

Hearing the States

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Abstract

The 2016 Presidential and Senate elections raise the possibility that a conservative, life-tenured Supreme Court will preside for years over a politically dynamic majority. This threatens to weaken the public's already fragile confidence in the Court. By lowering the political stakes of both national elections and its own decisions, federalism may enable the Court to defuse some of the most explosive controversies it hears. Federalism offers a second-best solution, even if neither conservatives nor liberals can impose a national political agenda. However, principled federalism arguments are tricky. They are structural, more prudential than legal or empirical. Regardless of ideology, a bias toward federal power is hard-wired into the modern judicial appointment process. Once on the bench, Justices see an increasingly elite bar of Washington D.C. specialists steeped in federal practice, even when hearing cases concerning state sovereignty. These are problems for the Court, despite its likely sympathy for federalism arguments in years to come. This article suggests one solution: help the Court hear the states. Relatively minor reforms to the Court's approach in cases impacting state sovereignty could harness the politics of state attorneys general to help the Court hear all states more clearly, facilitate a more principled federalism, and depoliticize the Court itself. States cannot help protect the Court from politicization, however, if their attorneys general fall victim to the same national polarizing forces that threaten the Court. Any reforms to help the Court hear the states better, therefore, must also help the states keep their voices strong and independent.

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I. INTRODUCTION

The 2016 Presidential and Senate elections suggest the possibility that a conservative, life-tenured United States Supreme Court will preside for years, even decades, over a politically diverse and increasingly polarized nation. Such an outcome threatens to weaken the public's already fragile confidence in the Court. On one hand, the Court must navigate a principled course through a politically charged docket. Increasing political opposition to its rulings could draw the Court's institutional standing down to unprecedented lows.¹ Yet compromising legal principles according to prevailing sentiment could further cultivate the view that the Court plays politics. On the other hand, the legal principles the Court holds are determined in large part by politics through the appointment process.² Even when those principles reflect the politics of the time at appointment, however, the Justices' increasingly long tenures can open divides between their principles and the principles reflecting

1. *See infra* Section II.A.

2. *See infra* Section II.B.

the politics of later decades. Those divides start wide when other non-majoritarian political processes align in the appointment of Justices who will serve for decades after the politically fortuitous moment.

Federalism offers the Court a course through these perils.³ Federalism lowers the political stakes of both national elections and judicial decisions. It may enable the Court to defuse some of the most explosive controversies likely to appear before it. Federalism also has the virtue of consistency with the conservative ideology that the Court's likely future majorities will share. Principled federalism offers a second-best solution for conservatives who can settle for limiting federal power in Washington, and liberals who can settle for realizing progressive policies close to home, even if neither can impose a national political agenda.

The problem with the course of federalism, however, is that even principled proponents find it hard to follow.⁴ Federalism arguments are structural arguments, relying on prudential claims more than either constitutional text or empirical facts. Substantive policy preferences may cloud a Justice's view of constitutional structure. Regardless of ideology, a bias toward federal power is hard-wired into the modern judicial appointment process. The farm team for future Justices is the federal government. Presidents looking to make safe and effective lifetime appointments rely on loyalty to the federal executive branch, not to state legislatures. Senators in the confirmation process generally do not want to hear from a nominee that their policy powers are circumscribed. Once on the bench, Justices see an increasingly elite bar of Washington D.C. specialists steeped in federal practice, even when hearing cases concerning state sovereignty.

These are problems for the Court, despite its likely sympathy for federalism arguments in years to come. This article suggests one solution: *help the Court hear the states*. There is a corps of competent advocates with impeccable political pedigrees—left, right, and center—ready and willing to help the Court counter the inside-the-beltway wisdom and see its way to a federalism the states want and the Court needs: state attorneys general.⁵

Attorneys general already enjoy influence with the Court second only to the United States Solicitor General. The Court's federal situation, however, may require even stronger state voices for their diverse perspectives to be

3. See *infra* Section III.A.

4. See *infra* Section III.B.

5. See *infra* Section IV.A.

heard.⁶ Although several of the Court's rules accommodate the states, other practices undermine the role of state attorneys general. Worse, the political polarization around the Court's agenda threatens to extend into the states and compromise their role as credible advocates of federalism. Relatively minor reforms to the Court's approach in cases impacting state sovereignty could harness the politics of state attorneys general to help the Court hear all states more clearly, facilitate a more principled federalism, and help to depoliticize the Court itself.⁷

This article presents the problem and a solution in three parts. Part II describes the political tensions likely to arise as a conservative Supreme Court presides over a potentially skeptical nation. Part III draws on a conventional account of federalism as a safeguard for judges from politics and proposes federalism as a way for the Court to remain both principled and sufficiently popular to be effective. Part IV establishes the state attorneys general as credible advocates for principled federalism, so long as they can discern state interests independently of national politics. It suggests several modest reforms to the Court's procedure and deliberations to reinforce the states' credibility. A brief conclusion offers two paths forward for state attorneys general, only one of which will safeguard the Court and federalism in the decades ahead.

II. THE PROBLEMS OF A POLITICAL COURT

Politics matter for the Supreme Court. Although the Court enjoys a relatively large measure of autonomy, it faces several constraints from the conventional "political branches," elites, and public opinion more broadly.⁸ The confirmation battle to fill the seat vacated by Justice Scalia, with the Republican Senate's pre-election disregard of President Obama's nominee and post-election embrace of President Trump's nominee, is only the most recent example.⁹ From year to year, public opinion may constrain the Court's approach

6. *See infra* Section IV.B.

7. *See infra* Section IV.C.

8. *See generally* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515 (2010); Richard H. Pildes, *Is the Supreme Court a 'Majoritarian' Institution?*, 2010 SUP. CT. REV. 103 (2010).

9. *See* Tessa Berenson, *How Neil Gorsuch's Confirmation Fight Changed Politics*, TIME (Apr. 7, 2017), <http://time.com/4730746/neil-gorsuch-confirmed-supreme-court-year/>; *see generally* The Times Editorial Board, *It's Not Neil Gorsuch's fault, but We Can't Support His Ascension to a Stolen Supreme Court Seat*, L.A. TIMES (Mar. 25, 2017), <http://www.latimes.com/opinion/editorials/la-ed-neil-gorsuch-20170325-story.html>.

to highly controversial issues such as abortion or major social welfare reform like the Affordable Care Act, or facilitate the Court's rapid movement on issues such as same-sex marriage.¹⁰ In a decade, presidential regimes, such as President Reagan's commitment to new federalism, change the Court's course through appointments.¹¹ Over the course of decades, both formal amendments, such as the Sixteenth and Seventeenth Amendments, and informal constitutional moments, such as the New Deal, bring watershed changes to constitutional doctrine.¹² Opinions that diverge sharply from public opinion and the political branches on major issues are rare, at least over the long term.¹³

The Supreme Court also matters for politics. Its direct role in shaping the national law of politics for both the federal and state governments is greater than that of either of the Congress or the presidency.¹⁴ From *Reynolds v. Sims*¹⁵ to *Bush v. Gore*¹⁶ to *Citizens United v. Federal Election Commission*,¹⁷ the Supreme Court structures the very nature of representation in American democracy.¹⁸ The Court's indirect effects on politics through public opinion and complex mechanisms of legitimation, backlash, and polarization, are significant but limited by public ignorance of most of the Court's cases.¹⁹ From

10. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); see also *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *Roe v. Wade*, 410 U.S. 113 (1973); Cass R. Sunstein, *Don't Expect the Supreme Court to Change Much*, BLOOMBERG (Nov. 9, 2016), <https://www.bloomberg.com/view/articles/2016-11-09/don-t-expect-the-supreme-court-to-change-much>.

11. See Joan Biskupic, *Reagan's Influence Lives on in U.S. Courts*, USA TODAY, https://usatoday30.usatoday.com/news/washington/judicial/2008-05-11-appellate-judges_N.htm (last visited Mar. 6, 2018); John Kincaid, *The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 924–25 (1995).

12. See, e.g., BRUCE ACKERMAN, *2 WE THE PEOPLE: TRANSFORMATIONS* (1998).

13. See FRIEDMAN, *supra* note 10, at 382 (“What history shows is assuredly not that Supreme Court decisions always are in line with popular opinion, but rather that they come into line with one another *over time*.”); see also Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policymaker*, 6 J. PUB. L. 279, 285 (1957) (noting that “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States”).

14. See Anthony Johnstone, *The Federalist Safeguards of Politics*, 39 HARV. J. L. & PUB. POL. 416, 433–42 (2016).

15. 377 U.S. 533, 568–69 (1964).

16. 531 U.S. 98, 109–10 (2000).

17. 558 U.S. 310, 324, 337, 365 (2010).

18. See Johnstone, *supra* note 14, at 433.

19. See Nathaniel Persily, *Introduction*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 3, 3–15 (Nathaniel Persily et al. eds., 2008).

its decisions in *Brown v. Board of Education*²⁰ to *Roe v. Wade*²¹ to *District of Columbia v. Heller*,²² the Court at least provides focal points for mobilization (or demobilization) of political movements, and at times may prove a decisive influence on national elections.²³

A. *Too Much Politics*

The influence of politics on the Court and the Court on politics can benefit both the Court and politics, for example, by resolving the counter-majoritarian difficulty of judicial review and defending baseline norms of democratic participation.²⁴ At a moment of historic political polarization, however, the Court's politicization threatens the integrity of both the Court and political institutions. President Trump, elected with a minority of the popular vote and a relatively narrow margin in the electoral college,²⁵ likely will have at least one additional appointment in his first term, and at least two appointments if he serves two terms.²⁶ Given the age and ideology of the current Justices,²⁷

20. 347 U.S. 483, 495 (1954).

21. 410 U.S. 113, 164–65 (1973).

22. 554 U.S. 570, 636 (2008).

23. See David G. Savage, *Trump's Victory Ensures a Conservative Majority on the Supreme Court*, L.A. TIMES (Nov. 9, 2016, 12:50 PM), <http://www.latimes.com/nation/la-na-trump-supreme-court-20161109-story.html> (“The future of the Supreme Court’s ideological balance proved to be a critical factor for many Republican voters. In exit polls, about 1 in 5 voters said the Supreme Court appointments were ‘the most important factor’ in their decision, and those voters favored Trump by a 57% to 40% margin, according to ABC News.”).

24. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980) (arguing judicial independence “does not give [federal courts] some special pipeline to the genuine values of the American people: in fact it goes far to ensure that they won’t have one. It does, however, put them in a position objectively to assess claims . . . that . . . our elective representatives in fact are not representing the interests of those whom the system presupposes they are.”).

25. See Jugal K. Patel & Wilson Andrews, *Trump's Electoral College Victory Ranks 46th in 58 Elections*, N.Y. TIMES (Dec. 18, 2016), <https://www.nytimes.com/interactive/2016/12/18/us/elections/donald-trump-electoral-college-popular-vote.html>.

26. See Oliver Roeder, *Clinton and Trump Are Both Promising an Extreme Supreme Court*, FIFETHIRTYEIGHT (Aug. 1, 2016, 9:59 AM), <https://fivethirtyeight.com/features/clinton-and-trump-are-both-promising-an-extreme-supreme-court/> (“Thanks to the relentless, unidirectional drumbeat of time, Trump would have a good chance to replace at least one of [Justices Ginsburg, Kennedy, or Breyer], pushing the court in a conservative direction.”); see also Jason Le Miere, *Trump Thinks He Could Appoint Four Supreme Justices—In Just One Term*, NEWSWEEK (Oct. 16, 2017, 4:10 PM), <http://www.newsweek.com/trump-supreme-court-justice-appoint-686076> (stating that, due to health and age-related concerns, several more vacancies could open up on the Supreme Court during Trump’s presidential term).

27. See *United States Supreme Court Justices*, THE GREEN PAPERS, <https://www.thegreenpapers.c>

the near-term prospects for Senate control,²⁸ and the tendency for Justices to time their departures strategically (when possible),²⁹ it is possible that conservative Republican appointees could hold a 6–3 supermajority on the Court for decades.

With such high stakes, it is not surprising that the Court can tend to distort ordinary politics in the other branches. One example is the elimination of the filibuster in Supreme Court nominations. The execution of the “nuclear option” in the confirmation process may reshape the norms that protect the filibuster’s minority-protecting function in legislation generally. Similarly, extension of political conflict over the Supreme Court confirmation process deeper into Senate campaigns provides an additional lever for polarization and distracts from basic questions of policy at the federal and state levels.³⁰ These pressures on the political branches are likely to increase with the stakes of confirmation battles for seats now occupied by the oldest members of the Court: Justices Kennedy, Ginsburg, and Breyer.

Meanwhile, partisan polarization has changed the Court, decisively, for the long term.³¹ In an unprecedented development, the ideology of Supreme Court Justices’ votes in divided major cases reliably aligns with the party of the appointing President.³² The polarization on the bench is a lagging consequence of increasing polarization in the political branches, and for that reason

om/Hx/SupremeCourt.html (last updated Apr. 7, 2017).

28. See Jasmine C. Lee and Alicia Parlapiano, *Democrats Need to Win 28 Seats to Control the Senate. Republicans Need Only 8*, N.Y. TIMES (Feb. 7, 2018), available at <https://nyti.ms/2BhYrHQ> (“This election year, the political climate favors Democrats . . . But in the Senate . . . they must keep all of their seats and win two of the Republican seats in play. It is numerically possible, but there is little room for error.”).

29. See Ross M. Stolzenberg & James Lindgren, *Retirement and Death in Office of U.S. Supreme Court Justices*, 47 DEMOGRAPHY 269, 291 (2010) (finding support for the conventional wisdom that Supreme Court Justices time their departures and are about 2.6 times more likely to resign under a president of the same party as the president that nominated the Justice).

30. See Matt Flegenheimer, *Senate Republicans Deploy ‘Nuclear Option’ to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html>; see also Z. Byron Wolf, *Will Kennedy retire and be Republicans’ Senate savior?*, CNN (Mar. 9, 2018), <https://www.cnn.com/2018/03/09/politics/anthony-kennedy-gop-hoping-for-a-supreme-court-vacancy/index.html>.

31. See Adam Liptak, *The Polarized Court*, N.Y. TIMES (May 10, 2014), <https://www.nytimes.com/2014/05/11/upshot/the-polarized-court.html>.

