

STATE AMICI, COLLECTIVE ACTION, AND THE DEVELOPMENT OF FEDERALISM DOCTRINE

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I. INTRODUCTION

The highest legal officer of a state is its attorney general. In the last two decades, state attorneys general (SAGs) have found it hard to stay out of the news. Acting on behalf of the citizens of their states, SAGs frequently have filed litigation or reached settlements concerning consumer protection, the sale and advertising of tobacco products, antitrust, securities regulation, environmental protection, and many other issues.¹ In recent years SAGs frequently have acted in a collective and coordinated manner.² In one high-profile example, twelve states successfully sued in federal court to require the Environmental Protection Agency (EPA) to take action against the emission of gases that can contribute to global warming.³ In another, twenty-six states raised constitutional challenges in federal court to the Patient Protection and Affordable Care Act passed by Congress in 2010.⁴

¹ For overviews of activity by SAGs, see Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 914–15 (2008) (discussing the role SAGs played in the development of new product regulations); Lynn Mather, Symposium, *The Politics of Litigation by State Attorneys General: Introduction to Mini-Symposium*, 25 LAW & POL'Y 425, 425 (2003) (discussing the variety of roles SAGs play); Joseph F. Zimmerman, *Interstate Cooperation: The Roles of the State Attorneys General*, 28 PUBLIUS: J. FEDERALISM 71, 78–82 (1998) (recognizing the varied legal activities performed by SAGs and the National Association of Attorneys General). For one recent example, see Andrew Martin, *All 50 States Start Inquiry Into Foreclosures*, N.Y. TIMES, Oct. 14, 2010, at B9 (describing joint investigation by all SAGs into flawed paperwork filed to support home foreclosures). Further information on SAG activities can be found at the Web sites of the National Association of Attorneys General (<http://www.naag.org>) and the National State Attorneys General Program at Columbia Law School (http://www.law.columbia.edu/center_program/ag).

² See Colin Provost, *The Politics of Consumer Protection: Explaining State Attorney General Participation in Multi-State Lawsuits*, 59 POL. RES. Q. 609, 609–10 (2006) (noting that SAGs recently have pooled their resources for multistate activity); Thomas A. Schmeling, *Stag Hunting with the State AG: Anti-Tobacco Litigation and the Emergence of Cooperation Among State Attorneys General*, 25 LAW & POL'Y 429, 430 (2003) (attributing rise of SAG significance to “a new and quite remarkable level of cooperation that has been achieved among the SAGs themselves”).

³ *Massachusetts v. EPA*, 549 U.S. 497, 505 n.2 (2007). Ten states intervened to argue against the relief sought by plaintiffs. *Id.* at 505 n.5.

⁴ *Florida ex rel. Bondi v. U.S. Dep't of Health and Human Servs.*, 780 F. Supp. 2d 1256, 1258 (N.D. Fla. 2011), *aff'd in part, rev'd in part*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted*, 123 S. Ct. 603, 604 (2011). Six of those states joined this action after the fall 2010 elections ushered in new SAGs. *Florida: Six More States Sue Over Health Care Law*, N.Y. TIMES, Jan. 19, 2011, at A13. The SAG in Virginia raised a similar challenge. *Virginia ex rel. Cuccinelli v.*

Another frequent if less-publicized activity of SAGs has been to file friend-of-the-court (i.e., *amicus curiae*) briefs in the Supreme Court in cases that raise federalism issues—that is, cases that impact the scope of federal law, broadly defined, as it affects the prerogatives of states. While SAGs have been filing such briefs for decades,⁵ SAGs seem to be filing such briefs in greater numbers and with more coordination in the past twenty years.⁶ Thirty to forty or more SAGs joining in one *amicus* brief has become commonplace.⁷ On occasion, up to forty-nine or fifty states join in a single *amicus* brief.⁸ And at least in some cases, Justices refer to

Sebelius, 728 F. Supp. 2d 768, 770 (E.D. Va. 2010), *rev'd*, 656 F.3d 253 (4th Cir. 2011).

⁵ See Thomas R. Morris, *States Before the U.S. Supreme Court: State Attorneys General as Amicus Curiae*, 70 JUDICATURE 298, 298–301 (1987) (examining the *amicus* briefs filed in the 1970s and 1980s); Sean Nicholson-Crotty, *State Merit Amicus Participation and Federalism Outcomes in the U.S. Supreme Court*, 37 PUBLIUS: J. FEDERALISM 599, 600 (2007) (discussing the influence of *amicus* participation by states between 1953 and 1986).

⁶ See PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING 73–74 tbl.3.6 (2008) (documenting an increase in *amicus* briefs filed by states from 1950 to 1995); ERIC N. WALTEBURG & BILL SWINFORD, LITIGATING FEDERALISM: THE STATES BEFORE THE U.S. SUPREME COURT 60–61 tbl.5.1 (1999) (noting the rise in SAG *amicus* brief filings during period of twenty-six Court Terms); Michael E. Solimine, *Formalism, Pragmatism, and the Conservative Critique of the Eleventh Amendment*, 101 MICH. L. REV. 1463, 1477–78 (2003) (noting increases in SAG *amicus* brief filings in the past decade). SAG *amicus* briefs have become so prominent that in some cases the parties lobby to have numerous SAGs file such briefs for their side. See Tony Mauro & Carrie Levine, *Raising Its Game: Video Game Industry Lobbies State AGs in High Court Case*, NAT'L L.J., Aug. 30, 2010, at 17 (describing one such effort). In *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011), eleven SAGs eventually filed a brief in support of a California law that would have prevented minors from buying violent video games. See Brief for Amici Curiae Louisiana et al. as Amici Curiae Supporting Petitioners, *Schwarzenegger v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (No. 08-1448), 2010 WL 2866116 (case name changed after briefs were filed). Nine SAGs supported the plaintiffs. See Brief for Rhode Island et al. as Amici Curiae Supporting Respondents, *Schwarzenegger v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (No. 08-1448), 2010 WL 3697192.

⁷ See, e.g., Brief for the States of Illinois et al. as Amici Curiae in Support of Petitioner, *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323 (2010) (No. 09-223), 2009 WL 5190481 (forty-four states); Brief for the State of Kansas et al. as Amici Curiae in Support of Petitioner, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-751), 2010 WL 2224733 (forty-eight states); Brief of Maine et al. as Amici Curiae Supporting Respondents, *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008) (No. 07-562), 2008 WL 2489866 (forty-five states); Brief of Amici Curiae Vermont et al. in Support of Respondent, *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (No. 06-1249), 2008 WL 3851613 (forty-seven states).

⁸ See Brief of the States of New York et al. as Amici Curiae in Support of the Petitioner, *Watters v. Wachovia Bank*, 550 U.S. 1 (2007) (No. 05-1342), 2006 WL 2570992 (forty-nine states); Brief for the States of North Carolina et al. as Amici Curiae in Support of Petitioners, *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009) (No. 08-453), 2009 WL

the briefs in their opinions and appear to give them some jurisprudential weight. For example, in *McDonald v. City of Chicago*,⁹ where the Court held that the Second Amendment's individual right to bear arms was applicable to the states,¹⁰ Justice Alito's majority opinion twice observed that thirty-eight states had filed an amicus brief supporting the incorporation of the right against the states.¹¹

An impressive number of social science studies now document the filing of amicus briefs by SAGs and address their presumed effect on the Court's decisionmaking.¹² What has been little addressed in the scholarly literature, however, is the normative issue of what jurisprudential weight, if any, the Court *should* give to such briefs. The issue is not particularly striking when SAGs, even a large number of them, take a predictable position in an amicus brief—that is, a position in favor of state prerogatives. Many other interest groups file amicus briefs in the Court in favor of the policy positions advanced by their own groups. In contrast, the issue is particularly acute and sharpened when SAGs file amicus briefs that seemingly *oppose* the pro-state position.

Consider again the *McDonald* case. As noted, the majority seemed to factor that thirty-eight states had filed an amicus brief in support of incorporation of a federal right against their

583791 (forty-nine states); Brief for the States of North Carolina et al. as Amici Curiae in Support of Petitioners, Dep't of Revenue of Ky. v. Davis, 553 U.S. 328 (2008) (No. 06-666), 2007 WL 2115445 (forty-nine states); Brief of Texas et al. as Amici Curiae in Support of Petitioners, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (No. 02-1624), 2003 WL 23011472 (fifty states).

⁹ 130 S. Ct. 3020 (2010).

¹⁰ *Id.* at 3026. The Court in *McDonald* extended the holding in *Heller v. District of Columbia*, 554 U.S. 570 (2008), that the Second Amendment established an individual right to bear arms as a matter of federal law. *Id.* at 596. In *Heller*, thirty-one states filed an amicus brief in support of the plaintiff; indeed, that brief gratuitously argued that an individual right also ought to be applied to the states, seemingly anticipating the *McDonald* litigation. Ilya Shapiro, *Friends of the Second Amendment: A Walk Through the Amicus Briefs in D.C. v. Heller*, 20 J. FIREARMS & PUB. POL'Y 15, 39 (2008).

¹¹ 130 S. Ct. at 3046–47. Three states—Illinois, Maryland, and New Jersey—filed a separate amicus brief arguing against incorporation. Brief for the States of Illinois et al. as Amici Curiae in Support of Respondents, *McDonald*, 130 S. Ct. 3020 (No. 08-1521), 2010 WL 59029 [hereinafter Illinois Amicus Brief]. The majority opinion did not mention the latter brief.

¹² See *infra* Part II.

regulatory autonomy.¹³ In contrast, Justice Stevens in dissent—his last opinion before retiring—was less impressed. He acknowledged the brief and its large number of signatories.¹⁴ Unlike the majority, however, he said the brief was not evidence of a “popular consensus” among the states in favor of incorporation and did not accord the brief weight in his decision.¹⁵ He found it “puzzling that so many state lawmakers have asked us to limit their *option* to regulate a dangerous item.”¹⁶ Justices in other cases similarly have debated the significance, or lack thereof, of large numbers of state amici arguing *against* the logical position of a state with regard to federal power.¹⁷

This Article addresses whether the Court should give special weight, as Justice Alito did in *McDonald*, to a counterintuitive position expressed by a large fraction of the states in their amicus

¹³ *McDonald*, 130 S. Ct. at 3046–47.

¹⁴ *Id.* at 3115 n.47 (Stevens, J., dissenting).

¹⁵ *Id.*

¹⁶ *Id.* It is perhaps noteworthy that Justice Stevens used the word “lawmakers” to refer to SAGs because usually they are regarded as the enforcers of law, not the generators of law. For further discussion of the roles of SAGs vis-à-vis the other branches of state government, see *infra* Part III.C. In apparent contrast to his skeptical view of the weight to be given the SAG briefs in *McDonald*, Justice Stevens noted with approval in his dissent in another contemporary case that twenty-six states filed an amicus brief in support of an earlier decision that the majority overruled. *Citizens United v. FEC*, 130 S. Ct. 876, 941 n.26 (2010) (Stevens, J., dissenting). The apparent inconsistency in the positions advanced by Justice Stevens in these cases might instead be viewed as a distinction between the facts at issue: the earlier case overruled in *Citizens United* had upheld a *state* statute that limited the ability of corporations to make campaign contributions (a law the SAGs logically supported). See *id.* at 940 (Stevens, J., dissenting). In contrast, in *McDonald* the thirty-eight SAGs were arguing for a result that *limited* the ability of states (and political subdivisions thereof) to regulate activity, which befuddled Stevens.

