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STATE ATTORNEYS GENERAL, POLITICAL LAWSUITS, AND THEIR COLLECTIVE VOICE IN THE INTER-INSTITUTIONAL CONSTITUTIONAL DIALOGUE

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INTRODUCTION

State attorneys general (or state "AGs") are both legal and political actors, especially because almost all of them are elected officials. State attorneys general are also increasing their role in federal constitutional interpretation and federal policymaking more generally, using both law and politics to do so. The merger of politics and law is a long-standing American tradition. As Alexis de Tocqueville observed in the early 1800s, almost every legal issue in the U.S. eventually becomes a political issue, and almost every political one eventually becomes a legal one.[1] By its very nature, constitutional interpretation in our society means making crucial political and public policy choices in addition to legal ones. Scholars who study both the U.S. Attorney General[2] and the U.S. Solicitor General[3] note that these positions require attention to both law and politics. Scholars who study state attorneys general have come to the same conclusion.[4] For example, in his fairly early study of state

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1. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 99−102 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2010).

2. *See, e.g.*, CORNELL W. CLAYTON, THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY (1992); NANCY V. BAKER, CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789–1990 (1992).

3. *See, e.g.*, REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW (1992); LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987); RICHARD L. PACELLE, JR., BETWEEN LAW & POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION (2003); Peter N. Ubertaccio III, *The Solicitor General: Learned in the Law and Politics*, *in* EXPLORING JUDICIAL POLITICS 140–51 (Mark C. Miller ed., 2009).

4. *See, e.g.*, Rorie L. Spill et al., *Taking on Tobacco: Policy Entrepreneurship and the Tobacco Litigation*, 54 POL. RSCH. Q. 605 (2001); Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100 (2015); PAUL NOLETTE,

attorneys general, Peter Heiser notes that "some attorneys general will be more likely to adjust their legal conclusions to reflect political predilections."[5] Through participating in multistate litigation and presenting amicus curiae briefs to federal appellate courts including the U.S. Supreme Court, state attorneys general have recently begun asserting their collective voice as part of the inter-institutional conversation regarding federal constitutional interpretation and policy in the United States.

Although state attorneys general have not received the same degree of scholarly attention as their federal counterparts, scholars are beginning to understand the crucial role the state attorneys general collectively play in the inter-institutional dialogue that helps determine federal policy as well as the meaning of the various provisions in the federal constitution. State attorneys general are the chief litigators for their states, thus paving the way for them to use the federal courts to advance their often partisan agendas. As Paul Nolette has argued:

> Beginning in the last decades of the twentieth century, state litigation has taken on an expanded role in national policymaking. State attorneys general (AGs), the actors responsible for nearly all state litigation, have increasingly collaborated across state lines on investigations and lawsuits against major corporations and the federal government alike.[6]

Thus, the state attorneys general are asserting their collective voice in the institutional conversation over the meaning of the federal constitution and federal policymaking more generally.

State attorneys general are important statewide actors in the state governmental systems. As one scholar notes, "[b]esides a governorship, state attorneys general are arguably the most prominent statewide office one can hold in state politics."[7] Therefore, Nolette concludes that:

> State attorneys general (AGs) occupy an unusual position in state government, with most of them armed with virtually full control over litigation in the name of their state and considerable independence from other institutions in state government . . . AGs have used their position to take on a more prominent role in national politics, especially through increasing collaborations among themselves and other actors in national politics.[8]

FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA (2015).

5. Peter E. Heiser, Jr., *The Opinion Writing Function of Attorneys General*, 18 IDAHO L. REV. 9, 17 (1982).

6. NOLETTE, *supra* note 4, at 1.

7. Nick Robinson, *The Decline of the Lawyer-Politician*, 65 BUFF. L. REV. 657, 691 (2017).

8. NOLETTE, *supra* note 4, at 18.

At this point, it may be useful to provide some background data on the attorneys general of the various states. According to data from the National Association of Attorneys General ("NAAG"), forty-three of the state attorneys general are independent elected officials, while in Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming the attorneys general are appointed by the Governor.[9] However, only in Alaska and Wyoming does the attorney general serve at the will of the governor (giving the governor almost total control over the attorney general because of this removal power),[10] while in the other governor appointment states the attorney general can only be removed from office for cause (meaning that the attorney general has a fair amount of independence from the governor).[11] In Maine, the attorney general is appointed by the state legislature; in Tennessee, the attorney general is appointed by the state supreme court.[12]

As of July 2021, twenty-six of the state attorneys general were Republicans and twenty-four were Democrats.[13] There were forty men and ten women (six female Democrats and four female Republicans).[14] Twenty-five of the attorneys general had law degrees from in-state law schools (excluding "top-14" schools) and thirteen had law degrees from "top-14" law schools.[15] States have various citizenship, residency, legal experience, and age requirements for their attorneys general.[16] In sixteen states, the attorneys general are term-limited.[17] In twenty-three states, bar admission is not required either by state statute nor by the state constitution, but of course by tradition, all state attorneys general have law degrees and are members of the state bar.[18] More than forty-three states and territories now also have state solicitors general, who generally head the appellate practices in the offices of the state attorneys general.[19] Several studies have found that states do better both at the certiorari stage and on the merits at the U.S. Supreme Court when they have a solicitor general handle the case.[20]

9. *Attorney General Office Characteristics*, NAT'L ASS'N ATT'YS GEN., https://www.naag.org/news-resources/research-data/attorney-general-office-characteristics/ (last visited Dec. 29, 2021).

10. Note, *Appointing State Attorneys General: Evaluating the Unbundled State Executive*, 127 HARV. L. REV. 973, 982 (2014).

11. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 n.3 (2006).

12. *Attorney General Office Characteristics*, *supra* note 9.

13. *Who Are America's Attorneys General?*, NAT'L ASS'N ATT'YS GEN., https://www.naag.org/news-resources/research-data/who-are-americas-attorneys-general/ (last visited Dec. 29, 2021).

14. *Id.*

15. *Id.* The number of attorneys general with "top-14" law degrees increased on July 19, 2021 when New Jersey Attorney General Gurbir Grewal resigned to become the head of the U.S. Securities and Exchange Commission's Enforcement Division, and Governor Phil Murphy appointed Andrew Bruck to replace him. Bruck's law degree is from Stanford, and he is the first openly gay attorney general in New Jersey. Blake Nelson & Brent Johnson, *Murphy Appoints Interim N.J. Attorney General After Grewal's Departure*, NJ.COM (Dec. 29, 2021), https://www.nj.com/news/2021/06/murphy-appoints-interim-nj-attorney-general-after-grewals-departure.html.

16. *Attorney General Office Characteristics*, *supra* note 9.

17. Note, *supra* note 10, at 983.

18. *Attorney General Office Characteristics*, *supra* note 9.

19. H.W. Perry Jr., *The Elitification of The U.S. Supreme Court and Appellate Lawyering*, 72 S.C.L. REV. 245, 269 (2020).

20. *See* Ryan J. Owens & Patrick C. Wohlfarth, *State Solicitors General, Appellate Expertise, and State Success Before the U.S. Supreme Court*, 48 L. & SOC'Y REV. 657 (2014); Greg Goelzhauser & Nicole Vouvalis, *State Coordinating Institutions and Agenda Setting on the U.S. Supreme Court*, 41 AM. POL. RSCH. 819 (2012).

State attorneys general are unique, independent actors in the executive branch of their respective states because they alone determine when and how they will litigate in the courts. As several scholars have observed, "[u]nlike most executive officials, state attorneys general have the discretion to pursue policy through litigation without needing either gubernatorial or legislative approval."[21] Thus, state attorneys general have the power to litigate on behalf of the public interest. This common-law power also gives them advantages over private litigants when issues of standing arise. The fact that attorneys general mix law and politics should be beyond debate, especially since the vast majority of them are elected officials. Thus, "[t]he attorney general is both a public official acting in the name of the state, and a politician." [22]

In general, most state attorneys general have a common set of duties and responsibilities spelled out in state statutes and constitutions. These functions can vary from state-to-state and from incumbent-to-incumbent, but in general, they include:

> (1) [R]endering advisory opinions . . . to government officials [regarding questions of law]; (2) representing the state's legal interests [in court], either as a direct party or . . . [by presenting] amicus [curiae briefs]; (3) drafting and [presenting] legislative proposals; (4) administering . . . [state funds] in . . . contracting[,] . . . state bonding[, and other areas]; and (5) disseminating information regarding legal issues [concerning] the state. [23]

State attorneys general also have broad common-law authority to represent (and define) the public interest and litigate on its behalf. In *Florida ex rel. Shevin v. Exxon Corp.*, the U.S. Court of Appeals for the Fifth Circuit explained these broad common law powers:

> [T]he attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such authority, he typically may exercise all such authority as the public interest requires.[24]

Although most commentators consider the office of the attorney general as part of a complex state executive branch, some would argue that "[t]he office of attorney general is a strange hybrid in American governmental structure. With unique

One study found that the solicitors general tended to come from more prestigious law schools than the attorneys general who hired them. Banks Miller, *Describing the State Solicitors General*, 93 JUDICATURE 238 (2010).

21. Spill et al., *supra* note 4, at 606.

22. *Id.* at 607.

23. *See* Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 528 (1994).