32. See *id.* (“By contrast [to only two cases before 2010 that arguably broke along party lines], in just the last three terms, there were five major decisions that were closely divided along partisan lines . . .”).

is likely to continue for the foreseeable future.³³ Nearly two-thirds of Americans recognize the Court's polarization, reporting that "Supreme Court Justices are split on political grounds like Congress."³⁴ The Supreme Court's job approval rating recently matched a record low of 42%,³⁵ with trust in the judicial branch sliding from around 80% before the Court's intervention in the 2000 Presidential election through *Bush v. Gore*³⁶ to around 60%, nearing the 50% mark that is normal for a President (though still holding comfortably above Congress, which is in the 30% range).³⁷

Consistent with trends in the political branches, public opinion of the Court may be converging on citizens' views of the substance of their decisions, rather than the Court's distinct institutional role.³⁸ It is unlikely that public opinion would turn decisively against a single unpopular decision.³⁹ Professor Tom Clark explains, "courts generally benefit from high levels of diffuse support (especially relative to the other branches of government) that

33. See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301 (2016).

34. See Robert Green & Adam Rosenblatt, *Supreme Court Survey*, C-SPAN / PSB (2017), <https://static.c-span.org/assets/documents/scotusSurvey/CSPAN%20PSB%20Supreme%20Court%20Survey%20COMPREHENSIVE%20AGENDA%20sent%2003%2013%2017.pdf>.

35. See Jeffrey M. Jones, *U.S. Supreme Court Job Approval Rating Ties Record Low*, GALLUP (July 29, 2016), http://www.gallup.com/poll/194057/supreme-court-job-approval-rating-ties-record-low.aspx?g_source=SUPREME_COURT&g_medium=topic&g_campaign=tiles.

36. 531 U.S. 98 (2000).

37. See Lydia Saad, *Americans' Confidence in Government Takes Positive Turn*, GALLUP (Sept. 19, 2016), http://www.gallup.com/poll/195635/americans-confidence-government-takes-positive-turn.aspx?g_source=SUPREME_COURT&g_medium=topic&g_campaign=tiles (confidence slipped to 53% in 2015 and rose to 61% in September 2016). In the latest ratings from the first year of the Trump Administration, trust in the judicial branch increased to 68% (due to a large increase in trust by Republicans, offsetting a smaller decrease in trust by Democrats, in the year of Justice Gorsuch's confirmation), while trust in the executive branch declined to 45%, and trust in the legislative branch held at 35%. See Jeffrey M. Jones, *Trust in Judicial Branch Up, Executive Branch Down*, GALLUP (Sept. 20, 2017), <http://news.gallup.com/poll/219674/trust-judicial-branch-executive-branch-down.aspx?version=print>.

38. See David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 COLUM. L. REV. 731, 734 (2012) (emphasis added) ("The public may or may not like it when the Court restrains majoritarian action in the name of the Constitution or when Congress intervenes in constitutional issues, but this is contingent on whether it likes or dislikes the *valence of the result* commanded rather than a sense that the wrong institution is commanding the result.")

39. See *id.*; see also TOM S. CLARK, *THE POLITICS OF JUDICIAL INDEPENDENCE* 125 (Bruce Peabody ed., 2011).

enable them to weather the fallout from even exceedingly unpopular individual decisions.”⁴⁰ As the Court’s diverges further from the public in case after case, however, that reservoir of diffuse support may draw down, leaving the Court high and dry, politically stranded, and weak in public confidence.⁴¹ This spells trouble for an institution whose legitimacy famously depends on “neither FORCE nor WILL, but merely judgment.”⁴²

B. *Not Enough Politics*

A lack of political influence on the Court poses risks too. More precisely, the lagging effects of a politicized appointment process risks a deep disconnect between a Court comprising today’s Presidential appointments and the politics of the nation two decades from now. The disconnect begins with the current distance between a moderate popular majority⁴³ and conservative judicial appointments made by an historically unpopular President with the advice and consent of a decreasingly majoritarian Senate.⁴⁴ Over a decades-long

40. See CLARK, *supra* note 39, at 126.

41. See Fontana & Braman, *supra* note 38, at 781–82 (discussing the consequences judicial opinions may have on public opinion of the court); see also Eric Segall, *Supremely Elite: The Lack of Diversity on Our Nation’s Highest Court*, ABA HUM. RIGHTS MAG. (2015), https://www.americanbar.org/publications/human_rights_magazine_home/2015--vol-41--vol-41--no-1---lurking-in-the-shadows--the-supreme-court-s-qui/supremely-elite--the-lack-of-diversity-on-our-nations-highest-co.html (discussing the “Court’s distance from the lives of ordinary people”).

42. THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

43. See Lydia Saad, *Conservative Lead in U.S. Ideology Is Down to Single Digits*, GALLUP (Jan. 11, 2018), <http://news.gallup.com/poll/225074/conservative-lead-ideology-down-single-digits.aspx> (of U.S. adults, 35% identify as conservative, 35% identify as moderate, 26% identify as liberal); Jeffrey M. Jones, *Democratic Party Maintains Edge in Party Affiliation*, GALLUP (Dec. 4, 2017), <http://news.gallup.com/poll/223124/democratic-party-maintains-edge-party-affiliation.aspx> (“[B]ack to the early 1990s, Democrats have averaged a five-point advantage over Republicans in party affiliation, with leads in all but four years.”).

44. See Jeffrey M. Jones, *Trump’s First-Year Job Approval Worst by 10 Points*, GALLUP (Jan. 22, 2018), <http://news.gallup.com/poll/226154/trump-first-year-job-approval-worst-points.aspx> (“President Donald Trump’s job approval rating averaged 38.4% during his first year in office—slightly more than 10 percentage points lower than any other elected president’s first-year average.”); Philip Bump, *The Senate may be developing an electoral college issue*, WASH. POST (Apr. 10, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/04/10/the-senate-may-be-developing-an-electoral-college-issue/> (“[T]he Gorsuch nomination had support of senators representing 56.5 percent of the population, counting either senator’s support as reflecting the entire population of the state—or 44.4 percent of the population [counting each Senator as reflecting half the population of the state]. If you consider that latter metric a better reflection of reality, it puts Gorsuch into an unusual position: Earning a successful nomination to the bench despite his earning less than half of the support of the country—and appointed by a president who was similarly successful, thanks to the electoral college.”).

term of life tenure, that distance may grow for at least two reasons. First, the public's views may change over time. For example, the public could become more liberal or more conservative than the Justice was at appointment. It is also possible that a Justice's views may change over time, but such "ideological drift" may be less common as presidents appoint candidates with more durable sympathies.⁴⁵ Second, the court's docket may change over time. For example, a Justice appointed with popular views on one issue that predominates at appointment—say, executive power—may serve until another issue on which he has unpopular views—say, criminal procedure—becomes a predominant issue facing the Court.⁴⁶ With the loss of a bipartisan confirmation process, the Court's few remaining institutional safeguards against politicization—including life tenure, elite credentials, and the constraining power of precedent—risk increasing isolation for an "out of touch" court.

Consider President Franklin Roosevelt's campaign against the Supreme Court, which culminated in his court-packing plan.⁴⁷ President Roosevelt used rhetoric of "bring[ing] to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work." He

45. As many as half of Justices serving since 1937 showed "ideological drift" away from the appointing President, more often to the left than the right, which in theory could mitigate any ideological disconnect. See Lee Epstein et al., *Ideological Drift Among Supreme Court Justices*, 101 NW. U. L. REV. 1883 (2007). A more recent assessment suggests that recent appointments may do a better job at protecting against ideological drift, in part by requiring federal executive branch experience or other signals of ideological dedication. See Lee Epstein et al., *President-Elect Trump and His Possible Justices* (Dec. 15, 2016), <http://pdfserver.amlaw.com/nlj/PresNominees2.pdf>. That study notes that, "[u]nlike Kennedy or Souter, neither of whom ever worked in Washington, Alito shows no signs of drift or divergence," and suggests Justice Gorsuch is also unlikely to drift from his conservative positions. *Id.* at 12–13.

46. For example, take the Justices who preceded Justice Gorsuch in his seat. Justice Jackson was appointed as a New Dealer who supported federal power, though he later articulated the leading doctrine of executive constraint. Compare *Wickard v. Filburn*, 317 U.S. 111 (1942), with *Youngstown Steel Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). Justice Harlan was appointed as a restraintist protégé of Felix Frankfurter, though he eventually offered a leading articulation of unenumerated rights doctrine. Compare *Griffin v. Illinois*, 351 U.S. 12 (1956) (Harlan, J., dissenting), with *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (Harlan, J., concurring). Justice Rehnquist was appointed as a law-and-order conservative, though he became the leader of the New Federalism and limited the scope of federal law, including criminal law. Compare *New York v. Quarles*, 467 U.S. 649 (1984), with *United States v. Lopez*, 514 U.S. 549 (1995). Justice Scalia was appointed as a champion of judicial restraint, though his originalism galvanized new rights restraints on the government. Compare *Michael H. v. Gerald D.*, 504 U.S. 905 (1989), with *District of Columbia v. Heller*, 554 U.S. 570 (2008).

47. See, e.g., G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2002).

targeted the “Four Horsemen” (Justices Van Devanter, McReynolds, Butler, and Sutherland), three of whom were appointed by the opposition party, and whose average tenure on the bench reached twenty years as of 1937.⁴⁸ Although President Roosevelt’s court-packing tactics failed, his court-attacking strategy prevailed in consolidating a national majority of Americans to, in Professor Bruce Ackerman’s words, “endorse[] a break with their constitutional past,” in part through transformative judicial appointments.⁴⁹

Excluding the obvious criteria of race and gender, the Four Horsemen were relatively diverse for their time. Although they came from a different generation than the governing class of the time, they at least brought a varied range of persona and professional experiences from across the country.⁵⁰ Compare how Justice Scalia described his colleagues on the bench in 2015:

Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans), or even a Protestant of any denomination.⁵¹

Only in such a group would Justice Neil Gorsuch, a Coloradan by birth (who

48. See President Franklin D. Roosevelt, Fireside Chat (Mar. 9, 1937) (transcript available in The American Presidency Project), <http://www.presidency.ucsb.edu/ws/?pid=15381>.

49. See Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1166, 1181 (1988).

50. See THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 111, 542–43, 848–49, 894–95 (Kermit L. Hall et al., 1992). James McReynolds was a Kentuckian graduate of the University of Virginia Law School who practiced law in Nashville, unsuccessfully ran for Congress, and served as President Wilson’s Attorney General. *Id.* George Sutherland, born in England and raised in Utah, graduated from University of Michigan Law School and practiced law in Utah before serving in the House and Senate. *Id.* at 848–49. Willis Van Devanter, born in Indiana, graduated from the University of Cincinnati Law School and practiced law in Wyoming before his appointment to the Eighth Circuit Court of Appeals. *Id.* at 894. Pierce Butler was a Minnesotan who read for the bar and practiced law in his home state before his appointment to the Court. *Id.* at 111.

51. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting) (citations omitted).

attended a Jesuit high school in the Washington suburbs, Columbia University, and Harvard Law School before a career in Washington, D.C.), add any notable measure of cultural—if not racial or gender—diversity.⁵²

In historical terms, the current Supreme Court, while more diverse in terms of race and gender, is less diverse by most other relevant measures.⁵³ According to a comprehensive study by Professor Benjamin Barton, “the Roberts Court Justices have spent more pre-appointment time in legal academia, appellate judging, and living in Washington, D.C.,” as well as in elite colleges and law schools, “than any previous Supreme Court.”⁵⁴ Meanwhile, the Justices “have spent less time in the private practice of law, in trial judging, and as elected politicians than any previous Court.”⁵⁵ As Professor Barton argues, this new “cloistered and detached” judicial elite is ill-equipped for the kind of policymaking demanded by applying constitutional doctrine and interpreting statutes.⁵⁶ A Court so “inexperienced” compared to the population it governs, according to Professor Barton, leads to increased legal complexity, reduced sensitivity to the impact of its decisions on ordinary people (even ordinary litigants and jurors), and a distinct lack of practical wisdom.⁵⁷ Professors Lawrence Baum and Neal Devins suggest that to the extent Justices, and particularly swing Justices, are influenced by public opinion, elite groups predominate over the mass public.⁵⁸ This cultural disconnect only exacerbates the ideological disconnect between the Court and the nation.⁵⁹

There are lawyers in the Supreme Court other than the Justices.⁶⁰ The Justices’ elite and increasingly like-minded clerks, however, are unlikely to

52. See Adam Liptak et al., *For Court Pick, Painful Lesson from Boyhood*, N.Y. TIMES, Feb. 5, 2017, at A1.

53. See Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137, 1139–40 (2012).

54. *Id.* at 1138.

55. *Id.* at 1139.

56. See *id.* at 1172–73, 1176–77.

57. See *id.* at 1176–85.

58. See Baum & Devins, *supra* note 8, at 1580 (“In light of what we can surmise about the Justices’ incentives, it seems reasonable to conclude that they are more susceptible to influence from elite groups than from the mass public.”).

59. See *id.* at 1580–81; see also Segall, *supra* note 41.

60. See, e.g., TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 1*, 22–31 (2006).

add significant ideological or cultural diversity to the chambers.⁶¹ The advocates who argue before them, and the *amici curiae* who provide additional background to a case, might round out the Justices' limited experiences.⁶² Yet a highly specialized Supreme Court Bar is reemerging for the first time since the nineteenth century.⁶³ This cohort "suffers" from the same elite Washington D.C. experiences as the Justices, and Chief Justice Roberts emerged from it himself.⁶⁴ Professor Richard Lazarus argues the consequences of the bar's narrowing are "a Supreme Court docket and rulings on the merits [that are] more responsive to [elite] economic concerns."⁶⁵ Those lawyers stand atop an economy of influence to "push hard for amici support, generate stories in the national news print and broadcast media, and prompt the publication of op-eds in the nation's leading newspapers, all to coincide with the timing of the Court's consideration of the cert petition."⁶⁶ This elite "amicus machine" network, as described by Professors Alison Orr Larsen and Neal Devins,⁶⁷ wields impressive influence over the Court's docket.⁶⁸ It does not, however, ensure the Court's popular legitimacy.⁶⁹ To the contrary, the well-heeled amicus bar offers the Justices the kind of special interest influence Washington lobbyists offer members of Congress, without any of the popular electoral checks on that influence.⁷⁰

61. See Devins & Baum, *supra* note 33, at 355 ("As measured by the lower-court judges from whom the Justices draw their clerks, the tendency of Justices to take ideology into account has become markedly stronger since the early 1990s, especially among conservative Justices."); see also PEPPERS, *supra* note 60 (finding 94% of recent clerks were white, and 80% graduated from the same seven elite law schools).

