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Litigating State Interests: Attorneys General as Amici

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LITIGATING STATE INTERESTS: ATTORNEYS GENERAL AS AMICI

MARGARET H. LEMOS[†] & KEVIN M. QUINN[‡]

An important strain of federalism scholarship locates the primary value of federalism in how it carves up the political landscape, allowing groups that are out of power at the national level to flourish—and, significantly, to govern—in the states. On that account, partisanship, rather than a commitment to state authority as such, motivates state actors to act as checks on federal power. Our study examines partisan motivation in one area where state actors can, and do, advocate on behalf of state power: the Supreme Court. We compiled data on state amicus filings in Supreme Court cases from the 1979–2013 Terms and linked it up with data on the partisanship of state attorneys general (AGs). Focusing only on merits-stage briefs, we looked at each AG’s partisan affiliation and the partisanship of the AGs who either joined, or explicitly opposed, her briefs. If partisanship drives amicus activity, then we should see a strong negative relationship between the partisanship of AGs opposing each other and a strong positive relationship between those who cosign briefs.

What we found was somewhat surprising. States agreed far more often than they disagreed, and—until recently—most multistate briefs represented bipartisan, not partisan, coalitions of AGs. Indeed, for the first twenty years of our study, the cosigners of these briefs were generally indistinguishable from a random sampling of AGs then in office. The picture changes after 2000, when the coalitions of cosigners become decidedly more partisan, particularly among Republican AGs. The partisanship picture is also different for the 6% of cases in which different states square off in opposing briefs. In those cases, AGs do tend to join together in partisan clusters. Here, too, the appearance of partisanship becomes stronger after the mid-1990s.

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INTRODUCTION

Federalism law and theory assume that states are capable of resisting, or checking, federal power. A state-level check is considered “the principal benefit” of dividing power between the federal government and the states.¹ States’ checking capacity likewise plays a starring role in the “political safeguards” theory of federalism, which focuses not on why we should want a federal system but what it takes to maintain one. According to that theory, states can resist federal overreaching from within, manipulating the levers of the federal political process so as “to defend state interests from undue infringement.”²

It remains unclear, however, what motivates states to act as checks. Critics of the political safeguards theory argue that, in their efforts to appeal to voters, federal and state representatives may favor measures that aggrandize federal power at the expense of the states.³ Federal representatives may prefer federal solutions to state problems so that they can take credit for successful fixes, and state representatives may welcome federal intervention if it means more funding for popular initiatives or political cover for unpopular ones.⁴

¹ *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“Perhaps the principal benefit of the federalist system is a check on abuses of government power. . . . [A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”).

² *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting). For seminal works on the political safeguards theory, see generally JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175–84 (1980); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

³ See, e.g., Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 940–41 (2005) (“[B]ecause political support will depend primarily on policy outcomes rather than on the particular institution that delivers them, state and federal officials will experience a predictable set of incentives working at cross-purposes with any intrinsic interest in expanding the state and federal regulatory spheres.”).

⁴ See *id.* at 941 (“Federal regulation and spending obviously can, and often does, benefit state-level constituencies. Consequently, state officials who are primarily interested in maximizing political support will have no reliable interest in decreasing federal power (or, the equivalent, in increasing state power).”); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 74 (2004) (“[F]ederal representatives may have preferences on substantive issues like environmental protection or gun control that reflect

Underlying these critiques is a recognition that states comprise collections of individuals and institutions with diverse and often conflicting interests. To paraphrase Kenneth Shepsle, each state is a “they,” not an “it.”⁵ Different state actors may conceive of the state’s interests in different ways. And the people who are in a position to speak for the state qua state—to assert and defend its interests in the federal political process—may have competing interests of their own.

If state actors often lack incentives to stand up for state interests, what fuels federal-state conflict? One possible answer is partisan politics. An important new strain in federalism scholarship locates the primary value of federalism in how it carves up the political landscape, allowing groups that are out of power at the national level to flourish—and, significantly, to govern—in the states.⁶ On that account, partisanship, rather than a commitment to state authority as such, motivates state actors to act as checks on federal power.⁷

Our study examines partisan motivation in one area where state actors can, and do, advocate on behalf of state power: the Supreme Court. Acting through their attorneys general (AGs), states are involved in many cases adjudicating the boundaries of state and federal authority. In some cases, states spearhead the litigation as parties, as they did in the recent constitutional challenge to the Affordable Care Act.⁸ In other instances, states participate as amici on behalf of other states or private parties.⁹ They are aided by the fact that, under

the geographically concentrated views of their constituents, but they will have little reason to want those issues to be decided at the state level.”)

⁵ Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

⁶ See, e.g., Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080–81 (2014) (“[O]ur contemporary federal system generates a check on the federal government and fosters divided citizen loyalties, as courts and scholars frequently assume. But it does so for an unexplored reason—because it provides durable and robust scaffolding for partisan conflict.”); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 17 (2010) (“Even the variants of federalism most closely tied to sovereignty . . . can function if political competition is robust, as the political party out of national power will use whatever local weapons it possesses to challenge its rival.”); see also Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1783 (2005) (“[F]ederalism can be understood at least in part as a strategy for allowing would-be dissenters to govern in some subpart of a system.”).

⁷ Bulman-Pozen, *supra* note 6; see also *infra* notes 128–30 and accompanying text (discussing Bulman-Pozen’s account of partisan federalism in more detail).

⁸ Pete Williams, *State Attorneys General Sue over Health Bill*, NBC NEWS (Mar. 23, 2010, 7:44 PM), http://www.nbcnews.com/id/36001783/ns/politics-health_care_reform/#.VkvqiktjoWw (“The ink is still drying on the health care overhaul bill signed into law Tuesday by President Barack Obama, but attorneys general from at least 14 states have filed lawsuits to challenge the legislation.”).

⁹ See *infra* Part I (describing other studies of state amicus activity).

the Supreme Court's rules, state AGs may file amicus briefs without obtaining the consent of the parties or the permission of the Court.¹⁰

Indeed, a new crop of AGs—most of them Republicans—trumpets litigation as a means of defending state interests against federal encroachment. For example, Texas Attorney General Greg Abbott made news a few years ago by telling supporters that his job description is simple: “I go into the office,” he said. “I sue the federal government and I go home.”¹¹ Abbott was true to his words. According to news reports, he sued the Obama Administration at least twenty-seven times in five years.¹²

Litigation by state AGs is not reserved for challenges to federal law, of course. States also participate in cases concerning burdensome regulations by other states or limitations on state power that stem from the Bill of Rights or the Reconstruction Amendments.¹³ In these cases, too, state AGs use the concept of state interests to ground legal arguments about the appropriate scope and meaning of federal law.¹⁴

There is reason to believe, moreover, that AGs' efforts on behalf of their states are consequential. As we elaborate below, states are some of the most successful litigants before the Supreme Court.¹⁵ And prior empirical work suggests that the filing of state AG amicus briefs in the Supreme Court corresponds with higher rates of success for the

¹⁰ SUP. CT. R. 37.4 (exempting the U.S. Solicitor General, federal agencies, state attorneys general (AGs), and “authorized law officer[s]” of cities, counties, towns, or similar entities from the requirement of a motion for leave to file an amicus brief).

¹¹ Sue Owen, *Greg Abbott Says He Has Sued Obama Administration 25 Times*, AUSTIN AM.-STATESMAN (May 10, 2013, 5:14 PM), <http://www.politifact.com/texas/statements/2013/may/10/greg-abbott/greg-abbott-says-he-has-sued-obama-administration/>. Other AGs describe their jobs in similar terms of “stand[ing] up . . . to Washington and say[ing] ‘enough,’” “assert[ing] those [10th Amendment] rights,” and so on. Republican Att’y Gen. Assoc., *Republican Attorneys General: States’ Rights*, YOUTUBE (Jan. 22, 2014), <http://www.youtube.com/watch?v=WCgh-tbG4S4>; see also Michael D. Shear, *G.O.P. Turns to the Courts to Aid Agenda*, N.Y. TIMES, Jan. 4, 2015, at A1 (noting the role of AGs in various state-led suits against Obama-Administration initiatives).

¹² Catalina Camia, *GOP Attorneys General Push Back on Obama’s Executive Actions*, USA TODAY: ON POLITICS (Jan. 28, 2014, 12:09 PM), <http://onpolitics.usatoday.com/2014/01/28/gop-attorneys-general-push-back-on-obamas-executive-actions/>.

¹³ See *infra* Part II.C.2 (describing cases).

¹⁴ Compare Brief of Massachusetts et al. as Amici Curiae in Support of Respondents at 1, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 840014 (supporting a constitutional challenge to California’s ban on same sex marriage and explaining that “[a]s States, the Amici have a strong interest in ensuring that citizens have equal opportunity to participate in civil society”), with Brief Addressing the Merits of the States of Indiana et al. as Amici Curiae in Support of the Petitioners at 1, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 416198 (“The Amici States have interests in (1) protecting their ability to define and regulate marriage, and (2) preserving the integrity of their constitutions and democratic processes.”).

¹⁵ *Infra* Part I.

party supported by those briefs.¹⁶ Scholars suggest that state AG briefs can, at a minimum, serve a signaling function for the Court, alerting the Justices to federal laws and regulations (or, in the case of the dormant Commerce Clause, other states' laws) that trench on important state interests.¹⁷

But there is a complication: Contrary to what one might expect, states' briefs do not always push for more state autonomy and less federal (or interstate) meddling. State AGs sometimes defend federal laws against enumerated-powers challenges, defend other states' laws against dormant Commerce Clause challenges, take the side of claimants who invoke federal constitutional rights against state power, or argue in favor of preemption of state law.¹⁸ Nor is it unheard of for states to appear on both sides of cases before the Court.¹⁹ Such cases support the hypothesis that AG advocacy might be driven in large part by partisanship, rather than fealty to the abstract interests of the state *qua* state.

To test the role of partisanship in AG advocacy, we compiled data on state amicus filings in Supreme Court cases from the 1979–2013 Terms and linked it up with data on the partisanship of state AGs. Attorneys general in forty-three states are popularly elected,²⁰ and many aspire to higher office.²¹ We wanted to know: To what extent, and in what ways, is AG partisanship reflected in the positions the states take before the Supreme Court? Focusing only on merits-stage briefs, we looked at each AG's partisan affiliation and the partisanship of the AGs who either joined, or explicitly opposed, her briefs. If par-

¹⁶ *Infra* notes 49–53 and accompanying text.

¹⁷ See, e.g., Christopher R. Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 SUP. CT. ECON. REV. 233 (1999) (studying dormant Commerce Clause cases decided from 1970 to 1997 and arguing that the Court uses state amici as “fire alarms” that call attention to state regulations that burden interstate commerce); Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 64–66, 69–72 (2006) (arguing that state amicus filings serve a signaling function for the Justices in preemption cases).

¹⁸ See Michael E. Solomine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355, 366 (2012) (highlighting “those instances where a large number of SAGs file amicus briefs, often jointly, that take a position *against* the presumed state interest in a federalism dispute and when the Justices appear to take special note of that incongruence when rendering that decision”).

¹⁹ See *infra* Part II.B (reporting on the proportion of cases in which states file competing amicus briefs on the merits).

²⁰ 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) (citing COUNCIL OF STATE GOV'TS, *THE BOOK OF THE STATES* 268 (2005)).

²¹ See *id.* at 2453 (“[T]he Office of the Attorney General has long been seen by many of its occupants as a stepping stone to the Governor’s office . . .”).

tisanship drives amicus activity, then we should see a strong negative relationship between the partisanship of AGs opposing each other and a strong positive relationship between those who cosign briefs.

To our surprise, we found relatively low rates of interstate conflict in our set of state amicus briefs. States agreed far more often than they disagreed, and—until recently—most multistate briefs represented bipartisan, not partisan, coalitions of AGs. In about 94% of the cases in which any state wrote a merits brief, there was no explicit disagreement among the state AGs. Further, for the first twenty years of our study, the cosigners of these briefs were generally indistinguishable from a random sampling of AGs then in office. The picture changes after 2000, when the coalitions of cosigners become decidedly more partisan, particularly among Republican AGs.

The partisanship picture is also different for the 6% of cases in which different states square off in opposing briefs. In those cases, AGs do tend to join together in partisan clusters. Here, too, the appearance of partisanship becomes stronger after the mid-1990s.

Our findings are broadly consistent with theories of “partisan federalism,” but the nuanced patterns we uncover highlight the need for further theorizing, and empirical study, about the complex forces that inspire state officials to act. For example, we find notable differences between Democratic and Republican AGs, with Republican AGs increasingly joining together in partisan coalitions in cases in which Democrats do not participate at all. Meanwhile, some Democratic AGs—particularly those from western and southern states—have begun behaving more like Republicans. And, though AG coalitions have become markedly more partisan in recent years, the prevalence of bipartisan coalitions remains striking. Partisanship certainly plays some role in explaining AGs’ advocacy on behalf of the states—it would be remarkable if it did not—but plainly it is not the full story.