24. 526 F.2d 266, 268–69 (5th Cir. 1976) (internal citations omitted).

functions that combine elements of both the executive and judicial branches, the office fits uncomfortably into a system that requires a separation of powers."[25]

A. The Rise of Multistate Litigation

Beginning in the 1980s, state attorneys general started to join together to sue federal agencies for statutory noncompliance. These suits corresponded with a massive increase in budgets for the offices of the state attorneys general during the 1970s and 1980s.[26] These multistate lawsuits were designed to protect state interests against federal encroachment; also, in many cases, they served to force federal policy enforcement by creating nationwide standards.[27] The attorneys general learned that by joining together they could have a greater effect on national political issues.[28] These collective actions meant that state attorneys general no longer saw themselves as isolated state actors but instead as components of a collective voice in national policymaking and eventually in federal constitutional interpretation. The National Association of Attorneys General ("NAAG") took great pains to increase this sense of collective institutional interests among their members.[29] NAAG was once primarily an information exchange forum for the state attorneys general, but after severe criticism about the quality of state lawyers arguing cases at the U.S. Supreme Court,[30] NAAG established various programs meant to improve state litigators' effectiveness when they appeared before the Court or presented amici curiae briefs to it or both.[31] NAAG also took action to encourage states to sign onto fewer collective amici briefs instead of submitting their own individually or ones signed by just a few states.[32]

A major collaboration among the state attorneys general occurred in the late 1990s and concerned multistate litigation by the state attorneys general against the tobacco manufacturers. The state lawsuits were filed in large part because the federal government was not adequately regulating the tobacco industry.[33] In general, the states were suing the tobacco companies to recover the amount of money that the state governments had paid as a result of state residents' smoking-related health problems, thus giving the states standing.[34] The Attorney General of Mississippi filed the first lawsuit in 1994,[35] and eventually, all the states (represented by their state attorneys general) joined in the collective lawsuits or the eventual settlements,

25. Clayton, *supra* note 23, at 528 (internal citation omitted).

26. *See* Eric N. Waltenburg & Bill Swinford, *The Supreme Court as a Policy Arena: The Strategies and Tactics of State Attorneys General*, 27 POL'Y STUD. J. 242 (1999); ERIC N. WALTENBURG & BILL SWINFORD, LITIGATING FEDERALISM: THE STATES BEFORE THE U.S. SUPREME COURT 45–46 (1999).

27. *See, e.g.*, Clayton, *supra* note 23, at 533–34.

28. *See id.* at 539.

29. *See id.* at 543.

30. *See* Perry, *supra* note 19, at 269.

31. NOLETTE, *supra* note 4, at 33–34.

32. Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. REV. 1229, 1238 (2015); Cornell W. Clayton & Jack McGuire, *State Litigation Strategies and Policymaking in the U.S. Supreme Court*, 11 KAN. J.L. & PUB. POL'Y 17, 23–24 (2001).

33. NOLETTE, *supra* note 4, at 23–24.

34. MARTHA A. DERTHICK, UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS 75–76 (3d ed. 2012).

35. *Id.* at 74.

or both.[36] The tobacco lawsuits, therefore, became a truly bipartisan effort. Lynn Mather argues that the multistate litigation was "the centerpiece of an overall political strategy" to bypass the decision-making of legislatures and of bureaucratic agencies.[37] To finance these lawsuits, the state attorneys general chose a novel approach because "nearly all attorneys general circumvented legislatures by signing contingency-fee contracts with private tort lawyers."[38] Mather notes how important this cooperation between state attorneys general and private sector lawyers proved to be in determining federal regulatory policy regarding tobacco products.[39] Going even farther, one set of scholars has labeled the state attorneys general as "policy entrepreneurs" in the tobacco litigation who were able to create "policy innovations" because of their collective litigation efforts.[40]

The tobacco litigation ended in 1998 with the so-called "Master Settlement Agreement" ("MSA") between the tobacco manufacturers and forty-six states, plus individual settlement agreements reached earlier with the states of Florida, Minnesota, Mississippi, and Texas.[41] At the time, the MSA was "the largest civil settlement in . . . history."[42] The MSA "marked the first legal success against the tobacco industry after decades of failed private lawsuits."[43]

Among other things, the MSA required the tobacco companies to pay over $246 billion directly to the states, territories, and the District of Columbia,[44] and it required various nationwide changes in advertising and marketing of tobacco products.[45] It also greatly restricted the lobbying efforts of the tobacco industry.[46] Although the federal government proved unable to regulate the tobacco industry, the MSA actually achieved the same goal through litigation. As Mather notes, the "[c]reation of new law is indeed precisely what the attorneys general and plaintiff lawyers *were* attempting to do, to the extent that they were stretching existing legal concepts and rules to apply to the factual situation of tobacco."[47] Thus, the multistate tobacco litigation created a federal, nationwide policy framework for regulating the tobacco industry, even though none of the institutions of the federal government proved capable of doing so on their own.

The multistate tobacco litigation is clearly an example of a practice often referred to as "adversarial legalism."[48] Robert Kagan coined this term, and he defines this concept as "policymaking, policy implementation, and dispute resolution by

36. *Id.* at 81.

37. Lynn Mather, *Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 L. & SOC. INQUIRY 897, 908 (1998).

38. DERTHICK, *supra* note 34, at 2.

39. *E.g.*, Mather, *supra* note 37, at 897.

40. *See, e.g.*, Spill et al., *supra* note 4, at 605.

41. DERTHICK, *supra* note 34, at 1.

42. Mather, *supra* note 37, at 898.

43. NOLETTE, *supra* note 4, at 24.

44. Spill et al., *supra* note 4, at 607.

45. JOHN SLADE, *Marketing Policies, in* REGULATING TOBACCO 72, 87–88 (Robert L. Rabin & Stephen D. Sugarman eds., 2001); DERTHICK, *supra* note 34, at 3.

46. DERTHICK, *supra* note 34, at 3.

47. Mather, *supra* note 37, at 920.

48. *See generally* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001) [hereinafter KAGAN I].

means of lawyer-dominated litigation."[49] Kagan emphasizes that this form of policymaking is "characterized by frequent resort to highly adversarial legal contestation."[50] Note the emphasis on the role played by litigants and lawyers and the de-emphasis on the expertise of judges, legislators, or federal administrators.[51] Other countries tend to make these political decisions through legislative, bureaucratic, administrative, or other expert-driven mechanisms.[52] This tradition in the U.S. adds to American Exceptionalism, or what makes the U.S. government system unique around the world. In the U.S., however, we rely instead on lawyers and courts to achieve the same purpose. Nolette notes that:

> Scholars have noted the increasing judicialization of American politics, in which the complex and technical arena of law and courts has become a crucial battleground for political competition. State litigation is a prime example of this type of political contestation, becoming increasingly important in creating national regulatory policy yet occurring in venues largely shielded from the normal democratic process.[53]

The fact that the tobacco litigation ended in a settlement agreement before trial and not in a verdict from a judge emphasizes the role of the activist private lawyers and the activist state attorneys general in creating federal tobacco policy. As Martha Derthick concludes, "[c]rucially, some of tobacco's most zealous opponents wanted to achieve what legislatures could not deliver."[54] Only activist government and private lawyers could successfully use litigation for this purpose and create a nationwide policy outcome in the process. Along these same lines, as I have written previously:

> the courts provide an alternative forum for interests that did not win in the legislative branch or in the agency decision-making process. Because the courts make decisions using legal reasoning and legal analysis, this new arena for competition forces the government to justify its decisions in legal terms. Thus, adversarial legalism compels a dialogue among various institutional decision-makers as well as among various groups.[55]

The tobacco litigation clearly started a trend of cooperation among state attorneys general, although on some issues the cooperation is limited to those from the same political party. Between 1980 and 2013, Nolette found that there were 686 lawsuits filed by state attorneys general and involving multiple states.[56] Most of

49. *Id.* at 3.

50. ROBERT A. KAGAN, *American Courts and the Policy Dialogue: The Role of Adversarial Legalism*, *in* MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE 14 (Mark C. Miller & Jeb Barnes eds., 2004).

51. *See* DERTHICK, *supra* note 34, at 6.

52. KAGAN I, *supra* note 48, at 3.

53. NOLETTE, *supra* note 4, at 5.

54. DERTHICK, *supra* note 34, at 223.

55. MARK C. MILLER, JUDICIAL POLITICS IN THE UNITED STATES 289 (2015).

56. NOLETTE, *supra* note 4, at 21.

these cases involved the broad policy areas of antitrust enforcement, consumer protection, health care, and environmental policy.[57] Since 2000, multistate litigation initiated by state attorneys general has become both more common and has involved many more states than previously.[58] As the attorneys general have gotten involved in more and more multistate lawsuits involving a variety of issues, the impact of these suits taken together should not be understated.

Given their success in the tobacco litigation, many state attorneys general banded together more recently to sue drug manufacturers and distributors over the opioid crisis. A wide bipartisan collection of over forty-eight state attorneys general sued these drug companies in order to recoup the monies that the states had paid because of opioid overdoses and addiction problems.[59] As Nolette observes, "[t]he opioid litigation promises to be one of the largest such efforts in the history of modern attorney general activism, especially as the campaign has spread from focusing on one industry leader (Purdue Pharma, the manufacturer of OxyContin) to target a far wider range of opioid industry targets."[60]

In July of 2021, the attorneys general reached a potential settlement agreement with three drug distributors (Cardinal Health, AmerisouceBergen, and McKesson)—as well as drug manufacturer Johnson & Johnson—that would provide twenty-six billion dollars to the states to offset their losses due to the opioid crisis.[61] Many cities and counties had filed separate lawsuits against various companies, and the potential settlement might not end many of those over 4,000 suits.[62] As one journalist has written, "[t]he four companies that would be bound by the settlement . . . are widely seen as having some of the deepest pockets among the corporate opioid defendants and this agreement was eagerly anticipated as a major pillar in the national litigation."[63] State and local governments must decide whether or not to agree to the proposed settlement.[64] Some state attorneys general thought the settlement offer was too small. The Washington Attorney General argued that "[t]he settlement is, to be blunt, not nearly good enough for Washington."[65] Purdue Pharma, the maker of OxyContin owned by the billionaire Sackler family, was negotiating its own settlement deal worth a reported four-and-a-half billion dollars.[66] All of these proposed settlements would have to be approved by a variety of state and local governmental jurisdictions.[67] This is another example of multistate litigation taking the place of federal regulation of a key industry.

57. *Id.*

58. *Id.* at 21–22.

59. *See, e.g.*, Berkeley Lovelace Jr., *Nearly every US state is now suing OxyContin maker Purdue Pharma*, CNBC (June 6, 2019, 1:47 PM), https://www.cnbc.com/2019/06/04/nearly-every-us-state-is-now-suing-oxycontin-maker-purdue-pharma.html.

60. Paul Nolette & Colin Provost, *Change and Continuity in the Role of State Attorneys General in the Obama and Trump Administrations*, 48 PUBLIUS: J. FEDERALISM 469, 486 (2018).