¹⁷ See, e.g., *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 350 (2008) (arguing that a Dormant Commerce Clause challenge to Kentucky’s tax on bonds from other states was weakened by the support for Kentucky in an amicus brief signed by forty-nine states); *id.* at 373 (Kennedy, J., dissenting) (arguing that amicus brief was “irrelevant” and suggesting states always want to support their own protectionist laws); *United States v. Morrison*, 529 U.S. 598, 654 (2000) (Souter, J., dissenting) (finding ironic that the majority struck down a federal statute on federalism grounds when thirty-six SAGs filed an amicus brief in support of the law, though acknowledging that one state filed a brief supporting the majority’s position). The practice of the Court in federalism cases referring to state amicus briefs that support the federal position is not new. See, e.g., *Willcuts v. Bunn*, 282 U.S. 216, 233–34 (1931) (“[I]t is not without significance that in the present instance the States of New York and Massachusetts do appear here as amici curiae in defense of the [federal] tax [on income on the sale of county and city bonds].” (footnote omitted)).

brief and examines the concerns with doing so that Justice Stevens expressed in his *McDonald* dissent. The Article is primarily normative. Legal scholars and political scientists already have documented the rise of amicus filings in general, and that of states and SAGs in particular.¹⁸ While this Article will draw on that descriptive literature, its primary purpose is evaluative: What weight *should* the Justices (or any judge¹⁹) give to the fact that states, particularly a large number of states, have filed amicus briefs? In addressing this question the focus will be on federalism cases because that is the subject area in which one would expect states' arguments to be of special importance; these also are the cases in which states in their briefs may take what is arguably a position *against* their presumed interests. Relatively little of the otherwise abundant literature on federalism has directly addressed this issue.²⁰

The Article proceeds as follows. Part II places the discussion in context by summarizing the political and institutional role of SAGs in most states, their recent activism, and the support for and criticism of that activism. That Part next addresses the filing of amicus curiae briefs in the Supreme Court in general and the increased filing of such briefs by SAGs in particular. It emphasizes those instances, with *McDonald* being but one example, where state amici have taken a position against the apparent interest of states in a federal scheme.

¹⁸ See *supra* note 6; see also *infra* Part II.

¹⁹ States, of course, also can file amicus briefs in lower court litigation. See, e.g., Paul M. Collins, Jr. & Wendy L. Martinek, *Who Participates as Amici Curiae in the U.S. Courts of Appeals?*, 94 JUDICATURE 128, 128 (2010) (recognizing that there is more amicus participation in the federal courts of appeals than in the Supreme Court). In one recent high-profile example, eleven states filed an amicus brief in the Ninth Circuit Court of Appeals in favor of S.B. 1070, Arizona's controversial immigration law. See Brief of Amici Curiae States of Michigan et al. in Support of Defendants–Appellants, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645), 2010 WL 5162508. The Supreme Court has since granted certiorari in the case. *Arizona v. United States*, 2011 WL 3556224, at *1 (U.S. 2011). For convenience this Article will focus on the Supreme Court and how its Justices evaluate state amicus briefs, recognizing that many of the same issues apply to judges on lower federal courts and state courts who evaluate such briefs.

²⁰ For an exception, see JAY E. AUSTIN ET AL., REDEFINING FEDERALISM: LISTENING TO THE STATES IN SHAPING “OUR FEDERALISM” 5–6, 61–63 (Douglas T. Kendall ed., 2004), which discusses SAG amicus briefs filed in federalism cases in the Supreme Court and what weight they should be given.

Part III of the Article presents and evaluates arguments in favor of and against the Court giving jurisprudential weight to such briefs in federalism cases. That Part begins by addressing the issue of whether *any* weight should be given to such briefs. A highly formalistic view would give no, or at most very little, weight to them. However, most federalism cases are decided, in some manner, on functionalist grounds, and the Justices appear to be willing under this approach to give jurisprudential significance to state amicus briefs in some instances. Part III concludes by addressing arguments in favor of and against judges giving weight to such briefs under either approach.

Given the conflicting arguments, Part IV presents a taxonomy of examples of when the Justices should give significant jurisprudential weight to SAG briefs, especially in federalism cases where the state amici take a seemingly anti-state position. Part V concludes the Article.

II. STATE AMICUS CURIAE FILINGS IN FEDERALISM CASES IN THE SUPREME COURT

As noted in Part I, many SAGs have been particularly active in recent decades on a variety of regulatory fronts through threats of litigation against institutional defendants or by actually filing such suits.²¹ The increased activity has been attributed to a variety of causes, including the filling of a perceived regulatory gap left by lessened regulation by the federal government, the growth of powers and personnel in the SAG offices of many states, and the asserted passivity of other branches of state government.²² This increased activity has not gone uncriticized. Some scholars have argued that the increased activity is less due to appropriately filling a regulatory gap left by federal passivity than to SAGs seeking to maintain or further their political careers by currying favor with voters, interest groups, and campaign contributors.²³

²¹ See, e.g., Paul Teske, *State Regulation: Captured Victorian-Era Anachronism or "Re-enforcing" Autonomous Structure?*, 1 PERSP. ON POL. 291, 296 (2003) ("SAGs have moved into the forefront of social-regulatory activism, ahead of state legislatures, . . . by taking on cases against big national corporations . . .").

²² In addition to the sources cited *supra* in note 1, see Teske, *supra* note 21, at 295–96.

²³ See, e.g., Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698,

Critics also argue that the often-coordinated interstate activity of SAGs creates regulatory spillovers that can affect the entire nation, not merely the interested states.²⁴

The filing of amicus briefs in the Supreme Court by SAGs, however, has largely escaped these criticisms even though the increased filing of such briefs, particularly in a coordinated way, seems to be a first cousin to SAGs coordinating litigation strategies and, thus, should be subject to some of the same criticisms.²⁵ But filing amicus briefs has much less immediate impact than filing lawsuits in general; a court has the options of accepting, rejecting, or ignoring the arguments or positions advanced by such amici. Therefore, both supporters and critics of the increased activism of SAGs usually have treated the filing of amicus briefs by SAGs as a related activity to coordinated litigation but, ultimately, a relatively minor one.

At any rate, the increased filing of SAG amicus briefs in the Supreme Court is not particularly notable because many interest groups have been doing the same thing for several decades.²⁶ Amicus briefs themselves, at any court level and from any party, are largely creatures of the twentieth century. The Supreme Court promulgated rules in 1939 that permitted, with two exceptions, the filing of amicus briefs only with the permission of a party or of the Court.²⁷ The exceptions are for briefs filed by the

722–23 (2011) (“[A]ll elected attorneys general have incentives to take action that will respond to the interests of their constituents.”).

²⁴ See, e.g., Michael S. Greve, *Cartel Federalism? Antitrust Enforcement by State Attorneys General*, 72 U. CHI. L. REV. 99, 113–16 (2005) (demonstrating how SAGs in the antitrust context consistently surrender sovereignty to create a “cartel federalism”). For a good overview of these criticisms, see Timothy Meyer, Comment, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CALIF. L. REV. 885, 910–14 (2007).

²⁵ E.g., Greve, *supra* note 24, at 108–13 (critiquing content of SAG amicus briefs filed in antitrust cases). Cf. Meyer, *supra* note 24, at 904–05 (discussing but not criticizing the coordinated filing of amicus briefs by SAGs).

²⁶ See COLLINS, *supra* note 6, at 56–63 (studying interest groups’ amicus briefs in the Supreme Court from 1950 to 1995); Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1184 (2011) (pointing out that amicus participation by “[s]tates in the Supreme Court grew exponentially beginning in the 1970s, both at the merits and certiorari stages” (footnote omitted)).

²⁷ Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 761–62 (2000).

U.S. Solicitor General or by any state through its SAG.²⁸ It has been well documented that in recent decades more interest groups are filing amicus briefs in the Court; indeed, in recent Court Terms, the vast majority of cases decided on the merits are accompanied by one or more amicus briefs.²⁹ Likewise, simply by virtue of the references to such briefs in Court opinions, it appears that the Justices increasingly are taking note of them.³⁰ The larger number of filed amicus briefs has been variously traced to: the Court almost always granting requests to file such briefs; more lawyers and interest groups following Court decisions; the perceived importance of Court decisions; interest groups wishing to both counter amicus briefs filed by *other* groups and to justify their existences to their memberships; and the perception that such briefs have an effect on the Court's decisions.³¹

No doubt for similar reasons, SAGs also have long been filing amicus briefs in the Court. Such participation has been facilitated by the National Association of Attorneys General (NAAG), founded in 1907, and its Supreme Court Project, established in 1982.³² Since that time, SAGs increasingly have filed amicus briefs in the Court at both the certiorari and merits stages.³³ Moreover, SAGs also have increasingly coordinated such filings by joining in one

²⁸ EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 734–35 (9th ed. 2007); Kearney & Merrill, *supra* note 27, at 761–62. The current provision regarding SAGs' briefs is SUP. CT. R. 37.4.

²⁹ GRESSMAN ET AL., *supra* note 28, at 740–41; Kearney & Merrill, *supra* note 27, at 751–56; Ryan J. Owens & Lee Epstein, *Amici Curiae During the Rehnquist Years*, 89 JUDICATURE 127, 128–29 (2005).

³⁰ See, e.g., Kearney & Merrill, *supra* note 27, at 757–61 (determining that about 28% of all Court decisions in which one or more amicus briefs were filed contained a reference to the briefs); see also Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1353–55 (2010) (discussing increased filing of amicus briefs in the Supreme Court by the U.S. Solicitor General).

³¹ See COLLINS, *supra* note 6, at 41–47 (giving overview of and advancing reasons for increased filing of amicus briefs); Paul M. Collins, Jr. & Lisa A. Solowiej, *Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court*, 32 LAW & SOC. INQUIRY 955, 978–79 (2007) (discussing motivations of competing interest groups that file amicus briefs); Kearney & Merrill, *supra* note 27, at 762–65 (discussing various reasons for increased amicus filings).

³² See Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 542–48 (1994) (describing how NAAG established the Supreme Court Project to coordinate and professionalize litigation before the Court).

³³ WALTENBURG & SWINFORD, *supra* note 6, at 47.

brief because it is cheaper and is believed to carry greater weight with the Court.³⁴ Not surprisingly, SAGs historically have been particularly interested in filing amicus briefs in cases that raise federalism issues, concerning the scope of state power and prerogatives in a federal system, vis-à-vis federal law or other states.³⁵

Legal scholars and political scientists have documented SAGs' increased amicus filings in the Court and the apparent success of many of those efforts. As late as the 1960s, in most Terms one or more SAGs filed an amicus brief in only a dozen or fewer cases.³⁶ That began to change in the 1970s, and such briefs have since been filed in greater numbers—in up to fifty or more cases each Term.³⁷ Scholars also have found that the filing of SAGs amicus briefs corresponds with higher rates of success on the merits for the party supported by those briefs in general cases³⁸ and in federalism cases in particular.³⁹ Studies of specific types of federalism cases have reached similar results. For example, one study found that state amicus briefs often were filed in favor of Dormant Commerce Clause challenges to the statute of another state and that the Court was more likely to strike down those statutes when state amici opposed them as compared with private parties.⁴⁰ The study attributed that

³⁴ *Id.* at 70–75.

³⁵ At a high level of generality, virtually any merits-based Court decision will have some federalism implications. SAGs typically will weigh the perceived import of a pending case for its federalism implications before filing an amicus brief. *Id.* at 52–54. For purposes of this Article, defining precisely the concept of “federalism cases” is unnecessary. Typically, these cases involve, among other things: the scope of Congress’s constitutional power to statutorily limit private conduct in states or regulatory efforts by states themselves; federal constitutional limitations on state authority; the scope of state immunities in federal court litigation (e.g., the Eleventh Amendment); and the preemption of state law by federal statutes or by the Dormant Commerce Clause. See Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 431 (2002) (providing a similar list of federalism cases).

³⁶ See COLLINS, *supra* note 6, at 73 tbl.3.6 (providing state amicus filings from 1950, 1968, 1982 and 1995 Court Terms); WALTENBURG & SWINFORD, *supra* note 6, at 62–69 (providing similar data from 1953 through 1989 Court Terms).

³⁷ See *id.*

³⁸ Kearney & Merrill, *supra* note 27, at 809–11 (showing a study of cases from 1946 through 1995 Court Terms).

³⁹ Nicholson-Crotty, *supra* note 5, at 600 (introducing a study of cases from 1953 to 1986 Court terms).

