme Court must be available.[134]

## V. Conclusion

Despite the voluminous, high-quality literature on the scope of Congress's power to strip courts of jurisdiction, no sustained scholarly attention has previously been paid to the question of what affirmative power Congress exercises when it strips state courts of jurisdiction. This Article has attempted to fill that gap by distinguishing four categories of jurisdiction-stripping provisions. For three of these, one or more of the powers to ordain and establish lower federal courts and the substantive regulatory powers set forth mostly in Article I, Section Eight suffice. However, Congress lacks affirmative power to simultaneously close both state and federal courts to federal constitutional challenges to state laws.

Standing alone, that conclusion is important, even on the assumption that congressional power under both the Madisonian Compromise and the Exceptions Clause is plenary—what I have called the default view. For although a state court in the state that enacted an arguably unconstitutional law may be less sympathetic to the challenge than would be a federal court, state court judges bound by the Supremacy Clause to uphold the Constitution can and often do stand up to political pressure.

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132. 330 U.S. 386, 389–90, 394 (1947).

133. No alternative pathway guarantees the Supreme Court a supply of cases. To be sure, the Supreme Court has original jurisdiction over various cases "in which a State shall be Party," U.S. CONST. art. III, § 2, cl. 2, but most challenges to the constitutionality of state laws will not involve the state as a party. Private suits seeking to restrain unconstitutional state action will be brought against state officials rather than the state itself due to the state's sovereign immunity, *see* Alabama v. Pugh, 438 U.S. 781, 781–82 (1978) (per curiam) (disallowing claims against the state itself for injunctive relief, even while allowing similar claims against state officials), and many challenges to the constitutionality of state laws may arise in litigation involving only private parties. Thus, the Supreme Court's original jurisdiction does not provide an adequate basis for it to perform its essential function of adjudicating constitutional challenges to state laws.

134. Note that for these purposes, the possibility of a writ of certiorari counts as access even if the Supreme Court denies the petition for the writ in any particular case.

Moreover, the conclusion regarding affirmative power does not stand alone. The strongest argument against treating congressional power over the jurisdiction of the federal courts as plenary asserts that Congress may not interfere with the essential functions of the Supreme Court—the core of which consists of reviewing state court decisions rejecting constitutional claims and defenses. Thus, read alongside the extant jurisdiction-stripping literature, the analysis contained in this Article makes possible a role for the Supreme Court that Justice Holmes and many others have deemed essential to the survival of the Union.

In conclusion, consider an almost astonishing aspect of the framework set forth above. The argument for the limit to affirmative congressional power in Part III proceeded completely independently of the arguments that figure in the extant literature on other sorts of limits on jurisdiction stripping discussed in Part IV. It just works out as a fortuitous coincidence that the best account of the scope of Congress's affirmative power so neatly complements the least controversial of the theories articulating limits on the power of Congress under Article III to restrict the jurisdiction of the federal courts, including the Supreme Court.

The complementarity of these independent arguments might point to a single underlying cause: namely, the original understanding. However, I have not undertaken the historical study that would be necessary to reach a conclusion about whether, as a matter of the subjective intentions and expectations of the framers and ratifiers, or as a matter of the original public meaning of the words of the relevant constitutional provisions, there even existed a determinate understanding about how those provisions would interact. I am skeptical that it did,[135] but in any event, the complementarity of the pieces of the arguments discussed in this Article counts in favor of each of the pieces, regardless of whether it reflects a deliberate design of the framers and ratifiers. Textual interpretation—including constitutional interpretation—properly aims for coherence.[136] Accordingly, whatever can be said about the original understanding of congressional power to strip state courts of jurisdiction or the Exceptions Clause, the fact that a sound construction of each complements the other makes these respective constructions mutually reinforcing.

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135. *See* HART & WECHSLER, *supra* note 112, at 322 (noting "widespread acknowledgement that the materials from the founding period are quite limited and cryptic with regard to disputed issues about the meaning of Article III").

136. On the virtues of "coherentist" accounts, see generally PHILLIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) (describing constitutional interpretation as consisting of various interpretive modalities); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) (applying his theory that judges aim for results that best fit with precedent and principles of political morality); and Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1237–51 (1987) (offering a descriptive-normative-hybrid account of constitutional practice that aims to reconcile different forms of arguments, supplemented by a hierarchy for cases of irreconcilable conflict).

# State Public-Law Litigation in an Age of Polarization

Margaret H. Lemos* & Ernest A. Young**

*Public-law litigation by state governments plays an increasingly prominent role in American governance. Although public lawsuits by state governments designed to challenge the validity or shape the content of national policy are not new, such suits have increased in number and salience over the last few decades—especially since the tobacco litigation of the late 1990s. Under the Obama and Trump Administrations, such suits have taken on a particularly partisan cast; "red" states have challenged the Affordable Care Act and President Obama's immigration orders, for example, and "blue" states have challenged President Trump's travel bans and attempts to roll back prior environmental policies. As a result, longstanding concerns about state litigation as a form of national policymaking that circumvents ordinary lawmaking processes have been joined by new concerns that state litigation reflects and aggravates partisan polarization.*

*This Article explores the relationship between state litigation and the polarization of American politics. As we explain, our federal system can mitigate the effects of partisan polarization by taking some divisive issues off the national agenda, leaving them to be solved in state jurisdictions where consensus may be more attainable—both because polarization appears to be dampened at the state level and because political preferences are unevenly distributed geographically. State litigation can both help and hinder this dynamic. The available evidence suggests that state attorneys general (who handle the lion's share of state litigation) are themselves fairly polarized, as are certain categories of state litigation. We map out the different ways states can use litigation to shape national policy, linking each to concerns about polarization. We thus distinguish*

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*between "vertical" conflicts, in which states sue to preserve their autonomy to go their own way on divisive issues, and "horizontal" conflicts, in which different groups of states vie for control of national policy. The latter, we think, will tend to aggravate polarization. But we concede—and illustrate—that it will often be difficult to separate out the vertical and horizontal aspects of particular disputes and that in some horizontal disputes the polarization costs of state litigation may be worth paying.*

*We argue, moreover, that state litigation cannot be understood in a vacuum but must be assessed as part of a broader phenomenon in American law: our reliance on entrepreneurial litigation to develop and enforce public norms. In this context, state attorneys general often play roles similar to "private attorneys general," such as class action lawyers or public interest organizations. And states, with their built-in systems of democratic accountability and internal checks and balances, compare well with other entrepreneurial enforcement vehicles in a number of respects. Nevertheless, state litigation efforts may not always account well for divergent preferences and interests within the broad publics that the states represent, and this deficiency becomes particularly important in politically polarized times. Although our account of state litigation is, on the whole, a positive one, we caution that state attorneys general face a significant risk of backlash by other political actors, and by courts, if state litigation is (or is perceived to be) a bitterly partisan affair.*

## Introduction

This Article 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 (ACA) and the Obama Administration's Deferred Action for Parents of Americans program (DAPA), and "blue-state" challenges to the Bush Administration's

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-/ [https://perma.cc/NL3R-BRTW].

environmental policies and the Trump Administration's travel bans. Yet state AGs' influence over national 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,[2] as well as state efforts to enforce federal law in ways that may deviate from the national Executive's priorities.[3] 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 divided today along partisan and ideological lines than they have been for some time.[4] This polarization has important consequences, rendering national politics unusually contentious and often undermining our capacity for self-governance. It may cause legislative gridlock, prompting unilateral presidential action. At other times, polarization can lead to more extreme national legislation.

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.[5] It is no accident that AG Abbott—a Republican—made his comment about suing the federal government during the Obama Administration. Now that the political tables have turned, the homepage for the Democratic Attorneys General Association reads, in large orange font, "Democratic Attorneys General are the first line of defense against the new administration."[6] These partisan divides play out across the policy spectrum. 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.[7] Over the same period, red-state coalitions have likewise litigated to prevent such regulation.[8] Similarly, red- and blue-state coalitions

2. *See infra* section II(B)(4).

3. *See infra* section II(B)(5).

4. *See infra* subpart I(A).

5. *See, e.g.*, Ben Christopher, *For California Attorney General, Suing Trump Again and Again Is a Team Sport*, L.A. DAILY NEWS (Nov. 30, 2017), https://www.dailynews.com/2017/11/30/for-california-attorney-general-suing-trump-again-and-again-is-a-team-sport/ [https://perma.cc/F2A7-SMHP] (describing blue-state suits against the Trump Administration); Alan Neuhauser, *State Attorneys General Lead the Charge Against President Donald Trump*, U.S. NEWS (Oct. 27, 2017), https://www.usnews.com/news/best-states/articles/2017-10-27/state-attorneys-general-lead-the-charge-against-president-donald-trump [https://perma.cc/37L7-62MQ] (describing blue-state suits against the Trump Administration and red-state suits against the Obama Administration); Owen, *supra* note 1 (describing red-state suits against the Obama Administration).

6. DEMOCRATIC ATT'YS GEN. ASS'N (Feb. 9, 2018), https://democraticags.org/ [https://web.archive.org/web/20180201061037/https://democraticags.org/].

7. *E.g.*, Massachusetts v. EPA, 549 U.S. 497, 509 (2007).

8. *See, e.g.*, West Virginia v. EPA, 136 S. Ct. 1000 (2016) (granting application for stay of

confronted one another over the constitutionality of the ACA's individual mandate and Medicaid expansion.[9] 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.[10] In many instances, state public-law litigation is a vehicle for expressing 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 the popular press. Much of that attention has been negative.[11] At least since the multistate tobacco litigation of the 1990s, critics have argued that state suits may effectively result in national lawmaking by settlement, coercing defendants and circumventing federal lawmaking processes.[12] But new lines of critique have

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EPA's rule in petition filed by twenty-nine states); Lawrence Hurley & Valerie Volcovici, *U.S. Supreme Court Blocks Obama's Clean Power Plan*, SCI. AM. (Feb. 9, 2016), https://www.scientificamerican.com/article/u-s-supreme-court-blocks-obama-s-clean-power-plan/ [https://perma.cc/NJ5V-DZFE] (noting that "coal producer West Virginia and oil producer Texas," along with "several major business groups," led the effort).

9. *Compare* Brief of the States of Maryland, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, New Mexico, New York, Oregon, and Vermont, the District of Columbia, and the Virginia Islands as Amici Curiae in Support of Petitioners, NFIB v. Sebelius, 567 U.S. 519 (2012) (No. 11-398), *with* Brief for State Respondents, NFIB v. Sebelius, 567 U.S. 519 (2012) (No. 11-398) (filed on behalf of Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming). That the great State of Iowa appears twice in these citations is not a typo: the case divided the Attorney General and the Governor, who appeared on different sides.

10. *Compare, e.g.*, Brief of the Commonwealth of Virginia as Amicus Curiae in Support of Petitioners at 7, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556, 14-562, 14-571, 14-574), Brief of the State of Hawaii as Amicus Curiae in Support of Petitioners at 1, *Obergefell*, 135 S. Ct. 2584 (No. 14-556, 14-562, 14-571, 14-574), Brief of Massachusetts, California, Connecticut, Delaware, the District of Columbia, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington as Amici Curiae in Support of Petitioners at 1, *Obergefell*, 135 S. Ct. 2584 (No. 14-556, 14-562, 14-571, 14-574), *and* Brief of the State of Minnesota as Amicus Curiae in Support of Petitioners at 1, *Obergefell*, 135 S. Ct. 2584 (No. 14-556, 14-562, 14-571, 14-574) (all supporting the right of same-sex couples to marry), *with* Brief of Amicus Curiae State of Alabama in Support of Respondents at 1, *Obergefell*, 135 S. Ct. 2584 (No. 14-556, 14-562, 14-571, 14-574), Brief of Louisiana, Utah, Texas, Alaska, Arizona, Arkansas, Georgia, Idaho, Kansas, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, and West Virginia as Amici Curiae Supporting Respondents at 1, *Obergefell*, 135 S. Ct. 2584 (No. 14-556, 14-562, 14-571, 14-574), *and* Brief of South Carolina as Amicus Curiae in Support of Respondents at 2, *Obergefell*, 135 S. Ct. 2584 (No. 14-556, 14-562, 14-571, 14-574) (all rejecting a right to same-sex marriage).

11. *E.g.*, William H. Pryor, Jr., Comment, 31 SETON HALL L. REV. 604, 607 (2001); Professor John Langbein, Panel Two: The Politics and Economics of Government-Sponsored Litigation (June 22, 1999), *in* MANHATTAN INST., REGULATION BY LITIGATION: THE NEW WAVE OF GOVERNMENT-SPONSORED LITIGATION, https://www.manhattan-institute.org/pdf/mics1.pdf [https://perma.cc/9N9U-3FQ9].

12. *See, e.g.*, Pryor, *supra* note 11, at 608 ("The purpose of the tobacco litigation . . . was to establish through the action of several states a national policy that is properly reserved to state legislatures and to Congress in the exercise of its enumerated powers.").

emerged in more recent years, suggesting links between AG litigation and trends in partisanship and polarization. Critics contend that AGs 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.[13] Rather than focusing on threats to state autonomy, AGs today can be found pushing for *more* federal regulation[14] or supporting claims "of individuals as opposed to the states themselves."[15] 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. James Tierney, a former Maine AG and leading observer on these matters, worries "that the AGs become seen as one more lawyer . . . on the make, and that undercuts the credibility of the office itself."[16]

We have some sympathy for those critiques, but we think the picture is far more complicated than critics acknowledge—in part because the concept of "state interests" is itself complicated. To understand state litigation, 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 addresses "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.

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 state AGs 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 home states' regulatory interests—interests that tend to track partisan divisions—at a cost to the broader institutional interests of the states as such.

This contrast between vertical and horizontal conflicts is a helpful frame for considering state public-law litigation. But the line between such conflicts—and between states' institutional and regulatory interests—is often fuzzy and contested. As we explain, many seemingly vertical conflicts have

13. PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 200 (2015).

14. *Id.* at 30–31.

15. *Id.* at 200–01.

16. Neuhauser, *supra* note 5 (quoting former Maine AG, James Tierney).

horizontal aspects and vice versa. For regulatory challenges that cannot be solved without collective action—certain environmental issues, for example—pro-regulatory states have little choice but to push for nationwide solutions. In such circumstances, states' institutional and regulatory interests merge, and states exercise their sovereignty by appealing to federal power. Things look different to anti-regulatory states, and those disagreements will often play out along partisan lines. It does not follow, however, that the state AGs on either side of the case are putting politics before state interests. Likewise, under our contemporary model of federalism, states have an interest not only in doing their own thing but also in participating in national politics—an interest that may aggravate horizontal conflict.

State litigation must also be viewed in the evolving context of public-law litigation generally in American law. Our legal system is exceptional in its reliance on litigation and courts to resolve conflicts and articulate policies that, in other systems, would fall into political or bureaucratic channels.[17] And rather than rely exclusively on enforcement by the national Executive, federal law frequently authorizes entrepreneurial litigation by private attorneys general. When state AGs enforce federal law, they play a similar entrepreneurial role to class action attorneys or public interest organizations. The same thing is true when state AGs rely on their own state laws but cooperate to secure nationwide judgments or settlements that impose a de facto national regulatory solution on a particular industry.

An important response to criticisms of state litigation, then, is to ask "compared to what?" When states sue to enforce the Clean Air Act or the securities laws, or to challenge the ACA or the Trump travel bans, they are playing a similar role to the Sierra Club, the ACLU, or class action plaintiffs' lawyers. If states were precluded from bringing such suits, their private analogs would remain. Yet, as we explain, there are good reasons—grounded in democratic accountability and in state governments' unique institutional perspectives—to prefer state litigation to purely private mechanisms for aggregating diffuse interests.

Part I of this Article 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. We suggest that state autonomy can sometimes be a "safety valve" for polarized conflict at the national level. Part II then turns to state litigation. It charts the institutional development of state AGs' offices and the expansion of doctrinal and statutory rights to sue, which have helped state AGs emerge as a particularly powerful group of lawyers. We then map the different sorts of claims that states use to shape national policy.

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17. *See generally* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001).

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 are lining up on opposite sides of the same cases. The impact on our broader politics, however, will often turn on the nature of a given lawsuit. We use the distinction between vertical and horizontal conflicts as a framework for normative assessment of state public-law litigation in an era of intense political polarization. Finally, we take up the comparative question in Part IV, situating state litigation within the broader phenomenon of public-law litigation as a mode of American governance. Although we think suits by state AGs compare favorably to other mechanisms of aggregate litigation, we warn that overly aggressive state public-law litigation may result in a judicial or political backlash that might undermine the benefits of this valuable institutional mechanism.

## 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.[18] 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.[19] 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

18. For an accessible overview of the major characteristics of today's polarization, see Nolan McCarty, *What We Know and Don't Know About Our Polarized Politics*, WASH. POST (Jan. 8, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/08/what-we-know-and-dont-know-about-our-polarized-politics/?noredirect=on&utm_term=.edff6d7795a7 [https://perma.cc/DF6L-6ZFG]. For more extended treatments, see Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, *in* AM. POL. SCI. ASS'N, NEGOTIATING AGREEMENT IN POLITICS 38 (Jane Mansbridge & Cathie Jo Martin eds., 2013); RONALD BROWNSTEIN, THE SECOND CIVIL WAR: HOW EXTREME PARTISANSHIP HAS PARALYZED WASHINGTON AND POLARIZED AMERICA (2007); THOMAS E. MANN & NORMAN J. ORNSTIEN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 43–58 (2012).

19. *See, e.g.*, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties*, AM. POL. SCI. REV., Sept. 1950, at 18–19; *see also* DAVID A. HOPKINS, RED FIGHTING BLUE: HOW GEOGRAPHY AND ELECTORAL RULES POLARIZE AMERICAN POLITICS 78–79 (2017) (discussing the APSA report). Later on, political scientists worried that the parties were dying out. *See id.* at 84–95. They weren't. The cycles of social scientists' fears suggest that current predictions about the necessarily enduring nature of polarization should also be taken with a grain of salt. We are thus partial to the prediction that Marc Hetherington and Thomas Rudolph offer: "Things Will Probably Get Better, but We Are Not Sure How." MARC J. HETHERINGTON & THOMAS J. RUDOLPH, WHY WASHINGTON WON'T WORK 212 (2015).

conceptions of the good life, with strong and contrary implications for government regulation, fiscal policy, and individual rights.[20] The temperature of political debate has called into question whether our national political institutions can 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.[21] This line of thought surely represented the conventional wisdom in terms of its basic assumptions, even if not everyone accepted the conclusion that America's federal structure could safely be junked.[22] Scholars looking to defend federal structures were left searching for glimmers and vestiges of state identity that might sustain autonomous subnational institutions.[23] The question *now*, by contrast, sometimes seems to be whether Americans can find sufficient common ground to move forward together on common problems.[24] Federalism, we suggest, can help.

### *A. Polarization in National Politics*

The Democratic and Republican Parties are more polarized today than they have been in decades—maybe more than a century, according to some

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20. 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. *See, e.g.*, Michael Sandel, *Introduction* to LIBERALISM AND ITS CRITICS 3–4, 8–9 (Michael Sandel ed., 1984) (discussing the priority of the "right" over the "good" in late-twentieth-century liberalism). 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.

21. *E.g.*, MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 115 (2008).

22. *See, e.g.*, ROBERT SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 54–55, 92 (2009); Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080–81 (2014).

23. *See, e.g.*, Ernest A. Young, The *Volk* of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System 6 (Feb. 24, 2015) (unpublished manuscript) (available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2552866 [https://perma.cc/R6RY-3Y9M]).

24. *See, e.g.*, Joshua Holland, *Under Trump, Red States Are Slashing the Safety Net and Blue States Are Fighting Back*, THE NATION (Jan. 30, 2018), https://www.thenation.com/article/under-trump-red-states-are-slashing-the-safety-net-and-blue-states-are-fighting-back/ [https://perma.cc/P9WE-MZDJ] ("Is America turning into two different republics sharing one set of borders?").

measures.[25] 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.[26] There are fewer conservative Democrats and fewer liberal Republicans.[27] As a result, there is little or no overlap between members of the different parties.[28] Second, and closely related, is the notion of *ideological divergence*, which refers to the distance between the party medians.[29] That distance today is greater than at any time since the end of Reconstruction.[30]

A vigorous debate exists as to whether this polarization of politicians reflects a broader polarization of the public at large. One group views the public as basically moderate in its views but sees a fundamental disconnect between those views and a highly polarized political class.[31] Another group holds that polarization reaches much further down into the electorate.[32] But even if the public's policy views remain moderate, surveys reveal high degrees of "affective" polarization.[33] Simply put, Democrats and Republicans don't like each other very much—much less, it seems, than in

25. *See, e.g.*, Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 POLITY 411, 411–13 (2014) (concluding, based on roll-call votes, that "[p]olarization of the Democratic and Republican Parties is higher than at any time since the end of the Civil War").

26. Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1694 (2015).

27. Hare & Poole, *supra* note 25, at 416 fig.1 (showing ideological dispersion of the parties in Congress 1879–2013).

28. Farina, *supra* note 26, 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. Chris Cillizza, *The Ideological Middle Is Dead in Congress. Really Dead.*, WASH. POST (Apr. 10, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/04/10/the-ideological-middle-is-dead-in-congress-really-dead/?utm_term=.bf4a268983ff [https://perma.cc/ZLM2-YCY4]. In the Senate, there were fifty-eight senators in this overlap-space in 1982; by 2013, none. *Id.*

29. Farina, *supra* note 26, at 1694.

30. *The Polarization of the Congressional Parties*, VOTEVIEW.COM (Mar. 21, 2015), https://legacy.voteview.com/political_polarization_2014.htm [https://perma.cc/BM8C-9NZK]; *see* David W. Brady & Hahrie Han, An Extended Historical View of Congressional Party Polarization (Dec. 2, 2004) (unpublished manuscript) (on file with author).

31. *See, e.g.*, MORRIS P. FIORINA, SAMUEL J. ABRAMS & JEREMY C. POPE, CULTURE WAR? THE MYTH OF A POLARIZED AMERICA 7–8 (3d ed. 2011).

32. *See, e.g.*, ALAN I. ABRAMOWITZ, THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY 83 (2010); Alan I. Abramowitz & Kyle L. Saunders, *Is Polarization a Myth?*, 70 J. POL. 542, 553–54 (2008) ("The high level of ideological polarization evident among political elites in the United States reflects real divisions within the American electorate.").

33. *See* HETHERINGTON & RUDOLPH, *supra* note 19, at 28–33; *Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/ [https://perma.cc/S495-LEB9] (reporting that, in 2014, 27% of Democrats and 36% of Republicans saw the other party as "a threat to the well-being of the country").

the 1980s and 1990s.[34] And this partisan dislike has translated into a polarization of political trust, so that partisans report radically low levels of trust in government when the other party dominates the national government.[35]

Such polarization translates into sharp and sustained disagreement and a refusal to compromise across party lines. Evidence suggests that this effect is most severe when institutions are closely divided, as either party can realistically hope to gain control and neither can afford to give the other a victory.[36] When different parties control the House and Senate, the probable effect is gridlock—an inability to get things done because there's no common ground for consensus.[37] 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.

These obstacles can sometimes be overcome by appeals to the public at large. But low levels of political trust make it difficult for a president to go over the heads of partisan opponents in the Congress and appeal to moderates in the other party, as President Reagan was able to do in the 1980s.[38] 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.[39] Rather than addressing big, contentious questions, a gridlocked Congress will tend to enact symbolic legislation or to leave the critical choices to agencies.[40]

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.[41] In times of unified government, the

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34. *See* HETHERINGTON & RUDOLPH, *supra* note 19, at 30–31 (discussing increases in Democratic and Republican negativity towards the other party over time). Your humble authors remain a happy exception.

35. *See id.* at 73–91, 94.

36. *See id.* at 25; FRANCES E. LEE, BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE 18–21 (2009) (explaining that political parties' institutional interest in "winning elections and wielding power" can bring them into conflict, even when they are not ideologically opposed on an issue).

37. *See* McCarty, *supra* note 18 ("The combination of high ideological stakes and intense competition for party control of the national government has all but eliminated the incentives for significant bipartisan cooperation on important national problems. Consequently, polarization has reduced congressional capacity to govern.").

38. *See* HETHERINGTON & RUDOLPH, *supra* note 19, at 40–42.

39. On the subject of gridlock, see generally, Symposium, *The American Congress: The Legal Implications of Gridlock*, 88 NOTRE DAME L. REV. 2065 (2013).

40. *See, e.g.*, Diana Epstein & John D. Graham, *Polarized Politics and Policy Consequences* (RAND Corp., Occasional Paper 2007), at 17, https://www.rand.org/content/dam/rand/pubs/occasional_papers/2007/RAND_OP197.pdf [https://perma.cc/9PQR-X4M2].

41. There are important caveats here. The legislative process builds in enough veto-gates and

consequence of polarization should be more *extreme* legislation.[42] In that sense, 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 need not compromise with the minority party.

It is not obvious that the polarization we have described is a bad thing. After all, as we have already noted, American political scientists at the middle of the twentieth century longed for ideologically pure parties that would offer voters a clear choice; this, they thought, was the key to truly responsible government.[43] To assess whether political polarization is good or bad for the Republic would require its own article (or book), and we cannot offer a rigorous analysis here. Briefly, we would emphasize several specific concerns developed elsewhere in the literature. Some political scientists argue that unified government can 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.[44] Moreover, our separation of powers effectively imposes supermajority requirements on most legislative action; as a result, polarization combined with a close division of the electorate results either in gridlock or diversion of government action into constitutionally dubious channels.[45] Finally, recent literature suggests that contemporary polarization is more "affective" than policy-driven; in other words, Americans have developed a strong dislike for persons on the other political "team" even though the actual policy

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effective supermajority requirements that the minority party can often still gum things up even under conditions of unified government. Moreover, unified government can sometimes expose fissures in the majority party, producing something reminiscent of gridlock under divided government. *See, e.g.*, Louis Jacobson, *The Year of Single Party Control and Supermajorities*, GOVERNING (Jan. 7, 2013), http://www.governing.com/topics/politics/gov-year-single-party-control-supermajorities.html [https://perma.cc/7V85-BNDG] (discussing examples from state 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 Care Act) through Congress. By the end of the year, however, the gigantic tax overhaul had changed the picture substantially. *See, e.g.*, Naomi Jagoda, *Trump Signs Tax Bill Into Law*, THE HILL (Dec. 22, 2017), http://thehill.com/homenews/administration/366148-trump-signs-tax-bill-into-law [https://perma.cc/H6GZ-8FTT].

42. *See, e.g.*, Morris P. Fiorina, *America's Missing Moderates: Hiding in Plain Sight*, AM. INT., https://www.the-american-interest.com/2013/02/12/americas-missing-moderates-hiding-in-plain-sight/ [https://perma.cc/99ZH-YRFL] (discussing excesses by both parties during recent periods of unified government).

43. *See supra* note 19.

44. *See, e.g.*, Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 164 (2011) (finding that states "tend to 'overshoot' relative to the median voter's specific policy preferences").

45. *See, e.g.*, Thomas E. Mann, *Foreword* to AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION, at xxii–xxiii (James A. Thurber & Antoine Yoshinaka eds., 2015).

differences between the parties are often minor.[46] It is hard to see any upside to polarization once it reaches that point. In any event, we sketch these reasons simply to give a sense of our priors. Our argument here must largely presuppose, rather than defend, the proposition that polarization is worrisome and in need of mitigation. Our question is whether federalism—and, in particular, state litigation—is likely to mitigate or exacerbate the polarization that worries us.

### *B. Polarization and the States*

Federalism can operate as an important safety valve in polarized times, lowering the temperature on contentious national policy debates and creating opportunities for policymaking that may be impossible at the national level.[47] In evaluating this claim, it will help to distinguish between polarization *within* states and polarization *among* states. Some states, at least, seem to have less polarized politics than we see at the national level. In these states, bipartisan resolutions to divisive issues may well be possible. But even if states have similar political cultures to that at the national level, the distribution of political preferences is geographically uneven. This polarization *among* states—the now familiar divide between red and blue states—makes it possible to act on divisive issues in ways that avoid the all-or-nothing nature of national solutions.

*1. Polarization Within States.*—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,[48] while Texas Republicans and Democrats tend to share a general commitment to a low-tax, small-government model.[49]

Precisely *why* this is so is difficult to pin down, but the available evidence suggests two (complementary) answers. First, state politicians may themselves be less polarized—in the sense of ideological distance—than

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46. *See, e.g.*, HETHERINGTON & RUDOLPH, *supra* note 19, at 28–33; LILLIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY 50–54 (2018) ("[C]urrent levels of partisan antipathy have moved beyond pure disagreements of principle. Partisans dislike each other to a degree that cannot be explained by policy disagreement alone.").

47. *See, e.g.*, Anthony Johnstone, *Hearing the States*, 45 PEPP. L. REV. 575, 589 (2018) ("Federalism is the classic constitutional solution to reduce the costs of political contestation through policy decentralization.").

48. *See* Susan Milligan, *The Popular Republicans*, U.S. NEWS (Feb. 2, 2018), https://www.usnews.com/news/the-report/articles/2018-02-02/republican-governors-stay-above-the-fray-in-blue-states [https://perma.cc/BR2T-KWGX] (discussing Massachusetts Governor Charlie Baker).

49. *See, e.g.*, ERICA GREIDER, BIG, HOT, CHEAP, AND RIGHT: WHAT AMERICA CAN LEARN FROM THE STRANGE GENIUS OF TEXAS 32 (2013).

their federal counterparts. Second, even if Democrats and Republicans are miles apart ideologically, the unique features of state government may dampen the effects of that distance.

To begin with, it appears 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.[50]

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.[51] 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.[52] Similarly, five of the last six governors of Massachusetts—one of the bluest states there is—have been Republicans.[53] Last year, the current governor of the Bay State enjoyed the highest approval ratings in the nation, and several other Republican governors in blue states are similarly popular.[54] One recent analyst concluded that "Republican gubernatorial candidates are . . . able to be more moderate

50. Boris Shor & Nolan McCarty, *The Ideological Mapping of State Legislatures*, 105 AM. POL. SCI. REV. 530, 540 fig.7 (2011).

51. *Id.*

52. *Id.* at 546 fig.15.

53. *See* Chris Cillizza, *The Most Popular Governor in the Country Is a Republican from Massachusetts. Yes, Really.*, CNN (July 22, 2017), https://www.cnn.com/2017/07/22/politics/charlie-baker-q-and-a/index.html [https://perma.cc/3VL8-XLW2]; *Former Governors' Bios*, NAT'L GOVERNORS ASS'N, https://classic.nga.org/cms/FormerGovBios?inOffice=Any&state%20=ed0deacd-6d0b-4311-9e7a-9f9bc737e513&party=&lastName=&firstName=&nbrterms=Any&biography=&sex=Any&religion=&race=Any&college=&higherOfficesServed=&militaryService=&warsServed=&honors=&birthState=Any&submit=Search [https://perma.cc/WGB4-EUKN] (listing the party affiliations of Massachusetts's current and prior governors).

54. *See* Cillizza, *supra* note 53 (reporting a 71% approval rating for Massachusetts Governor Charlie Baker); David Mark, *Republican Governors Thrive in Blue States, Polling Shows*, MORNING CONSULT (July 18, 2017), https://morningconsult.com/2017/07/18/republican-governors-thrive-blue-states-polling-shows/ [https://perma.cc/86QG-T4QL] (stating that Governors Charlie Baker of Massachusetts, Larry Hogan of Maryland, and Phil Scott of Vermont all had "enviable approval ratings" before their re-elections); Milligan, *supra* note 48 (reporting that "Nevada's Brian Sandoval, Maryland's Larry Hogan, Massachusetts's Charlie Baker, and Vermont's Phil Scott"—all Republicans in blue states—"remain among the most popular governors in the country").

than Republican presidential candidates, and therefore tend to be more ideologically compatible with the Democrat-dominated electorates of blue states."[55] Republican governors in Democratic states thus seem to do best when they take a moderate line on social issues and maintain significant separation from the national party.[56]

As this last point suggests, an inquiry into polarization in state government should heed, not only the ideological preferences of state officials, but also how those preferences translate into political *behavior*. Several characteristics of state government suggest that we might expect state politics to reflect less partisan conflict even if state officials are themselves fairly polarized.[57] For example, surveys indicate that state and local governments enjoy considerably higher levels of trust than the federal government. Researchers have been asking survey questions about trust in government for many decades, and trust has recently become central to some scholars of polarization.[58] Those scholars have generally focused on national-level measures of trust. But the survey questions have often included a comparative component that inquires whether citizens repose more trust in state or national institutions. This research concludes that "[c]itizens on average evaluate the performance of the federal government as significantly lower than that of the state and local governments, report less faith in the federal government to 'do the right thing,' have significantly lower confidence in the ability of the federal government to solve problems effectively, see the federal government as significantly less responsive than lower levels of government, and nearly 60% see the federal government as the most corrupt level of government."[59] If polarization scholars are right that

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55. Kevin Deutsch, *Why Blue States Elect Red Governors*, 21 WASH. U. POL. REV., Nov. 11, 2014, http://www.wupr.org/2014/11/11/why-blue-states-elect-red-governors/ [https://perma.cc/3ZRP-N3WT].

56. *See* Cillizza, *supra* note 53; Joshua Miller, *Why Is Charlie Baker So Popular?*, BOS. GLOBE (Sept. 27, 2017), https://www.bostonglobe.com/metro/2017/09/27/why-charlie-baker-popular/0DjpSUgTJPbQZWZ80qdOPL/story.html [https://perma.cc/Z54U-VSLB]; Milligan, *supra* note 48.

57. The discussion here is exploratory; we make no strong claims about causation. There is widespread debate about what causes polarization generally. *See* Farina, *supra* note 26 (summarizing political science literature). We express no view on those broader questions.

58. *See* HETHERINGTON & RUDOLPH, *supra* note 19, at 33–39.

59. *See* Cindy D. Kam & Robert A. Mikos, *Do Citizens Care About Federalism? An Experimental Test*, 4 J. EMP. LEG. STUD. 589, 598 (2007) (reporting results from the 2000 Attitudes Toward Government Study, but concluding that "[t]hese findings are consistent with those reported by other scholars, using other nationally representative surveys"); *see also State Governments Viewed Favorably as Federal Rating Hits New Low*, PEW RES. CTR. (Apr. 15, 2013), http://www.people-press.org/2013/04/15/state-governments-viewed-favorably-as-federal-rating-hits-new-low/ [https://perma.cc/8U2M-WATG]. The Pew Research Center explains that:

> Overall, 63% say they have a favorable opinion of their local government, virtually unchanged over recent years. And 57% express a favorable view of their state government – a five-point uptick from last year. By contrast, just 28% rate the federal

higher levels of trust make it more likely that partisans will make "ideological sacrifices" to create bipartisan solutions,[60] then that ought to be more likely at the state level.

Culture may also play a role in mitigating ideological polarization's effects on state officials. State political cultures may be sufficiently distinctive that the range of partisan disagreement is narrower within them.[61] Daniel Elazar, for example, argued that certain states share a broader commitment to regulation and social provision based on having been originally settled by New England Puritans committed to those values.[62] Consistent with this view, Republican governors in New England have tended to support the more generous social welfare arrangements in those states while pushing fiscal conservatism around the edges.[63] We might further speculate that state political cultures include shared norms of political *practice* that inhibit the nastier forms of partisanship that entrench polarization.[64]

Or perhaps state and local governments deal with a large number of bread-and-butter issues—e.g., road maintenance, education, and crime control—on which the public may have limited tolerance for partisan

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> government in Washington favorably. That is down five points from a year ago and the lowest percentage ever in a Pew Research Center survey.

*Id.* Interestingly, levels of trust in the federal government themselves vary significantly from state to state. *See* Paul Brace & Martin Johnson, *Does Familiarity Breed Contempt? Examining the Correlates of State-Level Confidence in the Federal Government*, *in* PUBLIC OPINION IN STATE POLITICS 19 (Jeffrey E. Cohen ed., 2006).

60. HETHERINGTON & RUDOLPH, *supra* note 19, at 157–61.

61. *See, e.g.*, Samuel C. Patterson, *The Political Cultures of the American States*, 30 J. POL. 187, 195–96 (1968). Patterson argues that:

> No one would expect the American political culture to be uniformly distributed spatially; our evidence is adequate enough to show that the political culture of Mississippi is not the same as that of Iowa. Some states may stand out more distinctively than others, and some group themselves in sections or regions that are distinctive.

*Id. See also* JOHN J. HARRIGAN & DAVID C. NICE, POLITICS AND POLICY IN STATES AND COMMUNITIES 10 (10th ed. 2008) (observing that "numerous studies have found that political culture influences the kind of policies adopted by states").

62. *See* DANIEL J. ELAZAR, THE AMERICAN MOSAIC: THE IMPACT OF SPACE, TIME, AND CULTURE ON AMERICAN POLITICS 58 (1994); *see also* DAVID HACKETT FISCHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA 189–90, 200–01 (1989) (examining in depth the influence of Puritan folkways in New England).

63. *See* Cillizza, *supra* note 53 (observing that Massachusetts governor Charlie Baker ran "as basically a non-partisan manager" who would "watch the state's pocketbook," but that he favored "abortion rights and featured his brother's coming-out story in a legendary campaign ad"); Milligan, *supra* note 48 (citing social welfare policies of New England Republican governors, such as expanding Medicaid).

64. On political norms and conventions generally, see, for example, Neil S. Siegel, *Sustaining Collective Self-Governance and Collective Action: A Constitutional Role Morality for the Trump Era and Beyond*, 107 GEO. L.J. (forthcoming 2018).

posturing that prevents basic needs from being met.[65] 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, pragmatic concerns like fixing potholes and reducing crime may moderate polarization's effects. Unlike their federal counterparts, state politicians can't spend all their time grandstanding; state governments have to get certain things done, and a lot of those things aren't particularly ideological. Balanced budget requirements may further constrain them from the worst kinds of obstruction and kicking the can down the road. Successful Republican blue-state governors, after all, are frequently characterized as "pragmatic," "non-ideological" managers who tend to decouple their own political fortunes from the national party.[66] Democratic governors in red states are, for now at least, fewer and further between. But the ones we have seem to have pursued a similar approach.[67]

Another important factor may be that (unlike North Carolina) many states are not as closely divided as the national government—they are not purple but consistently red or blue. As we've already noted, some research suggests that close divisions increase the incentives for political opportunism, as the minority party may hope to regain the majority if it can prevent the opposition from being successful.[68] In states where the minority is likely to remain in that position, by contrast, minority party-members may seek to have at least some voice through bipartisan cooperation. We might even be seeing some vindication of the Antifederalist notion that republican government—predicated on statesmanlike transcendence of narrow factional interest—is more likely to succeed in smaller communities. It's hard to know for sure, and the question is ultimately an empirical one on which we presently lack much good evidence. We *do* have evidence, however, that polarization and its effects are less extreme at the state level.

One significant caveat is in order. A variety of research suggests that levels of polarization and mistrust are in part a function of the issue set that is salient to voters.[69] The comparatively sunny cast of some states' politics

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65. *See* Deutsch, *supra* note 55 (noting that "state and national politics are two different animals, with different issues at play").

66. *See, e.g.*, Milligan, *supra* note 48 (discussing four Republican governors working with Democratic-controlled legislatures); *see also* Cillizza, *supra* note 53 (describing the popularity of Massachusetts governor Charlie Baker).

67. *See, e.g.*, Tyler Bridges, *Can This Governor Teach Democrats How to Win in the South?*, POLITICO (Sept. 2, 2017), https://www.politico.com/magazine/story/2017/09/02/john-bel-edwards-southern-democrats-215570 [https://perma.cc/4UQ2-UV8M] (profiling Louisiana governor John Bel Edwards).

68. *See supra* note 36 and accompanying text.

69. *See, e.g.*, HETHERINGTON & RUDOLPH, *supra* note 19, at 44, 97–98 (hypothesizing that salience affects the influence that trust exerts on political opinions and giving examples); HOPKINS, *supra* note 19, at 99–100 ("[T]he newfound salience of social and cultural concerns during the 1990s

may thus arise from the issues laid before state governments. If we were to devolve certain contentious issues from the national scene to state governments, that might well change the character of state politics. Perhaps habits of cooperation forged in filling potholes might bleed over into debates about transgender rights. But they also might not.

In sum, there are reasons to think that federalism can mitigate the effects of political polarization by offering alternative policymaking venues in which the hope of consensus politics is more plausible. As the next section details, taking divisive questions off the national agenda may moderate the overall polarization problem even if that is not true.

*2. Polarization Among States.*—The notion of an equally divided nation goes back all the way to the 2000 election.[70] But very few places in America are fifty-fifty in this way: "Geography matters."[71] Within the states, relatively small differences in the correlation of partisan forces[72] significantly affect political outcomes, painting some state governments completely red and others blue.[73] In those states, even if state-level bipartisanship fails to generate effective policy on divisive issues, unified government might step in to fill the breach.

As of 2015, only nineteen states had divided government.[74] That number declined to eighteen after the 2016 elections, then slipped to seventeen after West Virginia Governor Jim Justice switched to the Republican party.[75] Thus, even those state legislatures with relatively high levels of polarization may be capable of avoiding gridlock and getting things done. In New Jersey, for example, Democrat Phil Murphy's election as governor has made the Garden State one of eight states under unified Democratic control. "If Murphy has his way," the Washington Post predicted, "New Jersey will become a proving ground for every liberal policy idea coming into fashion, from legalized marijuana to a $15 minimum wage, from a 'millionaire's tax' to a virtual bill of rights for undocumented immigrants."[76] Meanwhile,

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was the driving force behind the divergence of the blue Northeast and Pacific Coast from the red South and interior West.").

70. *See, e.g.*, Michael Barone, *The 49 Percent Nation*, 33 NAT'L J. 1710, 1710–12 (June 9, 2001), http://www.uvm.edu/~dguber/POLS125/articles/barone.htm [https://perma.cc/E2P2-DEZA] (emphasizing the narrow popular vote margins in recent elections).

71. *Id.* (formatting omitted).

72. Matthew S. Levendusky & Jeremy C. Pope, *Red States vs. Blue States: Going Beyond the Mean*, 75 PUB. OPINION Q. 227, 242–44 (2011).

73. *See* HOPKINS, *supra* note 19, at 41–45 (giving examples).

74. *State Partisan Composition*, NAT'L CONF. ST. LEGISLATURES (Apr. 11, 2018), http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx [https://perma.cc/Q8D9-WVBC].

75. *Id.*

76. David Weigel, *Incoming N.J. Governor Plans a Swing to the Left—And a Model for the*

Republican-controlled states have "pursued economic and fiscal strategies built around lower taxes, deeper spending cuts and less regulation" and have adopted policies with respect to labor, education, and social issues that diverge sharply from blue-state strategies.[77]

To be sure, the combination of polarization and unified government can produce less compromise and more extreme policy in state governments, too.[78] But the stakes are lower for statewide, as compared to nationwide, solutions. At the very least, devolving decision-making 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.[79] Especially when state government is unified, those Democrats can pursue a very different set of policies than those originating on Capitol Hill. 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.[80]

A federalism-based *modus vivendi* is unlikely to satisfy devoted partisans on one side or another of any divisive issue. But as Michael McConnell has explained, "So long as preferences for government policies are unevenly distributed among the various localities, more people can be satisfied by decentralized decision making than by a single national authority."[81] Moreover, when different jurisdictions can implement (and not

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*Country*, WASH. POST (Jan. 15, 2018), https://www.washingtonpost.com/powerpost/incoming-nj-governor-plans-a-swing-to-the-left--and-a-model-for-the-country/2018/01/13/25f06238-f7d7-11e7-a9e3-ab18ce41436a_story.html?noredirect=on&utm_term=.fa458987b2c4 [https://perma.cc/MF3B-KKTJ].

77. Dan Balz, *Red, Blue States Move in Opposite Directions in a New Era of Single-Party Control*, WASH. POST (Dec. 28, 2013), https://www.washingtonpost.com/politics/red-blue-states-move-in-opposite-directions-in-a-new-era-of-single-party-control/2013/12/28/9583d922-673a-11e3-ae56-22de072140a2_story.html?noredirect=on&utm_term=.19b8da2155a1 [https://perma.cc/B3X3-TA9F].

78. *See id.* ("The risk is that with unified control, governors and their like-minded legislators push beyond the views of their citizenry, particularly in states where public opinion is more evenly divided."); Lax & Phillips, *supra* note 44, at 149 (studying congruence between state policy and public opinion and finding that "state policy is far more polarized than public preferences") (formatting omitted). As we noted above, some research suggests—somewhat counterintuitively—that extreme policy may be more likely in states like North Carolina, where the two parties are in pitched battle for control of state government, than in states in which the majority party can count on continuing supremacy. *See supra* note 36 and accompanying text.

79. *See, e.g.*, Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1755, 1783–86 (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, 1301–05, 1311 (2004).

80. *See, e.g.*, Bulman-Pozen, *supra* note 22 (suggesting that state challenges to federal law stem largely from partisanship).

81. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987).

simply advocate) their preferences, they can have significant and unexpected effects on the national debate. When the same-sex marriage issue became salient in the mid-1990s, for example, most states used the autonomy that the federal system afforded them to explicitly outlaw the practice. But some states permitted same-sex marriages to go forward, and over time the example of those new families helped bring about one of the most remarkable shifts in public opinion in American history.[82] State-by-state diversity may thus break up rigidly polarized political patterns over time, even if state political cultures are not significantly more warm and fuzzy than the national one.

### C. *How Federal Polarization Affects Federalism—And How State Litigation Can Help*

We've argued that states can serve as safety valves for polarized national politics. In order for states to play those roles, however, the federal government must leave them room to maneuver. And there's the rub: while polarization highlights the benefits of federalism, it also poses a distinct threat to state autonomy.

This point is most obvious under conditions of unified national government. As we explained above, polarization plus unified government is likely to produce more extreme policy. That means more federal overreaching—statutes that trench on state interests or that are more broadly preemptive in scope. Where that is true, states may find they have less space to act, and the benefits outlined above will be lost.

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.[83] 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, "[W]e can't wait for an increasingly dysfunctional Congress to do its job. Where they won't act, I will."[84] And it became a

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82. *See generally* Ernest A. Young, *Exit, Voice, and Loyalty as Federalism Strategies: Lessons from the Same-Sex Marriage Debate*, 85 U. COLO. L. REV. 1133, 1135–36, 1140–42 (2014).

83. *See, e.g.*, Ernest A. Young, *A General Defense of* Erie Railroad Co. v. Tompkins, 10 J.L. ECON. & POL'Y 17, 68–69 (2013) (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"); *see also* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 525–35 (1954) (developing this view).

84. *See* Kenneth S. Lowande & Sidney M. Milkis, *"We Can't Wait": Barack Obama, Partisan Polarization and the Administrative Presidency*, 12 FORUM 3, 3 (2014).

yearlong 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.[85] President Trump has shown few signs of retreating from executive-branch unilateralism, notwithstanding unified Republican control of government; he has used executive orders for (among other things) his controversial travel bans and efforts to strip "sanctuary cities" of federal funding.[86]

From a federalism perspective, there's a lot not to like about unilateral executive action. Most obviously, it's 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.[87] Others emphasize the many "veto-gates" in Congress that stand in the way of legislation.[88] These are the so-called political and procedural safeguards of federalism. And to the extent that states get

85. *Id.* at 9. 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. *Id.* at 11–12.

86. Rebecca Harrington, *Trump Signed 90 Executive Actions in His First 100 Days—Here's What Each One Does*, BUS. INSIDER (May 3, 2017), https://www.businessinsider.com/trump-executive-orders-memorandum-proclamations-presidential-action-guide-2017-1 [https://perma.cc/9TTV-UV49]. The one major exception is President Trump's effort to replace the Obama Administration's Deferred Action for Childhood Arrivals (DACA) immigration program, implemented through unilateral executive action, with a legislated immigration package. *See generally* Noah Rothman, *Congress Doesn't Want the Responsibility Anymore*, COMMENTARY (Feb. 22, 2018), https://www.commentarymagazine.com/politics-ideas/congress-outsourcing-apathy-capitol/ [https://perma.cc/8FMX-UTTR] (surveying executive action under the Trump administration and suggesting the cause is as much congressional abdication as executive overreach). Of course, if no legislation is forthcoming, Trump may likewise reach for his pen and phone.

87. On the political safeguards theory, see, for example, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 175–84 (1980) (arguing that the states' political representation obviates the need for judicial review in federalism cases); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 233–34 (2000) (arguing that political parties protect states by linking the fortunes of national- and state-level politicians); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543–46 (1954) (arguing that the states' representation in Congress provides a powerful check on national action); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1350–52 (2001) (arguing that political safeguards are not sufficient to replace judicial review but nonetheless provide an important check on national action).

88. *See, e.g.*, Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEXAS L. REV. 1321, 1339 (2001) ("[T]he lawmaking procedures prescribed by the Constitution safeguard federalism in an important respect simply by requiring the participation and assent of multiple actors. These procedures make federal law more difficult to adopt by creating a series of 'veto gates.'"); Young, *Two Cheers*, *supra* note 87, at 1361–63 (stressing the role of legislative inertia in protecting federalism).

protection in the *legislative* process, one might worry about federal policy being made in a far more streamlined fashion and centered in the executive branch, where states have no special voice.[89] Granted, states may find considerable freedom to shape federal policy in its bureaucratic interstices by proposing innovative ways to implement federal mandates or by dragging their feet on locally unpopular requirements.[90] But despite the practical importance of 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 an additional way in which states can mitigate the effects of polarization—not through legislation and regulation, but through litigation: states can challenge federal action that arguably goes too far.[91] Anthony Johnstone has observed that "[i]f the primary virtue of federalism in these politically polarized times is the accommodation of diverse policy preferences . . . then attorneys general are uniquely qualified to give voice to those preferences in federalism litigation."[92] This role is not unique to states, of course—private litigants can bring federalism-based legal challenges as well.[93] 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. 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 ACA 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 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.[94] One might well wonder, therefore, whether in *practice* state litigation mitigates polarization or instead exacerbates it. The remainder of this Article is devoted to that question. We begin by surveying the landscape of state litigation, mapping

89. *See* Clark, *supra* note 88, at 1393–94; Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 869–71, 900 (2008).

90. *See, e.g.*, Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1271–80 (2009) (describing this phenomenon as "uncooperative federalism").

91. *See, e.g.*, Daniel Francis, *Litigation as a Political Safeguard of Federalism*, 49 ARIZ. ST. L.J. 1023, 1025–26 (2017) (contending that the state litigation is an undervalued safeguard for federalism).

92. Johnstone, *supra* note 47, at 599.

93. *See* Bond v. United States, 564 U.S. 211, 223–24 (2011) (rejecting the United States' contention that individuals lack standing to raise claims that a federal statute exceeds Congress's enumerated powers).

94. *See supra* note 5 and accompanying text.

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 defending the state against legal challenges; in many areas, they also share responsibility with federal agencies for enforcing federal law.[95] 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.[96]

Although state public litigation goes back considerably further, state AGs' 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

95. *See generally* NAT'L ASS'N OF ATTORNEYS GENERAL, STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 45, 84, 121–22, 234, 270–73 (Emily Myers ed., 3d ed. 2013) [hereinafter NAAG] (discussing the role of state AGs and areas of joint federal-state enforcement, such as antitrust and environmental law).

96. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2452 (2006). Interesting questions arise when a given state itself has divided government. In North Carolina, for example, the Republican-dominated legislature has jousted with the Democratic governor for control over litigation on behalf of the state. *See* Current Operations Appropriations Act of 2017, § 147-17, 2017 N.C. Sess. Laws 248, 261–66 (amending various provisions so as to strengthen the General Assembly's control over litigation involving the constitutionality of state statutes). 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, 570 U.S. 744, 753–54 (2013) (discussing the role of the House's Bipartisan Legal Advisory Group). 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. *See, e.g.*, Wikipedia, Government of Massachusetts, https://en.wikipedia.org/wiki/Government_of_Massachusetts [https://perma.cc/NH8A-VQ2J] (listing Massachusetts's governor as a Republican and its AG as a Democrat); Wikipedia, Government of Illinois, https://en.wikipedia.org/wiki/Government_of_Illinois [https://perma.cc/K9SS-48CA] (stating that Illinois currently has a Republican governor and a Democratic AG). This creates thorny state separation of powers problems on which federal practice can provide little guidance. *Cf.* THE FEDERALIST NO. 70, at 472–80 (Jacob E. Cooke ed., 1961) (Alexander Hamilton) (arguing against a plural executive). 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.

$206 billion.[97] In more recent years, AGs have targeted, and ultimately disrupted, settled industry practices by paint producers, toy manufacturers, pharmaceutical companies, and auto companies—among others. As one corporate lobbyist put it, "In 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[.]"[98]

State litigation is not just practically significant; it is also politically salient. And as AGs have become increasingly active and entrepreneurial, they have also attracted criticism from various quarters—including from other AGs.[99] Critics 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 Part III. Our goal here is to provide a positive account of what state public-law litigation *is*, and what makes it possible.