61. *See, e.g.*, Jan Hoffman, *Drug Distributors and J.&J. Reach $26 Billion Deal to End Opioid Lawsuits*, N.Y. TIMES (July 21, 2021), https://www.nytimes.com/2021/07/21/health/opioids-distributors-settlement.html.

62. Lauren del Valle, *Opioid Settlement: Attorneys General Propose Settlement with Drug Distributors*, CNN (July 21, 2021), https://www.cnn.com/2021/07/21/business/global-opioid-settlement-offer/index.html.

63. Hoffman, *supra* note 61.

64. del Valle, *supra* note 62.

65. Hoffman, *supra* note 61.

66. *Id.*

67. del Valle, *supra* note 62.

B. The Goals of the State Attorneys General

State attorneys general have long interpreted their respective state constitutions and other sources of state law,[68] but the new multistate litigation has given them a voice in creating federal policy and in interpreting the federal constitution.[69] Nolette argues that multistate lawsuits filed by state attorneys general have one of three basic goals, which are either: (1) nationwide policy creation, usually through lawsuits against national industries such as the tobacco companies or pharmaceutical companies; (2) policy enforcement, usually by suing federal agencies to require them to expand regulation; or (3) the blocking federal policies promulgated by federal agencies or by the president through executive orders.[70]

I would argue that a fourth goal of the multistate litigation is the use of federal courts to increase the collective voice of the state attorneys general in the inter-institutional dialogue about constitutional interpretation in the United States. Collectively, state attorneys general are now the second most active litigants in the Supreme Court of the United States, falling behind only the federal government.[71] State attorneys general have also been quite active in submitting amicus curiae briefs to the Supreme Court.[72] The creation of the National Association of Attorneys General, with assistance from the U.S. Justice Department, has enabled attorney general offices to coordinate their amicus curiae efforts and professionalize their appearances before the U.S. Supreme Court.[73] Both of these activities have greatly increased their collective voice in federal constitutional development and interpretation.

The importance of state attorneys general in shaping federal policy is therefore a fairly recent and important phenomenon. Nolette has argued that state attorneys general "have been and continue to be an important and underappreciated force in contemporary American political development. Their litigation campaigns . . . have gone beyond simply enforcing the law and have instead crucially shaped the contours of national policy."[74]

C. "Governance as Dialogue" Movement

This next Section will explore the interactions of the "Governance as Dialogue" Movement with both separation of powers and federalism theory. Simply

68. *See, e.g.*, Ian Eppler, Note, *The Opinion Power of the State Attorney General and the Attorney General as a Public Law Actor*, 29 B.U. PUB. INT. L.J. 111 (2019).

69. *See, e.g.*, Clayton, *supra* note 23.

70. NOLETTE, *supra* note 4, at 19–20.

71. *See* Lynn Mather, *The Politics of Litigation by State Attorneys General: Introduction to the Mini-Symposium*, 25 LAW & POL'Y 425 (2003); Stephanie A. Lindquist & Pamela C. Corley, *National Policy Preferences and Judicial Review of State Statutes at the United States Supreme Court*, 43 PUBLIUS: J. FEDERALISM 151 (2013).

72. *See, e.g.*, Waltenburg & Swinford, *supra* note 26, at 242–59; Sean Nicholson-Crotty, *State Merit Amicus Participation and Federalism Outcomes in the U.S. Supreme Court*, 37 PUBLIUS: J. FEDERALISM 599 (2007); Colin Provost, *When to Befriend the Court? Examining State Amici Curiae Participation Before the U.S. Supreme Court*, 11 STATE POL. & POL'Y Q. 4 (2011); Michael E. Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355 (2012).

73. KEVIN T. MCGUIRE, THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY 111 (1993); NOLETTE, *supra* note 4, at 34.

74. NOLETTE, *supra* note 4, at vii.

stated, the Governance as Dialogue Movement argues that the U.S. Supreme Court does not necessarily have the last word on interpreting the U.S. Constitution. Instead, the movement argues that constitutional meaning comes out of a continuing inter-institutional conversation or dialogue among the courts, the Congress, the President, the States, and other political actors.[75] In Alexander Bickel's famous 1962 book, *The Least Dangerous Branch*, he was one of the first Americans to advocate for judicial scholars to consider the interactions between the courts and other political institutions.[76] Bickel said that the courts must engage in a "continuing colloquy" with the more political branches of the government.[77] Bickel was reacting against a notion of judicial supremacy then common among law professors and other judicial scholars.

Louis Fisher is probably the next key voice in the Governance as Dialogue Movement. In 1988, Fisher published his book entitled *Constitutional Dialogues* where he argued that the U.S. Supreme Court was not solely responsible for interpreting the U.S. Constitution because constitutional interpretation involves a very complicated ongoing conversation among many political actors.[78] Fisher often refers to this phenomenon as "coordinate construction." As he uses the term, it means, "[t]he opportunity for all three branches to interpret and shape the Constitution."[79] Fisher was also reacting negatively to the notion of judicial supremacy that was then so prevalent. In later works, Fisher argued, "[i]nstead of a hierarchical system, with the Court sitting supremely at the top, the process of making constitutional law and shaping constitutional values is decidedly polyarchic."[80] Reflecting Edwin Corwin's language,[81] Keith Whittington uses the term "departmentalism" to refer to this governance as a dialogue phenomenon. As Whittington has noted, "[d]epartmentalism would hold that constitutional interpretation is not peculiar to the courts, but rather that each of the three coordinate branches has an equal responsibility and authority to interpret. Whenever each branch acts, it necessarily exercises an interpretive power."[82] Barry Friedman generally agrees with this approach, although he adds that the courts "facilitate and mold the national dialogue concerning the meaning of the Constitution."[83]

Both legislators and judges often use the Governance as Dialogue language, even if they are unaware of that specific academic terminology. For example, Justice Ruth Bader Ginsburg argued that constitutional interpretation often requires judges to enter into "a continuing dialogue with other branches of government, the States,

75. MILLER, *supra* note 55, at 200–01.

76. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH OF GOVERNMENT: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

77. *Id.* at 240.

78. LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988); *see also* LOUIS FISHER, RECONSIDERING JUDICIAL FINALITY: WHY THE SUPREME COURT IS NOT THE LAST WORD ON THE CONSTITUTION (2019).

79. LOUIS FISHER & DAVID GRAY ADLER, AMERICAN CONSTITUTIONAL LAW 22 (7th ed. 2007).

80. LOUIS FISHER, *Judicial Finality or an Ongoing Colloquy, in* MAKING POLICY, MAKING LAW 153 (Mark C. Miller & Jeb Barnes eds., 2004).

81. EDWARD S. CORWIN, COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT (1938).

82. KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 29 (2007).

83. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 581 (1993).

or the private sector."[84] A Member of Congress told me in an interview for a different project that "[t]he relationship between Congress and the courts involves a continuous back and forth between us and the courts. In other words, it is a complex dialogue among equal branches always jockeying for power."[85] Even Supreme Court rulings acknowledge that Congress and other political actors have a role in constitutional interpretation. For example, in *City of Boerne v. Flores*, even while striking down a Congressional statute as unconstitutional, Justice Kennedy's majority opinion noted that "[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."[86]

The Governance as Dialogue Movement includes both scholars of the U.S. government and those who study the Canadian governmental system. Canadian scholars often use dialogic language to describe the interactions among their courts and the legislative branch in Canada.[87] While American scholars in the Governance as Dialogue Movement are reacting against ideas of judicial supremacy, Canadian scholars in the movement are generally reacting against notions of parliamentary supremacy.[88] On both sides of the border, the key point of the Governance as Dialogue Movement is clear: constitutional interpretation involves an ongoing conversation among the various institutions of government and other political actors, including each country's Supreme Court.

In the United States, the Governance as Dialogue Movement must be understood within the context of American federalism and our separation of powers system. The simplistic traditional understanding of separation of powers theory in the United States seems to hold that the three federal branches (legislative, executive, and judicial) all have different roles and distinct functions in our system of government. The reality, of course, is much more complicated than the conventional wisdom might allow, especially when the idea of federalism is added to the mix. Rejecting the three branches of government metaphor, Rubin refers to the U.S. government as a "network of interconnected institutions."[89] Others have also addressed the highly complex nature of our separation of powers and federalism system. Along this line, J. Mitchell Pickerill notes that "lawmaking in our separated system is continuous, iterative, speculative, sequential, and declarative."[90] Martin describes the interactions between the legislative branch and the judicial branch as "institutional interdependence" because "the Founders created a separation-of-

84. Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work*, 83 GEO. L.J. 2119, 2125 (1995).

85. MARK C. MILLER, THE VIEW OF THE COURTS FROM THE HILL 8 (2009).

86. 521 U.S. 507, 536 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* Holt v. Hobbs, 574 U.S. 352, 357–58 (2015).

87. *See, e.g.*, Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures: (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75 (1997); Kent Roach, *Common Law Bills of Rights as Dialogue Between Courts and Legislatures*, 55 U. TORONTO L.J. 733 (2005); Sujit Choudhry & Claire E. Hunter, *Measuring Judicial Activism on the Supreme Court of Canada: A Comment on* Newfoundland (Treasury Board) v. Nape, 48 MCGILL L.J. 525 (2003).

88. *Id.*

89. EDWARD L. RUBIN, *Independence as a Governance Mechanism*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman eds., 2002).

90. J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 4 (2004).

powers system whereby no single institution could enact policy unilaterally."[91] As I have written previously, "[a]s a matter of constitutional design, the United States simply does not feature a hierarchy of lawmakers or compartmentalized niches for each branch of government. Instead, the U.S. Constitution creates a system of overlapping and diversely representative branches of government, which share and compete for power."[92] Or put in its most simple terms—and as Richard Neustadt has stated—in reality, our separation of powers system features "separated institutions *sharing* powers."[93]

Federal constitutional interpretation is not static in the United States; there is never one clear-cut answer to constitutional interpretation questions. One must always remember that constitutional meaning in the U.S. requires us to consider separation of powers theory and federalism together. As Jonathan Casper has argued, all public policy making in this country is a "dynamic process" in which "issues recur,"[94] and this is certainly true for constitutional interpretation. Of course, the courts (and especially the Supreme Court of the United States) do play a key role in constitutional interpretation in our separation of powers system. As Justice Robert Jackson has reminded us about the role of the judiciary, "[n]o sound assessment of our Supreme Court can treat it as an isolated, self-sustaining, or self-sufficient institution. It is a unit of a complex, interdependent scheme of government from which it cannot be severed."[95] Or as another study has concluded, "American political institutions by design are inextricably linked in a continuing dialogue."[96] By using multistate litigation and submitting a very large number of amicus briefs to the federal courts, the state attorneys general clearly want to increase their role in the inter-institutional dialogue regarding the interpretation of the U.S. Constitution. Thus, these attorney general initiated lawsuits reflect both adversarial legalism and the continuing institutional dialogue regarding constitutional meaning in this country.