⁴⁰ Christopher R. Drahozal, *Preserving the American Common Market: State and Local*

success, in part, to the Court treating such amici as “fire alarms” highlighting particularly egregious or burdensome state regulations of interstate commerce.⁴¹ Another study examined Supreme Court federalism cases from 1986 through 2003 where state laws were challenged on the basis of preemption by federal statutes, finding that state amicus briefs almost always were filed in favor of the anti-preemption position and that those filings were associated (though not in a statistically significant way) with the prevailing side.⁴² It, too, attributed that association to the signaling function such briefs serve for the Justices.⁴³

Whether and to what extent any amicus curiae brief has or should have an effect on the decisionmaking of the Justices are issues not limited to briefs filed by SAGs. As suggested above, these questions have been explored elsewhere,⁴⁴ and their implications for SAG briefs is not particularly unique. What is unique are 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 their decision. The first of these actions takes place relatively rarely but perhaps more often than might be thought.⁴⁵ In several of these instances, Justices expressly have relied on, or taken issue with, the position taken by the state amici.⁴⁶

Governments in the United States Supreme Court, 7 SUP. CT. ECON. REV. 233, 257–60 (1999) (conducting a study of Dormant Commerce Clause cases decided from 1970 to 1997).

⁴¹ *Id.* at 245–53.

⁴² Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 69–72 (2006).

⁴³ *Id.* at 64–66.

⁴⁴ See, e.g., Kearney & Merrill, *supra* note 27, at 761–62 (exploring the U.S. Solicitor General’s influence as an amicus filer).

⁴⁵ See Drahozal, *supra* note 40, at 266–69 (discussing instances when state amici opposed state statute on Dormant Commerce Clause grounds); Greve & Klick, *supra* note 42, at 69 n.58 (noting that in 105 federal preemption cases studied, all state amici favored preemption in only one case, and in only four cases, state amici appeared on both sides). The explicit reliance by the Court in its opinions on such briefs stands in contrast to those more common instances when large numbers of SAGs file an amicus brief in support of the pro-state position and the Court makes no mention of them. See *supra* notes 7–8 and accompanying text.

⁴⁶ See *supra* notes 9–17 and accompanying text. Of course, judicial citation of SAG amicus briefs is an imperfect measure of their influence. The Justices may be influenced by such briefs and not cite them in opinions, and citation of the briefs does not necessarily

One such example is the aforementioned *McDonald* litigation.⁴⁷ Other recent cases are illustrative, as well. Consider *Rapanos v. United States*,⁴⁸ decided in 2006. There, the Court held that certain wetlands were not subject to regulation under the Clean Water Act (CWA) because they were not “navigable waters,” the operative term in the CWA.⁴⁹ Two SAGs filed an amicus arguing in favor of a restrictive interpretation like the one the Court ultimately gave, while thirty-three SAGs joined in one brief supporting a more expansive interpretation of the CWA covering the wetlands in question.⁵⁰ The latter SAGs argued that federal intervention helped their own regulatory authority by, among other things, protecting downstream states from out-of-state pollution.⁵¹ The plurality opinion by Justice Scalia was unimpressed by this position. Among the reasons advanced by the plurality in rejecting these SAGs was that it was unlikely an expansive interpretation was intended by Congress when the CWA statutorily calls for preserving “the primary rights and responsibilities of the States” and the interpretation sought by these SAGs would bring “virtually all” land and water resources “under federal control.”⁵² That being so, Justice Scalia continued, the fact thirty-three states wished “to unburden themselves” of their rights and responsibilities as stated in the statute was irrelevant.⁵³ In Justice Scalia’s view, although state officials may find it “attractive to shift to another entity controversial decisions disputed between politically powerful, rival interests,” the CWA did not provide for such shifting.⁵⁴ In contrast, Justices Kennedy

mean that they were particularly influential. Paul Chen, *The Informational Role of Amici Curiae Briefs in Gonzalez v. Raich*, 31 S. ILL. U. L.J. 217, 225 (2007). Nonetheless, citation is an objective measure of influence, together with any comments a Justice might make about such briefs; thus, it is critical to this Article’s analysis.

⁴⁷ See *supra* notes 9–16 and accompanying text.

⁴⁸ 547 U.S. 715 (2006).

⁴⁹ *Id.* at 732–34.

⁵⁰ *Id.* at 718–20 n.† (listing amicus briefs).

⁵¹ Brief of the States of New York et al. as Amici Curiae in Support of Respondents, *Rapanos*, 547 U.S. 715 (No. 04-1034), 2006 WL 139208, at *1–3. For further discussion of the amicus and other briefs in *Rapanos*, see WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 293–94 (2010).

⁵² *Rapanos*, 547 U.S. at 737 (quoting 33 U.S.C. § 1251(b)).

⁵³ *Id.* at 737 n.8 (plurality opinion).

⁵⁴ *Id.*

and Stevens in separate opinions gave weight to the counter-intuitive endorsement of these SAGs.⁵⁵ Interestingly, no opinion mentioned the two SAGs who supported a restrictive interpretation.

Consider also the recent case of *United States v. Comstock*.⁵⁶ There, the Court held that Congress properly exercised its authority under the Necessary and Proper Clause when it passed a statute that authorized the Department of Justice (DOJ) to detain certain dangerous federal prisoners beyond the date that the prisoner otherwise would be released.⁵⁷ A statutory predicate was that the DOJ must consult the states where the prisoner would otherwise be treated post-release.⁵⁸ In passing on the constitutionality of the measure, the majority held that the statute did not invade any state sovereignty interests.⁵⁹ Though not mentioned by the majority, twenty-nine states filed an amicus brief arguing in favor of the constitutionality of the law.⁶⁰ No states filed a brief in opposition to the law. Justice Thomas, however, discussed the amicus brief in a dissent joined by Justice Scalia. As he noted, the SAGs' brief supported the law in part because detaining such individuals is expensive and states "would rather the Federal Government bear this expense."⁶¹ Justice Thomas, unpersuaded by these arguments, contended that "Congress'[s] power is fixed by the Constitution [and] does not expand merely to suit the States' policy preferences, or to allow State officials to avoid difficult choices regarding the allocation of state funds."⁶² "The Constitution," he continued, "gives States no more power to decline this responsibility than it gives them to infringe upon those liberties in the first instance."⁶³

A final example illustrates the difficulties associated with characterizing the position advanced by SAGs as amici in some

⁵⁵ *Id.* at 777 (Kennedy, J., concurring); *id.* at 799 (Stevens, J., dissenting).

⁵⁶ 130 S. Ct. 1949 (2010).

⁵⁷ *Id.* at 1954–56.

⁵⁸ *Id.* at 1954–55.

⁵⁹ *Id.* at 1962–63.

⁶⁰ Brief for the States of Kansas et al. as Amici Curiae in Support of Petitioner, *Comstock*, 130 S. Ct. 1949 (No. 08-1224), 2009 WL 2896311.

⁶¹ *Comstock*, 130 S. Ct. at 1982 (Thomas, J., dissenting).

⁶² *Id.*

⁶³ *Id.*

cases. In *Department of Revenue of Kentucky v. Davis*,⁶⁴ the Court rejected a challenge under the Dormant Commerce Clause to a Kentucky income tax law that taxed the interest from bonds issued by cities and other political subdivisions from other states while exempting interest from bonds issued by Kentucky cities and political subdivisions.⁶⁵ SAGs from forty-nine states filed an amicus brief in favor of the legality of the Kentucky law.⁶⁶ The Court voted 6-to-3 to reject the challenge.⁶⁷ Writing for the majority, Justice Souter twice mentioned that all of Kentucky's sister states had signed on to a supportive amicus brief.⁶⁸ He gave significance to the brief and its number of signatories, arguing that it was "striking" that most of the alleged harms of the law flow to the other states and their citizens, yet all of them "have lined up with Kentucky in this case."⁶⁹ In contrast, Justice Kennedy dismissed the significance of the brief, writing in dissent that the brief was "irrelevant" because "[p]rotectionist interests always want the laws they pass, even if their fellow citizens bear the burden."⁷⁰

Should the position of the SAGs' amicus brief in *Davis* have been considered as supporting or opposing the states' rights position? In most federalism cases it will be relatively straightforward to identify the position in favor of a state and against the interest of the federal government or federal law, but Dormant Commerce Clause cases like *Davis* are one illustration that the exercise may not be so straightforward in some cases. On one hand, it might seem as though the pro-state position in such cases is just that, and the SAGs in *Davis* were taking that position by supporting the validity of a law from a sister state, which resembled their own. Federalism principles, it might be argued, should leave states free to regulate as they see fit, free from

⁶⁴ 553 U.S. 328 (2008).

⁶⁵ *Id.* at 331–33, 341.

⁶⁶ Brief for the States of North Carolina et al. as Amici Curiae in Support of Petitioners, *Davis*, 553 U.S. 328 (No. 06-666), 2007 WL 2115445. Forty-one states had a law like Kentucky's. *Davis*, 553 U.S. at 335.

⁶⁷ *Davis*, 553 U.S. at 330.

⁶⁸ *Id.* at 350, 354.

⁶⁹ *Id.* at 354.

⁷⁰ *Id.* at 373 (Kennedy, J., dissenting).

Dormant Commerce Clause constraints.⁷¹ All things being equal, though, the better view is that the pro-state position in these cases is one *attacking* the law of a sister state that allegedly violates the Dormant Commerce Clause (i.e., the law of that particular state discriminates against or improperly burdens interstate commerce).⁷² The victims of such a law are other states and their citizens. In these circumstances, an amicus brief by SAGs from other states that supports such a challenged law of a sister state, as in *Davis*, is best viewed as one that does not take a pro-state position.⁷³

Nonetheless, this exercise demonstrates the complexities of conceptualizing “state interests” and determining whether SAGs—individually or collectively—are acting in accord or against such interests in their amicus briefs in these federalism cases. Each state, presumably, desires to maximize its own regulatory power, with or without the cooperation of other states. That notion does not map directly on facile generalizations about SAGs supporting or undermining “state interests,” however, because it begs questions about *which* state or states are being undermined or supported. The balance of this Article unpacks the notion of state interests and the impact of SAGs’ actions individually and collectively in the context of amicus brief filings.

III. EVALUATING THE PROPRIETY OF JUDICIAL RELIANCE ON STATE AMICI IN FEDERALISM CASES

Having outlined how SAGs file amicus briefs in federalism cases, how on occasion such briefs take a position against the

⁷¹ See AUSTIN ET AL., *supra* note 20, at 62 (“The Court is plainly creating problems for the states under the [D]ormant Commerce Clause, not solving them.”); Fallon, *supra* note 35, at 461 (“Perhaps more important, [D]ormant Commerce Clause doctrine directly impedes efforts by state and local governments to promote distinctively local ends.”).

⁷² See *Davis*, 553 U.S. at 337–40 (giving overview of Dormant Commerce Clause doctrine).

⁷³ See, e.g., Drahozal, *supra* note 40, at 245–46 (“That states challenge the statutes of other states is itself strong evidence that the challenged statute has an impermissible out-of-state effect.”); see also Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 166–68 (2010) (arguing that Dormant Commerce Clause power is an appropriate response to collective action problems caused by states imposing costs on other states).

presumed interest of the states as a whole, and how the Supreme Court expressly relies on such briefs in some cases, this Article now turns toward the normative issue of whether the Justices *should* give these particular briefs any special weight when deciding these cases. In doing so, this Part examines the formalist rationale against reliance on SAG amicus briefs and functional arguments on both sides of the issue.

A. THE FORMALIST POSITION AGAINST RELYING ON STATE ATTORNEY GENERAL AMICUS BRIEFS

At the outset, one might argue that the Court should not take into account, much less cite as authority, *any* amicus brief filed by SAGs (or anyone else) in federalism cases. The legal and policy arguments often found in amicus briefs can be advanced by the parties in their own briefs. Practical experience, some suggest, additionally shows that many or most of such briefs are filed by ideological allies of one or another party and often make arguments that are best suited for op-ed pages or the policymaking organs of other branches of government.⁷⁴ This “lobbying” of the Court, Professor Philip Kurland argued decades ago, is “unseemly” and should be banned.⁷⁵

There is a whiff of such a position in some of the cases mentioned earlier. Recall Justice Thomas’s dissent in *Comstock*.⁷⁶ There, he seemed to suggest that it did not matter that a majority of the states filed a brief in favor of a federal law that arguably invaded state prerogatives beyond the scope of Congress’s Article I powers.⁷⁷ From this view, therefore, it likely should not matter whether none, one, two, a majority, or all fifty states file an amicus

⁷⁴ See Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 326–33 (2008) (summarizing these arguments); Kearney & Merrill, *supra* note 27, at 745–46 (same).