62. See Barton, *supra* note 53, at 1172–73 (arguing that the elite nature of the current Justices has left them detached from legal reality and the public).

63. See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008).

64. Cf. *id.* at 1488–502.

65. See *id.* at 1554. But see Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1941 (2016) ("We push back on the argument that the Supreme Court Bar is responsible for producing a pro-business Court that favors the haves over the have-nots.").

66. See Lazarus, *supra* note 63, at 1525.

67. See Larsen & Devins, *supra* note 65, at 1935.

68. See Lazarus, *supra* note 63, at 1528 ("With amicus support, however, the odds [of the Court granting a petition for *certiorari*] jump considerably [from approximately 2% in paid cases]. If there was at least one amicus brief filed in support, the odds of *certiorari* being granted in October Term 2005 was just shy of 20%. If there were at least four amicus briefs filed in support of the paid petition, the odds jumped even higher to 56%.")

69. See Larsen & Devins, *supra* note 65, at 1950–51.

70. See *id.* at 1907 ("Supreme Court specialists are experts in identifying ways in which a case is

III. FEDERALISM AS A JUDICIAL SAFEGUARD FROM POLITICS

The Supreme Court is both too political and not political enough. The current appointment and confirmation process extends partisan polarization from the electorate to the Presidency, up Pennsylvania Avenue to the Senate, and on across the street to the Supreme Court. Once seated, the Court itself engages cases with major political impacts, direct and indirect.⁷¹ This raises the stakes for the appointment and confirmation process, which drives increased political mobilization around the Court, and the vicious cycle continues. With the President likely to make appointments that could consolidate an ideologically consistent bloc of Justices for a generation, these political pressures will build for the foreseeable future.⁷² At the same time, perhaps motivated by the politicizing forces that demand safe (confirmable) and effective (consistent) appointees, the Court has never been so removed from the public it serves.⁷³ It is no coincidence that the judicial purist's prayer "no more Souters"⁷⁴ refers to the last Justice appointed with substantial practical experience in state judicial and executive branches.⁷⁵ Such a varied, pragmatic, and obviously relevant background is now a liability for an appointee who lacks time in the political crucible of the federal executive branch or a reliable paper trail from substantial federal judicial experience.⁷⁶

a good or bad vehicle to establish broad legal principles and, as such, the amicus machine helps the Court identify which cases to hear and how to rule on those cases.”)

71. See *supra* Section II.A.

72. See Roeder, *supra* note 26.

73. See *infra* notes 74–76.

74. See Adam Liptak, *Trump's Supreme Court List: Ivy League Is Out, the Heartland Is In*, N.Y. TIMES, Nov. 15, 2016, at A21 (quoting then-Alabama Attorney General, now Eleventh Circuit Judge, William Pryor). Tulane graduate Judge Pryor's presence on President Trump's shortlist might suggest a possible departure from the cultural homogeneity of recent appointees, though he was passed over in favor of Judge Gorsuch. See *id.*

75. See Adam Liptak, *Obama Has Chance to Select Justice with Varied Résumé*, N.Y. TIMES (May 1, 2009), <http://www.nytimes.com/2009/05/02/us/02assess.html>.

76. See *Souter, David Hackett*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/souter-david-hackett>. Justice Souter spent only five months on the First Circuit before his nomination to the Supreme Court. See *id.*; see generally Michael C. Dorf, *Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices 'Evolve' and Others Don't?*, 1 HARV. L. & P. REV. 45, 457 (2007) (“[A]n especially reliable predictor of whether a Republican nominee will be a steadfast conservative or evolve into a moderate or liberal [is] experience in the executive branch of the federal government. Those who lack such experience evolve; those who have it do not.”).

A. *The Promises of Federalism*

One way to reconcile the long-term ideology of the Supreme Court with the fluctuating politics of the nation is federalism. Federalism is the classic constitutional solution to reduce the costs of political contestation through policy decentralization.⁷⁷ Justice O'Connor, who like Justice Souter brought experience from multiple branches of state government to the bench, offered the Supreme Court's clearest articulation of this virtue: "[federalism] assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society."⁷⁸ Because its central virtue is the accommodation of political differences, its defenders span the ideological divide.⁷⁹ As Professor Steven Calabresi explains, "[t]here is *nothing* in the U.S. Constitution that is more important or that has done more to promote peace, prosperity, and freedom than the federal structure of that great document."⁸⁰ This is because federalism is designed, in Professor Michael McConnell's terms, to better "reflect the diversity of interests and preferences of individuals in different parts of the nation."⁸¹ Professor Akhil Amar agrees: "[S]tates can generate a wide range of legislative policies that can accommodate sharply divergent local needs and political preferences."⁸² Dean Erwin Chemerinsky recognizes how "[s]afeguarding community decisionmaking enhances diversity, as groups are allowed to decide their own nature and composition," and suggests how this primary value has been underemphasized in traditional accounts.⁸³

A new generation of scholars continues to elaborate this important theme of political accommodation through federalism. Leading this effort is Dean

77. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

78. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

79. See Jeffrey Rosen, *Federalism for the Left and Right*, WALL ST. J. (May 19, 2017), <http://www.wsj.com/articles/federalism-for-the-left-and-the-right-1495210904>; *infra* notes 80–90.

80. See Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 770 (1996).

81. See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987); see also John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 106 (2004) (stating that one of the key benefits of federalism is "the satisfaction of diverse local preferences").

82. See Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1236 (1994).

83. See Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 536 (1995).

Heather Gerken, who updates the argument for “second-order diversity” under various versions of federalism, and the ability of political minorities to dissent by deciding.⁸⁴ Professor Cristina Rodríguez identifies federalism’s value in negotiating political conflict by creating “multiple electorates—a design feature that channels the complexity of public opinion by creating varied political communities with institutional features that can serve as vehicles for the realization of multiple and contradictory preferences.”⁸⁵ Professor Ernest Young argues that “the need for federalism has radically *increased* as the world has become more diverse, complex, and interconnected,” particularly in politically fraught “scenarios of profound national division.”⁸⁶ Before President Obama appointed him to the First Circuit, Judge David Barron warned of the costs of national legislation that preempts state policy development, in terms of:

[C]utting off future outlets for social learning, reducing institutional mechanisms that pressure the government to remain dedicated to tackling underlying problems too fundamental to be solved in one fell national swoop, or shrinking the public space for the kinds of citizen participation and mobilization that are always the preconditions to meaningful social change.⁸⁷

These new voices ensure that the theoretical foundations of federalism will deepen as the Court further constructs its doctrine in the area.

Federalism also enjoys status as a central commitment of the current and

84. See Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1161 (2005) (“Second-order diversity avoids a push to the preferences of the median decisionmaker in every case. Because second-order diversity varies the composition of decisionmaking bodies, we would expect variation in democratic outputs as well. Some democratic outputs will reflect the views of those in the middle, while others will reflect the perspectives of those closer to the ends of the political spectrum.”).

85. Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2127 (2014).

86. See Ernest Young, *Federalism as a Constitutional Principle*, 83 U. CIN. L. REV. 1057, 1060–62 (2015) (“By giving groups that are out of power at the national level a chance to exercise power in a state, federalism protects liberty in a third way: by fostering political circulation. Democracies lose their freedom when a particular party or group secures a permanent lock on power . . . But in America, the out-party in Washington will always be running any number of states, and politicians from those states can run for national office on a record of actual governing experience and achievement.”).

87. David J. Barron, *Foreword: Blue State Federalism at the Crossroads*, 3 HARV. L. & POL’Y REV. 1, 5 (2009).

likely future Supreme Court majority, and possible supermajority. After Justice O'Connor articulated the federalism agenda,⁸⁸ Chief Justice Rehnquist led its most politically sensitive battles,⁸⁹ and Justice Scalia consolidated its historical and structural foundations,⁹⁰ the Roberts Court is following their lead. The leading example of its commitment is *The Health Care Cases*.⁹¹ A full seven members of the Court held that the Affordable Care Act's requirement that states expand Medicaid eligibility "runs contrary to our system of federalism" in an unprecedented limitation of the general welfare spending power with the anti-commandeering principle.⁹² Even the two dissenters invoked the "interests of federalism," which they argued "are better served when States retain a meaningful role in the implementation of a program of such importance."⁹³ Chief Justice Roberts' lone lead opinion on the Commerce Clause issue recognized, "[b]ecause the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed."⁹⁴ Four other Justices agreed, although they emphasized liberty rather than subsidiarity.⁹⁵

Justice Gorsuch's record is thin on federalism, and one commentator suggests "he does not show the same fervor about federalism as he does about separation of powers within the federal government."⁹⁶ Yet in at least two areas, preemption and the "dormant" commerce power, he took distinctive

88. See *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

89. See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

90. See *Printz v. United States*, 521 U.S. 898 (1997).

91. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

92. *Id.* at 575–85 (opinion of Roberts, C.J., joined by Breyer and Kagan, J.J.); see also *id.* at 689–90 (opinion of Scalia, Kennedy, Thomas, and Alito, J.J.) ("Seven Members of the Court agree that the Medicaid Expansion, as enacted by Congress, is unconstitutional.")

93. See *id.* at 630 (Ginsberg, J., joined by Sotomayor, J., dissenting).

94. See *id.* at 536.

95. See *id.* at 658 (opinion of Scalia, Kennedy, Thomas, and Alito, J.J.) ("[The individual mandate] gives such an expansive meaning to the Commerce Clause that *all* private conduct (including failure to act) becomes subject to federal control, effectively destroying the Constitution's division of governmental powers.")

96. See Kevin Russell, *Judge Gorsuch on Separation of Powers and Federalism*, SCOTUS BLOG (Mar. 15, 2017, 3:22 PM), <http://www.scotusblog.com/2017/03/judge-gorsuch-separation-powers-federalism/>.

pro-federalism positions as a judge on the Tenth Circuit Court of Appeals.⁹⁷ Early signs from the Supreme Court suggest Justice Gorsuch will be committed advocate of federalism. In an early dissent for himself and Justices Kennedy, Thomas, and Alito, Justice Gorsuch criticized the majority's opinion, which addressed a seemingly technical issue of tolling under federal pendent jurisdiction, for "no small intrusion on traditional state functions and no small departure from our foundational principles of federalism."⁹⁸ He concluded, "Maybe we've wandered so far from the idea of a federal government of limited and enumerated powers that we've begun to lose sight of what it looked like in the first place."⁹⁹ These words suggest a federalism agenda.

President Trump's pre-election list of twenty-one potential Supreme Court nominees, prepared with the help of the Federalist Society and Heritage Foundation, contains "committed judicial conservatives" who likely share the Court majority's commitment to federalism.¹⁰⁰ Notably, most of the potential nominees come from the states rather than Washington, D.C., with about half of the candidates drawn from state supreme courts, and relatively few carrying the Harvard or Yale degrees that have monopolized the Court.¹⁰¹

Federalism, therefore, offers a second-best solution for both conservatives who can settle for limiting federal power in Washington, and liberals who can settle for realizing progressive policies close to home, even if neither can impose a national political agenda. With a prospect of a conservative majority on the Supreme Court for decades, principled federalism may help the Justices navigate through the possibility of an emerging center-left electorate.¹⁰² Through federalism, a Court can police the constitutional structure without erecting road blocks in the way of sustained policy development.¹⁰³

97. See *Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088, 1094 (10th Cir. 2015) (applying a strong presumption against preemption to the Price-Anderson Act, and recognizing the presumption as "[a] duty that is only 'heightened' where (as here) the area of law in question is one of traditional state regulation like public health and safety" (citing *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 334 (2008))); *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir. 2015) (rejecting a dormant commerce clause challenge to a state's renewable energy mandate).

98. *Artis v. District of Columbia*, 138 S. Ct. 594, 608 (2018).

99. *Id.* at 617.

100. See Liptak, *supra* note 74.

101. See *id.*

102. See Ilya Somin, *Trump, Federal Power, and the Left—Why Liberals Should Help Make Federalism Great Again*, WASH. POST (Dec. 5, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/05/trump-federal-power-and-the-left-why-liberals-should-help-make-federalism-great-again/?utm_term=.89f1ea92379ff.

103. See *id.*

“Rather than foreclose democratic outlets, federalism rulings can be circumvented by both Congress and the states,” Professor Neal Devins explains, because “Congress can advance the same legislative agenda by making use of another source of federal power,” and interest groups “can also turn to the states to enact state versions of the very law that Congress could not enact.”¹⁰⁴

If federalism plays such a politically ameliorative role, it will not occur simply because political actors recognize the value of federalism as such. For these purposes, “federalism,” the lawyerly rules of the political game, may be distinguished from politically charged slogans like “states’ rights.”¹⁰⁵ The latter, while highly salient with the public, often arise in individual rights issues (e.g., race or abortion) that do not present the difficult structural judgments where the states could best inform the Court.¹⁰⁶ Unlike hotly contested and often abstract debates over constitutional liberties, the structural technicalities of federalism doctrine do not matter much to the electorate at large.

For these purposes, that is federalism’s strength.¹⁰⁷ “[T]he Court’s federalism decisions had no observable effect on public opinion,” according to Professor Nathaniel Persily, because “[t]hey are simply too complex and obscure to have altered the flimsy beliefs that most people have on the relevant issues.”¹⁰⁸ The President and the Senate have their own agendas, and have little reason to pay more than lip service to limitations on their own federal power.¹⁰⁹ The political branches may even embrace such limits to avoid accountability.¹¹⁰ As Professor William Marshall observed near the peak of the

104. Neal Devins, *Congress and Judicial Supremacy*, in *THE POLITICS OF JUDICIAL INDEPENDENCE: COURTS, POLITICS, AND THE PUBLIC* 65 (Bruce Peabody ed., 2011).

105. See generally Ernest A. Young, Symposium, *Two Cheers for Process Federalism*, 46 *VILL. L. REV.* 1349, 1351, 1353–55 (2001) (discussing “an ‘ideal’ theory of federalism, derived from some basic structural imperatives in the Federalist Papers,” which involves judicial review of both constitutional structure and individual rights).

106. See generally *id.* at 1353–55 (discussing an ideal federalism doctrine theory in which the judiciary reviews “polic[es] and maintain[s] the system of political and institutional checks,” and is not focused solely on individual rights cases).