D. Who Speaks for the States in Multistate Litigation and Amicus Curiae Briefs

Recently, state attorneys general have been taking the lead on questions of how the state can influence federal constitutional interpretation because as stated earlier, they usually have the sole power in the state to file lawsuits challenging federal policy decisions. Thus, the attorneys general are using the federal courts to help them amplify their voices in the inter-institutional constitutional conversation. As Marshall explains, "[t]he most far-reaching of the attorney general's common-law powers is the authority to control litigation involving state and public interests. It is generally accepted that the attorney general is authorized to bring actions on the state's behalf. As the state's chief legal officer, the attorney-general has power, both

91. ANDREW D. MARTIN, *Statutory Battles and Constitutional Wars: Congress and the Supreme Court, in* INSTITUTIONAL GAMES AND THE U.S. SUPREME COURT 23 (James R. Rogers et al., 2006).

92. JEB BARNES & MARK C. MILLER, *Governance as Dialogue, in* MAKING POLICY, MAKING LAW 202 (Mark C. Miller & Jeb Barnes eds., 2004).

93. RICHARD E. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP FROM FDR TO CARTER 26 (1980).

94. Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50, 62 (1976).

95. ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 2 (1955).

96. Roy B. Flemming et al., *Attention to Issues in a System of Separated Powers: The Mycrodynamics of American Policy Agendas*, 61 J. OF POL. 76, 104 (1999).

under common law and by statute, to make any disposition of the state's litigation that he deems for its best interest."[97]

The greatest tool in advancing their voice in the inter-institutional constitutional dialogue has become the multistate lawsuit. In multistate lawsuits, various state attorneys general join together and file lawsuits against private entities or even against the federal government. Even though state attorneys general are generally independent political and legal actors, they can be constrained by state constitutional or statutory provisions regarding such issues as whether they have a choice in defending or challenging the constitutionality of state laws.[98] Various scholars have studied state attorney general multistate suits in a variety of substantive areas of the law, including criminal procedure,[99] consumer protection,[100] pharmaceutical pricing and marketing,[101] health care,[102] immigration,[103] and environmental policies.[104] While it is usually fairly easy to determine who is representing what branch of the federal government in the inter-institutional conversation about constitutional interpretation, it is not always clear who is speaking for the individual states.[105] Because most states have a complex plural executive system, the governor and the state attorney general may often be competing to be seen as the voice of the state on various policy issues, even in the courts.[106] For example, in *National Federation of Independent Business v. Sebelius*,[107] governors from Iowa, Mississippi, and Nevada joined the litigation against the Affordable Care Act because their respective attorneys general refused to do so.[108] In fact, the Attorney General of Iowa supported an amicus curiae brief on the other side of the case.[109] How could the state of Iowa be on both sides of the litigation? Wyoming's governor also signed onto the litigation, even though the Attorney General of Wyoming is appointed by and serves at the pleasure of the governor.[110] In fact, the Supreme Court seemed a bit confused about who was the true voice of the state in *National Federation of Independent Business v. Sebelius.* As Anthony Johnstone concluded, "[t]he Court took no note of the distinction between the attorneys general

97. Marshall, *supra* note 11, at 2456–57.

98. Devins & Prakash, *supra* note 4.

99. Provost, *supra* note 72, at 4.

100. Colin Provost, *The Politics of Consumer Protection: Explaining State Attorney General Participation in Multi-State Lawsuits*, 59 POL. RSCH. Q. 609 (2006); Colin Provost, *An Integrated Model of U.S. State Attorney General Behavior in Multi-State Litigation*, 10 STATE POL. & POL'Y Q. 1 (2010).

101. NOLETTE, *supra* note 4, at 43–105.

102. *Id.* at 168–197.

103. Shanna Rose & Greg Goelzhauser, *The State of American Federalism 2017–2018: Unilateral Executive Action, Regulatory Rollback, and State Resistance*, 48 PUBLIUS: J. FEDERALISM 319 (2018).

104. Nolette & Provost, *supra* note 60.

105. *See, e.g.*, Anthony Johnstone, *A State Is a "They," Not an "It": Intrastate Conflicts in Multistate Challenges to the Affordable Care Act*, 2019 B.Y.U. L. REV. 1471 (2019).

106. Marshall, *supra* note 11, at 2463. Recall that in forty-eight states, the state attorney general is independent from the chief executive, because only in Alaska and Wyoming does the attorney general serve at the will of the governor. *Id.* In the other states where the governor appoints the attorney general (Hawaii, New Hampshire, and New Jersey), they can only be removed from office for cause. *Id.*

107. 567 U.S. 519 (2012).

108. Johnstone, *supra* note 105, at 1485.

109. *Id*.

110. *Id.*

who represented their States and governors who represented only their offices . . . . In the most significant federalism decision of the new century, the Court mistook who actually spoke for the States."[111]

Multistate litigation and signing onto amicus briefs are ways for state attorneys general to increase their visibility in speaking for the state, sometimes in competition with the governor, in the inter-institutional constitutional conversation. Joseph Blocher argues that by also signing onto amicus briefs submitted to the U.S. Supreme Court, the state attorneys general are attempting to increase their collective role in the inter-institutional federal constitutional dialogue by representing the voice of the citizens in this conversation.[112] Blocher looks primarily at amicus briefs from state attorneys general in the areas of gun control and health care cases. He argues that the state attorneys general are attempting to represent the voice of the people in the inter-institutional constitutional conversation. Blocher thus writes, "by effectively recasting themselves as the people's attorneys general, the [state attorneys general] helped solve popular constitutionalism's problem of institutional design even as they raised new questions about their own responsibilities as representatives of the states themselves."[113] The term "popular constitutionalism" comes in part from Larry Kramer's book, *The People Themselves: Popular Constitutionalism and Judicial Review*.[114] Kramer is generally considered to be a progressive, which makes his book different from conservative assertions of popular constitutionalism. As one review of this book notes, "Kramer articulates popular constitutionalism as the view that The People have ultimate authority to interpret and enforce the Constitution."[115] Or as Mark Tushnet explains the concept, "[w]e can find in U.S. history a persistent strain of popular constitutionalism-that is, as I understand the point, the deployment of constitutional arguments by the people themselves, independent of, and sometimes in acknowledged conflict with, constitutional interpretations offered and enforced by the courts."[116] If the state attorneys general articulates the voice of the people in the inter-institutional constitutional conversation, then the attorneys general have greatly increased the importance of themselves and of the offices they hold.

E. Political Ambition

State attorneys general may be participating in multistate litigation and signing onto many amicus briefs in part because of their individual political ambitions. In fact, there is an old joke that "AG" really stands for "Aspiring Governor."[117] Recall that state attorneys general are generally considered the second

111. *Id.*

112. Joseph Blocher, *Popular Constitutionalism and the State Attorneys General: Responding to Reva B. Siegel,* D*ead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. F. 108 (2011).

113. *Id.*

114. LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

115. Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1602 (2005) (reviewing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)).

116. Mark Tushnet, *Popular Constitutionalism As Political Law*, 81 CHI.-KENT L. REV. 991 (2006).

117. *See, e.g.*, Devins & Prakash, *supra* note 4, at 2144; Larry J. Sabato, *The AG: Attorney General as Aspiring Governor. Hint: It's Twice as Good to be Lieutenant Governor*, SABATO'S CRYSTAL BALL: UVA CTR.

most powerful public official in the state. Political scientists have long been interested in studying political ambition. In his seminal work, Joseph Schlesinger broke down political ambition into three categories: progressive ambition (the politician's desire to seek higher office); static ambition (the desire to remain in one office); and discrete ambition (the desire to serve only one term in a single political position).[118] In their study of state legislators, Professors Cherie D. Maestas, Sarah Fulton, L. Sandy Maisel, and Walter J. Stone discovered that various factors, including age and sex, affect an individual's level of progressive ambition.[119] Are all state attorneys general automatically ambitious politicians? As Colin Provost summarizes the literature in this area, "there is a consensus that a variety of personal, political and institutional factors shape, facilitate or impede progressive ambition while serving in lower office, but there is greater disagreement over whether all politicians begin service in lower office as progressively ambitious individuals."[120]

State attorneys general are a key component of the American legal profession, and American lawyers are often politically ambitious. Since the founding, lawyers have been over-represented within American politics.[121] For example, of the fifty-two signers of the Declaration of Independence, twenty-five were lawyers; thirty-one of the fifty-five members of the Continental Congress were lawyers. Lawyers also dominated the constitutional conventions called to write the new state constitutions after the American Revolution.[122] Of the nation's first sixteen presidents, twelve were lawyers.[123]

Lawyer-legislators have long been the largest occupational group in Congress and in many state legislatures.[124] As of June 2021, 144 members of the U.S. House (thirty-three percent) and 50 U.S. Senators (fifty percent) had law degrees.[125] Congressional lawyer-legislators are most common coming from the South, and the least likely to come from the West.[126] These figures are part of a long downward trend in the number of lawyer-legislators in Congress, but nevertheless indicate that the legal profession is still well over-represented in the legislative branch.[127] Among these lawyer-legislators, it is worth noting that in 2021 there were

FOR POL. (2010), https://centerforpolitics.org/crystalball/articles/ljs2010042201/; Colin Provost, *When is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 PUBLIUS: J. FEDERALISM 612 (2010).

118. JOSEPH SCHLESINGER, AMBITION AND POLITICS: POLITICAL CAREERS IN THE UNITED STATES (1966).

119. Cherie D. Maestas et al., *When to Risk it? Institutions, Ambitions, and the Decision to Run for the U.S. House*, 100 AM. POL. SCI. REV. 195 (2006).