⁷⁵ Philip B. Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 632 (1974). When amicus curiae briefs were first filed in American courts in the nineteenth century, they were ostensibly filed by friends of the court, not of the parties, and provided putatively objective arguments and information to aid the judge that the parties could or would not. Over time, though, many amicus briefs took on a more advocacy role. Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 706 (1963).

⁷⁶ See *supra* notes 61–63 and accompanying text.

⁷⁷ See *supra* notes 56–63 and accompanying text.

brief in favor of or against state interests in a federalism case. The relevant constitutional or statutory issues are solely for the Court to decide.⁷⁸

Despite such views, it is extremely unlikely that the Court would seriously consider banning the filing of amicus briefs in federalism (or any other) cases, nor should it. The Court has been relying expressly on amicus briefs in its cases for decades, though that alone is an inadequate basis for ascertaining whether it *should* continue to do so. More importantly, the Court implicitly deals with the strengths and weaknesses of such briefs on a case-by-case basis. If an amicus brief is not particularly helpful or merely parrots the positions of a party, it should not be cited as authority and is presumably ignored or given little weight. Nor is there anything peculiar about federalism cases that should change this approach.

In contrast, if some or all federalism cases were decided on a highly formalistic basis, there might be some merit in arguing that *any* positions advanced by SAG amicus briefs in such cases are simply irrelevant. When majorities on the Rehnquist Court in the 1990s began to strike down federal laws on various federalism grounds, some critics charged that those decisions were excessively formalistic.⁷⁹ Some years ago Professor Allison Eid persuasively

⁷⁸ For another example, albeit not one where a majority of SAGs advanced a pro-federal position, see *Gonzalez v. Raich*, 545 U.S. 1 (2005). That case was a challenge to congressional power under the Commerce Clause to regulate the medicinal use of marijuana in one state—California—where such use was otherwise lawful. Eight other states permitted such use. *Id.* at 5. Six SAGs, including California’s, filed amicus briefs in support of the challenge. Brief of the States of Alabama et al. as Amici Curiae in Support of Respondents, *Gonzales*, 45 U.S. 1 (No. 03-1454), 2004 WL 2336486; Amicus Curiae Brief for the States of California et al. in Support of Angel McClary Raich et al., *Gonzales*, 45 U.S. 1 (No. 03-1454), 2004 WL 2336549. In the course of rejecting the challenge, the majority argued (like Justice Thomas in *Comstock*) that “state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause.” *Id.* at 29 (citing *United States v. Morrison*, 529 U.S. 598, 661–62 (2000) (Souter, J., dissenting) (relying in part on the amicus brief of thirty-six SAGs in favor of the federal statute there challenged)). The point apparently being made by the majority in *Gonzalez*, then, is that a position advanced by SAGs as amicus is of no or little relevance in federalism cases. The SAG amicus briefs in *Gonzalez* are not explicitly discussed by any of the opinions in the case.

⁷⁹ For an overview of those decisions and their critics, see Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191, 1195–1208 (2003) (discussing scholarly criticism of, among other cases, *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); and *United*

argued that this criticism was overstated, however, and that the federalism decisions of the Rehnquist Court are best understood as a blend of formalism and functionalism.⁸⁰ In other words, properly understood, both the majority opinions and dissents in such cases often drew on formal (e.g., constitutional text and historical materials) and functional (e.g., the pragmatic values that federalism intends to serve) principles.⁸¹ In this Article's view, Eid's analysis applies just as well to more-recent federalism decisions.⁸²

To be sure, the line between the two models is indistinct and some opinions skew more toward one than the other. So, too, some individual Justices seem to use one methodology over the other in federalism cases, with Justice Thomas's preference for formalism being the most pronounced.⁸³ On that point, consider again Justice Thomas's dissenting opinion in *Comstock*. Relying on mainly formalistic elements, he dismisses the relevance of the SAGs' brief altogether.⁸⁴ In contrast, the majority opinion by Justice Breyer, while not mentioning the brief, has substantial elements of both formalism and functionalism, drawing on Necessary and Proper Clause jurisprudence,⁸⁵ an extended

States v. Morrison, 529 U.S. 598 (2000)).

⁸⁰ *Id.* at 1192.

⁸¹ *Id.* at 1192–93.

⁸² See, e.g., *Gonzalez*, 545 U.S. at 5–33 (relying not only on a formal analysis based on a close reading and application of Commerce Clause precedents, but also on various primary and secondary sources that illuminated the practical operation of the medical marijuana market). Granted, there was little discussion in *Gonzalez* of federalism values, which perhaps makes the majority opinion *more* formalistic than functional. This is not to suggest that a functional approach to interpreting congressional power under the Commerce Clause requires explicit, open-ended balancing of such values. The majority in *Gonzalez*, for example, seemed little interested in the state regulatory scheme at issue or how that state policy might be balanced against federal interests. Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzalez v. Raich*, 2005 SUP. CT. REV. 1, 33–36. If a more functional approach were used, to take a closer look at the presence or absence of state regulation and the interests at stake, SAG amicus briefs might be more relevant.

⁸³ See, e.g., *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 361–62 (2008) (Thomas, J., concurring) (noting that the Dormant Commerce Clause has no basis in the text of the Constitution); *Gonzalez*, 545 U.S. at 58–74 (Thomas, J., dissenting) (reasoning that the text and original public meaning of the Commerce Clause does not permit the federal government to regulate intrastate marijuana usage).

⁸⁴ See *supra* notes 61–63 and accompanying text.

⁸⁵ *United States v. Comstock*, 130 S. Ct. 1949, 1956–58 (2010).

discussion of the history and purpose of twentieth-century federal statutory development,⁸⁶ and arguments that the federal statute by its terms and in practical application does not improperly invade state prerogatives.⁸⁷

In short, it seems likely that most, though not all, of the Justices follow a non-purely formalistic federalism jurisprudence compatible with giving weight to the sheer fact that SAGs have filed amicus briefs and with engaging the arguments advanced therein. At the very least, the case law displays a range of views on these issues, and a majority of Justices reject the purely formalistic view that such briefs should be given absolutely no weight. The following sections will address whether giving such weight is appropriate from a functional standpoint, especially in those instances where SAGs file amicus briefs arguing against state interests in federalism cases.

B. FUNCTIONAL ARGUMENTS IN FAVOR OF RELYING ON STATE ATTORNEY GENERAL AMICUS BRIEFS

1. *Political Safeguards of Federalism.* The most straightforward argument for giving significant weight to SAG amicus briefs arguing against the state interest, as the Court did in *McDonald* and *Davis*,⁸⁸ is a variation of the theory of the political safeguards of federalism. As Professors John McGinnis and Ilya Somin have remarked, “[e]ach generation produces its own version” of this theory.⁸⁹ The theory had its genesis in the work of Professor Herbert Wechsler with significant later contributions by Professors Jesse Choper and Larry Kramer, among others.⁹⁰ A full exposition

⁸⁶ *Id.* at 1958–60.

⁸⁷ *Id.* at 1962–65.

⁸⁸ See *supra* notes 9–17 and accompanying text.

⁸⁹ John O. McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 92 n.7 (2004).

⁹⁰ JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (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). For other scholarly support for the theory see, for example, Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1293 (2009) (arguing that judicial enforcement of federalism provides incentives for states not to participate in the legislative process), and see generally Bradford R. Clark, *Separation of*

of the theory and the similarities and differences among the versions advanced by its advocates is unnecessary here. Suffice it to say that, in all of its variants, it is essentially a political process—an oriented theory purporting to affect the process of judicial review in federalism cases. The argument is that the states and state interests are already represented in the federal Executive and Legislative Branches. The people in each state, directly and through the electoral college, elect members of these Branches to serve their interests. The structure and practical operation of Congress and the importance of political parties having ties to states further serve to protect state interests. Given these presumptions, the theory posits that federal courts should not enforce state interests against federal legislation in federalism cases because state interests are sufficiently protected already.⁹¹

The reception of the political safeguards theory has waxed and waned on the Supreme Court.⁹² By its own terms, the theory only applies to challenges to congressional legislation,⁹³ so it does not apply to cases involving constitutional rights like *McDonald and Davis*.⁹⁴ However, a variant of the political safeguards theory still can be utilized in those contexts. It would posit that federal courts

Powers as a Safeguard of Federalism, 79 TEX. L. REV. 1321 (2001) (arguing that states' interests in Congress are protected by separation of powers doctrine, making passage of legislation difficult), and Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003) (noting change in deference to legislatures).

⁹¹ See McGinnis & Somin, *supra* note 89, at 103 (giving a brief overview of the political safeguards theory).

⁹² The most explicit endorsement of the theory came in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985): "State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552. Subsequently, the Court stepped back and, while not overruling *Garcia*, took a harder look at challenges to the constitutionality of congressional legislation on federalism grounds in such cases as *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). Still later cases, such as *United States v. Comstock*, 130 S. Ct. 1949 (2010), while upholding congressional statutes against constitutional challenges on federalism grounds, gave relatively little weight to political safeguards arguments.

⁹³ CHOPER, *supra* note 90, at 175–205.

⁹⁴ See *supra* notes 9–17 and accompanying text. It would apply to statute-centric cases like *United States v. Morrison*, 529 U.S. 598 (2000), in which the dissents relied on, and the majority ignored, the support for the federal law expressed by thirty-six SAGs filing as amici. *Id.* at 654 (Souter, J., dissenting).

should give significant, if not necessarily dispositive, weight to the position of states expressed as amici when they argue that federal law, broadly described, does *not* invade state sovereign prerogatives. The filing of amicus briefs by SAGs would be seen as a form of representation of state interests in federal court litigation. While the content of the arguments advanced in such briefs would be most pertinent, the number of states signing on to such briefs would be relevant as well.

Indeed, relying on SAG amicus briefs offers some advantages over the mere representation of states in Congress and the Executive—the underpinnings of the political safeguards theory. Such amicus briefs are real-time representations of state interests in ongoing litigation, not simply the somewhat-amorphous and uncertain representation found to exist through the actions of members of Congress because they are elected from each state. The classic political safeguards theory assumes that *all* federal statutes were the result of a legislative process that always involved some level of state representation in Congress; and federal judges would then defer when those statutes were subsequently challenged in court.⁹⁵ One might wonder whether this assumption of representativeness should instead be tested on a statute-by-statute basis. Relying on SAG amicus briefs would inform judges undertaking such an inquiry because they could be more confident that various states, through their highest legal officers, are asking federal courts to uphold or enforce the actual state interests and not the presumed ones, as state legislators often might do under the political safeguards theory.⁹⁶

⁹⁵ CHOPER, *supra* note 90, at 175.