Why do we see so much more partisanship in recent decades? Though we suspect that the shift in AG amicus activity reflects broader trends toward political polarization, that is not a complete answer. Are we observing evidence that AGs themselves are more polarized, leaving less room for agreement between those on the left and those on the right? Or are AGs simply channeling the increasingly polarized politics of their states? Put differently, to the extent that partisanship inspires state officials to assert state interests, whose partisanship matters?

These questions underscore the importance of disaggregating different kinds of state actors and different kinds of state action.²² Although most AGs are elected, and all must be political creatures to some extent, they are also *legal* officers. Their job is to represent the interests of their clients—the states—and in many cases those interests will be grounded in state laws and policies that the AGs themselves do not control. The effects of partisanship may therefore be more muted for AGs than for, say, state governors. If that is correct, then the recent surge in partisan briefing might also reflect the trend toward one-party rule in the states.²³

This Article proceeds in three parts. Part I provides an overview of existing research into the causes and effects of state AG advocacy before the Supreme Court. Part II describes our research design and our findings. Part III discusses the implications of our research and outlines avenues for further study.

I

STATES BEFORE THE BAR: BACKGROUND AND EXISTING RESEARCH

States today are some of the most active litigants in the Supreme Court. As a group, their participation both as direct parties and as amici is second only to that of the U.S. Government.²⁴ States also can boast impressive success rates. For example, a study of state petitions for certiorari filed during the 2001–2009 Terms reported that “the states enjoyed remarkable success obtaining review, with 21.9% of their petitions being granted compared to a 4.2% success rate for all paid petitions during the sample period.”²⁵ A 1999 study concluded

²² See Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1201 (1999) (“In discussions about American federalism, it is common to speak of a ‘state government’ as if it were a black box, an individual speaking with a single voice. . . . [A] ‘state’ actually incorporates a bundle of different subdivisions, branches, and agencies.”).

²³ *Infra* note 151.

²⁴ Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 533 (1994); Cornell W. Clayton & Jack McGuire, *State Litigation Strategies and Policymaking in the U.S. Supreme Court*, 11 KAN. J.L. & PUB. POL’Y 17, 17 (2001); Thomas R. Morris, *States Before the U.S. Supreme Court: State Attorneys General as Amicus Curiae*, 70 JUDICATURE 298, 299 (1987); Douglas Ross, *Safeguarding Our Federalism: Lessons for the States from the Supreme Court*, 45 PUB. ADMIN. REV. 723, 727 (1985).

²⁵ Greg Goelzhauser & Nicole Vouvalis, *State Coordinating Institutions and Agenda Setting on the U.S. Supreme Court*, 41 AM. POL. RES. 819, 826 (2012).

that, on the merits, “states are more successful than any other litigator save the United States.”²⁶

States’ Supreme Court activism is of relatively recent vintage. Prior to the 1980s, most state AG offices were small, sleepy outposts.²⁷ Things changed dramatically over the next few decades. The “New Federalism” of the Reagan Administration resulted in the devolution of countless regulatory and administrative responsibilities from the federal government to the states.²⁸ As the workload of state agencies increased, so too did their litigation exposure—with the burden of defense falling on state AGs. Matters heated up on offense as well. As federal agencies decreased their enforcement activities, state-level enforcers rushed in to fill the void.²⁹ Areas like antitrust and consumer protection, once dominated by the federal government, became enclaves of aggressive state enforcement.³⁰

Recognizing their AGs’ significant new responsibilities, states allocated more resources to them.³¹ Higher budgets and greater responsibilities, in turn, drew a new breed of attorney to the AG’s office. Increasingly, the “state’s law firm” was staffed with “a younger, better educated, and more ambitious caliber of attorney.”³²

Yet the increased stature of state AGs did not translate immediately into success at the bar—particularly in the federal courts, and even more particularly in the Supreme Court, where states must vie against attorneys experienced in the specialized art of Supreme Court

²⁶ ERIC N. WALTENBURG & BILL SWINFORD, *LITIGATING FEDERALISM: THE STATES BEFORE THE U.S. SUPREME COURT* 77 (1999).

²⁷ See Clayton, *supra* note 24, at 538 (describing AGs’ offices as “placid and reactive” prior to 1980); Morris, *supra* note 24, at 299 (“[S]tate attorneys general tended to look upon their role as being merely ministerial functionaries of the state administration; they were in office to do the bidding of other political executives and defend the state establishment from legal attacks.”). In 1950 the average AG’s office had a staff of roughly nineteen attorneys; the median budget hovered just under \$104,000. WALTENBURG & SWINFORD, *supra* note 26, at 45. By 1970, the average staff had grown to fifty-one, and the median budget to \$612,089. *Id.*

²⁸ *Id.*

²⁹ See William L. Webster, Lecture, *The Emerging Role of State Attorneys General and the New Federalism*, 30 WASHBURN L.J. 1, 5 (1990) (“In short order the states asserted themselves in dramatic fashion. . . . Attorneys general were called ‘fifty regulatory Rambos’ by one individual.”).

³⁰ *Id.*; see also Clayton, *supra* note 24, at 535–36 (describing states’ efforts to secure regulatory and enforcement authority in areas including antitrust and consumer protection).

³¹ During the 1970s and early 1980s, AGs’ budgets expanded at rates that outpaced general government spending in every state. Clayton & McGuire, *supra* note 24, at 18. By 1989, the mean number of attorneys was more than 148, and the median budget \$9.9 million. WALTENBURG & SWINFORD, *supra* note 26, at 45.

³² Clayton, *supra* note 24, at 538.

advocacy.³³ Speaking to the Fifth Circuit's Judicial Conference in 1974, Justice Powell observed that "[s]ome of the weakest briefs and arguments come from [the states as] representatives of the public interest."³⁴ That same year, Chief Justice Burger proposed appointing amicus curiae for California in order to "begin our drive to force the States to abandon their on-the-job training of their lawyers in this Court."³⁵ Other federal judges expressed similar views, as did other attorneys.³⁶

Juxtaposed against the mounting resources and responsibilities of AGs, this crescendo of criticism spurred several institutional responses designed to improve the effectiveness of AG advocacy.³⁷ The most significant was the 1982 creation of the National Association of Attorneys General (NAAG) Supreme Court Project.³⁸ The Project (now known as the Center for Supreme Court Advocacy) helps coordinate state litigation efforts, and provides various forms of support (including organizing moot arguments and the like) for AGs with cases before the Court.³⁹

³³ On the increasing specialization of the Supreme Court bar, see generally Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008).

³⁴ Justice Lewis F. Powell, Jr., Address at the Fifth Circuit Judicial Conference (May 27, 1974).

³⁵ Goelzhauser & Vouvalis, *supra* note 25, at 822 (internal quotation marks omitted).

³⁶ For example, state and local government lawyers earned dismal scores from federal judges in a 1978 study of the caliber of advocacy in the federal courts, ranking well below both private practitioners representing individuals and appointed counsel in criminal appeals. WALTENBURG & SWINFORD, *supra* note 26, at 44 (citing ANTHONY PARTRIDGE & GORDON BERMANT, FED. JUDICIAL CTR., *THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS: A REPORT TO THE COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS* 69 tbl.43 (1978)). Fifty-seven percent of the judges surveyed reported that advocacy by state and local attorneys was a "serious problem." *Id.* And, in a study of attorneys who argued cases before the Supreme Court between 1977 and 1982, only 4% of state and local government lawyers were considered to be "experts" by their peers. *Id.* (citing KEVIN T. MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* 155 tbl.7.4 (1993)).

³⁷ Another impetus for the new coordination were several decisions in the early 1980s broadly construing 42 U.S.C. § 1983. See Stewart A. Baker & James R. Asperger, *Foreword: Toward a Center for State and Local Legal Advocacy*, 31 CATH. U. L. REV. 367, 371 (1982) (discussing the elimination of the "good faith" defense in *Owen v. City of Independence*, 445 U.S. 622 (1980), and the expansion of § 1983 enforcement powers in *Maine v. Thiboutot*, 448 U.S. 1 (1980)).

³⁸ See Ross, *supra* note 24, at 727–28 (describing National Association of Attorneys General's (NAAG) genesis and functions). Another significant institutional response was the creation of the State and Local Legal Center (SLLC), which files amicus briefs on behalf of member associations. *Id.* at 728.

³⁹ See NAAG Center for Supreme Court Advocacy, NAT'L ASSOC. OF ATT'YS GEN., http://www.naag.org/naag/about_naag/center-supreme-court.php (last visited Feb. 27, 2015) (describing the Center's functions); Clayton & McGuire, *supra* note 24, at 23–25 (same).

Not surprisingly, the number of Supreme Court cases involving states as parties, particularly as petitioners, shot up in the years that followed.⁴⁰ Even more notable is the increase in states' filings as amici. Such filings are not command performances, but represent AGs' discretionary decisions to devote limited resources to Supreme Court advocacy.⁴¹ The most comprehensive study of state litigation in the Supreme Court, a book-length treatment by Eric Waltenburg and Bill Swinford, reports that by 1989 states had "become exceptionally active *amicus curiae* participants. They account[ed] for 20 percent of all *certiorari* petitions accompanied by an *amicus* brief and 18 percent of the *amicus* briefs on the merits."⁴²

If anything, the number of state briefs filed understates the level of state activity. Thanks in large part to NAAG's coordination efforts, states frequently band together on amicus briefs. Although NAAG initially encouraged states to file multiple briefs supporting each other in the same case, "by the late 1980s, NAAG's strategy began to shift away from a *coalitional* strategy toward a *joining* strategy, in which states are encouraged to sign onto a single brief rather than filing multiple individual briefs."⁴³ The effects are palpable. A study of merits-stage state amicus briefs found that the average number of joining states jumped from 2.4 in the 1970s to 13.9 in the 1990s.⁴⁴ A more recent study reveals similar joining behavior at the *certiorari* stage: Using data on state *certiorari* filings compiled by Dan Schweitzer at NAAG, Greg Goelzhauser and Nicole Vouvalis report that "[d]uring

⁴⁰ Several studies examine state litigation in the Supreme Court between 1953 and 1989 (the dates covered by Phase I of the Supreme Court Judicial Database). Focusing on cases in which state and local governments participated as direct parties during that period, Richard Kearney and Reginald Sheehan found that appearances "have trended upward, from a low of 20 cases in 1955 to a high of nearly 140 cases in 1986." Richard C. Kearney & Reginald S. Sheehan, *Supreme Court Decision Making: The Impact of Court Composition on State and Local Government Litigation*, 54 J. POL. 1008, 1011 (1992). Similarly, Waltenburg and Swinford found that "there has been an appreciable increase in state participation before the Court as [petitioners]—more than one case per term" from 1954 to 1989. WALTENBURG & SWINFORD, *supra* note 26, at 62.

⁴¹ See Clayton, *supra* note 24, at 544 ("Unlike when states are party to a suit, the decision to participate as *amicus curiae* is determined largely by the personal interests and felt political pressures on individual attorneys general. Changes in the institutional role of the office should therefore be reflected by trends in state *amicus* activity.").

⁴² WALTENBURG & SWINFORD, *supra* note 26, at 48; see also Morris, *supra* note 24, at 302 ("Prior to the 1970 term, the total number of cases attracting state *amici* had never exceeded 15. . . . [T]he total number of cases for the 1980 through 1983 terms has never been fewer than 25 . . .").

⁴³ Clayton & McGuire, *supra* note 24, at 23–24.

⁴⁴ *Id.* at 24–25; see also WALTENBURG & SWINFORD, *supra* note 26, at 48 ("NAAG's focus on the coordination of state *amicus* activity has resulted in substantial levels of joining behavior. Accordingly, where it is rare to find more than two *amici* joining together on a *pre-certiorari amicus* brief, on average six states coalesce . . .").

the 2001–2009 terms, state-sponsored amicus briefs urging review in state-filed cases were joined by an average of about 18 states, and only 5 of the 88 briefs filed were signed by a single state.”⁴⁵

We know that states are active as amici, but do their briefs make a difference? Interviews with former Supreme Court clerks suggest that the Justices and their clerks pay close attention to amicus briefs filed by state AGs.⁴⁶ As one clerk put it, “there is an institutional interest in taking state concerns seriously because of federalism concerns.”⁴⁷

Quantitative research paints a similar picture of the effects of states’ efforts as amici. Focusing on the 1953–1989 Terms and controlling for other factors that might affect the decision on certiorari, Waltenburg & Swinford found that the probability of a grant increased substantially when a group of states submitted a certiorari-stage brief, but not when an individual state weighed in as amicus.⁴⁸ Goelzhauser and Vouvalis’s study of state certiorari petitions from the 2001–2009 Terms likewise suggests that states can amplify their influence by banding together.⁴⁹ The authors reason that state amicus support, particularly if widespread, sends “a more credible signal [than a petition alone] that the case impacts not only the filing state’s interests, but those of other states as well.”⁵⁰

Notably, subsequent work by Goelzhauser and Vouvalis suggests that not all state groups are created equal: The composition of the group matters, at least at the certiorari stage. Examining an expanded sample of state certiorari petitions from the 2001–2010 Terms and measuring state government ideology using the approach of William Berry and his coauthors,⁵¹ Goelzhauser and Vouvalis found that “petitions accompanied by a state-filed amicus brief are more likely to be granted as the preference heterogeneity of the state lobbying coalition

⁴⁵ Goelzhauser & Vouvalis, *supra* note 25, at 825.