Before proceeding, a few words on terminology and scope: we use the term "state public-law litigation" because we want to address a particular subset of litigation by state AGs. We do not focus on government-contracts 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 public-rights cases brought by nongovernmental organizations seeking broad reforms became a critical category of litigation in the late twentieth century, requiring courts and scholars to rethink a litigation model predicated on the enforcement of private rights,[100] so too litigation by state governments has increasingly taken on a public-law cast.

That said, the category remains fuzzy. Although one can easily identify examples of state public-law litigation, such as the state lawsuits challenging the ACA or the Trump travel bans, delimiting principles are harder to come by.[101] Because our interest is in the practical impact of state litigation on American politics and the federal system, we want to define the relevant category fairly loosely. What we have in mind is (1) litigation activity (not only filing lawsuits but also defending them and participating as amici) (2) by

97. *See infra* notes 110–16 and accompanying text.

98. Alan Greenblatt, *The Avengers General*, GOVERNING (2003), https://www.heartland.org/_template-assets/documents/publications/12520.pdf [https://perma.cc/8QNP-GDVE].

99. *See id.* (describing Republican AGs' critiques of entrepreneurial state litigation and the ensuing formation of the Republican Association of Attorneys General).

100. *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 73–76 (7th ed. 2015) (describing the shift from a private "dispute resolution" model to a public rights or "law declaration" model of the judicial function).

101. *Cf.* Randy E. Barnett, *Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267, 268–72 (1986) (highlighting the difficulty of separating "public" and "private" law).

states[102] that is (3) intended to have a legal and/or political impact that transcends the individual case and the jurisdiction where the action takes place.

### *A. The Engines of Expanding State Litigation*

Prior to the 1980s, most state AG offices could be described as "[p]lacid and reactive."[103] Things changed dramatically over the next few decades. The "New Federalism" of the Reagan Administration devolved countless regulatory and administrative responsibilities from the federal government to the states.[104] 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.[105] Higher budgets and greater responsibilities, in turn, drew a new breed of attorney to the AG's office. Increasingly, the "state's law firm" was staffed with "a younger, better educated, and more ambitious caliber of attorney."[106]

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.[107] Areas like antitrust and consumer protection, once dominated by the federal government, became

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102. We focus here on actions by state AGs. But it bears emphasis that important litigation efforts have sometimes been led by governors or other state officials, by membership organizations representing state institutions (such as the National Governors' Association), or by local governments. The leading challenges to President Trump's effort to punish "sanctuary cities" acting contrary to federal immigration policy, for example, have been brought by the Cities of San Francisco and Chicago. Laura Jarrett & Tal Kopan, *Federal Judge Again Blocks Trump from Punishing Sanctuary Cities*, CNN (Sept. 15, 2017), https://www.cnn.com/2017/09/15/politics/chicago-lawsuit-trump-sanctuary-cities-jag-funds/index.html [https://perma.cc/Q2BX-D7TF].

103. Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 538 (1994); *see* 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").

104. ERIC N. WALTENBURG & BILL SWINFORD, LITIGATING FEDERALISM: THE STATES BEFORE THE U.S. SUPREME COURT 45 (1999).

105. During the 1970s and early 1980s, AGs' budgets expanded at rates that "outpaced the growth of 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). Between 1970 and 1989 the mean number of attorneys increased from 51 to 148, and the median budget from $612,089 to $9.9 million. WALTENBURG & SWINFORD, *supra* note 104.

106. Clayton, *supra* note 103; *see also* Kevin C. Newsom, *The State Solicitor General Boom*, 32 APP. PRAC. 6, Winter 2013, at 7–8 (describing the rise of appellate attorneys with private experience in state solicitor general offices).

107. *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.").

enclaves of aggressive state enforcement.[108] Many AGs established specialized units and task forces to handle their new responsibilities, thereby "enhanc[ing] the role of the attorney general as a 'public interest lawyer' and offer[ing] many opportunities to improve the quality of life for citizens of the states and jurisdictions."[109]

Meanwhile, new provisions of federal law facilitated state litigation by authorizing state AGs to enforce federal statutes, often by suing as *parens patriae* to protect the rights of state citizens.[110] The common law doctrine of *parens patriae* dates back to early English practice, in which the King exercised certain royal prerogatives as "parent of the country."[111] In its more modern form, the doctrine allows states to vindicate sovereign or quasi-sovereign interests, including an "interest in the health and well-being . . . of [their] residents in general."[112] Today, many state and federal statutes explicitly authorize states to sue as *parens patriae*.[113] Others can be read to authorize state suits implicitly by creating broad rights of action for citizens whom the states represent.[114] And even absent specific statutory

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108. *Id.*; *see also* Clayton, *supra* note 103, at 535–36 (describing states' efforts to secure regulatory and enforcement authority in areas including antitrust and consumer protection).

109. NAAG, *supra* note 95, at 46.

110. *See, e.g.*, Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, sec. 301, § 4(c), 90 Stat. 1383, 1394 (1976) (codified at 15 U.S.C. § 15(c) (2012)) (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* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 712 (2011) ("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.").

111. Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of* Parens Patriae, 74 TUL. L. REV. 1859, 1863 (2000); Jack Ratliff, Parens Patriae: *An Overview*, 74 TUL. L. REV. 1847, 1850 (2000).

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

113. Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 495–96, 496–97 nn.39–40 (2012). Whether Congress could confer authority on state AGs to sue in circumstances where state law denies it is an interesting question, but beyond the scope of this article.

114. *See, e.g.*, EEOC v. Fed. Express Corp., 268 F. Supp. 2d 192, 197 (E.D.N.Y. 2003) (citing Connecticut v. Physicians Health Servs. of Conn., Inc., 287 F.3d 110, 121 (2d Cir. 2002)) ("[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) (quoting 29 U.S.C. § 630(a)) (reasoning that AG has statutory standing to sue under Age Discrimination in Employment Act as "'legal representative' of the people of the [state] for the purposes of this action"); Minn. v. Standard Oil Co. (Ind.), 568 F. Supp. 556, 563–66 (D. Minn. 1983) (permitting state to sue as *parens patriae* under § 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").

authorization, state AGs may (depending on state law) have common law or constitutional authority to litigate as *parens patriae* on behalf of citizens.[115]

The 1990s tobacco litigation built on, and spurred, expansions in AG authority. Prior to the states' assault on Big Tobacco, countless private plaintiffs had sued under a variety of tort and warranty theories—all seeking to hold the industry accountable for peddling an unreasonably dangerous product. None succeeded.[116] Many plaintiffs were simply outspent by the defendants; others were turned away on the ground that they had assumed the risk of smoking; and still others were thwarted by courts' refusal to permit large numbers of smokers to sue together as class actions.[117]

Then came the states, which were able to avoid the pitfalls of earlier litigation and bring the tobacco companies to the bargaining table. Most states pursued restitution actions, seeking reimbursement for Medicaid expenses incurred in the treatment of smoking-related illnesses.[118] By shifting the focus from individual smokers to the states' own losses, the state suits were able to cut off the tobacco companies' prime defense strategy: blaming individual smokers. As Mississippi AG Mike Moore put it, "This time, the industry cannot claim that a smoker knew full well what risks he took each time he lit up. The state of Mississippi never smoked a cigarette. Yet it has paid the medical expenses of thousands of indigent smokers who did."[119] Similarly, the states' strategy allowed them to avoid the challenges of class certification: "[I]nstead of millions of plaintiffs, there would only be one. Concerns over common issues of fact, which doomed earlier class actions to fail the predominance and superiority tests of federal and state class action statutes, would be finessed."[120] Ultimately, forty-six states joined the Master Settlement Agreement, which required the tobacco companies to pay the states more than $200 billion over twenty-five years and to agree to an array of regulatory constraints.[121]

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115. *See generally* Ieyoub & Eisenberg, *supra* note 111, at 1864–75 (describing the contours of *parens patriae* doctrine and its grounding in common law).

116. *Id.* at 1860 ("Before the states' litigation, the tobacco industry had not lost a smoking case . . . .").

117. Anthony J. Sebok, *Pretext, Transparency and Motive in Mass Restitution Litigation*, 57 VAND. L. REV. 2177, 2184–88 (2004) (describing the history of tobacco litigation).

118. *Id.* at 2189; *see also id.* (describing Minnesota's consumer-fraud approach as a notable exception).

119. Mike Moore, *The States Are Just Trying to Take Care of Sick Citizens and Protect Children*, 83 A.B.A. J. 53, 53 (1997).

120. Sebok, *supra* note 117, at 2190.

121. Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 371–73 (2000). Four states settled separately for approximately $36.8 billion, bringing the total to roughly $243 billion. W. Kip Vicusi, *The Governmental Composition of the Insurance Costs of Smoking*, 42 J.L. & ECON. 575, 577 (1999).

Although the tobacco litigation is in some ways *sui generis*, it highlights several features that have helped fuel state litigation more broadly. First, the tobacco suits entailed an "unprecedented" degree of interstate cooperation among AGs, and their success made clear—to AGs as well as to potential defendants—the power of concerted multistate action.[122] Second, the litigation demonstrated the value of cooperation between AGs and private attorneys. The states' suits benefited from substantial assistance and financing from private lawyers—a pattern that has been repeated in many subsequent actions. By teaming up with private counsel (particularly those willing to work for a contingent fee), state AGs can expand their reach into litigation that would otherwise be prohibitively expensive or resource-intensive, or would require specialized expertise.[123] Third, the staggering size of the settlement—"the largest transfer of wealth as a result of litigation in the history of the human race"[124]—revealed just how lucrative state litigation could be. In the years since the tobacco litigation, state AGs have become adept at using large monetary recoveries to publicize the financial contributions they make to the state and its citizens.[125] In many states, moreover, AG offices can retain certain types of financial recoveries, making litigation a self-sustaining endeavor.[126]

Finally, the states' legal theories in the tobacco cases created a template for future actions against industries that cause widespread harm to state citizens.[127] The recoupment strategy alone is a powerful tool for recovering the states' own expenses[128] and becomes more powerful still when combined with the states' authority to sue as *parens patriae* to address harms to their citizens.[129] In the ongoing state efforts against opioid manufacturers, for

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122. Ieyoub & Eisenberg, *supra* note 111, at 1860 ("The scope of interstate attorney general cooperation was unprecedented.").

123. *See generally* Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 532–33, 538–46 (2016) (analyzing the costs and benefits of partnerships between public and private attorneys).

124. Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563, 564 (2001). Critics are quick to note that the settlement is being financed largely by smokers, who now pay more for cigarettes. *Id.*; *see also* Sebok, *supra* note 117, at 2181 ("As an executive at R.J. Reynolds ironically put it, '[T]here's no doubt that the largest financial stakeholder in the [tobacco] industry is the state governments.'").

125. *See* Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 855 & n.6 (2014) (offering examples); Lemos, *supra* note 110, at 732–33 & n.153 (same).

126. Lemos & Minzner, *supra* note 125, at 866–67 (describing "revolving fund[]" arrangements at the state level).

127. See Ieyoub & Eisenberg, supra note 111, at 1862 (arguing that "it is [the states'] legal theories, together with the precedent of concerted attorney general action, that have the greatest implications for joint action on other fronts").

128. *See* Dagan & White, *supra* note 121, at 355–57 (focusing on the states' restitutionary claims and describing similar claims against gun manufacturers and lead-paint makers).

129. *See generally* Ieyoub & Eisenberg, *supra* note 111, at 1862, 1875–83 (describing *parens*

example, the states have asserted various common law tort claims and are seeking recovery for harms to citizens and to their own proprietary interests, including "billions of dollars in damages to the State related to the excessive costs of healthcare, criminal justice, education, social services, lost productivity; and other economic losses as a direct result of the illicit use of these dangerous drugs caused by opioid diversion."[130]

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's "stake in protecting its quasi-sovereign interests" as a reason for "special solicitude" in the standing analysis.[131] Long before those words were penned, 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,[132] courts have permitted states to sue in equivalent cases.[133] Similarly, as noted above, 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. When unions and other

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*patriae* standing as applied in the tobacco litigation and its potential for future suits). For a more critical take, see DeBow, *supra* note 124, at 565 (arguing that "the tobacco template could conceivably be applied to a wide range of industries in future government litigation—including, perhaps, makers of alcoholic beverages, fatty foods, and automobiles" and warning of a "substantial danger that state attorneys general and local government officials will regularly succumb to the temptation of the tobacco example, and will seek to achieve regulatory and tax outcomes through litigation . . . .").

130. Complaint at 3, Ohio v. McKesson Corp., No. 1:12-cv-00185-RBW (Ohio Ct. Com. Pl. Feb. 26, 2018).

131. 549 U.S. 497, 520 (2007).

132. 46 U.S. 95, 105–07, 110 (1983) (holding that person subjected to illegal chokehold by police lacked standing to seek an injunction, as there was no guarantee that the plaintiff would be subjected to similar acts by police in the future); *see also* O'Shea v. Littleton, 414 U.S. 488, 490, 503–04 (1974) (denying that a case or controversy existed regarding discriminatory law enforcement practices on similar grounds).

133. *See, e.g.*, Pennsylvania v. Porter, 659 F.2d 306, 314–15 (3d Cir. 1981) (holding that state had standing as *parens patriae* to enjoin police misconduct while noting that "many individual victims may be unable to show the likelihood of future violations of *their* rights"). Courts have reasoned that, because the state represents all of its citizens, it will typically have little trouble establishing that a harm that has occurred in the past will likely befall some citizens in the future. *Id.* This sort of probabilistic reasoning generally does not work for private litigants. *See generally* Summers v. Earth Island Inst., 555 U.S. 488, 491, 494–501 (2009) (denying standing to a private environmental organization that had asserted a statistical certainty that *some* of its members would be injured by *some* of the challenged Forest Service actions). We suspect the difference is that cases like *O'Shea* and *Lyons* are grounded importantly in concerns about judicial intervention in state and local governance—a concern that is radically less compelling when the state itself is the plaintiff.

private organizations asserted similar claims, however, courts ruled that their injuries were too remote to establish standing.[134]

Representative suits by states also enjoy a host of other procedural advantages over their closest private analogues, class actions. Whereas 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.[135] Courts have likewise refused to subject *parens patriae* suits to the jurisdictional requirements of the Class Action Fairness Act[136] or to mandatory arbitration clauses.[137] And 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.[138] As one court put it, "[T]he State should be the preferred representative" of its citizens.[139]

It is not surprising, then, that state litigation activity has increased markedly 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.[140] 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.[141] The most comprehensive study of state litigation in the Supreme Court reports that since 1989 states have "become exceptionally active *amicus curiae* participants. They account for 20% of all *certiorari* petitions accompanied by an *amicus* brief and 18%

134. John C. Coffee, Jr., *"When Smoke Gets in Your Eyes": Myth and Reality About the Synthesis of Private Counsel and Public Client*, 51 DEPAUL L. REV. 241, 241–42 (2001).

135. *See* Lemos, *State Enforcement*, *supra* note 110, at 500–10 (detailing the procedural requirements for private class actions versus the requirements for similar suits brought by the State).

136. Mississippi v. AU Optronics Corp., 571 U.S. 161, 164 (2014); *cf.* People v. Greenberg, 946 N.Y.S.2d 1, 7 (App. Div. 2012) (holding that suit by state AG was exempt from similar jurisdictional rules governing private securities actions).

137. *See, e.g.*, EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002) (holding that arbitration agreement between employee and employer did not bar EEOC from bringing enforcement action).

138. *See* Lemos, *State Enforcement*, *supra* note 110, at 505–06 (collecting cases).

139. Sage v. Appalachian Oil Co., Inc., No. 3:92-CV-176, 2:93-CV-229, 1994 WL 637443, at *2 (E.D. Tenn. Sept. 7, 1994).

140. *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.

141. *See* Clayton, *supra* note 103, at 544 ("[T]he decision to participate as *amicus curiae* is determined largely by the personal interests and felt political pressures on individual attorneys general.").

of the *amicus* briefs on the merits."[142] Today, states' participation in the Supreme Court—both as direct parties and as amici—is second only to that of the federal government.[143]

The Supreme Court may be the most prominent venue for state litigation, but it is hardly the only one. States also have become more frequent litigants in the state and lower federal courts. Texas's Greg Abbott sued the Obama Administration "at least 44 times";[144] AG Maura Healy of Massachusetts reportedly "led or joined dozens of lawsuits and legal briefs" challenging the Trump Administration in 2017 alone.[145]

And states are now far more likely to band together in litigation in order to maximize their impact. For example, Paul Nolette found a marked increase in "coordinated AG litigation"—defined as filed lawsuits as well as preliminary investigations involving coordinated activity by at least two AGs—from 1980 to 2013. Professor Nolette reports: "From a consistently low number of one to four cases a year throughout the 1980s, the quantity of multistate cases . . . gradually increased, reaching twenty for the first time in 1996, thirty in 2002, and forty in 2008."[146] The number of AGs participating in such cases also has grown, with a greater proportion of multistate cases involving sixteen or more states in recent years.[147] As Nolette explains,

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142. WALTENBURG & SWINFORD, *supra* note 104, 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 105, at 24–25; *see also* WALTENBURG & SWINFORD, *supra* note 104, 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." Greg Goelzhauser & Nicole Vouvalis, *State Coordinating Institutions and Agenda Setting on the U.S. Supreme Court*, 41 AM. POL. RES. 819, 825 (2013). One veteran state litigator attributes these changes in part to technological advances, noting that email has made it far easier for dispersed AGs' offices to share drafts. *See* Letter from Tom Barnico, Dir. AG Program, Boston College Law School, to authors (July 20, 2018) (on file with authors).

143. Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. REV. 1229, 1235 (2015).

144. Dan Frosch & Jacob Gershman, *Abbott's Strategy in Texas: 44 Lawsuits, One Opponent: Obama Administration*, WALL ST. J. (June 24, 2016), https://www.wsj.com/articles/abbotts-strategy-in-texas-44-lawsuits-one-opponent-obama-administration-1466778976 [https://perma.cc/D87N-QWXA].

145. Steve LeBlanc & Bob Salsberg, *Massachusetts' Maura Healey Helping Lead Effort to Litigate Trump*, BOSTON.COM (Dec. 18, 2017), https://www.boston.com/news/politics/2017/12/18/massachusetts-maura-healey-helping-lead-effort-to-litigate-trump [https://perma.cc/9M9B-GA4X].

146. NOLETTE, *supra* note 13, at 21 app. at 221; *see also id.* fig.2.1.

147. *Id.* at 21–22 & fig.2.2.

"Litigation involving over half of the nation's AGs, once an unusual event, represents over 40% of all the multistate cases conducted since 2000."[148] For many observers, AG activism amounts to "a major shift in how political fights are waged."[149]

### *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 ACA; (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.

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.[150] And state amicus briefs concerning the validity of the federal Defense of Marriage Act (DOMA) raised both federalism and individual rights arguments.[151]

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148. *Id.* at 22.

149. Frosch & Gershman, *supra* note 144.

150. *See* Complaint at 11–12, Washington v. Trump, No. 2:17-cv-00141-JLR, 2017 WL 462040 (W.D. Wash. Jan. 3, 2017) (alleging individual rights violations as well as violations of the Administrative Procedure Act (APA)).

151. *See* Brief Addressing the Merits of the State of Indiana and 16 Other States as Amicus Curiae in Support of the Bipartisan Legal Advocacy Group of the U.S. House of Representatives at 4–8, United States v. Windsor, 570 U.S. 744 (2013) (No. 12-307), 2013 WL 390993 [hereinafter *Windsor* Pro-DOMA States' Brief] (arguing that neither federalism nor equal protection analysis supported heightened scrutiny of DOMA); 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 at 3, United States v. Windsor, 570 U.S. 744 (2013) (No. 12-307), 2013 WL 840031 [hereinafter *Windsor* Anti-DOMA States' Brief] (arguing that DOMA denied equal protection and infringed states' authority to regulate marriage). There is, moreover, important diversity within categories. As we discuss further below, the relevant legal

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 AGs. We define our categories by the legal claim asserted, not the form in which that claim is advanced. And, while we have framed our categories as challenges to the legality of either federal governmental or private action, we also include states' assertion of arguments—often in opposition to other states—affirming the legality of those actions.[152]

*1. Federal Power Claims.*—This category contains claims that federal action exceeds the legal limits of national authority. The paradigmatic claims are those about the reach of Congress's enumerated powers.[153] For example, minutes after President Obama signed the ACA, thirteen states filed suit arguing that Congress lacked power under the Commerce Clause to require individuals to buy health insurance.[154] 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 private parties as defenses to the imposition of federal requirements or penalties,[155] or in suits for a

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constraints in each of the first three categories—federalism and separation-of-powers principles and individual rights—may be either constitutional or statutory in character. We do not distinguish between constitutional and statutory claims because we think that both constitutional and statutory norms serve constitutive functions in many instances. *See generally* Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 464 (2007) (discussing the constitutive role of statutory and other non-entrenched norms in structuring the government and identifying individual rights).

152. *See, e.g.*, *Windsor* Pro-DOMA States' Brief, *supra* note 151, at 2–3.

153. 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. City of Boerne v. Flores, 521 U.S. 507, 512 (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, City of Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074), 1996 WL 10282 (defending RFRA); 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, City of Boerne, Texas, City of Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074), 1996 WL 695519 (attacking RFRA). And Ohio Solicitor Jeffrey Sutton was given oral argument time to argue against RFRA's constitutionality.

154. *14 States Sue to Block Health Care Law*, CNN (Mar. 23, 2010), http://www.cnn.com/2010/CRIME/03/23/health.care.lawsuit/index.html [https://perma.cc/3UPJ-8C8H]; *see generally* NFIB v. Sebelius, 567 U.S. 519, 547–58 (2012) (opinion of Roberts, C.J.) (accepting those arguments).

155. In *United States v. Lopez*, 514 U.S. 549 (1995), for example, a criminal defendant prosecuted for possessing a firearm within 1,000 feet of a school argued (successfully) that the federal prohibition did not regulate interstate commerce. *Id.* at 551–52. In *United States v. Morrison*, 529 U.S. 598 (2000), an individual defendant in a civil case argued (again successfully) that the federal private right of action for victims of "gender-motivated violence" exceeded Congress's

declaratory judgment or an injunction seeking to bar enforcement of federal law.[156] States then come in as amici—sometimes on both sides of the case.[157]

These cases are high visibility but, we want to suggest, of limited practical importance. They're just not very promising, given the Court's capacious understanding of national enumerated powers.[158] 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.[159] (In the healthcare case, the Taxing Clause saved the day for the ACA.)[160] We may see occasional wins for states here, but they're likely—as in *Lopez*—to be mostly symbolic in their importance.[161]

The more significant 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 for enforcement and implementation. Polarization makes states governed by the party that is out of power in Washington particularly likely to want to opt out of such programs. Under the Anti-Commandeering Doctrine, Congress can't *require* state officials to implement federal policy.[162] Instead, Congress typically conditions federal benefits (usually money) on state cooperation.[163]

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power under both the Commerce Clause and Section Five of the Fourteenth Amendment. *Id.* at 601–02, 604.

156. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 15 (2005) (addressing claim by users of medicinal marijuana seeking declaratory and injunctive relief that the federal Controlled Substances Act, as applied to them, exceeded Congress's Commerce power).

157. In *Lopez*, several states filed in support of the Gun Free School Zones Act. *See* Brief for the States of Ohio, New York, and the District of Columbia as Amici Curiae in Support of Petitioner, United States v. Lopez, 514 U.S. 549 (1995) (No. 93-1260), 1994 WL 16007793. 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 at 13, United States v. Lopez, 514 U.S. 549 (1995) (No. 93-1260), 1994 WL 16007619 (arguing that "the Commerce Clause does not authorize enactment of the Gun Free School Zones Act").

158. *See generally Raich*, 514 U.S. at 15–19; Wickard v. Filburn, 317 U.S. 111, 118–29 (1942).

159. *See, e.g.*, United States v. Comstock, 560 U.S. 126, 130 (2010) (upholding broad federal power to imprison sexual predators under the Necessary and Proper Clause); *Raich*, 545 U.S. at 34–36 (Scalia, J., concurring in the judgment) (arguing that the Necessary and Proper Clause allows Congress to regulate noncommercial activity that affects commerce).

160. *See NFIB*, 567 U.S. at 574 (upholding the ACA under the Taxing Clause).

161. *See, e.g.*, Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 476–77 (2002); Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After* Gonzales v. Raich, 2005 SUP. CT. REV. at 1, 39–40 ("A roll-back of the national regulatory state was never in the cards; there are simply too many precedential, institutional, and political constraints pressing the Court to uphold relatively broad federal power.").

162. *See* Printz v. United States, 521 U.S. 898, 933 (1997); New York v. United States, 505 U.S. 144, 188 (1992).

163. *See generally* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L.

Challengers therefore argue that federal spending conditions are insufficiently clear or amount to federal coercion, as in the Medicaid Expansion portion of the healthcare case[164] or in the current challenges to the Trump order on sanctuary cities.[165] Alternatively, states' claims may focus on whether certain federal requirements really amount to commandeering.[166]

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.[167] 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.[168] Likewise, the Medicaid expansion decision established an opt-out right for states.[169]

Finally, an important class of federal-power claims involves state immunities from federal regulation. These claims arise defensively, typically

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REV. 1911, 1918–19, 1923–31 (1995) (noting the broad potential of conditional spending to circumvent limits on Congress's enumerated powers). The leading case remains *South Dakota v. Dole*, 483 U.S. 203 (1987).

164. *See NFIB*, 567 U.S. at 575.

165. *See, e.g.*, City of Santa Clara v. Trump, 250 F. Supp. 3d 497, 507 (N.D. Cal. Apr. 25, 2017).

166. 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 or are instead being "commandeered" into enforcing federal immigration policy. *See, e.g.*, City of Philadelphia v. Sessions, 280 F. Supp. 3d 579, 597–99 (E.D. Pa. 2017); Alison Frankel, *DOJ Wants to Change the Constitutional Conversation in Sanctuary Cities Cases*, REUTERS (Mar. 7, 2018), https://www.reuters.com/article/us-otc-sanctuary/doj-wants-to-change-the-constitutional-conversation-in-sanctuary-cities-cases-idUSKCN1GJ362 [https://perma.cc/XK63-P8YQ].

167. *See, e.g.*, MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 26 (1995) (contrasting "dual" and "cooperative" federalism); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001) (categorizing congressional acts that "invite state agencies to implement federal law" as "cooperative federalism" programs).

168. *See Printz*, 521 U.S. at 933–34.

169. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585–88 (2012) (opinion of Roberts, C.J.) (stating that states are free to opt out of the Medicaid expansion while remaining within the original Medicaid program). 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 limit the scope of federal policy and preserving a right of opt-out dissolves. This may have been Justice Story's hope, for example, in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). Although *Prigg* upheld Congress's power to enact the Fugitive Slave Law and broadly construed its preemptive force, Story may have hoped that the Court's holding that Congress could not require state and local officials to participate in the law's enforcement would gut its effectiveness. *See id.* at 532, 598, 672–73; DAVID C. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, 245 n.54 (1985). Unfortunately, he turned out to be wrong about that. *See* Paul Finkelman, *Sorting Out* Prigg v. Pennsylvania, 24 RUTGERS L.J. 605, 664 (1993).

in response to claims by private litigants.[170] 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.[171] 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 states from damages claims brought by individuals for violations of federal law.[172] More recent cases have constricted federal civil rights claims against state and local officers for violations of federal statutory requirements.[173] States have participated in these cases as both party defendants and extensively as amici (again, often on both sides).[174]

These immunity cases differ from most of our examples of state public-law litigation in that they arise defensively—they are not, as it were, examples of AGs like Texas's Greg Abbott going into work and suing the federal government. Nonetheless, they do seem part of a systematic effort 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*[175] and *Kimel v. Florida Board of Regents*,[176] for example, as an extension of his entrepreneurial tenure as State Solicitor of Ohio.[177]

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170. 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, 88–89 (1883) (holding that New Hampshire could not pursue financial claims against another state where New Hampshire had no interest of its own).

171. *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (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. Transit Auth., 469 U.S. 528, 531 (1985); *see also* Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. at 1, 31–32 (discussing claims under *National League of Cities* as a species of "immunity federalism").

172. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996); Hans v. Louisiana, 134 U.S. 1, 18 (1890).

173. *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 276 (2002) (Federal Educational Rights and Privacy Act (FERPA) does not create enforceable private rights under 42 U.S.C. § 1983); Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (concluding no implied right of action for disparate impact discrimination under Title VI).

174. *See, e.g.*, Brief of Amicus Curiae States of California et al., Supporting the State of Florida, et al., at 4, Seminole Tribe v. Florida, 517 U.S. 44 (1996) (No. 94-12), 1995 WL 17008502 (May 3, 1995) (contending that a statute mandating state participation in federal programs was inconsistent with principles of federalism).

175. 531 U.S. 356 (2001).

176. 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. *Id.*; *Garrett*, 531 U.S. at 356.

177. *See also Alexander*, 532 U.S. at 276, in which Judge Sutton, in private practice, appeared

*2. Federal Separation of Powers Claims.*—It's less intuitive to think of States making separation of powers arguments, but one can find examples reaching way back: in 1970, for example, Massachusetts filed an unsuccessful original action in the Supreme Court challenging the constitutionality of the Vietnam War.[178] Separation of powers claims have become far more prevalent over the past decade or so. As we've noted, polarization tends to cause gridlock, even with a nominally unified government in Washington. And gridlock encourages the President to reach for his pen and phone to get things done.[179] Resulting challenges 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 a national lawmaking process that has shifted from Congress to the Executive Branch.

*United States v. Texas*—the immigration case—is a good example.[180] When President Obama extended lawful presence to millions of additional undocumented aliens, it was hard to argue that the deferred-action programs (Deferred Action for Parents of Americans (DAPA) and Deferred Action for Childhood Arrivals (DACA)) fell outside the authority of the national government as a whole. Instead, state challengers contended that the President lacked the authority to—as Obama himself put it—"change the law" without going to Congress.[181] 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 are statutory but serve a constitutional purpose. Again, the immigration case is a good example. Texas's successful argument in the district court was simply that Obama's policy change had failed to comply with the Administrative Procedure Act (APA) 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 importantly, it allows states—

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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.

178. Commonwealth of Massachusetts v. Laird, 400 U.S. 886 (1970); *see also id.* at 886 (Douglas, J., dissenting) (noting that Massachusetts had authorized the suit by a specific legislative enactment).

179. *See* CNN, *Obama-I've Got a Pen and a Phone*, YOUTUBE, https://www.youtube.com/watch?v=G6tOgF_w-yI [https://perma.cc/AV7E-4AU3] (recording a speech by President Obama, wherein he expressed frustration with congressional gridlock and his intent to take unilateral action).

180. *See* 136 S. Ct. 2271, 2272 (2016) (affirming the injunction of the DAPA program and DACA program expansions in Texas v. United States, 86 F. Supp. 3d 591, 606, 678 (S.D. Tex. 2015)).

181. Brief for the State Respondents, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674), 2016 WL 1213267, at *1.

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 administrative state.[182]

The separation of powers principle that Congress—not the President—makes the law also generates 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.[183] 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 differs from that of the Congress that enacted Title IX of the Civil Rights Act.[184] Likewise, when federal agencies promulgated broad "preemption preambles" during the George W. Bush Administration, a coalition of states, as well as a state governmental association, filed amicus briefs arguing that these preambles exceeded the agencies' statutory mandate.[185]

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182. For assessments of the so-called administrative safeguards of federalism, compare Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2028, 2101–09 (2008) (asserting that administrative law is well-suited to preserving federalism), with Stuart M. Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2114, 2145–54 (2008) (arguing that federalism requires insistence that Congress play the primary role).

183. *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2706 (2015) (considering challenge by twenty-three states to EPA rule regulating air pollutants on the ground that the agency did not consider costs of regulation as required by statute).

184. *See* Texas v. United States, 201 F. Supp. 3d 810, 815–16 (N.D. Tex. 2016) (granting preliminary injunction on behalf of thirteen states and other plaintiffs).

185. *See* Brief of Amici Curiae Vermont, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, West Virginia, Virginia, Washington, Wisconsin, and Wyoming in Support of Respondent at 4, Wyeth v. Levine, 555 U.S. 555 (2009) (No. 06-1249); Brief of the National Conference of State Legislatures as *Amicus Curiae* Supporting Respondents at 5, Wyeth v. Levine, 555 U.S. 555 (2009) (No. 06-1249), https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_06_1249_RespondentAmCuNatlConfofStLegis.authcheckdam.pdf [https://perma.cc/2BEW-E7YX]; *see also* Brief of the Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. as Amicus Curiae Supporting Respondent at 6, Wyeth v. Levine, 555 U.S. 555 (2009) (No. 06-1249), https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_06_1249_RespondentAmCuCtrStEnforcementAntitrustandConsProtLaws.authcheckdam.pdf [https://perma.cc/UD4H-NKFK]. On the preemption preambles, see Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L.REV. 227 (2007).

A more difficult class of cases involves litigation challenging federal government *inaction*. Federal administrative law generally presumes that agency inaction—at least in the form of agency refusals to initiate enforcement proceedings—are not subject to judicial review.[186] But this presumption can sometimes be overcome, as it was by *Massachusetts v. EPA*'s holding that states could challenge the agency's denial of rulemaking petitions authorized by statute.[187] Given Congress's continued failure to act on climate change, "EPA regulation pursuant to [*Massachusetts v. EPA*] . . . has served as the core of the US federal efforts on climate change."[188] And where an incoming administration seeks to overturn previous executive action—thus arguably returning to the status quo ante of *in*action---states may find greater leverage to challenge this departure from the prior baseline. Recent litigation over the Trump Administration's "repeal" of President Obama's DACA policy, for example, has gotten significant traction by arguing that the repeal rested on improper reasons.[189] State litigation to enforce the Executive's statutory obligations can thus force adoption and continuation of executive policies even where national-level gridlock would otherwise foreclose them.

*3. Federal Rights Cases.*—Some state challenges to federal action rely not just on structural principles but also on individual rights arguments. In the travel ban cases, for instance, state governments assert *parens patriae* standing to raise the rights of their citizens. Sometimes states assert proprietary interests as well; some of the state plaintiffs in the travel ban cases argued that their state universities had been deprived of faculty and students from abroad.[190] And sometimes the states participate as amici to express a view on the scope of federal individual rights, as in the same-sex marriage cases.[191]

This category also includes state litigation activity contesting federal rights. For example, numerous states have participated as amici opposing

186. Heckler v. Chaney, 470 U.S. 821, 832 (1985).

187. 549 U.S. 497, 528 (2007).

188. Hari M. Osofsky & Jacqueline Peel, *The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future?* 30 ENV'T & PLAN. L.J. 303, 310 (2013).

189. *See, e.g.*, Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 407, 438 (E.D.N.Y. 2018) (granting preliminary injunction against repeal of DACA program in suit by New York and fifteen other states). Similar litigation challenges the Trump Administration's effort to overturn President Obama's "clean power plan." *See, e.g.*, Richard Valdmanis, *States Challenge Trump Over Clean Power Plan*, SCI. AM. (Apr. 6, 2017), https://www.scientificamerican.com/article/states-challenge-trump-over-clean-power-plan/ [https://perma.cc/7JK8-A3TZ].

190. *See* Hawaii v. Trump, 859 F.3d 741, 765 (9th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 2392 (2018) ("EO2 harms the State's interests because (1) students and faculty suspended from entry are deterred from studying or teaching at the University; and (2) students who are unable to attend the University will not pay tuition or contribute to a diverse student body.").

191. *See supra* notes 10 (*Obergefell* briefs) and 151 (*Windsor* briefs).

Equal Protection challenges to affirmative action in state universities.[192] It is even more common to see states opposing rights claims by criminal defendants.[193] Similarly, states often 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.[194] And in all such cases, other states may support the party asserting federal rights as amici. When he was AG of Minnesota in the early 1960s, for example, Vice President Walter Mondale filed a brief on behalf of twenty-two states urging the Supreme Court to expand the right to counsel in *Gideon v. Wainwright*.[195]

As we discuss in more detail in the following Part, these rights cases create the potential for conflicts among states. Whenever state AGs support claims of constitutional rights, 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. And because they frequently involve "hot button" issues, these cases raise particular risks of politicizing the AG's office.

*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 jurisdictions for a very long time.[196] And local governments have also been active in this sort of litigation—for example, in suits against the firearms industry during the 1990s.[197] But the most successful efforts have been

192. *See* Lemos & Quinn, *supra* note 138, at 1257.

193. *See id.* at 1255–56 (observing that many Republican AG briefs filed in criminal procedure cases are not opposed by state briefs favoring the criminal defendant).

194. *See, e.g.*, City of West Covina v. Perkins, 525 U.S. 234, 235 (1999) (Ohio SG Jeffrey Sutton, who had filed an amicus brief on behalf of twenty-nine states, arguing on the city's behalf by leave of court).

195. 372 U.S. 335 (1963). *See* Yale Kamisar, Gideon v. Wainwright *and Related Matters: An Armchair Discussion Between Professor Yale Kamisar and Vice President Walter Mondale*, 32 L. & INEQ. 207, 207 (2014) (discussing Mondale's role in *Gideon*).

196. *See, e.g.*, Georgia v. Tenn. Copper Co., 206 U.S. 230, 231, 236 (1907) (hearing the State of Georgia's public nuisance claim against Tennessee copper companies for discharging noxious gases that crossed the border into Georgia).

197. *See, e.g.*, Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEXAS L. REV. 1837, 1843 (2008) ("By the late 1990s, municipalities began

undertaken by states. Most observers seem to agree that the tobacco litigation ushered in a new era of state activism that then spread to other regulatory areas and types of litigation.[198]

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* of them.[199] 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 the tobacco settlement essentially created a nationwide regulatory regime governing cigarettes.[200] It includes, for example, not only payments by the defendants for past harms but also agreements to strengthen warning labels and restrictions on advertising. 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.

Similar multistate litigation efforts have imposed quasi-regulatory regimes via comprehensive settlements with major industry players in the pharmaceutical and other industries.[201] 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.[202] 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

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suing the gun industry to recover the costs of law enforcement and emergency medical services related to gun violence.").

198. *See, e.g.*, NOLETTE, *supra* note 13, at 23–24.

199. Forty-six states, the District of Columbia, Puerto Rico, American Samoa, Guam, Northern Mariana Islands, and the Virgin Islands, joined the Master Settlement Agreement with the tobacco companies. Four other states—Florida, Minnesota, Mississippi, and Texas—settled their cases separately. *Supra* note 121 and accompanying text; *see also* NAAG, *supra* note 90, at 388.

200. NOLETTE, *supra* note 13, at 24. The tobacco companies, along with NAAG, petitioned Congress for a national legislative settlement, but no such legislation was ever enacted. Dagan & White, *supra* note 121, at 369–70.

201. *See* NOLETTE, *supra* note 13, at 49–59 (offering a detailed account of the pharmaceutical litigation); *id.* at 25 tbl.2.1 (listing the top fifteen industries targeted in multistate litigation).

202. *See* Sarah T. Reise, *State and Local Governments Move Swiftly to Sue Equifax*, BALLARD SPAHR CONSUMER FIN. MONITOR (Oct. 3, 2017), https://www.consumerfinancemonitor.com/2017/10/03/state-and-local-governments-move-swiftly-to-sue-equifax/ [https://perma.cc/K24M-P9W7].

another comprehensive settlement with terms that would effectively act as, and possibly obviate, national regulation.

*5. State Enforcement of Federal Law.*—State AGs also can, and do, enforce many aspects of *federal* law. State enforcement of federal law is pervasive, from antitrust to consumer protection to environmental law.[203] As we explained above, this can happen either through explicit statutory authorization or through states relying on more general private rights of action, often asserting *parens patriae* standing to sue on behalf of their citizens.[204]

On its face, this category of cases may not seem particularly empowering for states, given that AGs are merely enforcing policies that already have been written into federal statutes and regulations. Yet the level of enforcement can have profound consequences for what the law means in practice, and for how regulated entities view their options. That is true even when the law's substantive requirements are perfectly clear: higher levels of enforcement are likely to increase deterrence by raising the expected sanction for violations.[205] And when the relevant statutory or regulatory commands are somewhat less than pellucid—as is often the case—state AGs can shape policy on a national scale by pushing particular interpretations of vague or ambiguous federal laws.[206]

Thus, the most interesting instances for our purposes are those where state enforcement reflects a disagreement with national enforcement policy. The most salient recent example was Arizona's effort to ramp up enforcement of federal immigration laws in response to what it saw as an abdication by federal authorities.[207] Another example, with a different political valence, would be Eliot Spitzer's effort in New York to enforce federal environmental laws more aggressively than the federal EPA had previously been willing to do.[208]

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203. *See generally* Lemos, *State Enforcement*, *supra* note 105, at 707–17 (describing the contours of state enforcement of federal laws in a variety of areas).

204. *See supra* notes 105–10 and accompanying text.

205. *See* Lemos, *State Enforcement*, *supra* note 110, at 737–40 (describing the power of enforcement).

206. *See, e.g.*, *id.* at 739–40 (describing how state enforcement has molded federal antitrust doctrine).

207. *See* Arizona v. United States, 567 U.S. 387 (2012) (holding much of Arizona's effort preempted).

208. *See* Lemos, *State Enforcement*, *supra* note 110, at 743–44 (explaining that the EPA was embroiled with lawsuits at the time but that it adopted Spitzer's legal strategy within a few weeks, bringing a suit against power plants that New York intervened in). We leave to one side here the converse scenario, which occurs when states refuse to enforce federal law or repeal state laws that parallel federal laws. These state decisions may also significantly undermine or affect federal policy. For example, Colorado's decision to end state prohibition of most marijuana use made it significantly more difficult for federal authorities to further national drug policies in that state. *See*

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's 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 undermine the fortunes of big oil companies, the oil-producing states may share in the consequences.

## III. State Litigation, Politics, and Polarization

As state AGs have gained prominence, they have also attracted critics. A prominent 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.[209] 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."[210] 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; there is now a much closer mix of Democrats and Republicans—due in part to aggressive campaign

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*generally* Ernest A. Young, *Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction*, 65 CASE W. RES. L. REV. 769, 774–76 (2015).

209. *See, e.g.*, *supra* notes 13–15 and accompanying text; NOLETTE, *supra* note 13, at 200–01 ("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."); Jim Copland & Rafael A. Mangual, *Left-Wing AGs Are Playing Politics with the Law*, NAT'L REV. (Sept. 29, 2016), https://www.nationalreview.com/2016/09/state-attorneys-general-political-abuses-power [https://perma.cc/3C37-URUK] ("Left-wing state attorneys general are acting less like legal representatives of their constituents and more like partisan political activists."); Anthony Johnstone, *The Appeal of State Attorneys General in a Federal System*, H-FEDHIST, H-NET REVIEWS (July 2017), http://www.h-net.org/reviews/showrev.php?id=50033 [https://perma.cc/Z3DS-GL92] (reviewing Nolette, *supra* note 13) ("As AGs become more responsive to national interests, they may become less responsive to their own states' interests."); Brooke A. Masters, *States Flex Prosecutorial Muscle*, WASH. POST (Jan. 12, 2005), http://www.washingtonpost.com/wp-dyn/articles/A2107-2005Jan11.html [https://perma.cc/33M7-83UW] (addressing how some business groups view AGs as "ambitious politicians more interested in making headlines than consistent, viable policy"); Walter Olson, Opinion, *Partisan Prosecutions: How State Attorneys General Dove Into Politics*, N.Y. POST (Mar. 30, 2017), https://nypost.com/2017/03/30/partisan-prosecutions-how-state-attorneys-general-dove-into-politics/ [https://perma.cc/U9WA-6EUE] ("These days, packs of red- and blue-team AGs roam the political landscape looking for fights to get into . . . .").

210. Greenblatt, *supra* note 98.

contributions and ads by the Chamber of Commerce and similar groups.[211] 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, as this Part explains. We begin by surveying what we know about partisanship and polarization among state AGs themselves, and then address the question that animates this Article: to the extent that state litigation is "political," what should we make of that fact?

### *A. Polarization, State AGs, and State Litigation*

When RAGA was founded in 1999, there were only twelve Republican AGs.[212] Today there are twenty-seven.[213] In the intervening years, AG elections have not only gotten more competitive,[214] they have also become more high-profile and more expensive. Drawing on data from the Database on Ideology, Money in Politics, and Elections (DIME), Figures 1 and 2 show the median and mean total campaign contributions reported by AG candidates in races from 1990 to 2012.[215] As the difference between the medians and means suggests, there are outliers in both directions—but particularly at the high end. Not all AG elections are expensive today, but some are *very* expensive. In 2012, for example, seven AG candidates reported fundraising totaling more than $1 million; Greg Abbott topped that list at $13.9 million.

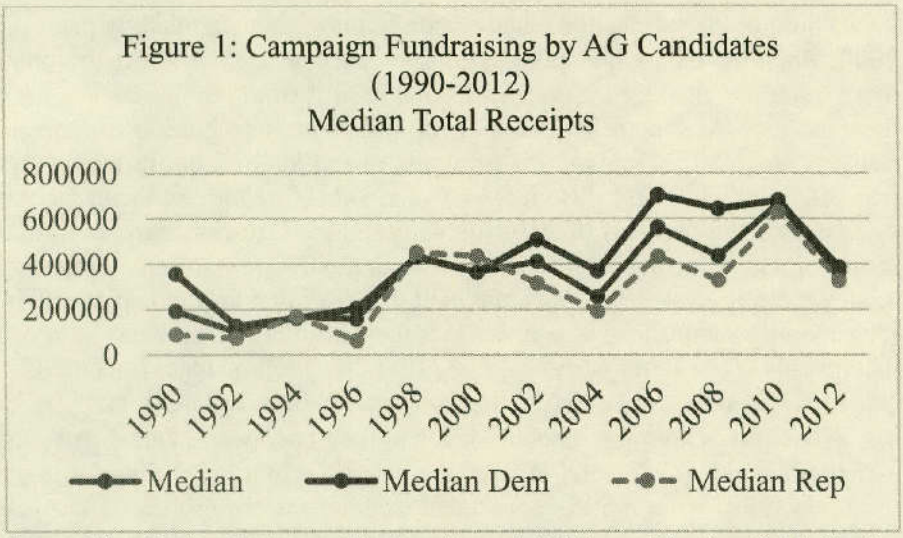
211. *Id.*

212. *Id.*

213. *Attorney General (state executive office)*, BALLOTPEDIA, https://ballotpedia.org/Attorney_General_(state_executive_office) [https://perma.cc/KSN8-3HMZ] (showing party control of state AG seats).

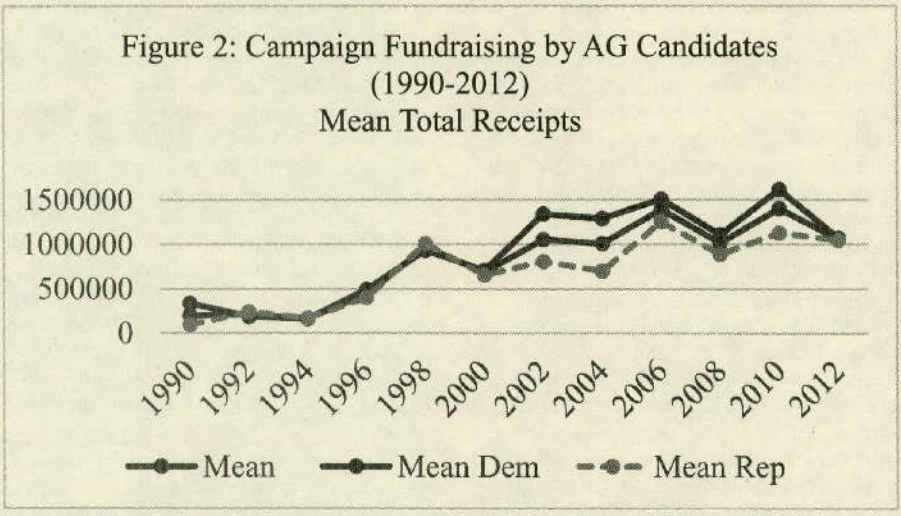
214. Greenblatt, *supra* note 98 (noting that the formation of RAGA "brought the office of state attorney general back into political play around the country").

215. Because the number of AG races in any given election cycle is not uniform, an overall tally of total receipts would be misleading.




Source: Adam Bonica, Database on Ideology, Money in Politics, and Elections: Public Version 2.0 (2016). Stanford, CA: Stanford University Libraries. https://data.stanford.edu/dime.

Note: In Figure 1, the top line is referencing "Median Dem" and the middle line is referencing "Median."




Source: Adam Bonica, Database on Ideology, Money in Politics, and Elections: Public Version 2.0 (2016). Stanford, CA: Stanford University Libraries. https://data.stanford.edu/dime.

Note: In Figure 2, the top line is referencing "Mean Dem" and the middle line is referencing "Mean."

These numbers must be taken with a grain of salt, particularly prior to 2000, when the data were spotty. But they are consistent with reports that more money is flowing into AG races, much of it from out of state.[216] And there is good reason to believe that the numbers have gone up (perhaps sharply) since 2012. RAGA, for example, raised $16 million in 2014—up from $470,000 in 2002.[217] Both RAGA and DAGA reported raising record sums during the first half of 2017 (up 45% and 73%, respectively, from the same point in the prior election cycle).[218] Both groups are also deploying their money more aggressively, after announcing in 2017 that they would end their longstanding "handshake agreement that they wouldn't target seats held by incumbents of the other party."[219] The effects were immediate: in one 2017 race alone, RAGA and DAGA collectively spent about $10 million.[220]

If AG races are more contentious than they once were, and if partisan associations like RAGA and DAGA are playing a more significant role in those elections, what are the consequences for AGs themselves? Do AGs reflect the same kind of partisan sorting and ideological divergence that characterize polarization at the federal level? Measuring polarization in AGs

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216. *See, e.g.*, Dan Levine & Lawrence Hurley, *Trump Bump: Court Fights Draw Big Money into Attorney General Races*, REUTERS (July 31, 2017), https://www.reuters.com/article/us-usa-politics-attorneys-general/trump-bump-court-fights-draw-big-money-into-attorney-general-races-idUSKBN1AG17K [https://perma.cc/E5Z6-YVLX] (describing spending in AG races generally); *see also* Christopher R. Nolen, *Election Law*, 41 U. RICH. L. REV. 121, 139 (2006) (reporting that out-of-state organization contributed $2.1 million to candidate for attorney general, prompting reforms); Andrew Brown, *Big Money Funding Race for WV Attorney General*, CHARLESTON GAZETTE-MAIL (Oct. 1, 2016), https://www.wvgazettemail.com/news/politics/big-money-funding-race-for-wv-attorney-general/article_b695b5ab-94a8-5115-a860-c93b28f79743.html [https://perma.cc/F95S-6A4U] (describing RAGA's significant contributions to the West Virginia AG race); Kathleen Gray, *Campaign Cash Flowing into Races for Attorney General, Secretary of State in Michigan*, DETROIT FREE PRESS (Jan. 31, 2018), https://www.freep.com/story/money/real-estate/michigan-house-envy/2018/01/31/campaign-cash-flowing-into-races-attorney-general-secretary-state-michigan/1084953001/ [https://perma.cc/GM8U-E5N3] (describing state office campaign spending in Michigan); Jon Lender, *Jepsen Solicits Special-Interest Funds to Help Out-of-State Political Ally*, HARTFORD COURANT (Sept. 29, 2017), https://www.courant.com/politics/government-watch/hc-jepsen-herring-fundraiser-20170927-story.html [https://perma.cc/L74A-N62W] (describing spending by Connecticut lobbyists on Virginia AG race); Ben Wieder, *Big Money Comes to State Attorney-General Races*, ATLANTIC (May 8, 2014), https://www.theatlantic.com/politics/archive/2014/05/us-chamber-targets-dems-in-state-attorney-general-races/361874/ [https://perma.cc/ALW4-98HR] (describing spending in various states' AG races).

217. Steven Mufson, *Conservatives Pour Money into Races for State Attorneys General*, WASH. POST (Sept. 23, 2016), https://www.washingtonpost.com/business/economy/conservative-groups-pour-money-into-races-for-state-attorneys-general/2016/09/23/7a57030c-7e86-11e6-8d13-d7c704ef9fd9_story.html?utm_term=.ebf3ed23a35e [https://perma.cc/ZU9C-ZXKF].

218. Levine & Hurley, *supra* note 216.

219. Alan Greenblatt, *State AGs Used to Play Nice in Elections. Not Anymore*, GOVERNING MAG. (Nov. 15, 2017), http://www.governing.com/topics/politics/gov-state-attorneys-general-elections-2017-2018-raga-daga.html [https://perma.cc/2ANF-QLV4].