⁹⁶ The literature in favor of the political safeguards theory has relatively little to say about amicus briefs filed by SAGs, and what little it says is not favorable. For example, Choper, one of the leading proponents of the political safeguards theory, was unimpressed by the use of SAG amicus briefs as a proxy for state interests. In *National League of Cities v. Usery*, 426 U.S. 833 (1976), which struck down a federal statute extending minimum-wage requirements to municipal employees as violating the Tenth Amendment, Choper notes that twenty-two states, either as parties or amici, urged that the statute be struck down. Only four states filed amicus briefs in support of the statute. *Id.* at 182. He observes that many members of Congress from the twenty-two states had voted for the statute, raising questions about who really represents the states. *Id.* at 182–83. Choper also observes that during the New Deal, the Court in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), struck down a federal law regulating the wage and hours of coal workers despite

2. *Reliance on State Legislation.* A variant of this argument is suggested by the Court's reliance on state legislation when developing federal constitutional law. The Court in several contexts, such as substantive due process⁹⁷ or the "evolving standards" of cruel and unusual punishment under the Eighth Amendment,⁹⁸ has relied expressly on the presence or absence of state legislation on point.⁹⁹ Whether and to what extent the Court should exercise such reliance has been a matter of some controversy. Some have argued that it is artificial to think of the states as a collective entity, whose statutes should be a source of law development by federal courts.¹⁰⁰ For example, as colorfully put by Professor Roderick Hills, "judicial dragooning of state legislatures into an involuntary constitutional convention—attributing to legislators' votes some constitutional significance of which they were unaware and might, indeed, vociferously reject—is truly an odd way to define national constitutional doctrine."¹⁰¹ Others have argued that additional problems attend the notion of

the fact that "seven major coal producing states most directly affected by the law . . . came before the Court as amici curiae to support the federal enactment." *Id.* at 204. *Carter* was brought by a private party, and Choper used the episode to illustrate, as he saw it, the inappropriateness of allowing parties to advance state interests in litigation. *Id.* at 204–05. Choper grudgingly concedes that state governments *can* "present their views through amici curiae briefs, and the Court has been influenced on occasion to uphold federal power when affected states have supported it . . ." *Id.* at 204 (citing *Willcuts v. Bunn*, 282 U.S. 216 (1931)). Overall, however, he seems unpersuaded that the Court *should* use such amicus briefs for that purpose. Choper of course is arguing for the Court to adopt his robust version of the political safeguards theory. In contrast, the present Article assumes that not everyone, on and off the Court, is willing to embrace that vision, so it is appropriate to consider the pros and cons of relying on SAG amicus briefs under a milder form of the political safeguards theory.

⁹⁷ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 570–71, 578 (2003) (surveying state laws to aid the determination of a constitutional challenge to one state's anti-sodomy law).

⁹⁸ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 579–80 (2005) (surveying state law to aid the determination of a constitutional challenge to one state's law permitting the death penalty for minors).

⁹⁹ See Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1778–82 (2011) (summarizing the Court's reliance on state law on a variety of substantive issues of constitutional law); Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 371–80 (2009) (same).

¹⁰⁰ E.g., Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17, 17–18 (2009) (arguing against treating states as a single collective decisionmaker and a source of national law).

¹⁰¹ *Id.* at 20–21.

counting states to develop federal law, such as deciding which threshold number of states should matter¹⁰² and why state statutes passed at different times for different reasons should be considered collectively.¹⁰³

Court reliance on SAG amicus briefs, in contrast, ameliorates some of these problems. The dragooning of state legislatures lampooned by Hills does not occur with SAG amicus briefs filed intentionally and voluntarily by the states in the specific context of the case at issue. On this account, such amicus briefs are superior barometers of state opinion and state interests, as opposed to federal judges merely counting the actions—or non-actions—of state legislatures at different points in the past under potentially different conditions. Likewise, SAG amicus briefs are frequently filed in large numbers in a coordinated way, and this collective action, to a degree, counters the problem of federal judges pondering how much weight to give to the actions of how many states. States may pass similar legislation for a variety of reasons at a variety of times, whereas SAG amicus briefs are filed in one case for, presumably, the same or similar reasons, especially if they are filed in a coordinated way. When a large number of SAGs join in one brief, it suggests that they are reaching over political and regional lines in presenting uniform arguments to the Court. Because most federalism decisions expressly, or by implication, affect the entire nation, a supermajority of SAGs filing amicus briefs in some fashion fairly can be said to represent most of the country. Conversely, whether a court could reach that same comfort level by counting State practices is unclear, even if it could cobble together sufficiently similar numbers.

A final set of arguments, related to and overlapping with those above, posits that SAG briefs can serve as useful information signals to the Court. Professor Christopher Drahozal has suggested that because states and SAGs are frequent litigators in the Supreme Court, they face reputational penalties if they

¹⁰² Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1109–13 (2006).

¹⁰³ *Id.* at 1119–23.

advance frivolous arguments as parties or amici.¹⁰⁴ Therefore, it follows that the Court may find it useful to treat SAG amicus briefs as reliable “fire alarms,” especially in cases raising federalism issues where the states, presumably, have something relevant to say.¹⁰⁵ Indeed, numerous federal statutes empower SAGs to enforce federal law directly in federal court regarding consumer protection and other issues.¹⁰⁶

Moreover, it may be normatively desirable for the Court, implicitly and perhaps even explicitly, to be cognizant that a decision will provoke a backlash or, conversely, will find support among the states. State amici can serve a useful purpose in supplying such evidence. Express reliance on such briefs may enhance the institutional legitimacy of the Court by signaling that the Court is not oblivious to the concerns of important stakeholders in the controversy behind the litigation.¹⁰⁷ And particularly when it comes to amicus briefs that argue against the supposed state rights at issue, common sense and evidence suggests that such arguments are particularly trustworthy and entitled to greater weight than briefs that support the writer’s interests.¹⁰⁸ Such counterintuitive positions taken by SAGs make them more credible advocates in those cases.

¹⁰⁴ Drahozal, *supra* note 40, at 252.

¹⁰⁵ *Id.* at 252–53. SAGs are not unaware of federal law because they often are statutorily empowered “to ascertain whether regulated entities within their jurisdictions are complying with relevant state and federal laws.” Trevor W. Morrison, *The State Attorney General and Preemption*, in *PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION* 81, 86 (William W. Buzbee ed., 2009).

¹⁰⁶ Lemos, *supra* note 23, at 708–11 (giving examples).

¹⁰⁷ Lee Epstein & Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONAL APPROACHES* 215, 224–25 (Cornell W. Clayton & Howard Gillman eds., 1999) (noting that justices learn from these briefs “the preferences of sets of actors who are relevant to their liability to attain their goals”); Omari Scott Simmons, *Picking Friends From the Crowd: Amicus Participation as Political Symbolism*, 42 *CONN. L. REV.* 185, 190 (2009) (“Amicus participation dispels external public criticism that the Court is detached and indifferent to the public . . .”). Not everyone agrees with this benign vision of the role of amici. See Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 *TEX. L. REV.* 1247, 1254 (2011) (observing that Judge Richard Posner has argued that amicus briefs should not be used as a vehicle for interest groups to signal their political preferences to a court).

¹⁰⁸ See Michael A. Bailey et al., *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 *AM. J. POL. SCI.* 72, 72 (2005) (noting a study of amicus briefs filed by the Solicitor General found that the Justices found

This is not to say that the Court explicitly calling or relying on stakeholders like SAGs does not come without institutional costs. After all, the stakeholders may not respond in ways the Court may contemplate. Consider one prominent example. In *Brown v. Board of Education (I)*,¹⁰⁹ the Court declared that racially segregated public schools were unconstitutional but decided to hold further argument on the remedy. The Court invited states “requiring or permitting segregation in public education” to submit amicus briefs on that issue and participate in oral argument.¹¹⁰ In *Brown v. Board of Education (II)*,¹¹¹ six states responded to the invitation by filing amicus briefs, and the Court cordially observed that the “presentations were informative and helpful.”¹¹² But other states in the Deep South pointedly refused the invitation, “signaling their intention not to be legally or morally bound by the decision.”¹¹³ This episode is a cautionary note on the Court explicitly calling for the views of SAGs via amicus.¹¹⁴ On the whole, however, much can be said for relying on SAG briefs under a functional approach, especially those arguing against state interests in federal cases.

the briefs “more credible” when, among other things, the position taken by the brief “is ideologically counter to [the Solicitor General’s] typical policy views”).

¹⁰⁹ 347 U.S. 483 (1954).

¹¹⁰ *Id.* at 496.

¹¹¹ 349 U.S. 294 (1955).

¹¹² *Id.* at 299. The six states that accepted the Court’s invitation were Arkansas, Florida, Maryland, North Carolina, Oklahoma, and Texas. *Id.*

¹¹³ MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 314 (2004).

¹¹⁴ A subsequent and perhaps more successful example of the Court calling for the views of SAGs occurred in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), where the Court in an original action upheld the constitutionality of the Voting Rights Act of 1965. *Id.* at 308. “Recognizing that the questions presented were of urgent concern to the entire country,” the Court first had invited all states to participate as amici curiae. *Id.* at 307. Five states filed or joined briefs supporting South Carolina, which challenged the law, and twenty-one filed or joined briefs supporting the Act. *Id.* at 307–08 n.2. The Court added that “despite the emotional overtones of the proceeding, the briefs and oral arguments were temperate, lawyerlike, and constructive, . . . [and] [t]his additional assistance [was] most helpful to the Court.” *Id.* at 308. Neither the majority opinion nor Justice Black’s partial dissent made any further reference to the amicus briefs. All that said, the occasional practice of the Court requesting amicus briefs from SAGs “is now defunct.” David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 270 n.131 (2009).

C. FUNCTIONAL ARGUMENTS AGAINST RELYING ON STATE ATTORNEY GENERAL AMICUS BRIEFS

1. *Political Safeguards of Federalism.* The starting point for the proposition that the Court should *not* give special weight to SAG amicus briefs arguing against state interests is again the political safeguards of federalism theory.¹¹⁵ The theory has its passionate defenders, but also has been subject to withering criticism on a number of grounds. Critics have argued, among other things, that federal officials—even those elected by states—are subject to interest group pressures and other forces that lead them to discount state interests. Political parties at the national level often pursue policies at a nationwide level and often are uninterested in systematically considering the more time-consuming and complicated path of enacting policy that accommodates state-by-state interests. The upshot of this criticism is that, contrary to what the theory suggests, courts should not refuse to adjudicate cases presenting challenges to congressional statutes regulating the states.¹¹⁶

A branch of this criticism focusing on state officials contends that such officials “have systematic political interests that often cause them to undermine federalism.”¹¹⁷ Most of the public typically has little knowledge of or interest in federalism as a concept, much less as a normatively sound form of government. Their interest usually lies in the end result of policies, not whether a state or national solution is used.¹¹⁸ In that environment, state

¹¹⁵ See *supra* notes 89–91 and accompanying text.

¹¹⁶ For criticism of the political safeguards theory, see generally Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 NW. U. L. REV. 977 (2002); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1815–44 (2005). Cf. Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 940 (2005) (arguing that both supporters and critics of the political safeguards theory overstate the motivations of federal and state politicians “to maximize the institutional power of the governments they control”).

¹¹⁷ McGinnis & Somin, *supra* note 89, at 103.

¹¹⁸ *Id.* at 113; see also Ilya Somin, *Foot Voting, Political Ignorance, and Constitutional Design*, 28 SOC. PHIL. & POL'Y 202, 211–12 (2011). Other studies, however, indicate that citizens may be more sophisticated about federalism than commonly thought. See, e.g., Cindy

officials have little incentive to systematically favor federalist, as opposed to nationalist, solutions to public policy concerns, especially when those officials are subject to re-election.¹¹⁹ Similarly, state officials may wish for the national government to accept responsibility for problems so national politicians may take the blame when the solution does not work.

These same arguments can apply to the filing of amicus briefs by SAGs. Recall that Justice Scalia dismissed the SAG amicus brief in *Rapanos* on the basis that the states were improperly seeking to shift responsibility for making difficult decisions to federal officials.¹²⁰ McGinnis and Somin, two of the sharpest critics of process-based federalism theories, point to the SAG briefs in *United States v. Morrison*¹²¹ as another example of state officials failing to enforce federalism values. There, the Court considered a constitutional challenge to a provision of the Violence Against Women Act (VAWA) that created a federal cause of action for victims of domestic violence.¹²² The provision arguably encroached upon state authority by regulating a topic traditionally left to state law and state courts.¹²³ Thirty-six SAGs filed an amicus brief in support of the law, while one state filed an amicus brief against the law.¹²⁴ The majority, in holding that the provision was beyond the constitutional authority of Congress, made no mention of the briefs. A dissent, in contrast, found it “ironic” that federalism principles were used to strike down the provision, given that a large number of SAGs supported it.¹²⁵ McGinnis and Somin argue that the SAGs in *Morrison* were amenable to take a position that

D. Kam & Robert A. Mikos, *Do Citizens Care About Federalism? An Experimental Test*, 4 J. EMPIRICAL LEGAL STUD. 589, 592 (2007) (arguing that ordinary citizens are more willing to support federalist solutions to public policy issues than usually thought, especially “when they are exposed to federalism-based arguments raised by elites in political discourse”); Saundra K. Schneider et al., *Public Opinion Toward Intergovernmental Policy Responsibilities*, 41 PUBLIUS: J. FEDERALISM 1, 4 (2011) (noting “wide variability in findings and the apparent complexity of public opinion toward governmental policy responsibilities”).