⁴⁶ See Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 48 (2004) (“Following the solicitor general, amicus briefs filed by states were the next most frequently cited government entity as being important enough to always warrant close consideration.”).

⁴⁷ *Id.*

⁴⁸ WALTENBURG & SWINFORD, *supra* note 26, at 75 (controlling for the presence of the Solicitor General, conflict (and alleged conflict) among the lower courts, civil liberties issues, and a nonstate amicus).

⁴⁹ Goelzhauser & Vouvalis, *supra* note 25, at 831.

⁵⁰ *Id.* at 824.

⁵¹ William D. Berry et al., *Measuring Citizen and Government Ideology in the American States, 1960–93*, 42 AM. J. POL. SCI. 327, 329–31 (1998) (measuring the ideology of a state’s citizens and political leaders using a range of information, including the roll-call voting scores of congressional delegations, the outcomes of congressional elections, the partisan division of state legislatures, and the party of the governor).

increases.”⁵² Heterogeneous coalitions, they hypothesized, may be better able to convey credible signals of case importance to the Court.⁵³

So much for the certiorari stage; what about the merits? Here the evidence is more spotty.⁵⁴ The few studies that focus on the effect of state amicus briefs at the merits stage suggest that state advocacy does make a difference—at least some of the time. Richard Kearney and Thomas Merrill examined cases decided between 1946 and 1995 in an effort to tease out the effects of various categories of amici, including states. They found that state amici had a positive, and statistically significant, impact on the success rates of the respondents they supported, but no equivalent impact when they appeared on behalf of petitioners.⁵⁵ Other studies have examined states’ impact in particular issue areas.⁵⁶ For example, Sean Nicholson-Crotty focused on federalism cases from 1953 to 1986 and found that “it made little or no difference in the federalism outcome if a single state filed an amicus brief in support of state power.”⁵⁷ But his findings did suggest that the

⁵² Greg Goelzhauser & Nicole Vouvalis, *Amicus Coalition Heterogeneity and Signaling Credibility in Supreme Court Agenda Setting*, 45 PUBLIUS 99, 100 (2014).

⁵³ *Id.* at 102.

⁵⁴ A handful of studies have examined states’ overall success rates without attempting to measure the impact of states’ advocacy as amici, and have found that states enjoyed significantly enhanced success rates through the 1970s and 1980s. See WALTENBURG & SWINFORD, *supra* note 26, at 84 (“During the Warren Court the states’ average success rate was 35.4 percent. Since 1970 that has improved to 53 percent.”); Kearney & Sheehan, *supra* note 40, at 1013 (finding that the success rate for state and local governments as parties “leaped from 36.7% during the Warren Court to more than 61% during the Burger/Rehnquist Court, making them the second-best performing category of litigants”—bested only by the federal government). Cornell W. Clayton and Jack McGuire found a similar upward trajectory in states’ successes as amici during the 1970s and 1980s, though the trend turned downward from 1990 to 1994. See Clayton & McGuire, *supra* note 24, at 26–27 (describing the trends in state advocacy between 1960 and 1995). The authors hypothesize that the reversal of fortune might be due to the increased “amicus activity of other groups, particularly those opposed to the exercise of state authority . . .” *Id.* at 27. Alternatively, states may have become “less selective in making appeals to the Court [given their earlier successes], whereas their opponents bec[a]me more so.” *Id.*

⁵⁵ See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 809–10 (2000) (noting that when “States file amicus briefs supporting the petitioner, and no State appears as a different kind of amicus, they . . . secur[e] a [petitioner win] rate about 5% higher than the benchmark rate [of success for petitioners in cases sans amici]. . . . [T]he respondents supported by States have bettered the benchmark rate by nearly 9%”—a statistically significant improvement).

⁵⁶ See, e.g., Douglas Ross & Michael W. Catalano, *How State and Local Governments Fared in the United States Supreme Court for the Past Five Terms*, 20 URB. LAW. 341 (1988) (examining criminal procedure cases over five years and finding that state litigants are more likely to win when other states filed amicus briefs supporting their position on the merits).

⁵⁷ Sean Nicholson-Crotty, Note, *State Merit Amicus Participation and Federalism Outcomes in the U.S. Supreme Court*, 37 PUBLIUS 599, 605 (2007). The category of

presence of multiple state briefs “has a positive and significant impact on the likelihood that the Court will support state rather than national or shared power.”⁵⁸ The same was true of a single brief signed by multiple states.⁵⁹ By contrast, the Court ruled against state power in every case in which at least one state filed a brief supporting the “national power” outcome.⁶⁰

In sum, the available evidence—while far from conclusive—suggests that state amicus activity has had an impact on the Court’s decisions on certiorari and on the merits. Yet states’ participation is not uniform, nor are the positions states advocate.⁶¹ Importantly for present purposes, existing research indicates that AGs from different states increasingly articulate opposing interests. Writing in 1987, Thomas Morris reported that states appeared on opposite sides of only 2% of the cases argued before the Supreme Court.⁶² Such findings reinforced the view that the political developments of the 1980s and early 1990s “helped forge a new sense of shared interest between the states in each others’ legal policymaking and litigation. . . . [N]ot only have state attorneys general become more active, they have increasingly sought to influence policy qua states in the collective sense rather than as individual state actors.”⁶³

That sense of shared interest may have eroded in recent years, however. A new study by Paul Nolette finds significantly more interstate conflict, particularly during the Obama Administration. Focusing on cases decided between 1993 and 2013, Nolette examined instances in which multiple AGs filed briefs, either as amici or parties, at the certiorari or merits stage. He found a “large spike” in interstate con-

“federalism cases” consists of cases so classified in Phase II of the Supreme Court Judicial Database, yielding “593 formally decided cases where state versus national power was a major value reflected in the majority opinion.” *Id.* at 603.

⁵⁸ *Id.* at 608.

⁵⁹ *See id.* at 605–08 (discussing court trends in cases with the support of multiple states on a single brief).

⁶⁰ *See id.* (“In those cases where states filed briefs supporting national power, the outcome reflected that value 100 percent of the time.”).

⁶¹ For example, some states file, and join, far more amicus briefs than others. *See, e.g.,* Morris, *supra* note 24, at 304 (finding variation among the states in the level of amicus activity between 1974 and 1983, with California and New York leading the pack); WALTEBURG & SWINFORD, *supra* note 26, at 66 (finding the nation’s most populous states tend to be most active as parties, whereas states that are less populous but “rich in natural resources and/or containing large tracts of land area owned by the federal government” tended to be the most active amici).

⁶² Morris, *supra* note 24, at 302 (“Most of the divisions did not consist of a significant number of states on either side, but rather one or two states on either side or one or two dissenters from an otherwise large number of states.”). Not surprisingly, Morris found that dormant Commerce Clause cases were the most common sites of interstate conflict. *Id.*

⁶³ Clayton, *supra* note 24, at 539.

flicts during the last four years of the sample.⁶⁴ In 35% of the cases during that period, states either squared off against each other or collaborated on briefs with a strong partisan slant—defined as those in which Republican or Democratic AGs constituted at least 80% of participating AGs.⁶⁵

Nolette’s study represents a rare effort to examine the partisan dimension of state amicus briefing.⁶⁶ Our project picks up on similar themes. Like Nolette, we are interested in the rate of interstate agreement and conflict, and, specifically, the relationship between the amicus joining and opposition behavior of AGs and their partisanship. Though some of our findings are similar, our methodology is different. In the next Part, we describe our research design and conclusions.

II

RESEARCH DESIGN AND FINDINGS

A. Data Collection

The starting point for our analysis is the set of amicus brief headers gathered by Alexandra Dunworth, Joshua Fischman, and Daniel Ho.⁶⁷ These authors collected all headers of amicus briefs from

⁶⁴ Paul Nolette, *State Litigation During the Obama Administration: Diverging Agendas in an Era of Polarized Politics*, 44 *PUBLIUS* 451, 456 (2014).

⁶⁵ *Id.* at 455–56, 457 tbl.1.

⁶⁶ Another new—and, as yet, unpublished—study takes up the partisanship question in the specific context of federalism cases. Sarah Esty, a Yale Law School student, examined state amicus and certiorari briefs from the 2004–2005 and 2012–2013 Terms, focusing on cases that implicated state-federal relations. Sarah Esty, *State Federalism Preferences Under Bush and Obama: An Empirical Assessment of Partisan Federalism* (unpublished manuscript) (on file with the New York University Law Review). She coded each brief as liberal or conservative using the Supreme Court Database issue direction coding, and as pro- or anti-federalism based on “whether [the brief] called for greater state or federal control over laws, courts, or agencies.” *Id.* at 7. Esty also separately coded each state’s partisan identity based on presidential vote share, governor’s party, and Attorney General’s party. *Id.* at 8. She found that 16% of state briefs advanced an anti-federalism (pro-federal government) position. *Id.* at 11. Esty concluded, moreover, that states were more likely to support federal power when doing so tracked the “state’s ideological preferences. Almost two-thirds of the time (62%) that Democratic states advocated anti-federalism positions, they did so to promote a liberal policy outcome When Republican states urged anti-federalism results, over three quarters of the time (77%) it was in service of achieving a conservative outcome” *Id.* at 16 (footnote omitted). For Esty, those results “suggest a strong empirical basis for partisan federalism” *Id.* at 20. Yet her data also suggest that a state’s assertion of pro- or anti-federalism results does not follow directly from the state’s (or its AG’s) political orientation as compared to that of the President. As Esty explains, “[a]nti-Obama states were not statistically significantly more likely to take a pro-federalism stance than pro-Obama states.” *Id.* at 17.

⁶⁷ Alexandra Dunworth, Joshua Fischman & Daniel E. Ho, *Policy Voting: What Amici Tell Us About Law* (Oct. 30, 2009) (working paper), available at <http://dho.stanford.edu/research/amici.pdf>.

the 1978–2006 Terms using the Lexis Supreme Court Briefs database.⁶⁸ We followed a similar procedure to collect amicus briefs from the 2007–2013 Terms.

These raw data contain both certiorari briefs and merits briefs. In order to select just the merits briefs from states, we applied a series of regular expressions to the brief headers to test for the inclusion of specific language, such as whether a state name appeared in the header; whether the words “amicus,” “amici,” or “curiae” appeared in the header; whether a merits position was advanced; and whether particular state and local interest groups were listed in the header. Our first pass through the data merely noted whether such language was present in each header and recorded the results.

Our next data processing step involved taking the output from step one and limiting our attention to the set of briefs that include a state name or a state and local interest group name, the terms “amicus,” “amici,” or “curiae,” and language consistent with a merits position being advanced. Given that our goal is to find and code the merits briefs of states, this is an overinclusive list.

We then engaged in computer-assisted coding of this overinclusive set of cases. We did this by creating a computer program written in the Python language that walked through each case in the list. For each case, the program made initial coding decisions for several key variables, such as which states or groups signed the brief, which party the brief supported, and what the docket number was. These initial computer codings were displayed on the computer screen through a graphical user interface that also displayed the text of the brief header. One of the authors then reviewed the computer-generated codings for each brief, making corrections where necessary. Finally, we screened for any remaining certiorari briefs by looking for multiple briefs from similar collections of cosigners in the same case. There was relatively little data from 1979, so we focused our attention on data from the 1980 Term through the 2013 Term. This resulted in a dataset of 989 state merits briefs. Throughout the remainder of this Article, we will use the terms “brief” and “amicus brief” to refer to amicus briefs on the merits—not certiorari briefs.