120. Provost, *supra* note 117.

121. *See, e.g.*, ESTHER LUCILE BROWN, LAWYERS, LAW SCHOOLS, AND THE PUBLIC SERVICE (1948); Joseph A. Schlesinger, *Lawyers and American Politics: A Clarified View*, 1 MIDWEST J. POL. SCI. 26 (1957); HEINZ EULAU & JOHN D. SPRAGUE, LAWYERS IN POLITICS: A STUDY IN PROFESSIONAL CONVERGENCE (1964); Robinson, *supra* note 7, at 657–58.

122. MARK C. MILLER, THE HIGH PRIESTS OF AMERICAN POLITICS: THE ROLE OF LAWYERS IN AMERICAN POLITICAL INSTITUTIONS 31 (1995).

123. ADAM BONICA & MAYA SEN, THE JUDICIAL TUG OF WAR: HOW LAWYERS, POLITICIANS, AND IDEOLOGICAL INCENTIVES SHAPE THE AMERICAN JUDICIARY 35 (2021).

124. *See generally* MILLER, *supra* note 122.

125. JENNIFER E. MANNING, CONG. RSCH. SERV., R46705, MEMBERSHIP OF THE 117TH CONGRESS: A PROFILE 5 (2021).

126. Robinson, *supra* note 7, at 684.

127. Bonica and Sen note that over American history, lawyers have comprised an average of sixty-two percent of the U.S. House and seventy-one percent of the U.S. Senate. BONICA & SEN, *supra* note 123, at 32.

six former state attorneys general serving in the U.S. Senate and one in the U.S. House.[128] More than half of U.S. presidents and vice presidents have been lawyers,[129] and a very high percentage of the president's cabinet have also been lawyers throughout American history.[130] Lawyers have also dominated the office of governor.[131]

The dominance of the legal profession among American politicians and in policymaking led Alexis de Tocqueville in the early 1800s to refer to lawyers as the American aristocracy. He observed, "If I were asked where I place the American aristocracy, I should reply without hesitation, that it is not composed of the rich, who are united together by no common tie, but that it occupies the judicial bench and the bar."[132] And as Adam Bonica and Maya Sen conclude, "It is difficult to overstate the influence that lawyers – and by extension the bar – have exercised over the development of American political institutions and norms."[133]

In a previous work, I have detailed the various advantages that lawyers have in U.S. electoral politics.[134] But for our purposes, I want to highlight the fact that three elected offices are open exclusively to lawyers: elected state judges, elected local district attorneys, and state attorneys general. These jobs are often seen as steppingstones to higher political office.[135] As Paul Hain and James Piereson observe, "The advantages enjoyed by lawyers in the American political opportunity structure can be easily appreciated . . . . They are thus advantaged in their ability to advance in their careers primarily because they are able to monopolize an important route of political advancement."[136] State attorneys general are unique in their powers as lawyer-politicians in part because of their power to control litigation on behalf of the state and in part because of their relationship with federal agencies. As one set of scholars concludes:

> In recent decades, state AGs have emerged as a uniquely powerful cadre of lawyers. As the chief legal officers for their respective states, AGs are responsible for enforcing state law and defending the state against legal challenges; in many areas, they also share responsibility with federal agencies for enforcing federal law.[137]

128. MANNING, *supra* note 125, at 3. Four current members of the U.S. Senate Judiciary Committee served as attorney general for their respective states before running for the Senate (Senators Whitehouse, Blumenthal, Hawley, and Cornyn); Senator Ted Cruz was appointed as his state's solicitor general in the attorney general's office. *About: Members*, COMM. ON THE JUDICIARY, https://www.judiciary.senate.gov/about/members (last visited Dec. 29, 2021).

129. *See, e.g.*, AMERICA'S LAWYER PRESIDENTS: FROM LAW OFFICE TO OVAL OFFICE (Norman Gross, ed., 2004); Robinson, *supra* note 7.

130. *Id.*, at 669.

131. MILLER, *supra* note 122, at 31.

132. *See* TOCQUEVILLE, *supra* note 1, at 266.

133. *See* BONICA & SEN, *supra* note 123, at 33.

134. Miller, *supra* note 122, at 64–75.

135. *See, e.g.*, Provost, *supra* note 117; Sabato, *supra* note 117.

136. Paul L. Hain & James E. Piereson, *Lawyers and Politics Revisited: Structural Advantage of Lawyer-Politicians*, 19 AMER. J. POL. SCI. 41, 42–43 (1975).

137. Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 65 (2018).

Since the vast majority of state attorneys general are statewide elected officials, the individuals who occupy those offices must have had a fair amount of political ambition just to get there in the first place. Thus, it is not really surprising that many attorneys general have hopes of attaining higher office, or in Joseph Schlesinger's terminology "progressive ambition." Looking at state attorneys general who served between 1988 and 2003, Colin Provost found that fifty-four percent either ran for governor or U.S. senator.[138] Using data from 1984–2010, Sabato found that eleven percent of those elected governor in that period were former attorneys general.[139] However, former lieutenant governors had double the success rate, with twenty-two percent of governors having previously served as lieutenant governors.[140] There were some clear differences among the states. For example, twenty-nine percent of Arizona governors during that period were former attorneys general; thirty-three percent of Michigan governors, and seventy-five percent of Arkansas governors, previously served in the attorney general office.[141] However, twenty-eight states did not have a single former attorney general elected to the governorship during the period that Sabato studied.[142] Wanting to know more about which specific individual attorneys general had progressive ambition, Provost found that elected attorneys general had more ambition than appointed ones, those individuals who actively participated in multistate litigation had more ambition than those who did not participate, and sex and age had an effect on an individual's level of progressive ambition.[143] Provost concluded that "not all state AGs necessarily begin their service with the same level of ambition."[144]

Without a doubt, some state attorneys general do have ambitions for higher political office. As one study noted:

> Elected attorneys general seek political advantage. They invariably curry favor with their political base (party, interest groups, voters) as they seek reelection or a new office. Correspondingly, elected attorneys general pay more attention to the needs of their political base than to the institutional or political interests of other parts of the executive branch, including the governor.[145]

Increased resources for the offices of attorney general have also made these offices more important for those with political ambition. As one group of scholars concluded, "[A]s the offices of the state attorneys general have professionalized, the public profile of the office has grown, and it has become a more attractive office for ambitious politicians."[146] Sensing that state attorneys general were able to increase their visibility and their importance in national policymaking, more and more progressively ambitious individuals such as President Bill Clinton and Vice President

138. Provost, *supra* note 117, at 597.
139. Sabato, *supra* note 117.
140. *Id.*
141. *Id.*
142. *Id.*
143. Provost, *supra* note 117.
144. *Id*.
145. Devins & Prakash, *supra* note 4, at 2143.
146. Spill et al., *supra* note 4, at 607–08.

Kamala Harris have been attracted to the state attorney general job near the beginning of their political careers. As Clayton explains: "[c]ertainly the more active policymaking role assumed by state attorneys general may help to foster political careers, and in many instances protecting the 'public interest' may indeed overlap with what is good politics."[147]

Progressive ambition does require resources and public attention. Nolette notes that state attorney general offices have greatly expanded both in size and in resources since the 1970s.[148] As Margaret Lemos and Ernest Young quip: "[p]rior to the 1980s, most state AG offices could be described as '[p]lacid and reactive'"[149] Agreeing with this conclusion, Clayton notes that: "[a]ttorneys general's offices that were formerly small, intimate environments have grown into large, hierarchical legal bureaucracies."[150] These increasing resources came along the willingness of federal political actors to give more credence to the arguments made by state attorneys general. Congress enacted a variety of federal statutes that actually empowered state litigation by giving the states the power to enforce a wide array of federal laws,[151] and federal agencies provided funding for these activities as well as information sharing to streamline the enforcement efforts.[152] Federal courts also relaxed their standing requirements, allowing state attorneys general to participate in a variety of lawsuits on a wide range of issues.[153] As Nolette argues, more resources for attorney general offices came with "the incorporation of AGs into the structure of national social policy regime. Congress, federal agencies, and the courts have all contributed to creating new avenues for AGs to deploy their expanded resources to influence national policy through collaborative litigation."[154]

F. State Suits Against the Federal Government

Multistate litigation is now an important component in the partisan wars occurring throughout American politics.[155] These lawsuits may be either policy-forcing or policy-blocking, to use Nolette's terminology noted earlier.[156] The pattern has become clear that state attorneys general of the opposite party will use lawsuits against the federal government as a political and partisan weapon. To prove this point, Texas Republican Governor—and the former Attorney General of Texas—Greg Abbott was quoted in 2013 describing his job as follows: "I go into the office in the morning. I sue [Democrat] Barack Obama, and then I go home."[157] The

147. Clayton, *supra* note 23, at 538.

148. NOLETTE, *supra* note 4, at 33–35.

149. Lemos & Young, *supra* note 137, at 67.

150. Clayton, *supra* note 23, at 537–38.

151. For a list of some of these federal statutes, *see* NOLETTE, *supra* note 4, at 39–40.

152. *Id.* at 36–37.

153. *See, e.g.*, Mark L. Earley, *Keynote Address: "Special Solicitude": The Growing Power of State Attorneys General*, 52 U. RICH. L. REV. 561, 562. (2018).

154. NOLETTE, *supra* note 4, at 33.

155. *See, e.g.*, Lemos & Young, *supra* note 137, at 97.

156. *See, e.g.*, Philip Green, *Keeping Them Honest: How State Attorneys General Use Multistate Litigation to Exert Meaningful Oversight Over Administrative Agencies in The Trump Era*, 71 ADMIN. L. REV. 251, 256 (2019).