¹¹⁹ McGinnis & Somin, *supra* note 89, at 113.

¹²⁰ See *supra* notes 48–54 and accompanying text.

¹²¹ 529 U.S. 598 (2000).

¹²² *Id.* at 602.

¹²³ *Id.* at 662–63 (Breyer, J., dissenting).

¹²⁴ *Id.* at 600–01 n.† (listing briefs).

¹²⁵ *Id.* at 654 (Souter, J., dissenting).

encroached on state authority because “taking a position that can be portrayed as hostile to women may be more electorally disadvantageous than opposing the act.”¹²⁶

2. *Political State Attorneys General.* A second, related argument against Court deference to SAG amicus briefs would emphasize the political ambitions of SAGs—ambitions that presumably encourage those officials to take expedient policy positions that may not necessarily be protective of state interests.¹²⁷ Forty-three of the fifty SAGs are popularly elected independently of the other executive officers of state governments.¹²⁸ SAGs frequently run for and obtain even higher office.¹²⁹ The political ambitions of SAGs have been linked to their regulatory behavior. For example, SAGs who were elected or who represented more liberal states or states with relevant interest groups were more likely to join multistate lawsuits against the tobacco industry and other companies.¹³⁰ This is not to say that such behavior is completely driven by electoral ambitions. SAGs, like any state official, may simply be following what they perceive to be sound public policy or responding in a democratic fashion to the desires of constituents and interest groups within their

¹²⁶ McGinnis & Somin, *supra* note 89, at 114. *But cf.* Levinson, *supra* note 116, at 941 n.93 (arguing that “[e]very piece of federal pork barrel legislation benefit[s] some state-level constituency” and that it is no surprise that state governments would support such provisions, citing the SAG amicus briefs in *Morrison* as an example). It has been argued that analogous political considerations account for the filing of a SAG amicus brief supporting federal authority in the Eleventh Amendment context. In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Court held that Congress could not statutorily abrogate state immunity to damages suits in federal court under Title I of the Americans with Disabilities Act. *Id.* at 360–65. Seven states filed amicus briefs supporting the immunity, while fourteen states filed amicus briefs against the immunity. *Id.* at 359 n.* (listing briefs). Reportedly more than twenty states initially had agreed to support the immunity in amicus briefs, but “eventually advocates of disability rights persuaded many of those states to change their position.” Solimine, *supra* note 6, at 1478 (footnote omitted) (citing Marci A. Hamilton, *Why Federalism Must be Enforced: A Response to Professor Kramer*, 46 VILL. L. REV. 1069, 1083 (2001)).

¹²⁷ Meyer, *supra* note 24, at 895.

¹²⁸ Provost, *supra* note 2, at 609. For details about the selection process for the remaining SAGs, see Meyer, *supra* note 24, at 890.

¹²⁹ Colin Provost, *When is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 PUBLIUS: J. FEDERALISM 597, 597 (2010).

¹³⁰ Lemos, *supra* note 23, at 721–27; Meyer, *supra* note 24, at 901; Provost, *supra* note 2, at 615–16.

states.¹³¹ Yet, how these cross-currents play out in the filing of amicus briefs in the Supreme Court has not been extensively documented. What can be said is that a variety of factors go into a SAG's decision to file an amicus brief or to join in one filed by another, including cooperative communications fostered by the NAAG and the interest of one or more SAGs on a particular topic.¹³²

3. *The State Attorney General and Other State Officials.* Another reason for the Court to be suspicious of treating SAG amicus briefs as representative of the opinions and interests of states is the relationship of the SAG to other elected state officials. Most SAGs are independently elected and, for that reason, might be said to be charged with a legitimacy that an appointed official filing briefs would not. While voters may not pay much attention to the amicus filings of SAGs, presumably the general tenor of the policies of elected SAGs are consistent with their amicus filings.¹³³ Nevertheless, SAGs commonly take positions on policies in general and on litigation in particular that are opposed by the governor or other state officials. This may be due to the SAG and governor being from different political parties or for other reasons.¹³⁴ A

¹³¹ See, e.g., Colin Provost, *When to Befriend the Court? Examining State Amici Curiae Participation Before the U.S. Supreme Court*, 11 ST. POL. & POL'Y Q. 4, 5–6 (2011) [hereinafter Provost, *When to Befriend*] (“[A]micus participation will depend on [the SAG’s] policy priorities.”); Colin Provost, *An Integrated Model of U.S. State Attorney General Behavior in Multi-State Litigation*, 10 ST. POL. & POL'Y Q. 1, 3 (2010) [hereinafter Provost, *Integrated Model*] (noting that SAGs are “driven by the desire to satisfy policy objectives, but also by political ambition”); Rorie L. Spill et al., *Taking on Tobacco: Policy Entrepreneurship and the Tobacco Litigation*, 54 POL. RES. Q. 605, 616–17 (2001) (noting mixed motivations influencing SAGs in tobacco litigation context).

¹³² WALTENBURG & SWINFORD, *supra* note 6, at 72 (discussing the various “idiosyncratic and interpersonal forces at work” in the decision of SAGs to file amicus briefs). For an example of one SAG referring to his filing of amicus briefs in the Supreme Court as part of his election campaign, see Greg Abbott, *Issues*, <http://www.gregabbott.com/page/issues.aspx> (last visited Feb. 1, 2012) (Web site for re-election campaign of Texas Attorney General Greg Abbott).

¹³³ Provost, *When to Befriend*, *supra* note 131, at 7 (arguing that SAG amicus filings are not a “particularly salient or visible policy tool” for voters). The general notion that SAGs take actions, at least in part, to appeal to voters should not be a controversial proposition in a representative democracy. Meyer, *supra* note 24, at 895.

¹³⁴ Lemos, *supra* note 23, at 742–43; Meyer, *supra* note 24, at 892–95; Provost, *Integrated Model*, *supra* note 131, at 8–9. Occasionally this tension is revealed in SAG amicus briefs. See, e.g., Brief for the States of Indiana et al. as Amici Curiae Supporting Respondents at 1–3, *Virginia Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632 (2011) (No. 09-529),

recent high-profile example of such divergent agendas was the filing of lawsuits by some SAGs challenging the constitutionality of the mandatory insurance provision of the controversial federal health care law passed in 2010.¹³⁵ Some governors supported such suits when the SAG did not, and the reverse was true as well.¹³⁶ Concluding that a SAG amicus brief should be treated as an unimpeachable source of evidence of the public opinion or of the interests of a particular state, as opposed to, say, an amicus brief filed by the governor of a state is therefore difficult.¹³⁷ Indeed, it can be argued that state legislatures on the whole are or can be more deliberative about and more representative of the interests of a state than one of several elected officials in the state's executive branch.

4. *Interstate Externalities.* A final set of considerations that potentially undermine the utility of Court reliance on SAG amicus briefs are the problems raised by permitting one group of states to override the interests of another. The familiar policy rationales for federalism, such as facilitating interstate competition and promoting states as laboratories of experimentation, suggest that not all states will always agree with each other.¹³⁸ The Court may

2010 WL 4216274, at *1–3 (arguing that the agency of a state should not be able to sue state officials in federal court).

¹³⁵ See *supra* note 4 and accompanying text.

¹³⁶ Marcia Coyle, *Health Care Battle Heats Up*, NAT'L L.J., Aug. 9, 2010, at 1; Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 71–72 (2011). It is also worth noting that states were involved in the legislative debate over the law, which did not preclude some of them from also filing suit after passage of the law. John Dinan, *Shaping Health Reform: State Government Influence in the Patient Protection and Affordable Care Act*, 41 PUBLIUS: J. FEDERALISM 395, 396 (2011).

¹³⁷ Other interest groups representing states or state officials also can file amicus briefs in the Supreme Court in federalism cases. See Solimine, *supra* note 6, at 1478 n.79 (giving examples in Eleventh Amendment cases). But SAGs remain the dominant player in the filing of such briefs. The fact that SAGs do not need permission to file amicus briefs probably accounts for some of that dominance. See *supra* note 25 and accompanying text. The National Governors Association and other organizations representing states and their political subdivisions often lobby Congress, but they appear to have been much less active than SAGs in filing amicus briefs in the Court. See generally JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 115 (2009) (discussing the “intergovernmental lobby”).

¹³⁸ For excellent overviews of the functional justifications for federalism, see DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 85–88 (1995); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 378–412 (1997); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2213–28 (1998); Michael W.

undermine those values if it gives inappropriate weight to particular SAG amicus briefs, especially when states file amicus briefs that oppose state rights. Recall that the majority in *McDonald* noted that thirty-eight states filed an amicus brief in support of incorporating the Second Amendment against the states.¹³⁹ The majority did not mention, however, that three states filed an amicus brief against incorporation,¹⁴⁰ nor did it engage in an extended discussion regarding why the former amicus brief should be given greater jurisprudential weight than the latter.¹⁴¹ Why should the three states not be permitted to continue to engage in their own experimentation on gun control? And why shouldn't all of the states be permitted to compete with respect to mobile citizens and businesses by demonstrating different tastes for gun control policies?

Typically, the regulatory actions of SAGs are directed toward, and presumably have the most effect within, their own state. In the course of that regulation, though, SAGs may sue out-of-state entities or otherwise take action that has an extraterritorial effect. To be sure, "every act of state governance inevitably has at least some extraterritorial effects,"¹⁴² so insisting that SAGs only take actions that affect their own states is unrealistic. SAGs may have incentives to act collectively to stifle interstate competition and to support nationalist solutions to public policy issues. People or officials in one state may simply disagree with the policy preferences of people in another state, and they may wish to

McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–1511 (1987) (book review). For more skeptical appraisals of the practical values of federalism, see MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* (2008); Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 8–18 (2002); Robert J. Delahunty, *Federalism and Polarization*, 1 U. ST. THOMAS J.L. & PUB. POL'Y 63, 71–96 (2007); Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L.J. 481, 493–518 (2004). Cf. Heather K. Gerken, *The Supreme Court, 2009 Term, Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 21–25 (2010) (exploring values of federalism regarding political units within states).

¹³⁹ See *supra* notes 9–17 and accompanying text.

¹⁴⁰ See *supra* note 11.

¹⁴¹ See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (concluding that incorporating the Second Amendment "will to some extent limit the legislative freedom of the states," yet observing that restriction of state experimentation always occurs "when a Bill of Rights provision is incorporated").

¹⁴² Morrison, *supra* note 105, at 96.

impose their preferences on other states, even when the activities of those states have no extraterritorial effect.¹⁴³ Likewise, some states may wish to “capture a disproportionate share of federal monetary or regulatory largesse.”¹⁴⁴ Also, some states may wish to deal with interstate regulatory spillovers by imposing a nationalist solution on all states.¹⁴⁵ Dealing with such spillovers creates incentives for states to act collectively and for states to join a litigation bandwagon started by another state that may produce or influence a national solution.¹⁴⁶ SAG amicus filings may reflect this bandwagon effect,¹⁴⁷ and indeed such coordination is encouraged and facilitated by the NAAG.¹⁴⁸ Recent examples of large numbers of SAGs joining in one amicus brief in Supreme Court cases demonstrate the bandwagon effect and the entrepreneurship of some SAGs to obtain numerous signatories to an amicus brief.¹⁴⁹

¹⁴³ Lynn A. Baker, Symposium, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 962 (2001) (giving example of admission of Arizona, New Mexico, Oklahoma and Utah to the Union being conditioned on their prohibiting polygamy).

¹⁴⁴ *Id.* at 962 (footnote omitted). Baker argues that conditional federal funds inevitably make “some states better off at the expense of other states.” *Id.* (footnote omitted).

¹⁴⁵ *Id.* at 963; Greve, *supra* note 24, at 102.