107. See *infra* text accompanying note 108.

108. See Persily, *supra* note 19, at 10.

109. See Devins, *supra* note 104 (“For example, even though the Rehnquist Court invalidated more federal statutes than any other Supreme Court, Congress did not see the Court’s federalism revival as a fundamental challenge to congressional power. Lawmakers instead preferred to appeal to their bases by speaking out on divisive social issues—launching rhetorical attacks against lower federal courts and state courts.”).

110. See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUDIES IN AM. POL. DEV.* 35, 43 (1993) (“[M]ainstream politicians may facilitate judicial policy-making in part because they have good reason to believe that the courts will announce those policies

Court's "new federalism" agenda, "the protection of the states through the political processes in Washington is dead, or if not dead, is seriously ill."¹¹¹ Precisely because federalism is a low salience issue among the electorate and federal political elites, yet remains consistent with the Justices' jurisprudence, it may offer the Court a powerful tool to accommodate political conflict without risk to the Court of falling victim to the conflict.¹¹² In other words, in the current political culture, not only does federalism need the Court,¹¹³ but the Court needs federalism, too.

B. *The Perils of Getting Federalism Right*

The problem is, federalism is tricky. Federalism can be hard to apply in a principled manner because it poses value-laden questions that tug at the Court's ideological and institutional biases. Federalism arguments are structural arguments, with few clear anchors in constitutional text or practice. As Professor Charles Black observed of *McCulloch v. Maryland*,¹¹⁴ Chief Justice Marshall's opinion on the state tax issue "has to do in great part with what he conceives to be the warranted relational proprieties between the national government and the government of the states, with the structural corollaries of national supremacy."¹¹⁵ The textual locus of federalism, the Tenth Amendment,¹¹⁶ "states but a truism that all is retained which has not been surrendered."¹¹⁷ No less a textualist than Justice Scalia observed when discerning federalism's anti-commandeering rule in *Printz v. United States*, "[b]ecause

they privately favor but cannot openly endorse without endangering their political support.").

111. See William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139, 144 (1998).

112. Consider a couple of highly technical cases that significantly advanced state sovereignty, and associated federalism values, in regulatory and taxing spheres with low-profile but broad bi-partisan support from the states. See, e.g., *Mississippi ex rel. Hood v. AU Optronics*, 134 S.Ct. 736 (2014) (holding a state enforcement action is not a "mass action" removable to federal court under the Class Action Fairness Act of 2005); *Czyzewski v. Jevic Holding Corp.*, 137 S.Ct. 973 (2017) (holding a bankruptcy court must follow ordinary priority rules, including the special priority of state tax claims, in structured dismissals under Chapter 11).

113. See Marshall, *supra* note 111, at 154 ("In this climate, judicial intervention is necessary if the values of federalism are to be meaningfully protected.").

114. 17 U.S. 316 (1819).

115. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 15 (1969).

116. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

117. See *United States v. Darby*, 312 U.S. 100, 124 (1941).

there is no constitutional text speaking to this precise question, the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”¹¹⁸ Appeals to the structure of the Constitution, Professor Philip Bobbitt explains, “are largely factless and depend on deceptively simple logical moves from the entire Constitutional text rather than from one of its parts . . . [t]hey embody a macroscopic prudentialism drawing not on the peculiar facts of the case but rather arising from general assertions about power and social choice.”¹¹⁹

Take just a few examples of questions posed by current doctrine. What kinds of activities are sufficiently economic or substantially affect interstate commerce,¹²⁰ and how does a tradition of state regulation in the area matter?¹²¹ What is necessary to the federal regulation of interstate commerce,¹²² and what is or is not proper to the same?¹²³ How does the Constitution protect the free flow of interstate commerce in the absence of Congressional action, if at all?¹²⁴ How broadly does federal law expressly, or can federal law impliedly, preempt state law?¹²⁵ What is the scope of state sovereign immunity,¹²⁶ and what kind of congruence and proportionality is required between a federal civil rights law abrogating that immunity and the state injury it remedies?¹²⁷ Under what conditions may the federal government require states to enact or administer federal policy in exchange for funding,¹²⁸ and when does persuasion give way to coercion?¹²⁹ What exactly is commandeering (or economic dragooning), anyway?¹³⁰

Beyond federalism proper, the determination of liberty interests under substantive due process doctrine has long drawn on state law and practice.¹³¹

118. See 521 U.S. 898, 905 (1997).

119. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 74 (1984).

120. See *United States v. Lopez*, 514 U.S. 549, 559 (1995).

121. See *United States v. Morrison*, 529 U.S. 598, 615–17 (2000).

122. See *Gonzales v. Raich*, 545 U.S. 1, 5 (2005).

123. See *Nat’l Fed’n Indep. Bus. v. Sebelius*, 567 U.S. 519, 559, 572 (2012).

124. See *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338–39 (2008).

125. See *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

126. See *Seminole Tribe v. Florida*, 517 U.S. 44, 54–55 (1996).

127. See *Tennessee v. Lane*, 541 U.S. 509, 520 (2004).

128. See *South Dakota v. Dole*, 483 U.S. 203, 205–08 (1987).

129. See *Nat’l Fed’n Indep. Bus. v. Sebelius*, 567 U.S. 519, 582 (2012).

130. See *Printz v. United States*, 521 U.S. 898, 913–14 (1997); cf. *Sebelius*, 567 U.S. at 581–82.

131. See *Lawrence v. Texas*, 539 U.S. 558, 570–71 (2003) (counting states that abolished sodomy laws).

As the second Justice Harlan recognized, this practice also demands sensitivity to state interests, state autonomy, and any emerging state consensus: “the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.”¹³² Professors Adam Pritchard and Todd Zywicki argue state-based “[t]radition can provide a source of knowledge on which to base constitutional judgments broader than the ephemeral and limited wisdom of a legislative body or nine Supreme Court Justices.”¹³³ Professor Akhil Amar similarly asks the Supreme Court to incorporate into its constitutional deliberations the values expressed in state constitutions as “deeper and more considered judgments of the people themselves.”¹³⁴

These questions would be tough enough without the institutional loyalty and ideological biases that work against the principled resolution of federalism questions.¹³⁵ Despite some Justices’ apparent commitments to federalism, the Court’s federal institutional bias tends toward centralization (including stronger enforcement of federal rights against states) and away from state autonomy (including weaker enforcement of limits on federal powers).¹³⁶ This bias includes the Justices’ physical situation within the political culture of Washington, D.C., during and almost always at some point before their appointments.¹³⁷ Federal executive branch service has become the preferred proxy for ideological sympathy with the appointing president.¹³⁸ Although they tend not to articulate their views of federalism in jurisprudential terms,

132. See *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

133. Adam C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition’s Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 520 (1999) (“Common law and state constitutional law are the products of a decentralized evolutionary process rooted in community preferences; as a result, the rules that develop will tend to be efficient, unanimity-reinforcing principles, reflecting the expectations of the individuals residing in a given community.”).

134. See Akhil Reed Amar, *Foreword: Lord Camden Meets Federalism—Using State Constitutions to Counter Federal Abuses*, 27 RUTGERS L.J. 845, 861 (1996).

135. See *infra* notes 136–43 and accompanying text. In a related trend, Judge (and former Ohio State Solicitor) Jeffrey Sutton and Brittany Jones find “a material preference for federal cases over state court cases over the last dozen years,” potentially driven by similar institutional biases toward federal courts. Jeffrey Sutton & Brittany Jones, *The Certiorari Process & State Court Decisions*, 131 Harv. L. Rev. F. (forthcoming 2018).

136. See Ilya Somin, *The Impact of Judicial Review on American Federalism: Promoting Centralization More than State Autonomy*, in *COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS?* 440, 477–80 (Nicholas Aroney & John Kincaid eds., 2017).

137. See Barton, *supra* note 53.

138. See Dorf, *supra* note 76.

Senators from both parties understandably are jealous of their national policymaking powers in confirming Justices.¹³⁹

What is worse, federalism easily takes on ideological valences that exacerbate rather than mitigate political polarization.¹⁴⁰ Deregulatory commitments to broad readings of implied preemption or dormant commerce power expanding federal authority, for example, might be paired uneasily with narrow readings of express powers limiting federal authority over commerce and civil rights (or vice versa).¹⁴¹ Professor Richard Hasen concludes that Justice Scalia, in federalism cases and elsewhere, “purported to advocate a completely neutral approach that would lift the Court above the realm of politics, but his inconsistency in applying it and his intense partisanship inside and outside the Court tended to drag the institution into the muck.”¹⁴² A broader

139. See, e.g., Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, 109th Cong. 158, at 3 (2005) (statement of Sen. Specter) (“I am concerned about what I bluntly say is the denigration by the Court of Congressional authority.”); *id.* at 5 (statement of Sen. Leahy) (“When we discuss the Constitution’s Commerce Clause or Spending Power, for example, we are asking about Congressional authority to pass laws to ensure clean air and water and children’s and seniors’ health, safe food and drugs, safe work places, even wetland protection and levees that should protect our communities from natural disasters.”); *id.* at 25 (statement of Sen. DeWine) (“Many Americans are concerned when they see the Court strike down laws protecting the aged, the disabled and women who are the victims of violence . . . I must tell you, Judge, I too am concerned. Judges are not members of Congress. They are not elected.”).

140. See JAY E. AUSTIN ET AL., *REDEFINING FEDERALISM: LISTENING TO STATES IN SHAPING “OUR FEDERALISM”* 4–5 (Douglas T. Kendall ed., 2004) (identifying an ideological form of “libertarian federalism,” that “has contributed to the polarization around this issue both on the Court (most federalism cases have been the same five Justices in the majority and the same four Justices in dissent) and around the country”).

141. See, e.g., Michael S. Greve et al., *Preemption in the Rehnquist and Roberts Courts: An Empirical Analysis*, 23 SUP. CT. ECON. REV. 353, 379 (2015) (finding the late Rehnquist Court “proved more inclined to find federal preemption, largely because pro-preemption sentiments hardened among the conservative justices”). “[O]ver time and especially under the Roberts Court, lawyerly preemption questions have assumed a distinctly ideological flavor.” *Id.* at 385. Counter to federalism stereotypes, the liberal Justices are uniformly more likely to vote against preemption than the conservative Justices, although within the conservative block and in unanimous cases, doctrinal rather than ideological factors appear to predominate. See *id.* at 381–85; see also Gregory M. Dickinson, *An Empirical Study of Obstacle Preemption in the Supreme Court*, 89 NEB. L. REV. 682, 707–08 (2011) (“[W]hile the Court’s preemption decisions considered in the aggregate may fall generally along ideological lines, predictive models based solely on judicial ideology miss an important determinant of legal decisions: doctrinal disputes among the Justices.”).

142. See RICHARD L. HASEN, *THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION* xii (2018). The contradictions include Justice Scalia’s federalism jurisprudence. See *id.* at 134–37 (discussing as examples *Bush v. Gore*, 531 U.S. 98 (2000) and *Gonzales v. Raich*, 545 U.S. 1 (2005)).

study by Professor Christopher Parker found that the Justices' substantive ideological commitments to policy override their structural ideological commitments to federalism, as "Justices are more strongly influenced by their beliefs regarding the specific policies at hand than they are by their principles regarding the proper structure of government authority."¹⁴³

If doctrinal rigor can counter this attitudinal bias, states will need to help. As Douglas Kendall wrote more than a decade ago, "[t]he Court will have to sort out this tangled doctrine in cases," and states can offer a non-ideological "outline of a federalism jurisprudence that is neither controversial nor chaotic, a vision of federalism as a neutral principle."¹⁴⁴ The Court, Kendall then hoped, would take a path "moving toward federalism as a neutral principle, and away from federalism as a political weapon."¹⁴⁵ Some recent cases signal a broadening ideological appeal of federalism on the Court.¹⁴⁶ That ideological breadth safeguards the Court as well as our national politics.

IV. A SOLUTION FROM THE STATES

Today's Supreme Court, within its narrow band of elite federal experience, needs help in making the value-laden prudential judgments that principled federalism demands.¹⁴⁷ The equally elite Washington D.C. advocacy and

143. See Christopher M. Parker, *Ideological Voting in Supreme Court Federalism Cases, 1953–2007*, 32 THE JUST. SYS. J. 206, 230 (2011) (finding that "liberal justices will be more likely to support states' rights when the state policy is liberal, while conservative justices will increase their support for the federal government when the state policy is liberal"); see also Brady Baybeck & William Lowry, *Federalism Outcomes and Ideological Preferences: The U.S. Supreme Court and Preemption Cases*, 30 PUBLIUS: J. FEDERALISM 73, 96–97 (2000) ("Thus, counter to conventional wisdom, conservative justices often vote for national preemption; liberal justices often vote for states' rights; national preemption rulings may actually generate conservative outcomes; and decisions favoring states' rights may actually produce liberal results.").

144. See AUSTIN ET AL., *supra* note 140, at 137.

145. See *id.* at 5.

146. See Ilya Somin, *Federalism and the Roberts Court*, 46 PUBLIUS: J. FEDERALISM 1, 15 (2016) ("[T]here is a deep ideological division over judicial review of federalism in both the legal and political elite, and society more generally. That division is unlikely to disappear for some time to come. At the same time, it is clear that the left–right theory cannot account for several important developments in the Roberts Court's federalism cases, most notably the willingness of liberal justices to endorse limits on federal power in a number of key cases . . .").

147. See Chemerinsky, *supra* note 83, at 501 ("I believe that of all the areas of constitutional law, discussions about federalism are the ones where the underlying values are least discussed and are the most disconnected from the legal doctrines.").

amicus bar is not well positioned to fill the blind spot.¹⁴⁸ Nor is the United States, through the Solicitor General's office, which is duty bound to take sides on federalism questions.¹⁴⁹ There is one group of lawyers specially situated to help the Court develop a workable federalism faithful to the Constitution: the state attorneys general. If the primary virtue of federalism in these politically polarized times is the accommodation of diverse policy preferences in the states, then attorneys general are uniquely qualified to give voice to those preferences in federalism litigation.¹⁵⁰

Attorneys general are well-established members of the Supreme Court bar, both as counsel for states as parties in a substantial share of the Court's criminal and civil rights docket, and also as a steadily increasing presence as amici curiae.¹⁵¹ The Supreme Court first allowed state lawyers to represent state interests in the nineteenth century, and by the 1880s "the Court began to grant leave directly to state counsel to vindicate state rights."¹⁵² By the 1910s, the National Association of Attorneys General (NAAG) and groups of attorneys general started to appear in cases as amici curiae.¹⁵³

These early efforts met with mixed success, and filings of amicus briefs remained relatively rare until the middle of the twentieth century.¹⁵⁴ Amicus

148. See Larsen & Devins, *supra* note 65, at 1915–19.

149. See Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2113 (2015) (characterizing the supportive oath as "something that the Constitution requires of all state officers," and a "federal constitutional duty to concede the invalidity of state laws," noting that a "broad reading of the supportive oath would require all federal executives, including . . . the Solicitor General, to concede that the Constitution trumps a federal statute or treaty whenever they have personally concluded that the latter was more-likely-than-not inconsistent with the Constitution").