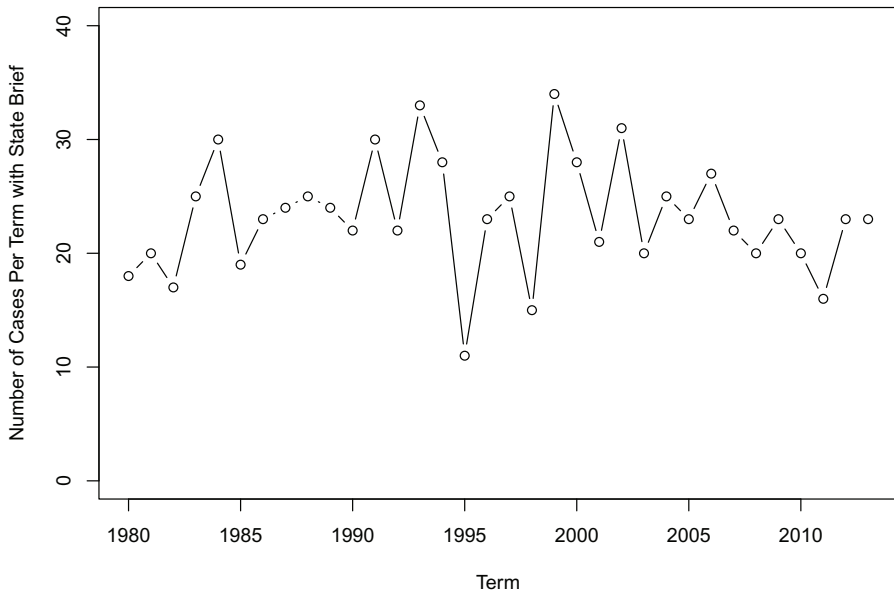
B. Preliminary Data Analysis and Observations

A threshold question, as reflected in existing studies of state litigation activity, is how frequently do states participate as amici? Relatedly, we might wonder whether this level of activity has changed over time. Figure 1 plots the total number of Supreme Court cases that had

⁶⁸ For the details of their raw data collection, see *id.* at app. A, at 38.

at least one state-signed amicus brief by Term. While there has been some year-to-year variability, the number of cases with state amici has not trended strongly either way from the 1980 Term to the 2013 Term. The average number of cases with state amici is about twenty, with a high of thirty-four cases per Term and a low of eleven. The surge noted in earlier studies based on pre-1989 data seems to have abated, with state amicus activity leveling off in more recent decades. It is important to note, however, that these steady numbers of cases with state amici are occurring during a time when the numbers of merits decisions reached by the Court have been declining. For instance, according to data from the Supreme Court Database, there were 128 merits decisions in the 1980 Term⁶⁹ while there were sixty-nine merits decisions in the 2013 Term.⁷⁰ Thus, the *fraction* of cases with states as amici was actually increasing during this time period.

FIGURE 1. SUPREME COURT CASES PER TERM WITH AT LEAST ONE AMICUS BRIEF FROM A STATE OR STATES



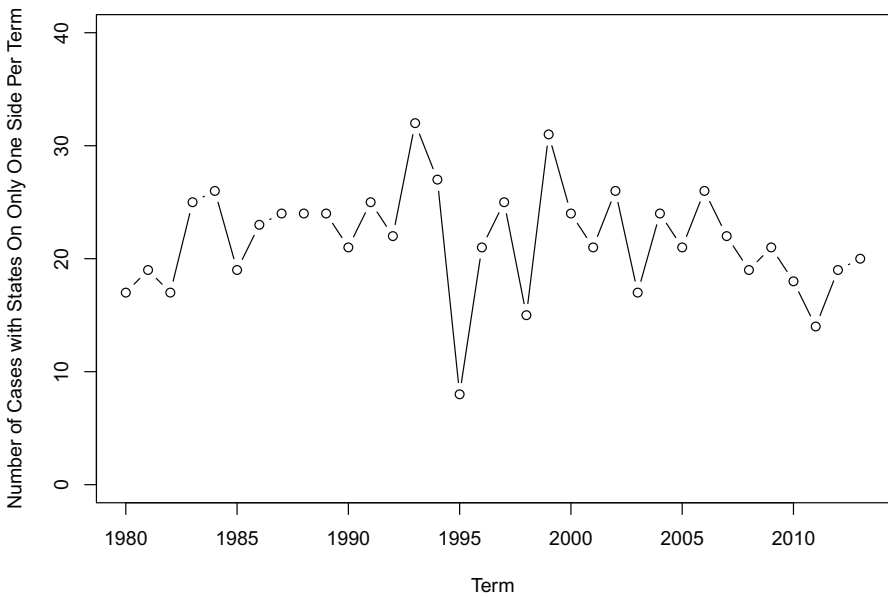
Notes: The y-axis gives the number of cases that had at least one merits-stage amicus brief signed by a state AG.

⁶⁹ *Analysis Specifications*, THE SUPREME COURT DATABASE, <http://scdb.wustl.edu/analysis.php> (last visited Feb. 8, 2015) (search “Range of Terms” for “1980 to 1980” and “Decision Type” for “judgment of the court (orally argued),” “opinion of the court (orally argued),” and “per curiam (orally argued)”).

⁷⁰ *Id.* (search “Range of Terms” for “2013 to 2013” and “Decision Type” for “judgment of the court (orally argued),” “opinion of the court (orally argued),” and “per curiam (orally argued)”).

We are also interested in how often the positions advocated by the states are explicitly opposed by other states in other amicus briefs. Figure 2 plots the number of cases with state amicus briefs in which no state filed an opposing brief. Figure 3 plots the number (and, in the lower plot, the fraction) of cases with state amicus briefs that featured competing state briefs taking different positions on the merits. It reveals that explicit disagreement among state amici is relatively rare—typically occurring in less than five cases per Term, and occasionally never occurring in a given Term.⁷¹ Over the full time period, we found interstate conflict in just over 6% of cases in which any state filed an amicus brief—although in some individual Terms this percentage is appreciably higher.

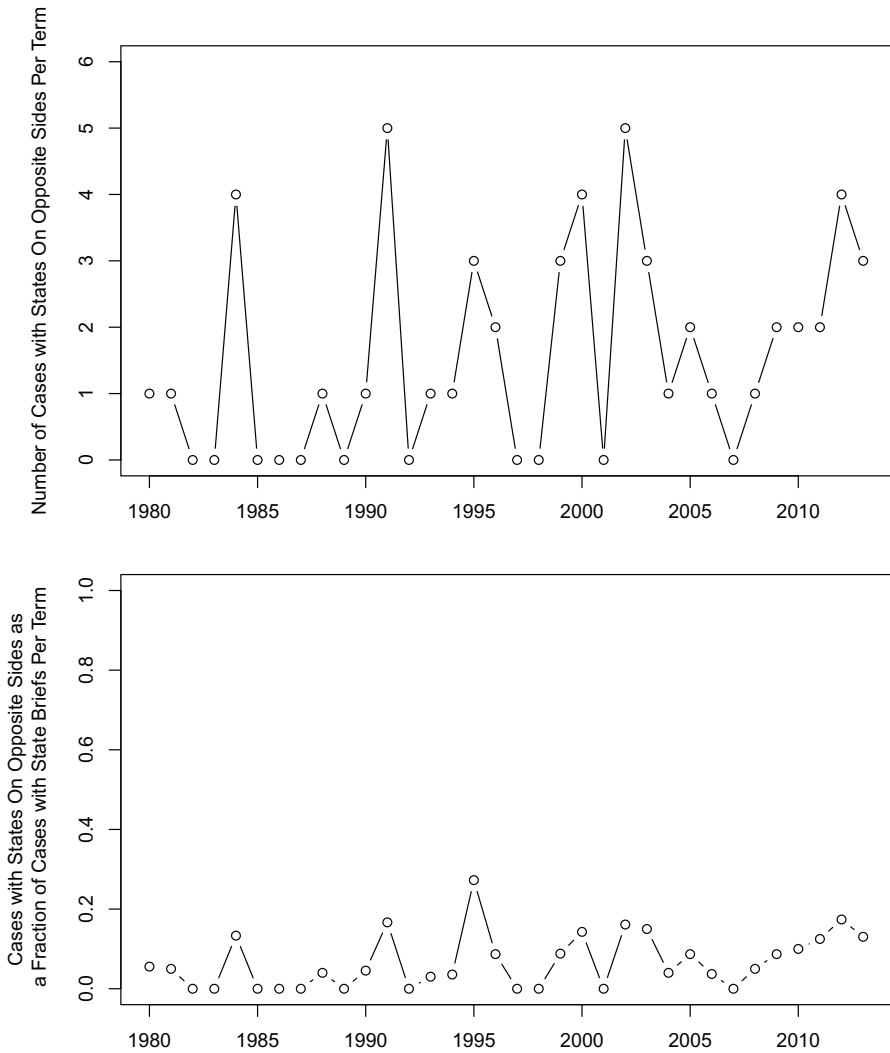
FIGURE 2. SUPREME COURT CASES PER TERM WITH AMICUS BRIEF FROM STATES AND NO EXPRESS DISAGREEMENT AMONG STATES



Notes: The y-axis gives the number of cases that had at least one merits-stage amicus brief signed by a state AG and in which no other states signed briefs supporting the opposing party.

⁷¹ To ensure that we were not missing cases of interstate conflict by focusing exclusively on amicus briefs, we also looked for conflicts between state amicus briefs and briefs filed by states as parties. We found nine such cases in our dataset that were not already captured by our search for explicit disagreement among state amici. Including the party-amicus conflicts in our analysis did not change the results, so we have omitted them for the sake of clarity.

FIGURE 3. SUPREME COURT CASES PER TERM WITH AMICUS BRIEF FROM STATES AND EXPRESS DISAGREEMENT AMONG STATES



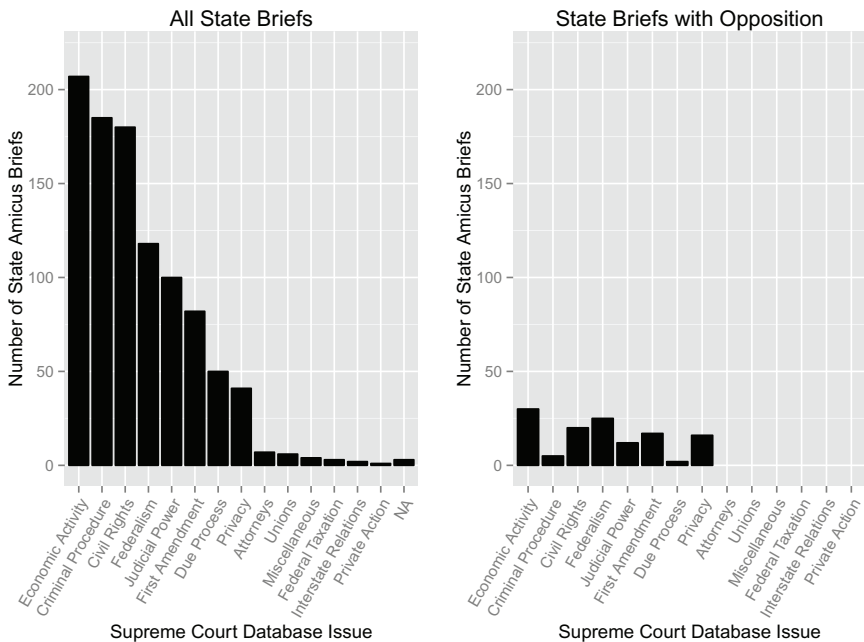
Notes: In the top panel, the y-axis gives the number of cases that had merits-stage amicus briefs signed by state AGs in which states took divergent merits positions. The bottom panel expresses the numbers from the top panel as a fraction of the number of cases with at least one state-signed amicus brief in each term.

What issues are at stake in the cases in which states participate as amici? To get a sense of this, we used the fourteen category “issue area codes” from the Supreme Court Database.⁷² While there has

⁷² THE SUPREME COURT DATABASE, *supra* note 69.

been some criticism of these issue codes,⁷³ they provide a glimpse of what is at stake in the various cases. Figure 4 displays the relative frequency of briefs in each of the fourteen issue areas, both for all state briefs and for cases in which there is conflict among state amici. What we see is that economic activity is the most common issue category both for all briefs and for briefs with explicit state opposition. But states are active in a variety of other categories as well, including federalism, civil rights, judicial power, first amendment, and, within the “all-briefs” subplot, criminal procedure and due process. This broad pattern suggests to us that, unsurprisingly, AGs are asserting a variety of interests on behalf of their states—not just the abstract institutional interests typically at issue in debates over federalism, but a range of regulatory interests as well.

FIGURE 4. FREQUENCY OF SUPREME COURT DATABASE ISSUES AMONG STATE AMICUS BRIEFS



Notes: The left panel displays the number of state-signed amicus briefs on each of the fourteen categories of Supreme Court Database issues from the 1980 to 2013 Terms. The right panel displays similar numbers but only for state amicus briefs in which at least one other state signed an opposing brief.

⁷³ See, e.g., Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477, 480–81 (2009) (“[Coding of] the Database has serious, but often unrecognized, implications for empirical legal scholarship. . . . [R]ather than illuminate the workings of the Supreme Court, some empirical findings may reflect the way the Database reports . . . [or codes] information.”).

C. *State Amicus Activity and Partisanship*

1. *Cosigners and Opponents*

To what extent is AG amicus behavior observationally equivalent to partisan amicus behavior? There are various ways researchers might approach that question. For example, one might try to code the substantive positions advanced by AG briefs as liberal or conservative, and then determine the partisan affiliation of the AGs who sign each brief. The difficulty, of course, is devising a system for coding substantive positions that is both valid and reliable.⁷⁴

We opted to focus on the relationships among the AGs who joined, and who opposed, briefs by other AGs. As noted in Part I, it is increasingly rare for individual AGs to file briefs on their own; most state amicus briefs are signed by two or more AGs. We wanted to know whether the resulting coalitions of AGs represent clusters of copartisans, or whether they are better explained by factors other than partisanship. To that end, we examined the association between a particular state AG's own partisan affiliation and the average partisanship of the state AGs who explicitly *opposed* amicus briefs signed by the original AG. We also examined the association between each AG's partisan affiliation and the average partisanship of the AGs who *joined* amicus briefs signed by the original AG. If partisanship is an important determinant of amicus activity, then one would expect a strong negative relationship between the ideology of AGs opposing each other and a strong positive relationship between the ideology of AGs who cosign amicus briefs.