220. *Id.*

is no easy task, given the absence of conventional measurement tools—such as roll-call votes, which are the dominant tool for measuring ideology (and, thus, polarization) in Congress. But the available evidence suggests that the more general trends toward political polarization have not passed AGs by. To the best of our knowledge, the only current measure of AG ideology is from the DIME project, from which we drew the data on campaign contributions above. DIME is the brainchild of Stanford political scientist Adam Bonica, and it is more than a repository of information on campaign finance. Professor Bonica uses the contribution data to estimate the ideology of candidates based on the contributions they receive—"[t]he pattern of who gives to whom."[221] Because many donors give to candidates at all levels of government, the ideology measures—known as CFscores—can compare the ideology of politicians in different types of offices (e.g., legislators vs. governors) as well as comparing different inhabitants of the same office (e.g., AGs from different states or AGs from the same state in different years).[222]

The limited information on AG races prior to 2000 makes it difficult to draw any meaningful conclusions about trends over time, but the data do suggest that partisan sorting is no less pronounced among AGs than among other elected officials. Figure 3 shows the CFscores for AGs elected in 2000–2012: positive values are more conservative, and negative values are more liberal. As is true in Congress today, there is no overlap between the most conservative Democrats and the most liberal Republicans.[223] Professor

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221. Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM. J. POL. SCI. 367, 367 (2014). Bonica argues that:

> The idea underlying the ideological measures is straightforward. Contributors are assumed—at least in part—to distribute funds in accordance with their evaluations of candidate ideology. That is, contributors will on average prefer ideologically proximate candidates to those who are more distant. The pattern of who gives to whom allows me to simultaneously locate both contributors and recipients.

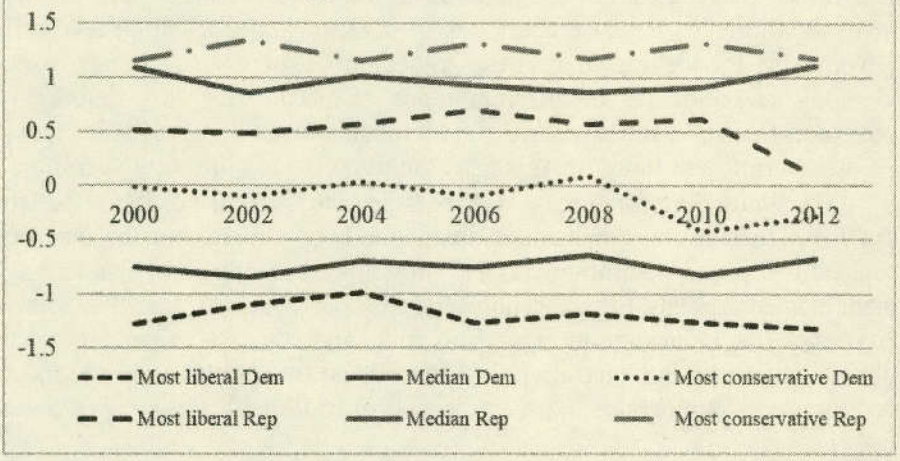
*Id.* For a detailed description of methodology, see *id.* at 368–73.

222. *See id.* at 369 ("In any given state, between 70% and 90% of contributors who fund state campaigns also give to federal campaigns, providing an abundance of bridge observations . . . . Candidates who run for both state and federal office provide additional bridge observations.").

223. The discerning reader will notice that the lines for the most conservative Democrats and most liberal Republicans appear to hit the same point (just above zero), though not at the same time. That is in fact one person: Louisiana AG Buddy Caldwell, who was elected as a Democrat in 2008 and as a Republican in 2012. (Because CFscores are based on lifetime contributions, they do not capture a candidate's shift to the left or right.) It's worth noting that Louisiana elected the most conservative Democratic AG in 2000 and 2004 as well. Georgia held that title in 2002 and 2006, before that AG seat likewise flipped red in 2010. *See* Adam Bonica, *Database on Ideology, Money in Politics, and Elections: Public Version 2.0*, STAN. U. LIBR. 2016, https://data.stanford.edu/dime [https://perma.cc/Y49T-LQ6W]. It bears emphasis that the static nature of the CFscores we are using here—that is, the fact that they do not capture changes in a candidate's contributor base from one year to the next—dampens our ability to glean trends in polarization from the DIME data. Many AGs serve multiple terms, and several states had the same AG through all or most of the period for which data are widely available. The trend lines for those incumbent AGs will be flat, even if the AGs' contributors—or their litigation strategies—moved to the left or the right. That said, most

Bonica's own analysis of the data paints a similar picture for ideological divergence. Focusing on state-level ideology during the 2009–2010 election cycle, Bonica found that AGs in thirty-five states were more ideologically extreme than "the mean state legislator from their respective party" and that the distance between the mean Democrat and Republican AGs was similar to the ideological divergence in Congress at the time.[224]

Figure 3: Ideology of Successful AG Candidates, 2000-2012




Source: Adam Bonica, Database on Ideology, Money in Politics, and Elections: Public Version 2.0 (2016). Stanford, CA: Stanford University Libraries. https://data.stanford.edu/dime.

Note: In Figure 3, the second line from the top is referencing "Median Rep" and the fifth line from the top is referencing "Median Dem."

states did experience turnover in the AG's office between 2000 and 2012, meaning that new candidates—with new scores—were elected during that time. The lack of any discernible movement toward greater ideological divergence among Democratic and Republican AGs is therefore somewhat surprising, given trends in polarization in Congress and in other offices, and worthy of further study.

224. Bonica, *supra* note 221, at 376. The distance between the CFscores of the mean Democrat and Republican AGs was similar to (but slightly higher than) that for governors. *Id.* at 376–77. One interesting difference between AGs and other state officials is that the former seem to be divided more *symmetrically* than the latter. Professor Bonica's data show higher (that is, more extreme) CFscores for Republicans than for Democrats in the U.S. House and Senate, and in state legislatures and governorships. State AGs, by contrast, are more evenly balanced—at least in terms of their contributors. Bonica, *supra* note 221, at 377 fig.2; *see* Johnstone, *supra* note 47, at 608 (observing that "Professor Adam Bonica's study of campaign finance contributions finds attorneys general to be slightly more polarized than other state officials, but also demonstrates they are more balanced as a group across the ideological spectrum than other state or federal elected officials, state courts, or even federal circuit court judges.").

The fact that AGs from different parties are divided is not terribly surprising, though the suggestion that they are more ideologically extreme than most state legislators may be. The operative question for our purposes, however, is whether trends in political polarization are being reflected in state litigation. It's easy to see why the answer might be yes. Some observers predict, for example, that the changes in AG elections will sharpen partisan divides and reduce bipartisan cooperation: "It's hard to work cooperatively with your fellow AGs if you're always wondering what they're going to use to try to target you in the next election."[225] Or, to put it more bluntly: "As each cycle goes by, the presumption is going to be that the AG across the table is going to destroy you if he or she can."[226]

Similarly, the trend toward unified government in the states is likely to produce more polarization, and less bipartisanship, in state litigation. Until relatively recently, it was not uncommon to find Democratic AGs in otherwise red states.[227] And, because most states had divided government, most AGs had to contend with an opposite-party legislature or governor. It stands to reason—and there is some evidence to support this notion, discussed below—that AGs who hail from a different party than other state leaders will tend to take a more moderate approach to litigation than those who work in states with more one-sided politics. But those "purple" seats are becoming less common, as more states turn to unified government and more AG races follow suit. Of the thirty-one states that had unified government in 2017, at least twenty-seven had same-party AGs.[228]

Here too, it is easier to hypothesize about polarization than to measure it, but what we know about state litigation suggests that partisanship is playing a more dominant role. For example, research on state amicus briefing 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.[229]

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225. Greenblatt, *supra* note 219 (quoting Paul Nolette).

226. *Id.* (quoting Jim Tierney).

227. *See* Greenblatt, *supra* note 98 (comparing the total number of Republican AGs in the United States in 1999 and 2003).

228. *Compare* NAT'L CONF. OF STATE LEG., 2017 STATE & LEGISLATIVE PARTY COMPOSITION (Mar. 1, 2017), http://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_2017_March_1_9%20am.pdf [https://perma.cc/Q8RT-WBR7] (showing party composition of state legislatures and governors), *with Attorney General (State Executive Office)*, BALLOTPEDIA, https://ballotpedia.org/Attorney_General_(state_executive_office) [https://perma.cc/KSN8-3HMZ] (showing party control of state AG seats). We say "at least" because Hawaii's AG is technically a non-partisan official, appointed by the state's elected governor. *See id.*

229. Morris, *supra* note 103, 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 Commerce Clause cases were the most common sites of interstate conflict. *Id.*

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 . . . . [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."[230]

That sense of shared interest may have eroded in recent years. A 2014 study by Professor 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.[231] In 35% of the cases during that period, states either squared off against each other or collaborated on briefs with a strong partisan slant.[232]

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."[233] He found partisanship to be playing a dominant role in "policy-blocking" litigation as well—a category of litigation that he defines as "state legal challenges to regulatory actions by federal policymakers"[234]—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 raise important questions about how to measure partisanship and polarization in the litigation context. One might try to code the 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.[235] Instead, most

230. Clayton, *supra* note 103, at 539.

231. Paul Nolette, *State Litigation During the Obama Administration: Diverging Agendas in an Era of Polarized Politics*, 44 PUBLIUS 451, 455–56 (2014).

232. *See id.* at 455–57, 457 tbl.1 (discussing the increase in horizontal conflicts involving partisan participation among AGs from 1999 through 2013).

233. NOLETTE, *supra* note 13, at 30–31. 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.* at 31.

234. *Id.* at 31–32.

235. 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*

researchers have focused on the identity of the AGs who participate in the relevant case or brief. Nolette identifies partisanship by a head count of participating AGs.[236] 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 that a brief signed by twenty Democrats and five Republicans registers the same way regardless of whether there are twenty Democratic AGs in office or forty-five.

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 Margaret Lemos and 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.[237] If state amicus activity were partisan, one would expect cosigners to be from the same party and opposing briefs to be filed by AGs from different parties. Professors Lemos and Quinn 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.[238] When AGs appeared as amici on only one side of a case, they tended to do so in bipartisan coalitions.[239] (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.)[240]

Partisan patterns do not, of course, prove that partisanship is *causing* AGs to act.[241] Virtually no researchers have sought to tease out different

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*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); Young, *Blowing Smoke*, *supra* note 161, at 11–12 (noting that the inconsistent nature of these classifications poses a significant problem in accurate coding).

236. In his study of amicus briefs, for example, Professor Nolette defines cases as partisan in which Republican or Democratic AGs constituted at least 80% of participating AGs. Nolette, *supra* note 231, at 455. Nolette does not specify how he identifies polarization in multistate litigation.

237. Lemos & Quinn, *supra* note 143, at 1233, 1243.

238. *Id.* at 1251–52.

239. *Id.* at 1268.

240. *Id.* at 1255–56.

241. A focus on brief-joining may also tend to overstate the importance of partisanship, in the sense that it may capture relatively low-stakes position-taking rather than truly impactful legal action. The AG who supplies the twentieth signature to an amicus brief is probably not devoting a

drivers for state litigation. The leading exception is Colin 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.[242] 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.[243]

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 main consequence of non-participation is exclusion from the settlement proceeds, other state AGs may see little advantage to sitting it out.[244]

As Professor Provost's study indicates, moreover, AGs' own partisan affiliations may be less significant in some cases than the ideological

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great deal of her office's resources to the case, and her decision to join is unlikely to have much impact on the law. Such brief-joining may offer opportunities for AGs to signal to and satisfy co-partisans—and such behavior may in turn have ripple effects for other aspects of AGs' work—but nonetheless is meaningfully different from, say, spearheading litigation on behalf of the state as party.

242. *See* Colin Provost, *An Integrated Model of U.S. State Attorney General Behavior in Multi-State Litigation*, 10 ST. POL. & POL'Y Q. 1, 10, 14–15 (2010) [hereinafter Provost, *Integrated Model*]; Colin Provost, *State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism*, 33 PUBLIUS, Spring 2013, at 37, 47–49 [hereinafter Provost, *State Attorneys General*]; Colin Provost, *The Politics of Consumer Protection: Explaining State Attorney General Participation in Multi-State Lawsuits*, 59 POL. RES. Q. 609, 612–15 (2006) [hereinafter Provost, *Politics of Consumer Protection*].

243. Provost, *Integrated Model*, *supra* note 242, at 15–17.

244. NOLETTE, *supra* note 13, at 28 ("When a regulatory settlement 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.").

commitments of the state's citizens—or, perhaps, of other state officials.[245] 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. We take up those questions next.

### *B. Horizontal and Vertical Litigation*

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.[246] The classic conflict 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 potent 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 its preferences on a dissenting minority group of states. Classic examples here are the fugitive slave laws, which the slaveholding states that dominated the national government before the Civil War enacted to force the abolitionist North to go along with slavery.[247]

Vertical conflict is primarily about each state's right to go its own way on particular questions. When Alfonso Lopez successfully challenged Congress's authority under the Commerce Clause to restrict guns in

245. Provost, *Integrated Model*, *supra* note 242, at 17; *see also* Lemos & Quinn, *supra* note 143, at 1263–66 (making this point and using the states' briefing in *District of Columbia v. Heller* as an example).

246. *See* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 109–10 (2001) (defining and contrasting "vertical" and "horizontal aggrandizements").

247. *See id.* at 121–24.

schools,[248] 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. Generally speaking, the same will be true of other "federal power" claims, as we defined them in the previous Part.

Horizontal conflict, on the other hand, now mostly takes the form of fights for the right to control national policy. Both Texas's challenge to DAPA and the blue states' efforts to protect DACA from repeal by the Trump Administration are arguable examples, given the federal government's plenary power over immigration matters.[249] Similarly, in *Massachusetts v. EPA*, one group of states[250] thought that the EPA should regulate greenhouse gases as air pollutants under the Clean Air Act; another group[251] thought it should not. Both were trying to make policy for the whole country—and still are, in extensive litigation concerning President Trump's environmental policies.[252] (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.)[253] Thus, these sorts of claims often involve conflict among states over the content of national policy rather than carving out space for state

248. United States v. Lopez, 514 U.S. 549, 567–68 (1995).

249. We say "arguable" because, to the extent that DACA and DAPA sought to centralize the discretionary judgment about whom to deport in the White House or Main Justice, the defeat of those policies 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.

250. 549 U.S. 497, 505 n.2 (2007) (listing California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington).

251. *Id.* at 505 n.5 (listing Alaska, Idaho, Kansas, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Texas, and Utah).

252. *See* Juliet Eilperin, *NYU Law Launches New Center to Help State AGs Fight Environmental Rollbacks*, WASH. POST (Aug. 16, 2017), https://www.washingtonpost.com/politics/nyu-law-launches-new-center-to-help-state-ags-fight-environmental-rollbacks/2017/08/16/e4df8494-82ac-11e7-902a-2a9f2d808496_story.html ?utm_term=.18e432b374ca [https://perma.cc/MU6Z-TJKV]. Blue state AGs announced that they would sue to block President Trump's rollback of President Obama's "clean power plan" long before the new plan was unveiled in the summer of 2018. *See* Press Release, David J. Hayes, Exec. Dir., NYU State Energy & Envtl. Impact Ctr., State Attorneys General Ready to Sue EPA Over Clean Power Plan Repeal (Nov. 28, 2017), http://www.law.nyu.edu/centers/state-impact/news/ags-ready-to-sue-epa-over-clean-power-plan-repeal [https://perma.cc/4772-7G2G]; *see also* Press Release, Office of Attorney Gen. Maura Healey, AG Healey Leads Statement From 20 State Attorneys General Announcing Intent to Sue Over EPA Rollback of Clean Car Rule (Aug. 2, 2018), https://www.mass.gov/news/ag-healey-leads-statement-from-20-state-attorneys-general-announcing-intent-to-sue-over-epa [https://perma.cc/TK3S-PVC6].

253. *See, e.g.*, Engine Mfrs. Ass'n v. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 247, 257–58 (2004) (accepting industry argument, supported by the United States as amicus, that California's rules requiring fleet operators of vehicles to purchase low-emissions vehicles were subject to preemption by more permissive federal standards).

policy diversity.[254] The same is true of cases in which states seek to enforce federal rights—constitutional or statutory—or use state law to create what is effectively a nationwide regulatory regime.

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.[255] Although many observers have traditionally ascribed a conservative political valence to state autonomy in general, thoughtful scholars on the Left have recognized that to be a mistake at least since the George W. Bush administration.[256] By contrast, the interests in horizontal cases—where the parties dispute what the uniform

254. Horizontal conflicts may also involve wealth transfers from one part of the country to another. Southerners objected to the national tariff in the nineteenth century on the ground that it protected infant industry in the North while resulting in higher prices for imported goods in the South. *See, e.g.*, DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 271–73 (2007). Likewise, many have argued that the 2017 national tax overhaul's limit on the deduction for state and local taxes transfers wealth from blue to red states. *E.g.*, Michael Hiltzik, *The Republican Tax Plan is an Arrow Aimed at Blue States like California*, L.A. TIMES (Nov. 3, 2017), http://www.latimes.com/business/hiltzik/la-fi-hiltzik-tax-california-20171103-story.html [https://perma.cc/T26B-HEEK]. For that reason, blue states have filed suit to challenge the tax overhaul. *See* Joseph De Avila, *Democratic States Sue Trump Administration Over Tax Overhaul*, WALL ST. J. (July 17, 2018), https://www.wsj.com/articles/democratic-states-sue-trump-administration-over-tax-overhaul-1531851068. But even these fights—ostensibly over money—were actually about far more substantive policy preferences. The tariff promoted one way of life (industrialization) over another (agrarianism), while the tax reform favors a low tax–low services model of state regulation over a high tax–high regulation model.

255. *See* Baker & Young, *supra* note 246, at 140–42, 152–55.

256. *See, e.g.*, David J. Barron, *Reclaiming Federalism*, DISSENT MAG. (Spring 2005), http://www.dissentmagazine.org/article/reclaiming-federalism [https://perma.cc/2GVP-LXCE] ("With all three branches of the national government in conservative hands, progressives have begun to wonder whether federalism might be useful after all."); Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY J. (Spring 2012), http://democracyjournal.org/magazine/24/a-new-progressive-federalism [https://perma.cc/B9Q7-R42P] (arguing that federalism "allows racial minorities and dissenters to act as efficacious political actors, just as members of the majority do"). Today's California has taken up the mantle of resistance to national authority passed down from John C. Calhoun's South Carolina. *See, e.g.*, Don Thompson & Elliot Spagat, *Jeff Sessions, California Governor Clash as Feud Escalates*, U.S. NEWS (Mar. 7, 2018), http://www.usnews.com/news/best-states/california/articles/2018-03-07/trump-administration-sues-california-over-sanctuary-laws [https://perma.cc/3LFM-BBE8] (reporting new U.S. suit to preempt California's immigrant sanctuary laws). And the next great vertical federalism conflict may well take place over blue states' efforts to legalize marijuana. *See* Sadie Gurman, *Sessions Terminates US Policy that Let Legal Pot Flourish*, AP NEWS (Jan. 4, 2018), https://apnews.com/19f6bfec15a74733b40eaf0ff9162bfa [https://perma.cc/YF9R-PJT7] (reporting how Jeff Sessions's lifting of Obama-era policy "now leave[s] it up to federal prosecutors to decide what to do when state rules collide with federal drug law").

federal rule should be—are more likely to be shorter-term regulatory interests with an identifiable political valence.[257]

To the extent that these observations are true, they suggest several normative propositions—propositions that, we believe, many critiques of state litigation today imply but rarely make 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 Solicitor General Kevin Newsom's amicus brief on behalf of Alabama, Louisiana, and Mississippi, supporting the pot-smokers in *Gonzales v. Raich*.[258] 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.[259]

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

A second normative proposition is that AGs 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 clearing 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

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257. To be clear, we do not mean to say that interests in particular regulatory policies are inherently short-term. The blue states' suit to force national limits on greenhouse gases in *Massachusetts v. EPA*, for instance, asserted a very long-term interest. And certainly, *constitutional* arguments are long term in their consequences if adopted. The more short-term factor is the litigating states' expectations concerning the relative propensity of either the national or state governments to promote their favored policies at any given political moment.

258. 545 U.S. 1 (2005).

259. Brief of the States of Alabama, Louisiana, and Mississippi as Amici Curiae in Support of Respondents, Gonzales v. Raich, 545 U.S. 1 (2005) (No. 03-1454), 2004 WL 2336486, at *1–3.

sort of state litigation undermines our federal system's ability to manage polarization.

We think there is a lot of truth to these propositions, but they are not the full story. For a variety of reasons, many state public-law lawsuits will not fall cleanly into one category or the other. And even in clearly vertical cases, states may have legitimate structural interests that favor national action. Finally, horizontal litigation may serve either individual rights or other structural values—principally separation of powers—that are independently worth promoting.

First, many cases have both vertical and horizontal dimensions. For instance, the ACA 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.[260] 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 effectively sought to force the blue states to stick with the prior, less universal regime.

Likewise, cases that look horizontal may have an important vertical dimension. As we explained above, many state challenges to national policy nowadays rely on separation of powers theories. These state challenges 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.[261] These cases may seem horizontal because they don't purport to limit national authority overall. But,

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260. *See, e.g.*, Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 LAW. & CONTEMP. PROBS. 29, 33, 44, 46–47 (2012) (explaining the free-rider problem in the interstate healthcare market due to multistate insurance operations and cross-state hospital use); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 35–50 (1995) (summarizing the traditional economic justifications for national authority).

261. *See, e.g.*, Texas v. United States, 809 F.3d 134, 150 (5th Cir. 2015), *aff'd per curiam by an equally divided court*, 136 S. Ct. 2271 (2016) (summarizing the States' claims that the President's immigration policy violated both separation of powers and the APA); Marian Johns, *14-State Coalition Challenges Consumer Financial Protection Bureau's Constitutionality*, LEGAL NEWSLINE (Aug. 6, 2018), https://legalnewsline.com/stories/511489533-14-state-coalition-challenges-consumer-financial-protection-bureau-s-constitutionality [https://perma.cc/W75X-MKTQ] (describing claim by Texas and thirteen other states that the CFPB violates separation of powers principles requiring that executive officers not be unduly insulated from accountability to the President).

particularly in a world of polarization and gridlock, they often render federal action impossible (or at least vanishingly unlikely) as a practical matter.[262]

Second and closely related, there can be legitimate disagreement even in clearly vertical cases about where the institutional interests of the states lie. International relations scholars have argued that contemporary nations exercise their sovereignty by entering into cooperative arrangements with other nations to address problems, like climate change or the international drug trade, that they cannot effectively address alone.[263] 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."[264] 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 foster the sort of autonomy that can mitigate national polarization. One of us has argued 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.[265] Cases like *Garrett* and *Kimel*, for example, did not take the potentially contentious issue of disability rights off the national agenda; they simply allowed state institutions to get away with

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262. *See generally* Clark, *supra* note 88, at 1339–41 (explaining how enforcing the rules of the federal lawmaking process safeguards federalism).

263. *See, e.g.*, ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 26–29 (1995).

264. *See, e.g.*, Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010) (arguing that the purpose of federal power generally is to solve collective action problems).

265. *See, e.g.*, Young, *State Sovereign Immunity*, *supra* note 171, at 51–58; Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEXAS L. REV. 1, 63–65, 112–15, 121 (2004).

violating federal law without paying damages.[266] Yet this argument may underappreciate the extent to which removing the threat of damages awards enables the 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,"[267] immunity claims may play a role similar to other assertions of vertical autonomy rights. We suspect this possibility is minor[268] but cannot discount it entirely.

All of this helps refine the normative propositions we outlined above. For those who believe that AGs have a critical role to play in vindicating the states' long-term institutional interests—and we count ourselves as members of that camp—it is not enough to ask whether AGs are litigating in bipartisan coalitions or trying to "block" federal policy rather than to "force" it. Likewise, when we observe AGs lining up on both sides of a case, or seeking to impose their own views of good policy on the rest of the nation, we cannot (without more) conclude that any of the participating AGs is putting short-term political or policy gains above state interests. There is no substitute for parsing the particular merits issues in each individual case.

As we have explained, what matters from a federalism perspective is whether the state's litigating position could, if successful, enable *that state* to "go its own way." In an interconnected economy such as ours, one state's autonomy will sometimes be another state's shackles, and we should not be surprised that many such policy disagreements play out along partisan lines. It does not follow, however, that state AGs are doing anything other than playing their traditional role as "representatives of their states"[269] when they push for more rather than less federal law.

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266. Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000). States remain subject to federal requirements, however, and plaintiffs can often secure injunctive relief against them and (sometimes) damages from the responsible state officers. 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 TEXAS L. REV. 1037, 1095 (2001).

267. *See* Bulman-Pozen & Gerken, *supra* note 90, at 1310.

268. 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 University v. Doe* leave state officials who are "uncooperatively" administering federal spending power regimes subject only to the cutoff of federal funds by the responsible federal agency. *See* 536 U.S. 273, 279, 283, 286–89 (2003) (rejecting private enforcement under § 1983 of a federal conditional spending statute). That remedy involves considerable political costs and, as a result, is rarely attempted in practice. *See* Rosado v. Wyman, 399 U.S. 397, 426 (1970) (characterizing the cutoff of federal funds as a "drastic sanction").

269. *See* NOLETTE, *supra* note 13, at 200–01 (arguing that state AGs opposing state policymaking autonomy have departed from their traditional role).

That said, there have been—and will continue to be—important cases in which state AGs use litigation to lock in particular policies in ways that run counter to state autonomy. For example, although *United States v. Windsor* 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,[270] the Court's decision in *Obergefell* imposed a single national answer to the question of same-sex marriage.[271] That resolution left people concentrated in blue states very happy, but it imposed a piece of their social vision on an unwilling group of red states. And in arguing against the rights claims in *Windsor* and in favor of the claimants in *Obergefell*, some of the states made arguments that may be invoked to undermine state interests in future litigation concerning state autonomy.[272]

Perhaps not surprisingly, the briefing patterns in *Windsor* and *Obergefell* were decidedly partisan. Thirty-six states filed amicus briefs in *Obergefell*: nineteen in support of same-sex marriage rights and seventeen opposed. The AGs supporting the rights claim were all Democrats, while those opposing the claim were all Republicans.[273] The states arguing against the rights were, moreover, pretty solidly red: fourteen had a unified Republican government; two had Republican-controlled legislatures and Democratic governors; and one had a Republican-controlled legislature and an independent governor.[274] The states on the pro-rights brief were more mixed: only seven had a unified Democratic government; six had Republican governors; and in nine the Republican party controlled one or both houses of the legislature.[275] Thus, in many of those states, the Democratic AG was taking a position on marriage that other members of state government (perhaps a majority) may have opposed. It is surely no coincidence that same-sex marriage was already legal in every one of the pro-rights states, either as

270. 570 U.S. 744, 766–68 (2013).

271. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

272. *See, e.g.*, Brief of the Commonwealth of Virginia, *supra* note 10, at 33 ("[I]t is indisputable that whenever such conflicts arise [between federalism and individual rights], the Fourteenth Amendment trumps federalism" and suggesting that federalism only matters if it pushes in the same direction as individual rights claims); *Windsor* Pro-DOMA States' Brief, *supra* note 151, at 7–8 (questioning whether "federalism ha[s] any residual connection to the equal protection standard applicable to the federal government" and objecting "to the idea of leveraging individual rights claims using the Constitution's structural safeguards").

273. *See supra* note 10 for briefs filed by state amici. Party affiliations of state AGs can be found at https://ballotpedia.org/Attorney_General_(state_executive_office) [https://perma.cc/YX8Q-6Q2E].

274. *See* NAT'L CONF. ST. LEGISLATURES, *supra* note 74 (showing party control of state governments).

275. *Id.* In some of those states, the Republican party controlled both the governor's seat and part of the legislature.

a result of a court ruling or (more commonly) a state statute.[276] Similarly in *Windsor*, the seventeen Republican AGs who signed the state brief defending DOMA—a restriction on state power—hailed from states with constitutional provisions or legislation consistent with the Act.[277]

This is horizontal conflict in action: states using federal law (statutory or constitutional) to extend their own vision of the good nationwide. Even if one thinks—as we do—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. The federalism side of the equation is complicated by the fact that one of the most important things states do is to define themselves as moral and political communities 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.[278] The fact that the pro-rights states were making a statement against interest, to some extent, may have made their arguments that much more weighty.[279] More broadly, it may well promote state interests in the long term for states to be recognized as sources of important insights

276. *Same-Sex Marriage, State by State*, PEW RES. CTR. (June 26, 2015) http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state [https://perma.cc/DCN4-KRMC] (showing same-sex marriage laws over time).

277. Lemos & Quinn, *supra* note 143, at 1258. The briefing patterns in *District of Columbia v. Heller*—concerning the individual right to bear arms under the Second Amendment—are perhaps even more interesting in this regard. The states filed warring amicus briefs in *Heller*, and the anti-gun brief was signed by Democratic AGs only. Yet Democrats also accounted for fifteen of the thirty-one AGs who signed the pro-gun brief—"arguing not only against the typical Democratic position on guns, but also against state power." The likely explanation is that "virtually all of the AGs on the pro-gun brief hailed from states in the West, Midwest, and South—where support for gun rights typically is strongest." *See id.* at 1263–64. Similarly, the AGs who signed pro-gun amicus briefs in *McDonald*, arguing that the Second Amendment right to bear arms should be incorporated against the states, represented states that already guaranteed "an 'individual' right to keep and bear arms in their own constitutions, often in terms more expansive than those in the Second Amendment." Joseph Blocher, *Popular Constitutionalism and State Attorneys General*, 122 HARV. L. REV. F. 108, 111 (2011).

278. *Cf.* Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in* United States v. Windsor, 2012–2013 CATO SUP. CT. REV., at 117, 133–37 (2013) (discussing this aspect of the same-sex marriage debate).

279. *See* Michael E. Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355, 366 (2012) (highlighting "those instances where a large number of SAGs file amicus briefs, often jointly, that take a position *against* the presumed state interest in a federalism dispute and when the Justices appear to take special note of that incongruence when rendering that decision").

on questions like this.[280] At the very least, we acknowledge that the cost to federalism may be worth paying in important cases.

The same may be true of other horizontal claims, such as separation of powers challenges to executive unilateralism that do not foreclose federal legislation. If national policymaking is likely one way or another, there may be no immediate payoff from the perspective of federalism. Yet the longer-term effect of such litigation may be to reinforce structural limitations on federal executive authority that, on the whole, work to the benefit of the states.[281] As in the individual rights setting, moreover, there may be an independent value to state participation in fundamental questions about the structure of American government.

The question remains whether distinctly partisan litigating patterns by state AGs might deepen the social and political cleavages that mark this era of intense polarization. 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 the desire to vindicate sincere views about the law that happen to correspond to the positions taken by one's political party.[282] Even clearly vertical claims asserting institutional interests can be brought for partisan reasons, 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.[283]

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280. *See generally* Francis, *supra* note 91, at 1048–51 (arguing that states benefit from voicing their views on federal law through litigation); *cf.* Solimine, *supra* note 279, at 375–76 (offering a normative defense, grounded in a variation on political-safeguards theory, of justices' apparent reliance on state amicus briefs).

281. *See supra* subpart I(C); *see also* Johns, *supra* note 261 (noting separation of powers challenge to the Consumer Financial Protection Bureau).

282. 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* Young, *Blowing Smoke*, *supra* note 161, at 8–17. 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. COMMENTARIES 641, 645, 695 (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 and is not necessarily an antonym to "legal."

283. *See* Young, *Dark Side*, *supra* note 79, at 1308–10.

Nevertheless, there is a somewhat different reason to worry about partisan motivations—a reason that goes to the heart of our exploration of state public-law litigation and polarization. One might grant the point about Madisonian contestation and still worry about the consequences of branding contentious legal issues as "red" or "blue." It bears emphasis that the relevant cases would, for the most part, be brought with or without the states: most litigation in which AGs participate either already involves other plaintiffs—typically private individuals or organizations[284]—or could be brought by private parties instead of states. One might therefore take the view that state participation serves only to exacerbate the ill effects of polarization, by bringing explicitly partisan warfare to the courts. That may well be a cost, but it depends on a comparative assessment, not only of different categories of state litigation—our focus thus far—but also of state litigation and its alternatives, a question we take up in the next Part.

## IV. State Governments as Public-Law Litigators

Any normative assessment of state public-law litigation must contend with a comparative question: state litigation *as compared to what*? One obvious alternative to litigation (regardless of the parties) is *regulation*, and a common strain in critiques of state litigation is that it crowds out other more democratic means of resolving contested policy questions.[285] That critique might gain force to the extent that state litigation itself appears to be a partisan affair, as partisan political issues seem best resolved through political processes. But the force of the objection depends on whether more democratic—and straightforwardly political—modes of policymaking are in fact meaningful alternatives, and on how litigation by states compares to the alternative of litigation by private individuals and groups. This Part explores those comparative questions, situating state litigation within the broader phenomenon of public-law litigation generally.

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284. We say "typically" because state AGs sometimes litigate alongside federal agencies as well. *See, e.g.*, NOLETTE, *supra* note 13, at 51–55 (describing coordinated litigation by state and federal agencies targeting pharmaceutical pricing practices); PHILIP A. LEHMAN, N.C. DEP'T OF JUSTICE, NATIONAL MORTGAGE SETTLEMENT: EXECUTIVE SUMMARY OF MULTISTATE/FEDERAL SETTLEMENT OF FORECLOSURE MISCONDUCT CLAIMS 1, http://portal.hud.gov/hudportal/documents/huddoc?id=natlsetexecsum%282%29.pdf [https://perma.cc/TR4X-MR96] (describing joint state-federal settlement involving "robo signing" practices by mortgage banks).

285. *E.g.*, NOLETTE, *supra* note 13, at 203–04 ("Rather than relying on typical policymaking processes such as legislation or rule making, the AGs use the tools of adversarial legalism to influence policy."); Margaret A. Little, *Pirates at the Parchment Gates: How State Attorneys General Violate the Constitution and Shower Billions on Trial Lawyers*, COMPETITIVE ENTER. INST. ISSUE ANALYSIS, 2017, at 3 ("These lawsuits violate the Constitution's separation of powers, particularly the assignment of lawmaking, taxing, and expenditure powers to the legislature."); *supra* note 11 and accompanying text.

### *A. State Lawsuits as a Subset of Public-Law Litigation*

As we have seen, state litigation sometimes has the practical effect of setting policy for the nation as a whole, and it generally does so outside the normal lawmaking processes for establishing federal regulatory norms. The states' tobacco settlement, for example, established nationwide rules for tobacco companies that bound basically the entire industry—all without the enactment of any federal statute or regulation. Critics have seized on this feature of state litigation, arguing that AGs are taking contested, and often deeply partisan, issues off the democratic table and throwing them instead to the courts.

Such criticisms find longstanding analogues in critiques of public-law litigation, even when it is undertaken by private parties and nongovernmental organizations. At least since the 1960s, public-law litigation has been a central part of the American legal landscape. Some of this litigation has been constitutional, such as the NAACP's campaign against Jim Crow, and some has been statutory, such as litigation by the Sierra Club, the National Resources Defense Council, and other groups to enforce environmental standards. But there is no doubt that American public law counts on nongovernmental actors to develop and enforce critical constitutional and statutory norms. Elaboration and implementation of legal norms through adversarial litigation is, in Robert Kagan's memorable phrase, "the American way of law."[286]

In his seminal article four decades ago, Abram Chayes observed that "the dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies."[287] Similarly, the influential Hart and Wechsler casebook documents a shift from a "dispute resolution" model of judicial power (in which judicial articulation and implementation of norms arise out of deciding concrete disputes between private parties) to a "public rights" or "law declaration" model (in which litigation is a vehicle for articulating public norms of broad applicability beyond the parties to the case).[288] Resistance to the public rights model of litigation has often centered on concerns about courts' role in governance.[289] As Professor Chayes acknowledged, public-

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286. KAGAN, *supra* note 17.

287. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

288. FALLON ET AL., *supra* note 100, at 3–76; *see also* Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 14 (1979) ("The task of a judge, then, should be seen as giving meaning to our public values and adjudication as the process through which that meaning is revealed or elaborated.").

289. *See, e.g.*, SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 233 (2010) (noting that "[a]mong the most frequent criticisms" of the "large

law litigation tends to produce relief that is not "confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees."[290] Just as state AGs' settlements over tobacco and prescription drug pricing effectively produced national regulatory regimes,[291] public-law litigation brought by private parties and NGOs has often involved not only judicial lawmaking but also the establishment of ongoing remedial regimes affecting large swaths of society. And it has been criticized accordingly: like state litigation, public-law litigation is often charged with blurring the line between litigation and legislation and with establishing ongoing regulatory regimes outside the normal lawmaking process.[292]

A related set of criticisms focuses on the practical impact of public-law litigation on governance. Using litigation to articulate and implement legal norms is an important aspect of what Robert Kagan called "adversarial legalism," which he decried as "a markedly inefficient, complex, costly, punitive, and unpredictable method of governance and dispute resolution."[293] The "complexity, fearsomeness, and unpredictability" of American-style litigation "often deter the assertion of meritorious legal claims and compel the compromise of meritorious defenses"; worse, Kagan suggests, "Adversarial legalism inspires legal defensiveness and contentiousness,

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role of courts and lawsuits in American policy implementation" is "that it is deeply undemocratic, unsuited to a political community committed to representative democracy and legislative supremacy"); Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 428 (1977) (observing that institutional reform litigation places judges "in a new role: they become responsible for implementing broad reforms in complex administrative systems, without ordinarily having expertise in either public administration or the particular institutional field in question").

290. Chayes, *supra* note 287, at 1302.

291. *See* NOLETTE, *supra* note 13, at 22–24, 45–53.

292. *See, e.g.*, Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 686, 707–12 (1978). Moreover, to the extent that state AGs can use the proceeds of prior litigation to fund their ongoing activities, they may be able to set their own agendas without the same level of supervision provided by the typical appropriations process. *See supra* note 126 and accompanying text (discussing "revolving-fund" statutes, which permit some state AGs to retain certain litigation proceeds); Lemos & Minzner, *supra* note 125, at 873–74 (suggesting how self-funding mechanisms for public enforcers might interact with the appropriation process).

293. KAGAN, *supra* note 17, at 4; *see also id.* at 198–206 (emphasizing the expense, inefficiencies, and uncertainty resulting from a regulatory system that has litigation at its center). We take "adversarial legalism" to be a broader category than "public law litigation." As Sean Farhang has pointed out, "[t]he vast bulk of private litigation enforcing federal statutes (well over 90 percent) is neither a story of impact litigation by interest groups seeking to make policy, nor of suits challenging the policymaking prerogatives of national authorities." FARHANG, *supra* note 289, at 11.

which often impede socially constructive cooperation, governmental action, and economic development, alienating many citizens from the law itself."[294]

Finally, the notion—often implicit in critiques of programmatic state litigation—that AGs should stick to more prosaic and uncontroversial functions, like enforcing the auto lemon laws, likewise echoes the broader literature on public-law litigation. Critics of the federal Legal Services Corporation (LSC) during the 104th Congress, for example, prohibited LSC grantees from filing class actions on the ground that "impact litigation" was a distraction from providing bread-and-butter services to individual indigent clients.[295] The class action literature warns that cause-oriented lawyers may be poorly situated to represent the interests of some of their clients, who may be more concerned about more immediate interests than advancing the broader cause.[296] More generally, some commentators have defended the private dispute resolution model as better suited to the institutional competences and legitimacy of courts.[297] State AGs, in other words, are hardly the only people involved in public-law litigation who have been urged to stick to a less grandiose conception of their institutional role.

The fact that common criticisms of state public litigation apply, for the most part, to public-law litigation *generally* does not mean those criticisms are unimportant. But it does raise the "compared to what?" question we flagged at the beginning of this Part. Robert Kagan grounds the adversarial legalistic structure of our governance in the combination of Americans' demand for justice and distrust of government.[298] Similarly, Sean Farhang attributes the pervasiveness of private enforcement of public regulation to political polarization and frequent bouts of divided government.[299]

None of these features of American public life are going away anytime soon. On the contrary, as Part I suggested, current rates of polarization may make conventionally "political" solutions to contested policy questions especially unlikely, especially at the federal level. Meanwhile, given the central role that public-law litigation plays in our legal system, reining in state AGs would not (in most cases) result in less adversarial legalism, but

294. KAGAN, *supra* note 17, at 4.

295. *See* Legal Services Corporation, Supplementary Information Regarding the Final Rule on Class Action Participation, 61 Fed. Reg. 63,754 (Dec. 2, 1996) (to be codified at 45 C.F.R. pt. 1617) ("The legislative history of this provision indicates an intent that legal services programs should focus their resources on representation of individual poor clients and not be involved in any class actions.").

296. *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471, 490–91, 493 (1976) (discussing the potential conflict in civil rights cases between the ideological goals of class action lawyers and the best interests of their clients).

297. *See, e.g.*, Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–95, 400–05 (1978) (arguing that "polycentric" problems are best solved by legislators).

298. KAGAN, *supra* note 17, at 229.

299. FARHANG, *supra* note 289, at 216–17.

simply a shift from state litigation to litigation by class action lawyers, NGOs, and the like.

In short, the alternative to much public litigation by states is probably not—or at least often not—resolution of the underlying controversy by political or bureaucratic means. In our view, then, the more salient question is one that has been largely ignored in the literature to date: how do states compare with other institutional options for pursuing public-law litigation?

### *B. States as Aggregate Litigants*

Public-law litigation typically asserts claims on behalf of diffuse interests, such as consumers, racial minorities, or persons exposed to environmental harms. One of the central questions in American procedural law is how to facilitate litigation by numerous and diffuse persons—such as citizens who benefit from a clean environment—who would likely not have either the incentives or the wherewithal to bring individual lawsuits. The class action is the classic solution, though there is also multi-district litigation, the mass action permitted under some states' laws, and the rule that organizations can have standing to sue on behalf of their members. We think it makes sense to view state governments as another such mechanism, and so it will be useful to compare state governmental plaintiffs to other means for aggregating diffuse interests in litigation.

We begin with points of similarity. States have many of the same interests that private parties do, and in many cases state litigation will have private analogs (or may be brought contemporaneously with private parties). States own property, for example, and they enter into contracts. And not surprisingly, when they suffer injuries to these sorts of proprietary interests, states have no trouble establishing their standing to sue.[300]

What may be less obvious is that these sorts of interests may support important forms of public-law litigation against the national government. For instance, in *Massachusetts v. EPA*, the Bay State and several other state governments sought to force the EPA to regulate greenhouse gases under the Clean Air Act.[301] Although the Supreme Court's ruling on standing relied importantly on the Commonwealth's *sovereign* interests, the Court noted that "Massachusetts does in fact own a great deal of the 'territory alleged to be affected'" by climate change.[302]

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300. *See, e.g.*, Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 406–07 (1995).

301. 549 U.S. 497 (2007).

302. *Id.* at 519. It is hard to tell whether Massachusetts could have established standing based on this ownership interest alone. We think, however, that the real difficulty with Massachusetts's claim for standing involved the causation elements of standing. As we discuss further *infra*, the causes of climate change are so multifarious, and the likelihood that any given regulatory change would redress it are so murky, that "special solicitude" for the Commonwealth's state-ness may

Likewise, an important category of legal conflict between the national and state governments involves cooperative federalism programs in which states participate in exchange for federal funds. The Court frequently likens these statutory regimes to contracts between the national government and the states, and it seems clear that state governments could challenge federal administration of the regime based on their contractual interest in enforcing the terms of the deal as the states understand them.[303]

States also have a range of non-proprietary interests that arise out of being governments. Such interests are divvied up into confusing categories of "sovereign" and "quasi-sovereign" interests,[304] though most are relatively straightforward without the terminology. Governments often have responsibilities and prerogatives—regulatory and otherwise—with respect to property they do not own; hence Massachusetts had an interest in "preserv[ing] its sovereign territory" in the climate change case.[305] Governments also have responsibilities to provide benefits to their citizens that can be increased by harmful activity; recall that, in the tobacco litigation, states sued to redress their increased Medicaid expenses arising from their citizens' tobacco use.[306] And because governments have regulatory responsibilities, they suffer cognizable injuries when they are prevented from enforcing their own laws. That is why, for example, a state government that intervenes in litigation contesting the validity of a state statute has standing to appeal a judgment striking the statute down, even if neither of the original parties files an appeal.[307]

Similarly, state governments can be injured by actions that change or make it more difficult to perform their regulatory responsibilities.[308] In the Texas immigration case, the state argued that it had certain legal

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have been necessary to get it over the hump. But that goes to causation, not to whether the ownership interest was sufficient to support the requisite "injury in fact."

303. *See, e.g.*, Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) (likening spending-power legislation to contracts between the federal and state governments); Bowen v. Massachusetts, 487 U.S. 879 (1988) (entertaining a state's challenge to administration of a federal grant-in-aid program).

304. *See, e.g.*, Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601–02 (1982) (outlining the proprietary, sovereign, and quasi-sovereign interests of states).

305. *Massachusetts*, 549 U.S. at 519.

306. *See, e.g.*, Complaint at 42, Florida v. Am. Tobacco Co., No. CL 95-1466 AH, 1996 WL 788371 (Fla. 15th Cir. Ct.), http://www.tobaccoontrial.org/wp-content/uploads/2015/05/1994-Florida-Attorney-General-Complaint.pdf [https://perma.cc/23D5-57TV].

307. *See* Maine v. Taylor, 477 U.S. 131, 137 (1986) (holding that "a State clearly has a legitimate interest in the continued enforceability of its own statutes"); *see also* Kathryn A. Watts & Amy J. Wildermuth, Massachusetts v. EPA: *Breaking New Ground on Issues Other than Global Warming*, 102 NW. U. L. REV. 1029, 1035 (2008) (noting that "the state . . . has a sovereign interest in preserving its own law" that "should be sufficient for Article III purposes").

308. The Supreme Court has held, for example, that a private organization has Article III injury in fact when a defendant's practices impair the organization's ability to provide services to the population it serves. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982).

responsibilities to all persons lawfully present within its jurisdiction; it was required, for example, to issue such persons drivers' licenses at a net cost to the State of about $130 per license.[309] This example simply illustrated concretely the basic truth that expanding the population for which a state is responsible inevitably increases the burdens of educating, policing, and otherwise supporting that population.[310] Similarly, Massachusetts's recent challenge to the Trump Administration's expansion of religious exemptions to the ACA's contraceptive mandate stressed that, under state law, reductions in employers' federal insurance coverage obligations would trigger corresponding costs as the Commonwealth became obligated to fill any resulting gaps.[311] More generally, because state governments are pervasively involved in cooperative federalism arrangements with federal agencies—sharing regulatory responsibilities over benefits programs, education, environmental protection, homeland security, and any number of other areas—changes in federal regulation will often impact the rights and obligations of state governments under these schemes.

Finally, in addition to pursuing their own interests, state governments frequently sue as *parens patriae* on behalf of their citizens. *Parens patriae* standing typically requires that the state assert a "quasi-sovereign" interest—that is, "a set of interests that the State has in the well-being of its populace."[312] The Supreme Court has acknowledged that *parens patriae* is a "judicial construct that does not lend itself to a simple or exact definition."[313] But the concept becomes somewhat more tractable when considered alongside more conventional (private) forms of claim aggregation. When a state like Massachusetts or Texas files a lawsuit on behalf of its citizens and relies on injuries to *their* interests to support its claim to standing, it is typically doing something akin to what the NAACP and the Sierra Club do when they file lawsuits on behalf of their members.[314]

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309. Brief for the State Respondents at 19, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674).

310. *See* Brief of Amici Curiae Federal Courts Scholars and Southeastern Legal Foundation in Support of Respondents at 7–9, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674). Mr. Young was counsel of record and primary author on this brief.

311. *See* Massachusetts v. U.S. Dep't of Health & Human Servs., 301 F. Supp. 3d 248, 255–56 (D. Mass. 2018). The district court rejected this interest as insufficiently certain to support Article III standing, see *id.* at 258–65, and appeal is pending in the First Circuit as this Article goes to press. One of us has filed an amicus brief in support of the Commonwealth's standing to sue, while remaining agnostic on any issues on the merits. *See* Brief of Professor Ernest A. Young as Amicus Curiae in Support of Plaintiff–Appellant Urging Reversal, No. 18-1514, Massachusetts v. U.S. Dep't of Health & Human Servs. (filed Sept. 24, 2018).

312. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 602 (1982).

313. *Id.* at 601.

314. Dissenting in *Massachusetts v. EPA*, for example, Chief Justice Roberts wrote that "[j]ust as an association suing on behalf of its members must show not only that it represents the members but that at least one satisfies Article III requirements, so too a State asserting quasi-sovereign

The hornbook doctrine of organizational standing allows an association or other membership organization to sue on behalf of its members so long as "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[315] Many national organizations that frequently file claims in federal court are comparable in size to the states. The Sierra Club, for example, claims three and a half million members—enough to be the thirtieth most populous state in the Union, just behind Connecticut and ahead of Iowa.[316] The American Association of Retired Persons (AARP) is roughly the size of California.[317] Such organizations may sue when they can show that at least one member has suffered (or will suffer) an injury in fact.[318] In order to establish standing as *parens patriae*, by contrast, a state must show that the claimed injury affects a "sufficiently substantial segment of [the state's] population."[319] That requirement is not terribly demanding,[320] but it does erect a hurdle that private organizations need not overcome.

*Parens patriae* cases also markedly resemble private class actions, as state AGs represent the interests of citizens who are not themselves formally parties to the suit. The resemblance holds regardless of whether AGs are pursuing monetary remedies for citizens[321] or seeking injunctive or

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interests as *parens patriae* must still show that its citizens satisfy Article III." 549 U.S. 497, 538 (2007) (Roberts, C.J., dissenting). Roberts was objecting to the notion that a state's unique character "dilutes the bedrock requirement of showing injury, causation, and redressability to satisfy Article III." *Id.* But he offered no reason why a state that could meet those requirements should have *less* right to represent its citizens than an association has to represent its members.

315. Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977).

316. *Compare Who We Are*, SIERRA CLUB, https://www.sierraclub.org/about [https://perma.cc/8BMJ-DQKG] (estimating that Sierra Club includes 3.5 million members and supporters), *with* Wikipedia, List States and Territories of the United States by Population, https://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_population [https://perma.cc/58AC-4BLD] (reporting Connecticut's population as 3,588,184 and Iowa's as 3,145,711).

317. *Compare Social Impact*, AM. ASS'N OF RETIRED PERSONS, https://www.aarp.org/about-aarp/company/social-impact/ [https://perma.cc/362Y-GFS3] (claiming "nearly 38 million members"), *with Wikipedia*, List States and Territories of the United States by Population, *supra* note 316 (reporting California's estimated 2017 population as 39,536,653 persons).

318. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 511 (1975) (establishing that an "association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justifiable case had the members themselves brought suit").

319. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982). That requirement serves to differentiate the state's interest from "the interests of particular private parties," and to ensure that the state is "more than a nominal party." *Id.*

320. *See* Lemos, *State Enforcement*, *supra* note 110, at 495 & n.37 (describing courts' treatment of the requirement).

321. *Id.* at 499 (emphasizing similarities between state litigation and damages class actions and

declaratory relief.[322] Indeed, "*parens patriae* and private class actions often proceed in tandem, with public and private attorneys working together" to pursue common goals.[323]

These many points of similarity between state public-law litigation and private alternatives underscore the need to situate the work of state AGs within the broader litigation landscape. In many cases—though not all, a significant qualification to which we return below—state litigation will operate as a supplement to, or a substitute for, similar litigation by private individuals or groups. Understanding state litigation that way helps highlight its comparative strengths, while also focusing attention on potential weaknesses.

### *C. Democratic Litigation?*

The most obvious, and important, difference between state and private litigation is that states are democratic governments. The overwhelming majority of state AGs are independently elected, and those who are not are usually accountable to an elected governor.[324] State law generally provides other checks and balances, such as legislative oversight, budgetary controls, or sunshine laws requiring some degree of public transparency. These mechanisms are by no means perfect,[325] but they do suggest that a state AG should be more accountable to a state's citizens than the leaders of an organization like the Sierra Club are to its members.

In an ideal world, moreover, one might imagine that AGs' obligation to represent diverse constituencies of voters might cause them to adopt more moderate litigating positions than private groups—thereby ameliorating some of the concerns about partisanship and polarization that we explored above. A state AG represents the whole state—not just the party that elected her.[326] And although partisan assumptions surely shape every AG's conception of the public interest, we have little doubt that AGs do frame that interest more broadly. State AGs' responsibilities cut across a wide range of

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citing sources).

322. *See generally* Margaret H. Lemos, *Three Models of Adjudicative Representation*, 165 U. PA. L. REV. 1743, 1757–63 (2017) (comparing public suits and injunctive class actions of the sort that public-interest groups often spearhead).

323. Lemos, *State Enforcement*, *supra* note 110, at 499.

324. In Tennessee, the state AG is appointed by the Supreme Court, considered an officer of the judicial branch, and serves an eight-year term. *See* TENN. CONST. Art. VI, § 5. This arrangement appears to be unique. *Attorney General of Tennessee*, BALLOTPEDIA, https://ballotpedia.org/Attorney_General_of_Tennessee [https://perma.cc/C6ZC-4UE8].