150. See *supra* notes 77–79 and accompanying text. Cities have the potential to give voice to diverse urban interests at the Court, too. See Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 1, 36 (2012) (arguing "that including local public entities in constitutional debates may serve to strengthen those debates, along with the efficacy of local governments and local public law offices"). Unlike states, however, cities lack an express role in the constitutional structure, and do not comprehensively represent the nation—many Americans do not live in cities, but nearly all Americans live in a state. See *id.* at 43; see also U.S. Cities are Home to 62.7 Percent of the U.S. Population, but Comprise Just 3.5 Percent of Land Area, UNITED STATES CENSUS BUREAU (Mar. 4, 2015), <https://www.census.gov/newsroom/press-releases/2015/cb15-33.html>.

151. See generally Dan Schweitzer, "The Supreme Court of the United States", in STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES (Emily Meyers, ed., 3d ed. 2013).

152. See Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 702 (1963).

153. See *id.* at 706.

154. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the*

appearances by the states and other interested organizations, notably the ACLU and AFL-CIO, as well as the Solicitor General of the United States, steadily increased until, as Professors Joseph Kearney and Thomas Merrill find, “cases without amicus briefs have become nearly as rare as cases with amicus briefs were at the beginning of the century.”¹⁵⁵ At mid-century, the states struggled in their encounters with the Warren Court, winning a little more than one-third of the cases in which they appeared from 1954 to 1970, but from 1970 to 1989 the states’ side prevailed in more than half of the cases in which states appeared.¹⁵⁶ Today, attorneys general appear before the Supreme Court on behalf of states more often, and prevail in a higher percentage of their cases, than any other advocacy group, save the United States.¹⁵⁷

The states’ turnaround can be traced to 1982.¹⁵⁸ After sharp criticism from the Court about the poor quality of state lawyering, attorneys general developed a Supreme Court advocacy project within NAAG, which monitored, coordinated, and improved state advocacy in the Supreme Court.¹⁵⁹ The move coincided with the low point of judicially enforced federalism in *Garcia v. San Antonio Metropolitan Transit Authority*.¹⁶⁰ Justice Scalia noted how early in his tenure, before professionalization of state appellate advocacy, states at the Court “were throwing away important points of law, not just for their state, but for the other 49.”¹⁶¹ Douglas Ross, founder of the NAAG Supreme Court Project, called for more effective state voices at the Court.¹⁶²

Supreme Court, 148 U. PA. L. REV. 743, 744 (2000).

155. *See id.* at 744, 753 n.25 (“[T]he States filed amicus briefs in 4.13%, 5.11%, 12.64%, 19.47%, and 29.64% of all cases (for a total of 14.51%).”); Richard C. Kearney & Reginald S. Sheehan, *Supreme Court Decision Making: The Impact of Court Composition on State and Local Government Litigation*, 54 J. POL. 1008, 1011 (1992) (finding state and local government appearances “have trended upward, from a low of 20 cases in 1955 to a high of nearly 140 cases in 1986”); ERIC N. WALTENBURG & BILL SWINFORD, LITIGATING FEDERALISM: THE STATES BEFORE THE U.S. SUPREME COURT 62 (1999) (“[T]here has been an appreciable increase in state participation before the Court as [petitioners]—more than one case per term” from 1954 to 1989).

156. *See* WALTENBURG & SWINFORD, *supra* note 155, at 107.

157. *See* Schweitzer, *supra* note 151, at 405; *see also* WALTENBURG & SWINFORD, *supra* note 155, at 77.

158. *See* Douglas Ross, *Safeguarding Our Federalism: Lessons for the States from the Supreme Court*, 45 PUB. ADMIN. REV. 723, 727 (1985).

159. *See id.*

160. 469 U.S. 528 (1985); *see* Ross, *supra* note 158, at 726–27.

161. *See* Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 6, 2013, at 12, 2013 WLNR 25103681.

162. *See* Ross, *supra* note 158, at 730.

“Just as advocacy organizations, such as the American Civil Liberties Union, the NAACP Legal Defense Fund, and even the solicitor general’s office, are effective watchdogs for their clients’ interests at the court, so the states should have guardians of their interests on watch,” Ross argued, “[t]o maximize the effectiveness of the states’ role in making ‘Our Federalism’ a reality.”¹⁶³

The initiative worked by cultivating the development of appellate experts in attorney general offices modeled after the Solicitor General of the United States.¹⁶⁴ Now, thirty-nine states have such offices, and another seven states have similar appellate experts serving the attorney general.¹⁶⁵ These lawyers form an “outside the beltway” elite of “highly credentialed attorneys.”¹⁶⁶ More than half of them attended elite law schools, nearly forty percent clerked on federal courts of appeals, and nearly one in five clerked on the Supreme Court.¹⁶⁷ Unlike their elite counterparts in the Washington, D.C. bar, however, they also bring significant geographic and demographic diversity from offices spread across the states.¹⁶⁸ Professor David Fontana explains how such geographically decentralized offices can increase the accountability and competence of officials by “expos[ing] them to more argument pools and . . . plac[ing] them in different reputational networks.”¹⁶⁹ Even among officials within the same party, “[e]mpowering decentralized officials . . . can generate cross-cutting ideological pressures across and within the branches regardless of whether the branches are controlled by the same parties or different parties.”¹⁷⁰ These positive effects of decentralization, which Professor Fontana identifies within the federal government, would be amplified among the state attorneys general, assuming their coordination does not become a

163. *Id.*

164. *See generally* James R. Layton, *The Evolving Role of the State Solicitor: Toward the Federal Model?*, 3 J. APP. PRAC. & PROCESS 533 (2001) (discussing how a state solicitor’s role and function closely mirrors that of the U.S. Solicitor General).

165. *See* Memorandum from Dan Schweitzer, States with Solicitors General, (March 2017) (memorandum on file with author).

166. *See* Lazarus, *supra* note 63, at 1501.

167. *See* Greg Goelzhauser & Nicole Vouvalis, *State Coordinating Institutions and Agenda Setting on the U.S. Supreme Court*, 41 AM. POL. RES. 819, 823 (2012).

168. *See infra* text accompanying notes 169–71. For example, in 1996 nearly half of attorneys representing states were women, while 90% of attorneys representing other parties were male. *See* Layton, *supra* note 164, at 533 n.1.

169. *See* David Fontana, *Federal Decentralization*, 103 VA. L. REV. (forthcoming 2018) (manuscript at 40), available at <https://ssrn.com/abstract=3029180>.

170. *Id.*

channel for centralization along partisan or other lines.¹⁷¹

A. *How States Can Give Voice to Federalism*

States succeed at the Supreme Court because the Court pays attention to the states.¹⁷² Even when states “were not generally regarded for their outstanding legal expertise,” according to a survey of Supreme Court clerks by Professor Kelly Lynch, “the Court’s concern for the states as an integral component of the American system of government” merits the Court’s consideration of state amicus briefs.¹⁷³ Unlike most amici curiae, the number of states on a brief matters to the Court, suggesting attorneys general play a quasi-representative role.¹⁷⁴ In another survey, a Justice noted that the number of amici curiae is generally of little or no consequence, “unless it is from many of the states.”¹⁷⁵ Especially at the petition stage, these briefs “often emphasize how granting a particular case will reduce uncertainty and better allow the states to address important policy issues.”¹⁷⁶ The current Court is highly receptive to these arguments, granting certiorari in nearly half of cases supported by state amicus briefs, compared to less than one in twenty petitions filed by other

171. See *id.*; see also Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1097 n.69 (2014) (noting that the states can have divided governments—an attorney general and a governor from different parties—but unified party governments are more prevalent).

172. See Schweitzer, *supra* note 151, at 407–08.

173. See Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 48 (2004).

174. See Sean Nicholson-Crotty, *State Merit Amicus Participation and Federalism Outcomes in the U.S. Supreme Court*, 37 PUBLIUS: J. FEDERALISM 599, 609 (2007) (stating that “participation is associated with a significant and substantive increase in support for state power by the Court, at least when states act together by filing numerous briefs or cosigning individual briefs advocating that outcome”); see also Cornell W. Clayton & Jack McGuire, *State Litigation Strategies and Policymaking in the U.S. Supreme Court*, 11 KAN. J.L. & PUB. POL’Y 17, 30 (2001) (“NAAG’s coalitional strategy appears to have been effective at improving state levels of success during the mid- and late 1980s.”); Douglas Ross & Michael W. Catalano, *How State and Local Governments Fared in the United States Supreme Court for the Past Five Terms*, 20 URB. LAW. 341, 347 (1988) (finding that over five years of criminal procedure cases (1982–1986), state litigants are more likely to win when other states filed amicus briefs supporting their position on the merits); Thomas R. Morris, *States Before the U.S. Supreme Court: State Attorneys General as Amicus Curiae*, 70 JUDICATURE 298, 305 (1987) (“Increased coordination of state amicus activity as part of an overall effort to improve state advocacy has apparently been successful in increasing state participation.”).

175. See Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 689 n.89 (2008).

176. Goelzhauser & Vouvalis, *supra* note 167, at 824.

lawyers.¹⁷⁷

As one may expect, the states' voices are most prominent, and most effective, in federalism cases. As a law clerk noted, "there is an institutional interest in taking state concerns seriously because of federalism concerns."¹⁷⁸ Professors Margaret Lemos and Kevin Quinn explain, "state AG briefs can, at a minimum, serve a signaling function for the Court, alerting the Justices to federal laws and regulations (or, in the case of the dormant Commerce Clause, other states' laws) that trench on important state interests."¹⁷⁹ Even before the rise of the New Federalism in the 1990s, more than ninety percent of state amicus briefs supported state power.¹⁸⁰ Conversely, when states are conflicted or uniformly oppose a federalism-based claim during the same period, Professor Nicholson-Crotty finds "the Court's ruling always favors nationalization."¹⁸¹

It is no surprise that states' fortunes improved at the Supreme Court with the appointment of Justices more friendly to federalism, though the mechanism is complicated.¹⁸² States are both recognizing and reinforcing the pro-federalism trend at the Court.¹⁸³ Professors Waltenburg and Swinford suggest "presidential appointments, state litigation proficiency, Court decisions, and state litigation actions form an interrelated causal structure wherein a force producing a change in one element will reverberate through the whole system."¹⁸⁴ While the ideological trend of the Justices accounts for part of the

177. See Schweitzer, *supra* note 151, at 407–08.

178. Lynch, *supra* note 173, at 48.

179. Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. REV. 1229, 1233 (2015).

180. See Nicholson-Crotty, *supra* note 174, at 604.

181. See *id.* at 609.

182. See Paul Chen, *The Institutional Sources of State Success in Federalism Litigation Before the Supreme Court*, 25 LAW & POL'Y 455, 466 (2003) (noting how the appointment of conservative Justices has helped state policy interests); see also WALTENBURG & SWINFORD, *supra* note 155.

183. See Chen, *supra* note 182 ("The Court's federalism decisions are important . . . because they are legal precedents that may be invoked to effect a fundamental restructuring of the current balance of power between the federal government and the states . . . [t]herefore, state political and legal actors . . . will have an incentive to continue litigating cases that they think will advance their policy interests."); Brandon D. Harper, *The Effectiveness of State-Filed Amicus Briefs at the United States Supreme Court*, 16 U. PA. J. CONST. L. 1503, 1509 (2014) ("Given the increasing research on the effectiveness of amicus briefs, it is no surprise that states are becoming more involved.").

184. See WALTENBURG & SWINFORD, *supra* note 155; see also Harper, *supra* note 183, at 1521 (suggesting three mechanisms of increased state influence: "First, the Court may rely more heavily on state-filed briefs because the attorneys general are seen as experts on the legal issues affecting their states, and collective statements of a large number of attorneys general may weigh in favor of a closer

reemergence of judicially enforced federalism over the past three decades, the states themselves are responsible for catalyzing that trend. Professor Paul Chen observes, “the recent federalism decisions are more likely the product of litigation sustained over many cases and spanning a period of time rather than simply the pro-state Justices on the Court reaching out to decide particular cases to advance their pro-state policy preferences.”¹⁸⁵

There remain blind spots, however, in the Court’s approach to federalism, and the states offer the Court a credible and politically legitimate source of arguments to help it get federalism right.¹⁸⁶ At about the time the dissenters in *Garcia* lamented the majority’s fallback on the political safeguards of federalism, “rejecting the role of the judiciary in protecting the States from federal overreaching,”¹⁸⁷ the state attorneys general were developing a hybrid model of federalism enforcement. Dean Erwin Chemerinsky recognized early in the New Federalism movement that political safeguards of state interests can find expression through the judicial process, where “advocates before a court may argue the importance of states’ interests as a consideration in judicial decisionmaking.”¹⁸⁸ In *Garcia*, the dissenters complained:

The adoption of the Seventeenth Amendment (providing for direct election of Senators), the weakening of political parties on the local level, and the rise of national media, among other things, have made Congress increasingly less representative of state and local interests, and more likely to be responsive to the demands of various national

analysis of their arguments. Second, the Court may be more concerned with the broader implications of its rulings now that there are more perspectives in the room. Finally, that the Court is relying more on state-filed briefs may be a self-fulfilling prophecy. That is, state attorneys general are more successful because they are more frequent litigants”).

185. Chen, *supra* note 182, at 466; *see also id.* at 458 (“These changes themselves are the product of broader developments in the American political regime, and include the following: (1) the diminishing effectiveness of the states’ lobbying power in the federal policymaking arena over the last three decades; (2) the increasing effectiveness of litigation by states’ attorneys general (SAGs) in the federal judicial arena because of increased skill, funding, and coordination of litigation strategies among SAGs; and (3) the convergence of these changes resulting in a pro-state agenda on the Supreme Court.”).