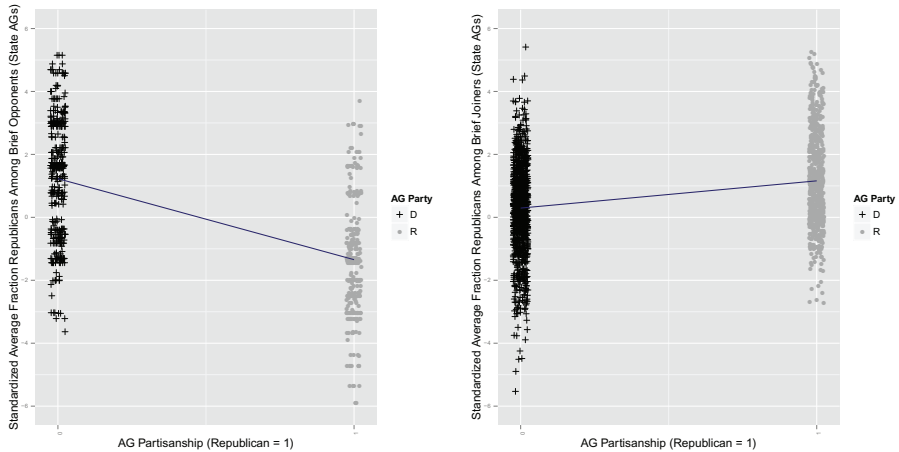
With the help of a research assistant, we used Internet searches to determine the party affiliation for all of the AGs in our sample. That task was straightforward for elected AGs.⁷⁵ For those appointed by

⁷⁴ For literature discussing the problems with efforts to code judicial decisions as "liberal" or "conservative," see Anna Harvey & Michael J. Woodruff, *Confirmation Bias in the United States Supreme Court Judicial Database*, 29 J.L. ECON. & ORG. 414, 415 (2013) (finding that the labeling of cases depended more on the preferences of the Court than on the disposition of the case); William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 776–78, 780–81 (2009) (explaining the numerous variables involved in classifying a decision); Shapiro, *supra* note 73, at 480–81 (arguing that the coding of the Supreme Court Database can lead to inaccurate legal empirical scholarship); Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 11–12 (noting that the inconsistent nature of these classifications poses a significant problem in accurate coding).

⁷⁵ There is one complication: A significant number of elected AGs are initially appointed (usually by the governor) because their predecessor steps down in a nonelection year. Many run for election in a later year, but some do not. Virginia, in particular, stands out in this respect: The appointed AGs serve a brief interim term before being replaced by an elected one. VA. CODE ANN. § 24.2-213 (2011). We used the party of the appointing governor as a proxy for the partisanship of the interim AGs.

the state governor (Alaska,⁷⁶ Hawaii,⁷⁷ New Hampshire,⁷⁸ New Jersey,⁷⁹ and Wyoming⁸⁰), we used the partisan affiliation of the governor as a proxy for the partisanship of the AG. In Maine, the legislature appoints the AG.⁸¹ As it happens, all of the Maine AGs ran for office either before or after their term as AG, so we used the political affiliations revealed in those races. We were unable to get reliable information on Tennessee AGs, who are appointed by the state supreme court.⁸² We therefore exclude Tennessee AGs from our data analysis.

FIGURE 5. THE RELATIONSHIP BETWEEN ATTORNEY GENERAL IDEOLOGY AND PARTISANSHIP OF AMICUS BRIEF OPPONENTS AND COSIGNERS (1980–2013 TERMS)



Notes: Each data point is a state AG term observation (e.g., the AG of Illinois in the 2003 Term). The data points have been coded to reflect partisanship.

Figure 5 plots the relevant data. The *x*-axis in both subplots gives the partisanship of each state AG—coded as 0 for non-Republican⁸³ and 1 for Republican. The *y*-axis of the left plot gives the standardized

⁷⁶ The governor of Alaska appoints the head of each principal executive department. ALASKA STAT. ANN. § 39.05.020 (West 2015). The AG is the head of the Department of Law. ALASKA STAT. ANN. § 44.23.010 (West 2015).

⁷⁷ The governor of Hawaii appoints the head of each principal executive department. HAW. CONST. art. V, § 6. The AG is the head of the Department of the Attorney General. HAW. REV. STAT. § 26-7 (West 2015).

⁷⁸ N.H. CONST. art. XLVI.

⁷⁹ N.J. CONST. art. V, § 4.

⁸⁰ WYO. STAT. ANN. § 9-1-601 (2015).

⁸¹ ME. CONST. art. IX, § 1.

⁸² TENN. CONST. art. VI, § 5.

⁸³ These “non-Republicans” are all Democrats, except for the Minnesota AGs who belong to the Democratic-Farmer-Labor Party.

average fraction of Republicans among the AGs taking merits-brief positions that are explicitly opposed to the merits-brief positions of the state AG in question. The y -axis of the right plot gives the standardized average fraction of Republicans among the AGs taking merits-brief positions that are explicitly in agreement with the merits-brief positions of the AG in question. The standardization subtracts the total fraction of Republican AGs serving in the Term in question and divides by the sample standard deviation of the partisanship indicator from that Term over the square root of the number of cosigners (or opponents, depending on the subplot). This is simply a z -score. A value greater than 1.96 on the y -axis implies that a state's opponents (left plot) or allies (right plot) were more Republican than would be expected by chance. A value less than -1.96 on the y -axis implies that a state's opponents (left plot) or allies (right plot) were less Republican than would be expected by chance. Values close to 0 are consistent with opponents (left plot) and allies (right plot) being drawn randomly from the distribution of state AGs during the Term in question.

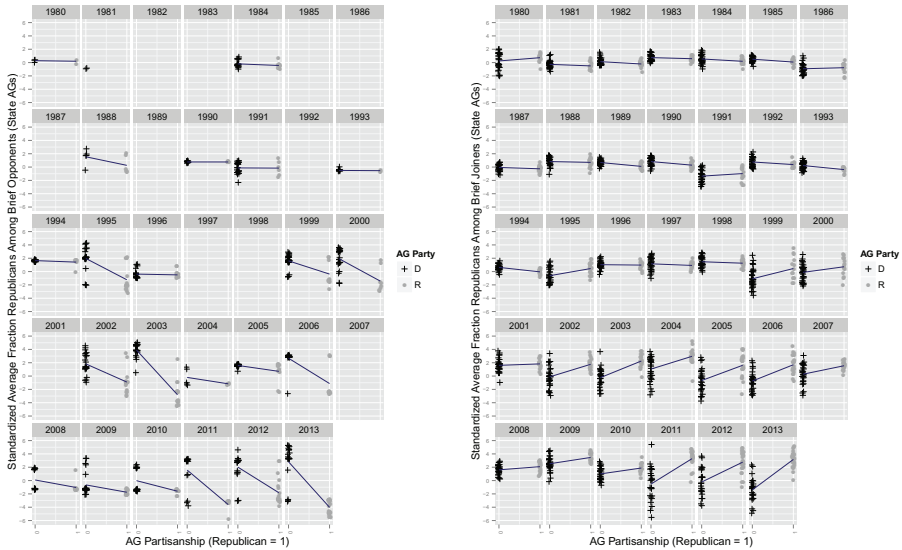
Figure 5 presents, at best, weak evidence that state AG amicus activity is consistent with a theory of partisan motivations. As would be expected under accounts of partisan-motivated AG behavior, we see a negative relationship between AGs' own partisanship and opponent partisanship and a positive relationship between own partisanship and cosigner partisanship. However, the strength of these relationships is weak, with average z -scores for both Democrats and Republicans (the values on the y -axis of the regression line when AG Partisanship is 0 and 1 respectively) well below 1.96 in absolute value. Further, there are a number of state AGs whose amicus behavior goes against a simple partisan interpretation. This can be seen by the Democrat AGs in the left plot (and the Republican AGs in the right plot) who have opponents (cosigners) who are much more likely to be Democrats than would be expected by chance (i.e., have z -scores below -1.96). Similarly, there are a number of Republican AGs in the left plot (and Democratic AGs in the right plot) who have opponents (cosigners) who are much more likely to be Republicans than would be expected by chance (i.e., have z -scores above 1.96).

The conclusion to take from Figure 5 is that, on average, over the entire period of study there are visible but statistically insignificant relationships between an AG's own partisanship and the partisanship of brief opponents and joiners. This lack of statistically significant relationships is not so surprising when one considers that Figure 5 pools data from nearly thirty-five years—years that, according to the accounts cited above, featured a great deal of change in the role of

state AGs. Figure 5 also pools data across forty-nine states, each with its own unique characteristics. Our next step, then, is to disaggregate these results by Term and state to determine if the aggregate results are washing out statistically significant relationships within Term and within state.

We begin by disaggregating the data by Term. If the weak associations seen in Figure 5 are simply artifacts of collapsing data from multiple Terms, then we should see stronger relationships within individual Terms. Figure 6 presents results similar to those in Figure 5, but on a Term-by-Term basis. A number of interesting patterns stand out. First, prior to the 1995 Term, the regression lines in both the left and right subplots are quite flat and never take values greater than 1.96 in absolute value. This is consistent with nonpartisan behavior both among brief opponents and brief cosigners.

FIGURE 6. THE RELATIONSHIP BETWEEN ATTORNEY GENERAL IDEOLOGY AND PARTISANSHIP OF AMICUS BRIEF OPPONENTS AND COSIGNERS OVER TIME (1980–2013 TERMS)



Notes: Each data point is a state AG term observation (e.g., the AG of Illinois in the 2003 Term). The data points have been coded to reflect partisanship.

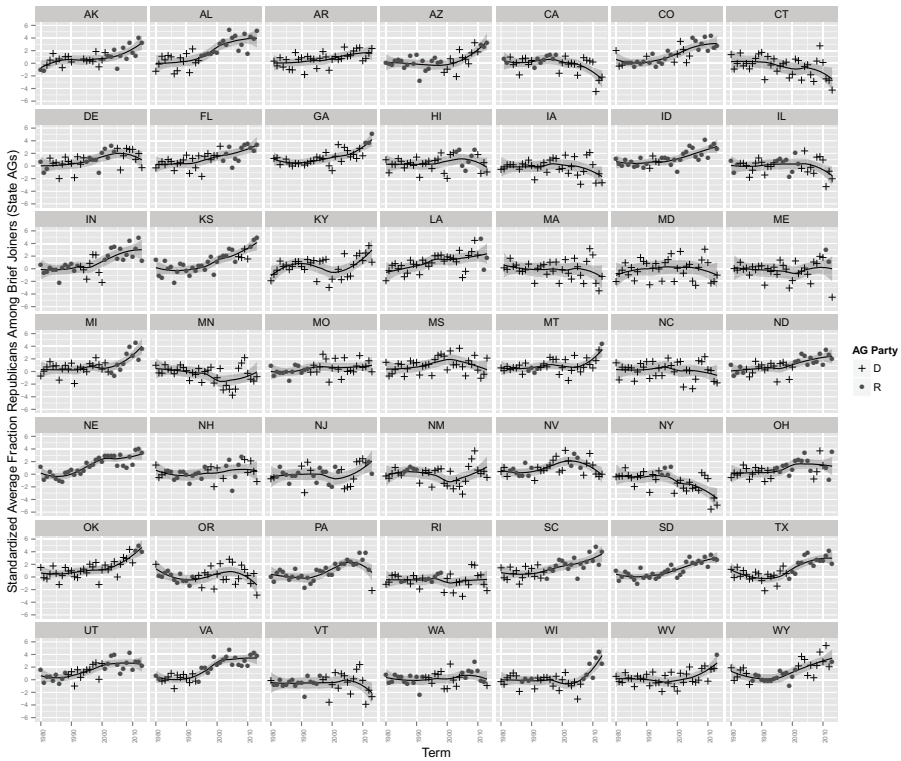
However, after the mid-1990s a different story emerges. Beginning in 1995, the regression lines in the left subplot begin to take on negative slopes for most of the remaining Terms. Looking more closely at the post-1994 subplots on the left, we see that the average partisanship of opponents of Democratic AGs is significantly more

Republican than would be expected by chance in five Terms (1995, 2003, 2006, 2012, and 2013). In those same plots, the average partisanship of opponents of Republicans is significantly more Democratic than would be expected by chance in three Terms (2003, 2011, and 2013). Polarization among AGs in cases with opposing state briefs is therefore a relatively recent phenomenon—certainly after 1994 and even more heavily concentrated after the 2010 Term.