325. *See generally* Margaret H. Lemos, *Democratic Enforcement? Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929 (2017) (discussing some weaknesses of public accountability mechanisms).

326. NAAG, *supra* note 95, at 45 (explaining that the AG is the "principal legal representative of the public interest for all citizens").

issues, from criminal enforcement to consumer welfare to environmental protection to preventing terrorism.[327] They are, therefore, accountable and responsive to broader interests than the subset of their citizens directly affected by a particular lawsuit. And because state AGs increasingly act on a national stage—collaborating with other states, taking part in cooperative federalism schemes with national officials, and soliciting campaign contributions from national interest groups—they cannot afford to take too parochial a perspective on their activities.

Thus, to the extent that one is concerned that public-law litigation is less democratic than alternate modes of policymaking, one might find good reason to prefer state litigation to analogous litigation by private parties. This point comes with several essential caveats, however. The political and national pressures bearing on state AGs may be a double-edged sword. As we've shown, AG campaigns are a lot more expensive than they were in the 1990s, and the imperatives of campaign fundraising may push AGs to espouse more extreme—or simply more consistently red or blue—positions. The more general literature on polarization suggests, after all, that politicians taking highly partisan positions may be responding more to funders than to voters.[328]

Likewise, although one might hope that AGs consider the interests of *all* citizens, AGs' incentives to do so are, at the very least, questionable. Every state contains large numbers of both Republicans and Democrats, and to the extent that state public-law litigation has a partisan slant, state citizens not from the AG's party may strongly prefer that the litigation not be brought. State AGs (or the governors who appoint them) are elected on the same at-large, first-past-the-post system as other statewide officials, which necessarily leaves the minority party unrepresented even where the margin between majority and minority is small.[329] Even if high-profile public lawsuits become campaign issues in AG elections—and they sometimes do—AGs in many states may have little or no incentive to worry about the

327. In many instances, those responsibilities will constrict the opportunities for partisanship, or dampen its effects. For example, aside from occasional high-profile exceptions, AGs typically defend state legislation against constitutional attack, even if the legislation in question was the handiwork of an opposite-party legislature and runs counter to the AGs' own policy preferences. Similarly, Democratic AGs defend criminal convictions; Republican AGs defend civil rights or environmental judgments—and so on. There may be cases to the contrary, and we do not know (and do not purport to suggest) that Democrats and Republicans handle the day-to-day demands of the job in precisely the same way. Nevertheless, there are likely to be large swaths of the job that lack any particularly sharp partisan valence, and where the tensions between "states' interests" and partisan interests is relatively easy to resolve.

328. *See, e.g.*, BROWNSTEIN, *supra* note 18, at 327–38 (2007) (recounting the rise of "netroots" organizations that raised large sums of money for Democrats and used their influence to push party politicians to the Left).

329. *See, e.g.*, HOPKINS, *supra* note 19, at 38–45 (2017) (discussing the effects of first-past-the-post rules).

preferences of citizens from the other party.[330] Representation of *all* the states' citizens often depends on the partisan alignments in the state, which will determine whether the AG must compete for the median voter or play to her party base.

This representation problem is, of course, endemic to all unitary decisionmakers elected on a winner-take-all basis. Many Republicans felt shut out of government under the Obama Administration, just as many Democrats do now. Federalism is a partial answer to that problem, as it gives the national out-party the opportunity to control at least some states where it remains a majority,[331] and further decentralization may address it at the state level.[332] But we think the problem feels different when the relevant elected official is a lawyer, and the people of the state are not just his constituents but his *clients*. The interests (perhaps "preferences" is a better word in this context) of Republicans and Democrats may in many instances be irreconcilable, and it is probably impossible to ask an AG to "represent" all the citizens in many scenarios. At the same time, we find it deeply problematic for a lawyer purporting to act on behalf of all the state's citizens to ignore the preferences of a large portion of them.[333]

At first blush, private class actions seem preferable on this score—though here, too, matters prove to be more complicated than they first appear. Just as AGs have an obligation to represent the "state," or "the people," or "the public interest," so too class counsel are obligated to represent *all* the

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330. We see some indications that AG elections involve different political dynamics from other statewide offices. The fact that five of the last six governors of Massachusetts have been Republicans suggests that state government races are competitive despite the State's all-Democrat congressional delegation. But we are told that in fact, races for AG are *not* competitive, and the record seems to bear this out: The last Republican AG of Massachusetts was Elliott Richardson, who left the post in 1969. *See* Wikipedia, Massachusetts Attorney General, https://en.wikipedia.org/wiki/Massachusetts_Attorney_General [https://perma.cc/H2DW-SGFK] (showing political affiliation of Massachusetts AGs dating back to 1702). Hence, current AG Maura Healy can feel comfortable filing nearly a dozen lawsuits against the Trump Administration in 2017 alone notwithstanding her Republican governor's 71% approval rating. David S. Bernstein, Maura Healey's Trump Card, BOST. MAG. (Jan. 30, 2018), https://www.bostonmagazine.com/news/2018/01/30/maura-healey-donald-trump/ [https://perma.cc/F4RV-RN6G] (estimating that Massachusetts AG Healy filed roughly fifteen lawsuits against the Trump Administration in 2017). *Why* AG politics is so different from gubernatorial politics is a mystery to us, but that mystery is outside the scope of this paper.

331. *See, e.g.*, Gerken, *Dissenting by Deciding*, *supra* note 79, at 1783 (noting "federalism can be understood at least in part as a strategy for allowing would-be dissenters to govern in some subpart of a system"); Young, *Dark Side*, *supra* note 79, at 1286 (noting "the party that is 'out' in Washington will almost certainly be 'in' in at least a couple of dozen states and literally thousands of localities").

332. *See, e.g.*, Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 21–25 (2010) (arguing that federalism should encompass cities and local institutions).

333. *See generally* Lemos, *State Enforcement*, *supra* note 110, at 489, 512–13, 546 (developing these points and arguing that citizens should therefore not be bound by the judgments in representative state actions).

members of the class. The latter obligation is, at least in theory, easier to enforce. Rule 23 of the Federal Rules of Civil Procedure requires judges in class actions to ensure that class counsel can "fairly and adequately represent the interests of the class."[334] The Supreme Court has observed that "[t]he adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent."[335] And if there are conflicts of interest within the class, there are mechanisms to deal with them. Rule 23(c)(5) permits a court to "divide[] [a class] into subclasses"[336] when the class contains members "whose interests are divergent or antagonistic."[337]

The protections of Rule 23 may not help with the ideological conflicts we have in mind, however. Class counsel is duty-bound to protect the "interests" of absent class members, but—as we hinted above—there is a difference between legal "interests" and "preferences" about law and policy. Class action doctrine tends to conceive of interests in objective terms, analogous to the goals embodied in substantive law. Thus, one might have an "interest" in obtaining a certain form of relief if there is a colorable argument that the law so provides; whether or not one actually *wants* that relief is largely irrelevant to the adequacy-of-representation inquiry.[338] Derrick Bell's work on school-desegregation litigation provides an illustration. Bell's account makes clear that many African-American families opposed such litigation because they thought race-discrimination lawsuits should pursue school quality over integration. But that kind of conflict—over how best to understand the law and what to do about it—is not the kind of conflict of interest that Rule 23 has in mind. On the contrary, as David Marcus has explained, "[j]udges [in school-desegregation litigation] dealt with the problem of conflicts in litigant preferences among class members by denying their relevance. Really at stake, they reasoned, were group rights, and individuals did not matter all that much."[339]

This feature of class-action litigation has led some commentators to search for means to make class-action litigation more "democratic," to take better account of individual preferences. Bill Rubenstein, for example, has suggested "[r]ules that require[] individuals or experts filing group-based

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334. FED. R. CIV. P. 23(g)(1)(B), (g)(4).

335. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997).

336. FED. R. CIV. P. 23(c)(5).

337. CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS, A. BENJAMIN SPENCER & ADAM N. STEINMAN, 7AA FEDERAL PRACTICE AND PROCEDURE § 1790 (3d ed. Sept. 2018 update).

338. In damages class actions, the solution (in theory, at least) is to opt out. Thus, the problem is most stark in "mandatory" injunctive class actions.

339. David Marcus, *Flawed But Noble: Desegregation Litigation and its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 690 (2011).

cases to demonstrate that some level of community dialogue preceded the decision to file, or to show some level of community participation in the filing, or to establish approval for their filings from democratically elected representatives."[340] AGs are, of course, one category of democratically elected representative. And while existing mechanisms of democratic accountability for state AGs—including independent elections, interdependent relationships with other arms of state government, and various checking and transparency mechanisms grounded in state constitutions and statutes—leave ample room for improvement, they nevertheless remain an important advantage for state litigation as compared to its private alternatives.

### *D. The Litigation Safeguards of Federalism*

In assessing the role that state governments can play in public-law litigation, it is also worthwhile to consider the impact of such litigation on the states' role in our federal system. Writing in this vein, Daniel Francis has argued that state litigation is one of the "political safeguards of federalism."[341] Just as Herbert Wechsler argued that states participate in contemporary federalism through their representation in the national legislative branch,[342] and Heather Gerken, Jessica Bulman-Pozen, and Gillian Metzger have contended that states protect their interests through their bureaucratic interactions with the national executive,[343] so Professor Francis argues that states realize their role in modern federalism in part through activity before the judicial branch.[344]

It is easy to appreciate these "litigation safeguards of federalism" when states argue that the national government lacks power to intrude on state policy choices.[345] But the point extends to cases involving horizontal conflicts among states, or cases in which states use litigation to protect their citizens from business practices they deem harmful (or to protect businesses from regulatory demands they deem harmful). Prior to the New Deal, states presided over a purportedly exclusive sphere of state autonomy, and their primary federalism interest was in guarding the boundaries of that sphere. But we now live in an age of concurrent jurisdiction and cooperative federalism, wherein states act in the same policy space as the national

340. William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1652–53, 1659 (1997); *see also* Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1185 (1982) (arguing for "full disclosure of, although not necessarily deference to, class sentiment").

341. Francis, *supra* note 91, at 1026, 1040–41.

342. *See* Wechsler, *supra* note 87, at 543–44, 546.

343. *See* Bulman-Pozen & Gerken, *supra* note 90, at 1286.

344. *See* Francis, *supra* note 91, at 1048.

345. *See supra* section II(B)(1).

government and, much of the time, serve as partners in the same regulatory regimes.[346] States therefore have an interest not just in safeguarding their autonomy to act independently of the national government but also in participating within the broader system of national policymaking and implementation. As Professor Francis puts it, the institutional arrangements of federalism must protect "the ability of the states to participate saliently in governance, regulation, and political life, and to do so independently—that is, neither with the prior permission nor at the direction of the federal government."[347]

Litigation is one way that states can find a public forum to oppose, support, or seek to shape national policy. As Professor Francis points out, litigation has several advantages in this regard. Filing a lawsuit affords state AGs the opportunity to force their concerns onto the national agenda, in a public setting in which factual claims are submitted to adversarial testing and where decision of the particular issue will not be "bundled" (as in elections) with any number of other issues.[348] Litigation also can clarify the lines of accountability that the Supreme Court often says are critical to a well-functioning federalism, by making clear which governments (or government officials) are responsible for particular policies.[349]

In all these ways, litigation compares favorably to Professor Wechsler's legislative representation in Congress (which may or may not actually care about state institutional interests)[350] and to forms of bureaucratic "uncooperative federalism" (which are usually *not* very transparent or public, and which may tend toward prolonged recalcitrance rather than legal resolution). Most of these benefits, Francis emphasizes, are independent of how the cases actually come out; the important point is the availability of the courts as a public, responsive, and relatively level playing field for states to articulate their views.[351]

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346. *See, e.g.*, Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1557 (2012) ("States do not rule separate and apart from the system. . . . [T]hey serve as part of a complex amalgam of national, state, and local actors implementing federal policy."); Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, SUP. CT. REV., 2011 at 253, 257–63 (tracing the change from dual federalism to an integrated system of concurrent jurisdiction).

347. Francis, *supra* note 91, at 1033.

348. *See id.* at 1044–45.

349. *See id.* at 1051–54; *see also* New York v. United States, 505 U.S. 144, 169 (1992) (emphasizing the importance of clear lines of political accountability in federal systems).

350. *See, e.g.*, Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 958–60 (2001) (contending that representation in Congress does not protect states as institutions from federal aggrandizement); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEXAS L. REV. 1459, 1477–78 (2001) (observing that temporary interests may prompt state representatives in Congress to "sacrifice [states'] rights as institutions").

351. *See* Francis, *supra* note 91, at 1040–41.

State litigation may thus be a valuable mechanism for state participation in our federal system *generally*, without regard to the particular type of lawsuit involved. Given their concurrent jurisdiction over regulatory matters and involvement in cooperative federalism schemes, state governments are important stakeholders in the national political process. In Albert Hirschman's terms, vertical litigation protects states' right to "exit" that process and pursue their own vision, while horizontal litigation is more like "voice" within the national process.[352] We do not say that litigation is always or even mostly *superior* to other forms of involvement, such as political representation in Congress, connections between state and national political parties, the intergovernmental lobby, or bureaucratic consultation and infighting.[353] But federalism has always been about finding more than one basket for one's eggs.

### *E. Judicialization and Backlash*

State public-law litigation is not only more democratic than many forms of private litigation; it may also be more powerful. As Part II explained, state AGs enjoy various advantages in the litigation realm that may make state public-law litigation more formidable, or simply more feasible, than its private analogues—a consequence that will strike some observers as entirely desirable and others as cause for regret. The key point for present purposes is that there will not *always* be a private analog to state suits: state litigation has a broader reach given the more expansive scope of state interests and the favorable procedural rules for states.[354]

Consider questions of standing, for example. Even when AGs are asserting the same sorts of interests as private parties, the scope of the state's interests may be broader than those for the average individual or firm, due to the breadth of states' activities and holdings. As we described above, states can also establish standing based on interests that flow from their status as governments—interests that lack any private equivalent. In the Texas immigration case, for instance, it is difficult to imagine a private plaintiff who could claim a concrete injury from the Obama Administration's deferred-action programs. Similarly, some commentators have suggested that state

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352. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 4–5, 30 (1970) (defining "exit" and "voice" as alternative courses of action when the quality of a regime declines).

353. *See* JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 116–17 (2009) (highlighting the intergovernmental lobby); Bulman-Pozen & Gerken, *supra* note 90, at 1255–56 (focusing on bureaucrats); Kramer, *supra* note 87, at 219 (prioritizing political parties); Wechsler, *supra* note 87, at 543–44 (emphasizing representation in Congress).

354. *See* Lemos, *Privatizing Public Litigation*, *supra* note 123, at 572–78 (discussing government advantages in litigation).

AGs may be "the only plaintiffs who have a shot at standing" to pursue Emoluments Clause challenges against President Trump.[355] At the very least, it seems clear that the AGs' theory—that the Emoluments Clauses were "material inducements to the states entering the union," giving states an interest in enforcing "the terms under which [they] participate[] in the federal system"—would not be available to a private individual or group.[356]

AGs also can claim significant advantages when they sue on behalf of individuals, as in *parens patriae* cases. Because State AGs need not file a class action in order to represent their citizens, they are not bound by Rule 23 and can bring suit much more easily than can a class action attorney. The tobacco cases are a prime example. Hundreds of private suits had foundered on the shoals of class certification before the states stepped in. Among other things, the states were able to avoid difficult questions of predominance that doomed damages class actions requiring individualized evidence of injury or causation.

In addition to these procedural benefits, AGs derive practical advantages from their governmental status. AGs have investigatory powers, such as the ability to issue subpoenas, that enable them to gather information from potential adversaries in the absence of formal discovery.[357] AGs also have tools of publicity that may not be available to private parties and attorneys. A press conference by a state AG, or group of AGs, is likely to carry more weight and capture more attention than a statement by a private legal-advocacy organization or class-action attorney.[358] The publicity associated with AG investigations and litigation may, in turn, enhance the leverage AGs can bring to the bargaining table. And AGs have significant resources at their disposal. Even if their budgets are limited (and in many states they are), AGs

355. Cogan Schneier, *After Defeat in New York, State AGs Are Next to Test Emoluments Challenge*, NAT'L L.J. (Jan. 24, 2018), https://www.law.com/nationallawjournal/sites/nationallawjournal/2018/01/24/after-defeat-in-new-york-state-ags-are-next-to-test-emoluments-challenge/ [https://perma.cc/3YXQ-LGM6] (quoting James Tierney, former AG of Maine).

356. Complaint at 6–32, District of Columbia v. Trump, No. 8:17-cv-01596-PJM (D. Md. June 12, 2017).

357. *See, e.g.*, Stephanie Ebbert, *Healey Wins Showdown with Exxon Mobil*, BOSTON GLOBE (Jan. 11, 2017), https://www.bostonglobe.com/metro/2017/01/11/healey-wins-showdown-with-exxon-mobil/HwActch6RI8WQVKdlfJJ9I/story.html [https://perma.cc/9WE3-HDYF] (describing Massachusetts AG's investigation of Exxon Mobil, which will compel Exxon to turn over "40 years of documents" on the company's research on global warming).

358. *See, e.g.*, Nolette, *supra* note 13, at 58–64 (describing how AG litigation shaped public opinion and changed the political climate on pharmaceutical pricing); Sebok, *supra* note 117, at 2177–79 (describing shifts in public opinion on smoking after the multistate suit); *see also* Rachel M. Cohen, *The Hour of the Attorneys General*, AM. PROSPECT (Mar. 22, 2017), http://prospect.org/article/hour-attorneys-general [https://perma.cc/VXL7-BCB8] ("When a state files a lawsuit, it invokes a special sort of gravitas that private entities don't have. And when ten, or fifteen, or twenty states join together to sue a corporation or the federal government, it sends a powerful message—something AGs rarely overlook.").

can and often do team up with private attorneys with sizeable war chests. In some cases, moreover, AG litigation has been subsidized by private donations: for example, the red-state challenges to the ACA were financed largely by a private lobbying organization.[359]

All of this suggests that state public-law litigation may sweep more broadly than litigation by private individuals and groups. It follows that as state litigation increases, so too does the number of contentious policy issues that will be resolved by litigation (and settlement) rather than via more conventional political processes of legislation and regulation. Whether that is a good or a bad thing depends, of course, on one's view of the appropriate bounds of "adversarial legalism"—a question we do not purport to answer here.

Instead, we want to make a somewhat different point. The advantages that states currently enjoy in the litigation field are not set in stone, and they could be trimmed back—by courts, by state legislators, or even by federal law. Opponents of state standing already suggest that states should face unique obstacles to standing that ordinary litigants need not confront. In the Texas immigration case, for example, the United States asserted that Texas's injury was "self-inflicted" and that it was somehow "offset" by benefits that it would experience under the federal policy the state sought to challenge.[360] But there is no general doctrine of self-inflicted injury or offsetting benefits in standing law. Likewise, in *Massachusetts v. Mellon*, the Supreme Court suggested that state governments cannot assert *parens patriae* standing to assert their citizens' federal constitutional rights in a suit against the national government.[361] That is not a disability that any private membership organization would face, even though *Mellon*'s assertion that the United States itself is the primary representative of its citizens in federal matters would seem to apply there as well.

State AGs also face potential backlash from others within state government. State legislators have the power to slash AGs' budgets—as has happened in our home state of North Carolina.[362] Legislators might also impose limitations (such as requirements of legislative or gubernatorial approval) on AGs' ability to initiate suit. Or, to take another example from

359. Charles Elmore, *Lobbying Group Picks Up Costs of Florida's Health-Care Legal Challenge*, PALM BEACH POST (Feb. 19, 2011), https://www.palmbeachpost.com/news/lobbying-group-picks-costs-florida-health-care-legal-challenge/uy6qFUcLnID908WJyXsWSP/ [https://perma.cc/7NLT-SRAJ].

360. *Texas v. United States*, 86 F. Supp. 3d 591, 617, 635 (S.D. Tex. 2015).

361. 262 U.S. 447, 485–86 (1923). *Mellon* seems flatly inconsistent with *Massachusetts v. EPA*, 549 U.S. 497, 520–21 (2007), which allowed states to sue *parens patriae* to assert their citizens' rights under the Clean Air Act. But that question is beyond the scope of our discussion here.

362. Anne Blythe, *GOP Lawmakers Target Democrat Josh Stein with Surprise Budget Cuts*, NEWS & OBSERVER (June 21, 2017), https://www.newsobserver.com/news/politics-government/state-politics/article157510939.html [https://perma.cc/RZH5-KPBJ].

North Carolina, state legislators might attempt to assert control over the conduct of certain categories of state litigation[363] or to vest litigation authority in government attorneys outside the AGs' office.[364]

Finally, we can imagine a variety of federal-law responses. As we have noted, a significant number of federal statutes explicitly authorize state governments to sue to enforce federal law, and where this is true, Congress would be free to restrict or condition such suits as it sees fit. Likewise, states sometimes avail themselves of broad general rights to sue under the APA and similar laws, and these general rights could be modified to specify the circumstances under which state AGs may sue. Because most state public-law litigation is brought in federal court, the federal rules of procedure could also be amended to limit the circumstances in which state governments may file suits. And just as the "special solicitude" for states' standing under *Massachusetts v. EPA* was a judicial innovation, so too the federal courts may decide to craft special limitations on state lawsuits. We would not rule out the possibility that principles of constitutional federalism might limit federal law's ability to systematically make it more difficult for states to file lawsuits than other parties, but we suspect the range of action open to Congress and the federal courts on this point is relatively broad.

That state legislatures, Congress, or the federal courts *could* limit state lawsuits hardly means that they should. A central thrust of our argument has been that state litigation is—on the whole—a uniquely valuable contribution to national debate about matters of shared public concern. We think it would be counterproductive to hamstring state AGs in the ways suggested above, and we think that most concerns about contemporary litigation should be directed at reforming public-law litigation generally, rather than focusing on states.[365] But we do worry that as states take a more prominent and aggressive role in public-law litigation, AGs may invite a backlash that could limit their authority. Indeed, the threat of such a backlash strikes us as directly related to the themes of partisanship and polarization that we have explored in this Article.[366] To the extent that state litigation is viewed as "political" in a pejorative sense, it may be especially vulnerable to retrenchment by political

363. *See* Act of June 28, 2017, ch. 57, sec. 6.7(*l*), § 120.32.6(b), 2017-3 N.C. Adv. Legis. Serv. 1, 19 (LexisNexis) (vesting legislative leaders with "final decision-making authority" over the litigation of cases in which the constitutionality of state law is challenged).

364. *See* Lemos, *Democratic Enforcement*, *supra* note 325, at 983–84 (describing arrangements in some states in which specialized agencies control certain categories of litigation).

365. Justice Thomas, for example, has recently called for limiting nationwide injunctions. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring). Such injunctions feature in many state lawsuits, *see, e.g.*, *id.*, but are not unique to them.

366. *See* Johnstone, *supra* note 47, at 609 (worrying that state AGs "cannot be part of the solution to national partisan polarization . . . if those forces of polarization extend to the state level"); Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U. RICH. L. REV. 633, 651 (2018) (worrying that the increasing frequency and polarized nature of state litigation risks "cheapening the brand" of the states as litigants).

opponents. And courts may refuse to extend favorable treatment to state litigation if they come to see it as a form of political grandstanding, or if it forces them to confront a host of divisive issues they would otherwise avoid.

We close, then, with two points about the future of state public-law litigation. First, we want to sound a note of caution for AGs and others involved in state public-law litigation. State AGs—like any other litigants—have to balance the costs and benefits of potential litigation when deciding whether to proceed. In the previous Part, we argued that the states' long-term institutional interests deserve significant weight in that calculus, though they will sometimes be trumped by competing imperatives. It bears emphasis that the states' institutional interests include an interest in maintaining *litigation* as a distinctive mode of state power. That interest will sometimes counsel restraint, even when the short-term gains of successful litigation would be sizeable.

Second, to the extent that new restrictions are proposed for state litigation, those restrictions should be informed by a careful assessment of the role that state public litigation plays in our federal system and our national politics. We hope the analysis in this Article can contribute to that assessment.

## 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 states 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, 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.

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# The Federal Deregulation of Insurance

David Zaring*

*The efforts to get the federal government out of the business of regulating insurance have been comprehensive but not entire. The project offers two insights about deregulation and how to do it. The first insight is comparative. Given that courts, Congress, and agencies have all tried to undo the federal regulation of insurers, the higher quality of deregulation done by regulators themselves, as opposed to the other branches of government, is informative and makes out a story of comparative advantage when it comes to regulation. The second insight serves as a reminder of the stickiness of globalization. Because the federal government has made commitments to the European Union, it cannot entirely remove itself from the oversight of insurance, much as the policymakers in power today might wish to do so. Both insights make insurance a case study about the way that deregulation can work more generally.*

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Deregulation has been prioritized by the Trump Administration from the very beginning. It was touted in some of the first executive orders issued by the President, less than two weeks after his inauguration.[1] It began to be realized by Congress's unprecedented use of the Congressional Review Act (CRA) to rescind signature rules promulgated in the last year of the Obama Administration, beginning with seven House votes in the first week of February 2017.[2]

The pursuit of deregulation has continued with a string of presidential appointees signaling their intentions to cut rules and reduce enforcement.[3]

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1. *See* Exec. Order No. 13,772, 82 Fed. Reg. 9965 (Feb. 3, 2017) (directing Treasury Secretary to review financial regulations pursuant to principles, including to "make regulation efficient, effective, and appropriately tailored"); Exec. Order 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017) (directing agencies to repeal at least two existing regulations before issuing a new regulation and requiring "total incremental cost of all new regulations, including repealed regulations [for 2017] . . . shall be no greater than zero").

2. Thomas O. McGarity, *The Congressional Review Act: A Damage Assessment*, AM. PROSPECT (Feb. 6, 2018), http://prospect.org/article/congressional-review-act-damage-assessment-0 [https://perma.cc/VZD9-7C2T] ("[T]he vast majority of bills enacted during his first six months in office stemmed from the Congressional Review Act of 1996 (CRA).").

3. *See, e.g.*, Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017) (directing the Treasury, Labor, and Health and Human Services Secretaries to roll back Obama Administration rules concerning contraception coverage under the Affordable Care Act); Press Release, Envtl. Prot. Agency, EPA Takes Another Step to Advance President Trump's America First Strategy, Proposes Repeal of "Clean Power Plan" (Oct. 10, 2017), https://www.epa.gov/newsreleases/epa-takes-another-step-advance-president-trumps-america-first-strategy-proposes-repeal [https://perma.cc/Z2AX-8M3W] (proposing the repeal of the "Clean Power Plan"); U.S. DEP'T OF TREASURY, A

The head of the Consumer Financial Protection Bureau has vowed to stop "pushing the envelope" when it comes to enforcement and has reassigned enforcement resources to education and advocacy roles, and he is not alone in making these sorts of choices.[4] The Treasury Department has issued a series of white papers designed to reduce regulatory burdens; these white papers are becoming a customary way to set forth a deregulatory roadmap for agencies and departments.[5]

Perhaps the most dramatic example of deregulation has been the effort to abandon the federal role in the supervision of insurance companies. That oversight, less than a decade old and cautious even during the zenith of the Obama Administration, has become the subject of deregulatory attentions from all three branches of government. The goal, at least domestically, has not been to *reduce* the burdens of federal regulations of the industry but to *eliminate* them entirely.[6] Despite these ambitions, the retreat of federal oversight of the insurance industry during the Trump Administration has been comprehensive but not entire.

The experience so far of federal deregulation of insurance offers two different insights. The first concerns the right way to do deregulation domestically, for federal insurance regulation has been challenged by all

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FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: CAPITAL MARKETS 132, 180, 205, 218 (2017), https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf [https://perma.cc/U6LX-NUSV] (proposing repeal or reconsideration of several Dodd-Frank era financial regulations).

4. Renae Merle, *Trump Administration Strips Consumer Watchdog Office of Enforcement Powers in Lending Discrimination Cases*, WASH. POST (Feb. 1, 2018), https://www.washingtonpost.com/news/business/wp/2018/02/01/trump-administration-strips-consumer-watchdog-office-of-enforcement-powers-against-financial-firms-in-lending-discrimination-cases/?utm_term=.a024320b06c0 [https://perma.cc/SQ73-JXUR] ("The Trump administration has stripped enforcement powers from a Consumer Financial Protection Bureau unit responsible for pursuing discrimination cases, part of a broader effort to reshape an agency it criticized as acting too aggressively."); email from Mick Mulvaney, Acting Dir., Consumer Fin. Prot. Bureau, to _DL_CFPB_AllHands (Jan. 23, 2018, 12:59 CST), https://bankingjournal.aba.com/wp-content/uploads/2018/01/Mulvaney-Memo.pdf [https://perma.cc/SE76-EHRU] ("[T]he days of aggressively 'pushing the envelope' of the law in the name of the 'mission' are over."). More generally, "[t]he steady pace of deregulation has shown how much can be done at the agency without legislative action, and more change is expected in the year ahead as agencies fill out their complement of Trump appointees." Richard Satran, *With Congress Gridlocked, U.S. Finance Regulators Roll Back Dodd-Frank*, THOMSON REUTERS REG. INTELLIGENCE (Jan. 24, 2018).

5. *See, e.g.*, David J. Reiss, *The Trump Administration and Residential Real Estate Finance*, 23 NO. 20 WESTLAW J. SEC. LIT. & REG. 02 (describing "a series of Treasury reports — titled 'A Financial System That Creates Economic Opportunities' — that . . . offer a glimpse into how this administration intends to regulate — or more properly, deregulate" financial markets).

6. The President, for example, sent the Secretary of the Treasury a memorandum ordering him to vote against any further federal efforts to supervise insurance companies. Memorandum on the Financial Stability Oversight Council, Daily Comp. Pres. Doc. 2 (Apr. 21, 2017), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-treasury/ [https://perma.cc/6K59-XYQ7] (instructing the Treasury Secretary in § 3, "consistent with law," to vote against any federal effort to increase supervision over a particular insurance company).

parts of the government. The insurance experience suggests it is better done by agencies than by courts or Congress. The second serves as a reminder of the increasing importance of international relations in domestic regulation. It is only the fact that the United States has committed itself to obligations to the European Union that has ensured that the federal regulatory role in insurance will remain at least somewhat relevant during the Trump Administration. In many ways, the two tools the federal government has to regulate insurance—the domestic one made dormant and the international one still important—are quite different. Papers could be written about either; this Essay considers both because the changing federal role in insurance is important in its own right. Federal insurance supervision can also serve as an example of how to do domestic deregulation and the consequences of regulatory globalization.

Although states have traditionally had the exclusive power to regulate insurance, the federal government was given a role in 2010 through legislation responding to the financial crisis, which the collapse of the insurance giant AIG had exacerbated.[7] The federal government received the power to designate some insurance firms as "systemically important financial institutions" (SIFIs).[8] It then designated the three largest American insurance firms, and in so doing began to roll out a message to the industry about what sort of prudence it expected, as well as what kind of size would amount to systemic significance. In addition, a newly created Federal Insurance Office (FIO) was given the power to represent the United States before international organizations of insurance and financial regulators, centralizing in the federal government an international role that had previously been left to the insurance commission of the states and federal territories.[9]

SIFI designation has been attacked by all three branches of government,

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7. There is no constitutional constraint against a federal role in insurance regulation, as the Supreme Court held in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 561–62 (1944) (holding that the Sherman Act, an antitrust statute, could be applied to insurance). But in the next year, Congress passed a statute precluding the government from regulating the business of insurance. McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. § 1012 (2012)). For a discussion of AIG's problems, see Daniel Schwarcz & David Zaring, *Regulation by Threat: Dodd-Frank and the Nonbank Problem*, 84 U. CHI. L. REV. 1813, 1824–30 (2017).

8. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 113, 124 Stat. 1376, 1398 (2010) (codified at 12 U.S.C. § 5323 (2012)) (providing this power, which covered not just insurance companies but all "nonbank financial companies").

9. The FIO also has the power to monitor and collect data on the insurance industry in an effort to determine whether insurers were engaging in risky conduct that could jeopardize their solvency. This data collection activity gives the office a research function as well; in 2016, it issued a report on the effectiveness of terrorism-insurance research. *See* U.S. DEP'T OF TREASURY, REPORT ON THE OVERALL EFFECTIVENESS OF THE TERRORISM RISK INSURANCE PROGRAM 6–7 (2016), https://www.treasury.gov/initiatives/fio/reports-and-notices/Documents/2016_TRIP_Effectiveness_%20Report_FINAL.pdf [https://perma.cc/MTM5-3BZX] (explaining the data collection processes under the 2015 Reauthorization Act).

beginning in 2016. However, the federal role in insurance regulation will remain relevant as long as the Administration lives up to the so-called "covered agreement" concluded with European insurance regulators in the waning days of the Obama Administration and signed by the Secretary of the Treasury on September 22, 2017.[10]

The administrative state is experiencing a deregulatory moment, even as global entanglements make comprehensive deregulation all the more difficult given our commitments to our foreign trading partners. Understanding the possibilities of deregulation in this context matters not just for insurance but also for the deregulatory project as a whole.

## I. Deregulation: A How-To Guide

The Trump Administration has found deregulation to be uneven going. The efforts so far, particularly the environmental ones, have been characterized by Ricky Revesz as "sloppy and careless, [because] they've shown significant disrespect for rule of law and courts have called them on it."[11] On the other hand, those CRA resolutions, at a minimum, have made deregulation—at least comparatively—one of the Administration's most prominent success stories.[12] The problem for the Administration's non-CRA deregulatory efforts has frequently been one of procedural execution, with agencies failing to identify the rational basis for deregulation, or staying Obama-era rules without much justification. Courts have frequently been unwilling to excuse these failures or to take on the deregulation mantle themselves, while Congress has been distracted with other priorities and partisan divisions.[13]

To make sense of how a government might pursue an insurance-deregulatory agenda, it is useful to review the legal constraints on deregulation. The standards for deregulation by agencies are modest (or at least they should be since the seminal *Chevron* decision's deference holding captured the imagination of federal judges), by courts procedural, and by

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10. Press Release, U.S. Dep't of Treasury, Treasury, USTR Sign Covered Agreement on Prudential Insurance & Reinsurance Measures with the European Union (Sept. 22, 2017), https://www.treasury.gov/press-center/press-releases/Pages/sm0164.aspx [https://perma.cc/M9XM-FNWX].

11. Oliver Milman, *'Sloppy And Careless': Courts Call Out Trump Blitzkrieg on Environmental Rules*, GUARDIAN (Feb. 20, 2018), https://www.theguardian.com/environment/2018/feb/20/donald-trump-epa-environmental-rollbacks-court-challenges [https://perma.cc/J33E-UHJU].

12. *See* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2 (2017) (discussing the way Congress's use of the CRA meant that it has "eagerly repealed numerous regulations").

13. *See, e.g.*, Clean Air Council v. Pruitt, 862 F.3d 1, 4 (D.C. Cir. 2017) (concluding that "EPA lacked authority under the Clean Air Act to stay" a rule on greenhouse gas emissions and ordering the agency to implement the rule).

Congress essentially nonexistent.[14] These constraints shape what deregulation can look like and, this Essay argues, affect the quality of deregulatory decision-making. Legal constraints alone will not tell the whole story—despite its legal flexibility, Congress has been unable to realize many of its deregulatory ambitions. But they are of great consequence when it comes to deregulatory policymaking by courts and agencies.

### *A. Deregulation by Agencies*

For agencies inclined to deregulate, the choice to do so is evaluated on the same standard as the decision to regulate in the first place. As Cass Sunstein has put it, "Courts should not treat deregulation substantially differently from regulation."[15]

This means that the most important constraint on deregulation is that a deregulatory removal of a rule or order must be implemented with the same degree of process that accompanied the promulgation of the rule or order.[16] Moreover, the basis for deregulation cannot be justified solely with reference to the political preferences or taste for repeal of the appointees who run the agency; instead, there must be a case made in the deregulatory order that the public interest will, defined quite broadly, be served by the administrative action.[17] As we will see, these procedural and modest substantive requirements have meant that the quality of the deregulatory decisions by the Financial Stability Oversight Council (FSOC or the Council) have been well explained, especially in comparison to the efforts of Congress and the courts.

These hurdles apply only when agencies seek to actively remove rules or orders from the books. Removing rules or orders is the most effective and lasting form of deregulation, but it is not the only kind of deregulation that agencies can pursue.

Agencies can suspend the operation of a rule if they can establish that good cause requires it—a difficult standard to meet for a high-profile rollback, without any sign of an emergency, and one that the Trump administration has sometimes tried, often unsuccessfully.[18] Another, more

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14. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984), which held that courts should afford deference to any reasonable agency interpretation of its governing statute, was itself a deregulation case—in it, the Reagan Environmental Protection Agency reinterpreted a Carter EPA rule to reduce burdens on, among others, oil refiners.

15. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 74 (1985).

16. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1206 (2015) (noting that the APA makes no distinction between initial and subsequent agency action).

17. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973) (explaining that when Congress regulates, it "must rationally further some legitimate governmental interest"). *But see* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (arguing that different policy preferences by a new administration's regulators could be a reasonable basis for a change in policy).

18. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) ("The statute makes no

temporary form of deregulation can be handled by agency enforcement divisions. The choice not to bring enforcement actions to curb violations of existing rules that could have been brought is all but unreviewable.[19] For insurance regulation, this means that if the government chooses not to designate any more insurance companies as significant SIFIs, there is no risk that anyone can force it to do so with a lawsuit.

However, there are limits to the effectiveness of deregulation through nonenforcement. The Council could change its mind and ramp up the designations; the choice to restart enforcement, and against whom, is just as unreviewable as the choice not to enforce.[20] Moreover, ceasing new designations leaves the old designations on the books, with all the messages to industry that they send.

Deregulation, ideally, would be something premeditated, rather than pursued at haste. J.B. Ruhl and James Salzman think that the decision about how to stop regulating should be part of the initial calculation about when to regulate; their work on regulatory exit was the subject of the *Duke Law Journal* symposium on administrative law in 2018.[21] Ideally when regulating, Ruhl and Salzman have argued, "Government should also ask how it will *exit* when it realizes it (1) has accomplished Goal X, (2) is not achieving Goal X, or (3) has regulated more than necessary to achieve Goal X."[22] Arguably, this exit potential is a part of federal insurance regulation. Dodd-Frank did provide for an exit from SIFI designations and required regular reviews of designations to see if they remained appropriate.[23] So did the government's

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distinction, however, between initial agency action and subsequent agency action undoing or revising that action. . . . And of course the agency must show that there are good reasons for the new policy."); Clean Air Council v. Pruitt, 862 F.3d 1, 9, 14 (D.C. Cir. 2017) (rejecting effort by EPA to stay a rule regulating methane emissions scheduled to go into effect because of the lack of process).

19. As the Court has said, "[A]n agency's decision not to take enforcement action should be presumed immune from judicial review . . . ." Heckler v. Chaney, 470 U.S. 821, 832 (1985).

20. As Daniel Deacon has observed, "All else being equal, a deregulatory presidential administration would prefer to proceed by rulemaking or legislation because these forms of policymaking exhibit a 'stickiness,' or obduracy, that enforcement practices do not." Daniel T. Deacon, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 796–97 (2010).

21. Symposium, *Exit and the Administrative State*, 67 DUKE L.J. 1615 (2018).

22. J.B. Ruhl & James Salzman, *Regulatory Exit*, 68 VAND. L. REV. 1295, 1299 (2015). *See* Justin R. Pidot, *Governance and Uncertainty*, 37 CARDOZO L. REV. 113, 122–23 (2015) ("[Regulatory] exit is simply a form of radical legal evolution that occurs when lawmakers respond to new information or changing circumstances that demonstrate that a legal regime is beyond saving, or perhaps, that the targeted problem has been solved."). *But see* Sarah E. Light, *Regulatory Horcruxes*, 67 DUKE L.J. 1647, 1649 (2018) (noting that notwithstanding any efforts by regulators to build a formal exit strategy into a regulatory program *ex ante*, background legal rules like the Administrative Procedure Act permit successor administrations to exit regulatory programs).

23. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 113, 124 Stat. 1376, 1401 (2010) (codified at 12 U.S.C. § 5323 (2012)). For a discussion on the mechanisms by which § 113 of Dodd-Frank designates SIFIs, see Joshua S. Wan, Note, *Systemically Important Asset Managers: Perspectives on Dodd-Frank's Systemic Designation Mechanism*, 116

implementing regulations—it used those annual reviews to de-designate first GE Capital, and then AIG, two of the four firms (three of which were insurers) on the SIFI list.[24]

By contrast, poorly planned deregulation is fraught with the potential for mistakes. As Hannah Wiseman has observed, "[A]gencies facing immediate pressure to cut budgets, regulations, and programs will not have the time to conduct detailed comparisons of their most effective programs or . . . decide on a particular metric for effectiveness."[25] One of the institutions involved with insurance supervision, the Treasury Department's Office of Financial Research, has been characterized as facing this kind of chaos.[26]

It is by no means obvious that the nascent federal scheme to regulate insurance was devised with much attention as to how to reduce the federal government's involvement—the point was to give the federal government a role, not to end it. But by creating potential for exit and institutionalizing lookback review, the federal government's insurance regulations were created with the possibility of deregulation in mind.

In section II(C)(1), we will see how, exactly, that lookback process has been used to withdraw the Council from the field of insurance regulation.

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COLUM. L. REV. 805, 813–16 (2016).

24. *See* FIN. STABILITY OVERSIGHT COUNCIL, MINUTES OF THE FINANCIAL STABILITY OVERSIGHT COUNCIL 4 (2015), https://www.treasury.gov/initiatives/fsoc/council-meetings/Documents/February%204,%202015-Minutes.pdf [https://perma.cc/3GU9-L8YS] (describing the Council's annual review of designated firms); *see also* FIN. STABILITY OVERSIGHT COUNCIL, NOTICE AND EXPLANATION OF THE BASIS FOR THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S RESCISSION OF ITS DETERMINATION REGARDING AMERICAN INTERNATIONAL GROUP, INC. (AIG) 2 (2017), https://www.treasury.gov/initiatives/fsoc/designations/Documents/American_International_Group,_Inc._(Rescission).pdf [https://perma.cc/TJT9-YPXL] (explaining the decision to de-designate AIG); FIN. STABILITY OVERSIGHT COUNCIL, BASIS FOR THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S RESCISSION OF ITS DETERMINATION REGARDING GE CAPITAL GLOBAL HOLDINGS, LLC 2 (2016), https://www.treasury.gov/initiatives/fsoc/designations/Documents/GE%20Capital%20Public%20Rescission%20Basis.pdf [https://perma.cc/JX38-ADBT] (explaining the decision to de-designate GE Capital).

25. Hannah J. Wiseman, *Regulatory Triage in a Volatile Political Era*, 117 COLUM. L. REV. ONLINE 240, 250 (2017); *see also* Sarah E. Light, *Precautionary Federalism and the Sharing Economy*, 66 EMORY L.J. 333, 344 (2017) ("[S]cholars and policymakers should grapple more actively with the bases for a shift in the allocation of regulatory authority.").

26. *See* Ryan Tracy, *Washington's $500 Million Financial-Storm Forecaster Is Foundering*, WALL ST. J. (Feb. 19, 2018), https://www.wsj.com/articles/washingtons-500-million-financial-storm-forecaster-is-foundering-1519067903 [https://perma.cc/J2PR-T2RV] (describing the Trump Administration's plans to reduce headcount and budget, noting that no official had been nominated to permanently head the office). The office is involved because its director participates in Council decisions as a nonvoting member. FIN. STABILITY OVERSIGHT COUNCIL, *Who Is on the Council?*, U.S. DEP'T OF TREASURY (Sept. 19, 2018), https://www.treasury.gov/initiatives/fsoc/about/council/Pages/default.aspx [https://perma.cc/ZX34-R46S].

### *B. Deregulation by Congress*

Michael Van Alstine has written about congressional deregulation—he calls it "statutory deregulation" and argues that it is the way to deregulate most aggressively.[27] As Van Alstine has put it, congressional deregulation can result in "a dismantling of regulatory oversight over broad sectors of commerce."[28] Moreover, as a democratically elected body without the accountability worries that agencies pose, there are few legal constraints to what a deregulatory Congress can do, conditional on its ability to pass any sort of legislation at all. Congress must establish that its deregulatory bills do not violate the separation of powers and that there is a rational basis for its decision—two tests that are famously easy to meet.[29] But there is no procedural review or requirement of a commensurate level of process when the Legislature acts, as opposed to when agencies do.

Despite the straightforwardness of the constraints on deregulation, Congress has only rarely pushed deregulatory legislation forward. There have been many false starts; during the Obama Administration, the Legislature debated, and the House occasionally passed, bills designed to throw some sand in the gears of the regulatory state. There was the Regulatory Accountability Act, which would have introduced cost-benefit, formal adjudication and other procedural requirements to rulemakings;[30] the Separation of Powers Restoration Act, which would have ended judicial deference to agency interpretations of law;[31] and Regulations from the Executive in Need of Scrutiny Act, which would have empowered Congress to issue resolutions of disapproval for any agency rule and required congressional approval of major agency rules before those regulations could

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27. *See* Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 807 (2002) (describing statutory deregulation as the "most common" form of deregulation and the jurisprudential response to the "excesses of modern public law" responsible for lifting regulatory oversight over large industries).

28. *Id.*

29. The nondelegation doctrine, which polices congressional intrusions into the responsibilities of the other branches, has been successfully invoked in the Supreme Court only in 1935; it has had, as Cass Sunstein has said, "[O]ne good year, and 211 bad ones (and counting)." Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000). As for rational review, as the Ninth Circuit has put it, "the legislature's decision to remove certain [] requirements that it no longer deems essential . . . is a rational and quintessentially legislative decision." Merrifield v. Lockyer, 547 F.3d 978, 990 (9th Cir. 2008); *see also* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 532 (1985) (discussing judicial review of agency decision-making, which, as with congressional legislation, evaluates an agency decision under the rational basis test and accords it "great deference").

30. H.R. 5, 115th Cong. (2017), https://www.congress.gov/115/bills/hr5/BILLS-115hr5rfs.pdf [https://perma.cc/4W2K-YGPJ].

31. H.R. 4768, 114th Cong. (2016), https://www.congress.gov/114/bills/hr4768/BILLS-114hr4768rfs.pdf [https://perma.cc/V49Q-HKGP].

be implemented.[32] Each of these statutes would have affected every agency's efforts to make policy; none of them would have been at risk of a judicial finding of unconstitutionality, and yet the Legislature has been unable to present them as bills passed by both houses and ready for the President's signature.

Congress's central role in the deregulatory story being told by this Administration lies not in its normal order but in the order created by a deregulatory fast-track, one that can be used only when the stars have aligned and both the presidency and Legislature are in the same hands, after taking over for a President of a different party. In such a case, the Legislature can and has utilized the CRA[33] to facilitate congressional reversals of administrative regulations.[34] The CRA permits Congress to undo regulations through a fast-track joint resolution of disapproval.[35] Even more dramatically, it "salts the earth"—"[n]o substantially similar rule can be subsequently adopted by regulators once Congress has reversed a rule under the CRA."[36] However, it applies only to rules adopted within the last sixty days that Congress was in session, meaning that the window for a CRA resolution is brief, though various congressmen have been mulling over ways to expand this window.[37]

During the first four months of the Trump Administration, CRA resolutions of disapproval were passed fifteen times,[38] undoing an array of rules ranging from the Interior Department's antipollution stream protection rule[39] to the Securities and Exchange Commission's resource extraction rule, which required mineral companies to report payments made to foreign governments.[40] The Administration also rolled back rules related to internet

32. H.R. 10, 112th Cong. (2011), https://www.congress.gov/112/bills/hr10/BILLS-112hr10rfs.pdf [https://perma.cc/QAJ4-YPJJ].

33. 5 U.S.C. §§ 801–08 (2012).

34. *See* Michael D. Shear, *Trump Discards Obama Legacy, One Rule at a Time*, N.Y. TIMES (May 1, 2017), https://www.nytimes.com/2017/05/01/us/politics/trump-overturning-regulations.html [https://perma.cc/Q3XX-VHLT] (providing examples of administrative regulations that President Trump and Congress have reversed).

35. *See* 5 U.S.C. §§ 801(a)(3)(B), 802 (describing the procedural requirements for congressional disapproval).

36. *Id.* § 801(b)(2).

37. *See id.* § 801(d)(1) (providing a window of sixty session days for the Senate and sixty legislative days for the House); David Zaring, *Guidance and the Congressional Review Act*, REG. REV. (Feb. 15, 2018), https://www.theregreview.org/2018/02/15/zaring-guidance-congressional-review-act/ [https://perma.cc/N5YK-C49N] (providing an example of congressional efforts to use the CRA to reverse Obama Administration regulations).

38. *See CRA Resolutions*, RULES AT RISK, http://rulesatrisk.org/resolutions [https://perma.cc/7XMG-LJGN] (listing the resolutions of disapproval and their dates).

39. *See* Pub. L. No. 115-5, 131 Stat. 10 (2017) (disapproving the stream protection rule).

40. *See* Pub. L. No. 115-4, 131 Stat. 9 (2017) (disapproving the resource extraction rule).

privacy, drug testing for unemployment compensation, and other areas.[41] The turn to the CRA was unprecedented; the statute had only been utilized once before, when the Bush Administration undid a late Clinton Administration rule on ergonomics in the workplace.[42]

The CRA was not used to effectuate insurance deregulation—neither the Council's insurance-relevant rules nor its designations were promulgated during the final sixty days of the Obama Administration. The covered agreement with the European Union discussed in subpart III(B) may have arguably been eligible for CRA treatment, as it was passed during the final week of the Obama Administration (and was also transmitted to Congress then as well), despite it not obviously counting as a "rule" subject to CRA supervision. But the Administration eventually signed the covered agreement, and the CRA is unlikely ever to be used in any case where the incoming Administration agrees with the previous one on the merits of a regulatory policy.

Instead, the reliance on the CRA underscores how the limited external constraints on congressional action are less relevant than internal constraints imposed by the legislative process—the filibuster and other delaying tactics available to the Senate, the problems of scheduling votes where legislative time is scarce and priorities compete, and the need to harmonize legislation in two houses.[43] It all means that while deregulation may be easily achieved by Congress in theory, with little check on deregulatory powers, it is, in fact, no easy legislative task.

### C. *Deregulation by Courts*

There has been little written about court-driven deregulation as such, but there is little doubt that the judicial deregulatory role is critical, given that courts act as a final check on agency initiatives. This means that when agencies lose court cases, the effect is deregulatory (unless they lose court cases when they are trying to deregulate)—a policy does not go into effect or a regulatory action is reversed. As Van Alstine has observed, this sort of "less conspicuous" deregulation can be accomplished by courts invoking constitutional or administrative law.[44] Courts review agency regulations

41. To see the full collection of rules, see *CRA Resolutions*, *supra* note 38.

42. For further discussion of the Bush Administration's rescission of the Clinton Administration's rule on ergonomics, see Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 638 (2003) and Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2172 (2009).

43. As Michael Gerhardt has explained, "[T]he Senate has adopted formal rules for its internal governance, including Senate Rule XXII, which expressly authorizes filibusters or protracted debate to delay or obstruct legislative action." Michael J. Gerhardt, *Dissent in the Senate*, 127 YALE L.J. F. 728, 733 (2018).

44. Van Alstine, *supra* note 27, at 807–08. This can of course be exacerbated where there is a

pursuant to the Administrative Procedure Act (APA), which was passed, as George Shepherd has argued, with the support of regulated industry because it was thought it would provide a check on the growth of the New Deal state.[45]

The judiciary has taken up the charge of the APA; judges reverse agency actions approximately one-third of the time, making judicial review a real hurdle.[46] This check on regulation has proven vibrant, despite the fact that, doctrinally, judicial review is supposed to be deferential to findings of fact and reasonable constructions of law.[47] Courts do not defer on the required procedures that agencies must follow, however, and are as likely to reverse agencies on the matters on which they are supposed to be deferential as on the matters where they are not.[48]

There are limits to what courts can do, however. The traditional remedy upon reversal is to return the rule or order to the agency with instruction to try again if it chooses, meaning that a judicial order voiding a regulation is ordinarily accompanied by an invitation to the agency to regulate in a similar, but more procedurally complete way.[49] As Nicholas Parrillo has shown, courts rarely used their contempt powers to bring agencies into line, even after repeated violations of the law, meaning that courts, unlike Congress through its CRA review, are very unlikely to salt the earth with a deregulatory injunction.[50] Judicial review, as the APA's name suggests, is principally for procedural mistakes (as well as legal ones), though courts have reserved for

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"vague judicial hostility to regulatory legislation." Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 911 (1982); *see also* Richard J. Pierce & Sidney A. Shapiro, *Political and Judicial Review of Agency Action*, 59 TEXAS L. REV. 1175, 1206 (1981) ("The decision to enforce the delegation doctrine strictly and reject congressional decisions to adopt regulatory schemes without spelling out all details beforehand would effectuate a judicial deregulation of the economy.").

45. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1627 (1996) (stating that the "two groups that agencies harmed most, lawyers and regulated businesses," pushed for judicial review of agency action through a codified APA).

46. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 137, 140–41 (2010) (reporting on a number of studies that show that courts reverse agencies approximately one-third of the time).

47. *See id.* at 170–76 (discussing how often agencies win their cases).

48. Patricia Wald, The Contribution of the D.C. Circuit to Administrative Law, Address Before the American Bar Association Section of Administrative Law (October 1987), *in* 40 ADMIN. L. REV. 507, 528 (1988) (identifying an inadequate agency rationale as the reason for fifty-eight reversals or remands out of a total of 159 opinions issued by the D.C. Circuit for one year in the late 1980s). For further discussion of judicial review of agency rulemaking, see Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 95 (1995).

49. 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 8:31[2](a) (3d ed. 2010) (observing the typicality of this remedy, "including remand for further proceedings, remand with instruction, and reversal and remand").

50. Parrillo concluded that "even though contempt findings are practically devoid of sanctions, they nonetheless have a shaming effect that gives them substantial if imperfect deterrent power." Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 697 (2018).

themselves the right to take a hard look at the substantive basis for the agency rule.[51]

Deregulation through courts is also a narrower process than when done through Congress. Courts must wait for a plaintiff to put a regulation before them and then may only pass on that particular regulation, rather than on a broader regulatory program involving a variety of rules and orders. In section II(C)(2), we will see how one court interpreted its role to reverse an order extending extra supervision to an insurance company; it focused on procedural failures and a disagreement on statutory interpretation to do so, but it did not, and probably could not, conclude that the rules underlying the designation decision were themselves defective—it could only reject those rules as applied to one insurer.

## II. The Retreat from Regulating Big Insurers

SIFI designation of insurance companies is overseen by the FSOC, a committee of financial regulators created by the Dodd-Frank Wall Street Reform Act to consider broad risks to the American financial system. Designated firms are subject to extra supervision by the Federal Reserve Board; the hope is to ensure that the SIFI is well-capitalized and not engaged in overly risky business schemes.[52]

The Council has always been an idiosyncratic regulatory entity—a creation of financial crisis legislation that jammed agency heads together to ensure that the broad view of the financial economy was being considered by these heads at some point, instead of creating a new consolidated financial market regulator to take this view. The new Administration has tried to get it out of the business of regulating insurance in two ways. First, the Council itself has de-designated designated insurers—a deregulation strategy—and hinted that it will not designate more insurers—a nonenforcement strategy. Second, the Treasury Department has recently proposed that the Council should be reformed in a way that would have it do less oversight and operate more as a think tank for its member regulators.[53]

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51. *See, e.g.*, Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 55 (1983) (stating that "[t]he agency . . . failed to articulate a basis for not requiring nondetachable belts under Standard 208").

52. As the Fed has explained in a proposed rule for the consolidated supervision of systemically important insurers, "the consolidated approach would categorize an entire insurance firm's assets and insurance liabilities into risk segments, apply appropriate risk factors to each segment at the consolidated level, and then set a minimum ratio of required capital." Press Release, Federal Reserve, Federal Reserve Board Approves Advance Notice of Proposed Rulemaking and Approves Proposed Rule (June 3, 2016), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20160603a.htm [https://perma.cc/VM57-GVS6].

53. The Treasury has suggested that the Council raise the stage 1 asset number to $250 billion. Jeff Bater, *Mnuchin: Bank 'Systemic Risk' Label Should Start at $250 Billion*, BLOOMBERG BNA (July 27, 2017), https://www.bna.com/mnuchin-bank-systemic-n73014462373/

Congress has also tried to cut the Council out of insurance oversight. The Financial CHOICE Act, which passed the House on June 8, 2017, would completely eliminate the Council's designation power.[54]

Congress's effort to remove powers from the Council must be considered in light of the way the Council used those powers—and how the Council itself, and the courts, have cut back on insurance regulation, in addition to how Congress might do so itself. In particular, of the three insurance companies and one commercial lender who were designated as systemically significant, none remain subject to the Fed's oversight as of this writing.[55] Two of the insurance companies—AIG and Prudential—were de-designated by the Council itself, along with the commercial lender—GE Capital.[56] MetLife got out of its designation by contesting it in court.[57]

The sample is not large, but it permits a qualitative comparison of the way deregulation can be done by an agency and the way it can be done by a court or the Legislature. The Council considered the substantive basis of its designation decision in its decisions to de-designate and illustrated how the de-designated firms had transformed themselves into less risky entities. The court focused on what it perceived as procedural missteps in the initial regulation, while the Legislature has sought, somewhat bluntly, to end the designation power altogether.

More generally, the de-designation process illustrates how courts and agencies deregulate: courts deregulate procedurally and agencies substantively, while Congress simply removes regulatory powers altogether, or did in its bills designed to deregulate insurance. Normatively, there are reasons to prefer deregulation on substantive grounds over regulation that is stopped for procedural reasons. But, to be sure, this substantive advantage for agency deregulation in the effort to remove the federal government from insurance oversight is not immutable. Agencies could slow future regulators' efforts by promulgating internal procedural hurdles. Congress can deregulate

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[https://perma.cc/KAR5-GWVK].

54. For a general overview of the Act, see HOUSE FIN. SERVS. COMM., THE FINANCIAL CHOICE ACT: EXECUTIVE SUMMARY, https://financialservices.house.gov/uploadedfiles/financial_choice_act-_executive_summary.pdf [https://perma.cc/63S2-L9D8]. To view the Act's full text and details of its progression through the House and Senate, see H.R. 10 - FINANCIAL CHOICE ACT OF 2017, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/10/text/eh [https://perma.cc/CLN7-KYXA].

55. The Council de-designated the last one, Prudential, by an order dated October 16, 2018. *See infra* section II(C)(1); *see also* Jesse Hamilton, *Prudential Is Plotting Its Escape from Fed's Tough Oversight*, BLOOMBERG (Aug. 17, 2017), https://www.bloomberg.com/news/articles/2017-08-17/prudential-is-said-to-plot-its-escape-from-fed-s-tough-oversight [https://perma.cc/L3XA-PFSW] (describing the company's de-designation strategy).

56. *See* FIN. STABILITY OVERSIGHT COUNCIL, *Designations*, U.S. DEP'T OF TREASURY (July 18, 2018), https://www.treasury.gov/initiatives/fsoc/designations/Pages/default.aspx [https://perma.cc/3RYM-QX7F] (listing designations and the basis for those designations).

57. MetLife, Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219, 242 (D.D.C. 2016).

in any way it wants to—bluntly, or with a scalpel—by piling on procedural hurdles or by imposing substantive exemptions. Even courts, through reference to hard-look review, can reverse agency regulatory efforts on substantive grounds; they are not tied only to procedure, even though procedural missteps are the usual focus. The argument in this Essay is only that the various parts of the government may have certain comparative advantages when it comes to deregulation, and that insurance deregulation exemplifies them.

### *A. How the Regulation of Individual Firms Could Constitute Regulation of the Entire Sector*

The prospect that nonbanks could be designated as systemically significant and subjected to oversight by the Fed was something that worried a number of very large financial companies.[58] GE Capital and AIG were unable to avoid initial designation, but once designated both firms transformed their operations and their balance sheets in an effort to escape the process.[59] Both firms shrank, reduced their reliance on short-term sources of funding, sold off businesses, and reduced their leverage, or ratio of total assets to equity.[60] Prudential did so much less.

The insurance industry responded to the prospect that any insurance company might be designated with alarm, but it was not alone. When the Treasury Department's Office of Financial Research issued a white paper suggesting that certain large asset managers could, and perhaps should, be subject to designation, the response from that industry was intense.[61]

Designation, and the attendant oversight by the Fed, was viewed by these firms as a penalty, illustrating that SIFI designation put the federal government in the business of insurance regulation, a function of its penalty power. Penalties are often part of functional administrative schemes, and there are reasons to believe that a regime that penalizes some nonbanks for growing too large and interconnected is a useful way to regulate both those institutions and the rest of the insurance sector. It can make sense to subject specific firms to intensive oversight because of the particular risks posed by the firms. In the run-up to the financial crisis, AIG—a then very large

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58. Douglas J. Elliott, *Regulating Systemically Important Financial Institutions that Are Not Banks*, BROOKINGS REPORTS (May 9, 2013), https://www.brookings.edu/research/regulating-systemically-important-financial-institutions-that-are-not-banks/ [https://perma.cc/WQ2S-J34B].

59. *See infra* section II(C)(1).

60. *Id.*

61. OFFICE OF FIN. RESEARCH, ASSET MANAGEMENT AND FINANCIAL STABILITY 19 (2013) (concluding that asset managers had suffered "material distress" during the financial crisis); Cary Martin Shelby, *Closing the Hedge Fund Loophole: The SEC as the Primary Regulator of Systemic Risk*, 58 B.C. L. REV. 639, 674–75 (2017) (noting that the OFR study "was severely criticized by a large number of industry participants" and by the SEC commissioner).

American insurance company overseen by a welter of state and federal regulators (AIG's primary federal regulator was the now-shuttered Office of Thrift Supervision, involved because one of AIG's subsidiaries held a thrift charter)—got involved in two different businesses that both posed substantial run risk.[62] In one, its financial products subsidiary sold insurance contracts on corporate credit (so-called credit default swaps) and failed to properly hedge them.[63] In the other, it engaged in securities lending, which meant that it was loaning out securities it held in its treasury in exchange for a payment and cash collateral, both of which it could reinvest.[64]

When the financial crisis hit, AIG was obligated to post more collateral to satisfy its counterparties than it could make good on its credit insurance; at the same time, its securities-lending funding dried up, as many of the borrowers of its securities were the kind of financial institutions that got into trouble during the crisis.[65] AIG required a massive bailout, and recognizing the way that its runnable businesses could interact to topple the firm would have been difficult.[66] But uncovering these sorts of connections are the very particulars that a team of supervisors tasked to a single large firm might be able to suss out. Targeted, whole-firm supervision of a conglomerate like AIG might offer regulators a full picture of the risks being taken by an insurer otherwise supervised on a piecemeal basis.

But more broadly, making examples of three insurers provided guidance to the rest of the industry about how the federal government thought about what constituted systemic risk in the provision of insurance services.[67] Moreover, regulating the insurance industry by looking very closely at three insurance companies arguably also constitutes cost-effective supervision. There is evidence, for example, that the industry as a whole has reduced its holdings of risky assets since the designations—but federal regulators did not have to place supervisors in each and every insurance company in the country to bring about this result.[68]

Moreover, the designation process did not only discipline nonbank

62. Daniel Schwarcz, *A Critical Take on Group Regulation of Insurers in the United States*, 5 U.C. IRVINE L. REV. 537, 551 (2015). For a further discussion of how AIG collapsed, and what happened afterwards, see David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1427–30 (2014).

63. Schwarcz, *supra* note 62, at 551.

64. For further discussion of AIG securities lending, see *id.* at 551–55.

65. Schwarcz & Zaring, *supra* note 7, at 1827–28.

66. *See id.* at 1825, 1827–28 (describing the unforeseen risk in two of AIG's pre-bailout activities).

67. Schwarcz & Zaring, *supra* note 7, at 1824–30, 1841.

68. *See* INT'L MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT: POTENT POLICIES FOR A SUCCESSFUL NORMALIZATION 101–02 (2016), http://www.imf.org/external/pubs/ft/gfsr/2016/01/ [https://perma.cc/M8HN-PMEX] (describing the reduction in risky assets by both large and small American insurers).

firms; it also disciplined regulators who were failing to regulate their industry to a degree that the Council thought appropriate—those regulators risked having their regulatory-oversight responsibilities transferred to the Federal Reserve through a SIFI designation, a loss of turf that few agencies would appreciate.[69] That prospect may have improved state regulation of insurer solvency.[70]

Still, the use of SIFI designations on insurance companies, even for AIG, was controversial. They marked the first federal foray into insurance regulation, which, under the McCarran-Ferguson Act, had been exclusively reserved to the states.[71] Dodd-Frank created a statutory basis for federal involvement in insurance, but the insurance industry and state regulators have expressed opposition to the federal role ever since the passage of the statute.[72] Their fear was that any role for the national government, no matter how narrowly tailored, would constitute a first step in the federalization of insurance oversight.

Critics relatedly—and as it turned out, incorrectly—also worried that the designation process would be a "Hotel California," from which no designated nonbank would ever be able to leave.[73] Some observers also suspected that the Council took its designation cues from an international process. The global Financial Stability Board (FSB), a group of regulators from all over the world that American agencies had joined, designated the three American insurance companies as globally risky before the American agencies performed their own analysis.[74] The chair of the Senate Banking

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69. Schwarcz & Zaring, *supra* note 7, at 1817–18.

70. This pattern—the threat of designation followed by improved regulation—worked to improve the Securities and Exchange Commission's regulation of money market funds. *See generally* SEC. & EXCH. COMM'N, MONEY MARKET FUND REFORM 22–23, 26–27, 29–31; Amendments to Form PF, 79 Fed. Reg. 47,736 (2014), amending 17 C.F.R. Parts 230, 239, 270, 274, 279; *see* Press Release, Sec. & Exch. Comm'n, SEC Adopts Money Market Fund Reform Rules (July 23, 2014), https://www.sec.gov/news/press-release/2014-143 [https://perma.cc/A3JQ-8ZGB] (describing amendments to the rules that govern money market funds).

71. McCarran-Ferguson Act, ch. 20, 59 Stat. 34 (1945) (codified as amended at 15 U.S.C. § 1012 (2012)).

72. *See, e.g.*, Letter from Nat'l Conference of Ins. Legislators, to Barney Frank, Chairman, House Fin. Servs. Comm. (Oct. 23, 2009), http://ncoil.org/wp-content/uploads/2016/04/10272009October23Letter.pdf [https://perma.cc/FUF6-9GGG] ("We continue to disagree with the necessity for such an office and question its accountability and effectiveness."). For a discussion of states' reaction to and roles under Dodd-Frank, see Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 581–87 (2011).

73. Indeed, the American Action Forum called it precisely this. *Hotel California: FSOC Edition*, AM. ACTION FORUM (July 1, 2016), https://www.americanactionforum.org/infographic/hotel-california-fsoc-edition/ [https://perma.cc/F7TW-Z82A]. The reference is to a song by the Eagles, about a place from which "you can check out any time you like, but you can never leave!" THE EAGLES, *Hotel California*, *on* HOTEL CALIFORNIA (Asylum Records 1976).

74. For a discussion of the FSB generally, see David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT'L L. 683, 698–99 (2012).

Committee had wondered whether the Council's designation decisions were "sufficiently open, objective, data-driven, and free from the influence of outside organizations"—by which he meant the FSB.[75]

The quantum of discretion afforded designation decisions by the Council has occasioned widespread debate. Jeremy Kress has praised the flexibility of the process;[76] Daniel Schwarcz and I have found the administrative component of designation to be a reasonable and sensible response to risk in insurance.[77] On the other hand, Christina Skinner has written that there ought to be more levels of designation than the binary choice the Council has to make.[78] To her, the fearsome prospect of designation, paired with the alternative of doing nothing, resembles regulatory regimes that are often criticized for being too blunt.[79] The Department of Agriculture's meat inspection service, for example, can pull its inspectors from a plant when they find violations, or it can do little else, and it has often been criticized for that all-or-nothing dynamic.[80] Skinner has proposed a sort of graduated oversight, including an information-gathering intermediate step called SIFI Lite.[81] The Treasury Department itself has suggested that the Council might be better served identifying activities that should be regulated for risk, rather than firms.[82] The suggestion would transform the Council from being a regulator to one making recommendations to its member regulators about what they should supervise—it would become something of a think tank.[83]

Other commentators have suggested that the Council should prepare a cost–benefit analysis accompanying any designation decision. The district court that reversed the Council's designation of MetLife insisted, quite implausibly, that the Council's governing statute *required* a cost–benefit

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75. *FSOC Accountability: Nonbank Designations: Hearing Before the Comm. on Banking, Hous. & Urban Affairs*, 114th Cong. 1–2 (2015) (statement of Sen. Richard Shelby, Chairman, S. Comm. on Banking, Hous. & Urban Affairs).

76. Jeremy Kress, *The Case Against Activity-Based Financial Regulation*, CLS BLUE SKY BLOG (Nov. 16, 2017), http://clsbluesky.law.columbia.edu/2017/11/16/the-case-against-activity-based-financial-regulation/ [https://perma.cc/VQK4-H5CJ].

77. Schwarcz & Zaring, *supra* note 7, at 1869–81.

78. As Skinner has put it, "[A]lthough regulating nonbank financial institutions has, so far, proceeded in a black-and-white fashion—with all systemically important institutions regulated in a manner highly similar to banks—this approach is insufficiently attentive to the need for a more graduated, spectrum-like system." Christina Parajon Skinner, *Regulating Nonbanks: A Plan for SIFI Lite*, 105 GEO. L.J. 1379, 1384 (2017).

79. *See id.* at 1396–97 (describing the "stark consequences of a binary situation" due to the "all-or-nothing" situation).

80. 21 U.S.C. § 606(a) (2012).

81. Skinner, *supra* note 78, at 1385.

82. *See id.* at 1396 (describing FSOC declining to go forward with any new SIFI designations and instead commissioning a study on types of risks to be regulated).

83. *See supra* Part II.

analysis, a claim that is surprisingly common when it comes to the judicial supervision of financial regulators.[84] Cost–benefit analyses are controversial, however, because of the difficulty of quantifying the benefits of a regulation designed to avoid a financial crisis.[85] Such benefits are extremely hard to forecast; they involve macroeconomic employment and growth projections subject to a wide array of outcomes depending on the assumptions made.[86]

### *B. The Council's Process*

As a group of agencies, the Council is best understood as a regulator made up of regulators. The Council is chaired by the Treasury Secretary and includes nine other federal financial regulators, all of whom are the heads or chairs of their respective agencies.[87] It also includes, in a non-voting capacity, some non-federal regulators—a state banking supervisor, a state insurance commissioner, and a state securities administrator, as chosen by the state

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84. *See* Metlife, Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219, 239–42 (D.D.C. 2016) (analyzing the importance and necessity of using a cost–benefit analysis in the administrative process); *see also* Bus. Roundtable v. SEC, 647 F.3d 1144, 1149–51 (D.C. Cir. 2011) (determining that the agency "neglected its statutory obligation to assess the economic consequences of its rule").

85. John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 931 (2015). For example, financial institutions such as bank holding companies are subject to supervision by the Fed. 12 U.S.C. §§ 1841–52 (2012). They must comply with its rigorous capital standards, partly because of the risk the collapse of those firms can have on the larger economy. *See* Capital Adequacy of Bank Holding Companies, Savings and Loan Holding Companies, and State Member Banks (Regulation Q), 12 C.F.R. § 217.1 (2018) (setting out the minimum capital requirements and adequacy standards imposed on certain financial institutions). These requirements have been the centerpiece of financial regulation for decades, and the Fed changes the rules as time passes and new challenges are posed to the soundness of the financial system. The standards always impose costs on banks, but, when promulgating or amending the rules, the Fed has not tried to quantify the benefit in crises avoided, nor has it been asked to do so by the courts. *See* Henry T. C. Hu, *Financial Innovation and Governance Mechanisms: The Evolution of Decoupling and Transparency*, 70 BUS. LAW 347, 404 (2015) ("[T]he Federal Reserve Board is generally not required to provide cost-benefit analysis with its rulemaking . . . .").

86. Coates, *supra* note 85, at 999–1001.

87. Of these nine, eight are "real" regulators, and one is a voting member with insurance expertise. FIN. STABILITY OVERSIGHT COUNCIL, *About FSOC*, U.S. DEP'T OF TREASURY (Sept. 10, 2018), https://www.treasury.gov/initiatives/fsoc/about/Pages/default.aspx [https://perma.cc/SJ38-AS6D] (providing a list of the nine regulators). The large number of federal financial regulators has, it is thought by many in the academy and elsewhere, made for too many financial overseers; the Treasury has proposed reducing the number of regulators in the past. *The Department of the Treasury Blueprint for a Modernized Financial Regulatory Structure*, U.S. DEP'T OF TREASURY 14 (Mar. 2008), https://www.treasury.gov/press-center/press-releases/Documents/Blueprint.pdf [https://perma.cc/9C79-WFR4] ("In the optimal structure three distinct regulators would focus exclusively on financial institutions: a market stability regulator, a prudential financial regulator, and a business conduct regulator."). For a discussion on alternative approaches to financial regulation, see Lawrence A. Cunningham & David Zaring, *The Three or Four Approaches to Financial Regulation: A Cautionary Analysis Against Exuberance in Crisis Response*, 78 GEO. WASH. L. REV. 39, 45 (2009).

regulators in each issue area.[88] While this state participation is relatively unique, only federal regulators get to vote on designations.[89]

As for the statutory guidance governing those regulations, Congress promulgated the sort of multi-factor balancing test that former Justice Antonin Scalia used to bemoan.[90] Congress gave the Council eleven factors to apply to designations, one of which included "any other risk-related factors that the Council deems appropriate."[91] The Council, in turn, added content to that broad mandate by promulgating a regulation indicating that it would principally focus on size, substitutability, interconnectedness, leverage, liquidity, and existing regulatory scrutiny when deciding whether to designate a firm as systemically important.[92]

Those six factors were applied to the three designated insurance companies through a three-step process. The first test was straightforward and quantitative and focused mainly on size. Nonbank financial companies with more than $50 billion in assets pass this stage.[93] The initial stage is followed by two qualitative stages: one in which the Council assesses the riskiness of particular institutions that pass the quantitative threshold using a broad array of publicly available data, and a second, if necessary, where the institution can present evidence to the Council designed to persuade it not to designate.[94]

The MetLife designation exemplifies the process. After passing the first and second stages of FSOC review, MetLife was informed that it was being

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88. Press Release, N. Am. Sec. Adm'rs Ass'n, State Regulators Announce Representatives for the Financial Stability Oversight Council (Sept. 23, 2010), http://www.nasaa.org/1520/state-regulators-announce-representatives-for-the-financial-stability-oversight-council/ [https://perma.cc/VFX9-4AF9].

89. Two federal bodies, the FIO and the Office of Financial Research, are also represented on the Council by their directors but do not vote on designations.

90. Scalia compared one balancing test to one that asked judges to divine "whether a particular line is longer than a particular rock is heavy." Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

91. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 113(a)(2)(K), 124 Stat. 1376, 1398 (2010) (codified at 12 U.S.C. § 5323(a)(2)(K)).

92. Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 12 C.F.R. § 1310 (2018).

93. Or so FSOC explained, "[A] nonbank financial company will be reviewed further if it has at least $50 billion in total consolidated assets . . . ." FIN. STABILITY OVERSIGHT COUNCIL, *Nonbank Designations – FAQs*, U.S. DEP'T TREASURY (Nov. 21, 2016), https://www.treasury.gov/initiatives/fsoc/designations/PAges/nonbank-faq.aspx [https://perma.cc/269J-5U86].

94. *Id.* In Stage 2:

> the FSOC notifies a company that comes under active review, and reviews existing public and regulatory information and information submitted by the company. If the Council decides to evaluate the company further, it notifies the company and begins Stage 3, a detailed, in-depth analysis that includes a review of confidential information provided by the company.

*Id.*

considered for designation and offered an opportunity to respond. The firm submitted over 21,000 pages of materials to the Council and made its case to regulators in person as well as through briefing.[95] After considering these materials and the argument of the firm and recommendations of Council staff, the Council, by a vote of 9–1, with the federal insurance expert dissenting, officially designated MetLife.[96]

In reaching its conclusion, the Council discussed each of the ten statutory factors in Dodd-Frank and the six categories contained in its final rule. The Council observed that MetLife was the largest insurance provider in the United States and was "significantly interconnected to insurance companies and other financial firms through its products and capital markets activities."[97] These activities, including securities lending and the funding of agreement-backed notes, created liabilities "that increase the potential for asset liquidations by MetLife in the event of its material financial distress."[98] The Council posited that "MetLife's complexity, intra-firm connections, and potential difficulty to resolve" could aggravate the risk that financial distress at the company could impair financial market functioning.[99] Additionally, while acknowledging that MetLife's operating insurers were subject to state insurance regulation, the Council noted that this regulation was focused predominantly on protecting policyholders rather than on safety and soundness; by regulating the firm on a state-by-state basis, the existing scheme made it difficult to impose and monitor firm requirements about capital buffers—liquidity requirements designed to ensure that shocks would not be fatal.[100]

### C. *De-Designation by the Council and the Courts*

Insurance deregulation has been done much more coherently by the Council than by the government's other deregulators. It offers some evidence that if deregulation must be pursued, agencies have the ability to focus on substance more than courts do, and they enjoy an expertise advantage over Congress, which, at least in financial regulation, tends to spend its time considering blunt and broad deregulatory bills, which it then fails to pass.

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95. MetLife, Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219, 229 (D.D.C. 2016).

96. *Id.*

97. FIN. STABILITY OVERSIGHT COUNCIL, BASIS FOR THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S FINAL DETERMINATION REGARDING METLIFE, INC. 6 (2014), https://www.treasury.gov/initiatives/fsoc/designations/Documents/MetLife%20Public%20Basis.pdf [https://perma.cc/5EEB-T5YT].

98. *Id.* at 9.

99. *Id.* at 16.

100. *See id.* at 26 (describing the decentralized supervision of Metlife).

*1. De-Designation by the Council.*—We can see how the Council deregulates through its decisions de-designating AIG, Prudential, and GE Capital. In the Council's decision that de-designated GE Capital on June 28, 2016, it emphasized that the firm had transformed itself in an effort to reduce its potential to create systemic risk. As the Council observed, "GE Capital has fundamentally changed its business."[101] In particular, it had engaged in "a series of divestitures, a transformation of its funding model, and a corporate reorganization," all of which made the company substantially smaller.[102] It was a "much less significant participant in financial markets and the economy" and, in addition, had "shifted away from short-term funding, and reduced its interconnectedness with large financial institutions."[103] The Council also observed that GE Capital "no longer owns any U.S. depository institutions and does not provide financing to consumers or small business customers in the United States."[104] All told, the de-designation order was twenty-three pages long. It cited statutory authority and the Council's own regulation. In addition to considering the shrunken size of the changed firm, it evaluated its contagiousness and emphasized that the risk that other firms would fail if GE Capital failed was one of the drivers of the decision to designate, and to de-designate.

For these reasons, the Council removed its regulatory oversight (which, again, it exercised through the Fed) over a firm that had changed and become less systemically risky. The interconnectedness of the firm particularly mattered to the Council's analysis; the concern was not whether it would be bad for the economy if GE Capital failed but whether other firms would be more likely to fail if GE Capital failed. One of the reasons for the financial crisis bailout of AIG was the fact that so many of its counterparties were financial firms depending on it to stand behind its credit default swaps, which can be understood as a form of insurance written on the prospect of a corporate bond default.[105] The Council wanted to make sure that GE Capital's failure would not start a chain reaction. Hence the concern about whether other parties depended upon GE Capital and whether other lenders could pick up the firm's slack.

To be sure, the Council also considered the firm's financing. GE Capital was designated in part because of its size, but also because it relied on short-

101. FIN. STABILITY OVERSIGHT COUNCIL, BASIS FOR THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S RESCISSION OF ITS DETERMINATION REGARDING GE CAPITAL GLOBAL HOLDINGS, LLC 2 (2016), https://www.treasury.gov/initiatives/fsoc/designations/Documents/GE%20Capital%20Public%20Rescission%20Basis.pdf [https://perma.cc/33D7-SSEF].

102. *Id.*

103. *Id.*

104. *Id.*

105. For a primer on how credit default swaps work, see William K. Sjostrom, Jr., *The AIG Bailout*, 66 WASH. & LEE L. REV. 943, 947–52 (2009).

term debt that could disappear quickly in difficult times. The idea is that a firm that depends on rolling over debt every month might be more subject to market fluctuations than a firm that would not have to worry about finding financing until next year. By reducing its reliance on short-term debt, GE Capital managed to reassure the Council that this was not a risk.

For AIG, the Council relied on comparisons between the firm and its peers. The comparisons indicated that in changing its business model, the firm had become much smaller than the biggest banks, and smaller even than an undesignated insurance company, Berkshire Hathaway, in total assets.[106] Moreover, the company held less debt than the large banks subject to extra Fed supervision; this debt was larger than that issued by its insurance peers Prudential and MetLife but, once again, was lower than the undesignated Berkshire Hathaway.[107] After, among other things, exiting business in ways that made that company less interconnected with the rest of the financial system and reducing "the amounts of its total debt outstanding, short-term debt, derivatives, securities lending, repurchase agreements, and total assets," in some cases significantly as FSOC put it, AIG also won de-designation.[108] The Council observed that the firm had reduced its securities lending and its leverage—to the point that assets were 5.4 times larger than equity, making the firm leveraged, but substantially less leveraged than the largest banks.[109] Finally, the Council emphasized that only $9.4 billion in credit default swaps—the derivatives that had brought AIG lower during the financial crisis—had been written on the firm's credit.[110] That was far lower than the $25.6 billion outstanding referencing Berkshire Hathaway's credit, to say nothing of the $20.5 billion referencing Goldman Sachs and the $20.9 billion referencing Morgan Stanley.[111] As the Council indicated,

> capital markets exposures to AIG have decreased, and the company has sold certain businesses in which it held dominant market shares, rendering the company less interconnected with other financial institutions and smaller in scope and size. . . . While this liquidity risk

106. FIN. STABILITY OVERSIGHT COUNCIL, NOTICE AND EXPLANATION OF THE BASIS FOR THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S RESCISSION OF ITS DETERMINATION REGARDING AMERICAN INTERNATIONAL GROUP, INC. (AIG) 13 tbl.2 (2017), https://www.treasury.gov/initiatives/fsoc/designations/Documents/American_International_Group,_Inc._(Rescission).pdf [https://perma.cc/78AD-7PG3].

107. *Id.*

108. *Id.* at 5.

109. *See id.* at 13 tbl.2 (comparing the leverage ratio of AIG to the largest bank holding companies and insurers).

110. *See id.* at 17 (noting the decrease in the amount of outstanding single-name credit default swaps for which AIG is the reference entity). Of course, AIG's financial crisis problems with CDS came from the CDS contracts it wrote rather than the ones referencing its own credit.

111. *See id.* at 13 tbl.2 (comparing the gross CDS outstanding for which bank holding companies and insurers are the reference entity).

> is material, the Council's analysis . . . indicates that the level of forced asset sales by AIG in the event of its material financial distress may be lower than previously contemplated . . . .[112]

In sum, the Council noted, AIG was a "notably different" business than the one that was initially designated.[113] It accordingly ordered that the firm's designation as a SIFI be revoked.

Prudential's de-designation order, promulgated on October 16, 2018, was sixty-six pages long, the lengthiest such FSOC order yet, and once again, it was analytically coherent, applying the standards identified by the Council as the ones on which designation turns in depth.[114] The challenge for the Council was that its de-designation decision was, for the first time, made for a firm that had, in most relevant senses, gotten bigger than it was when it was first identified as systemically important.[115] If, as a result, the order is less persuasive than the Council's two other de-designation decisions, it is recognizably in the same genre.

The decision included a qualitative and quantitative analysis, focusing on a finding that any distress at the firm would be unlikely to be transmitted to the broader financial markets.[116] In particular, the Council considered three ways that trouble at Prudential could be contagious.[117] For fire sales of assets brought on by the potential disappearance of sources of funding (the "Asset Liquidation Transmission Channel"), the Council concluded, for example, that "there is not a significant risk that a forced asset liquidation by Prudential would disrupt trading in key markets or cause significant losses or funding problems for other firms with similar holdings" and that Prudential's fire-sale risk was "manageable" by the firm itself.[118] For exposure risk (the "Exposure Transmission Channel"), the Council concluded that despite the fact that unlike other designated firms Prudential had not shrunk, and instead had increased its securities lending and derivatives commitments, few other firms were exposed to risks in a way that would threaten their viability.[119] For replaceability risk (the "Critical Function or Service Transmission Channel"), the Council concluded that despite the fact that Prudential is the country's largest insurer, other firms could take its place if it imploded, given

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112. *Id.* at 5.

113. *Id.*

114. FIN. STABILITY OVERSIGHT COUNCIL, NOTICE AND EXPLANATION OF THE BASIS FOR THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S RESCISSION OF ITS DETERMINATION REGARDING PRUDENTIAL FINANCIAL, INC. 2–9 (2018), https://home.treasury.gov/system/files/261/Prudential-Financial-Inc-Rescission.pdf [https://perma.cc/V8QQ-NLDV].

115. *Id.* at 11 tbl.1.

116. *Id.* at 61.

117. *Id.* at 14.

118. *Id.* at 32.

119. *Id.* at 5–6.

that the insurance markets were "highly competitive."[120] The order reviewed all the assets held by Prudential, often in comparison to the similar asset holdings of other institutions.[121] It, for example, reported that Prudential was the 16th and 11th riskiest firm when it came to fire sales, assuming two different sorts of shocks.[122] In all, though the order is wanting in some particulars, the Council made an elaborate and lengthy case for de-designation.

In all three de-designation cases, the Council examined the balance sheets of the companies in detail and assessed the role of the firms in the broader financial system. As we have seen, the critical criterion for the Council was contagion—the regulators wanted to establish that if the firms failed, it would be unlikely to create a financial panic with broader implications for the domestic economy.

There are both process and structural advantages to the Council's de-designation role.

On the process front, although the Council works differently than other agencies, like all of them, it is required by the APA to consider evidence, apply that evidence to the governing legal standards, and issue a reasoned decision, reviewable by the courts.[123] The Council hears from applicants for de-designation and has issued a roadmap for how these decisions will be made; that roadmap commits the Council to a process that it must follow.[124]

Structurally, the Council is comprised of the heads of a diverse array of federal financial regulators. De-designation decisions require two-thirds of these regulators to agree on the decision, along with the Secretary of the Treasury.[125] Although the heads of all the agencies with roles on the Council are political appointees, their appointments are often staggered, with terms of four to six years, making it possible for holdovers from previous administrations to be serving alongside new appointees (as was the case at the beginning of the Trump Administration, when the chairs of the Fed and the FDIC, the directors of the Federal Housing Finance Administration and the CFPB, and the independent insurance member had been appointed by the previous President).[126] As time passes, an Administration can be more sure

120. *Id.* at 7.

121. *Id.* at 11–12 tbls.1 & 2; *id.* at 62–63 apps. A & B.

122. *Id.* at 65 app. C.

123. *See* 5 U.S.C. §§ 701–06 (providing for judicial review of agency action).

124. FIN. STABILITY OVERSIGHT COUNCIL, *Nonbank Designations – FAQs*, U.S. DEP'T OF TREASURY (Nov. 21, 2016), https://www.treasury.gov/initiatives/fsoc/designations/Pages/nonbank-faq.aspx [https://perma.cc/X97H-F7DT].

125. *Id.*

126. Alan S. Kaplinsky & Mark J. Levin, *The Financial Stability Oversight Council: Another Potential Route for Overturning the CFPB's Final Arbitration Rule*, BALLARD SPAHR LLP (July 13, 2017), https://www.consumerfinancemonitor.com/2017/07/13/the-financial-stability-oversight-council-another-potential-route-for-overturning-the-cfpbs-final-arbitration-rule/ [https://perma.cc

of getting sympathetic appointees on the Council, but even then, the members of the Council will head independent agencies, largely insulated from political control, and will have different perspectives and priorities on questions like insurance regulation. This sort of diversity of opinion is not in and of itself a guarantee of wise policymaking, but scholars ranging from Eric Posner and Cass Sunstein to Condorcet have argued that different perspectives can improve decision-making.[127] At the very least, the evidence on insurance deregulation suggests that there is something to the required process and structure of decision-making.

*2. De-Designation by the Courts.*—The Council's substantive version of deregulation can be compared to the procedural focus of the court that undid MetLife's designation, which was less compelling.

MetLife filed suit to undo its designation by the Council in the U.S. District Court for the District of Columbia. That court reversed the Council's designation on two grounds. The first emphasized that the Council had failed to apply the factors it had previously indicated were critical to the decision to designate to MetLife in a manner the court could credit. Rather than assessing the riskiness of MetLife, the court concluded that two of the Council's criteria were ignored without adequate explanation. The court complained that the Council had "abandoned the Guidance and refused to evaluate MetLife's vulnerability to material financial distress," and that its designation "hardly adhered to any standard when it came to assessing MetLife's threat to U.S. financial stability."[128] It meant that the designation decision itself was "fatally flawed."[129]

The second ground for reversal turned on the Council's failure to do an adequate cost–benefit analysis in making its designation decision.[130]

Getting too far into the weeds of whether the Council applied its standards consistently is unnecessary. But it is fair to say that the court relied on a gotcha form of consistency; it concluded that FSOC had conflated two inquiries it had promised to perform into one. In particular, it concluded:

> The [Council's] Guidance divided six categories of analysis into two distinct groups. The first group (size, substitutability, and

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127. *See* Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 140–43 (2006) (arguing that involving more voices in a decision improves the quality of the decision); *see also* MARQUIS DE CONDORCET, ESSAY ON THE APPLICATION OF MATHEMATICS TO THE THEORY OF DECISION-MAKING (1785), *reprinted in* CONDORCET: SELECTED WRITINGS 33, 34–36 (Keith M. Baker ed., 1976).

128. MetLife, Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219, 236–37 (D.D.C. 2016).

129. *Id.* at 230.

130. *Id.* at 239–40.

> interconnectedness) was meant "to assess the potential impact of the nonbank financial company's financial distress on the broader economy." The second group (leverage, liquidity risk, and maturity mismatch) was meant "to assess the vulnerability of a nonbank financial company to financial distress." The distinction was clear: FSOC intended the second group of analytical categories to assess a company before it became distressed and the first group to assess the impact of such distress on national financial stability. Yet in the Final Determination, FSOC posited that all six categories were meant *only* "to assess the potential effects of a company's material financial distress." That is undeniably inconsistent.[131]

But of course large, connected firms are unlikely to pose risk unless they are also highly leveraged or illiquid. And at any rate, the court never suggested that the Council had not considered the six factors, only that it had not done so in a way that could be expressed in two inquiries rather than one.

The Council was also faulted, a bit more plausibly, for failing to consider some relevant factors in making its decision about riskiness. The court expressed its view as follows:

> [The Council] never projected *what* the losses would be, *which* financial institutions would have to actively manage their balance sheets, or *how* the market would destabilize as a result. . . . Predictive judgment must be based on reasoned predictions; a summary of exposures and assets is not a prediction.[132]

This sort of "you should have done more" second guessing is also easy to criticize. It is never clear how much more is enough, and suggesting that the Council's procedures are arbitrary because it relied on data about exposure to conclude that MetLife was systemically risky—but that it failed to make an explicit prediction about systemic riskiness—holds the Council to an awfully high standard of connecting the dots.

As for the court's argument that the Council's "decision intentionally refused to consider the cost of regulation, a consideration that is essential to reasoned rulemaking," the less said, the better.[133] Nothing about the APA requires a cost–benefit analysis, which means that the textual basis for requiring a cost–benefit analysis must be found in Dodd-Frank itself.[134] The

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131. *Id.* at 234 (citations omitted).

132. *Id.* at 237.

133. *Id.* at 242.

134. The APA does not contain any language requiring a cost–benefit analysis, and the Supreme Court requires a clear statement from Congress. Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 510 (1981) ("When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute."); Jennifer Nou, *Regulating the Rulemakers: A Proposal for Deliberative Cost-Benefit Analysis*, 26 YALE L. & POL'Y REV. 601, 607 (2008) (describing the failed attempts to formally codify cost–benefit requirements in the APA). *But see* Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVTL. L.

portion of the statute that the court concluded required the agency to consider cost only invited the Council to use "any other risk-related factors that the Council deems appropriate" in making its designation decisions, an invitation that obviously includes no required factors, including cost.[135]

Although the court's findings of procedural errors were unpersuasive as a matter of logic, the point is that the critique was based on the idea that the Council, regardless of the decision it made, failed to follow the processes that it and Congress had laid out. The court never suggested that MetLife did or did not present a risk to the financial system. It instead evaluated the designation according to the standards the Council had announced for itself, and found them wanting. While other judges might have been more procedurally lenient towards the Council, none of them got to evaluate MetLife's case. The Council filed an appeal to the decision during the Obama Administration, only to drop the suit and acquiesce to de-designation during the Trump Administration.[136]

*3. Deregulation by Congress.*—Congress has not successfully passed any legislation that would remove any regulation of the insurance industry, but it has made noises about doing so. The House Financial Services Committee complained in a report that "FSOC's nonbank designation process is arbitrary and inconsistent."[137] The committee complained, among other things, that FSOC had failed to show that material financial distress at its insurance companies might have ripple effects, by causing "impairment of financial intermediation or of financial market functioning that would be sufficiently severe to inflict significant damage on the broader economy."[138] But this oversight has not resulted in passed legislation that would undo the Council's power to designate insurance companies as systemically risky. The House has tried; the Financial CHOICE Act, which it passed, would completely eliminate FSOC's designation power.[139] But that statute, though

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REV. 1, 6 (2017) ("[A]ny decision not to quantify costs and benefits, or to show that the latter justify the former, does require some kind of explanation (at least if the governing statute does not rule cost-benefit analysis out of bounds).").

135. 12 U.S.C. § 5323(a)(2)(K) (2012); *MetLife*, 177 F. Supp. 3d at 242.

136. Pete Schroeder, *MetLife, U.S. Regulators Agree to Set Aside Legal Fight*, THOMPSON REUTERS (Jan. 18, 2018), https://www.reuters.com/article/us-usa-metlife-fsoc/metlife-u-s-regulators-agree-to-set-aside-legal-fight-idUSKBN1F8064 [https://perma.cc/R5YC-CU2M].

137. REPUBLICAN STAFF OF H.R. FIN. SERVS. COMM., 115TH CONG., THE ARBITRARY AND INCONSISTENT FSOC NONBANK DESIGNATION PROCESS 3 (Comm. Print 2017) https://financialservices.house.gov/uploadedfiles/2017-2-28_final_fsoc_report.pdf [https://perma.cc/DVQ4-ZS3H].

138. *Id.*

139. *See* HOUSE FIN. SERVS. COMM., THE FINANCIAL CHOICE ACT: EXECUTIVE SUMMARY, https://financialservices.house.gov/uploadedfiles/financial_choice_act-_executive_summary.pdf [https://perma.cc/63S2-L9D8] (summarizing the proposed repeal of FSOC's authority to designate firms as "systemically important").

blunt, has not gotten beyond the lower house. Instead, Congress passed a modest deregulatory bill that did nothing about insurance supervision (it modified, among other things, the Volcker Rule's impact on other financial institutions, and reduced the number of banks subject to so-called "stress tests").[140] The result is that Congress's role in federal insurance deregulation has been all or nothing—and thus far, it has been nothing that has been the result.

Perhaps this did not have to be the case—the deregulatory Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 chipped away at the Dodd-Frank regulatory requirements, but made no attempt to fundamentally undo them (and did little about insurance regulation other than to encourage transparency in international insurance regulatory standard setting).[141] But Congress is limited on the substantive work it can do in deregulation by some constraints of the regulatory process. It must legislate prospectively, rather than retrospectively, and it must regulate classes, rather than individual firms, as the latter is left to the judiciary, and it is comprised of generalists, rather than experts—few members of Congress would claim expertise in matters of systemic risk.[142]

*4. Conclusion.*—What we see with deregulatory courts and a deregulatory Council is a traditional and important distinction between substance and procedure in administrative law. The Council has regulated the insurance industry by singling out for extra attention some institutions that posed risk to the final system. In deciding that these risks were no longer worth the extra attention, the Council considered how big the institutions were or had become, how seriously they had taken the effort to become less risky, and how interconnected the institution was once it was shrunken. It worried most about this interconnectedness because doing so is a textbook form of financial regulation, which is designed to forestall the type of contagion that really exists only in finance (manufacturing, for example, does not have this sort of risk; just because Chrysler goes bankrupt doesn't mean that Ford and GM will as well).[143] In the last financial crisis, every investment

140. Economic Growth, Regulatory Relief, and Consumer Protection Act Pub. L. No. 115-174, §§ 203, 204, 401, 132 Stat. 1296, 1309–10, 1359 (2018).

141. Indeed, the most pro-deregulation members of Congress have indicated that they were unsatisfied with the 2018 statute and hoped for more in the future. *Summary of the Economic Growth, Regulatory Relief and Consumer Protection Act (S. 2155)*, JDSUPRA (May 25, 2018), https://www.jdsupra.com/legalnews/summary-of-the-economic-growth-34187/ [https://perma.cc/9HUB-5FKC].

142. For an analysis, see Michael Herz, *The Legislative Veto in Times of Political Reversal: Chadha and the 104th Congress*, 14 CONST. COMMENT. 319, 336 (1997) (discussing cases where "congressional adjudication [would] so impermissibly intrude[] on judicial authority").

143. After all, the Council's mission is "to identify risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large,

bank in the United States looked set to collapse without a government intervention after the collapse of one of them—Lehman Brothers; by the end of the crisis, only two of the five largest in the country were left, and they had converted themselves into bank holding companies, exchanging the oversight of the SEC for that of the Fed, which has the power to make emergency loans to banks facing a run.[144]

The court's reasoning, by contrast, had nothing to do with the question of whether insurance companies posed threats of systemic risk. Instead, it bespoke a traditional focus on procedure and a sort of second guessing about whether the procedures identified by the agency actually applied in the way the agency promised. While one form of deregulation focuses on the riskiness of financial institutions, the other focuses on a decision-making process that went into that riskiness determination.

This makes the Council's form of deregulation substantive and much more satisfying than judicial deregulation, which said nothing about whether MetLife was actually risky or not but only critiqued the Council for making the decision it did.

This record is a retreat from Dodd-Frank's clear desire to put the Council in an oversight position over nonbank financial companies. That statute's creation of the FIO also suggests the desire for a federal role. Nonetheless, new regulatory schemes by definition create new burdens. While new executives and regulators cannot abandon oversight over industries that Congress has insisted be regulated, they can certainly turn down invitations to regulate from the Legislature.

Congress gave the Council the power to oversee systemically risky insurance companies, but it did not mandate a federal insurance regulation scheme. Perhaps unsurprisingly, then, an administration with a deregulatory bent has turned away from federal insurance oversight, preferring to leave such matters to the states.

## III. International Regulation's Role

The remaining federal role in insurance regulation will be provided by the part of the Treasury Department made responsible for negotiating international agreements on insurance. While the government is getting out of the business of the direct regulation of large insurers, regulatory cooperation orchestrated by the FIO has managed to keep the federal government involved in oversight. This indirect regulation has been based on international, rather than domestic policymaking. It is rooted in a deal

interconnected bank holding companies . . . ." 12 U.S.C. § 5322(a)(1)(A) (2012). For a discussion of the Council's "sweeping" rulemaking authority, see Peter Conti-Brown, *Elective Shareholder Liability*, 64 STAN. L. REV. 409, 434–35 (2012).

144. The history is reviewed in Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 473–512 (2009).

between federal and European insurance regulators. The deal requires American regulators to remove some state requirements on insurance and reinsurance companies in exchange for similar EU concessions. It also encourages (and may ultimately require) state regulators to adopt a form of supervision used in the European Union for all U.S. insurance companies doing business in the EU, which includes all large U.S. insurers, making the regulatory impact of international agreements substantial.

The so-called covered agreement concluded with the European Union, which the Obama Administration negotiated and the Trump Administration signed, illustrates how the growing internationalization of insurance (or almost anything, really) can impel American regulators, even those of a deregulatory bent, to engage with their foreign counterparts.

It is perhaps enough to say that the covered agreement gives the federal government a regulatory role in the supervision of insurance companies through the operation of regulatory cooperation with foreign jurisdictions. It is a testament to the global nature of the insurance market and the way that all forms of finance cross borders. It has also meant that the FIO's diplomatic role has been the statutory basis for the continuation of federal involvement in insurance oversight. It also is technical—the FIO is involved in insurance regulation not because of a sweeping deal on fundamental principles on insurance oversight, but rather on a give-and-take on reinsurance rules, and a concession to the EU on the appropriate way to supervise big insurance firms, a way that could revolutionize insurance supervision in the United States. But for aficionados, it is worth spelling out exactly how the covered agreement does so and how the FIO was charged with the power to negotiate it. Those less concerned with the intricacies of insurance supervision may find these details unnecessary for an understanding of the larger point.

The conclusion of the covered agreement raises some of the usual concerns about international financial regulation—is the cooperation by agencies sufficiently responsive to outside input, given that notice and comment implementing an international agreement can look like a fait accompli?[145] Time will tell, but it is clear that international financial regulation is hard to resist and tends to entangle—the covered agreement includes a provision for a Joint Committee of American and European regulators who will oversee its adoption and implementation over the next five years, meaning that international cooperation is more than a deal—it also creates cross-border institutions.[146]

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145. For one look at the concerns raised along these lines, see David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 WASH. U. L. REV. 59, 82–84 (2013).

146. The Treasury Department has said that "the Joint Committee will serve as a forum for consultation and to exchange information on the administration and proper implementation of the Agreement." U.S. DEP'T OF TREASURY, STATEMENT OF THE UNITED STATES ON THE COVERED AGREEMENT WITH THE EUROPEAN UNION 3 (Sept. 22, 2017), https://www.treasury.gov/initiatives

### *A. Statutory Authority*

Title V of the Dodd-Frank Wall Street Reform Act created the FIO within the Department of the Treasury.[147] That office has limited powers, especially domestically, where insurance supervision remains the province of the state insurance commissions.[148] FIO has nonetheless been charged with a particularly important outward-facing role. Congress instructed it "to coordinate Federal efforts and develop Federal policy on prudential aspects of international insurance matters, including representing the United States, as appropriate, in the International Association of Insurance Supervisors"; to "consult with the States (including State insurance regulators) regarding insurance matters of national importance and prudential insurance matters of international importance"; and to "advise the [Treasury] Secretary on . . . prudential international insurance policy issues."[149]

It also has been given the power, in association with the United States Trade Representative, to conclude agreements on insurance regulation with foreign counterparties. These so-called covered agreements are defined in Dodd-Frank as follows:

> a written bilateral or multilateral agreement regarding prudential measures with respect to the business of insurance or reinsurance that—
>
> (A) is entered into between the United States and one or more foreign governments, authorities, or regulatory entities; and
>
> (B) relates to the recognition of prudential measures with respect to the business of insurance or reinsurance that achieves a level of protection for insurance or reinsurance consumers that is substantially equivalent to the level of protection achieved under State insurance or reinsurance regulation.[150]

Covered agreements are meant to both strengthen insurance regulation and level the playing field between the United States and other countries. One of the problems for insurers who want to expand their operations abroad has been navigating the regulatory burdens posed by the government of every

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/fio/reports-and-notices/Documents/US_Covered_Agreement_Policy_Statement_Issued_September_2017.pdf [https://perma.cc/H3FR-SPFP].

147. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 501–02, 124 Stat. 1376, 1580 (2010) (codified at 31 U.S.C. § 313 (2012)).

148. So it has been since passage of the McCarran-Ferguson Act. That statute, as William Eskridge and John Ferejohn have explained, "exempt[s] insurance [from federal antitrust laws] and leav[es] that industry to state regulation." William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1233 n.72 (2001).

149. 31 U.S.C. § 313(c) (2012). It has since directed the FIO to seek more transparency in these negotiations. Economic Growth, Regulatory Relief, and Consumer Protection Act Pub. L. No. 115-174, § 211, 132 Stat. 1296, 1317–19 (2018).

150. 31 U.S.C. § 313(r)(2) (2012).

attractive market.[151] The efforts to liberalize this sort of trade—trade in services—has traditionally been thought to be less effective than the liberalization of trade in goods because of these regulatory barriers to entry.[152] Insurance companies seeking to do business abroad need to comply with local licensing requirements, rules about capital that must be retained to insure their solvency, and consumer-protection requirements relating to the kinds of insurance that can be sold and the basis for the denials of claims—all of these can be used to protect incumbent insurers, and the burden would be on foreign competitors.

Bilateral agreements are also meant to serve as a backstop for regulatory cooperation in cases where—as is the case with insurance regulation in particular—multilateral governance has not made progress. An analogy might be drawn to this country's approach to progress on reducing barriers to trade. When multilateral trade negotiations like the Doha Round of the World Trade Organization have foundered, the United States has increasingly looked to pursue its trade interests through bilateral trade and investment deals.[153] In the case of post-crisis insurance supervision, the options offered in Dodd-Frank suggest that where multilateral efforts either to level the international playing field or to improve the supervision of systemically risky insurance companies have foundered, bilateral covered agreements might serve as a useful supplement.