186. *See AUSTIN ET AL.*, *supra* note 140, at 63 (“The Court errs, according to the states, when it inappropriately concludes that to protect the states it must limit the ability of the federal government to play a role in addressing national problems. The Court errs even more seriously in ignoring the states’ pleas for reform of judicial doctrines under the Supremacy Clause and the dormant Commerce Clause that inappropriately limit state experimentation.”).

187. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 567 (1985) (Powell, J., dissenting).

188. *See Chemerinsky, supra* note 83, at 510.

constituencies.¹⁸⁹

Yet popularly elected attorneys general appearing in the Supreme Court, sworn to uphold their state constitutions as members of state government, can serve as an imperfect analogy to legislatively elected Senators appearing in Congress before the Seventeenth Amendment.¹⁹⁰ The attorneys general offer a distinct voice to state interests in Court, and the Court is ready to listen.¹⁹¹

Attorneys general are uniquely positioned to advance federalism arguments that bridge the distance between the Justices and the people in the states.¹⁹² All but seven attorneys general are elected separately from the governor and other state executive officers.¹⁹³ They owe legal and political duties to the state as a client and to their constituencies, respectively.¹⁹⁴ Professor Elizabeth Weeks Leonard explains that, in the context of health care reform, state officials are institutionally oriented to “[f]ram[e] objections to substantive policies in terms of states’ rights, even when state interests seemingly are not implicated,” and “vocalize[] constituents’ views on the merits of the new federal law.”¹⁹⁵ The legal process can mitigate political pressures, for example, because attorneys general “appoint as state solicitors those on whom they can rely not for political guidance, but for reasoned legal advice pertinent to appeals,” which can “counteract the political pressures often felt by attorneys general when they make appellate decisions.”¹⁹⁶

Politics has had its place in the rise of the attorneys general at the Supreme Court, of course. Substantive ideological commitments, typically marked by party affiliation, run across state lines. This is particularly likely to occur in the relatively low-cost decision to join amicus briefs initiated by other

189. *Garcia*, 469 U.S. at 565 n.9.

190. See generally Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525 (1994) (discussing the role of state attorneys general as national policymakers).

191. See *id.* at 529.

192. See *id.* at 531–33.

193. See *id.* at 530. Forty-three states elect the attorney general. *Id.* The governor appoints the attorney general in Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming. *Id.* The legislature appoints the attorney general in Maine, and the state supreme court appoints the attorney general in Tennessee. *Id.*; see also STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES (Emily Meyers, ed., 3d ed. 2013).

194. See Clayton, *supra* note 190, at 530.

195. Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 165 (2010).

196. See Layton, *supra* note 164, at 550–51.

states.¹⁹⁷ In criminal procedure cases from 1970 through 2009, for example, Professors Shane Gleason and Colin Provost found institutional resources dominated a state's decision to initiate amicus briefs, while partisanship played a limited role in a state's decision to join another state's amicus brief, with Republicans predictably siding with law enforcement more than Democrats.¹⁹⁸ Sometimes, states break from the expected "pro-state" position due to broader ideological commitments.¹⁹⁹ A notable early example is Minnesota Attorney General (and later Senator, Vice President, and Ambassador) Walter Mondale's amicus brief joined by twenty-two states on the side of the petitioner, and against their sister state Florida, in *Gideon v. Wainwright*.²⁰⁰ Traditionally, however, these cross-cutting commitments (whether partisan or ideological) did not usually find expression in state attorney general briefs.²⁰¹ Instead, until recently states sat out of "such controversial areas as race and sex discrimination, abortion, freedom of speech and press, and church-state relations."²⁰²

In most cases, institutional loyalty to state interests plays an important role in Supreme Court advocacy.²⁰³ In a thorough study of attorney general behavior before the Supreme Court, Professors Margaret Lemos and Kevin Quinn find "AGs are asserting a variety of interests on behalf of their states—not just the abstract institutional interests typically at issue in debates over federalism, but a range of regulatory interests as well."²⁰⁴ The office of the

197. See Clayton, *supra* note 190, at 544 ("Unlike when states are party to a suit, the decision to participate as *amicus curiae* is determined largely by the personal interests and felt political pressures on individual attorneys general. Changes in the institutional role of the office should therefore be reflected by trends in state *amicus* activity.").

198. See Shane A. Gleason & Colin Provost, *Representing the States Before the U.S. Supreme Court: State Amicus Brief Participation, the Policy-making Environment, and the Fourth Amendment*, 46 PUBLIUS: J. FEDERALISM 248, 267–70 (2016); see also, Colin Provost, *An Integrated Model of U.S. State Attorney General Behavior in Multi-State Litigation*, 10 STATE POLITICS & POL'Y Q. 1, 4 (2010) (finding, in study of state consumer protection litigation, that "electoral factors might matter more than factors related to the public interest").

199. See Clayton, *supra* note 190, at 544.

200. 372 U.S. 335 (1963); see also Morris, *supra* note 174, at 300.

201. See Morris, *supra* note 174, at 302.

202. See *id.* at 303.

203. Cf. David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 11 (2018) ("Our focus on these inter-branch relations means we must sideline the related but distinct question of federalism as a cockpit in which institutional loyalty also plays a potentially salient function.").

204. Lemos & Quinn, *supra* note 179, at 1247.

attorney general is designed to express those interests through legal advocacy that channels partisan motivations.²⁰⁵ As lawyers with a duty to the state's overall policy agenda, attorneys general must discern that agenda in the complicated ideological commitments of its electorate as filtered through the state's constitution and laws,²⁰⁶ as well as broader economic and social interests.²⁰⁷ Attorneys general, particularly elected attorneys general, enjoy substantial political latitude to determine their states' interests in Supreme Court amicus briefing, independent of state political elites including interest groups and other elected officials.²⁰⁸ Professors Lemos and Quinn find "not just that partisanship does not provide a *full* explanation—i.e., that AG behavior is consistent with partisan motivations," but "in the sizeable group of cases in which AG coalitions are bipartisan, it appears that some AGs are acting *contrary* to partisan motivations."²⁰⁹

Even where politics predominates, partisan contestation can ensure states provide diverse perspectives on the issues before the Supreme Court.²¹⁰ Professors Lemos and Quinn find "Democrat and Republican AGs alike seem to seek out cases in which they are not forced to choose between their preferred policy outcomes and the long-term institutional prerogatives of the states they represent."²¹¹ Moreover, it is a fallacy of composition to suppose that partisanship at the state level necessarily amounts to partisanship at the national

205. *See id.* at 1265–66 ("Different officials may experience partisan motivations in different ways, and those motivations may or may not be counterbalanced by the competing imperatives of the officials' institutional roles and professional commitments . . . [T]he fact that AGs are *legal advocates* may play a role in explaining [nonpartisan behavior in joining amicus briefs]."); *see also* Harper, *supra* note 183, at 1516 (identifying attorney general motivations as "1) a genuine interest to affect the law of federalism; 2) a desire to affect the outcomes of cases even where the state is not directly involved in the case or controversy or is unable or unwilling to bear the expense of litigating as a party; or 3) politics").

206. *See* Devins & Prakash, *supra* note 149, at 2153.

207. *See, e.g.,* WALTEBURG & SWINFORD, *supra* note 155, at 72–73 (identifying regional patterns in state amicus brief coalitions).

208. *See* Colin Provost, *When to Befriend the Court? Examining State Amici Curiae Participation Before the U.S. Supreme Court*, 11 ST. POL. & POL'Y Q. 4, 23 (2011) (suggesting, based on a study of criminal procedure cases between 1990 and 2001, that, like an attorney general's constituents, "elites, such as the governor and police groups, do not monitor amicus participation in Supreme Court cases very closely either, and as a result, AGs are largely free to participate according to their own evaluation of the case").

209. Lemos & Quinn, *supra* note 179, at 1263.

210. *See id.* at 1254–56 (discussing the diversity of issues before the Supreme Court and their correlation with partisanship and polarization).

211. *See id.* at 1257. Republican attorneys general predominate in federalism cases seeking to limit

level, at least as long as state partisanship does not simply mirror national partisanship.²¹² 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.²¹³ This capacity for ideological balance, both within a single attorney general office and across the states, enhances the states' credibility.²¹⁴ When states muster ideologically balanced coalitions in amicus briefs supporting certiorari petitions, the Supreme Court is more likely to take the case.²¹⁵ In a study of states as parties, Professors Ryan Owens and Patrick Wohlfarth find those states that "design formal legal institutions to foster increased appellate litigation expertise and credibility . . . are better able to protect their interests before the Court and thereby preserve the policies of state legislators."²¹⁶

Conversely, even the unmatched credibility of the Solicitor General of the United States suffers when the office takes positions disproportionately supporting the President's political agenda rather than the more complicated set of policy valences reflected in the federal laws the Solicitor General has a duty to uphold.²¹⁷ In one recent argument, for example, Chief Justice Roberts

national regulatory power under the Commerce Clause, for example, while Democratic attorneys general predominate in federalism cases seeking to limit national *deregulatory* power through preemption. *Compare, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), with *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011).

212. See generally Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 7 (2009) ("[M]ultiple failures of the ideal can offset one another, producing a closer approximation to the ideal at the level of the overall system.").

213. See Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM. J. POL. SCI. 367, 376–78 (2014).

214. See Kevin C. Newsom, *The State Solicitor General Boom*, A.B.A. SEC. OF LITIG. (Mar. 14, 2013) ("[S]tates are not 'one-off' litigants. They are institutional litigants—repeat players—and they have concrete long-term interests . . . One of a state solicitor general's chief tasks is to coordinate and unify the state's litigation program so as to maximize the state's effectiveness as a legal policy-maker.").

215. See Greg Goelzhauser & Nicole Vouvalis, *Amicus Coalition Heterogeneity and Signaling Credibility in Supreme Court Agenda Setting*, 45 PUBLIUS: J. FEDERALISM 99, 107 (2014) ("[T]here is a strong relationship between the level of preference heterogeneity among lobbying states at the agenda setting stage and the probability of the Supreme Court granting review. This suggests that heterogeneous lobbying coalitions are better able to convey credible signals about case importance.").

216. Ryan J. Owens & Patrick C. Wohlfarth, *State Solicitors General, Appellate Expertise, and State Success Before the U.S. Supreme Court*, 48 LAW & SOC'Y REV. 657, 682 (2014).

217. See Patrick C. Wohlfarth, *The Tenth Justice? Consequences of Politicization in the Solicitor*

called a change in the federal government's position "a little disingenuous," rejecting the standard explanation for such shifts: "It wasn't further reflection. We have a new secretary under a new administration."²¹⁸ Reporter Adam Liptak notes lawyers in the Solicitor General's office jokingly concede that "'upon further reflection' actually means 'upon further election.'"²¹⁹ The Court may not be as attuned to similar shifts in any one state's position, unlike the United States, and a bipartisan coalition of states can lend credibility that any single partisan office may lack.²²⁰ As former Alabama Solicitor General Kevin Newsom explains, "if a state does not speak with a unified voice to the courts in which it routinely appears . . . those courts will grow frustrated with the state's flip-flopping and count it against the state's credibility. And that, of course, can be a death-blow."²²¹

B. *How Partisanship Can Distort the States' Voices*

The states cannot be part of the solution to national partisan polarization, however, if those forces of polarization extend to the state level. If that occurs, it may cost the states' credibility at the Supreme Court, obstructing both the states' and the Court's path to a principled federalism over time. Despite the institutional advantages of attorneys general discussed above, there are worrying indications that state attorneys general may be unable to resist what Professor Jessica Bulman-Pozen recently termed "partisan federalism," in which the states' resistance to federal power serves primarily as a vehicle for national partisan policy mobilization and countermobilization.²²² Partisan contestation among states can be a constructive force in sharpening arguments for principled federalism, but, where partisan federalism predominates, distinct state

General's Office, 71 J. POL. 224, 235 (2009) ("Not only are the justices more apt to ignore *amicus* arguments when faced with a politicized S.G., but now a solicitor general perceived as politically biased also stands to jeopardize success when defending positions with a direct governmental interest at stake.").

218. Transcript of Oral Argument at 31–32, *U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013) (No. 11-1285).

219. Adam Liptak, *Trump's Legal U-Turns May Test Supreme Court's Patience*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/2017/08/28/us/politics/trump-supreme-court.html>.

220. See Goelzhauser & Vouvalis, *supra* note 215, at 103 (arguing that "heterogeneous state *amicus* coalitions are more likely to be successful at convincing the Supreme court to grant review," while stating that "[f]ormer Supreme Court clerks have suggested that state-filed *amicus* briefs, and filing by 'group of states' in particular, are afforded special weight by the Court") (internal citation omitted).

221. Newsom, *supra* note 214.

222. See Bulman-Pozen, *supra* note 171, at 1080.

interests are at risk of becoming subsumed under national partisan debates.²²³

This trend toward increasing partisanship began around the year 2000.²²⁴ At the end of the Clinton administration in 1999, responding to the states' successful bipartisan mobilization against the tobacco industry, Alabama Attorney General (now Eleventh Circuit Judge and potential Supreme Court nominee of President Trump) William Pryor founded the Republican Attorneys General Association ("RAGA") to coordinate fundraising and litigation on a partisan axis.²²⁵ Later, Republicans folded the state-level association into the national Republican Party as an affiliate, although it recently split off again to exert more control over fundraising.²²⁶ Democrats followed suit at the beginning of the George W. Bush administration in 2002 with the Democratic Attorneys General Association ("DAGA"), though it maintained organizational independence from the national Democratic Party.²²⁷

The impact of these associations' increased efficiency in fundraising for attorneys general, and associated influence in coordinating state litigation

223. *See id.* at 1096–1108 (discussing partisan federalism and outlining three main ways that states and their national allies contest national policy of the opposing party).

224. *See* Lemos & Quinn, *supra* note 179, at 1265 ("The increase in partisanship in the post-2000 coalitions is striking . . . The greater the ideological divide between Democrats and Republicans, the harder it may be for AGs from the two parties to come together on joint briefs.").

225. *See* George Lardner Jr. & Susan Schmidt, *Attorneys General Raise Funds for GOP*, WASH. POST, Mar. 30, 2000, at A01 ("Republican state attorneys general are soliciting large contributions from corporations that are embroiled in—or are seeking to avert—lawsuits by states.").