157. David Siders, *Republican AGs take Blowtorch to Biden Agenda*, POLITICO (Mar. 21, 2021), https://www.politico.com/news/2021/03/21/gop-attorneys-general-biden-477365.

attorneys general often cooperate with ideologically based interest groups in these suits.[158] These lawsuits against the federal government are part of a broader effort by state attorneys general to increase their role in federal policymaking and in federal constitutional interpretation. As several scholars have concluded:

> [S]tate AGs' influence over national policy extends beyond . . . well-known examples. It also includes significant increases in amicus curiae filings by state governments, multistate litigation by groups of AGs working together to combat questionable business practices, as well as state efforts to enforce federal law in ways that may deviate from the national Executive's priorities. State AGs are playing a pivotal role in some of the most important national political debates of the day, and they are doing so largely through entrepreneurial litigation.[159]

The partisan motivated lawsuits by groups of attorneys general are a recent phenomenon. Republican state attorneys general sued the Obama Administration seventy-eight times during the eight-year Obama Administration; mostly Democratic attorneys general sued the George W. Bush Administration seventy-six times during that president's eight years in office.[160] Some of the most prominent attacks against the constitutionality of the Affordable Care Act ("ACA"), also known as "Obamacare," were initiated by Republican attorneys general only minutes after Congress passed the ACA legislation.[161] These lawsuits reflect both vertical conflicts between the federal government and the state and horizontal conflicts among the partisan state attorneys general.[162] Political lawsuits initiated by state attorneys general therefore cannot be viewed in a vacuum, but we must take into account the broader context that American law is clearly shaped by entrepreneurial litigation that develops and enforces public norms. Thus, state attorneys general can be compared to cause lawyers, class-action lawyers, "private attorneys general," and public interest groups on both the right and the left.[163] Politically-motivated lawsuits by state attorneys general have thus become quite commonplace.

The number of politically-motivated lawsuits filed by state attorneys general, however, skyrocketed during the Trump Administration. State attorneys general, almost always Democrats, filed an astounding 138 multistate lawsuits against the Trump Administration during its mere four years in office.[164] Only six of

158. Paul Nolette, *State Litigation During the Obama Administration: Diverging Agendas in an Era of Polarized Politics*, 44 PUBLIUS: J. FEDERALISM 451, 465 (2014).

159. Lemos & Young, *supra* note 137, at 97.

160. Erik Ortiz, *State Attorneys General Have Sued Trump's Administration 138 Times – Nearly Double Those of Obama and Bush*, NBC News (Nov. 16, 2020), https://www.nbcnews.com/politics/politics-news/state-attorneys-general-have-sued-trump-s-administration-138-times-n1247733.

161. Nolette, *supra* note 158.

162. Lemos & Young, *supra* note 137, at 48 ("When most people think of federalism, they imagine 'vertical' conflicts between the states and the federal government, conflicts in which states typically are resisting assertions of federal power so as to maximize their own regulatory autonomy. But our federal system also addresses 'horizontal' conflicts in which powerful states (or groups of states) attempt to impose their will on others. Vertical conflicts are, for the most part, about who decides—the states or the federal government. Horizontal conflicts are about what policies will prevail."). *See also* Nolette, *supra* note 158.

163. Lemos & Young, *supra* note 137, at 44.

164. Ortiz, *supra* note 160.

those lawsuits involved a Republican attorney general as part of the multistate litigation.[165] As of mid-November of 2020, the state attorneys general were successful in their suits against the Trump Administration seventy-nine percent of the time, with sixty lawsuits then still pending.[166] This is about the same success rate as overall challenges to Trump Administration administrative policies throughout his term. As Olga Khazan reported in *The Atlantic*:

> As of April [2021], out of the 259 regulations, guidance documents, and agency memoranda [the Trump Administration] issued that were challenged in court, 200, or 77 percent, were unsuccessful, according to from the Institute for Policy Integrity, a think tank at New York University that researches regulatory policy. A typical administration loses more like 30 percent of the time, the group says.[167]

Some states took the lead often in most of these lawsuits against the Trump Administration. These included the Democratic strongholds of New York, California, Massachusetts, Washington, and Hawaii. Texas has generally taken the lead in suing Democratic Presidents. Writing fairly early in the Trump years, one journalist stated that the New York Attorney General's office "has arguably become the most visible and vocal AG's office to oppose the Trump Administration – a result no doubt of the office's sprawling size and its location, but it's also not one known to be press-adverse."[168] After President Trump left office, the Attorney General of New York brought criminal charges against one of the key players in the Trump Corporation.[169] Xavier Becerra, Secretary of Health and Human Services in the Biden Administration, alone filed over 110 lawsuits against the Trump Administration when he was Attorney General of California,[170] costing the taxpayers over $41 million.[171] Massachusetts Attorney General Maura Healey was involved in over 100 of these suits,[172] and Washington State Attorney General Bob Ferguson

165. *Id.*

166. *Id.*

167. Olga Khazan, *The Unraveling of the Trump Era*, ATLANTIC (July 28, 2021), https://www.theatlantic.com/politics/archive/2021/07/which-trump-regulations-were-overturned-biden/619583/?utm_source=email&utm_medium=social&utm_campaign=share.

168. Alan Neuhauser, *State Attorneys General Lead the Charge Against President Donald Trump*, U.S. NEWS & WORLD REP. (Oct. 27, 2017), https://www.usnews.com/news/best-states/articles/2017-10-27/state-attorneys-general-lead-the-charge-against-president-donald-trump.

169. Press Release, Letitia James, N.Y. Att'y Gen., Statement from Attorney General James on Criminal Indictment of Trump Organization and CFO Weisselberg (July 1, 2021).

170. Siders, *supra* note 157.

171. Rhonda Lyons, *California's Bill for Fighting Trump in Court? $41 Million so Far*, CAL. MATTERS (Jan. 22, 2021), https://californianewstimes.com/californias-bill-for-fighting-trump-in-court-41-million-so-far-times-herald/139026/.

172. Emily Jane Fox, "*Donald Trump Was Doing Things That Were Illegal And Unconstitutional": Massachusetts A.G. Maura Healey On Prosecuting A President*, VANITY FAIR (Dec. 8, 2020), https://www.vanityfair.com/news/2020/12/massachusetts-ag-maura-healey-on-prosecuting-a-president?utm_source=onsite-share&utm_medium=email&utm_campaign=onsite-share&utm_brand=vanity-fair.

participated in eighty-two lawsuits against the Trump Administration.[173] Hawaii and Maryland separately took the lead in suing President Trump over his travel bans from mostly Muslim nations, while Maryland and the District of Columbia joined together to sue President Trump over alleged violations of the Constitution's Foreign and Domestic Emoluments Clauses.

Massachusetts Attorney General Healey argued that the Democratic state attorneys general were crucial players in the Trump legal drama because, as she described: "[w]hat a sad commentary that in order to defend the Constitution, to protect the rule of law, we found ourselves taking Donald Trump and his administration to court over 100 times, but it was absolutely necessary. The good news is we won over 80% of those cases."[174] Healey continued, "I don't think you can overstate how much energy and effort it took to hold the line against the Trump Administration that was doing things so entirely unprecedented and in violation of so many norms and the rule of law."[175] Arguing that the state attorneys general were representing the public interest in these suits, Healey concluded: "[t]he role of the AG has never been more important."[176]

Given how important state attorneys general have become in suing presidential administrations of the opposite political party, it is not surprising that both parties have created partisan organizations to promote and raise money for the state attorneys general in each respective party. In 1999, Republican state attorneys general came together to form the Republican Attorneys General Association. Over the years, it has raised millions of dollars to support the GOP office holders.[177] This organization reported that in the second quarter of 2021, it has raised over $5.3 million—the most for any single quarter in its history.[178] The press release went on to say that:

> Republican attorneys general are rigorously defending the Constitution and have waged an unprecedented legal battle against the Biden Administration's radical agenda. This fight against the progressive agenda being pushed by Democrats in Washington is winning support from Americans across the country in record numbers . . . . Republican attorneys general are united in the common defense of federalism, the Constitution, and the rule of law, and will continue the fight at any cost.[179]

The Democratic Attorneys General Association, founded in 2002, has also raised millions, but generally, far less than its Republican counterpart.[180] The Democratic Attorneys General Association raised about $5.7 million in the first half

173. David Gutman, *Bob Ferguson Sued the Trump Administration 82 Times. What's He Going to Do Now?*, SEATTLE TIMES (Nov. 14, 2020, 6:00 AM), https://www.seattletimes.com/seattle-news/politics/bob-ferguson-sued-the-trump-administration-82-times-whats-he-going-to-do-now/.
174. Fox, *supra* note, at 172.
175. *Id.*
176. Neuhauser, *supra* note, at 168.
177. *Id.*
178. Republican Attorneys General Association, Press Release: RAGA Reaches New Fundraising Milestone in Second Quarter, July 9, 2021, https://republicanags.com/2021/07/09/raga-reaches-new-fundraising-milestone-in-second-quarter/.
179. Id.
180. Neuhauser, *supra* note 168.

(as opposed to the second quarter) of 2021.[181] The Democratic press release announcing the fundraising success states:

> It was Democratic AGs that protected the results of a free and fair 2020 election. Now as it is our turn on the ballot in the upcoming midterm, we thank our existing donors who are contributing again to DAGA and welcome new donors joining with us and our AGs to guarantee democracy will remain in the hands of the people's lawyers, our Democratic AGs, who uphold the rule of law and fight for justice every day.[182]

Note how each side argues that it is representing the voice of the people in the inter-institutional conversation over the meaning of the U.S. Constitution.