### *B. The Covered Agreement*

The covered agreement concluded by the FIO at the end of the Obama Administration gives the federal government a role in regulating insurance even as it has retreated from its SIFI designation role. The Trump Administration, after some hemming and hawing, announced on July 14,

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151. To take one example, a number of congressmen protested to the U.S. Trade Representative that insurance, among other industries, "face[s] serious market access barriers in Japan." Letter from Max Baucus, Dave Camp, Orrin Hatch & Sander Levin to Ron Kirk, U.S. Trade Representative, Office of the U.S. Trade Representative (Nov. 8, 2011), https://waysandmeans.house.gov/UploadedFiles/TPP_Japan_big_4_letter.pdf [https://perma.cc/U2ZN-28EK].

152. As Anupam Chander has observed, "International trade law has long recognized that internal regulations, not just border rules, might serve as barriers to trade in goods, but the even more extensive diffusion of regulatory authority over services heightens the challenge for discerning protectionist from other regulatory objects in services." Anupam Chander, *Trade 2.0*, 34 YALE J. INT'L L. 281, 299 (2009); *see* Taunya L. McLarty, *Liberalized Telecommunications Trade in the WTO: Implications for Universal Service Policy*, 51 FED. COMM. L.J. 1, 12 (1998) ("[T]rade liberalization in service markets was much further behind the liberalization of trade in goods . . . .").

153. *See* Rafael Leal-Arcas, *Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?*, 11 CHI. J. INT'L L. 597, 622 (2011) ("[W]orld leaders dropped a commitment to complete the troubled Doha Round in 2010 and vowed to push forward on bilateral and regional trade talks . . . .").

2017, that the Treasury Secretary would sign the covered agreement; he duly did so September 22, 2017.[154]

In particular, the covered agreement creates a federal role for the capital rules for reinsurers and for the supervision of insurance companies, as a supervisor of what kind of rules the states can impose on insurers. In reinsurance, the agreement reduces regulatory barriers to foreign competition in the United States and EU. Its group-supervision principles, in contrast, harmonize the regulatory approaches of the supervision of large insurance companies' operations in both jurisdictions. The agreement also includes an information-exchange component designed, among other things, to deepen regulatory ties between American and European insurance supervisors. The agreement thus sets regulatory parameters for the EU and U.S. insurance industries and requires the FIO's monitoring and oversight of the implementation of the agreement in the United States. It means that while the federal regulators are marching away from the direct supervision of insuring through the Council and the Fed, the elimination of federal regulation of insurance has not been complete because of the role it will now have insuring that state regulators meet the terms of the covered agreement. Instead, through international agreement, the federal government will find that it must continue to supply regulatory oversight to the insurance industry.

As for reinsurance, the covered agreement is best understood as an effort to reduce regulatory barriers to foreign competition in the United States and EU. The agreement serves to remove posted collateral and local presence requirements for EU and U.S. reinsurers doing business across the Atlantic.[155] The reinsurance portion of the agreement thus reduces trade barriers in both the United States and the European Union in a way likely to benefit American consumers. It is something like a trade deal, contained within the more narrow confines of a limited agreement on international insurance regulation.[156] In particular, the requirement that foreign reinsurance firms post 100% collateral to do business in certain American

154. For some background on adoption, see John S. Pruitt et al., *Legal Alert: US-EU Covered Agreement—An Overview*, EVERSHEDS SUTHERLAND (July 2, 2018), https://us.eversheds-sutherland.com/NewsCommentary/Legal-Alerts?find=196936 [https://perma.cc/XX5R-JQ5P].

155. U.S. DEP'T OF TREASURY, BILATERAL AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE EUROPEAN UNION ON PRUDENTIAL MEASURES REGARDING INSURANCE AND REINSURANCE 4 (2017), https://www.treasury.gov/initiatives/fio/reports-and-notices/Documents/US_EU_Covered_Agreement_Signed_September_17.pdf [https://perma.cc/7CZF-WF5C] [hereinafter BILATERAL AGREEMENT].

156. And it was assessed as such. The American Insurance Association, an industry group, said that the "agreement on prudential matters will end the discriminatory actions against U.S. insurers and reinsurers, increase U.S. competitiveness, and boost the international standing of the U.S. state-based insurance regulatory system." *AIA Statement on the U.S.-EU Covered Agreement*, AMERICAN INSURANCE ASSOCIATION (July 14, 2017), http://www.aiadc.org/media-center/all-news-releases/2017/july/aia-statement-on-u-s-eu-covered-agreement [https://perma.cc/7AK2-RHH4].

jurisdictions makes little sense for well-supervised European reinsurers. This problem has been apparent for years, yet any reduction in the collateral requirements, which thereby would open up the U.S. reinsurance market and introduce new competitors, to the benefit of insurance companies and ultimately consumers, has been slow.

The agreement thus would prevent U.S. state insurance regulators from requiring EU reinsurers to post such high levels of collateral as a condition for U.S. firms to be credited for their contracts with EU reinsurers.

The United States also got something for American reinsurance companies. One of the covered agreement's objectives, as announced in its Article I, is "the elimination, under specified conditions, of local presence requirements."[157] Specifically, the agreement relieves U.S. reinsurers from the obligation to establish a local presence—i.e., a branch or subsidiary—in the EU. The local presence requirement in the EU was also a real burden on the ability of American reinsurers to access that market. The elimination of that burden should level the playing field for American and European reinsurance firms by making it easier for American reinsurers to access the European market without opening an office in every jurisdiction in which they do business.[158]

The agreement also contains provisions on group supervision. Under the EU's "Solvency II" regime, European insurers are subject to group supervision, and foreign insurers seeking to do business in the EU are required to establish that they are supervised in a comparable way.[159] Most worryingly for American firms, the EU reserved for itself the right to impose additional capital and other regulatory requirements on firms based in countries that were not determined by the EU to have a supervisory system that is "equivalent" to the Solvency II supervisory system.[160]

The covered agreement provides that this requirement will not be imposed upon American insurers doing business in Europe, provided that they can establish that they are being adequately supervised as groups. The "consolidated" form of supervision assesses the solvency and soundness of insurance firms with reference to all of their subsidiaries; in the United States, solvency is traditionally assessed at the subsidiary, or operating entity, level, on a state-by-state basis, so that each state regulatory authority monitors the solvency of each insurance company subsidiary doing business in that

157. BILATERAL AGREEMENT, *supra* note 155, at 4.

158. Pruitt et al., *supra* note 154.

159. As Elizabeth Brown has said, "Solvency II will likely influence how insurance regulators outside of the EU regulate insurance, particularly those in the United States." Elizabeth F. Brown, *The Development of International Norms for Insurance Regulation*, 34 BROOK. J. INT'L L. 953, 972 (2009).

160. *See id.* ("Solvency II would require that non-EU insurance companies be regulated by a supervisory authority equivalent to the national authorities within the EU . . . .").

state.[161] The agreement was in this way designed to "establish[] that the [American] supervisory authority, and not the [European] supervisory authority, will exercise worldwide prudential insurance group supervision," as the agreement provides in Article I.[162] It means that U.S. insurance groups operating in the EU will be supervised at the worldwide group level by the relevant U.S. insurance supervisors rather than through a European process imposed on American insurers and based on Solvency II.

Group supervision is the appropriate way to supervise any large financial conglomerate; one of the lessons of the bailout of AIG concerned the downside of supervision on an entity-by-entity basis, for regulators did not realize that AIG's credit default swaps business, to say nothing of its securities lending business, was in the province of local supervision. Banks are supervised at the holding-company level by the Federal Reserve, and the single-point-of-entry resolution scheme also looks to manage firms in crisis in a consolidated way.[163] Dodd-Frank, in the way it treated nonbank subsidiaries of broker-dealers and derivatives desks, also looked to the group rather than the operating subsidiary in assessing systemic risk.[164] The group-supervision component of the covered agreement brings this sort of focus to insurance conglomerates, and appropriately so.

Finally, the agreement provides for an information exchange that will amplify and improve contacts between regulators in the United States and EU.[165] Over four decades of "cooperation among central bankers and securities regulators has contributed to the capacity for the coordinated response that we have seen, to the degree that we have seen it," in the response to the last crisis, by both.[166] In the midst of that crisis, "the SEC coordinated its shorting ban with its international counterparts at an IOSCO [International Organization of Securities Commissions] meeting, even though the coordination was done in the hallways rather than during the

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161. *See* Schwarcz, *supra* note 62, at 543 ("[F]inancial data is generally not closely scrutinized by the states in which individual companies are licensed to conduct business but are not domiciled. Instead, these states defer to the financial analysis and regulation of the state of domicile . . . .").

162. BILATERAL AGREEMENT, *supra* note 155, at 5.

163. For a criticism of the way these relate, see Arthur E. Wilmarth, Jr., *The Financial Industry's Plan for Resolving Failed Megabanks Will Ensure Future Bailouts for Wall Street*, 50 GA. L. REV. 43, 48 (2015).

164. *See* Michael Greenberger, *Overwhelming A Financial Regulatory Black Hole with Legislative Sunlight: Dodd-Frank's Attack on Systemic Economic Destabilization Caused by an Unregulated Multi-Trillion Dollar Derivatives Market*, 6 J. BUS. & TECH. L. 127, 162 (2011) (observing that "the Dodd-Frank Act includes both the 'Volker Rule,' which generally prohibits banks from engaging in proprietary trading or ownership of hedge or equity funds, and the 'Lincoln' or 'Push-Out Rule,' which requires bank holding companies to establish separate affiliated corporations for, *inter alia*, commodity swaps dealings . . . .").

165. BILATERAL AGREEMENT, *supra* note 155, at 4–5.

166. David Zaring, *International Institutional Performance in Crisis*, 10 CHI. J. INT'L L. 475, 485 (2010) (describing the way this repeated conference had evolved).

official session."[167] By the same token, the coordination of the injections of capital through swap lines and other mechanisms by the world's central bankers was facilitated by their already extant supervisory cooperation.[168] In other words, cooperation on matters of enforcement and understandings along those lines can create or further the relationships that can facilitate an international response to the next crisis.[169] That precedent suggests that the agreement on information exchange is a worthy and useful aspect of the agreement.

## Conclusion

The deregulation of the federal oversight of insurance has been achieved but only mostly. In insurance at least, agencies have more carefully stuck to their substantive tasks in ordering deregulation than have the courts or Congress.

Deregulation is not the only story, however. Because the federal government committed itself to a deal on standards with the European Union on three particular aspects of insurance supervision, the federal role in insurance regulation is reduced but not entirely retired. In the increasingly globalized world, deregulation is likely to be complicated by the international commitments that are part of the modern regulatory toolkit. It all makes deregulation something easier said than done, but if you want to see how to do it, the way that regulators have gotten out of the business of the direct regulation of insurers offers insights on the comparative advantages and disadvantages of the country's would-be deregulators.

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167. *Id.*

168. Peter Conti-Brown & David Zaring, *The Foreign Affairs of the Federal Reserve* 33–37, J. Corp. L. (forthcoming).

169. For more on this, see Zaring, *supra* note 166, at 485.

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# The Canon Wars

Anita S. Krishnakumar* and Victoria F. Nourse**

*Canons are taking their turn down the academic runway in ways that no one would have foretold just a decade ago. Affection for canons of construction has taken center stage in recent Supreme Court cases*[1] *and in constitutional theory. Harvard Dean John Manning and originalists Will Baude and Stephen Sachs have all suggested that principles of "ordinary interpretation"*[2]*—including canons*[3]*—should inform constitutional interpretation. Given this newfound enthusiasm for canons, and their convergence in both constitutional and statutory law, it is not surprising that we now have two competing book-length treatments of the canons—one by Justice Scalia and Bryan Garner,* Reading Law, *and the other by Yale Law Professor William N. Eskridge,* Interpreting Law. *Both volumes purport to provide ways to use canons to read statutes and the Constitution. In this Review of* Interpreting Law, *we argue that this contemporary convergence on canons raises some significant interpretive questions about judicial power and the very idea of a canon.*

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1. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 576 (2008) (employing the ordinary meaning canon—the maxim that the Constitution's words ought to be given their normal and ordinary meaning).

2. Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1859–60 (2016) (using interpretive canons such as "*expressio unius*" to interpret the Constitution); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2015, 2025–38 (2011) (applying various "rules of construction" to interpret the Constitution's vesting clauses).

3. *See generally* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017) (analyzing at length the canons as part of the "law of interpretation").

## Introduction

What counts as a "canon" of statutory interpretation? Is any interpretive principle articulated by the U.S. Supreme Court a canon? Or does canonical status require something more in the way of historical pedigree, longevity, regularity of use, or some other measure? Can and should all interpretive tools, including legislative history, statutory precedents, and administrative agency interpretations, be considered part of the canon—or are these separate resources standing apart from, and perhaps in hierarchical tension with, the canons of construction per se?

These are just some of the fascinating questions raised by Bill Eskridge's new book, *Interpreting Law: A Primer on How to Read Statutes and the Constitution*.[4] Styled as a treatise, the book is, like all Eskridgean work, a delight to read. Eskridge puts what he calls "the gentle reader" through her interpretive paces, asking her to apply the hypothetical "No Vehicles in the Park" statute to a variety of vehicular items—from an 1897 Léon Bollée Voiturette to a Bock Otto SuperFour Motorized Wheelchair.[5] The reader-friendly veneer is fitting, as the book is labeled a "primer" for students, scholars, lawyers, and judges. Eskridge's chief goal is to offer a robust and important alternative to the late Justice Antonin Scalia and Professor Bryan A. Garner's treatise-like tome on statutory interpretation, *Reading Law: The Interpretation of Legal Texts*.[6] Even the names of the two books are—intentionally, we think—similar.

4. WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION (2016) [hereinafter ESKRIDGE, INTERPRETING LAW].

5. *Id.* at 33–34, 133–34.

6. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

## I. Theories of the Canons: Static v. Dynamic

If the names of the books are similar, the implied—and sometimes express—theories of canons reflected therein are distinctly different. Scalia and Garner's *Reading Law* offers fifty-seven valid canons that it urges "provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law"[7] by focusing on the statute's text.[8] By contrast, Eskridge's *Interpreting Law* eschews the idea that a handful of canons applied mechanically can provide a complete answer to the interpretive questions at issue in a case.[9] Eskridge makes a significant bow to text,[10] insisting that the foundation of interpretation includes ordinary meaning, but the implicit theory of canons the book produces is overtly dynamic—as one might expect from the author of *Dynamic Statutory Interpretation*.[11] To Eskridge, canons are a regime, a regime that is inherently normative and nonmechanical and likely to change over time.

*Interpreting Law* is an incredibly rich and illuminating contribution to the fields of statutory and constitutional interpretation.[12] Eskridge's encyclopedic knowledge of the fields is revealed in his treatment of numerous interpretive canons and his nuanced, honest discussions about the advantages, disadvantages, and intricacies confronted in applying each of the canons he presents. He gives texture to a vast array of canons that textualists hold dear, emphasizing the importance of ordinary meaning among many other textual canons. Unlike the more dogmatic Justice Scalia volume, however, Eskridge gives us both sides of the debate. For example, consider the question of dictionary usage. Eskridge is admirably restrained. He knows that despite judicial enthusiasm for the practice, linguists find dictionary usage entirely unhelpful because the meanings in dictionaries are

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7. *Id.* at xxix.

8. *See id.* at 343–46, 369–90 (discussing the false notions that "the spirit of a statute should prevail over its letter" and that "committee reports and floor speeches are worthwhile aids in statutory construction").

9. *See* ESKRIDGE, INTERPRETING LAW, *supra* note 4, at 9 ("Text and purpose are like the two blades of a scissors; neither does the job without the operation of the other. More important, statutory text and legislative purpose do not exhaust the context that is relevant for the proper application of statutes."); *id.* (arguing, as an example, that "the rule of law requires the judge to consider practice and precedent before she confidently declares statutory meaning"); *id.* at 23 ("Any accurate description of statutory practice ought to include ordinary meaning, the whole statute and related statutes, statutory precedents, legislative history, administrative constructions, and constitutional and other background norms as relevant factors to consider.").

10. *Id.* at 40–41 (asserting that the ordinary meaning of a statute should be "the anchor for statutory interpretation by judges").

11. WILLIAM N. ESKRIDGE JR., DYNAMIC STATUTORY INTERPRETATION (1994).

12. *Cf.* ESKRIDGE, INTERPRETING LAW, *supra* note 4, at 10–11 (commenting that Justice Scalia's judicial opinions "devoted many more pages of analysis to precedent and practice than to plain meaning").

acontextual.[13] So, he proposes a helpful amendment to allow for use of dictionaries to limit, rather than determine, meaning and goes on to ask various questions about the canon's scope.[14] Such a style is dramatically different from Scalia and Garner's more rigid approach and appears throughout Eskridge's volume, as he thoughtfully considers and interrogates a broad range of textual and substantive canons in both statutory and constitutional interpretation.

The bottom line is this: even if you are interested in only the conventional textual canons emphasized by Justice Scalia, you should read Eskridge's treatise. Like treatises generally should do, Eskridge's treatise gives you a balanced view of the limits and advantages of the canons, along with reams of citations. Although a pragmatist himself, Eskridge comprehensively explains and treats with respect the ordinary meaning canon, the rule of the last antecedent, the canon of negative implication, and the whole act canon, among other textualist favorites.[15] What is more, in addition to the conventional textual canons discussed by Justice Scalia, Eskridge's volume also addresses substantive issues about which he and Justice Scalia disagree—such as Justice Scalia's dynamic anticanon against legislative history[16] and his rejection of the ancient Blackstonian rule against considering absurd consequences in statutory interpretation.[17] At each turn, *Interpreting Law* expands our knowledge about canons, evaluating the tradeoffs in terms of stability, predictability, and democratic accountability.[18] Many devotees of the Scalia–Garner treatise will find (no doubt to their surprise) that Eskridge agrees with Scalia and Garner on such things as the fact that some canons can have a stabilizing effect.

However balanced, readers familiar with the canon literature will note some Eskridgean canons that will strike them as new or strange. (To be fair, this is also true of some of the canons and anticanons in Justice Scalia's book.) This is, in part, because Eskridge's account of canons in *Interpreting Law* repurposes several traditional statutory interpretation tools as canons—

13. *See id.* at 57–58 (noting that linguists are critical of judicial decisions that quote a dictionary definition and describing the importance of context).

14. *See id.* at 59 ("[D]ictionaries are often useful in clarifying or narrowing our understanding of statutory terms.").

15. *See id.* at 33–55, 67–68, 78–81, 102–17 (providing thorough explanations of the various canons).

16. As explained *infra* pp. 119–21, we call this anticanon "dynamic" because it reflects the way Justice Scalia believes legislative history *should* be treated, not the way the vast majority of courts currently treat it.

17. *See* SCALIA & GARNER, *supra* note 6, at 234–38 (2012) (proposing that limiting conditions must be used when applying the absurdity doctrine so as to limit judicial revision of the text).

18. *See* ESKRIDGE, INTERPRETING LAW, *supra* note 4, at 160–62 (observing how precedent and the order of litigation impact predictability and democratic accountability).

including legislative history,[19] statutory precedents,[20] and standards governing deference to administrative interpretations.[21] This raises important methodological concerns for us. As we argue in the next Part, it creates a substantive ordering problem because, in our view, precedent and legislative history should take precedence over rules like *noscitur a sociis*. For this Part, however, the point is that Eskridge's implied theory of canons is highly dynamic—it is not limited to the canons we know existed at the Founding; it is not limited to the traditional textual canons; rather, it includes ideas found in modern cases, ideas embraced by the law professoriate, and in some cases, ideas that are simply aspirational.[22]

In many ways, this more dynamic view reflects reality: the Supreme Court has in the past twenty-five years embraced a variety of new substantive canons. The Scalia–Garner treatise is dynamic as well; it may focus on text, but it includes interpretive rules that few would describe as canons as opposed to judicial doctrines, like rules about preemption and implied rights of action. Moreover, the Scalia–Garner treatise goes out of its way to thumb its nose at canons that one might think well-established: rejecting the notion that remedial statutes are to be interpreted liberally and the idea that the "purpose of interpretation is to discover intent."[23] On these and other matters, Professor Eskridge's treatise is in some respects more traditional than Justice Scalia's. In fact, one way to look at Eskridge's treatise is as a dynamic response to Justice Scalia's own dynamism. In our view, Eskridge was right when he criticized Scalia and Garner's *Reading Law* as picking and choosing the authors' favorite canons.[24] In some cases, Eskridge has replied with his own countercanons.[25] The difference is that Eskridge openly admits that he is not describing a static world.

All of this raises the central question of this Review: What counts as a canon of construction? This is a notoriously unresolved question in statutory and constitutional theory, one that Eskridge himself highlighted in a review

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19. *See id.* at 240–45 (describing, for example, a "Committee Report Canon").

20. *See id.* at 174–76 (describing, for example, a "Canon of Relaxed *Stare Decisis* for Common Law Statutes").

21. *See id.* at 299–301 (describing, for example, a "*Curtiss-Wright* Super-Deference Canon").

22. *See* discussion *infra* subparts II(A)–(C).

23. SCALIA & GARNER, *supra* note 6, at 364–66 (arguing against the liberal construction of remedial statutes because of the difficulty in determining what constitutes a remedial statute and what constitutes liberal construction); *id.* at 391–96 (arguing that "further uses of *intent* in questions of legal interpretation [should] be abandoned").

24. *See* William N. Eskridge Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 535–36 (2013) (reviewing SCALIA & GARNER, *supra* note 6) (arguing that Scalia and Garner's attempt to set forth a collection of "valid canons" of statutory construction was unsuccessful).

25. *See id.* at 541–42 (discussing certain canons not analyzed by Scalia and Garner, such as the *stare decisis* canon).

he wrote of *Reading Law* shortly after it was published.[26] *Interpreting Law* never directly tackles this question, but its own capacious list of canons contains an implicit answer. That answer appears to be that a canon is any judicial principle or method of reasoning that the Supreme Court can use, should use, or has used (even once) in construing a statute.

This implicit definition makes sense given Eskridge's project of recording in one place all of the interpretive rules the Court has used—particularly in a universe in which no established consensus exists regarding the criteria for achieving canon status.[27] We nevertheless resist a super-dynamic-canon theory on the ground that "any interpretive rule or method of reasoning" is simply too capacious a definition. We are worried that the "dynamic canon" theory elides important distinctions and fails to answer basic questions. First, the definition ignores important differences between language and substantive canons, which we believe should be treated separately rather than lumped together under a universal umbrella. Second, the dynamic definition papers over crucial questions about the role of canons in statutory interpretation more generally, such as: Have canons now subsumed all interpretation or, as we believe, do they play a subsidiary role? How do we know a real canon when we see one? And so on.

After exploring such questions in some detail, we propose our own preliminary answers in the Parts that follow.

## II. An Ordering Problem

Eskridge begins the volume with a healthy moderation in the great canon debates. He rejects the realist but cynical Llewellyn view that the canons are mere window-dressing as well as the formalist view that canons are rule-like:

> A thesis of this volume is that the canons are *neither* mechanical rules that by their own force assure the rule of law or democratic accountability or good governance, *nor* cynical instruments for result-oriented judges to decorate judicial opinions like ornaments on a Christmas tree. Rather, the canons constitute an *interpretive regime*, namely, a set of conventional considerations relevant to statutory interpretation that ought to be laid out systematically in one volume

26. *See id.* at 541 (focusing specifically on the question of what rules are "canonical").

27. Indeed, one of us has followed a similar, only slightly less capacious, definition in previous work. *See* Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 240 (2010) [hereinafter Krishnakumar, *Roberts Court First Era*] (defining substantive canons as "interpretive presumptions and rules based on background legal norms, policies, and conventions"); *see also* Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 855–57, 857 n.148 (2017) [hereinafter Krishnakumar, *Reconsidering*] (comparing Krishnakumar's versus Eskridge and Frickey's definitions of substantive canons in empirical work measuring the Court's reliance on such canons).

> available to students, attorneys, judges, agencies, and legislative drafting offices.[28]

We admire this moderation but worry about the idea of an "interpretive regime." The term "regime" suggests a consistency, force, and primacy that the canons do not exhibit.[29] In our view, the canons do not constitute an interpretive regime but, rather, are one type of interpretive resource—a set of judicial assumptions and presumptions—that can guide statutory interpretation when other, more authoritative, interpretive resources fail to fill a gap or render clarity illusory. Canons generally should be a *last resort, not a first one*. Why? Because, as a general rule, canons are judicial assumptions about meaning—default rules. Default rules are second-best guesses or policies that apply when all first-best evidence fails.

In other words, the ordering problem is this: By treating legislative history, precedent, administrative practice, and other interpretive resources as canons, *Interpreting Law* inadvertently (we think) places them on the same level in the hierarchy of interpretive tools as judicially created maxims, such as the presumption that tax statutes should be narrowly construed or that all statutes should be construed to avoid redundancy. But that is not how judges should—or in practice actually do—treat precedent, administrative practice, and legislative history when construing statutes. At various points, Eskridge appears to recognize that statutory interpretation is rife with ordering problems.[30] He argues that some materials take precedence over others.[31] Precedents should control against a new plain meaning analysis.[32] And judges should "consider relevant legislative history even if the judge believes there is or might be an ordinary or plain meaning."[33] At the same time, however, he treats *stare decisis*, legislative history, and administrative constructions in rhetorical ways—i.e., calling them canons—that suggest that these materials are on a par with other more well-known canons.

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28. ESKRIDGE, INTERPRETING LAW, *supra* note 4, at 20.

29. *See* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71 (2018) (citing data from the Roberts Court's first ten terms showing that judicial canon use is unpredictable and ever-changing).

30. *See, e.g.*, ESKRIDGE, INTERPRETING LAW, *supra* note 4, at 141 (exemplifying the ordering problem through interpretation of the Park Safety Act).

31. *Id.*

32. *Id.*

33. *Id.* at 202.

### A. *The Canonization of Precedent, Legislative Evidence, and Administrative Interpretations*

First, consider *Interpreting Law*'s treatment of precedent. Eskridge is a huge fan of precedential forces in statutory interpretation, explaining that "adherence to *stare decisis* 'marks an essential difference between statutory interpretation on the one hand and [common] law and constitutional interpretation on the other.'"[34] In the next sentence, however, he equates this principle with traditional canons of construction: "Like the ordinary meaning rule and the whole act rule, this *super-strong presumption of correctness for statutory precedents* purports to be a foundation for the application of federal statutes . . . ."[35] Eskridge goes on to build up a hefty subset of *stare decisis* canons: a canon of relaxed *stare decisis* for common law statutes; an "acquiescence" canon for legislative acquiescence to a judicial determination; and a "reenactment" canon for judicial interpretations Congress reenacts.[36] Other "precedent-based canons"[37] include a canon for judicial interpretation of common law "terms of art," a canon for statutes that borrow from other acts (what Eskridge charmingly dubs *stare de statute*, following Frank Horack),[38] and the "shadow precedents canon" (which we discuss in more detail below).[39]

Now consider the book's treatment of legislative history. Compared to *stare decisis*, Eskridge is not as enthusiastic about legislative history (or what one of us calls "legislative evidence"),[40] but he seems very enthusiastic about canonizing the approaches he recommends (including the recommendations of one of the authors of this Review). For example, he offers up the "committee report canon," which notes that House and Senate committee reports and explanations of the conferees are considered the most reliable and authoritative form of legislative history; the "sponsor's statement canon," which explains that the Supreme Court routinely considers statements made by the sponsor of the statute when relevant to the statutory question at issue; and the "subsequent legislative history canon," which recognizes that the

34. *Id.* at 163 (quoting Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 540 (1948)).

35. *Id.*

36. *See id.* at 174–76 (discussing the canon of relaxed *stare decisis* for common law statutes); *id.* at 176–77 (discussing the acquiescence canon for cases in which Congress does not act); *id.* at 177–79 (discussing the reenactment canon for cases in which Congress reenacts a statute).

37. *Id.* at 179 (discussing other precedent-based canons beyond strict *stare decisis*).

38. *Id.* at 182 (citing Frank E. Horack Jr., *The Common Law of Legislation*, 23 IOWA L. REV. 41 (1937)).

39. *Id.* at 180–82 (discussing a common law canon for terms of art); *id.* at 182–85 (discussing a borrowed act canon); *id.* at 185–86 (discussing a shadow precedents canon).

40. *See* VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 153 (2016) (referring to legislative history as "legislative evidence").

"current federal judicial understanding is that subsequent legislative history is generally not a reliable source for statutory meaning"—although Eskridge argues that courts *should* consider this form of legislative history.[41] Eskridge also recommends as canons interpretive rules advocated by one of us in a law review article, including a "backwards induction canon," which reads legislative evidence from the last point of legislative decision rather than requiring a full-scale, front-forward history; the "rules of proceedings canon," which holds that in cases of doubt Congress should resolve the doubt as would the rules of the House and the Senate; and the "sore losers canon," which would bar the judiciary from citing legislative materials created by those who lost the vote, except in limited circumstances.[42]

Canonization continues in the area of deference to administrative interpretations of statutes. As Eskridge rightfully acknowledges, "the overwhelming weight of official statutory interpretation is by administrators and agencies, not by judges."[43] This is an exceedingly important point and one that Justice Gorsuch's recent confirmation hearings put into the spotlight given his concerns about *Chevron* deference.[44] Here, what most conventionally know as precedents are dubbed canons. There is the "*Skidmore* Canon" on the interpretive value of regulatory history and the "*Chevron* Rule" on judicial deference to agency lawmaking.[45] Under *Chevron*, *Interpreting Law* offers up the "Major Questions Canon," the "Plain Meaning Rule (*Chevron* Step One)," the "*Brand X* Canon (*Chevron* Step Two)," and other deference canons, including the "*Seminole Rock/Auer* Canon" and the "*Curtiss-Wright* Super-Deference Canon."[46] This may be a rhetorical tic, or a strategy to rebut *Reading Law*'s own lengthy list of fifty-seven canons (with its own imaginative use of the canon label), but, in the end, *Interpreting Law* leaves the impression of canons, canons everywhere.

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41. ESKRIDGE, INTERPRETING LAW, *supra* note 4, at 240–48, 251–54.

42. *Id.* at 224–37. Given that one of us is the author of these putative canons, see Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70 (2012), it seems distinctly ungracious to decline canonization, if by canonization one means something sacred. Our point is that canonization has the potential to reduce the importance of a principle that should take priority.

43. ESKRIDGE, INTERPRETING LAW, *supra* note 4, at 259.

44. *See* Ilya Somin, *Gorsuch Is Right About Chevron Deference*, WASH. POST: VOLOKH CONSPIRACY (Mar. 25, 2017), https://washingtonpost.com/news/volokh-conspiracy/wp/2017/03/25/gorsuch-is-right-about-chevron-deference/ [https://perma.cc/P9FM-TBA4] (highlighting public interest in Justice Gorsuch's opinions regarding *Chevron* deference); *see also* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (articulating Justice Gorsuch's opposition to *Chevron* deference).

45. ESKRIDGE, INTERPRETING LAW, *supra* note 4, at 269, 278.

46. *Id.* at 287–301.

### *B. Interpretive Priority*

Now that we have seen the tendency of the book to canonize a wide variety of precedents, practices, and materials, it is possible to consider in greater detail what we mean by the ordering problem. We begin with a hypothetical we hope will illustrate the problem. Eskridge is known for his amusing and illuminating hypotheticals, so we respond in kind. The basic idea of the "garbled order" was first deployed by Judge Posner.[47]

Imagine soldier Bill searching for the meaning of a garbled order from General Dick.[48] Soldier Bill cannot hear the precise order but knows that he must decide whether to attack or retreat. Imagine that there is a norm among soldiers that one is a coward if one does not attack, known informally as the "Tally Ho" canon. As soldier Bill is pondering the garbled command, General Dick's aide Colonel Victoria, who drafted the original order, appears at soldier Bill's side telling him that General Dick ordered retreat. Would a rational soldier attack? Would he tell Colonel Victoria to bug off, because the Tally Ho canon controls? Now assume the General's aide is nowhere to be found, but soldier Bill remembers a similar battle days earlier when General Dick's order was clear: attack only when fired upon. It seems highly doubtful that soldier Bill would ignore that precedent and proceed willy-nilly forward, raising the Tally Ho flag and attacking without a shot fired.

If these intuitions are sound, then we can begin to see why over-canonization raises interpretive problems. By suggesting that legislative history and precedent amount to canons, *Interpreting Law* essentially assigns them the same authoritative value as more conventionally understood canons—like *noscitur a sociis* or the presumption against extraterritorial application. As a result, we may have no way of distinguishing actual evidence of meaning from informed estimates or sheer guesses about meaning. Taken to its extreme, the privileging of canons over actual evidence of context can yield irrational outcomes—e.g., the soldier attacking rather than retreating—because it privileges hypothetical over actual evidence of meaning.[49] Recall our story: in the first case, the soldier has evidence of the actual speaker's meaning. Under Eskridge's interpretive regime approach, however, if the actual evidence amounts to a canon (legislative evidence), it appears to have no priority in authoritativeness, and the soldier may attack even when the general wants him to retreat. Similarly, in the second case, the soldier has no actual evidence of the speaker's meaning but has an actual

47. *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189 (1986).

48. *See id.* ("The commander replies, 'Go—'; but the rest of the message is garbled.").

49. Irrationality is a strong statement, but one accepted by at least some political scientists. *See* McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW. & CONTEMP. PROBS., Winter 1994, at 3, 23–25 (applying statistical decision theory to demonstrate that ignoring the legislative history increases the probability of judicial error).

experience to which he can analogize. If precedent amounts to a canon, the soldier is left weighing one canon telling him to attack against another telling him to wait—leaving our poor soldier-interpreter in no man's land.

We doubt that Eskridge himself would accept at least some of the implications from our hypothetical. First, he has been most insistent about the value of precedent in deciding statutory cases.[50] He is at pains in *Interpreting Law* to argue that an authoritative precedent "is more immediately important than the ordinary meaning that today's judge might have otherwise found."[51] Second, although Justice Scalia has famously rejected legislative evidence, dubbing it an anticanon, Eskridge rejects that position.[52] He recognizes that "[f]or more than a century, federal judges have been willing to consider legislative history . . . ."[53] The questions we pose here are not about particular interpretive resources in isolation, however. They are about the value of interpretive resources *relative to each other*. We worry that dubbing a wide variety of materials as canons, or as a consistent "interpretive regime," can yield serious problems regarding the relative authority of different interpretive resources. Rather than making something sacred, this labeling practice may reduce the level of importance of central legal principles.

To be fair, Professor Eskridge is doing nothing different than Justice Scalia and Bryan Garner did in *Reading Law*, which took general practices (e.g., preemption and implied rights of action) and turned them into canons and anticanons. Moreover, since Eskridge's book is styled as a "primer," the author may have felt it more important to leave major ordering problems to other work. On the other hand, this ordering problem has important consequences for interpreters, as the garbled order hypothetical demonstrates. One of the great principles of the Scalia–Garner treatise—the book to which Eskridge is responding—is its insistence on valid canons and invalid ones, the most important "invalid" one being the use of legislative history.[54] One of us has argued, at length, that Justice Scalia's antipathy toward legislative evidence is antidemocratic and ignorant.[55] Here, our point

50. *See* William N. Eskridge Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362–64 (1988) (arguing for an "evolutive" approach when analyzing statutory precedents).

51. ESKRIDGE, INTERPRETING LAW, *supra* note 4, at 141; *see also id.* at 163 (discussing the super-strong presumption of correctness for statutory precedents).

52. *See id.* at 191–204, 240–45 (recognizing that no source "has generated greater debate" than legislative history but, nevertheless, applying legislative evidence based on a conference committee report).

53. *Id.* at 198.

54. *See* SCALIA & GARNER, *supra* note 6, at 9, 69, 82, 341, 377–78 (listing fifty-seven valid canons, including the ordinary-meaning and fixed-meaning canons, and distinguishing them from the various pitfalls of statutory interpretation, including reliance on legislative history).

55. *See* NOURSE, *supra* note 40, at 161–81 (arguing that "constitutional skepticism about legislative history is unwarranted"). Justice Scalia famously called legislative history "garbage" but

is different: treating legislative history as a canon makes it appear as if it is on par with *ejusdem generis*, or the whole act rule. If that is what *Interpreting Law* recommends, Eskridge may well encourage that which he would otherwise reject: blindness to actual evidence of Congress's meaning, administrative precedents about meaning, or even *a controlling* judicial precedent on meaning, because some other canon prevails in a feverish canon war.

## III. Overcanonization

One of *Interpreting Law*'s most useful features is also one of its most nettlesome. That is, the book is a cornucopia of interpretive tools, rules, and maxims. It aims for thoroughness, and it admirably achieves its goal. But the book's very thoroughness is also somewhat problematic, in our view. In reading through *Interpreting Law*'s exhaustive list of canons, we often found ourselves having the same reaction that Justice Scalia once described having to many of the canons in Karl Llewellyn's famous list of "Thrusts" and "Parries"—i.e., "Never heard of it."[56]

This is because, in addition to listing numerous canons that are well-established and accepted by all—e.g., the avoidance canon, *ejusdem generis*, the whole act rule—*Interpreting Law* labels as canons (i) methods or patterns of judicial reasoning that scholars have identified and even criticized but that none would call a canon;[57] (ii) statements made by the Supreme Court in a few cases that are neither well-known nor well-established;[58] and (iii) aspirational rules of interpretation that have been advocated by scholars.[59] Moreover, it inadvertently projects a false equivalency between the former and the latter by neglecting in some cases to acknowledge when a particular canon is one that has been only infrequently invoked, lacks consensus, represents a method of reasoning rather than an interpretive rule, or is merely aspirational.[60] This Part highlights a few such overcanonizations

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could not tell the difference between a committee report and a conference report, one of which happens at the beginning of the legislative process and the other at the end. *See id.* at 69–95 (discussing various Supreme Court "basic" mistakes in Congress 101).

56. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 26–27 (1997).

57. *See* discussion *infra* subpart III(A) (describing the "Shadow Precedents Canon" and the "Administrability Canon").

58. *See* ESKRIDGE, INTERPRETING LAW, *supra* note 4, at 118–21, app. at 410, 421 (coining a *noscitur a legibus sociis* canon, a drafting manuals canon, and a lower court consensus canon); *see also infra* subpart III(B) (highlighting the "problems with turning stray Supreme Court comments into canons").

59. *See* ESKRIDGE, INTERPRETING LAW, *supra* note 4, app. at 440 (inventing U.S. Attorneys' canon); *id.* app. at 409 (articulating a dictionary-rule caveat to the effect that "[b]y revealing variety in word use, dictionaries can suggest ambiguity").

60. *See supra* notes 57–59.

and concludes that they are problematic because labeling everything the Supreme Court says a canon emboldens judges to make things up as they go along—particularly if these canons are then allowed to trump legislative history and other interpretive resources.

### *A. Canons v. Patterns of Judicial Reasoning*

Part of what makes *Interpreting Law* so rich is that it engages deeply with the literature in the statutory interpretation field. Eskridge weaves academic commentary throughout his discussion of the canons, and this contributes significantly to his presentation of the advantages and disadvantages of particular canons. But we fear that he may go a little too far in this weaving. Indeed, some of the canons he lists merely restate patterns or practices in judicial reasoning that scholars have identified in a handful of cases rather than rules or legal principles that courts have regularly announced.

Consider, for example, what Eskridge dubs the "Shadow Precedents Canon."[61] The canon derives from a series of law review articles authored by Deborah Widiss that expose a surprising Supreme Court practice in employment discrimination cases: the Court sometimes continues to reason from its own past precedents even after Congress has enacted legislation overriding those precedents.[62] Widiss criticizes this practice—urging the Court to give full effect to Congress's overrides and to cease reliance on superseded precedent cases—and suggests default interpretive rules that would help ameliorate this problem when it results from confusion about the scope of a congressional override.[63] *Interpreting Law* turns these instances of judicial misinterpretation into a canon of statutory construction: "Where Congress has only overridden the narrow result of a precedent, but not its underlying doctrinal structure, that decision is still citable as a shadow precedent."[64] This, in our view, is not and should not be a canon for a number of reasons.

First, the "shadow precedents" precept is not a rule that the Court itself has announced, although that deficiency perhaps could be overcome if it were

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61. ESKRIDGE, INTERPRETING LAW, *supra* note 4, at 185.

62. Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 513–18 (2009) [hereinafter Widiss, *Shadow Precedents*]; Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEXAS L. REV. 859, 860–66 (2012) [hereinafter Widiss, *Overrides*].

63. *See* Widiss, *Shadow Precedents*, *supra* note 62, at 560–74 (discussing problems that arise from reliance on shadow precedents and proposing interpretive reforms).

64. ESKRIDGE, INTERPRETING LAW, *supra* note 4, app. at 421. In the body of the book, the canon is formulated somewhat differently: "Depending on how broadly it is drafted, a statutory override of the precedent's result may not negate the force of the precedent's reasoning." *Id.* at 185 (citing Widiss, *Shadow Precedents*, *supra* note 62).

the only one.[65] Second, and more importantly, the practice of continuing to rely on shadow precedents is not a well-accepted or established interpretive rule. Indeed, it is not really an interpretive "rule" at all but, rather, a pattern of judicial behavior observed in a handful of cases in one area of the law. Widiss herself does not describe reliance on shadow precedents as an "interpretive rule"; instead, she characterizes it as a "mistake"[66] or as the result of understandable confusion about how to interpret an override statute.[67] Transforming this practice into a canon lends it an unwarranted sense of legitimacy and makes it seem like a more far-reaching practice—one that extends across statutory subject areas—than we necessarily know it to be.

In a similar vein is something Eskridge calls the "Administrability Canon."[68] This canon draws in part on a law review article written by one of us[69] and dictates that "an interpretation that has been shown over a period of time to have been easy to administer will be preferred to one that is less time-tested and harder to administer."[70] While we certainly agree that administrability is an important factor that the Supreme Court regularly takes into account when construing statutes, we disagree with Eskridge's effort to canonize it. As one of us has argued elsewhere, administrability concerns are a subset of practical, consequences-based reasoning, not a canon or interpretive rule.[71] That is, when courts, including the U.S. Supreme Court, take administrability into account in interpreting a statute, they tend to discuss things like the practical difficulty of implementing a particular interpretation, the likely effect the interpretation will have on judicial or other public resources, or the clarity or predictability of the legal rule established by the interpretation.[72] These are all practical consequences that follow from an interpretation, and they demonstrate that judges are remarkably pragmatic in interpreting statutes rather than driven by mechanical rules or canons.

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65. *See* discussion *infra* Part IV (noting Eskridge's failure to differentiate between "language canons" and "substantive canons").

66. *See* Deborah A. Widiss, *Still Kickin' After All These Years:* Sutton *and* Toyota *as Shadow Precedents*, 63 DRAKE L. REV. 919 *passim* (2015) (identifying mistakes made by courts that relied on shadow precedents).

67. *See, e.g.*, Widiss, *Shadow Precedents*, *supra* note 62, at 537–38 (discussing "doctrinal confusion" and "lack of analytic clarity" regarding the interpretation of overrides); *id.* at 551 (describing how narrow override language can lead to understandable confusion).

68. ESKRIDGE, INTERPRETING LAW, *supra* note 4, at 114–17.

69. *See* Anita S. Krishnakumar, *The Anti-Messiness Principle in Statutory Interpretation*, 87 NOTRE DAME L. REV. 1465, 1469 (2012) ("[T]he anti-messiness principle reflects a judicial preference for simple, easy-to-administer interpretations.").

70. ESKRIDGE, INTERPRETING LAW, *supra* note 4, at 114–15.

71. Krishnakumar, *Roberts Court First Era*, *supra* note 27, at 244–46.

72. *Id.* at 244–45.

Trying to turn judges' administrability-based pragmatic reasoning into a rule of construction thus strikes us as a bit upside down.

Moreover, it is potentially dangerous. When we label an interpretive principle a canon, it inevitably becomes imbued with an aura of legitimacy. Canons are considered neutral legal principles, handed down over time, that transcend ideology and judicial policy preferences and that constrain judges. Despite numerous efforts to shatter this mythical vision,[73] it persists in at least some form and is the basis for Scalia and Garner's effort to provide a list of valid canons for courts to employ. In fact, we suspect it is the reason Eskridge himself has sought to label so many different interpretive tools as canons. But in so doing, *Interpreting Law* runs the risk of creating a new problem—i.e., encouraging judicial power grabs. If anything the Supreme Court says in the course of explaining its reasoning in a case can be called a canon, then the Court may freely make things up as it goes along—inventing new canons, announcing caveats to existing ones, and even perhaps denouncing existing canons as it sees fit.

### *B. Occasional Canons*

Still other canons listed in *Interpreting Law* appear to us to be aspirational, in that they set forth interpretive rules that Eskridge *thinks are good rules* but that have not necessarily been embraced by the Court. Oftentimes, we agree that these rules are either linguistically erudite or justified by attention to legislative drafting practices. Nevertheless, we worry that *Interpreting Law* has a very capacious standard for a canon—and, again, that this is dangerous because it encourages judges to simply make up canons that they think reflect good rules of thumb.

One such example is the rule that "[f]ailure of U.S. Attorneys to initiate criminal prosecutions in the past is evidence that the Attorney General's current reading of the statute is too broad."[74] We have not heard of such a canon. It appears to derive from one case, *Lopez v. Gonzales*,[75] in which the Court observed that the "failure of even a single eager Assistant United States Attorney to act on the Government's interpretation of [the statute]" is telling evidence that "belies the Government's claim that its interpretation is the

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73. The most famous is Karl Llewellyn's list of twenty-eight pairs of canons and countercanons. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950); *see also* Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 647–48 (1992) (arguing that even if canons of construction were outcome determinative in every case, judges could choose to ignore them and invoke a different source of authority); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805–17 (1983) (agreeing with Llewellyn that every canon has an equal and opposite canon and arguing further that most canons are "just plain wrong").

74. ESKRIDGE, INTERPRETING LAW, *supra* note 4, app. at 440.

75. 549 U.S. 47 (2006).

more natural one."[76] This may well be a logical inference that the Court in future cases wishes to invoke (we express no views on the merits of the rule), but as used in *Lopez*, it seems to us more of a case-specific comment than a rule designed to govern the construction of all criminal statutes.

Moreover, there are some logical and linguistic leaps between the Court's inference that the government's interpretation is not the "more natural one"[77] and *Interpreting Law*'s articulation that failure to initiate prosecutions is proof that the government's reading is "too broad."[78] Indeed, this example highlights two problems with turning stray Supreme Court comments into canons: (1) the approach leaves substantial room for idiosyncratic characterization of the interpretive rule and (2) it enables judges (or other would-be canonizers) to mistake what they think are good rules for what the Court has actually said or done in past cases.

One might, at this point, legitimately ask: What is wrong with including rules a scholar thinks *ought to be* canons in a comprehensive list of canons? Treatise writers can and do push the law in new directions. Indeed, the Scalia–Garner volume makes similar moves—urging, for example, that seeking justice in an individual case is an anticanon.[79] But that is precisely the point. Blurring the lines between established, universally accepted canons such as *noscitur a sociis*, *expressio unius*, the rule against superfluity, and the rule of lenity, on the one hand, and rules scholars think *ought to be* canons, on the other, can result in naked power grabs. Blurriness, combined with a lack of clear guidelines regarding what it takes for an interpretive principle to be considered a canon, opens the door for anyone—and judges in particular—to make up canons anytime they choose. Don't like a particular canon? Make up an exception or limitation. Think a particular norm would help justify a favored interpretation of a statute? Make up a canon embodying that norm.

We do not mean to suggest that *Interpreting Law*'s approach to canons is going to usher in an entirely new form of judicial overreaching. Indeed, as Eskridge and Frickey have highlighted, the Rehnquist Court in the 1990s invented several new federalism clear statement rules in just this fashion.[80] But those clear statement rules were based on constitutional norms, not plucked out of thin air. And, importantly, they garnered significant criticism

76. *Id.* at 57–58.

77. *Id.* at 58.

78. ESKRIDGE, INTERPRETING LAW, *supra* note 4, app. at 440.

79. SCALIA & GARNER, *supra* note 6, at 347–48.

80. *See, e.g.*, William N. Eskridge Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (stating that the "most striking innovation" of the Rehnquist Court had been its creation of "a series of new 'super-strong clear statement rules' protecting constitutional structures, especially structures associated with federalism").

when first announced.[81] If statutory interpretation theory moves to a regime in which we begin to call everything the Court says in the course of interpreting a statute a canon, then we run the risk of opening the floodgates and emboldening judges to invent many more such canons in the future. What in the 1990s struck many as a problematic judicial power grab might in the 2020s and beyond become common judicial practice, without any constraining guidelines or criteria. (The problem is exacerbated, moreover, if and when such judicially invented canons are treated as equivalent in authority to legislative history or past precedents, or even used to trump such interpretive resources, as we noted in Part I.)

This, of course, brings us to a series of crucial—yet unresolved—questions in interpretation theory: What counts as a canon? From where do canons derive their legitimacy or authority? Does any comment made by the Supreme Court in a statutory interpretation case qualify? If not, how many times does the Court have to invoke an interpretive principle in order for it to become a canon? Or, on the other hand, is Supreme Court invocation the wrong test for what constitutes a canon? Must an interpretive principle be grounded in the common law, or date back to Blackstone or some other historical source, in order to be considered a canon? Must it accurately reflect how language works or how legislators draft statutes? We turn to these questions in the next Part.

## IV. What Counts as a Canon?

In the previous two Parts, we have sketched out some interpretive tools that, in our view, clearly *should not* be considered canons of statutory construction—e.g., other interpretive resources including legislative history, precedents, administrative interpretations, patterns or practices of judicial reasoning, and aspirational principles that scholars think should be a canon or are cited rarely. In this Part, we turn to the more difficult question of what *should* count as a canon and consider several positive criteria that might be used to evaluate potential canons.

We begin with a threshold point. Scholars tend to think of the canons of statutory construction as falling into two distinct categories: language canons and substantive canons,[82] also sometimes referred to as descriptive and

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81. *See id.* at 598 (comparing the new super-strong clear statement rules to a "'backdoor' version of the constitutional activism that most Justices on the current Court have publicly denounced").

82. For detailed explanations of this dichotomy, see WILLIAM N. ESKRIDGE JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 643–761 (5th ed. 2014) (introducing language canons and substantive canons of construction); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12–14 (2005) (describing the differences between language and substantive canons); David L. Shapiro, *Continuity and Change in Statutory*

normative canons.[83] Language canons, as their name suggests, focus on the text of the statute and encompass rules of syntax and grammar, "whole act" rules about how different provisions of the same statute should be read in connection with each other (e.g., to minimize internal inconsistency, to avoid superfluity), and Latin maxims such as *expressio unius est exclusio alterius* and *noscitur a sociis*.[84] Substantive canons, by contrast, are policy-based principles and presumptions that derive from the Constitution, common law practices, or normative concerns related to particular subject areas.[85]

In its effort to characterize the canons as a coherent interpretive regime, *Interpreting Law* ignores important differences between these two categories of canons—and, indeed, compounds the problem by expanding the universe of canons to include other interpretive tools such as legislative history, precedents, and administrative interpretations. Any honest, useful attempt at defining what it takes for an interpretive rule to count as a canon must, in our view, acknowledge three salient differences between language and substantive canons. First, language canons are typically considered neutral or objective,[86] whereas substantive canons are viewed as policy-based and are thought to add a thumb on the scales[87] in favor of a particular outcome.

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*Interpretation*, 67 N.Y.U. L. REV. 921, 927–41 (1992) (providing an overview of the range of interpretative cannons from the "purely linguistic" to the "substantive").

83. *See* Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992) (summarizing the distinction between descriptive canons, which are based on particular uses of language, grammar, or syntax, and normative canons, which dictate that ambiguous text be construed in favor of certain judicially crafted policy objectives).

84. ESKRIDGE JR. ET AL., *supra* note 82, at 644–47, 658, 668, 674–79. The maxim *expressio unius est exclusio alterius* means the "expression . . . of one thing indicates exclusion of the other." *Id.* at 668. The rule rests on a logical assumption of negative implication; if the legislature specifically enumerates certain items in a statute, this is taken to imply a deliberate exclusion of all other items. *Id.* For further explanation of the *expressio unius est exclusio alterius* canon, see 2A NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:23 (7th ed.) [hereinafter SUTHERLAND]. *Noscitur a sociis* translates to "it is known from its associates." *Id.* § 47:16. The canon dictates that when a statute contains a list of two or more words, courts are to give each word in the list a meaning that is consistent with the meaning of other words in the list. *Id.*; *see also* ESKRIDGE JR. ET AL., *supra* note 82, at 658 (describing *noscitur a sociis*).

85. *See, e.g.*, ESKRIDGE JR. ET AL., *supra* note 82, at 643 (asserting that substantive canons usually "derive from policy positions articulated by courts").