226. *See* Ben Wieder, *Big Money Comes to State Attorney-General Races*, THE ATLANTIC (May 8, 2014), <http://www.theatlantic.com/politics/archive/2014/05/us-chamber-targets-dems-in-state-attorney-general-races/361874/>. The RAGA joined the Republican National Committee's affiliate the Republican State Leadership Committee in 2002. *See id.* ("The Democratic Attorneys General Association came into existence three years after RAGA—the same year RAGA was folded into the RSLC . . ."). In 2014, the RAGA regained independence and control over its substantial treasury. *See* Alexander Burns, *Powerful GOP Group Splits Apart*, POLITICO (Jan. 21, 2014, 4:23 PM), <https://www.politico.com/story/2014/01/republican-state-leadership-committee-split-102443> (discussing how, unlike down-ballot races, "[a]ttorney general races are natural destinations for corporate and big-donor cash, given the broad discretion these officials have when it comes to initiating legal action").

227. *See* 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=.3a33e5568d60 ("Founded in 2002, the Democratic Attorneys General Association has recently added offices in San Francisco and Washington, and in May hired its first full-time executive director, veteran political strategist Sean Rankin."); *see also* Rachel M. Cohen, *The Hour of the Attorneys General*, THE AM. PROSPECT (Mar. 22, 2017), <http://prospect.org/article/hour-attorneys-general> (noting that DAGA is disconnected from the national democratic party).

agendas, became clear to a new generation of state advocates.²²⁸ When former Colorado Attorney General John Suthers joined the ranks of state attorneys general after serving as a United States Attorney, he found:

[T]he attorneys general are subject to intense lobbying in much the same fashion as legislators. But instead of seeking your vote, the lobbyists are hoping that you will or will not sign on to *amicus curiae* briefs in the appellate courts, or more importantly, that they can convince you to refrain from initiating or joining a lawsuit against their company or their interests.²²⁹

Those interests also exert influence through million-dollar fundraising efforts from business and trial lawyer interests.²³⁰ The RAGA claims both it and its Democratic counterpart raised more than \$30 million total for the thirty attorney general elections to be held in 2018, a significant amount for less expensive “second tier” statewide campaigns.²³¹

228. See John W. Suthers, *The State Attorney General's Role in Global Climate Change*, 85 DENV. U. L. REV. 757, 759 (2008) (“In March of 2005 I attended my first meeting of the National Association of Attorneys General (NAAG) in Washington, D.C. In the weeks prior to the meeting I was flooded with invitations to go to elegant private dinners and social receptions hosted by law firms for various interest groups while I was in Washington. That is not something that occurred when I went to district attorney or U.S. Attorney meetings . . . I learned that many companies and interest groups contributed to both RAGA and DAGA. I recall being a bit perplexed. What was the propriety and necessity of such an effort to influence attorneys general?”).

229. *Id.*

230. See Wieder, *supra* note 226 (“[W]hile the organizations [RAGA and DAGA] share many of the same top donors, there are some stark differences in the levels of giving and their overall spending. The Chamber’s giving to the RSLC, for example, has been more than 100 times greater than its giving to the DAGA from 2003 through 2013. Tobacco companies, most notably Reynolds American and Altria, have given more than \$7.5 million to the RSLC, compared to just over \$500,000 to the DAGA. At the same time, trial lawyers have given the DAGA more than \$4.5 million in that same time period. That’s \$3 million more than they’ve given to the RSLC.”).

231. See *About RAGA*, REPUBLICAN ATT’YS GEN. ASS’N, <http://www.republicanags.com/about> (last visited Mar. 4, 2018) (“RAGA has repeatedly shown to be a strong vessel for fundraising. In 2016, RAGA’s political spending totaled over \$14 million. For the cycle to date, RAGA has raised \$23.2 million. That number overwhelms the \$8.2 million raised by the Democratic Attorney General Association in the same period.”); see also *Democratic Attorneys General Association Breaks Fundraising Record in 2017*, DEMOCRATIC ATT’Y’S GEN. ASS’N, <https://democraticags.org/daga-breaks-fundraising-record/> (“The Democratic Attorneys General Association (DAGA) today announced record-breaking fundraising in 2017: 7.6 million across all platforms—more than \$2.4 million above 2016 numbers and \$3 million more than 2015. Commitments to DAGA for 2018 indicate this upward trend in fundraising will continue, as the Democratic Attorneys General Association increasingly garners public recognition and media interest.”).

This partisanship hit an inflection point during the Obama administration. For example, Republican attorneys general mobilized against the Obama administration and in support of gun rights; Democratic attorneys general mobilized in support of the Obama administration and in support of marriage rights.²³² Professor Paul Nolette's comprehensive study of state litigation over this period concludes:

As the line between national and state politics became increasingly blurred, AGs began defining their states' interests in increasing partisan and nationalized terms. This has left fewer issues in which there are clearly discernible and unified state interests conflicting with those of the federal government. Instead, AGs have alternated between broadly describing state interests as either the necessity of protecting state policy autonomy or upholding the interests of their individual citizens against government (state or federal) overreach, depending on the nature of the underlying policy dispute.²³³

In perhaps the boldest manifestation of state attorneys general engaging in national partisan conflict, nine Republican attorneys general issued "A Report on Obama Administration Violations of Law" as the presidential campaign heated up in March 2012.²³⁴ Published by the Republican State Leadership Committee, the report promised "as the states' chief legal officers, the attorneys general will make a concerted effort to educate their states' voters on the impacts that the Obama Administration's legal violations have on their every

232. See PAUL NOLETTE, *FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA* 189 (2015) (finding "seventy-five cases involved partisan participation among AGs [80% or more of states on a brief from AGs of a single party] during the first five years of the Obama administration," more than the total for either the Reagan (23) or Clinton (68) presidencies, and on pace to top the previous record under George W. Bush (89 cases)); see also Devins & Prakash, *supra* note 149, at 2140 (finding in a study of attorneys general refusals to defend challenges to state laws that "the post-2008 laws left undefended were overwhelmingly unpopular with the attorney general's political base (or the governor's when the latter appointed the attorney general). Democrats refused to defend same-sex marriage bans; Republicans refused to defend restrictive gun laws and statutes protecting same-sex couples").

233. NOLETTE, *supra* note 232, at 195.

234. See *Attorneys General Join Forces to Call Into Account Illegal Obama Administration Violations*, REPUBLICAN STATE LEADERSHIP COMM. (Mar. 5, 2012), [http://web.archive.org/web/20120308231106/http://rslc.com/_blog/News/post/MEMO_A_Report_on_Obama_Administration_Violations_of_Law].

day lives.”²³⁵

Such polarization can drive attorneys general away from articulating individual or common state interests in federalism and other issues, and toward more transactional partisan alliances.²³⁶ Reporter Eric Lipton, for example, found that industry lawyers “have written drafts of legal filings that attorneys general have used almost verbatim. In some cases, they have become an adjunct to the office by providing much of the legal work, including bearing the cost of litigation, in exchange for up to 20 percent of any settlement.”²³⁷ Professor Nolette explains how attorneys general challenging the Affordable Care Act outsourced much of the states’ litigation to the National Federation for Independent Business.²³⁸ Meanwhile, partisanship on both sides of that case drew attorneys general to not only take sides against attorneys general in other states (a common practice when state interests conflict), but also join other officials (such as governors) against the attorneys general of those states in doing so.²³⁹ “As AGs have defined their defense of state interests in increasingly polarized terms,” Professor Nolette observes, “it has led to growing conflicts between AGs and other state institutions.”²⁴⁰

Beyond conflicts within the states, polarization compromises the institutional role of attorneys general as a faithful voice of the states in the Supreme Court. A recent unpublished study of state attorneys general by Sarah Esty

235. *Id.*

236. See Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES (Oct. 29, 2014), <https://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html>; see generally Fred Lucas, *Nine State AGs Cite 21 Illegal Actions by Obama Administration*, CNS NEWS (Mar. 5, 2012, 3:53 PM), <https://www.cnsnews.com/news/article/nine-state-ags-cite-21-illegal-actions-obama-administration> (commenting on findings by nine attorneys general of potential illegal actions by Obama Administration).

237. See Lipton, *supra* note 236.

238. See NOLETTE, *supra* note 232, at 170–80.

239. See *id.* at 175–76.

240. See *id.* (“In the ACA litigation, for example, several governors and state legislatures attempted to influence their AGs’ decisions either to join or refrain from joining the ongoing litigation. Idaho’s state legislature became the first of several to pass legislation purporting to require the AG to file a lawsuit against the ACA, and the Georgia legislature even introduced articles of impeachment against the state’s Democratic AG for refusing to join the litigation. The Republican governors of Nevada and Mississippi both announced that they were hiring special outside counsel to represent their states after the states’ Democratic AGs had declined to do so, an action both AGs claimed violated their right to exclusive control over litigation in the name of their state. Meanwhile, Democratic legislators criticized their states’ Republican AGs for joining the challenge to the ACA. In Washington State, for example, the Democratic legislature moved to reduce Republican AG Rob McKenna’s budget, and Seattle’s city attorney initiated a lawsuit seeking to force McKenna’s withdrawal from the litigation.”).

finds “strong evidence that states primarily pursue ideological outcomes they prefer due to their political beliefs, with the federalism position necessary to achieve that outcome as a secondary concern.”²⁴¹ Such partisanship can increase the efficiency with which attorneys general communicate popular sentiment to the courts. However, this could come at a predictable cost to their credibility “[t]o the extent that courts value state input on cases because they see states as defenders of the Constitutional separation of powers and a bulwark against federal government tyranny.”²⁴² Partisanship compromises the distinct capacities attorneys general have to assist the Court in developing federalism along principled rather than partisan lines.²⁴³ “If states are calculatingly using the language of federalism to advance partisan and ideological ends,” Ms. Esty argues, “they ought to be treated just like other politically motivated private actors like the ACLU or NRA, without special deference.”²⁴⁴ If the Court needs credible arguments from the states in federalism cases, threats to states’ credibility become threats to the Court’s capacity to pursue a principled federalism.

241. See Sarah Esty, *State Federalism Preferences Under Bush and Obama: An Empirical Assessment of Partisan Federalism* 32 (2015) (unpublished manuscript) (on file with author).

242. See *id.* at 36–37.

243. See *id.* at 32; see also Lemos & Quinn, *supra* note 179, at 1262–63 (analyzing a compilation of data on state amicus filings in Supreme Court cases from 1970–2013 and partisanship of attorneys general, and concluding that at least some of the coalitions of joining and opposing states did reflect attorneys general partisanship).

244. See Esty, *supra* note 241, at 37.

C. How to Help the Court Hear the States Better

The extension of national political polarization into state attorney general offices raises serious potential conflicts of interest between the lawyerly duty to discern and articulate state legal interests and the increasing draw of national partisan and interest group influence.²⁴⁵ More importantly for the Supreme Court, it also risks the states' credibility at its bar.²⁴⁶ The Court is situated far from the states both as a matter of geography and experience. It needs to hear both principled arguments and popular sentiment from attorneys general in its federalism docket, but recent increases in partisanship reduces the ratio of legal signal to political noise.²⁴⁷

Attorneys general already enjoy a privileged position at the Court under its rules and as a matter of practice.²⁴⁸ Still, there are several potential reforms, large and small, that may help the Court hear the states better in federalism cases. Several procedural changes, mostly minor, could amplify the voice of the states through attorneys general at both the petition and merits stage.²⁴⁹ Some changes in the Court's deliberations also could reinforce the role of state attorneys general as independent voices of state interests.²⁵⁰

1. Procedural Changes

Supreme Court rules privilege state attorneys general relative to other parties. These rules often parallel the provisions directed toward the United States and the Solicitor General. For example, Rule 29 reinforces the statute providing for notice to and intervention by the Attorney General of the United States or a state attorney general "wherein the constitutionality of any Act of Congress [or any statute of that State] affecting the public interest is drawn in question."²⁵¹ Where a state is not a party, Rule 29 requires petitioners to serve notice of a constitutional challenge to a state statute "on the Attorney General

245. See Paul Nolette, *State Litigation During the Obama Administration: Diverging Agendas in an Era of Polarized Politics*, 44 PUBLIUS: J. FEDERALISM 451, 452 (2014); see also Lipton, *supra* note 236.

246. See Nolette, *supra* note 245, at 453–54.

247. See *id.* at 453–54.

248. See *id.* at 452.

249. See *infra* Section IV.C.1.

250. See *infra* Section IV.C.2.

251. See 28 U.S.C. § 2403 (2016); SUP. CT. R. 29.

of that State.”²⁵² This extends the notice and intervention rule from lower courts, but does not itself provide for state participation in the case. That is addressed by the rules governing amicus briefs.²⁵³ Just as the Solicitor General may file an amicus brief by right under Rule 37, “[n]o motion for leave to file an *amicus curiae* brief is necessary if the brief is presented . . . on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General.”²⁵⁴

The value of these procedural privileges is diluted, however, by the Court’s “open door” policy to amicus briefs over the past fifty years.²⁵⁵ As Professors Kearney & Merrill explain, experienced counsel routinely consent to amicus briefs, and when consent is withheld, the Court routinely grants motions for leave to file, with the effect of “permit[ting] essentially unlimited filings of amicus briefs in argued cases.”²⁵⁶ As a result, the number of amicus briefs continues to climb, reaching 171 filings in the combined cases under *National Federation of Independent Business v. Sebelius*.²⁵⁷ Some commentators suggest the Court should reimpose practical limits on amicus briefs, such as Professor Allison Orr Larsen’s proposal to limit the number of amici through party designations or other means.²⁵⁸ State briefs amounted to nearly 40% of the amicus briefs filed in recent terms, an increase from 28% two decades before, so the problem for states includes dilution by the increased volume of state briefs, not just those of other amici.²⁵⁹ Increased partisanship, channeled through the rise of organizations like the RAGA and the DAGA in amicus briefs, could lead to what Professors Clayton and McGuire call “amicus overload,” countering the states’ original successful effort to coordinate briefs around state interests.²⁶⁰ This includes an increasing number of cases

252. See SUP. CT. R. 29(4)(c).

253. See Sup. Ct. R. 37.

254. See *id.* at 37(4).

255. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PENN. L. REV. 743, 761–67 (2000).