¹⁴⁶ Meyer, *supra* note 24, at 904–05.

¹⁴⁷ Greve, *supra* note 24, at 100, 108; Meyer, *supra* note 24, at 904–05. Spillover effects may explain the opposing amicus or other litigation strategies by states in a particular case. For example, in *Massachusetts v. EPA*, eleven states (five as amici) supported the plaintiff state—seeking that the EPA regulate gasses that might contribute to global warming—while ten states (as intervening parties) were opposed. *See supra* note 3 and accompanying text. Most of the states seeking EPA regulation stood to gain economically, while most of the opposing states stood to lose. Andrew P. Morriss, *Litigating to Regulate: Massachusetts v. Environmental Protection Agency*, 2007 CATO SUP. CT. REV. 193, 211–12. Another example is *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011), in which the Court held that there was not a public nuisance action based on federal common law against carbon dioxide emitters. *Id.* at 2540. The plaintiffs included eight states. *Id.* at 2533 n.3. Twenty-three SAGs opposed the case. Brief of the States of Indiana et al. as Amici Curiae in Support of Petitioners, *Am. Elec.*, 131 S. Ct. 2527 (No. 10-174), 2011 WL 465735. Four SAGs supported the suit. Brief of the States of North Carolina et al. as Amici Curiae for the Respondents, *Am. Elec.*, 131 S. Ct. 2527 (No. 10-174), 2011 WL 1042201.

¹⁴⁸ Meyer, *supra* note 24, at 907.

¹⁴⁹ *See, e.g.*, Clark Neily, District of Columbia v. Heller: *The Second Amendment is Back, Baby*, 2008 CATO SUP. CT. REV. 127, 143 (describing how then-Texas Solicitor General Ted Cruz “worked indefatigably to persuade other states to join the [SAG amicus] brief” in *Heller*); *see also supra* notes 2–9 and accompanying text.

None of this is to say that states have no legitimate functional interests in supporting a national solution that will adversely impact other states or themselves or that such interests could not be reflected in the filing of SAG amicus briefs. This represents the familiar problem of regulating races-to-the-top and races-to-the-bottom, with the latter being most appropriate for a nationalist solution.¹⁵⁰ To put the same point another way, the exercise of federal—particularly congressional—power can be conceptualized by states as an appropriate response to the collective action problems created by the presence of national markets and interstate externalities.¹⁵¹ The problem comes with objectively distinguishing between the races, or the presence or absence of externalities or a national market, since analysis often seems to explicitly or implicitly draw on one's normative view of the regulation in question.¹⁵² For example, employment or housing discrimination in one state can have spillover effects in states that prohibit such discrimination by giving the former states a competitive advantage or by affecting markets in credit and pricing that have an interstate character.¹⁵³ The latter states may be inhibited from taking counteractive measures—or from outlawing discrimination in the first instance—for fear of losing businesses or citizens.¹⁵⁴ Similarly, the federalism argument in favor of experimentation is limited if state innovations have spillover effects.¹⁵⁵

¹⁵⁰ See Friedman, *supra* note 138, at 408 (citing the struggle to eliminate child labor as an example of this problem); McConnell, *supra* note 138, at 1499–1500 (citing competition on welfare as an example of this problem).

¹⁵¹ Cooter & Siegel, *supra* note 73, at 145–50.

¹⁵² *Id.* at 152–53; Baker, *supra* note 143, at 965; McConnell, *supra* note 138, at 1499–1500; see also William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 207–09 (1997) (discussing difficulties in identifying and attaining perfect conditions for efficient interstate competition).

¹⁵³ Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 36–37 (2010).

¹⁵⁴ *Id.* at 36.

¹⁵⁵ *Id.* at 39–40. Balkin has further argued that

[e]xperiments should be encouraged if they work to the benefit of the entire nation. But if these are genuine experiments, experiments generally end at some point and the results are tabulated; somebody has to decide whether the experiment is a success or a failure, and, if a success, adopt best practices nationwide.

Reasonable people can disagree on how to characterize a particular social problem under these criteria. In these circumstances, therefore, characterizing a particular amicus filing by SAGs as calling for an efficient or inefficient solution from a functional federalism perspective seems difficult for a court. The difficulty might be obviated if all, or almost all, states join in one amicus brief. This might be considered evidence that some states are not trying to export costs to, or unduly impose a nationalist solution upon, laggard states.¹⁵⁶ But even unanimity among states does not guarantee that interstate spillovers are minimized.¹⁵⁷ Recall the unanimity of the SAG amicus brief supporting the one state as litigant in the *Davis* case.¹⁵⁸ There, the dissent argued that the unanimous amicus brief was not surprising because in its view, this brief was the product of interest group pressure in each state seeking to pass costs onto the citizens of other states.¹⁵⁹

IV. THE APPROPRIATE LEVEL OF JUDICIAL CONSIDERATION TO STATE AMICI IN FEDERALISM CASES

That federal courts do or should defer in some way to the amicus briefs filed by SAGs would have, until relatively recently, struck many observers as unusual or unlikely. For decades scholars were concerned with “the countermajoritarian difficulty,” the problem of unelected courts not sufficiently deferring to the policy judgments of the elected legislative branches of the federal

Id. at 40. Some question-begging aspects to his analysis persist. Whether an experiment has worked “for the benefit of the entire nation” or how to decide if it has been a success or failure may not be so clear.

¹⁵⁶ Meyer, *supra* note 24, at 913.

¹⁵⁷ See Greve, *supra* note 24, at 102 (noting that state governments may “agree to exploit each others’ citizens because that leaves all governments better off (and consumers worse off)”). *But see* Levinson, *supra* note 116, at 946 (expressing skepticism that elected representatives “derive any direct benefits from the popularity or prosperity of their jurisdictions” and arguing that it is therefore simplistic to use market metaphors to critique interstate competition).

¹⁵⁸ See *supra* note 8 and accompanying text.

¹⁵⁹ See *supra* notes 64–70 and accompanying text. For support of the criticism advanced by the *Davis* dissent, see Greve, *supra* note 24, at 113–16 (using cartel analogy to explain why some states are unwilling to attack the anticompetitive policies of sister states even when those policies impose external costs).

and state governments.¹⁶⁰ Now, many scholars are more concerned with the *majoritarian* difficulty, the notion that, more often than not, the Supreme Court and other courts largely follow and are constrained by majoritarian preferences in constitutional and other decisionmaking.¹⁶¹ Many scholars now address whether and how courts *should* follow public opinion and other indicia of majoritarian preferences.¹⁶²

In a similar vein,¹⁶³ the appropriate inquiry for present purposes is whether and to what extent the Supreme Court should

¹⁶⁰ For an overview of that vast literature, see generally Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361 (2008).

¹⁶¹ See, e.g., BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 374–76 (2009) (noting that “[i]t took the Court quite a while to understand the limitations that motivated public opinion imposed on its Freedom of movement”). Nevertheless, there is not a scholarly consensus on the descriptive accuracy of the Court now as a largely majoritarian institution. For a trenchant departure from the seeming consensus, see Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 116–17.

¹⁶² See, e.g., Barry Friedman, *The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232, 1249–54 (2010) (“Ultimately, the question is not *whether* ‘authentic constitutional reasoning can include consideration of strongly held public opinion,’ but *how* it does and should do so.” (internal citation omitted)); Calvin Massey, Symposium, *Public Opinion, Cultural Change, and Constitutional Adjudication*, 61 HASTINGS L.J. 1437, 1444–45 (2010) (noting the myriad variables that affect whether public opinion should be considered in constitutional interpretation); Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1217–18 (2010) (arguing that public opinion can be used in a way that is consistent with standard judicial processes); Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 158 (2007) (arguing two reasons why “public outrage” should matter to judicial decisions). A competing argument recently posited that Supreme Court Justices care more about and follow elite opinion, not that of the majoritarian public at large. Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1537 (2010). Interestingly, these authors argue that the Justices—and their law clerks—often obtain information about elite opinion from amicus briefs and mention such briefs filed by states as one example. *Id.* at 1566–68.

¹⁶³ Another, related strand of recent scholarship argues that, in various ways, federal courts can and should share the task of developing constitutional law with the other branches of the federal government, the states, and even governmental units within states. E.g., ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM 151 (2009); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 341–42 (2011); Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 103–06; Gerken, *supra* note 138, at 21–22. Cf. Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 37–39 (2011) (describing how federal and state political actors often negotiate to resolve federalism issues). The Court’s use of SAG amicus briefs in deciding federalism cases would fit comfortably within this vision of governance. For an example of SAGs in

give weight to the amicus briefs filed by SAGs in federalism cases, particularly when those briefs are opposed to the states' rights positions. The debate outlined in the previous section does not yield a winner. Instead, it suggests that the Court should reject the extremes of never giving or always giving such briefs substantial jurisprudential weight.¹⁶⁴ If the extremes are to be rejected, the debate then focuses on the more difficult inquiry of when these briefs *should* be given weight. This Article argues that the Court can look to a combination of procedural and substantive criteria in evaluating the persuasiveness of such SAG amicus briefs in a given case.

A. PROCEDURAL CRITERIA

The procedural criteria can draw on the critiques of the Court “counting states” in various contexts when developing constitutional law.¹⁶⁵ This exercise consists of the Court counting how many states have particular legislation or state constitutional provisions. By analogy, the Court could count how many states have filed or joined in an amicus brief or briefs, for one or the other party—or both, and give appropriate weight to those numbers and the position advanced by the amici when making a decision. For instance, the Court could give considerable weight in federalism cases to, say, an amicus brief joined by a supermajority of SAGs arguing against the state interest and discount a competing amicus brief filed or joined by a small number of SAGs.¹⁶⁶

amicus briefs in federalism cases making such arguments, see Brief of States of Ohio et al. as Amici Curiae in Support of Petitioner at 2, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260), 1994 WL 16007793, at *1 (arguing that federal Gun-Free School Zones Act should be upheld because it is an example of the “historical cooperation and coordination that has existed between the States and the Federal government in the area of law enforcement”).

¹⁶⁴ For a similar argument, see AUSTIN ET AL., *supra* note 20, at 6.

¹⁶⁵ See *supra* notes 97–102 and accompanying text.

¹⁶⁶ An amicus brief filed by a small number of states can still be helpful or relevant, especially when it argues against state interests. As one example, see Brief for the States of North Carolina et al. as Amici Curiae in Support of Eric H. Holder, Jr. at 1–2, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009) (No. 08-322), 2009 WL 815239, at *1 (containing argument of six states covered by the preclearance provisions of section 5 of the Voting Rights Act in favor of constitutionality of that law, in part because it “does not place an onerous burden on States” and “States have been able to comply with [s]ection 5

As argued in Part III, the counting of states filing or joining amicus briefs ameliorates some of the methodological and interpretational problems associated with state counting in the general lawmaking context. Yet problems remain. Is a bare majority enough? Why should twenty-six states be able to override the interests of twenty-four? Are states on an equal footing when it comes to the count? Should states with large populations or which have regulatory or other interests pertinent to the case be given more weight than states which do not possess those characteristics? SAGs may join, or not join, amicus briefs for a variety of reasons, and treating all SAGs as fungible is arguably misleading, even when they join in one brief and ostensibly advance the same position.

It is unrealistic and unnecessary to insist that the Court engage in the complicated tasks of weighing the interest of a state that does or does not file an amicus brief through its SAG or determining the precise reason why a SAG filed or joined an amicus brief or declined to do so. The subjective motivations of other amicus brief filers are not similarly examined. The Court's rules require most amicus filers by motion to state their interest in the case.¹⁶⁷ Yet SAGs need not do so to file an amicus brief,¹⁶⁸ so presumably the Court believes that the interests of SAGs are objectively sufficient and do not need special scrutiny. At any rate, it would be nearly impossible for the Justices or their agents to unearth the back story of each SAG decision whether to file or to join an amicus brief. And it would be difficult for the Court to make factual investigations about each state to enable it to qualitatively weigh the contributions of each state, as opposed to merely counting states.¹⁶⁹

without undue costs or expense”).

¹⁶⁷ SUP. CT. R. 37.3(b).

¹⁶⁸ See *supra* note 28 and accompanying text.