86. That these are in fact "neutral" is not necessarily true. For example, one of us has argued that each of the Latin canons can be paired with another Latin canon to come out with different results. *See* WILLIAM N. ESKRIDGE JR., ABBE R. GLUCK & VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 91–93 (Supp. 2017) (noting that Latin canons have faced criticism for leading to counter canons). Similarly, linguists are not necessarily so sanguine about their neutrality. *See* LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 29 (1993) (noting that conflicting principles of interpretation have created a body of "mutually inconsistent legal rules," enabling lawyers and judges to use them to support almost any position they choose).

87. *See* Scalia, *supra* note 56, at 29 ("Some of the rules, perhaps, can be considered merely an

Second, and related to the first, the two sets of canons derive their authority and legitimacy from different sources: language canons are thought to reflect rules of grammar, logic, sentence organization, or even congressional drafting; substantive canons are thought to reflect background norms established in the Constitution, the common law, or some other element of the legal system.[88] Third, at the U.S. Supreme Court level at least, language canons are used far more frequently than substantive canons,[89] although substantive canons tend to bear the brunt of scholarly criticism.

It strikes us that to be considered a canon, an interpretive rule must be well-established in the legal community. That is, judges and lawyers must be familiar with it. Moreover, a canon must derive from an authoritative source; it cannot simply be a rule that a party suggests or makes up in its brief. Beginning from that premise, we consider four potential tests or measures that might be used to determine whether a particular interpretive rule counts as a canon: (1) the frequency with which the rule has been invoked by the U.S. Supreme Court; (2) the rule's longevity (i.e., when it was announced or how long it has been in place, and whether it has been adopted across different iterations or generations of the Supreme Court); (3) the justification for the rule; and (4) whether the Court definitively declared or announced the rule as one of general applicability (as opposed to treating it as a case-specific interpretive argument).

*1. Frequency of Invocation.*—One sign that an interpretive rule is well-established and even ingrained in the legal community is that it is invoked frequently, or at least regularly and consistently, over time in legal discourse. The number or frequency of citations to a rule or other legal source often is used as a proxy for its status in the legal community. In previous work on canonical dissents, for example, one of us has used the number of favorable citations to a dissenting opinion made by subsequent Supreme Court majority opinions, combined with the overruling of the original decision, as the measure for whether the dissenting opinion has been canonized.[90] Aaron-Andrew Bruhl similarly has compared the rate at which lower federal courts invoke particular linguistic canons and legislative history with the rate at

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exaggerated statement of what *normal, no-thumb-on-the-scales* interpretation would produce anyway." (emphasis added)).

88. *See* sources cited *supra* notes 82–83 (discussing generally various language and substantive canons of construction).

89. *See, e.g.*, Krishnakumar, *Reconsidering*, *supra* note 27, at 849–50 (reporting, in Tables 1 and 2, relative rates of the Roberts Court's references to language versus substantive canons); Mendelson, *supra* note 29, app. at 101 (tracking rates of engagement for all canons—both textual and substantive).

90. *See* Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 784 n.11 (2000) (describing her methodology).

which the Supreme Court invokes those same linguistic canons and legislative history; he has suggested that the comparison be used as a proxy for how closely lower federal courts follow the Supreme Court's lead in embracing or rejecting particular interpretive tools.[91] And in a recent study that traces the evolution of several prominent substantive canons, Judge Amy Coney Barrett has argued that canons do not become "deeply entrenched" the moment they are announced by the Supreme Court but only after subsequent cases begin to invoke them regularly.[92]

Frequency of citation is an admittedly imperfect measure of canonical status. It is not necessarily the case, for example, that the most frequently invoked interpretive rule is also the most universally accepted. Nevertheless, frequency of judicial invocation does capture an important aspect of what it means to be well-established and entrenched in the legal community. That said, a couple of questions remain. First, which judicial forum should be used to measure frequency of use—the U.S. Supreme Court, all federal courts, federal courts of appeals, or state courts? Most commentators have taken for granted that citation by the U.S. Supreme Court should be the yardstick by which frequency of use of a particular canon is measured.[93] We agree for several reasons. First, there is some evidence that lower courts tend to follow the U.S. Supreme Court's lead with respect to whether a particular canon is

91. Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React when the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 496–502 (2015).

92. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 138, 140–43, 151–52 (2010) (concluding that the "Charming Betsy" canon, articulated in 1804, was absent from the case law for the next century and did not become entrenched until the 1950s; noting that the avoidance canon was first clearly articulated by the U.S. Supreme Court in the 1830s but took several decades to become "a fixture in both case law and commentary"; observing that the "Indian canon" was articulated in an 1832 case but "lay dormant" for thirty-four years and that, given the "paucity of nineteenth century cases applying the canon," it could not be called a "well-settled law" until much later). In a different but related context, Richard Posner has used the number of citations to a scholarly work as "an index to the influence, and less confidently to the quality, of the paper." Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511 app. at 534 (1994) (book review).

93. *See, e.g.*, FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 99–101 (2009) (examining the Supreme Court's use of canons); ESKRIDGE, INTERPRETING LAW, *supra* note 4, *passim* (referring to the Supreme Court's use of various canons); ESKRIDGE JR. ET AL., *supra* note 82, app. B (listing canons invoked by the Rehnquist and Roberts Courts); Barrett, *supra* note 92, at 128–54 (tracing the history of substantive canons); Brudney & Ditslear, *supra* note 82, at 29–33 (reporting the Court's reliance on different interpretive resources); Krishnakumar, *Reconsidering*, *supra* note 27, at 847–50 (reporting the frequency with which Justices on the Roberts Court referenced canons); Krishnakumar, *Roberts Court First Era*, *supra* note 27, at 221–24 (examining the Roberts Court's reliance on canons in statutory cases); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEXAS L. REV. 1073, 1075–76 (1992) (analyzing the Supreme Court's use of authority in statutory cases). *But see* CROSS, *supra*, at 180–200 (examining use of canons and other interpretive resources by federal courts of appeals).

in or out of favor.[94] Second, the Supreme Court is the highest court in the land, so it is difficult to envision it following the lead of lower courts or state courts if such courts were to articulate a new canon or begin to employ an old one frequently. Moreover, the U.S. Supreme Court has the greatest visibility of any court in the country. Lawyers and judges in Oregon or Chicago may pay close attention to what the Oregon Supreme Court or the Seventh Circuit decide, but those living and practicing in other states may not. Last, given recent evidence that several state courts have fashioned their own unique interpretive regimes—which sometimes deviate significantly from the approach taken by the U.S. Supreme Court—it seems prudent to avoid state courts' potentially idiosyncratic pronouncements as the benchmark for determining which interpretive rules have become entrenched in the broader legal community.[95]

The next question then becomes: What suffices to constitute frequent use by the U.S. Supreme Court? Any numerical threshold will be inherently arbitrary. If we were to set a floor somewhere in the ballpark of seven to ten citations in U.S. Supreme Court opinions since 1790, when the first iteration of the Court began deciding cases,[96] this would capture most canons that scholars and judges are familiar with and then some. It would eliminate some of the canons listed in *Interpreting Law*'s appendix—but that is appropriate because some of the listed rules are not, in our view, canons but rather other interpretive resources, and others have been cited only sparingly.[97] In any event, we do not mean for this number to be set in stone but merely suggest it as a starting point for discussion. Perhaps the ideal number should be lower for canons that are subject-matter specific—e.g., those calling for liberal construction of the Freedom of Information Act[98] or interpreting the Sherman Act to benefit consumers[99]—but should be at the higher end of the spectrum for generally applicable rules such as the maxim that a "precisely drawn,

94. Bruhl, *supra* note 91, at 496–503.

95. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1778, 1805–06 (2010) (describing approaches adopted by several state supreme courts).

96. The U.S. Supreme Court began its first sittings on February 2, 1790. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 18 (1993).

97. Notably, several of the canons listed individually in *Interpreting Law* are narrower applications or formulations of a broader canon that is well-established (and that has been cited at least seven times by the Supreme Court). In such cases, even if the narrow application is not referenced the minimum number of times required to count as a canon on its own, it should be considered a subset of the broader canon. For example, the appendix lists a rule stating that "[a]mbiguities or uncertainties in criminal laws referenced in immigration statutes should be resolved in favor of noncitizens." *See* ESKRIDGE, INTERPRETING LAW, *supra* note 4, app. at 442. This strikes us as a narrow application, or subset, of both the rule of lenity and the immigration-law-specific rule that ambiguities should be resolved in favor of the alien.

98. *Id.* app. at 441.

99. *Id.* app. at 436.

detailed statute preempts or governs a more general statute."[100] In the end, the exact number of minimum citations is not what matters most; the minimum threshold should merely be a vehicle for ensuring that loose judicial commentary is not labeled a canon on the basis of one or two (or even three) stray utterances by the U.S. Supreme Court.

*2. Longevity or Historical Pedigree.*—How long an interpretive rule has been in effect may be one of the most important factors in determining whether it qualifies as a canon of statutory construction. When an interpretive rule has been around for a while, it is likely to be familiar to members of the legal community. It also is more likely to be cited or quoted in cases and to be listed in treatises. Latin maxims such as *expressio unius* and *ejusdem generis*, for example, seem to derive much of their authority from the mere fact that they have been on the books for a long time. And Justice Scalia famously once commented that the rule of lenity "is validated by sheer antiquity."[101]

Perhaps just as importantly, the law is inherently backward-looking and preoccupied with continuity, consistency, and predictability. That is why courts look to the common law to fill in gaps left in statutes[102] and why Blackstone's *Commentaries on the Laws of England*[103] are so widely cited by American courts even in the modern era.[104] In short, the longer a rule has been on the books, the more comfortable we are with it and the more we tend to trust that it *must be a good rule*—otherwise, how would it have endured? One of us has elsewhere called this an assumption of "soundness" and has noted its connection to the Burkean philosophical preference for tradition and longstanding understandings that pervades much of the American political and legal system.[105]

But Burkeanism and rule of law preferences for consistency and predictability aside, we are hesitant to treat longevity as a requirement—

100. *Id.* app. at 435.

101. Scalia, *supra* note 56, at 29; *see also* Barrett, *supra* note 92, at 129–34 (calling lenity "an entrenched part of the English approach to statutory interpretation" and tracing its early adoption by American courts).

102. *See, e.g.*, William N. Eskridge Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1051 (1989) (explaining that courts use common law rules to fill in gaps in statutes because the common law offers a "readily accessible body of rules" that private parties already are familiar with and are accustomed to following).

103. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1st ed. 1765).

104. A quick word search in Westlaw (Blackstone! /s comment!), for example, found 433 U.S. Supreme Court references to the Commentaries—356 of them made in 1902 or later.

105. *See* Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1849–50 (2015) (citing EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE AND THE RIGHTS OF MAN (Dolphin ed. 1961) (1790)) (maintaining that an interpretation's survival for a long period of time is evidence that it is sound, which is consistent with the Burkean preference for longstanding understandings).

rather than merely an indicator—that an interpretive rule should be considered a canon. It is one thing to recognize longevity and consistency as *signs* that a rule is well-established; it is quite another to insist on longevity, perhaps in the form of a minimum number of years on the books, before a rule may be considered a canon. Indeed, such an approach would bar the recognition of "new" canons, such as the federalism clear statement rules that cropped up largely out of the blue and in quick succession during the 1980s–1990s.[106] Moreover, it would entrench old rules that the Court no longer uses simply because they were adopted in the Blackstone era or were uttered once by the Supreme Court and then forgotten. Such concerns lead us to the conclusion that while longevity may act as an important "plus" factor in helping to determine whether a particular interpretive rule qualifies as a canon, it should not be used as a dispositive measure that all canons must meet.

In other words, we believe that while longevity can lend weight to an interpretive rule's claim to canonical status, it is not sufficient by itself to justify such status. In order for an interpretive rule to qualify as a canon, regular Supreme Court use also seems necessary. If the rule was invoked fleetingly—once or a few times during the nation's early years—but never used regularly, then it should not be considered a canon. By contrast, if such use was frequent but then fell off over time, the canon should continue to be considered a canon, barring express later rejection by the Court. One corrective for the "fleeting" canon problem would be to consider not only longevity in the abstract but consistent usage across different courts. If an interpretive rule was employed by both the Peckham and Warren Courts, for example, it should have greater warrant to be dubbed a canon than a rule whose use is limited to a single Supreme Court generation. Just as we view certain cases[107] as canonical because they have survived over long periods and have been cited in diverse situations by diverse judges, canon status for interpretive rules should require similar indicia.

*3. Justification.*—A third factor that might be used to measure whether an interpretive rule should be considered a canon is the basis or justification for the rule. There are, unfortunately, a variety of theories and justifications of canons. Some canons, for example, have been justified on the theory that they accurately reflect how Congress drafts statutes or how ordinary people

106. *See, e.g.*, Eskridge & Frickey, *supra* note 80, at 597 (calling the Court's creation of these clear statement canons a "most striking innovation").

107. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

use language,[108] or that they promote coherence throughout the U.S. Code.[109] Others have been said to derive their authority from the Constitution or established background norms pervading our legal system.[110] Further, some scholars, including Eskridge, have argued that the canons reflect principles basic to all communication.[111]

It is worth asking, then, whether grounding in one of these justifications is necessary for an interpretive rule to be considered a canon. That is, must a language canon do one of the following in order to qualify: reflect legislative drafting practices, reflect rules of grammar and logic that ordinary people use, or promote coherence across the U.S. Code? Must a substantive canon promote constitutional values or at least be grounded in some fundamental tenet of the American legal system?

In theory, one would want something more than mere age and usage to solidify a canon's legitimacy. But even the most plausible theories of canons have not fared well under scrutiny. Consider the theory that canons reflect how Congress drafts or how reasonable people use language. Recent

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108. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (arguing that the meaning of a statute's terms ought to be based on what is "most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute"); James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1203 (2010) [hereinafter Brudney, *Canon Shortfalls*] (describing the theory held by some that judicial reliance on conventional usage when construing a statute's terms "promote[s] greater predictability in statutory interpretation"); Brudney & Ditslear, *supra* note 82, at 12 (explaining that language canons aim to give effect to the plain meaning of the legislature's language, "which in turn is understood to promote the actual or constructive intent of the legislature that enacted such language"); William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 226 (2000) (discussing Justice Scalia's views about the judicial obligation to impose coherence on the U.S. Code); Elizabeth Garrett, *Attention to Context in Statutory Interpretation: Applying the Lessons of Dynamic Statutory Interpretation to Omnibus Legislation*, ISSUES LEGAL SCHOLARSHIP, Nov. 2002, art. 1, at 7 (describing how Congress drafts statutes knowing that they will be interpreted according to certain norms and default rules); Scalia, *supra* note 56, at 16 (discussing tension between applying the plain meaning of a statute and attempting to give effect to the legislature's intent).

109. *See, e.g.*, *Bock Laundry*, 490 U.S. at 528 (Scalia, J., concurring) ("The meaning of terms on the statute books ought to be determined . . . on the basis of which meaning is . . . most compatible with the surrounding body of law into which the provision must be integrated . . . ."); SCALIA & GARNER, *supra* note 6, at 252–53 (describing how words or phrases in a statute should be construed not to clash with other provisions of that statute).

110. *See, e.g.*, Brudney, *Canon Shortfalls*, *supra* note 108, at 1205 (explaining Frickey's view that legal interpretation does not rely on conventional usage or ordinary meaning and emphasizing Frickey's references to "evolving circumstances and extrinsic public-law values"); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 125 (2001) (explaining the textualists' practice of "reading statutes in light of established background conventions"); Scalia, *supra* note 56, at 29 (defending the rule of lenity and rules requiring a clear statement to eliminate state sovereignty or to waive the federal government's sovereign immunity).

111. *See, e.g.*, ESKRIDGE, INTERPRETING LAW, *supra* note 4, at 52–53 (explaining that conversations and statutory interpretation both operate under a cooperative principle); Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1220 (describing how certain canons are recognizable in everyday conversational settings).

empirical studies have shown that, in some cases, the canons actually contradict congressional staffers' descriptions of common legislative drafting practices. For example, the well-established rule against superfluity dictates that statutes should be construed to avoid redundancy, so that when there are two overlapping terms, each should be construed to have an independent meaning.[112] Interviews with congressional staffers, however, reveal that they sometimes deliberately err on the side of redundancy in order to "capture the universe," ensure coverage of key items, or satisfy particular legislators, constituents, or lobbyists who "want[] to see that word" included.[113] Similarly, the *expressio unius* canon, which instructs that the inclusion of one statutory term implies the intentional exclusion of another,[114] has many logical imperfections—most notably, that the legislator simply may not have contemplated the particular application at issue.[115] Yet there can be little doubt by any measure—frequency of use, longevity, or historical pedigree—that it is a canon.[116] And it is a canon even if there is no consensus among linguists that it is necessary to, or an accurate reflection of, everyday communication.[117]

Or consider the theory that canons should be grounded in a constitutional principle (which in theory would eliminate the language canons). On the one hand, the most commonly invoked substantive canons—e.g., avoidance, the rule of lenity, federalism clear statement rules, sovereign immunity waivers, preemption, and the presumption of nonretroactivity—are

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112. *See, e.g.*, Bailey v. United States, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.").

113. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 934 (2013).

114. *See, e.g.*, Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 80–81 (2002) (declining to apply the *expressio unius* canon where other reasons existed for exclusion of a statutory term).

115. *See* Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 676 (D.C. Cir. 1973) (noting that the canon "stands on the faulty premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the [legislature]"); SUTHERLAND, *supra* note 84, § 47:25 (discussing the limitations of the canon).

116. The canon appears to have first been referenced by the U.S. Supreme Court in 1806. *See* United States v. Grundy & Thornburgh, 7 U.S. (3 Cranch) 337, 353, 356d (1806) (referencing a lower court opinion employing the maxim "[e]*xpressio unius est exclusio alterius*"). Since then, it has been cited in at least another 130 cases. (A Westlaw search for "expressio unius" turned up 131 cases total.)

117. Geoffrey Miller wrote a fascinating article suggesting that the canons could be justified under Paul Grice's theory of conversational cooperation. Miller, *supra* note 111, at 1191–92. Grice's theory of cooperation, however, is quite controversial. Moreover, there is a significant question whether it applies in environments—within Congress or between Congress and courts—in which speakers have incentives *not* to cooperate. Similarly, David Shapiro has written a deservedly famous defense of the canons as favoring continuity as opposed to change. Shapiro, *supra* note 82. Eskridge cites Shapiro favorably, but one must wonder how "new" or "unconventional" canons preserve continuity.

all connected to or based upon constitutional principles.[118] At the same time, however, the Constitution has nothing to say on many subjects that statutes regulate—including, for example, antitrust rules, relations with Indian tribes, and veterans' benefits—yet we have numerous longstanding and frequently invoked canons about how to read antitrust, Indian-tribal, and veterans' benefits statutes, among others.[119]

Thus, what counts as a canon must be about more—or perhaps, less—than accuracy regarding how words are used or a connection to a constitutional provision. In our view, the basic thread connecting the canons is (or should be) *established convention*. Longevity or historical pedigree, and perhaps a connection to the Constitution, can help demonstrate established convention, but for the reasons we have outlined above, the real, indispensable measure for such convention must be regular Supreme Court use *across ideological divides*. Usage is important because canons claim their status as authoritative not simply based on age but because they represent how a "language community" understands and uses terms.[120] It is not that these are rules every citizen must or does speak, but that they are terms lawyers learn to speak. As the canons' most sophisticated supporters suggest, they are the *lingua franca* of the law.[121]

Basic communication, however, requires agreement to cooperate, as philosophers of language know quite well. Paul Grice famously wrote that a "Cooperative Principle" governs communication.[122] Canons that are ideologically divisive are not canons; they are not established as rules

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118. *See* Krishnakumar, *Reconsidering*, *supra* note 27, at 856, 901–08 (reporting results of an empirical study finding that the vast majority of substantive canons invoked by the Roberts Court fell into one of these six categories).

119. These include, but are not limited to, canons instructing that the Sherman Act should be construed in light of its overall purpose of benefitting consumers; that Indian tribes cannot be sued without explicit congressional authorization; that veterans' benefits statutes must be construed liberally for their beneficiaries; and that a presumption against the national "diminishment" of Indian lands exists. *See* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014) (invoking the principle that tribal sovereignty and immunity from suit can only be abridged through Congressional action); Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 440–41 (2011) (holding that the Veterans' Judicial Review Act should be "construed in the beneficiaries' favor," absent "clear indication" otherwise); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 317, 319 (2007) (explaining that the Court has not permitted "recovery for above-cost price cutting" under the Sherman Act because it could chill "legitimate price cutting," which benefits consumers); Hagen v. Utah, 510 U.S. 399, 411 (1994) (acknowledging that in diminishment cases, statutory ambiguities are resolved "in favor of the Indians").

120. *See* John F. Manning, *Continuity and the Legislative Design*, 79 NOTRE DAME L. REV. 1863, 1863 (2004) ("[P]roponents now emphasize that much like any other interpretive practice, a canon's utility will depend on the interpreter's capacity, at times, to identify how members of a linguistic community would ordinarily use that canon in context.").

121. *Id.* at 1863, 1869–70.

122. For a detailed explanation of this feature of discourse, see PAUL GRICE, STUDIES IN THE WAY OF WORDS 22–40 (1989).

accepted by the linguistic community. They do not follow the most basic notion of cooperation. It is well to remember that canons hail to ancient Roman practice (it is called "canon law" after all). Emperor Theodosius was famous for uniting warring religious sects. The "compromise" was one of the most important in all Christendom: the Nicene Creed is perhaps the most famous example of religious canons as well as one of enduring compromise.[123] This example simply reflects what positive political theorists tell us—that the idea of "compromise" is essential to any regime's stability.[124] Thus, in our view, the ultimate test of a canon is one that reflects the stability of compromise, by which we mean that *the canon reflects the agreement of Supreme Court Justices appointed by different parties and across ideological divides*.

*4. Can Canons Be Undeclared?*—Last, it is worth considering whether an interpretive rule can qualify as a canon only if the Supreme Court itself has consciously declared or understood itself to be adopting a canon (or generally applicable legal rule) as opposed to merely making a comment about its reasoning in the particular case in front of it. A "conscious declaration" requirement has the advantage of ruling out off-handed comments made by the Court that are case-specific—such as the so-called canon that U.S. Attorneys' failure to advance a particular reading of a criminal statute is strong evidence that the reading is incorrect.[125] It also would make it much harder for anyone other than the members of the Court to identify or designate particular interpretive rules as canons. Depending on one's perspective, this could be either a positive or a negative feature.

On the one hand, if regular Supreme Court use is the most sensible measure of a rule's status as a canon, then it may make a lot of sense to limit the ability to "declare" a canon to the Court. On the other hand, doing so risks

123. CHARLES FREEMAN, A.D. 381: HERETICS, PAGANS, AND THE DAWN OF THE MONOTHEISTIC STATE 129 (2009) ("Theodosius . . . had provided the legal framework within which Christianity had been given dominance over paganism and the Nicene Creed precedence within Christianity."); *see id.* at 101–03 (observing that Theodosius demanded that the sects reach agreement over "intractable philosophical problems" and by law "silenced the debate"); *id.* at 35 ("[I]t was not until the fourth century that the texts included in the New Testament were [finalized] as a canon . . . .").

124. *See* Tonja Jacobi, Sonia Mittal & Barry R. Weingast, *Creating a Self-Stabilizing Constitution: The Role of the Takings Clause*, 109 NW. U. L. REV. 601, 626 (2015) (concluding that compromises historically "resolve[] the immediate issue of the crisis" and "set rules governing future policies"). *See generally* Barry R. Weingast, *Political Stability and Civil War: Institutions, Commitment, and American Democracy* (discussing the interplay of the balance rule, representative democracy, and federalism), *in* ANALYTIC NARRATIVES 148 (Robert Bates ed. 1998).

125. *See* Lopez v. Gonzales, 549 U.S. 47, 57–58 (2006) ("[T]he failure of even a single eager Assistant United States Attorney to act on the Government's interpretation of 'felony punishable under the [CSA]' in the very context in which that phrase appears in the United States Code belies the Government's claim that its interpretation is the more natural one.").

missing at least some of the Court's gradual, perhaps understated, articulations of new canons. Not all canons are intended as such the moment they are uttered. Even if they are, the Court might not clearly declare them as canons, focusing instead on the application of the canon to the interpretive issue before it in the particular case. Indeed, the Court sometimes announces a rule or principle in one case with little thought about whether it will make sense in other cases, only to later confront a similar case in which the rule is useful and to invoke it in the second case as well. If the Court proceeds in this manner for several more cases, it becomes hard to argue that the rule is not a canon, even if the Court itself has never openly declared it one.[126] Accordingly, we would recommend that the nature and frequency of the Supreme Court's reliance on an interpretive rule—rather than the act of openly declaring the rule to be a broadly applicable one—should drive the analysis of whether the rule rises to the level of an established canon of statutory construction.

In short, we reject the notion that any and all norms can count as a canon. We also reject the notion that only textually authoritative canons should count. The former is too broad and the latter too narrow. Instead, canon status should be awarded only to interpretive rules that are well-established in the legal community and that reflect what we call "the stability of compromise."

126. A good example is the relatively new "elephants in mouseholes" canon, first articulated in Whitman v. Am. Trucking Associations, 531 U.S. 457 (2001). *See id.* at 468 ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Since *Am. Trucking*, the Court has referenced the "elephants in mouseholes" concept in thirteen subsequent cases. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1627 (2018); Cyan, Inc. v. Beaver County Employees Ret. Fund, 138 S. Ct. 1061, 1071 (2018); Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 984 (2017); Puerto Rico v. Franklin California Tax-Free Tr., 136 S. Ct. 1938, 1947 (2016); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2796 (2014); E.P.A. v. EME Homer City Generation, L.P., 572 U.S. 489, 528 (2014); Chamber of Commerce of U.S. v. Whiting, 563 U.S. 582, 640—41 (2011); Bilski v. Kappos, 561 U.S. 593, 645 (2010); Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 303 (2009); Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 239 (2009); Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 247 (2008); Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 116 (2008); Gonzalez v. Oregon, 546 U.S. 243, 267 (2006). None of these cases has characterized the "no elephants in mouseholes" principle as a "canon" per se; indeed, one called it an "English language observation." *Ali*, 552 U.S. 214 at 247. Nevertheless, many scholars and lower courts consider the "elephants in mouseholes" principle to be a canon. *See, e.g.*, Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React when the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 542 (2015) ("The 'no elephants in mouseholes' canon now occupies a secure, if limited, place in the interpretive landscape"); Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19 (2010) (discussing and evaluating the canon); Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 104 (2018) (referring to the "new 'no elephants in mouseholes' canon"); Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 787 (2017); Si Min Cen v. Attorney Gen., 825 F.3d 177, 194 (3d Cir. 2016); Coal. for Responsible Regulation, Inc. v. E.P.A., No. 09-1322, 2012 WL 6621785, at *1 (D.C. Cir. Dec. 20, 2012); United States v. Franck's Lab, Inc., 816 F. Supp. 2d 1209, 1237 (M.D. Fla. 2011), order vacated, appeal dismissed, No. 11-15350, 2012 WL 10234948 (11th Cir. Oct. 18, 2012).

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We end this Review where we began, by comparing *Interpreting Law* to Justice Scalia and Bryan Garner's *Reading Law* on the question, "What counts as a canon?" Under the test we have recommended in this Part—the nature, frequency, and stability of the Supreme Court's use of an interpretive rule—*Interpreting Law*'s list of canons is a bit too long, and Justice Scalia and Bryan Garner's list is quite a bit too short. Where Eskridge includes some interpretive rules that are not widely enough established to merit canonical status, Scalia and Garner exclude from the metacanon numerous interpretive rules that *are* widely established. In our view, Eskridge's overinclusion is less troublesome because he is open about where the rules he lists derive from, citing cases to support each canon he identifies and citing the scholarly work from which he draws recommended canons. By contrast, Justice Scalia and Bryan Garner offer little justification, beyond the authors' opinions, for expelling numerous established interpretive tools from the list of canons (or turning them into anticanons). Sins of omission may be more troublesome than overinclusion as readers unaware of the larger universe may reach inappropriate conclusions.

## Conclusion

There is every reason to believe that the "canon wars" are likely to continue in the Supreme Court and in the legal literature. Theories of interpretation have been relentlessly moving toward textualism, and, with that move, interpreters have attempted to fill gaps with standard canonical practice, claiming that our "law of interpretation," including our constitutional law, depends upon canons.[127] Such claims, however, leave unresolved the central question raised by both Eskridge's *Interpreting Law* and Scalia and Garner's *Reading Law*—What counts as a canon of construction? While we cannot hope to have answered that question definitively in this short Review, we have aspired to at least outline and evaluate some potential measures of canonical status. Others, we hope, will continue that conversation.

127. *See* Baude & Sachs, *supra* note 3, at 1088–89 (discussing canons as part of the "law of interpretation").

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# Diversity Jurisdiction and Juridical Persons: Determining the Citizenship of Foreign-Country Business Entities

Elisabeth C. Butler*

*Protecting foreign-country litigants from prejudice in state courts provided an original impetus for the creation of diversity jurisdiction. However, the protections of alienage jurisdiction are in peril with respect to large foreign companies. Under current law, it is not clear how to determine the citizenship of a foreign-country business entity. For large companies with thousands of members or shareholders from all over the world, this lack of clarity is particularly concerning because being forced to allege the citizenship of every member is not only extremely burdensome, if not impossible, but also severely restricts large foreign companies' access to federal court. The question ultimately turns on how to classify the foreign-country business entity. Under American law, a corporation has its own citizenship, and unincorporated associations have the citizenship of all of their members. But in the case of a foreign-country business entity, it is not always clear whether the entity should be classified as a corporation or an unincorporated association. The circuit courts are divided on how to address this issue. The Fifth and Ninth Circuits have resolved the issue by developing what I refer to as the "juridical person approach." Under this framework, a court will treat an entity like a corporation for citizenship purposes if it determines that the country of the entity's formation views the entity as a juridical person. By contrast, the Seventh Circuit has adopted what I refer to as the "comparison approach" to determine the citizenship of foreign-country business entities. This involves looking to the attributes of a foreign-country business entity and comparing it to American business entities, according the foreign-country entity the same citizenship that its American analogue would have. This Note analyzes these two approaches in terms of their adherence to Supreme Court precedent and their practical application. It recommends that courts uniformly apply a modified version of the juridical person approach to determine the citizenship of foreign-country business entities.*

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## Introduction

The need for federal courts to hear cases involving foreign-country litigants has been clear since the founding.[1] Indeed, there was broad consensus among the Framers that national courts must be able to hear these types of cases.[2] The Framers' fears of prejudice against foreign-country litigants led to Article III's pronouncement that the judicial power of the United States extends to cases between citizens of the United States and citizens of a foreign state and to the implementation of this constitutional grant by the First Congress in the Judiciary Act of 1789.[3] The Framers believed that allowing foreign-country litigants to assert their rights in federal court was necessary because cases involving citizens of a foreign country could have foreign relations consequences and thus should be decided by the courts of the nation, not of the states.[4] They were particularly concerned that international business disputes not be relegated to state court.[5] But now that the nature of international transactions has changed, with large foreign companies having thousands of members or shareholders from all over the world, the protections of alienage jurisdiction are in peril. If a foreign-country business entity[6] is treated like an American unincorporated association instead of a corporation, the citizenship of all of the company's members would be imputed to it, and the benefits that alienage jurisdiction was designed to provide would be eviscerated. A large company would have to allege the citizenship of each of its many thousands of members, and even if it managed to do that, the citizenship of a single member could destroy jurisdiction.

The question, then, is how to determine the citizenship of foreign-country business entities so as to preserve access to alienage jurisdiction where it seems warranted. American businesses that want to enjoy the benefits of diversity jurisdiction without dealing with the citizenship of their members need only organize themselves as corporations. However, it is unclear when a foreign-country business entity can be treated like an American corporation, and neither Congress nor the Supreme Court has

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1. THE FEDERALIST NO. 80 (Alexander Hamilton). Hamilton argued that
> [t]he reasonableness of the agency of the national courts in cases in which the state tribunals cannot be supposed to be impartial, speaks for itself . . . . This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different states and their citizens.

*Id.*

2. Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 10 (1996).

3. GEOFFERY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE 256 (11th ed. 2015).

4. Johnson, *supra* note 2, at 11.

5. *Id.* at 13–14.

6. For the purposes of this Note, I use the term "foreign-country business entity" to refer to a business organized under the laws of a country other than the United States.

provided any clarification. Three courts of appeals have attempted to solve this issue, resulting in a 2–1 circuit split.

The Fifth and Ninth Circuits have developed what I refer to as the "juridical person approach." Under this framework, a court looks to the law of the foreign country to determine whether the foreign-country entity is treated like a juridical person in the country of its formation. If it is, it is treated like a corporation for citizenship purposes. If not, it is treated like an unincorporated association and has the citizenship of its members. By contrast, the Seventh Circuit has adopted what I refer to as the "comparison approach" to determine the citizenship of foreign-country business entities. This involves looking to the attributes of a foreign-country business entity and comparing it to American business entities. The court then accords the foreign-country entity the same citizenship that its American analogue would have.

This Note evaluates these approaches and determines that the Fifth and Ninth Circuits' juridical person approach is superior to the Seventh Circuit's comparison approach in terms of adherence to Supreme Court precedent and ease and consistency in its application. This Note advocates adoption of a slightly modified version the juridical person approach.

Part I of this Note surveys the existing case law, covering Supreme Court precedent and the current circuit split. It explains both the comparison approach and the juridical person approach to determining citizenship and explores how the differences in the two approaches can lead to different citizenship findings. Part II evaluates the two approaches for both their adherence to Supreme Court precedent and their ease of application. Although the relevant Supreme Court precedent is vague and at times contradictory, this Note argues that the juridical person approach most faithfully follows the Court's original justification for treating corporations differently. In order to determine which aspects of a business the Supreme Court has found pertinent to the citizenship component of diversity jurisdiction, Part III traces the history of the Supreme Court's differing treatment of the citizenship of incorporated and unincorporated associations. Using this history, it identifies factors that should be used in creating a citizenship test for foreign-country business entities. It also delineates the attributes of a juridical person. Part IV advocates the adoption of a modified version of the juridical person approach.

## Part I

This Part begins by explaining the specific need for a method of determining the citizenship of foreign-country business entities. It then explores what Supreme Court precedent has to say about the citizenship of foreign-country business entities. It also provides an overview of the different approaches the circuits have adopted to determine the citizenship of foreign-country business entities and explains how those approaches can lead to

different findings. Although the Court has not ruled on the issue, courts of appeals have relied heavily on several Supreme Court cases to craft their approaches.

### *A. The Need for a Different Approach in the Foreign-Country Context*

A failure to create citizenship rules specifically in the foreign-country business-entity context would pose serious problems for foreign-country businesses—especially those from non-English-speaking countries. Employing the test used for American business entities of asking only whether an entity is a "corporation" without elaborating on what that means would essentially limit corporate citizenship privileges to business entities from English-speaking countries that use similar terminology. After all, how could a court be sure that an entity not called a corporation is in fact a corporation if there are no criteria to determine this other than the name of the entity? This is problematic because an entity that could not prove it was a corporation for purposes of the diversity statute would be forced to allege the citizenship of all of its members—potentially thousands of people.

Even moving past the requirement that the entity be called a corporation by the country of its formation causes problems. If we treat entities analogous to corporations as corporations, what degree of similarity is required to deem the business entity analogous to a corporation? Often, the American concept of corporations will not translate to foreign entities.[7] The Supreme Court's refusal to extend corporate citizenship privileges to other business entities has also made it difficult to define which qualities make an entity a corporation. Because the Court has stated that it has no principled reason for treating corporations differently from other similar types of business entities,[8] it is difficult to know which, if any, differences between entities are relevant. There seems to be little point, then, in trying to make foreign-country entities fit the American notion of corporations.

Ideally, Congress would pass a statute to resolve this issue. The Supreme Court has repeatedly refused to extend citizenship to business entities other than corporations because it believes that this type of question is best resolved by the legislature.[9] But until such time as Congress chooses to create a statute laying out the citizenship of foreign-country business entities, courts must create a consistent and workable standard for determining citizenship.

The only guidance Congress has provided comes from 28 U.S.C. § 1332(a). Under § 1332(a)(2), federal courts have subject matter jurisdiction

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7. VED P. NANDA ET AL., LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 5:14 (2018).

8. *See infra* note 85 and accompanying text.

9. *See, e.g.*, Carden v. Arkoma Assocs., 494 U.S. 185, 197 (1990) (reasoning that citizenship questions are "more readily resolved by legislative prescription than by legal reasoning").

over a controversy between a citizen of a state and a citizen of a foreign state where the amount in controversy exceeds $75,000. Similarly, under § 1332(a)(3), federal courts have subject matter jurisdiction over a controversy between citizens of different states where citizens of a foreign state are additional parties. Section 1332(c)(1) specifies that a corporation is deemed a citizen of every state and foreign state where it is incorporated and the State or foreign state where it has its principal place of business. Although § 1332(c) could be interpreted to allow other business entities to have their own citizenship,[10] the Supreme Court has declined to expand upon this language, allowing only corporations to have their own citizenship and treating all other business entities as unincorporated associations, which have the citizenship of all their members.[11] Although the statute clearly contemplates the citizenship of foreign-country business entities, its application to those entities is unclear, and the Supreme Court has not ruled on it. Because the Court has held in the context of American business entities that only corporations can be citizens, lower federal courts have focused their analysis on whether a foreign-country business entity can be deemed a corporation for purposes of the statute.

Although focused on the same goal, the courts have created two distinct approaches, resulting in a circuit split. And even the split itself is notable for the degree of disuniformity it exhibits. It consists not just of the 2–1 split between circuit courts, but also of splits within the circuits that have ostensibly spoken on the issue, with some district courts not even following their own circuit's precedent.[12] The Seventh Circuit, too, completely changed its mind on the issue,[13] and the Fifth Circuit, after choosing an approach in a

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10. *See* David P. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 36 (1968) ("I see no obstacle to construing 'corporation' in section 1332(c) to include the joint-stock association and the limited partnership, which are identical with corporations in terms of diversity policy.").

11. *See Carden*, 494 U.S. at 195–96 (holding that "diversity jurisdiction in a suit by or against the entity depends on the citizenship of 'all the members'").

12. As a court within the Seventh Circuit, the District Court for the Northern District of Illinois should be following the comparison approach. Instead, the court wrote that because the company "is regarded as a juridical person under [Chinese] law, has independent juridical person property under that law, and enjoys the property right of a juridical person," it had its own citizenship. InStep Software, LLC v. InStep (Beijing) Software Co., No. 1:11-CV-03947, 2012 WL 1107798, at *4 (N.D. Ill. Mar. 29, 2012). One recent case from a district court within the Fifth Circuit inexplicably failed to follow Fifth Circuit precedent using the juridical person approach, instead citing a Seventh Circuit case and appearing to endorse the comparison approach. W. African Ventures Ltd. v. Ranger Offshore, Inc., No. 4:17-CV-00548, 2017 WL 6405625, at *1 (S.D. Tex. Dec. 13, 2017) (citing Lear Corp. v. Johnson Elec. Holdings, Ltd., 353 F.3d 580, 582 (7th Cir. 2003)).

13. *Compare* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 285 (7th Cir. 1990) (concluding "that the Church is recognized under and by the laws of the Republic of Cyprus as a distinct juridical entity, and thus [was] a 'citizen or subject' of that state" for diversity purposes), *with* Fellowes, Inc. v. Changzhou Xinrui Fellowes Office Equip. Co., 759 F.3d 787, 788 (7th Cir. 2014) (rejecting the view that "every 'juridical

prior case, requested supplemental briefing on the citizenship of the foreign-country entity but failed to address the issue in its opinion, simply stating that citizenship was "unclear."[14] In addition to the lack of uniformity in the form of the approach, the approaches can also lead to different results, with one circuit finding jurisdiction where another would not. Moreover, subject matter jurisdiction should be guided by clear rules.[15] Jurisdiction is the most fundamental issue a court must address because it is about the court's power to proceed at all. It cannot be waived by the parties, and a lack of subject matter jurisdiction can be raised at any time, including by a court *sua sponte*.[16] Just as courts may not hear a case when they do not have jurisdiction, courts have an obligation to hear cases when they do.[17] Courts cannot answer these jurisdictional questions when the test for citizenship is unclear.

### *B. The Supreme Court*

It is far from clear which Supreme Court cases should guide the method for determining the citizenship of a foreign-country business entity. The circuits take starkly different views of which cases are relevant and of what those cases have to say about the issue. The Ninth Circuit, in crafting its juridical person approach, relied most heavily on *Puerto Rico v. Russell & Co.*[18] In *Russell*, an action was brought against a Puerto Rican business entity called a *sociedad en comandita* whose individual members were not domiciled in Puerto Rico.[19] The members removed the case from the insular district court of San Juan, Puerto Rico to the United States District Court for Puerto Rico under the Organic Act of Puerto Rico, which gave the United

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person' . . . is a corporation for the purpose of § 1332 no matter what other attributes it has or lacks").

14. Letter from Lyle W. Cayce, Clerk, Office of the Clerk for the Fifth Circuit (June 21, 2017) (requesting parties file letter briefs addressing whether "Brittania-U Nigeria, Limited, as a Nigerian private limited company is a separate juridical entity under Nigerian law such that its citizenship for purposes of either ground of jurisdiction asserted in this case would be akin to that of a corporation or whether some other analysis applies"); Brittania-U Nigeria, Ltd. v. Chevron USA, Inc., 866 F.3d 709, 713 (5th Cir. 2017) (citing Stiftung v. Plains Mktg., L.P., 603 F.3d 295, 298 (5th Cir. 2010) and its juridical person approach but calling the citizenship of a foreign-country business "unclear" and finding subject matter jurisdiction on other grounds).

15. Currie, *supra* note 10, at 1 (quoting THE AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Pt. I, at 72 (Official Draft 1965)) ("It is of first importance to have a definition so clear cut that it will not invite extensive threshold litigation over jurisdiction.").

16. FED. R. CIV. P. 12(h)(3).

17. *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (noting the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them").

18. 288 U.S. 476 (1933).

19. *Id.* at 477.

States District Court for Puerto Rico jurisdiction over all cases cognizable in United States district courts and, additionally, where all parties were citizens of the United States but were not domiciled in Puerto Rico.[20] This meant that the United States District Court for Puerto Rico had jurisdiction only if the citizenship of the members, rather than the *sociedad* itself, was taken into account.[21] To answer the question of whose citizenship was determinative, the Supreme Court began by discussing the history of diversity jurisdiction and corporations, noting that a corporation's distinct legal personality was the theoretical justification for treating it as having its own citizenship.[22] The Court rejected *Chapman v. Barney*'s[23] distinction between incorporated and unincorporated associations because to try to fit a civil law entity into a common law framework would be "to invoke a false analogy."[24] Instead, the Court placed emphasis on the fact that Puerto Rican law regarded the *sociedad* as a juridical person.[25] The *sociedad* could "contract, own property and transact business, sue and be sued in its own name and right."[26] Thus, the Court could find no adequate reason to treat the citizenship of the *sociedad* differently from that of a corporation.[27]

*United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc.*[28] and *Carden v. Arkoma Associates*[29] substantially limited *Russell* in the context of domestic business entities. *Bouligny* concerned the citizenship of an unincorporated labor union, which asserted that it had the citizenship of only its principal place of business and not that of its members.[30] The union attempted to use *Russell* to show that the Court had breached the doctrinal wall of *Chapman* and asked the Court to extend the changes in its conception

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20. *Id.* at 477–78.

21. *Id.* at 478–79.

22. *Id.* at 479.

23. 129 U.S. 677 (1889). *Chapman* involved a suit between the United States Express Company, a joint-stock company organized under the laws of New York, and Heman B. Chapman, a citizen of Illinois. *Id.* at 678. The United States Express Company filed suit in federal court on the basis of diversity jurisdiction. *Id.* at 681. The Supreme Court raised the issue of jurisdiction *sua sponte* and found no satisfactory showing as to the citizenship of the United States Express Company. *Id.* at 681–82. The Court held that the United States Express Company could not be a citizen of New York unless it was a corporation. *Id.* at 682. The United States Express Company was a joint-stock company—"a mere partnership"—so the citizenship of its members was relevant. *Id.* Because the citizenship of the company's members had not been alleged, "the record [did] not show a case of which the Circuit Court could take jurisdiction," and the Court reversed the decision of the lower court and remanded the case with instructions to set aside the judgment. *Id.*

24. *Russell*, 288 U.S. at 480–81.

25. *Id.*

26. *Id.* at 481.

27. *Id.* at 482.

28. 382 U.S. 145 (1965).

29. 494 U.S. 185 (1990).

30. *Bouligny*, 382 U.S. at 146.

of citizenship to unions.[31] The Court rejected this interpretation, noting that *Russell* actually restricted rather than expanded the jurisdiction of the United States District Court for Puerto Rico.[32] It also noted that *Russell* was irrelevant because Puerto Rico was not a state and the Court was not using the general diversity statute.[33]

While *Bouligny* stripped *Russell* of any real power in the context of domestic business entities, it left largely untouched *Russell*'s potential to influence the Court's approach to foreign-country business entities. This is because the problem presented in *Russell* "was that of fitting an exotic creation of the civil law, the *sociedad en comandita*, into a federal scheme which knew it not."[34] While one could argue that the Court's holding in *Russell* is limited to civil law entities, it makes sense to extend its analysis of business entities unfamiliar to American law to all foreign-country business entities. As the Seventh Circuit has noted, asserting that a foreign-country entity is a corporation

> assumes that [the foreign country] has business entities that enjoy corporate status as the United States understands it. Yet not even the United Kingdom has a business form that is exactly equal to that of a corporation. For example, it can be difficult to decide whether a business bearing the suffix "Ltd." is a corporation for the purpose of § 1332 or is more like a limited partnership, limited liability company, or business trust.[35]

Because these difficulties can arise even when dealing with common law countries, it makes sense to develop a test that can apply to any foreign-country business entity, regardless of the legal system that country uses.

The Court encountered similar arguments about *Russell*'s reach twenty-five years later in *Carden*. There, the Court addressed whether a limited partnership could be considered to have its own citizenship separate from that of the general and limited partners.[36] In discussing its prior opinions about the citizenship of business entities, the Court referred to *Russell* as an exception to its otherwise consistent jurisprudence.[37] The Court cited to *Bouligny* and reiterated the policies discussed in that opinion that led to the conclusion that *Russell* did not apply in that case.[38] This opinion arguably reduced *Russell* to its facts, with the Court holding that "at least common-law entities (and likely all entities beyond the Puerto Rican *sociedad en*

31. *Id.* at 151.
32. *Id.* at 151–52 & n.10.
33. *Id.* at n.10.
34. *Id.* at 151.
35. White Pearl Inversiones S.A. (Uruguay) v. Cemusa, Inc., 647 F.3d 684, 686 (7th Cir. 2011).
36. Carden v. Arkoma Assocs., 494 U.S. 185, 187 (1990).
37. *Id.* at 189.
38. *Id.* at 190.

*comandita*) would be treated for purposes of the diversity statute pursuant to what *Russell* called '[t]he tradition of the common law,' which is 'to treat as legal persons only incorporated groups and to assimilate all others to partnerships.'"[39] It is unclear, though, if the Court was considering foreign-country business entities or only American entities with civil law origins. No circuit court has attempted to use incorporation as a factor in determining the citizenship of a foreign-country business entity, likely for the same reasons that courts have not attempted to limit corporate citizenship privileges to entities called corporations.[40]

### C. *The Two Approaches*

The Fifth, Seventh, and Ninth Circuits are the only circuit courts that have discussed how to determine the citizenship of a foreign-country business entity for diversity purposes.[41] Both the Fifth and the Ninth Circuits use an approach that focuses on whether the country of the entity's formation treats the entity as a "juridical person." While the definition of juridical person is complicated and will be discussed at length in subpart III(B), *infra*, for now it is sufficient to say that a juridical person is an "entity that can own property, make contracts, transact business, and litigate in its own name . . . ."[42] In other words, a juridical person is an entity that "for the purpose of legal reasoning is treated more or less as a human being."[43] The

39. *Id.* at 190 (quoting Puerto Rico v. Russell & Co., 288 U.S. 476, 480 (1933)).

40. *See* Fellowes, Inc. v. Changzhou Xinrui Fellowes Office Equip. Co., 759 F.3d 787, 788 (7th Cir. 2014) (applying the comparison approach instead of using incorporation status to determine citizenship); Stiftung v. Plains Mktg., L.P., 603 F.3d 295, 299 (5th Cir. 2010) (applying the juridical person approach instead of using incorporation status to determine citizenship); Cohn v. Rosenfeld, 733 F.2d 625, 630 (9th Cir. 1984) (same).

41. District Courts within other circuits have expressed opinions about which approach to take. The District Court for the Southern District of Florida stated that it believed the Eleventh Circuit would follow the Seventh Circuit's comparison approach. Bradshaw Constr. Corp. v. Underwriters at Lloyd's, London, No. 15-24382-CIV, 2016 WL 8739603, at *6 (S.D. Fla. Jan. 8, 2016). Although not expressly adopting the comparison approach, the District Court for the Southern District of Alabama also cited to Seventh Circuit cases addressing this issue. *See* Stringer v. Volkswagen Grp. of Am., Inc., No. 15-00509-N, 2015 WL 5898326, at *3 (S.D. Ala. Oct. 8, 2015) (citing *White Pearl Inversiones* and *Fellowes* in determining a foreign-country business entity's citizenship); Keshock v. Metabowerke GMBH, No. CIV.A. 15-00345-N, 2015 WL 4458858, at *4 (S.D. Ala. July 21, 2015) (citing *White Pearl Inversiones* and *Fellowes* while discussing a foreign-country business entity's citizenship). The District Court for the Eastern District of Virginia noted that the Fourth Circuit had failed to rule on the citizenship issue, but because the parties agreed that the Seventh Circuit's case law was "sensible," applied its comparison approach. Hawkins v. Borsy, No. 105-cv-1256LMBJFA, 2018 WL 793599, at *5 (E.D. Va. Feb. 8, 2018). However, in two previous cases, that same court used the Ninth Circuit's juridical person approach to determine the citizenship of a foreign-country entity. LG Elecs., Inc. v. Asustek Computers, 126 F. Supp. 2d 414, 418 (E.D. Va. 2000); Honua Sec. Corp., Inc. v. SMI Hyundai Corp., No. 1:10CV785 (GBL), 2010 WL 11565898, at *3 (E.D. Va. Oct. 21, 2010).

42. Fellowes, 759 F.3d at 788.

43. *Juridical Person*, BLACK'S LAW DICTIONARY (10th ed. 2014).

juridical person approach asks only if the business's country of formation treats the business as a juridical person. If so, it is treated as a corporation for citizenship purposes.

The Ninth Circuit was the first of the circuit courts to address the citizenship of foreign-country business entities. In *Cohn v. Rosenfeld*,[44] the court addressed the issue of an *anstalt* organized under the laws of Liechtenstein.[45] To determine how to address the *anstalt*'s citizenship, the Ninth Circuit looked to the Supreme Court's analysis in *Russell*.[46] Drawing on that reasoning, the Ninth Circuit held that "[u]nder section 1332(a)(2) we ask only whether an entity is regarded as a juridical person by the law under which it was formed."[47] Because the court was certain that Liechtenstein considered *anstalts* to be juridical persons, the court determined that the *anstalt* had its own citizenship.[48] Among the relevant qualities, the court listed: limited liability; the ability to sue and be sued in the *anstalt*'s own name; that proceeds from litigation belonged to the *anstalt* itself; and that the relevant law mentioned that the *anstalt* had juridical personality.[49] This was in spite of the fact that *anstalts* "differ markedly from corporations in Liechtenstein."[50]

The Fifth Circuit followed the Ninth Circuit's approach when it addressed the issue of citizenship of a *stiftung* organized under the laws of Liechtenstein. In *Stiftung v. Plains Mktg., L.P.*,[51] the Fifth Circuit determined that the *stiftung* was a juridical person under the laws of Liechtenstein and thus was a citizen of Liechtenstein for purposes of diversity jurisdiction.[52] The court cited both *Russell* and *Cohn* to support its position that only the status of the entity as a legal person was relevant and that it was unnecessary to determine which American entity the *stiftung* most resembled.[53]

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44. 733 F.2d 625 (9th Cir. 1984).
45. *Id.* at 627.
46. *Id.* at 628–29.
47. *Id.* at 630.
48. *Id.* at 629.
49. *Id.*
50. *Id.* at 628.
51. 603 F.3d 295 (5th Cir. 2010).
52. *Id.* at 299.
53. *Id.* at 298. That the court cited one Seventh Circuit case, *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 285 (7th Cir. 1990), should not be read to say that the Fifth Circuit supports the Seventh Circuit's current approach to the citizenship issue. *Id. Autocephalous* followed the juridical person approach, and the Seventh Circuit has since limited that case to its facts. *See* Fellowes, Inc. v. Changzhou Xinrui Fellowes Office Equip. Co., 759 F.3d 787, 790 (7th Cir. 2014) (stating that *Autocephalous* "cannot be generalized to entities other than religious bodies organized under the law of Cyprus"). The Fifth Circuit did not cite any of the later Seventh Circuit cases moving away from *Autocephalous* and using the comparison approach.