Looking at the partisanship of cosigners in the right subplot of Figure 6 only confirms this conclusion. The slopes of the regression lines are again fairly flat throughout the 1990s, indicating no strong relationship between an AG's own partisanship and the average partisanship of cosigners. This changes through the 2000s as an AG's cosigners tend, on average, to more closely resemble the AG's own partisan affiliation. Interestingly, the patterns are different for Democratic and Republican AGs. The average *z*-score for Democratic AGs is never below -1.96, which means that the cosigners of the average Democratic AG were never more Democratic than would be expected by chance. Indeed, in one Term (2009) the average *z*-score for Democratic AGs is actually greater than *positive* 1.96 (2.52), indicating that cosigners of Democratic AGs were actually more Republican than would be expected by chance. Contrast the Republican AGs and their cosigners. In seven Terms (2003, 2004, 2008, 2009, 2011, 2012, and 2013) the average partisanship of cosigners of Republican AGs was more Republican than would be expected by chance given the observed partisan mix of AGs sitting in a Term. Further, there was never a Term in which the average Republican AG *z*-score was less than -1.96, meaning that the average Republican AG never had a group of cosigners who looked more Democratic than would be expected by chance. Much of the increased partisan polarization in AG behavior thus seems to be the result of Republican AGs writing briefs for cases in which Republican AGs are unified on the merits and Democratic AGs are reluctant to write at all. We will come back to this point later, to better understand which types of cases fit this pattern of unified Republican activity and Democratic inactivity.

Before turning to the cases, however, we disaggregate the results of Figures 5 and 6 by state. Here, we are especially interested in the patterns evident in states that alternate the partisan control of the AG's office. These states might provide some leverage on the role of partisanship, since other time-invariant, state-level factors are held constant.

FIGURE 7. STATE-BY-STATE TIME SERIES OF PARTISANSHIP OF AMICUS BRIEF COSIGNERS (1980–2013 TERMS)



Notes: Each data point is a state AG term observation (e.g., the AG of Illinois in the 2003 Term). The data points have been coded to reflect partisanship.

Figure 7 displays state-by-state time-series plots of the standardized partisanship of merits-brief cosigners. Again, these are simply z -scores. We do not display data on brief opponents because of the extreme sparseness of the data when conditioning on both Term and state. The pattern in Figure 7 is largely consistent with that in Figure 6: State-level z -scores are generally less than 1.96 in absolute value until the early 2000s when they begin taking on larger values—indicating that in these later Terms cosigners tended to be more homogeneously partisan than would be expected by chance.

While some states with Democratic AGs tend to have average z -scores below -1.96 during this later period (indicating increasingly Democratic brief cosigners), this is limited to a handful of northeastern states: Connecticut, New York, and Vermont. Indeed, there are more states with Democratic AGs that are trending in the other direction—toward more Republican cosigners than would be expected by chance. These states include: Kentucky, Louisiana,

Montana, Oklahoma, West Virginia, and Wyoming. The brief cosigning behavior of the Democratic AGs of these six states in the late 2000s and 2010s is more similar to that of Republican AGs than other Democratic AGs. The relative conservatism of these states (as measured in most any conventional way) suggests that partisanship by itself might be much less important for AG behavior than the underlying political values of a state's voters and politicians—including, but not limited to, the AG.

If we focus on states that alternated partisan control of the AG's office, we see that the change in partisan control does little to affect the partisanship of the state's merits-brief allies. Note that before and after a partisan transition, the z -scores remain relatively close to the loess smooth that has been superimposed on each subplot. Again, this suggests that partisanship, by itself, may be less important than state-specific factors and more general trends at the national level.

2. *Issues and Cases*

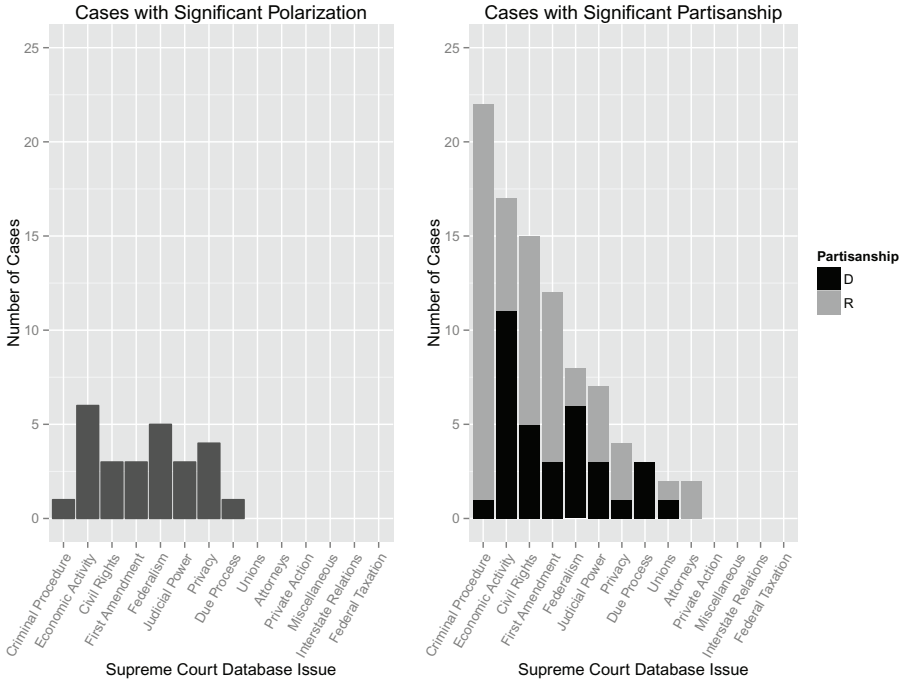
Though partisanship appears to be ascendant in our set of amicus briefs, there is still significant variation from Term to Term, and from case to case within Terms. Some cases feature partisan coalitions; others draw a bipartisan mix of AGs. What explains the difference? Though we cannot answer that question conclusively with the existing data, we can make some headway by examining the issues involved in the cases with the most—and the least—partisan coalitions.

The first step is to calculate case-specific summary measures that will allow us to focus on the cases that feature the most extreme polarization and/or partisan behavior by state AGs. In essence, there are two broad classes of cases: those in which opposing briefs were filed by state AGs and those in which all briefs from state AGs were on the same side. A look at the AGs on each side of the merits of the former category can tell us something about the level of polarization in the case in question. In the latter category of cases, without explicit disagreement on the merits, the partisan homogeneity of the participating state AGs can indicate the partisanship of the group.

Our measure of case-specific polarization derived from the cases with opposing state briefs is simply a two-sample z -test of the null hypothesis that the fraction of Republican state AGs in each opposing coalition is the same.⁸⁴ Cases with statistically significant polarization are those with z -scores greater than 1.96 in absolute value. The left panel of Figure 8 provides information on the Supreme Court

⁸⁴ These z -statistics are calculated with a correction for the fact that this is essentially a sampling without replacement problem.

FIGURE 8. CASE POLARIZATION AND PARTISANSHIP BY ISSUE AREA (1980–2013 TERMS)



Notes: The cases in the left panel are those that have polarization scores greater than 1.96 in absolute value. These are cases that feature states filing opposing briefs in which the difference in average partisanship between the two coalitions is more extreme than would be expected by chance. The right panel features cases without opposing briefs in which the lone coalition was more partisan than would be expected by chance. Cases with overly Democratic coalitions are depicted with black; cases with overly Republican coalitions are depicted with dark gray.

Database issue areas for the cases with significant polarization. The most prevalent issues in these cases are “economic activity,” “federalism,” and “privacy.”

Our measure of case-specific partisanship is taken from the cases without opposing briefs. Here, we tested the null hypothesis that the fraction of Republican AGs writing or joining a brief is the same as the fraction of Republican AGs serving in that Term. The tests used were simple *z*-tests with an adjustment for sampling without replacement. A *z*-statistic greater than 1.96 suggests that the briefing coalition is more Republican than would be expected by chance, while a *z*-statistic less than -1.96 suggests that more Democrats wrote or joined briefs than we would expect under the null. The right panel of Figure 8 displays the number of cases with significant partisanship in each direction.

Looking at this right-hand plot, the “criminal procedure” category is particularly striking. To the extent that we see partisan coali-

tions in such cases, those coalitions are overwhelmingly Republican in their orientation. Criminal procedure cases are also largely absent from the “opposition” subplot on the left. Though states filed a sizeable number of amicus briefs in such cases, we found opposing briefs in only three cases. The first two were *District of Columbia v. Heller*⁸⁵ and *McDonald v. City of Chicago*,⁸⁶ both concerning the scope of the right to bear arms under the Second Amendment. States squared off over guns again in *Abramski v. United States*,⁸⁷ dividing on the question of whether a straw purchaser, who buys a firearm for someone else, violates federal law prohibiting the making of false statements on firearm purchase forms.

Putting the joining and opposing cases together, we can see that Democratic AGs tend *not* to take partisan positions—positions we might expect to favor criminal defendants—on conventional criminal procedure issues. That finding might suggest that some state interests (such as in crime control) are both commonly held and strong enough to trump disagreements over policy, except in hot-button areas such as the Second Amendment. Alternatively, the absence of opposition and the strong Republican skew on criminal procedure briefs might reflect the power of electoral politics. Even if Democratic AGs strongly believe, for example, that the Fourth Amendment should not permit warrantless searches of cell phones, they will not take a public stand against law enforcement.

The “civil rights” and “first amendment” categories reveal similar asymmetries between Democratic and Republican coalitions, though the patterns are less stark. In both categories, Republican-slanted coalitions account for two-thirds of the briefs that rank as significantly partisan. Many of the Republican-dominated briefs respond to Establishment Clause challenges to governmental practices such as aid to religious schools and organizations,⁸⁸ school prayer,⁸⁹ and the placement of religious symbols on public land.⁹⁰ The others take up a mix of issues, ranging from redistricting⁹¹ to qualified immunity⁹² to

⁸⁵ 554 U.S. 570 (2008). Somewhat surprisingly, the states’ briefs in *Heller* did not reflect significant partisan polarization—an issue that we explore in more detail below.

⁸⁶ 561 U.S. 742 (2010).

⁸⁷ 134 S. Ct. 2259 (2014).

⁸⁸ *E.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (vouchers for religious schools); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (use of school facilities for religious purposes); *Mitchell v. Helms*, 530 U.S. 793 (2000) (aid to parochial schools).

⁸⁹ *E.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (student-led, student-initiated school prayer services).

⁹⁰ *E.g.*, *Salazar v. Buono*, 599 U.S. 700 (2010); *Van Orden v. Perry*, 545 U.S. 677 (2005).

⁹¹ *E.g.*, *Riley v. Kennedy*, 553 U.S. 406 (2008) (scope of the Voting Rights Act preclearance requirement); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (racial-gerrymandering challenge to a Texas redistricting plan).

the scope of rights of action under 42 U.S.C. §§ 1981 and 1983.⁹³ Despite their variation, however, a common thread runs through all of the Republican-dominated briefs: AGs are advancing arguments that are consistent with their partisan orientation *and* with state power. The tendency of Democrats to support more expansive individual rights might help explain why we see relatively few Democrat-led coalitions in these areas: The pro-individual rights position will often mean less state power. The Democrat-dominated briefs focus overwhelmingly on two issues—affirmative action⁹⁴ and campaign finance⁹⁵—where it is common for Democrats to oppose claims of individual rights. Thus, Democrat and Republican AGs alike seem to seek out cases in which they are not forced to choose between their preferred policy outcomes and the long-term institutional prerogatives of the states they represent.

The cases in which states file opposing briefs are interesting, therefore, because both sides cannot push for more state power. Though states square off in civil rights and “first amendment” cases with some frequency, only a handful of those cases involve sharply polarized battles between state amici. That handful includes some blockbusters: the famous challenge to the Virginia Military Institute’s male-only admissions policy;⁹⁶ *McConnell v. FEC*,⁹⁷ involving a First Amendment challenge to the McCain-Feingold campaign finance law; and the recent *Shelby County* case concerning the constitutionality of Section 4 of the Voting Rights Act.⁹⁸ The other two partisan-conflict

⁹² *E.g.*, *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014) (police officer’s immunity against a claim of excessive force).

⁹³ *E.g.*, *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 480 (2006) (corporate shareholder claim under 42 U.S.C. § 1981 for a breach of contract between a third party and a corporation); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005) (relationship between the private cause of action created by the Telecommunication Act of 1996 and 42 U.S.C. § 1983).

⁹⁴ *E.g.*, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (state university’s consideration of race in the admissions process); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (racial classifications in student assignment plans for elementary and high schools); *United States v. Paradise*, 480 U.S. 149 (1986) (racial quotas for the selection of new state trooper corporals).

⁹⁵ *E.g.*, *Am. Tradition P’ship v. Bullock*, 132 S. Ct. 2490 (2012) (challenge to Montana statute regulating corporate expenditures on behalf of candidates); *Randall v. Sorrell*, 548 U.S. 230 (2006) (challenge to various provisions of Vermont’s Campaign Finance Reform Act); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (spending limits as applied to political parties).

⁹⁶ *United States v. Virginia*, 518 U.S. 515 (1996).

⁹⁷ 540 U.S. 93 (2003).