The horizontal and partisan fights among the state attorneys general continue. Following the results of the 2020 presidential election, Republican attorneys general returned to their habit of filing partisan lawsuits.[183] GOP state attorneys general even joined lawsuits designed to perpetuate the falsehood that Donald Trump had actually won the 2020 presidential election. Very soon after President Trump lost the 2020 presidential election, the Republican Attorney General of Texas filed a lawsuit, claiming that the electoral college votes of four states that President Biden had won (Georgia, Michigan, Pennsylvania, and Wisconsin) should not be counted because of fraudulent voting in those states, instead shifting the ultimate decision to the GOP controlled state legislatures in each state.[184] The unprecedented Texas lawsuit was supported by seventeen additional Republican state attorneys general[185] and over 100 GOP members of the U.S. House of Representatives.[186] The U.S. Supreme Court quickly threw out the suit, stating that the Texas Attorney General did not have standing in the case.[187] As one journalist noted, "[t]o Democrats, the involvement of Republican attorneys general in the election's aftermath was something more pernicious than typical partisan warfare. Rather, it was 'something that we just haven't seen before.'"[188]

The partisan struggles in this country continued even after the 2020 elections. Some have argued that since a Democrat is now in the White House, lawsuits from Republican attorneys general will intensify during the Biden Administration. As of July 2021, Republican state attorneys general had already sued the Biden Administration over forty times,[189] and many of these suits concern issues that the media has deemed highly important to national politics. As one political advisor noted near the beginning of the Biden Administration, "Leaders in

181. *DAGA Raises $*5.7 *Million in Push Against GOP's Agenda to Restrict Voting, Healthcare, and Racial Equity*, DEMOCRATIC ATT'YS GEN. ASS'N (July 29, 2021), https://dems.ag/daga-raises-5-7-million/.
182. *Id.*
183. *See*, *e.g.*, Adam Liptak, Supreme Court Rejects Texas Suit Seeking to Subvert Election, N.Y. Times (Dec. 11, 2020), https://www.nytimes.com/2020/12/11/us/politics/supreme-court-election-texas.html.
184. Id.
185. Jeremy W. Peters & Maggie Haberman, 17 Republican Attorneys General Back Trump in Far-Fetched Election Lawsuit, N.Y. Times (Dec. 9, 2020), https://www.nytimes.com/2020/12/09/us/politics/trump-texas-supreme-court-lawsuit.html.
186. Liptak, *supra* note 183.
187. Id.
188. Siders, *supra* note 157.
189. Republican Attorney General Association, *supra* note 178.

government will use whatever levers of power are available to them to advance their policy goals. And state Republican attorneys general have the ability to bring lawsuits. And that's what they're doing."[190]

State attorneys general have become key players in partisan warfare being carried out through the judicial branch. As one journalist noted:

> With their party out of power in the White House and Congress, the nation's 26 Republican attorneys general have emerged as the weapons division of the GOP, reprising a role played by Democratic AGs during the Trump era. Just as Democratic AGs served as the vanguard of the blue-state resistance, Republican AGs are leading the charge to stymie President Joe Biden's policy-making agenda.[191]

These developments are not unexpected. As a former attorney general of Washington State, who also is the former president of the National Association of Attorneys General, has stated:

> The base of each party, Democratic and Republican, expects their attorney general to step up and fight for issues that the base believes in . . . . There's a higher expectation now that the AGs are going to be active, and if you don't step up, you're likely to come under fire from the people in your own party.[192]

Certainly, partisan groups of state attorneys general have become key players in efforts to reduce the power and prestige of Presidents Obama, Trump, and Biden respectively. As Mark L. Earley, the former Attorney General of Virginia, has noted, "[t]he most powerful elected position it the United States today, with respect to checking any perceived overreach of presidential or federal power, is not the Congress, the House of Representatives or the Senate, but is among the fifty state attorneys general."[193] Earley cites four reasons for this increased power among state attorneys general: (1) the results of the collective tobacco litigation discussed above; (2) the increasing partisan activity of the attorneys general, including the founding of the Republican Attorneys General Association and its corresponding Democratic Attorneys General Association; (3) the increase of national political campaign contributions flowing into the coffers of individual attorney general candidates; and (4) the Supreme Court's loosening of standing requirements for the state as litigants beginning in *Massachusetts v. EPA*.[194] Earley concludes:

> How does one view the growing power of the attorneys general to challenge executive and federal power? One can view it as a glorious playing out of the freewheeling and adaptable democratic system of checks and balances. Or one might view it as the grotesque free fall of an orderly administration of government that is now hopelessly

190. Siders, *supra* note 157.

191. *Id.*

192 .*Id.*

193. Earley, *supra* note 153.

194. *Id.* at 564–66. *See also Massachusetts v. EPA*, 549 U.S. 497 (2007).

> divided, reflecting a divided nation no longer able to govern itself in the traditional means to which we have become accustomed.[195]

G. Standing Issues

One key component in the explosion of multistate litigation has been the way the Supreme Court has treated questions of standing for the states. In the traditional conception of standing, the plaintiff must prove some actual or imminent harm was caused to them by the defendant.[196] If a party does not have standing, the lawsuit does not go forward.[197]

State attorneys general have a lot of advantages over their private sector colleagues when it comes to matters of standing. Some of these advantages come from the fact that the attorney general can define and then sue on behalf of the public interest. As Andrew Hessick and William Marshall explain: "States can establish standing by demonstrating an injury to the same sort of interests held by private individuals such as the interest in holding property. But because they are sovereigns, states also have sovereign and quasi-sovereign interests, and the violation of those interests can also support standing."[198] The advantages in standing held by the states and available for the attorneys general to use are substantial. As another scholar explained, state attorneys general are:

> [L]ess limited, relative to private attorneys, in their ability to find an appropriate case to use as a vehicle to advance a policy agenda. Because their authority is predicated to some extent on the 'public interest' conception of their role that is embedded in the common law tradition, [state] AGs are able to bring lawsuits with sweeping regulatory implications that private litigants would be unable to bring for lack of standing or other legal reasons.[199]

Thus, multistate litigation brings with it many advantages, including:

> Not only do they have myriad ways to establish standing to sue the President or an executive branch agency, and exclusive doctrines by which to frame those suits in a favorable manner, but their participation is also controlled ultimately by the public interest, not private or corporate interests.[200]

Thus, standing for state litigants is far easier to achieve than standing for private litigants.

195. *Id*. at 567.
196. *See, e.g.*, LOUIS FISHER & KATY J. HARRINGER, AMERICAN CONSTITUTIONAL LAW 81–82 (12th ed. 2019).
197. *See, e.g.*, LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA 61–62 (10th ed. 2019).
198. F. Andrew Hessick & William P. Marshall, *State Standing to Constrain the President*, 21 CHAP. L. REV. 83, 90 (2018).
199. Timothy Meyer, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CAL. L. REV. 885 (2007).
200. Jonathan David Shaub, *Delegation Enforcement by State Attorneys General*, 52 U. Rich. L. Rev. 653, 674 (2018).

Massachusetts v. EPA is the landmark U.S. Supreme Court decision that allowed state attorneys general to gain standing quite easily for their multistate lawsuits.[201] Massachusetts and eleven other states sued the federal Environmental Protection Agency ("EPA") in an attempt to force the agency to issue regulations limiting carbon dioxide and other greenhouse gases in an attempt to limit climate change. Much of the Supreme Court's opinion centered around the issue of state standing. In the 5-4 decision, Justice Stevens, writing for the Court's majority, stated that states have "special solitude" to bring suits that private litigants may lack.[202]

After noting the Court's position that it does not allow "citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws,"[203] the majority concluded that the states have "sovereign prerogatives" that are not available to private litigants.[204] Thus, the states can have standing even when other parties do not. As one scholar has concluded, "[t]he practical effect of the 'special solicitude' precedent established in *Massachusetts v. EPA* is that State AGs now have near-automatic standing in lawsuits against the federal government."[205]

Therefore, state standing is much easier to achieve than standing for federal legislators, which was severely restricted in *Raines v. Byrd*.[206] It is also far easier for states to achieve standing than it is for private litigants in many situations.[207] For example, taxpayer standing or citizen standing was eliminated in *Massachusetts v. Mellon*,[208] allowed in very limited circumstances in *Flast v. Cohen*,[209] and then again made extremely difficult to obtain in *Arizona Christian School Tuition Organization v. Winn*.[210] States also enjoy various other procedural advantages over private class-action lawsuits. As Lemos and Young explain, "[w]hereas class actions are governed by a complex set of procedural requirements designed to promote judicial economy and protect the interests of absent class members, courts have declined to apply those rules to similar suits by states – even as they have tightened up the requirements for private suits."[211]

Not everyone is pleased with the way the Supreme Court has expanded standing for the states. Some argue that relaxed state standing rules allow the courts to interfere in federal policymaking in ways that they should not.[212] As Seth Davis notes: "Article III standing doctrine reflects the idea that courts should not be brought into political battles about the public interest. They must stay above the fray to the extent possible, deferring to the political branches and preserving their own legitimacy by exercising restraint."[213] Others argue that the Supreme Court did damage to the traditional notion of standing when it made state standing so readily available. As part of their critique of the *Massachusetts v. EPA* decision, Bradford Mank and Michael Solimine argue, "[i]n the Massachusetts decision, the only

201. 549 U.S. 497 (2007).
202. *Id.* at 520.
203. *Id.* at 516–17.
204. *Id.* at 519.
205. Green, *supra* note 156, at 258.
206. 521 U.S. 811 (1997).
207. *See, e.g.*, Shaub, *supra* note 200, at 676–77.
208. 262 U.S. 447 (1923).
209. 392 U.S. 83 (1968).
210. 563 U.S. 125 (2011).
211. Lemos & Young, *supra* note 137, at 72.
212. *See, e.g.*, Seth Davis, *The New Public Standing*, 71 STAN. L. Rev. 1229 (2019).
213. *Id.* at 1277.

plausible theory for why states might possess greater standing rights than private individuals is because of their quasi-sovereign interests in protecting the health and welfare of their citizens and the states' natural resources."[214]

H. Lawsuits Against the Federal Government

At this point, it may be useful to discuss some of the outcomes of some other major policy-blocking lawsuits brought by state attorneys general against the federal government. A coalition of twenty-six Republican attorneys general filed suit minutes after Congress enacted the Affordable Care Act ("ACA"). The first case in a trilogy of Supreme Court decisions regarding the constitutionality of the ACA was *National Federation of Independent Businesses v. Sebelius*.[215] In a 5-4 decision, Chief Justice Roberts, writing for the majority, upheld most of the ACA, except for the provisions that mandated increased Medicaid coverage by the states. The Court ruled that the penalties for failure of individuals to buy health insurance were constitutional under Congress's taxing powers, although not constitutional under its interstate commerce powers.[216] Note that twelve state AGs signed an amicus brief in the case in favor of the Medicaid expansion requirements which the Court struck down.[217] Because of the Medicaid issues, state standing was not an issue in this case. Next in the case trilogy was *King v. Burwell*.[218] In this case, the plaintiffs challenged the legality of the state insurance exchange systems.[219] Although technically a statutory interpretation case, the ruling had clear constitutional ramifications. In a 6-3 decision, Chief Justice Roberts interpreted the language of the ACA in such a way that the Court ruled the exchanges to be properly constituted. Six states joined the suit, claiming that the insurance exchanges were illegal. Twenty-two states and the District of Columbia filed briefs supporting the legality of the state insurance exchanges.[220]