By contrast, the Seventh Circuit's most recent cases use a comparison approach in which the court determines citizenship of the foreign-country entity by comparing it to American business entities to determine which entity it most resembles. This approach resulted from the Seventh Circuit's different interpretation of Supreme Court precedent. The Seventh Circuit at first appeared to use the juridical person approach to classify a foreign-country business entity for purposes of determining citizenship. In *Autocephalous*,[54] the court concluded that "the Church [was] recognized under and by the laws of the Republic of Cyprus as a distinct juridical entity, and thus [was] a 'citizen or subject' of that state" for diversity purposes.[55] Yet when the court addressed the same issue years later in *Fellowes, Inc. v. Changzhou Xinrui Fellowes Office Equip. Co.*,[56] it rejected this approach. In holding that a Chinese business was most similar to an American LLC and thus could not be treated as a corporation for diversity purposes, the court explicitly rejected the view that "every 'juridical person' . . . is a corporation for the purpose of § 1332 no matter what other attributes it has or lacks."[57] The court limited its holding in *Autocephalous* to religious bodies organized under the law of Cyprus.[58]

The reasoning in *Fellowes* places the Seventh and Ninth Circuits directly at odds. In *Fellowes*, the Seventh Circuit held that the Supreme Court's subsequent decision in *Bouligny* "confined *Russell* to its facts," explaining that "*Russell* and its juridical-entity approach cover the *sociedad en comandita* and nothing else."[59] The Seventh Circuit reasoned that because both parties agreed that the Chinese company was "closer to a limited liability company than to any other business structure in this nation, it does not have its own citizenship—and it *does* have the Illinois citizenship of its member Hong Kong Fellowes, which prevents litigation under the diversity jurisdiction."[60]

> On the other hand, the Ninth Circuit in *Cohn* found the defendant's reliance on *Bouligny* and *Great Southern* misplaced and his attempt to analyze the "corporateness" of foreign business entities such as

54. 917 F.2d 278 (7th Cir. 1990).

55. *Id.* at 285.

56. 759 F.3d 787 (7th Cir. 2014).

57. *Fellowes*, 759 F.3d at 788. *Fellowes* was not the first time after *Autocephalous* that the Seventh Circuit addressed the issue of the citizenship of a foreign-country business entity. In *Lear Corp. v. Johnson Elec. Holdings Ltd.*, 353 F.3d 580 (7th Cir. 2003), the court asked whether a Bermudan entity "limited by shares" was most similar to an American corporation or LLC. *Id.* at 582. Because the entity was most similar to an American corporation, it had its own citizenship. *Id.* at 583. The opinion made no mention of *Autocephalous* at all but did not appear to apply juridical person analysis.

58. *Fellowes*, 759 F.3d at 790.

59. *Id.* at 789.

60. *Id.* at 790.

> Liechtenstein's anstalt fundamentally wrong. The determinative question in this case is not whether Film Productions is a corporation for purposes of 28 U.S.C. § 1332(c), but instead whether Film Productions is "a citizen or subject" of a foreign state under 28 U.S.C. § 1332(a)(2). The most relevant Supreme Court precedent is thus [*Russell*] rather than *Bouligny* or *Great Southern*.[61]

The Ninth Circuit's insistence that *Russell*, rather than *Bouligny*, governed places it in direct disagreement with the Seventh Circuit. The Fifth Circuit appears to agree with the Ninth Circuit that *Bouligny* does not limit *Russell*'s reach in the context of foreign-country business entities.[62]

### *D. When the Approaches Lead to Different Outcomes*

This split will mean that in some cases where the Ninth and Fifth Circuits would find jurisdiction, the Seventh Circuit would not. Assuming the citizenship of an entity's members would destroy diversity, the two approaches will lead to different outcomes in any case where the Seventh Circuit could classify an entity as something other than a corporation, but the country of the entity's formation would treat the entity as a juridical person. Take, for example, *Butler v. ENSCO Intercontinental GmbH*,[63] a case involving an LLC organized in the Cayman Islands. Noting that the law of the Cayman Islands treats an LLC as a "natural person of full capacity," the District Court for the Southern District of Texas followed the juridical person approach as laid out by the Fifth Circuit in *Stiftung* and ignored the citizenship of the LLC's members.[64] The same result would not obtain using the Seventh Circuit's comparison approach.[65] American LLCs are treated as unincorporated associations for citizenship purposes, meaning that they have the citizenship of their members.[66] The Seventh Circuit would presumably

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61. 733 F.2d at 628 (citation omitted). The distinction the Ninth Circuit makes here between § 1332(a) and § 1332(c) is of less importance now that § 1332(c) specifies that a corporation can be a citizen of a foreign country. Whether one chooses to interpret "corporation" under § 1332(c) to include more than businesses called corporations or chooses to find that business entities other than corporations can have their own citizenship under § 1332(a)(2) should make no practical difference.

62. *See* Stiftung v. Plains Mktg., 603 F.3d 295, 298 (5th Cir. 2010) (citing *Bouligny* to support its reading of *Russell*).

63. No. CV H-16-578, 2017 WL 496073 (S.D. Tex. Feb. 7, 2017).

64. *Id.* at *1 n.1 (quoting Companies Law § 27(2) (2010) Cayman Is.).

65. Interestingly, the court cites to a Seventh Circuit case for support. *Id.* (citing Bally Exp. Corp. v. Balicar, Ltd., 804 F.2d 398, 399–400 (7th Cir. 1986)). In that case, the court found diversity jurisdiction without engaging in an analysis of citizenship. *Bally*, 804 F.2d at 399. Because that decision came out years before either *Fellowes* or *Autocephalous*, it is not clear what approach the Seventh Circuit used to determine the citizenship of the Caymanian LLC. The case does not discuss the citizenship of the Caymanian LLC's members, so it is possible that there were no nondiverse members, making it unnecessary for the court to address the issue.

66. *See* Carden v. Arkoma Assocs., 494 U.S. 185, 195 (1990) ("[D]iversity jurisdiction in a suit by or against [an artificial entity other than a corporation] depends on the citizenship of 'all the

treat the Caymanian LLC like an American LLC and consider the citizenship of its members. If any member's citizenship would destroy diversity, the case would be dismissed for lack of subject matter jurisdiction. This is a truly problematic result. Whether a federal forum is proper in a particular case should not depend on the jurisdiction in which that case is filed.

Part II

This Part evaluates the approaches for their adherence to Supreme Court precedent. Although they both have some basis in Supreme Court precedent, the juridical person approach, which follows *Russell*, has more support. Both approaches suffer from difficulty in defining key terms, but once these definitions are established, the juridical person approach is also preferable for its ability to be applied consistently.

*A. Adherence to Supreme Court Precedent*

Focusing only on those Supreme Court cases that the courts of appeals have found relevant, the Ninth Circuit's reasoning makes more sense. *Russell* more closely addresses the issue at hand and has not been limited as much as the Seventh Circuit suggests, so the Ninth Circuit's invocation of *Russell* is most compelling. In *Russell*, the Court applied a juridical person approach and rejected the comparison approach because to "call the *sociedad en comandita* a limited partnership in the common law sense" would be "to invoke a false analogy."[67] The Seventh Circuit's approach focuses on making this false analogy.

The Seventh Circuit used *Bouligny* and *Carden*'s limitation of *Russell* in the context of domestic business entities to justify its departure from *Russell* in the context of foreign-country business entities.[68] In *Fellowes*, the Seventh Circuit, citing *Carden*, asserted that *Bouligny* limited *Russell* to its facts.[69] But *Bouligny* and *Carden* are both distinguishable from *Russell* in that neither involved a business entity unfamiliar to the American legal system. The entity in question in *Bouligny* was an unincorporated labor union and in *Carden* it was a limited partnership, both formed in the United States.[70]

*Bouligny* does not restrict *Russell* so much that it applies only to a *sociedad en comandita* and nothing else. Rather, *Bouligny* refused to extend the juridical person test from *Russell* to an American unincorporated

members' . . . .") (quoting Chapman v. Barney, 129 U.S. 677, 682 (1889)); FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1435–36 (2015).

67. Puerto Rico v. Russell & Co., 288 U.S. 476, 480–81 (1933).

68. Fellowes, Inc. v. Changzhou Xinrui Fellowes Office Equip. Co., 759 F.3d 787, 789 (7th Cir. 2014).

69. *Id.*

70. United Steelworkers of Am., AFL-CIO v. R.H. Bouligny, Inc., 382 U.S. 145, 146 (1965); *Carden*, 494 U.S. at 186.

association. Instead of acknowledging that the Court treats business entities unfamiliar to American law (in particular, those with civil law origins) differently than it treats familiar American business entities for purposes of determining citizenship, the Seventh Circuit completely read out any distinction and declared *Russell* toothless.[71] The citation to *Carden* for this same proposition is also inapposite because it too involved only citizens of states. That "*Bouligny* considered and rejected applying *Russell* beyond its facts"[72] does not foreclose the possibility that *Russell*'s analysis is pertinent to the analysis of citizenship of a foreign-country business entity. This is because *Bouligny* did not require the Court to decide the citizenship of a foreign-country business entity.

The Seventh Circuit acknowledged as much in a prior opinion, citing to *Russell* to support the proposition that when the party is a foreign-country entity, "it is then necessary to determine whether the characteristics of the foreign entity are enough like those of a U.S. corporation to make 'corporation' the correct translation into English."[73] But this endorsement of *Russell* is hollow—nothing in *Russell* suggests that a court should compare a foreign-country business entity to an American corporation. In fact, this is precisely what *Russell* called a false analogy.

*Russell* is the more instructive of the two cases because it contemplates classifying for purposes of jurisdiction an entity unfamiliar to American law under a statute similar to the diversity statute,[74] while *Bouligny* deals with the classification of an unincorporated American labor union. Much of *Bouligny*'s analysis revolved around the fact that the legislative branch was better suited to address the question of how to treat the citizenship of unincorporated labor unions for purposes of diversity.[75] The same type of treatment is not appropriate here—while Congress is silent, courts must adopt some type of test for citizenship or risk closing their doors to foreign-country businesses on the basis of diversity jurisdiction.

Although *Russell* is highly persuasive on this issue, it is not without its limits. The Court in *Carden* stated that after *Bouligny*, "at least common-law entities (and likely all entities beyond the Puerto Rican *sociedad en comandita*)" would treat only incorporated groups as having their own citizenship.[76] *Carden* did not specify whether this analysis differs in the

71. *See Fellowes*, 759 F.3d at 789–90 (confining *Russell* to its facts).

72. *Carden*, 494 U.S. at 191 n.2.

73. Hoagland *ex rel.* Midwest Transit, Inc. v. Sandberg, Phoenix & von Gontard, P.C., 385 F.3d 737, 743 (7th Cir. 2004) (citing *Carden*, 494 U.S. at 189–90; Puerto Rico v. Russell, 288 U.S. 476 (1933); Lear Corp. v. Johnson Elec. Holdings Ltd., 353 F.3d 580, 582–83 (7th Cir. 2003)).

74. So similar, in fact, that the Fifth Circuit mistakenly characterized *Russell* as being a case about diversity jurisdiction. Stiftung v. Plains Mktg., L.P., 603 F.3d 295, 298 (5th Cir. 2010).

75. *Bouligny*, 382 U.S. at 153.

76. *Carden*, 494 U.S. at 190 (quoting *Russell*, 288 U.S. at 480).

context of a foreign-country business entity. The most plausible reading of these cases is that only *Russell* commented on foreign-country business entities. And even *Russell* likely addressed only civil law entities.[77] However, there is good reason to extend *Russell*'s analysis to common law entities. It is difficult to compare foreign entities to American entities, whether they are from a common law or civil law tradition.[78] But because *Russell*'s test was not designed to deal with common law entities, applying it to those entities may not work in the way the Court intended. It is possible that using only the juridical person approach would be overinclusive in the context of common law entities, extending citizenship to entities the Court would not have intended. In formulating a test that applies to common law and civil law entities, courts should find a way to account for this overinclusiveness.

Further indication that *Carden* does not comment on foreign-country common law business entities, as the Seventh Circuit assumed, comes from the Seventh Circuit's citizenship test. Were it following *Carden*'s framework, the test would merely ask whether a business is incorporated. If it were, then the entity would be treated as a legal person. But this is not the test the Seventh Circuit—or any circuit, for that matter—uses. That is for good reason. As one district court noted:

> For domestic business enterprises, this split between corporations and other business entities produces a bright-line rule; however, applying this rule to a business enterprise based in a foreign nation is a "difficult" and underexplored problem because "[b]usinesses in other nations may have attributes that match only a subset of those that in the United States distinguish a corporation . . . from forms such as the limited liability company."[79]

"This problem is compounded by the general slipperiness between different forms of domestic business organizations, as different states impose different requirements on particular forms and many default or traditional rules are subject to customization by particular enterprises."[80] It is therefore impractical—if not impossible—to use incorporation as a heuristic for determining citizenship.

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77. *See* Cohn v. Rosenfeld, 733 F.2d 625, 630 (9th Cir. 1984) ("Federal courts have long recognized that other nations, particularly civil law nations, have evolved a scheme of business entities markedly different from that found in the United States.") (citing *Russell*, 288 U.S. at 480–82).

78. *See* White Pearl Inversiones S.A. (Uruguay) v. Cemusa, Inc., 647 F.3d 684, 686 (7th Cir. 2011) (noting the difficulty of classifying both common law and civil law entities).

79. Hawkins v. Borsy, No. 1:05–CV–1256 (LMB/JFA), 2018 WL 793599, at *5 (E.D. Va. Feb. 8, 2018) (quoting Fellowes, Inc. v. Changzhou Xinrui Fellowes Office Equip. Co., 759 F.3d 787, 788 (7th Cir. 2014)).

80. *Id.* at *5 n.8.

### *B. The Better Approach*

Both the juridical person test and the comparison test attempt to accomplish the same thing: to apply the Supreme Court's rules as consistently as they can in the foreign-country context. The difference is that the juridical person test boils the approach down to one thing—juridical personhood—while the comparison test attempts a more holistic review.[81]

The comparison approach works best when the categorization of the foreign-country entity is easy. It becomes difficult when a business has attributes of both a corporation and another entity like a partnership. It then becomes similar to a factor test and requires a court to weigh the different aspects of the business to determine what American entity it most resembles. Importantly, corporations share many features with other business entities like LLCs. The Court has even stated that there may be no policy reasons to treat the two differently. In *Carden*, the Court noted that its post-*Letson*[82] jurisprudence holding that only corporations are entitled to be treated as citizens in their own right could "validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization."[83] The Court noted that it was "undoubtedly correct that limited partnerships are functionally similar to other types of organizations that have access to federal courts, and is perhaps correct that considerations of basic fairness and substance over form require that limited partnerships receive similar treatment."[84] Similarly, in *Bouligny*, the Court recognized that the lower court's contention that there was "no common sense reason for treating an unincorporated national labor union differently from a corporation . . . had considerable merit."[85] However, in *Bouligny*, as in *Carden*, the Court ultimately concluded that "having entered the field of diversity policy with regard to artificial entities once (and forcefully) in *Letson*, we have left further adjustments to be made by Congress."[86] It makes little sense, then, to spend time and resources trying to decide whether a foreign-country entity is more similar to an American corporation or LLC when the Court itself has admitted that the distinction is not based on sound policy. Differences in nomenclature also complicate this

81. Note that this distinction may not always hold true. Courts have not applied either test in a consistent manner. Occasionally, the process required to determine if an entity is a juridical person involves considering as many factors as does the comparison approach.

82. Louisville, C. & C.R. Co. v. Letson, 43 U.S. (2 How.) 497 (1844).

83. Carden v. Arkoma Assocs., 494 U.S. 185, 196 (1990).

84. *Id.* (internal quotations omitted).

85. United Steelworkers of Am., AFL-CIO v. R.H. Bouligny, Inc., 382 U.S. 145, 146, 150 (1965) (internal quotations omitted).

86. *Carden*, 494 U.S. at 196.

undertaking. A Chinese LLC, for example, is more like an American closely held corporation than it is like an American LLC.[87]

When done correctly, the comparison approach has the benefit of more closely aligning the treatment of foreign-country entities with that of U.S. businesses. Because the comparison approach is more flexible than the juridical person approach, it allows courts to better tailor the results to specific concerns. But these same factors make it unpredictable and easily manipulated. Increasing the number of factors to be looked at decreases the predictability of the test. It is also more labor intensive, requiring a deeper dive into foreign-country law, all to make a distinction that the Court has admitted is not based on sound policy. This investigation would waste judicial time and resources, as there is a potentially limitless number of business entities that could be created by foreign countries.[88] Even though the threshold question of jurisdiction is critically important, the intricacies of foreign-country law are almost always peripheral to the core dispute, so courts should attempt to formulate a rule that minimizes the time and effort spent determining whether they have jurisdiction. As David Currie wrote: "Jurisdiction should be as self-regulated as breathing; . . . litigation over whether the case is in the right court is essentially a waste of time and resources."[89]

The juridical person approach, by contrast, has the benefit of simplicity, which the Court highly prizes in this context.[90] It takes the most important part of a corporation for jurisdictional purposes, its legal personhood,[91] and uses that to classify the foreign-country entity. The juridical person approach is also supported by principles of comity as it respects the foreign country's classification of the entity as a legal person. Foreign countries have created their own types of business entities according to their own policy rationales, so if the country of formation treats an entity as having its own legal

87. JIANGYU WANG, COMPANY LAW IN CHINA 52 (2014). Note, however, that a Chinese LLC was the entity in question in *Fellowes*. There, the parties agreed that the Chinese LLC was most similar to an American LLC. Fellowes, Inc. v. Changzhou Xinrui Fellowes Office Equip. Co., 759 F.3d 787, 790 (7th Cir. 2014). The court also compared the Chinese LLC to a general partnership. *Id.* at 788. Because of this classification, the court found that the Chinese LLC did not have its own citizenship. *Id.* This illustrates another drawback of the comparison approach—courts may disagree as to what type of American business entity a foreign-country entity resembles. These differences can cause disuniformity in result—the same issue that exists under the current split.

88. Similarly, there is a potentially limitless number of business entities that could be created by the states. The *Carden* Court believed that because of this, determining which entity "is entitled to be considered a 'citizen' for diversity purposes, and which of their members' citizenship is to be consulted, are questions . . . whose complexity is particularly unwelcome at the threshold stage of determining whether a court has jurisdiction." *Carden*, 494 U.S. at 197.

89. Navarro Sav. Ass'n v. Lee, 446 U.S. 454, 465 n.13 (1980) (quoting Currie, *supra* note 10).

90. *See id.* (explaining the virtue of simple rules to determine citizenship for jurisdictional purposes).

91. *See infra* subpart III(A).

personality, for reasons of both simplicity and comity, a U.S. court should inquire no further. Any further attempt to determine the status of foreign-country entities "would involve judicial encroachment on the sovereignty of the nation that formed them," and "[c]ourts lack the information, expertise, and political judgment in foreign affairs to undertake this burden."[92]

Because the juridical person approach is less intrusive into foreign-country law, it also respects the Supreme Court's desire to avoid being forced to do Congress's job. As the Court cautioned in *Carden*, determining the citizenship of various business entities is a "question[] more readily resolved by legislative prescription than by legal reasoning, and [one] whose complexity is particularly unwelcome at the threshold stage of determining whether a court has jurisdiction."[93] It determined that corporations would receive special treatment for citizenship purposes but elected to "leave the rest to Congress."[94] The juridical person approach complies with the policies the Court has identified for treating corporations differently while respecting Congress's rulemaking power. Should Congress determine that this rule violates some policy concern, it can enact a standard of its own.

However, the juridical person approach as currently formulated has a fatal flaw—courts have failed to identify a consistent definition of "juridical person." Some courts declare that an entity is a juridical person with little discussion,[95] while others list qualities of the entity without explaining their relevance or importance.[96] If courts intend to apply the juridical person approach, they need to agree on a definition of juridical person. The next Part proposes a definition.

## Part III

The Supreme Court has not said much about the citizenship of foreign-country business entities, but it has a long line of cases dealing with the citizenship of American business entities. This Part uses the Court's jurisprudence to identify the reasons it chose to accord corporations their own citizenship. This history aids in creating a test for the citizenship of foreign-country business entities by exploring what the Court found persuasive in the context of American business entities. This Part looks at how the Court has defined "corporation" because this Note approaches the diversity statute under § 1332(c) instead of § 1332(a). Under § 1332(c) the definition of "corporation" is critically important because in order to determine which

92. Cohn v. Rosenfeld, 733 F.2d 625, 630 (9th Cir. 1984).

93. 494 U.S. at 197.

94. *Id.*

95. *See* Stiftung v. Plains Mktg., L.P., 603 F.3d 295, 298–99 (5th Cir. 2010) (holding that a *stiftung* is a juridical person for diversity jurisdiction purposes because it is a juridical person under Liechtenstein law).

96. *See Cohn*, 733 F.2d at 628–29 (considering an entity's ability to sue, limited liability, and distribution of assets post-litigation).

foreign-country entities can be considered corporations for the purposes of this statute, the definition of "corporation" must be clear. However, this definition is relevant—if not essential—even if we are asking which entities can be considered "citizens" under § 1332(a). Currently, the corporation is the only type of American business entity that the Court accords its own citizenship. It is helpful, then, to see the reasons the Court has given for treating only these entities as citizens. From this history, two critical themes emerge—first, that only the citizenship of the real party to the controversy is relevant, and second, that only juridical persons can have their own citizenship for diversity purposes. This Part also uses case law and legal history to define "juridical person."

### *A. History of the Supreme Court's Corporation Jurisprudence*

In the context of American business entities, the Supreme Court has chosen to accord only corporations their own citizenship, leaving the citizenship of other business entities to rest on the citizenship of all their members.[97] In order to determine which types of business entities are corporations for purposes of § 1332(c),[98] one must first define "corporation." Because Congress has not offered a definition, one must be fashioned from Supreme Court precedent. The Court's definition is neither fixed nor precise, but it is useful in elucidating principles that can be applied to foreign-country business entities. To discover these principles, I trace the Court's corporate-personality jurisprudence from its inception in *Bank of the United States v. Deveaux*[99] to the modern cases. As the role of corporations within the U.S. economy changed, so too did the Court's treatment of them.

It is helpful to begin the study of the Supreme Court's understanding of the corporation with Justice Marshall's famous description of corporations in *Trustees of Dartmouth College v. Woodward*.[100] Although the case did not concern the citizenship of a corporation, Justice Marshall's detailed description of the corporation reflects an early understanding of a corporation's defining characteristics. He wrote: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[101]

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97. *See, e.g.*, *Carden*, 494 U.S. at 195–96 (holding that the citizenship of a limited partnership rests on the citizenship of all its members).

98. *See supra* note 61. Here, I am working off of the assumption that § 1332(c) applies, so the inquiry is whether a business can be deemed a corporation for purposes of the statute.

99. 9 U.S. (5 Cranch) 61 (1809).

100. 17 U.S. (4 Wheat.) 518 (1819).

101. *Id.* at 636.

In many ways, this definition reflects what Sanford Schane, in his article *The Corporation Is a Person: The Language of a Legal Fiction*, refers to as "creature theory."[102] This theory predominated early-nineteenth-century American thought[103] and "treats the corporation as an artificial entity whose legal rights arise through the act of incorporation."[104] Not being human, a corporation has rights only because those rights have been conferred on it by the law.[105] But this traditional definition is incompatible with allowing a corporation to assert diversity jurisdiction.[106] Article III of the Constitution speaks nowhere of the right of a corporation to sue; it speaks in terms of the rights of "citizens."[107] It would be incongruous to give the label of "citizen" to an entity that is nothing more than a lifeless creation of the state.[108] In order to give a corporation or a plaintiff suing a corporation access to a federal forum on the basis of diversity jurisdiction, the Court had to find a way to accord citizenship to corporations. To do this, it relied on the "group theory" of corporate personality, which "treats the corporation as a group of persons joined together for a common purpose."[109] Under this theory, the corporation is not an independent artificial being but merely a convenient aggregation of its members, who are the true bearers of rights.[110] This conception of the corporation allows a court to look through the label of "corporation" to its members, who are clearly citizens within the meaning of Article III.

In *Bank of the United States v. Deveaux*, the Court did just that. It held that although the corporation itself could not have citizenship, its members did, and their citizenship could be considered for purposes of diversity jurisdiction.[111] The corporation was "a company of individuals, who, in transacting their joint concerns, may use a legal name."[112] Although the corporation could not be a citizen, the people it represented could be, "and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted."[113] The members of the corporation could not be denied their constitutional right to sue in federal

102. 61 TUL. L. REV. 563, 565 (1987).

103. *Id.* at 567. *See also* John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 665–69 (1926) (discussing the history of the related "fiction" and "concession" theories of corporations).

104. Schane, *supra* note 102, at 606.

105. *Id.* at 565.

106. *Id.* at 573.

107. *Id.* at 572.

108. *Id.* at 573.

109. *Id.* at 607.

110. *Id.* at 566.

111. Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809).

112. *Id.*

113. *Id.*

court merely because they had organized themselves into a corporation.[114] In essence, the Court viewed the members of the corporation as being the real parties to the controversy, and thus it was their citizenship that was relevant. This theory—that citizenship should rest on the "real parties to the controversy"[115]—is critical to understanding diversity jurisdiction over corporations. This theory explains the shift in the Court's attitude toward corporate citizenship—once the Court saw the corporation *itself* as the real party to the controversy, it made sense to accord it its own citizenship, separate from that of its members.

As corporations grew in size, the group theory of citizenship began to cause problems. Under the *Deveaux* approach, a large corporation with shareholders from every state would usually fail to meet the complete diversity requirement of *Strawbridge v. Curtiss*[116] and would essentially be barred from using diversity jurisdiction to access federal court.[117] Moreover, requiring a large corporation to allege the citizenship of all of its members would sharply increase the cost of filing suit in federal court and would act as a strong deterrent to that practice. The Court remedied this problem in *Louisville, C. & C.R. Co. v. Letson* when it changed its approach to corporate citizenship, ruling that a corporation had the citizenship of its state of incorporation, not that of its members.[118] In so doing, the Court moved away from the group theory of corporations toward a person theory. The person theory argues that the corporation exists in its own right.[119] It is "more than just an expression of the sum of its members. It acquires a common will and pursues its own goals, and its life continues regardless of changes in its membership."[120] Because the corporation exists in its own right, like a human being, it is a legal person naturally, not as the result of its creation by law.[121]

The change in the Court's stance is apparent from its statement in *Letson* that a corporation, "though it may have members out of the state [of its creation], seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state."[122] With this change in the

114. Schane, *supra* note 102, at 574–75.

115. Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 460–61 (1980).

116. 7 U.S. (3 Cranch) 267 (1806).

117. Schane, *supra* note 102, at 575.

118. *Id.* at 558.

119. Schane, *supra* note 102, at 567.

120. *Id.*

121. *Id.* That a corporation is a legal person "naturally" should not be read to say that the corporation is a natural person—that term is synonymous with "human being." Corporations are artificial, as opposed to natural, persons.

122. *Letson*, 43 U.S. at 555.

understanding of a corporation, the corporation itself could be considered a citizen within the meaning of Article III.[123]

Here, too, the idea of the real party to the controversy reemerged. The Court reasoned that a corporation had its own citizenship because the corporation, and not its members, was the real party to the suit.[124] The Court defined the real parties to the controversy in *Navarro Savings Association v. Lee*[125] as the parties who have legal title, manage the assets, and control the litigation.[126] Under this theory, it makes sense to accord corporations their own citizenship—shareholders of a corporation do not manage the corporation's assets or control the litigation. The *Letson* Court believed the domicile of the corporation to be a "subject of more vital importance than any other that can be submitted to [its] decision," and balked at the idea "that such a question shall be determined by the caprice of every member of the body[.]"[127] The corporation was "a personification of certain legal rights under a description imposed upon it by the power that created it," and because of this "the whole is essentially and unchangeably different from all the parts, which are as completely merged and lost in it as the ingredients are in a chemical compound."[128]

Thus, "[a]n action against a corporation is an action against all the members of the corporation, in the corporate name and character, . . . exclud[ing] the idea of any separate identity or liability . . . ."[129] Although the Court would for a time backtrack on this notion of corporate personhood and instead retreat to confusing legal fictions,[130] the person theory remains the

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123. Schane, *supra* note 102, at 578.

124. *See Letson*, 43 U.S. at 511. The Court found that

> [t]he bringing or defending of a suit in the corporate name is the act of the official members in their natural persons; but is not the personal act of their constituents. . . . When, therefore, to defeat the jurisdiction, it is alleged that such or such a person, a private member of the corporation, is a party to the suit, the allegation is neither accurate in reason nor true in fact.

*Id.*

125. 446 U.S. 458 (1980).

126. *Id.* at 465.

127. *Letson*, 43 U.S. at 522.

128. *Id.* at 520.

129. *Id.* at 540.

130. In *Marshall v. Baltimore & Ohio Railroad*, 57 U.S. (16 How.) 314 (1853), the Court denied that the corporation itself could be a citizen. Schane, *supra* note 102, at 579–80. But instead of reverting back to the *Deveaux* rule of looking to the citizenship of the corporation's members, the Court held that the members were presumed to have the citizenship of the corporation's place of incorporation and were estopped from averring otherwise. *Id.* at 580–81. According to Schane, this odd approach was the result of the Court attempting to mitigate a premature application of the person theory in *Letson*. *Id.* at 579. That a corporation could be a person, even an artificial one, was simply too radical an idea for the time. *Id.* Instead, using the *Marshall* approach, the Court blended aspects of the person theory and the group theory to arrive at a conception of the corporation that gave them access to diversity of citizenship, but in a way that was more palatable. *Id.* at 580.

Court's conception of the corporation to this day.[131] The *Letson* theory was embodied in statute with the passage of 28 U.S.C. § 1332(c) in 1958, which stated that a "corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ."[132]

The Court further elaborated on corporate personhood in *Southern Railway Co. v. Greene*[133] when it held that a corporation was a person within the meaning of the Fourteenth Amendment.[134] The Court did not mention the members of the corporation or its status as an artificial being. Instead, the Court treated the corporation as a person in its own right—attributing assets, rights, and duties to the corporation itself.[135] This is consistent with early definitions of corporation, which asserted that individuality was the chief purpose of incorporation.[136] The Court used the term "individual" not just to mean acting as a single body but as acting as an individual, that is, a person.[137] This feature "enable[s] a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless

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Although the Court never officially overruled this understanding of corporate citizenship, it is unsupported by the language of 28 U.S.C. § 1332 and is no longer part of the Court's understanding. *Id.* at 583.

131. Schane, *supra* note 102, at 583. Although the person theory as articulated by Congress in 28 U.S.C. § 1332(c) "has never received the official sanction of the Supreme Court, in the minds of most legal writers, jurists, and corporate lawyers, the corporation itself is a citizen of a state, and for diversity purposes one compares directly its citizenship to that of the opposing party." *Id.* at 591. *See also* Americold Realty Tr. v. ConAgra Foods, Inc., 136 S. Ct. 1012, 1015 (2016) (discussing the Court's corporate-citizen line of cases and mentioning only *Letson* as representing the Court's position, not citing any of the later cases in which the Court moved away from *Letson*); Carden v. Arkoma Assocs., 494 U.S. 185, 194 n.3 (1990) ("*Marshall*'s fictional approach appears to have been abandoned. Later cases revert to the formulation of [*Letson*], that the corporation has its own citizenship.").

132. Schane, *supra* note 102, at 583 (quoting 28 U.S.C. § 1332(c) (1982)). The version of § 1332(c) quoted is the same as the one that was originally passed in 1958. The pertinent part of the current version of § 1332(c)(1) states that "a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . . ." 28 U.S.C. § 1332(c)(1) (2012). The change was made by the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 102, 125 Stat. 758, 759 (2011). This change was intended to clarify the citizenship of corporations with a principal place of business or state of incorporation (or both) abroad. H.R. REP. NO. 112-10, at 9 (2011), *reprinted in* 2011 U.S.C.C.A.N. 576, 580. The legislative history provides no clues as to which foreign-country business entities are corporations for the purposes of this statute.

133. 216 U.S. 400 (1910).

134. *Greene*, 216 U.S. at 412.

135. Schane, *supra* note 102, at 590.

136. *See* Providence Bank v. Billings, 29 U.S. (1 Pet.) 514, 562 (1830) ("The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men.").

137. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) ("Among the most important [features of a corporation] are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual.").

necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand," allowing a "perpetual succession of individuals" to act as "one immortal being."[138] Notions of individuality are closely linked to those of the juridical person—both are about the aspects of a corporation that make it like a human being. It is the corporation's unique status as an individual, a "person" separate from its members, that affords it this special treatment.

With corporate personhood as both the defining feature of a corporation[139] and an explanation for the Court's special treatment of corporate citizenship, it makes sense that the citizenship test for foreign-country business entities would include this aspect. At first glance, the juridical person approach would seem to do this; after all, the approach focuses on determining whether a business is treated like a person. However, this approach as it is currently applied fails to articulate a consistent test for personhood that courts can apply with predictability, largely due to the fact that there is no settled definition of "juridical person."

### *B. What Is a Juridical Person?*

It seems obvious, even tautological, to say that the definition of "juridical person" is a crucial component of the juridical person approach. Yet courts using this approach have largely failed to articulate a clear and consistent definition of the term. Courts should not treat the definition of juridical person as self-evident—scholars disagree as to its meaning.[140] To determine what courts mean when they use the term "juridical person," it is necessary to look to the case law for clues.

To be clear, "juridical person" is not synonymous with "corporation." The idea of the juridical person is not nearly precise enough to apply to corporations but exclude other similar, but unincorporated, entities. Even under the Supreme Court's precedent, it is clear that the term "juridical person" encompasses more than corporations. The majority opinion in *Carden* noted that *Chapman*, *Great Southern*,[141] and *Bouligny* were all cases that involved juridical persons.[142] Those cases did not involve questions

138. *Id.*

139. *See* JAMES D. COX & THOMAS LEE HAZEN, BUSINESS ORGANIZATIONS LAW 131 (4th ed. 2016) ("Recognition of a corporate personality generally is considered to be the most distinct attribute of the corporation.") (citing Anderson v. Abbott, 321 U.S. 349, 361 (1944)).

140. *See* John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 658 (1926) (explaining that the legal doctrine relating to a "jural person" is muddled and inconsistent); Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 438–39 (2000) (discussing the debate over the meaning of the term "juridical person").

141. Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449 (1900).

142. Carden v. Arkoma Assocs., 494 U.S. 185, 194 (1990).

about the citizenship of a corporation, but of a joint-stock company, a limited partnership, and an unincorporated labor union, respectively.[143]

This need not be read as a drawback to using the juridical person approach. The states have created a number of unincorporated entities that share many characteristics with corporations and are functionally very similar to corporations. Although the Supreme Court has chosen not to deem these entities "citizens," as it does corporations, it has noted numerous times that the reason for this is not based on policy or important structural differences between corporations and unincorporated entities.[144] Rather, the Court has refused to extend citizenship to these entities because it believes any changes to the citizenship of business entities must be made by Congress. This reluctance to make new rules cannot extend to foreign-country business entities.

As discussed earlier in this Note, the courts of appeals take their notion of the juridical person from the Supreme Court's holding in *Russell*.[145] But there the Court did not explicitly define what a juridical person was. Instead, it listed qualities of the *sociedad*—the business entity in question—and using those qualities, concluded that it was a juridical person.[146] Among the qualities, the Court listed: (1) that the *sociedad* can "contract, own property and transact business, sue and be sued in its own name and right;"[147] (2) "[i]ts members are not thought to have a sufficient personal interest in a suit brought against the entity to entitle them to intervene as parties defendant;"[148] (3) "[i]t is created by articles of association filed as public records;"[149] (4) it has a lifetime specified by the articles of association that is not connected to changes in its membership;[150] (5) managers alone can legally bind the *sociedad*;[151] (6) members enjoy a form of limited liability, which the Court analogized to that "imposed on corporate stockholders by the statutes of some states;"[152] and (7) Puerto Rican law declares that the *sociedad* is a juridical person.[153]

The Court did not make clear whether all of these factors were necessary to conclude that the *sociedad* was a juridical person or if the law's mere

143. Chapman v. Barney, 129 U.S. 677, 679 (1889); *Great Southern*, 177 U.S. at 450; United Steelworkers of Am., AFL-CIO v. R. H. Bouligny, Inc., 382 U.S. 145, 146 (1965).

144. *See supra* notes 83–85 and accompanying text.

145. *See supra* notes 25–26 and accompanying text.

146. Puerto Rico v. Russell & Co., 288 U.S. 476, 481 (1933).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 482.

statement that the *sociedad* was a juridical person was sufficient. Courts purporting to apply *Russell*'s juridical person approach have used various formulations of these qualities to articulate what makes an entity a juridical person. The Ninth Circuit in *Cohn* applied some of the *Russell* factors, listing that (1) "[a]nstalts have liability limited to their capitalization,"[154] (2) "can both sue and be sued in their own names,"[155] (3) "[a]ny recovery by an anstalt in such litigation becomes an asset of the anstalt,"[156] and (4) under Liechtenstein law, the anstalt is regarded as a juridical person.[157] Other courts have looked to law dictionaries for additional guidance. For example, the District Court for the Southern District of California wrote that "[a] juridical person is '[a]n entity, such as a corporation, created by law and given certain legal rights and duties of a human being; a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being.'"[158] Other district courts within the Ninth Circuit have followed similar formulations.[159] The Fifth Circuit considered fewer factors still, noting only that the entity was considered a juridical person under Liechtenstein law, was separated from the founder's personal assets, and was "an independent legal entity."[160]

From these cases a few themes emerge.[161] First, a majority of courts considering this issue appear to find persuasive that the country of the entity's formation views the entity as a juridical person. This is helpful to courts

154. Cohn v. Rosenfeld, 733 F.2d 625, 629 (9th Cir. 1984).

155. *Id.*

156. *Id.*

157. *Id.*

158. Petropolous v. FCA US, LLC, No. 17-CV-0398 W (KSC), 2017 WL 2889303, at *3 (S.D. Cal. July 7, 2017) (quoting *Person*, BLACK'S LAW DICTIONARY (10th ed. 2014)). It also listed the *Cohn* factors as "traditional corporate characteristics" the Court "may consider," including "(1) the protections of limited liability; (2) the ability to sue and be sued in its own name; and (3) the capacity to retain any recovery from a lawsuit as an asset of the entity." *Id.*

159. *See* Baja Developments LLC v. Loreto Partners, No. CV-09-756-PHX-LOA, 2010 WL 1758242, at *4 n.6 (D. Ariz. Apr. 30, 2010) (listing that under Mexican law a "*sociedad en comandita por acciones* is a juridical legal entity," may sue in its own name, and any recovery obtained in a lawsuit brought by the *sociedad* belongs to the entity itself, not its members); Inmexti v. TACNA Servs., Inc., No. 12CV1379 BTM (JMA), 2012 WL 3867325, at *3 (S.D. Cal. Sept. 6, 2012) (noting that the *sociedad de responsabilidad limitada de capital variable* "has the ability to sue and be sued, and is recognized as a juridical person under the laws of Mexico"); Celestine v. FCA US, LLC, No. 2:17-cv-00597-DAD-JLT, 2017 WL 3328086, at *3 (E.D. Cal. Aug. 4, 2017) (noting that a *naamloze vennotschap* organized under the laws of the Netherlands was a juridical person because it "may sue in its own name in the courts of the Netherlands, and may obtain recovery on its own behalf from such lawsuit under the laws of the Netherlands"); Garcia v. FCA US, LLC, No. 1:16-cv-00730-DAD-BAM, 2016 WL 4445337, at *3 (E.D. Cal. Aug. 24, 2016) (same).

160. Stiftung v. Plains Mktg., L.P., 603 F.3d 295, 298–99 (5th Cir. 2010).

161. *See also* BouMatic, LLC v. Idento Operations, BV, 759 F.3d 790, 791 (7th Cir. 2014) (listing "the standard elements of 'personhood'" as "perpetual existence, the right to contract and do business in its own name, and the right to sue and be sued").

administering this test—an indication that a foreign country treats the entity as a juridical person prevents the court from having to dive deeper into foreign law—but is unhelpful doctrinally as it tells us nothing about what a juridical person is. Second, a majority of courts listed the ability of the entity to sue in its own name as being relevant to this determination. Although the ability of an entity to sue in its own name should not be dispositive, there is some justification for looking at an entity's ability to sue in its own name. At common law, a partnership could not sue in its own name because it "was not a distinct legal entity but merely an aggregate of individuals."[162] The ability of an entity to sue in its own name, then, would seem to be an indication that it *is* a distinct legal entity. However, many state legislatures have overridden this common law rule and now allow partnerships to sue in their own name,[163] so this factor is probably not particularly meaningful. Additionally, the ability of a party to sue in its own name is connected to the idea of that party being the real party to the controversy by Federal Rule of Civil Procedure 17(a), which states that "[a]n action must be prosecuted in the name of the real party in interest."[164] However, as the Court noted in *Navarro*, those standards are related but "serve different purposes and need not produce identical outcomes in all cases."[165] Moreover, the Supreme Court has expressly rejected the ability of an entity to sue in its own name as entitling a business to be treated like a corporation for citizenship purposes.[166] Therefore, it makes sense to have the ability of the entity to sue in its own name as a necessary condition for being treated as a juridical person, but that factor could not by itself be determinative.

Third, many courts focus on limited liability. Limited liability indicates a level of insulation between the entity and its members, and the fact that liability can attach to the entity itself indicates its status as a legal actor. That limited liability is not reserved to corporations[167] should not be an issue because, as already noted, the notion of the juridical person encompasses more than just corporations. Similarly, courts find persuasive that the recovery obtained is an asset of the entity and does not go directly to the

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162. Gerald Reff, *Right of a Partnership to Sue or Be Sued in Its Own Name*, 20 ST. JOHN'S L. REV. 109, 109 (1946).

163. *E.g.*, *id.* at 110 (detailing the New York legislature's enactment of a statute giving partnerships the right to sue or be sued in their own name).

164. FED. R. CIV. P. 17(a).

165. Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 462 n.9 (1979).

166. Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 455–56 (1900). The Court found that the capacity to sue and be sued by the name of the association does not make the plaintiffs a corporation within the rule that a suit by or against a corporation in its corporate name in a court of the United States is conclusively presumed to be one by or against citizens of the State creating the corporation.

*Id.*

167. COX & HAZEN, *supra* note 139, at 7.

members. This too is an indication of separation between the entity and the members. Lastly, courts find perpetual existence persuasive. This is another indication that the status of individual members of the entity does not change the entity itself.

All of these qualities aim to shed light on whether the entity has personhood or individuality—the factors that the Court originally found persuasive in granting corporations their own citizenship. Scholars have also found them persuasive. As noted by the English legal historian Frederic William Maitland, the corporation, like a person is "a right-and-duty-bearing unit," and though it does not have all of the legal powers of a natural person (for example, it cannot marry), "for a multitude of purposes [the law] treats the corporation very much as it treats the man."[168] Like a man, a corporation has the power to contract, own property, and borrow money.[169] When a person contracts with a corporation, "there stands opposite to you another right-and-duty-bearing unit—might I not say another individual?—a single 'not-yourself' that can pay damages or exact them."[170] This quality—that the entity has certain powers that enable courts to treat it like a human being—is critical to the definition of "juridical person." *Letson*, too, emphasized the corporation's similarities to a natural person, noting its ability to contract and "the manner in which it can sue and be sued."[171]

From all of these sources, a fairly consistent definition of "juridical person" can be extracted. A juridical person is a legal entity that possesses rights and duties under the law similar to those of a natural person. In its own name and capacity, it can contract, sue and be sued, and own property. All profits and liabilities accrue to the entity itself and not to its members, and it has a continuous existence irrespective of its membership. For the purposes of § 1332, this definition of juridical person should not be considered a factor test, rather, these are the elements of a juridical person, and each element must be present to consider an entity a juridical person.

Part IV

This Part advocates adoption of a version of the juridical person approach. This approach has two parts, considering first whether the entity is a juridical person as it has been defined in this Note and second, whether the entity itself, and not its members, can be considered the real party to the controversy. The first part of this test comes from *Russell*, but *Russell* commented only on civil law entities, and this test would apply to common law entities as well. Because of this and because of the Court's history of

168. *Moral Personality & Legal Personality* 1903, *in* 3 COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 306–07 (H.A.L. Fisher, ed., 1911).

169. *Id.* at 307.

170. *Id.*

171. Louisville, C. & C.R. Co. v. Letson, 43 U.S. (2 How.) 497, 558 (1844).

considering the citizenship of only the real parties to the controversy, it is prudent to add to the test a second part that asks whether the entity's members can be considered the real parties to the controversy. If so, their citizenship should be considered. If not, the entity's status as a juridical person is sufficient to afford it its own citizenship, separate from that of its members, and only this citizenship should determine whether there is complete diversity among the parties. Although this portion of the test would not traditionally apply to civil law entities, to avoid adding an additional step that would require a court to determine whether something is a common law or civil law entity, it is best to apply this step to all foreign-country business entities.

I propose that courts adopt a new version of the juridical person approach to determine the citizenship of foreign-country business entities. This approach is focused on what the Court originally found persuasive in treating a corporation as having its own citizenship—its separate legal personality and the fact that the corporation—not its members—is the real party to the controversy. In fact, such an approach does not need to be newly created—it already exists in Supreme Court precedent. It was articulated by Justice O'Connor's *Carden* dissent and is derived from *Marshall*:

> In *Marshall*, as in *Deveaux*, . . . the determination whether the corporation was a citizen did not signal the end of the diversity jurisdiction inquiry. Rather, the Court engaged in a two-part inquiry: (1) is the corporation a "juridical person" which can serve as a real party to the controversy, and (2) are the shareholders real parties to the controversy.[172]

This test as articulated by Justice O'Connor works perfectly in the foreign-country context. It uses both the juridical person aspect of the test, and so is in keeping with *Russell*, but it also adds the element of the real party to the controversy, which is in keeping with the Supreme Court's early corporate-citizenship jurisprudence. Slightly reformulated to apply to foreign-country entities, the first part of the test would ask whether the foreign-country entity is a juridical person. If so, the second part of the test asks whether the entity's members are real parties to the controversy.

Like most other judges that use the term, Justice O'Connor does not elaborate on the meaning of "juridical person" within the test. But using the definition of juridical person formulated above, the first part of the test would ask: Can the entity contract, sue and be sued, and own property in its own name? Do the entity's profits and liabilities accrue directly to the entity itself? Does the entity have continuous existence irrespective of its membership? If the answer to all of these questions is yes, the entity is a juridical person for the purposes of this test.

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172. Carden v. Arkoma Assocs., 494 U.S. 185, 201 (1990) (O'Connor, J., dissenting) (citations omitted).

The second part of the test is explained by Justice O'Connor by reference to the *Marshall* Court. "To determine whether the corporation or the shareholders were real parties to the controversy, the Court considered which citizens held control over the business decisions and assets of the corporation and over the initiation and course of litigation involving the corporation."[173] She explained how this test applied to a corporation: "[F]or all the purposes of acting, contracting, and judicial remedy, [shareholders] can speak, act, and plead, only through their representatives or curators. For the purposes of a suit or controversy, the persons represented by a corporate name can appear only by attorney, appointed by its constitutional organs," and because of this, "[t]hey are not really parties to the suit or controversy."[174] This echoes the test for real party to the controversy as laid out in *Navarro*, which stated that the parties who have legal title, manage the assets, and control the litigation are the real parties to the controversy.[175]

Using only the juridical person standard is bound to be overinclusive in that businesses that are clearly not corporations in the American sense will be accorded the same citizenship treatment that an American corporation would receive. This will cause inconsistency between the treatment of foreign-country and domestic business entities because, as discussed above, American business entities that are not corporations can be considered juridical persons. The second part of the test will help to resolve some of this overinclusiveness by focusing on the real party to the controversy—what the Court has historically viewed as the justification for treating corporations as having their own citizenship. Dealing with the overinclusiveness is necessary if the test aims to follow the juridical person approach as it was set out in *Russell*. There, the Court noted that "those who formulated the [corporate citizenship] rule found its theoretical justification only in the complete legal personality with which corporations are endowed."[176] This meant that "status as a unit for purposes of suit alone, as in the case of a joint stock company or a limited partnership, not shown to have the other attributes of a corporation, has been deemed a legal personality too incomplete" to treat as if it were a single citizen.[177] Although the *Russell* Court believed its juridical person approach to be sufficient to resolve this problem in the context of civil law entities, it expressed no such opinion regarding common law entities. Ensuring that the entity's members are not the real parties to the controversy will help resolve this problem.

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173. *Id.*

174. *Id.* at 202 (alterations in original) (citing Marshall v. Baltimore & Ohio R.R. Co., 57 U.S. (16 How.) 314, 328 (1853)).

175. Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 465 (1980).

176. Puerto Rico v. Russell & Co., 288 U.S. 476, 479 (1932).

177. *Id.* at 480 (citations omitted).

Although application of the second part of the test to entities with civil law origins may not find direct support in Supreme Court precedent, it is nevertheless desirable to apply the second part of the test to all foreign-country business entities. To make a distinction in the test between civil law and common law entities would require a court to first determine the provenance of the entity in question, adding an additional step to the inquiry. This task could prove complicated,[178] and ultimately, very little is gained from a decision not to apply the second part of the test to a civil law entity. The inquiry into whether a company's members can be considered real parties to the controversy will involve many of the same factors that were considered in determining whether the entity was a juridical person and thus should not require a court to expend many additional resources to apply it. Moreover, this step of the test would only be outcome determinative where the shareholders could be said to be the real parties to the controversy. And according to the Court's diversity jurisprudence, that result is desirable. It is possible that applying the second part of the test to entities with civil law origins will prevent some businesses from asserting diversity jurisdiction where they otherwise could, but if their members can properly be considered the real parties to the controversy, it seems appropriate to take those members' citizenship into account.

Application of this new test will probably not create a perfect analogue to the Court's approach for American business entities. But as noted numerous times throughout this Note, that should not be a concern because the Court's current methods of determining the citizenship of American business entities are not based on policy decisions but on a decision that further changes to citizenship must be made by Congress.[179]

Courts cannot use this same justification here. As this Note has shown, there is no precise definition of "corporation," and therefore it is difficult to determine which foreign-country business entities should be deemed corporations for diversity-citizenship purposes. Congress has failed to legislate and the courts of appeals have been left to formulate their own rules, leading to the current circuit split. While Congress remains silent, courts must create some type of rules to determine citizenship in cases where it is unclear whether a foreign business entity is a corporation.

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178. For example, how should a court treat an entity with a long history of use in a common law country but that originated in the civil law system?

179. *See Carden*, 494 U.S. at 197. The Court held that declining to grant limited partnerships their own citizenship, "does not so much disregard the policy of accommodating our diversity jurisdiction to the changing realities of commercial organization, as it honors the more important policy of leaving that to the people's elected representatives." *Id.* The Court found that "such accommodation is not only performed more legitimately by Congress than by courts, but it is performed more intelligently by legislation than by interpretation of the statutory word 'citizen.'" *Id.*

## Conclusion

One of the primary purposes of diversity jurisdiction is to protect defendants from local prejudice that may be further compounded when one party is a citizen of a foreign country.[180] This is why determining the real parties to the controversy is so important—allowing a single person to destroy diversity when that person plays no part in the litigation would frustrate the purpose of the alienage rule and unfairly deny foreign-country litigants the protections the Constitution affords them. Ignoring the decision of another country to treat an entity as a legal person shows disrespect for that country's laws and frustrates the expectations of the members of that entity. This should not be done lightly. Because legal personhood has historically been the justification for according a corporation its own citizenship, that aspect should be given controlling weight in the determination of how to treat the business entity when it is determined that the entity, and not its members, is the real party to the controversy. For these reasons, federal courts should uniformly adopt the modified juridical person approach and eliminate the current circuit split.

180. *See generally* Johnson, *supra* note 2, at 31. Johnson argues that

> modern circumstances militate in favor of ensuring access to a national forum to resolve disputes involving noncitizens just as much today as, if not more so than, in 1787. History has demonstrated that the political processes in the country are susceptible to antiforeign sentiment, sometimes of a particularly virulent strain, which necessitates a forum more politically insulated than that offered by most states. Though this danger is not present in every alienage case, state court adjudication of disputes involving foreign citizens continues to raise the possible adverse foreign policy and international trade consequences feared by the Framers of the Constitution.

*Id.*

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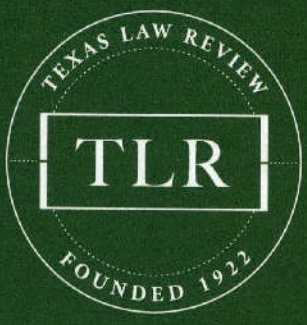
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