256. See *id.* at 762.

257. See 567 U.S. 519 (2012); see also Harper, *supra* note 183, at 1513.

258. See Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1809–10 (2014); see also Michael Solimine, *Retooling the Amicus Machine*, 102 VA. L. REV. Online 151, 165–66 (2016), <https://www.virginialawreview.org/volumes/content/retooling-amicus-machine> (arguing for limiting amicus briefs, but excluding the United States and state attorneys general from any limit).

259. See Harper, *supra* note 183, at 1519 n.105.

260. See *supra* notes 225–27 and accompanying text; see generally Clayton & McGuire, *supra* note 174, at 23.

in which states appear on both sides of a case.²⁶¹

The Court can hear the states better by calling for or allowing additional state briefing and argument in more federalism cases. In challenges to federal law in which the United States is not a party, it will be notified under Rule 29 and the Court can call for the views of the Solicitor General.²⁶² States, however, are not always parties to such constitutional challenges, which might be brought by federal criminal defendants or regulated private parties.²⁶³ For example, Michael Greve and others find “the states’ *amicus* practice seems suboptimal” in preemption cases, where “[s]tate participation is substantially higher in cases in which a state is already a party than in wholly private cases, where state *amici* might contribute a distinctive, authentic perspective.”²⁶⁴ A “call for the views of the state attorneys general” could help the Court ensure it hears state interests in all federalism cases.²⁶⁵ Although state attorneys general have a much broader portfolio of work and no one state may be able to respond to such a call, there are several large state attorney general offices of various perspectives who may be prepared to brief on demand if the call comes.²⁶⁶

261. See Lemos & Quinn, *supra* note 179, at 1268 (emphasis added) (“In most cases, AGs’ *amicus* briefs are not explicitly opposed by other state AGs. Until very recently, these unopposed coalitions of brief signers were generally bipartisan, with average partisanship similar to that of the population of state AGs then serving. The coalitions of unopposed *amici* have begun to take on more of a partisan hue in recent years, but most of the movement is due to Republican AGs writing briefs that other Republicans support and that Democratic AGs neither support nor oppose.”).

262. See SUP. CT. R. 29(4)(c).

263. See *id.*; see, e.g., Greve et al., *supra* note 141, at 370.

264. See Greve et al., *supra* note 141, at 370. As the authors explain, “[r]allying support for a state’s petition is a relatively low-cost proposition; monitoring wholly private cases and formulating a common state position in those cases involves much higher transaction costs.” *Id.* A call for the views of the state attorneys general by the Supreme Court in appropriate cases could reduce (or at least shift to the Court) the states’ monitoring costs, thereby increasing the supply of credible federalism arguments in private cases.

265. The Court rarely calls for the views of state attorneys general, and apparently has called for the views of a state solicitor general just once, at the petition stage in No. 08-1596, *Rhine v. Deaton*. See Amy Howe, *New invitation brief from Texas Solicitor General*, SCOTUSBLOG (Dec. 23, 2009), <http://www.scotusblog.com/2009/12/new-invitation-brief-from-texas-solicitor-general/>. There the Texas Solicitor General recommended that certiorari be denied, and the Court did so. See *id.*; *Rhine v. Deaton*, No. 08-1596, Docket, <https://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/08-1596.htm>.

266. See NOLETTE, *supra* note 232, at 44. According to Professor Paul Nolette’s database of state *amicus* participation, the top five lead authors of state *amicus* briefs in the Supreme Court between 1980 and 2013 were a politically and geographically diverse set of states, each of which averaged at least two *amicus* briefs per term: California (193 briefs), New York (110 briefs), Texas, (94 briefs),

Beyond ensuring opportunities for state amicus briefing, the Court can hear the states at oral argument in federalism cases. In 2008, Richard Lazarus noted that the Court recently granted several motions by state solicitors general to participate in argument as *amicus curiae*.²⁶⁷ Despite the overall increase in state amicus activity, however, the Court has been less receptive to state amici at the lectern since then. The Court granted 29 of 39 state requests for argument as amici from the 1996 term through the 2006 term, but only 3 of 18 state requests from the 2007 term through the 2016 term.²⁶⁸ Although the Court's reasons for denying the states are unclear, the decline coincides with several state requests to argue against traditional state interests, and possibly for narrower partisan interests. For example, the Court denied Texas's requests to argue with respondents in *D.C. v. Heller* and with petitioners in *McDonald v. City of Chicago*, in both cases taking sides against the state or local government.²⁶⁹ More recently, the Court denied Nevada's request to argue as amicus in support of petitioner in *Murr v. Wisconsin*, a direct challenge to a sister state's position at argument.²⁷⁰ The Court may be deciding that the traditional state interest is already represented at the lectern in these cases, and that states taking the position adverse to that position have little to add to the parties' arguments.

Given the increased involvement of private interests in state supreme court litigation, the Court also should become more skeptical of ghostwriting by and collusion with parties in state amicus briefs.²⁷¹ Rule 37(6) excludes state (and federal) amicus briefs from disclosure of "whether counsel for a party authored the brief in whole or in part and whether such counsel or a

Ohio (87 briefs) and Alabama (70 briefs). *See id.*

267. *See Lazarus, supra* note 63, at 1562 n.317.

268. Dan Schweitzer, *State Arguments as Amicus Curiae: 1996-2016 Terms* (memo on file with author).

269. *See* District of Columbia v. Heller, No. 07-290, <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/07-290.htm>; McDonald v. City of Chicago, No. 08-1521. Notably, the Court did allow the National Rifle Association to argue as amicus in *McDonald*. *See id.*

270. *See* Murr v. Wisconsin, No. 15-214, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/15-214.html>.

271. *See* Julia Blackwell Gelinis & Maggie L. Smith, *Ethical Issues in Appellate Practice*, IND. STATE BAR ASS'N (June 13, 2016), c.ygcdn.com/sites/www.inbar.org/resource/resmgr/CLE_2016/Appellate_Ethics.pdf. Former Alabama Solicitor General Kevin Newsom reported filing nearly half of his amicus briefs "in support of litigants represented by private-sector counsel—never simply as a favor, of course, but rather because in each of those cases the state's institutional interest lined up nicely with one of the parties' positions." Newsom, *supra* note 214.

party made a monetary contribution intended to fund the preparation or submission of the brief,” as well as broader disclosure of “every person or entity, other than the *amicus curiae*, its members, or its counsel” who monetarily contributed to the preparation of the brief.²⁷² Removing the state exception, and including them in the rule’s scope for other interested parties, would enable the Court to better police interest group ghostwriting or payments that could undermine the credibility of the brief.²⁷³ It also provides an incentive for states to keep their amicus brief deliberations and preparations “in house” where the offices’ institutional constraints may better align with state interests. Although such a policy paradoxically would seek to strengthen state interests by removing a privilege available only to states and the federal government, it accounts for the greater susceptibility of elected state attorneys general to such politicization.²⁷⁴ States also may be able to bolster their attorney general’s fidelity to the state, and independence from outside influence, with targeted campaign finance reforms.²⁷⁵

2. Deliberative Changes

As the studies discussed above suggest, the Supreme Court already accords special consideration to the states in federalism cases. Continued research and awareness of the benefits of principled attorney general advocacy, and the costs of partisan briefing tactics, may prompt the Court to refine its

272. SUP. CT. R. 37(6).

273. See, e.g., Eric Lipton, *Energy Firms in Secretive Alliance with Attorneys General*, N.Y. TIMES (Dec. 6, 2014), <https://www.nytimes.com/2014/12/07/us/politics/energy-firms-in-secretive-alliance-with-attorneys-general.html> (finding one example of ghostwriting outside the Court, the office of one-time Oklahoma Attorney General (now Environmental Protection Agency administrator) Scott Pruitt submitted a letter to the EPA that was written by a regulated party, copied “onto state government stationery with only a few word changes, and sent . . . to Washington with the attorney general’s signature.”).

274. See *supra* text accompanying notes 240–42.

275. See Anthony Johnstone, *Outside Influence*, 13 ELECTION L.J. 117, 131–36 (2014) (analyzing differential regulation of outside influence in campaign finance). Professor Eli Savit recently suggested that state attorneys general might also be subject to more stringent campaign finance regulations, given their quasi-judicial role in representing state interests. See Eli Savit, *The New Front in the Clean Air Wars: Fossil-Fuel Influence Over State Attorneys General—and How It Might Be Checked*, 115 MICH. L. REV. 839, 864 (2017) (“*Williams-Yulee* [*v. Florida Bar*, 135 S. Ct. 1656 (2015)] offers at least some possibility that willing states might be able to rein in special-interest groups’ outsized influence over AGs.”).

approach to state briefs on its own. To start, the Court should pay close attention to the states' interests, which must be set out expressly at the beginning of an amicus brief, and should be elaborated throughout the brief.²⁷⁶ Structural arguments for state policy autonomy under federalism should carry more weight than substantive arguments for imposing one state's preferred policy on the others.²⁷⁷ One powerful example of a structural, rather than substantive, state interest is Alabama's brief in *Gonzales v. Raich*.²⁷⁸ It disclaimed any policy agreement in its first sentence.²⁷⁹ "The Court should make no mistake: The State[] of Alabama . . . d[id] not appear [] to champion (or even to defend) the public policies underlying California's so-called 'compassionate use' law," instead staking its claim on a strong (though unsuccessful) argument from federalism.²⁸⁰

The Court also should consider more carefully the weight it accords the number of states joining a brief.²⁸¹ Partisan mobilization through RAGA and DAGA may make it easier for states to draw large numbers at either end of a polarizing issue, but those numbers may no longer be a reliable signal of general state interests.²⁸² Instead, as Professor Michael Solimine suggests, only a supermajority of states may ensure bipartisan consensus on state interests, "and such requirements can lead to better decisionmaking (i.e., the decision to join an amicus brief) because it forces states with disparate interests to make

276. See SUP. CT. R. 37(5).

277. See Margaret H. Lemos & Ernest A. Young, *State Public Law Litigation in an Age of Polarization* 1 (Mar. 8, 2018), <https://ssrn.com/abstract=3137317> (distinguishing "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," and arguing the latter "will tend to aggravate polarization").

278. See Brief for Alabama et al. as Amici Curiae Supporting Respondents at 1, *Gonzales v. Raich*, 545 U.S. 1 (2005) (No. 03-1454).

279. See *id.*

280. See *id.* "While the amici States may not see eye to eye with some of their neighbors concerning the wisdom of decriminalizing marijuana possession and use in certain instances, they support their neighbors' prerogative in our federalist system to serve as 'laboratories for experimentation' . . . 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. By stepping in here, under the guise of regulating interstate commerce, to stymie California's 'experiment[.],' Congress crossed the constitutional line." *Id.* at 2-3 (footnotes and citations omitted).

281. See Clayton & McGuire, *supra* note 174, at 17.

282. See *supra* notes 225-27, 260 and accompanying text (explaining the influence of RAGA and DAGA on bipartisan issues and their effect on state interests).

common ground.”²⁸³

The Court also should look to heterogeneity, self-consciously recognizing the value of diverse state coalitions. In *McDonnell v. United States*, the Court called out as persuasive amicus briefs from “[s]ix former Virginia attorneys general—four Democrats and two Republicans,” and “77 former state attorneys general from States other than Virginia—41 Democrats, 35 Republicans, and 1 independent.”²⁸⁴ Citing this example, Professor Solimine suggests the Court “only give deference (if at all) to amicus briefs joined by significant numbers of [attorneys general] from both political parties.”²⁸⁵ Other forms of heterogeneity, such as the regional coalitions of the “Old South,” “Big Sky,” and others identified by Professors Waltenberg and Swinford also might signal increased credibility.²⁸⁶ There will still be some cases where the nature of state interests will limit the number of states joining a brief, including along party lines given regional or even partisan valence of some policy interests, but the Court should be most confident about state interests when they are argued in a broadly bipartisan brief.

Finally, as in the rules of evidence, admissions against states’ federalism interests might be a further indicator of reliability.²⁸⁷ During the Warren and Burger Courts, states making nationalist arguments wielded almost veto-like powers in federalism cases where states filed briefs on both sides.²⁸⁸ This cure may be worse than the disease. It could empower partisan influence on potential hold-out states willing to argue for preemption of other states’ laws, for example. Professor Solimine suggests the Court should “give weight to a [state] amicus brief that argues against a state interest *only when* the brief specifically makes convincing functionalist arguments . . . that the need for national uniformity outweighs the federalism values of interstate competition

283. See Michael E. Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355, 393 (2012).

284. 136 S. Ct. 2355, 2372 (2016).

285. See Solimine, *supra* note 258.

286. See WALTENBURG & SWINFORD, *supra* note 155, at 73–74.

287. See FED. R. EVID. 804(b)(3).

288. See Nicholson-Crotty, *supra* note 174, at 605 (studying the Supreme Court’s federalism decisions from 1953 to 1986 and finding “[i]n those cases where states filed briefs supporting national power, the outcome reflected that value 100 percent of the time”). Conversely, the Solicitor General of the United States can wield veto-like power over preemption when a Republican administration “opts against both its institutional interest and the administration’s business clientele” by opposing federal preemption. See Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 74 (2006).

and safeguarding local variation that would be compromised.²⁸⁹ This proposal is closer to the mark, although it is hard to imagine a case in which the Court should give *no* weight to state arguments made by a state attorney general. Despite the risks of national partisan distortion of state legal interests,²⁹⁰ the state's chief legal officer is uniquely situated to voice those interests.²⁹¹ Instead, given the risk of partisan influence in the briefing process, the Court should remain attuned to the political valence of the briefs and suspicious of arguments that serve partisan goals without any apparent relationship to state federalism interests.

V. CONCLUSION

This article offers a prescription for the states at least as much as for the Supreme Court. Unlike other elected officials, attorneys general represent the states as lawyers, not just as politicians.²⁹² States find success, as they often did in the development of the New Federalism in the 1990s, when they give voice to diverse coalitions articulating principled arguments from state interests.²⁹³ States risk failure, as they do under the increased partisan polarization of the past decade, when they merely echo the policies of national political and special interest organizations.²⁹⁴ By discerning state interests independently of national politics, attorneys general can credibly help the Supreme Court answer federalism's hard questions.²⁹⁵ In the end, the Supreme Court needs the states as much as the states need the Supreme Court.

289. See Solimine, *supra* note 283, at 406.

290. See *supra* Section IV.B.

291. See *supra* Section IV.A.

292. See *supra* notes 193–96 and accompanying text.

293. See *supra* Section IV.C.2.

294. See *supra* Part III.

295. See *supra* Part IV.