⁹⁸ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

cases involve free exercise challenges, which may pose special challenges for Republican AGs by pitting religion against state power.⁹⁹

The cases coded as “privacy” involve similar clashes between individual rights and state power. Most of those cases concerned abortion;¹⁰⁰ the exception is *Romer v. Evans*,¹⁰¹ a well-known case involving gay rights, which prompted a partisan battle among state amici. *Hollingsworth v. Perry*,¹⁰² though coded as a “judicial power” case and ultimately resolved on standing grounds, likewise featured warring AG briefs over the constitutionality of state-level bans on same-sex marriage, as did *United States v. Windsor* (coded as “due process”).¹⁰³ In each case, one group of AGs (Democrats in *Romer*, *Hollingsworth*, and the abortion cases; Republicans in *Windsor*) took positions that cut against state power. Why? One possibility is that the underlying issues are so salient that they trump abstract questions of state authority. AGs might also feel comfortable taking positions that limit states’ regulatory options if existing state law already is protective of the rights at issue. It is telling, in this respect, that all of the AGs who signed the state brief defending the Defense of Marriage Act (DOMA) in *Windsor* hailed from states with constitutional provisions or legislation consistent with the Act.¹⁰⁴ Such behavior is consistent with what Lynn Baker and Ernie Young have dubbed “horizontal aggrandizement,” whereby states use federal power to lock in (and impose on other states) policies they already favor.¹⁰⁵

As noted above, the largest number of cases featuring interstate conflict fall within the “economic activity” and “federalism” issue cat-

⁹⁹ Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661 (2010) (free exercise challenge to public school’s policy of conditioning the use of school funds and facilities on groups’ agreement to accept all comers); Locke v. Davey, 540 U.S. 712 (2004) (free exercise challenge to state law prohibiting the expenditure of public funds for religious instruction).

¹⁰⁰ For examples of abortion cases that generated opposing amicus briefs by partisan coalitions of AGs, see McCullen v. Coakley, 134 S. Ct. 2518 (2014) (Massachusetts statute mandating “buffer zone” around abortion provider facilities) and Stenberg v. Carhart, 530 U.S. 914 (2000) (bans on partial-birth abortion).

¹⁰¹ 517 U.S. 620 (1996).

¹⁰² 133 S. Ct. 2652 (2013).

¹⁰³ 133 S. Ct. 2675 (2013) (holding that a federal definition of marriage as between a man and a woman violated equal protection).

¹⁰⁴ Cf. Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 122 HARV. L. REV. F. 108, 111 (2011) (“[A]ll the states that signed the *McDonald* amicus brief . . . [arguing that the Second Amendment right to bear arms should be incorporated against the states] already guarantee an ‘individual’ right to keep and bear arms in their own constitutions, often in terms more expansive than those of the Second Amendment.”).

¹⁰⁵ Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 110 (2001) (internal quotation marks omitted); see also Blocher, *supra* note 104, at 112 (offering a similar assessment of the state briefing in *McDonald*).

egories. The federalism category is fairly straightforward and includes many of the usual suspects, cases any law student could list as part of the Rehnquist Court's much-remarked "federalism revival."¹⁰⁶ States squared off against each other in partisan coalitions in *United States v. Morrison*,¹⁰⁷ *University of Alabama v. Garrett*,¹⁰⁸ *Department of Human Resources v. Hibbs*,¹⁰⁹ and *NFIB v. Sebelius*.¹¹⁰ The federalism category also includes preemption cases, though only one of them, *Arizona v. United States*,¹¹¹ generated a markedly partisan clash between state briefs. In several other preemption cases, Democrat-dominated coalitions of AGs defended state law without opposition from other states.¹¹²

The "economic activity" category resists a simple summary. Many cases in that category concern environmental regulation. Indeed, virtually all of the cases in which states participated on one side only, and in Republican-led coalitions, involved challenges to expansive environmental regulations by federal agencies.¹¹³ Environmental issues also provoked several partisan clashes between state amici.¹¹⁴

¹⁰⁶ *E.g.*, Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 431 (2002).

¹⁰⁷ 529 U.S. 598, 613, 627 (2000) (holding that the Violence Against Women Act exceeded Congress's power under the Commerce Clause and Section Five of the Fourteenth Amendment).

¹⁰⁸ 531 U.S. 356 (2001) (testing the bounds of Congress's power to legislate under Section Five of the Fourteenth Amendment).

¹⁰⁹ 538 U.S. 721 (2003) (same).

¹¹⁰ 132 S. Ct. 2566 (2012) (holding that aspects of the Affordable Care Act exceeded Congress's power under the Commerce and Spending Clauses, but sustaining the individual mandate as an exercise of the taxing power).

¹¹¹ 132 S. Ct. 2492 (2012) (challenge to Arizona law regulating unlawful immigrants as preempted by federal law).

¹¹² *E.g.*, *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011) (holding that federal Motor Vehicle Safety Standards, giving auto manufacturers the option of installing either simple lap belts or lap-and-shoulder belts on rear inner seats, did not preempt state tort claims); *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008) (holding that state statutes prohibiting grant recipients from using state funds to assist, promote, or deter union organizing were preempted by the National Labor Relations Act under *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976)); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (holding that state defective design claims were not preempted despite federal approval under the Medical Device Amendments).

¹¹³ *E.g.*, *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (Clean Water Act); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (National Pollution Discharge Elimination System permitting program under the Clean Water Act); *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461 (2004) (Clean Air Act's Prevention of Significant Deterioration program); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995) (Endangered Species Act).

¹¹⁴ *See, e.g.*, *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011) (multistate suit against interstate electrical corporations charged with contributing to the public nuisance of global warming); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009) (challenge to the EPA's interpretation of the Clean Water Act); *Env'tl. Def. v. Duke Energy Corp.*, 549

Dormant Commerce Clause cases (which divide the states almost by necessity) are also housed within the “economic activity” category. Most involve challenges to discriminatory state taxes, and none features a distinctly partisan division among the states.¹¹⁵ Another frequent subject in the “economic activity” category is antitrust, a topic that inspired several Democrat-dominated state coalitions¹¹⁶ and one partisan clash of state amici.¹¹⁷ Democrat-dominated coalitions also weighed in on issues related to civil litigation, including the relationship between arbitration and class actions,¹¹⁸ pleading standards,¹¹⁹ and limitations on punitive damages.¹²⁰

III

IMPLICATIONS AND SUGGESTIONS FOR FUTURE RESEARCH

Partisanship has become a central theme in scholarship seeking to understand the motivations of government actors. Earlier work tended to assume, following Madison, that “[a]mbition [would] counteract ambition”¹²¹—that government actors would reliably push for more power for the institutions they represented, thereby checking the power of other institutions.¹²² On that view, state representatives could be relied upon to resist federal overreaching and to push back

U.S. 561 (2007) (challenge to the EPA’s ability to impose new restrictions pursuant to the Clean Air Act); *Rapanos v. United States*, 547 U.S. 715 (2006) (challenge to federal power to regulate isolated wetlands under the Clean Water Act).

¹¹⁵ See, e.g., *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (challenge to North Dakota tax on outside retailers); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (challenge to Alabama statute imposing lower tax rate on domestic insurance companies than out-of-state insurance companies); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (challenge to Montana tax on coal mined in the state).

¹¹⁶ See *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007) (clarifying the meaning of predatory billing under federal antitrust law); *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199 (1990) (holding AGs lack authority to sue as *parens patriae* on behalf of indirect-purchaser consumers); *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332 (1982) (horizontal price fixing by medical societies).

¹¹⁷ See *Verizon Commc’ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004) (rejecting antitrust claims hinged to the Telecommunications Act of 1996).

¹¹⁸ In *AT&T Mobility LLC v. Concepcion*, the Court held that the Federal Arbitration Act preempted a state law that rendered mandatory class-waiver provisions in arbitration clauses unenforceable. 131 S. Ct. 1740 (2011). Partisan coalitions of AGs filed amicus briefs on both sides of the case.

¹¹⁹ E.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

¹²⁰ E.g., *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

¹²¹ THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

¹²² See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2312–14 (2006) (describing this conventional wisdom).

against unpopular federal initiatives with competing policies of their own.¹²³

More recent work has called into question the assumption that government actors will devote themselves to such “empire-building,” to borrow Daryl Levinson’s term.¹²⁴ As Levinson has explained, neither government officials nor their constituents have interests that “correlate in any systematic way with the power . . . of government institutions.”¹²⁵ Of course, government actors will *sometimes* have incentives to expand the scope of their institutions. But enhanced power is rarely an end in itself, as opposed to a means to some other end (such as enacting a certain policy, appealing to voters, etc.).¹²⁶

This is where partisanship enters the picture: If the abstract goal of institutional aggrandizement fails to spur official action, partisan ambitions might do the job instead. Thus, Levinson and Rick Pildes have argued that competition between the legislative and executive branches of the federal government is fueled by contests between the two dominant political parties, rather than by the formal separation of powers.¹²⁷

Building on Levinson and Pildes’s work, Jessica Bulman-Pozen has offered a similar theory to explain vertical conflicts between the state and federal governments. Partisanship, she argues, is a key reason for state challenges to federal power and federal policy: “States oppose federal policy because they are governed by individuals who affiliate with a different political party than do those in charge at the national level, not because they are states as such.”¹²⁸ Bulman-Pozen therefore rejects the view, reflected in earlier federalism law and literature, that state actors represent a distinct set of “state interests.”¹²⁹ Given party politics, she explains, “state opposition need not be based on something essentially ‘state’ rather than ‘national.’ Instead of representing distinctively state interests against the distinctively national interests of the federal government, states may participate in substantive controversies that are national in scope.”¹³⁰

¹²³ See Levinson, *supra* note 3, at 940 (“[A] political dynamic of competing imperialists is central to the law and theory of constitutional federalism. Even skeptics of the political safeguards argument take for granted that the federal and state governments will battle for power . . .”).

¹²⁴ *Id.* at 917.

¹²⁵ *Id.* at 920.

¹²⁶ *Id.*

¹²⁷ Levinson & Pildes, *supra* note 122, at 2315.

¹²⁸ Bulman-Pozen, *supra* note 6, at 1080.

¹²⁹ *Id.* at 1080, 1090.

¹³⁰ *Id.* at 1090; cf. Heather K. Gerken, *Abandoning Bad Ideas and Disregarding Good Ones for the Right Reasons: Reflections on a Festschrift*, 48 TULSA L. REV. 535, 545 (2013) (“All that federalism and localism need to get off the ground . . . is salient differences in

The partisanship explanation has great intuitive appeal. As is well known, today's parties are remarkably polarized.¹³¹ In the absence of meaningful overlap between the two dominant parties—"the most conservative Democrat is now more liberal than the most liberal Republican"—there is vanishingly little room for constructive bipartisan partnerships and compromises.¹³² Instead, the relationship between the parties is marked by conflict. Voters, moreover, increasingly vote along party lines.¹³³ Politicians who wish to distinguish themselves have strong incentives to do so in partisan terms, i.e., *as Republicans* or *as Democrats*. As one leading commentator put it, "[p]olitics is partisan warfare: that is our world."¹³⁴ It makes sense, in such a world, that government officials would rarely do battle with their copartisans, but would instead funnel their energies into challenging policies associated with partisan opponents.

All of this suggests that we should see partisan formations across our amicus brief data—we should see Democratic AGs challenging administrative decisions by Republican-controlled federal agencies, for example, with Republican AGs lining up to defend those agencies. We do see those patterns, but only in recent years. In roughly 6% of cases in which any state files an amicus brief, other states take a contrary position. In those cases, the opposing clusters of state AGs are often (though not always) noticeably partisan. Perhaps more tellingly, in the 94% of cases in which states participate as amici on only one side of the dispute, the coalitions of joining AGs have become increasingly partisan since 2000.

To be sure, partisan clusters do not necessarily prove that partisanship provides the spur to action. A case with warring state briefs, featuring three Republican AGs on one side and three Democratic AGs on the other, might appear as a partisan conflict but in fact be a regional one—say, between upriver and downriver states. Because we did not attempt to control for other factors that might provoke AGs to participate as amici, we cannot be sure that the partisan patterns we

opinion and lumpy residential patterns. . . . Under those conditions, decentralization can further a national conversation even if interest groups and political parties are simply running national fights through state and local sites." (citation omitted)).

¹³¹ See, e.g., Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 276 (2011) ("We have not seen the intensity of political conflict and the radical separation between the two major political parties that characterizes our age since the late nineteenth century.").

¹³² *Id.* at 277.

¹³³ See *id.* at 278 (describing the decline of "split-ticket voting").

¹³⁴ *Id.* at 277.

observe are in fact the result of partisan motivations as opposed to other factors.¹³⁵

That said, we are confident that at least some of the coalitions of joining and opposing states *do* reflect AG partisanship. For example, many of the cases in which the states squared off against each other were highly salient; some were blockbusters. That we would see partisan conflict in such cases is hardly surprising. They are big cases precisely because they involve controversial issues on which opinion is sharply divided, often along partisan lines. Many of the decisions in these cases were split five-to-four, with the Justices divided along similar ideological dimensions.