The final challenge to the ACA was in *California v. Texas*.[221] The Attorney General of Texas filed suit, joined by seventeen other states, claiming that, since Congress had repealed the tax penalties for failure of individuals to buy health insurance, the entire ACA was now unconstitutional based on the *National Federation of Independent Businesses v. Sebelius* ruling. A variety of states, led by California, entered the case on the other side.[222] In a 7-2 decision, Justice Breyer, writing for the Court's majority, ruled that the states lacked standing to challenge these provisions of the ACA and dismissed the lawsuit.[223] Justice Breyer concluded that "[t]he state plaintiffs have failed to show that the challenged minimum essential coverage provision, without any prospect of penalty, will harm them by leading more individuals to enroll in these programs."[224] It is unclear whether the Supreme Court

214. Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 Notre Dame L. Rev. 1955, 1958 (2019).
215. 567 U.S. 519 (2012).
216. *Id.*
217. Johnstone, *supra* note 105, at 1488.
218. 576 U.S. 473 (2015).
219. *Id.*
220. Johnstone, *supra* note 105, at 1491.
221. 141 S. Ct. 2104 (2021).
222. *Id.*
223. *Id.*
224. *Id.* at 2117.

was pulling back on unlimited standing for the states or whether the Supreme Court's ruling was fact-specific.

In addition to the suits challenging the ACA, states have sued the federal government on a variety of other issues, including immigration policy. In *Trump v. Hawaii*,[225] the Supreme Court, in a 5-4 decision, upheld President Trump's travel ban from several predominantly Muslim countries as a legitimate exercise of presidential power as delegated to the President by Congress in federal immigration statutes.[226] Chief Justice Roberts, writing for the Court's majority, stated that the President was acting properly under the authority delegated to him in the immigration laws and that the travel ban did not violate the No Establishment of Religion Clause in the First Amendment.[227] In contrast to the majority, the dissenting justices in this case felt that President Trump's own statements showed a religious animus underlying the travel ban order, thus violating the Establishment Clause.[228]

In *Texas v United States*, the Attorney General of Texas challenged the legitimacy of the Obama era Deferred Action for Childhood Arrivals ("DACA") program, also known as the Dreamer Program.[229] This program protects immigrants who were brought to the U.S. illegally as children.[230] The U.S. District Court judge in Texas said that the program was illegally implemented, and he barred further enrollment in the DACA program. However, the judge did allow those already enrolled to continue and even renew their participation in DACA.[231] The judge also said that Texas and other states clearly had standing in the case.[232] President Biden has stated that the federal government will appeal this decision.[233] In another case filed by the Attorney General of Texas, *Texas v. Pennsylvania*, the Supreme Court denied standing to the Attorney General of Texas in his lawsuit claiming that President Trump actually won the 2020 presidential election.[234] In its terse decision, the Supreme Court stated, "Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections."[235]

I. Is Multistate Litigation Beneficial?

Scholars have noted various critiques concerning this new trend in attorney general initiated multistate lawsuits, including whether the new partisan lawsuits are furthering polarization in this country and whether it is proper for the state attorneys general to bypass the normal legislative and bureaucratic decision-making processes.[236] As Lemos and Young articulate: "[l]ongstanding concerns about state litigation as a form of national policymaking that circumvents ordinary lawmaking

225. 138 S. Ct. 2392 (2018).
226. *Id.*
227. *Id.*
228. *Id.*
229. Texas v. United States, No. 1:18-CV-00068, 2021 WL 3022434 (S.D. Tex. July 16, 2021).
230 .*Id.*
231. Maria Sacchetti & Amy B. Wang, *U.S. Judge Blocks New Applicants to Program that Protects Undocumented 'Dreamers' Who Arrived as Children*, WASH. POST (July 17, 2021), https://www.washingtonpost.com/immigration/daca-court-decision/2021/07/16/6c9a35be-e677-11eb-a41e-c8442c213fa8_story.html.
232. *Id.*
233. *Id.*
234. 141 S. Ct. 1230 (2020).
235. *Id*.
236. *See, e.g.*, Lemos & Young, *supra* note 137.

processes have been joined by new concerns that state litigation reflects and aggravates partisan polarization."[237] Along these same lines, Jonathan Schaub notes that, "these suits are undeniably driven by politics, both with respect to the policy aspects and the individual political esteem that a state attorney general can achieve by bringing the suit."[238] Another line of criticism worries that state attorneys general are abandoning their traditional role of representing the best interests of their state as a whole and instead are more focused on the political interests of various groups and individuals who support their partisan interests.[239] However, we should always remain aware that not all state attorneys general join litigation or sign onto amicus briefs from others in their political party. As Johnstone notes, "State attorneys general also can exercise independence from their national parties, as evidenced by the surprising number of times attorneys general do not sign onto partisan multistate briefs."[240]

Another line of criticism is that states have little incentive to consider the broader national interest.[241] State attorneys general often seek nationwide injunctions against enforcing federal policies, and these potential injunctions raise various concerns among some scholars.[242] In a broader line of critique, Robert Kagan, who coined the term "adversarial legalism," argues that this form of lawyer-driven litigation used to articulate and implement legal norms is "a markedly inefficient, complex, costly, punitive, and unpredictable method of governance and dispute resolution."[243] Some worry that the multistate litigation will harm the esteem in which the public holds the office of attorney general. James Tierney, a former Maine Attorney General, argues "that the AGs become seen as one more lawyer, one more politician. on the make, and that undercuts the credibility of the office itself."[244]

On the other hand, some scholars note that multistate litigation initiated by state attorneys general is quite positive in its effects.[245] Some argue that presidential power has expanded to the point that Congress cannot challenge it, leaving it to the courts to constrain unchecked executive power. States are well-positioned to bring these issues to the judiciary.[246] Others see these multistate lawsuits as constitutionally necessary in our system of government.[247] As one scholar noted:

> One way to conceive of some actions by state attorneys general against the federal government is as a necessary constitutional check on the modern executive branch . . . . States, however, have unique institutional characteristics that make them ideally positioned to

237. *Id.* at 43.
238. Shaub, *supra* note 200, at 682.
239. Lemos & Young, *supra* note 137, at 48.
240. Johnstone, *supra* note 105, at 1502.
241. *See, e.g.*, Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 897–98 (2016).
242. *See, e.g.*, Jonathan Remy Nash, *State Standing for Nationwide Injunctions Against the Federal Government*, 94 NOTRE DAME L. REV. 1985 (2019); Mank & Solimine, *supra* note 214.
243. KAGAN I, *supra* note 48, at 4.
244. Neuhauser, *supra* note 168.
245. *See, e.g.*, Hessick & Marshall, *supra* note 198.
246. *Id.* at 85–86.
247. *See, e.g.*, Shaub, *supra* note 200.

> challenge executive action and to challenge it in the most effective manner.[248]

Another scholar brings up a variety of points:

> Multistate litigation is an important and effective tactic that affects the implementation of national policy. First, it promotes the sharing of resources and expertise amongst state offices . . . . Second, multistate litigation creates a perception of legitimacy that is important in pursuing successful litigation against the federal government . . . . Finally, it provides a crucial check on a branch of government which has been notoriously unfettered in its ability to influence national policy.[249]

Mank and Solimine offer another defense of the multistate litigation:

> [S]tates are independent (albeit subordinate) sovereigns in our federal system. When states, individually or collectively, conclude that Congress or the President or both have unlawfully and adversely affected state laws, interests, or policy choices in a preemptive manner, it is an appropriate check for a state to resist that change in federal court. States, in short, have interests in our federal constitutional order, and can use appropriate political and judicial tools to protect those interests.[250]

Thus, state attorneys general are increasingly using their collective voices to influence the inter-institutional federal conversation about federal policymaking and constitutional meaning in our society.

CONCLUSION

This Article has explored the ways that state attorneys general have used their powers and resources to affect national policy and constitutional interpretation in our society. The state attorneys general used to be quiet state officials who limited their involvement to the state courts and state government issues. Now, the mostly-elected state attorneys general are using multistate lawsuits and signing onto amicus curiae briefs to augment their role in federal policymaking. These lawsuits have the goals of creating federal policy when the federal government has not acted, of forcing federal agencies to regulate under the authority Congress has given them or to block federal policies promulgated by either federal agencies or presidential executive orders. The state attorneys general have various advantages over private litigants, including the relaxed standing rules that the U.S. Supreme Court has provided to the states. The state AGs also have the common law power to represent and define the public interest in the courts. Thus, state attorneys general are increasing their

248. *Id.* at 656.
249. Green, *supra* note 156, at 255–56.
250. Mank & Solimine, *supra* note 214, at 1969–70.

collective voice in the constitutional conversation in this country in large part by bringing lawsuits to the federal courts against the President.

This new activism from the state attorneys general is a clear example of adversarial legalism, adding to the notion of American exceptionalism. The activism is also an example of the way that constitutional interpretation is done in the U.S. according to the Governance as Dialogue Movement. The Governance as Dialogue Movement states that the courts do not necessarily have the last word on constitutional interpretation in our society, but that constitutional meaning is achieved by a continuous dialogue or conversation among the courts (including the U.S. Supreme Court), the President, the Congress, federal agencies, the states, and the people. By increasingly suing the federal government in federal courts and by their increasing use of amicus curiae briefs in other cases, the state attorneys general are amplifying their collective voice in the inter-institutional dialogue regarding federal policymaking and federal constitutional interpretation in this country. Not only do the state attorneys general speak for their states, but recall that they also can represent and define the public interest. Thus, in some ways, the state attorneys attempt to represent the voices of the people in the inter-institutional constitutional conversation.

State attorneys general are both legal actors and political actors who are not afraid to join the fight in our polarized political climate. Politically ambitious state attorneys general are using the powers and resources of their offices to help them achieve greater visibility and perhaps higher office. One can assume that their activism will continue into the future.