It bears heavy emphasis, however, that cases like this are a relatively small set. Just as it would be a mistake to conclude from the Justices' five-to-four votes that Supreme Court decisionmaking is always (or even mostly) ideological, it would be a mistake to jump from evidence of partisanship in a nonrandom sample of blockbuster cases to the conclusion that AG amicus briefing is always (or even mostly) a partisan endeavor. Our data show that, in many cases, AGs' advocacy positions cannot be explained by partisanship. The problem is not just that partisanship does not provide a *full* explanation—i.e., that AG behavior is consistent with partisan motivations, but we cannot make the leap from correlation to causation.¹³⁶ Instead, in the sizeable group of cases in which AG coalitions are bipartisan, it appears that some AGs are acting *contrary* to partisan motivations.

The high levels of bipartisan engagement serve as a reminder that partisanship is only part of the story, and that partisan ambitions may be trumped by other, cross-cutting, motivations. The briefing in *District of Columbia v. Heller*¹³⁷—concerning the individual right to bear arms under the Second Amendment—is instructive in this respect. The states filed warring amicus briefs in *Heller*, and though there are some obvious partisan aspects to the joining coalitions (the anti-gun brief was signed by Democratic AGs only), the association falls shy of formal significance. Of the thirty-one AGs who signed the pro-gun brief, fifteen were Democrats. And, notably, those Democrats argued not only against the typical Democratic position on guns, but also against state power: The pro-gun brief contended that the Second Amendment created an individual right to bear arms that

¹³⁵ We note that the same is true of Nolette's study, described in Part I and discussed in more detail below. See *supra* note 64 and accompanying text.

¹³⁶ See *supra* notes 85–99 and accompanying text (discussing criminal procedure, civil rights, and “first amendment” cases, in which states' briefs tend to be consistent with both partisan and institutional motivations).

¹³⁷ 554 U.S. 570 (2008).

ought to be incorporated against the states.¹³⁸ Why would so many Democrats sign onto such a brief? The likely answer is that, even if the individual AGs did not support gun rights, citizens (and perhaps other government officials) in their states did.¹³⁹ Virtually all of the AGs on the pro-gun brief hailed from states in the West, Midwest, and South—where support for gun rights typically is strongest.¹⁴⁰ The exceptions are Pennsylvania and New Hampshire, both of which had Republican AGs at the time.

Yet, not all western, midwestern, or southern states joined the pro-gun brief. For example, Arizona is absent from the brief, despite being named by *Guns & Ammo Magazine* as the number-one state for gun owners.¹⁴¹ Tennessee and North Carolina are also missing, though they are ranked sixteenth and nineteenth in *Guns & Ammo*, respectively.¹⁴² The Democratic AGs from those states stayed on the sidelines of *Heller*. The unruly patterns among Democrats from pro-gun states illustrate the complexity of the question: Neither simple partisanship, nor empire-building, nor regionalism can explain why some Democrats signed the briefs and others did not. Thus, while our findings are consistent with the view that partisanship is a “key” reason for federal-state conflict,¹⁴³ they underline how much more work there is to be done in understanding what drives state action and advocacy.

¹³⁸ See Brief of the States of Texas et al. as *Amici Curiae* in support of Respondent at 23 n.6, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (“[A]mici States submit that the right to keep and bear arms is fundamental and so is properly subject to incorporation.”).

¹³⁹ Roughly half the states on the pro-gun brief had Republican governors in 2008, and twenty-one of them supported the Republican candidate in the 2008 Presidential Election. It is notable, however, that two of the pro-gun states were strongly “blue” at the time: New Mexico and Ohio were served by Democratic AGs, Democratic governors, and a majority of voters in both states supported Obama in the 2008 election.

¹⁴⁰ Michael O’Shea divides states between categories he labels the *primary gun culture* (broadly supportive of gun rights) and the *secondary gun culture* (more restrictive), based on a catalogue of state laws and voter preferences. The more restrictive states are clustered in “highly urbanized coastal states and cities”; “the rest of the nation—Midwest, South, and West” tends to be far more gun-friendly. Michael P. O’Shea, *Federalism and the Implementation of the Right to Arms*, 59 SYRACUSE L. REV. 201, 209–13 (2008); see also *id.* at 211–12 n.50 (“Every Western state qualifies as a primary gun culture state except California So does every Midwestern state except Iowa[,] . . . Illinois and Wisconsin . . .”).

¹⁴¹ *Best States for Gun Owners 2014*, GUNS & AMMO (May 22, 2014), <http://www.gunsandammo.com/network-topics/culture-politics-network/best-states-for-gun-owners-2014/>.

¹⁴² *Id.*

¹⁴³ Bulman-Pozen, *supra* note 6, at 1080. Bulman-Pozen explicitly disavows any claim that partisanship is the *only* motivation for state-federal conflict. *Id.* at 1081 n.7.

Our findings are also broadly consistent with the results of Paul Nolette's recent study of state amicus briefs. Nolette finds an upward trend in "horizontal conflicts" among the states during the Obama Administration, but a closer examination of his results reveals that the spike appears in 2013 alone.¹⁴⁴ Our study suggests a trend of longer duration, stemming from the early 2000s, but with significant variation from year to year.¹⁴⁵

Nolette defines "horizontal conflict" among the states to include two kinds of cases: those in which states file warring amicus briefs; and those in which states are only on one side, but the coalition of joining AGs is more than 80% Republican or Democratic.¹⁴⁶ Although both types of conflicts increased in 2013, most of the action is in the second category: The number of briefs filed by lopsided partisan coalitions seems to have jumped from around fifteen to more than thirty in that year.¹⁴⁷ One must be cautious in drawing conclusions from those raw numbers. Nolette's study does not reveal how often particular AGs cosigned briefs with AGs of the opposing party. Without that kind of information, it is impossible to know whether the seemingly partisan behavior that Nolette reports is being counterbalanced by bipartisan behavior in other cases. That is exactly what the work in this Article accomplishes, and over a longer time period. Our data and analysis allow us to make stronger empirical claims and to better understand exactly when state AG behavior became more partisan.

The increase in partisanship in the post-2000 coalitions is striking. As we noted in the introduction, we suspect the increase reflects the broader trend toward party polarization: The greater the ideological divide between Democrats and Republicans, the harder it may be for AGs from the two parties to come together on joint briefs. Given the abundant evidence of the increasing polarization of elected officials holding other offices,¹⁴⁸ it would not be surprising if AGs were becoming more polarized as well.

It may be a mistake, however, to equate AGs with other elected officials. Different officials may experience partisan motivations in

¹⁴⁴ Nolette, *supra* note 64, at 456 fig.2.

¹⁴⁵ Another difference between the two studies is that Nolette examined merits briefs as well as briefs filed at the certiorari stage, and he does not disaggregate the two categories.

¹⁴⁶ *Id.* at 455.

¹⁴⁷ *Id.* at 456 fig.2.

¹⁴⁸ See, e.g., NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 1 (2006) (finding increasing polarization of U.S. Senators and Representatives since the mid-1970s); Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530, 546 (2011) (finding that most state legislatures have become increasingly polarized in recent years with some state legislatures more polarized than Congress).

different ways, and those motivations may or may not be counterbalanced by the competing imperatives of the officials' institutional roles and professional commitments.¹⁴⁹ For example, the fact that AGs are *legal advocates* may play a role in explaining our findings. The job of the AG is not to present her own best answers to the Court, but to represent the interests of the state. If state law embraces restrictive abortion policies, for example, it would be challenging for the state AG to advance a pro-choice argument on behalf of the state. Like other amicus briefs, state briefs begin with a statement of the interests of the amici, and they tend to emphasize state policies that support their positions. Without such supportive policies—which depend on state actors and institutions other than the AG—the asserted state interest carries much less heft. This feature suggests that AGs may not be able to give full vent to their partisan motivations.

Put somewhat differently—and as the *Heller* example suggests—the partisanship that drives AG advocacy may not always (or only) be the partisanship of the AG herself. It follows that we might expect to see different behavior from a Democratic AG in an otherwise heavily Republican state than from a Democratic AG in a resoundingly “blue” state.¹⁵⁰ And, as more states become more solidly “red” or “blue,” we might expect AGs to act in an increasingly partisan manner. Another way to explain our findings, then, is by reference to a trend related to (but not the same as) polarization: the rise of one-party rule in the states.¹⁵¹

Many important questions remain. Most obviously, our data do not allow us to identify the factors that *are* motivating AGs to write and join briefs in cases where the partisanship story does not fit. One promising avenue for future research would be to engage in a closer analysis of the substantive issues at play in state amicus briefs, and of the positions taken by different AGs. Though federalism cases offer an obvious starting point, other issue areas deserve attention as well.

¹⁴⁹ Cf. Hills, *supra* note 22, at 1201 (stressing the importance of disaggregating different types of state actors); Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 *YALE L.J.* 1889, 1906–09 (2014) (same).

¹⁵⁰ Sarah Esty's study of state briefing in four years' worth of federalism cases is particularly interesting in this regard. Esty found that certain measures of state ideology—the governor's party and the state's presidential vote, but not the state's AG party—were associated with significant increases in the state's likelihood of filing a profederalism brief during the Obama Administration. Esty, *supra* note 66, at 17–18. She reasons that “[t]he lack of significance of the Attorney General's party . . . suggests that they may have less control over the stances they take, or feel more constrained to act in a non-partisan manner that represents the interest of the people or the will of their Governor.” *Id.* at 19.

¹⁵¹ See, e.g., Dan Balz, *States of Polarization*, *WASH. POST*, Dec. 28, 2013, at A1 (describing the trend toward one-party rule in the states); Nicholas Confessore, *A National Strategy Funds State Political Monopolies*, *N.Y. TIMES*, Jan. 12, 2014, at A1 (same).

For example, our study suggests that a substantial number of cases of interstate conflict center on questions of individual rights. Such cases warrant further inquiry, whether or not they involve interstate conflict. Here we see states attempting to influence federal constitutional law and policy in areas that are not directly related their institutional interests—i.e., the interests of states *qua* states. (A state that files a pro-choice brief in an abortion case, for example, may be defending its policy choices but is not defending its institutional prerogatives in any obvious way.) Beyond partisanship, we know remarkably little about what motivates AGs to weigh in on questions of abortion policy, equality, and the like.

Another possibility is to test the effects of salience. Studies of interest-group amicus activity suggest that the extent of publicity surrounding a case plays a significant role in the decision to participate as amicus: “The more the media covers the Court’s decision to hear a case, the greater the probability of a membership-based interest submitting an amicus brief in the case.”¹⁵² The idea is that groups that depend on membership for financial support will select for cases that are likely to be visible to members and prospective members, so that they can publicize their lobbying efforts effectively.¹⁵³ A similar theory might apply to AGs, particularly those who face reelection or anticipate running for higher office, and who depend on constituents for political support. Viewed from this perspective, the high-profile nature of many of the cases featuring interstate conflict is interesting. Do AGs experience greater pressure to toe the party line in such cases? Or does the causal arrow run in the other direction, with AGs using high-profile cases as opportunities to score political points with constituents?

Still another approach would be to examine more closely the coalitions of joining states. If, as we have found, the patterns are not always strongly partisan (particularly for Democratic AGs), what explains them? Are they regional?¹⁵⁴ Does the presence or absence of a state solicitor general make a difference?¹⁵⁵ Finally, future work

¹⁵² Thomas G. Hansford, *Information Provision, Organizational Constraints, and the Decision to Submit an Amicus Curiae Brief in a U.S. Supreme Court Case*, 57 POL. RES. Q. 219, 226 (2004).

¹⁵³ *Id.* at 222.

¹⁵⁴ Waltenburg & Swinford performed cluster analysis of the states’ certiorari and merits stage joining behavior from 1953–1989. They discovered some regional cohesion in two of the four clusters of states, but struggled to explain the other two. WALTENBURG & SWINFORD, *supra* note 26, at 72–74.

¹⁵⁵ See Goelzhauser & Vouvalis, *supra* note 25, at 822–23, 830–31 (discussing the growing number of state solicitors general and finding that the probability of the Court granting review in a state-filed case is higher for states with solicitors general).

might explore different aspects of partisanship, looking at the partisan composition of other state institutions in addition to that of the AG herself.

CONCLUSION

Our study of state amicus briefs indicates that partisanship supplies, at best, a partial explanation for why AGs participate in Supreme Court litigation as amici. News reports tend to focus on a relatively small set of controversial cases. And in many of those cases, AGs square off against each other in the familiar battle lines of partisan conflict. When the cases featuring interstate conflict are put in context, however—considered alongside the mass of other cases in which AGs participate as amici—it becomes clear that they represent only a small fraction of the total. In *most* cases, AGs' amicus briefs are not explicitly opposed by other state AGs. Until very recently, these unopposed coalitions of brief signers were generally bipartisan, with average partisanship similar to that of the population of state AGs then serving. The coalitions of unopposed amici have begun to take on more of a partisan hue in recent years, but most of the movement is due to Republican AGs writing briefs that other Republicans support and that Democratic AGs neither support nor oppose.

This reality is largely missing from anecdotal accounts of AG behavior. Yet it serves as an important reminder of how little we know about the various forces that spur state officials to action. Partisanship surely is part of the story, but we have only begun to understand how partisan ambitions might interact with other competing motivations.