¹⁶⁹ On the other hand, as suggested below, the burden could be placed on the SAGs themselves to address these issues—i.e., to explain in the amicus brief why their states have interests that should be given particular weight by the Court. Cf. Amar, *supra* note 99, at 1780 (arguing that with regard to giving weight to state practice in interpreting the Fourteenth Amendment, while the Court “has not always openly paid more attention to more populous states, the Justices in future cases should do so routinely and explicitly”).

Further, federalism decisions of the Court that may directly involve only a small number of states in particular litigation usually have implications for the entire nation and for all the states. In this sense, all of the states are on an equal footing,¹⁷⁰ and some advantage persists in counting the states that may join an amicus brief without sharply differentiating among states that join or do not join the brief.

Because majority rules are the starting point in American democracy, a presumption should exist that SAG amicus briefs of twenty-six or more states are entitled to special weight. The presumption should be rebuttable, because SAG amicus briefs joined by fewer states still can be persuasive, but there should be a heightened burden of persuasiveness for courts to give them weight. More persuasive still would be an amicus brief joined by a supermajority of the states. The Constitution places supermajority requirements on the states (or on the Senate, where the states are on an equal footing) in certain important circumstances,¹⁷¹ and such requirements can lead to better decisionmaking (i.e., the decision to join an amicus brief) because it forces states with disparate interests to make common ground.¹⁷² That is, giving special weight to an SAG amicus brief filed by a supermajority of the states can be appropriate because they presumably have overcome collective action problems to do so.¹⁷³

¹⁷⁰ *E.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966) (referring to the “doctrine of the equality of States”); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2512 (2009) (referring to “our historic tradition that all the States enjoy ‘equal sovereignty’” (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960))).

¹⁷¹ *E.g.*, U.S. CONST., art. I, § 3, cl. 6 (two-thirds vote needed for impeachment); *id.* art. I, § 7, cl. 2 (two-thirds vote of House and Senate necessary to override presidential veto); *id.* art. V (Congress, by two-thirds vote of House and Senate, can propose amendments to the Constitution, and three-quarters of the states are needed to ratify proposed amendments); see also Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. COLLOQUY 300, 307 (2011) (describing proposed Repeal Amendment, which would permit two-thirds of the states to repeal any federal statute).

¹⁷² See John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1720–33 (2010) (arguing that the supermajority requirements of the constitutional amendment process lead to deliberation, consensus, and an absence of partisanship among the states).

¹⁷³ Cooter & Siegel, *supra* note 73, at 139–43. To be sure, this might depend in part on the, perhaps, unrealistic assumption that the content of a collectively filed amicus brief is

B. SUBSTANTIVE CRITERIA

The Court also should more closely examine the substantive arguments advanced by a SAG amicus brief before giving it significant weight. The Court should not simply note that such a brief might call for rejection of the state interest. Rather, the Court should examine how the arguments made in the brief are relevant to the legal issue raised in the case and how the arguments advance or undermine federalism values. In other words, any SAG amicus brief should be considered of limited relevance to a case that does not directly address federalism issues.¹⁷⁴ Similarly, to be persuasive, a SAG amicus brief should articulate why a nationalist, uniform solution that dampens interstate competition is necessary or unnecessary to resolve a challenge on federal constitutional grounds to the prerogatives of a single state or of a minority of the states. Such an inquiry would fit comfortably within a pragmatic approach that the Court sometimes takes to resolve federalism issues.¹⁷⁵

This proposed line of inquiry can be further examined by analyzing the arguments raised by and the Court's use of SAG amicus briefs in several prominent cases where a brief joined by a significant number of states opposed the state interest. A full examination of all such briefs or all such cases is well beyond the scope of this Article. Instead, the analysis that follows is a preliminary one, suggestive of how the Court *should* examine such briefs.

discussed and negotiated by all of the signatory SAGs. In many or perhaps even most cases, one or a small group of SAGs takes the lead in drafting the brief, and many other SAGs simply decide to sign on or not. Even if that process describes many SAG amicus briefs, concluding that the briefs therefore lack relevance to the Court is inappropriate. Merely signing on to a brief drafted by another is a significant public decision by an important public official of a state.

¹⁷⁴ For example, SAG amicus briefs should be given little weight in First Amendment cases that do not directly turn on the power of the states vis-à-vis the federal government. See *supra* notes 7–8 (giving examples of such cases where SAGs filed amicus briefs).

¹⁷⁵ For the general proposition that the Court should expressly take federalism values into account in decisionmaking in federalism cases, see Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 50–65 (2004), and Note, *State Collective Action*, 119 HARV. L. REV. 1855, 1875 (2006). In expressly drawing on SAG amicus briefs, the Court should do the same thing.

1. *Gideon v. Wainwright*. One example is the canonical decision of the Warren Court in *Gideon v. Wainwright*.¹⁷⁶ There, the Court held that the Sixth Amendment requirement that criminal defendants shall enjoy the right to counsel—which must be supplied by the government if the accused is indigent—applied to the states through the Fourteenth Amendment.¹⁷⁷ In doing so, the Court overruled its earlier decision of *Betts v. Brady*, which had held to the contrary.¹⁷⁸ In the course of reaching the *Gideon* decision, the Court did not directly address how federalism values might be advanced or undermined by incorporating this right, but it observed in the penultimate paragraph of Justice Black’s majority opinion that “Florida, supported by two other States, has asked that *Betts* [] be left intact. Twenty-two States, as friends of the Court, argue that *Betts* . . . should now be overruled. We agree.”¹⁷⁹

Evaluating the SAG amici in the order referenced by Justice Black, two states—Alabama and North Carolina—filed a brief in support of Florida, the state involved in the case.¹⁸⁰ In addition to engaging in then-standard doctrinal analysis under *Betts*, the brief also addressed federalism perspectives. It argued that requiring all states to provide for lawyers in all criminal proceedings would be an “assault upon the Tenth Amendment,”¹⁸¹ and would undermine “the essence of our federalism that states should have the widest latitude in the administration of their own systems of criminal justice.”¹⁸² The brief continued that imposing such a requirement on the less affluent counties of a state may create an unbearably onerous financial burden to pay attorney’s fees, and judges may find it difficult to find lawyers to appoint in “thinly populated rural counties.”¹⁸³

¹⁷⁶ 372 U.S. 335 (1963).

¹⁷⁷ *Id.* at 342.

¹⁷⁸ 316 U.S. 455, 471 (1942).

¹⁷⁹ *Gideon*, 372 U.S. at 345.

¹⁸⁰ *Id.* at 335–36.

¹⁸¹ Amicus Curiae Brief for the State of Alabama at 3, *Gideon*, 372 U.S. 335 (No. 155), 1962 WL 115123, at *3.

¹⁸² *Id.* at 4, 1962 WL 115123, at *4.

¹⁸³ *Id.* at 13, 1962 WL 115123, at *13.

The amicus brief filed by twenty-two states opposing the state interest against incorporation said much about the doctrinal value of *Betts* but relatively little about federalism values. It argued that the Sixth Amendment guarantee “transcend[ed] the power of the states to determine their own criminal procedures. Its denial in Florida, or in any other state, is ultimately of grave concern to all states throughout the nation.”¹⁸⁴ Observing that thirty-five states already required counsel in non-capital cases, the brief argued that because such appointments also were required in federal courts, “the absence of a similar compulsion upon the remaining [fifteen] states creates an ugly double standard that is incompatible with a healthy federalism.”¹⁸⁵

Anthony Lewis has provided useful background to the filing of these amicus briefs, particularly about the entrepreneurial efforts of attorneys to garner signatories for them.¹⁸⁶ After certiorari was granted, an attorney for Florida wrote the SAGs of all of the other states, asking them to file or join in an amicus brief opposing the overruling of *Betts*.¹⁸⁷ About half of the SAGs took the courtesy to respond, but the responses were not encouraging.¹⁸⁸ Some expressed sympathy with Florida’s support of *Betts* but declined to file a brief because their own states already provided for counsel to indigent criminal defendants.¹⁸⁹ Walter F. Mondale, then the SAG for Minnesota, replied that while he believed “in federalism and states[] rights too,” he concluded that it was fair and not an undue burden to require states to supply counsel to indigent criminal defendants.¹⁹⁰ More than that, Mondale proceeded to copy this correspondence to SAGs and friends in other states, which led to the Massachusetts SAG filing an amicus brief in favor of overruling *Betts*, joined by Mondale and the SAGs of twenty other states.¹⁹¹ Meanwhile, the initial responses to the letter from the

¹⁸⁴ Brief for the State Government Amici Curiae at 1, *Gideon*, 372 U.S. 335 (No. 155), 1962 WL 75209, at *1.

¹⁸⁵ *Id.* at 2, 1962 WL 75209, at *2.

¹⁸⁶ ANTHONY LEWIS, *GIDEON’S TRUMPET* 149 (1964).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 151.

¹⁸⁹ *Id.* at 152.

¹⁹⁰ *Id.* at 152–53.

¹⁹¹ *Id.* at 154–55. Professors at Harvard Law School aided the Massachusetts SAG in drafting the brief. *Id.* at 154. Lewis adds that “the most startling” aspect of the brief was

attorney for Florida suggested that as many as seven states might join an amicus brief on behalf of Florida, though only two states eventually so filed.¹⁹²

The amicus briefs in *Gideon* are not models of comprehensiveness with respect to addressing the federalism values advocated in this Article. The brief supporting incorporation says little about why the fifteen laggard states should be required to follow the thirty-five that already require counsel to be appointed. The paeans to a “healthy federalism” seem little more than a desire to force the fifteen to follow the preferences of the majority. The losing amicus brief is somewhat better on this score. While it, too, makes rhetorical calls about the need to follow federalism by referencing the Tenth Amendment, at least it attempts also to argue that less affluent states (or parts of states) will find it difficult to follow and implement a nationwide, uniform mandate like this one. Still, even this brief says little explicitly about why a nationwide requirement is unnecessary (other than an implication that the fifteen states without a requirement at that time were less affluent) or inappropriate in a federal system.

The majority opinion in *Gideon* mentions the amicus briefs on both sides.¹⁹³ It notes the number of states that joined each brief,¹⁹⁴ but it does not directly address the federalism arguments, such as they were, advanced by the SAG amici. Subsequent observers have argued that the Court took solace in the fact that a supermajority of states already required the appointment of counsel and that the decision can be said to be majoritarian in that regard.¹⁹⁵ Perhaps the fact that the state amici were arguing

the “mere fact that twenty-three states would urge the Supreme Court to impose a new standard of fairness on state criminal procedure.” *Id.* at 155. Lewis refers to twenty-three states as amici because one state—New Jersey—had been inadvertently omitted from the amicus brief filed. *Id.*

¹⁹² *Id.* at 160.

¹⁹³ *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

¹⁹⁴ *Id.*

¹⁹⁵ See ESKRIDGE & FEREJOHN, *supra* note 51, at 401–02 (noting that the court was motivated by a consensus of a majority of the states); Lain, *supra* note 99, at 379 n.73 (recognizing that the practice at issue was settled in almost every other jurisdiction and was part of the fabric of the Constitution). By the time of the Court’s decision in *Gideon*, only five states did not require the appointment of counsel for indigent criminal defendants.

against the state interest might be seen as a form of political cover by the Court, a shield against the inevitable criticism of an “activist” decision, not unknown during the Warren Court (not to mention other eras).¹⁹⁶ Indeed, this suggests that the twenty-two SAGs also had political cover to argue against the presumed state interest at issue.

2. *United States v. Morrison*. Another example is *Morrison*,¹⁹⁷ where the court held unconstitutional a statutory provision creating a cause of action for victims of domestic violence that could be brought in federal or state courts because it was beyond Congress’s power under the Commerce Clause or Section Five of the Fourteenth Amendment.¹⁹⁸ Thirty-six SAGs filed an amicus brief in support of the provision, while one SAG filed an amicus brief in opposition.¹⁹⁹ Neither brief was mentioned by the majority opinion; both were mentioned by the dissents.²⁰⁰

The amicus brief by the thirty-six states principally argues that the provision is constitutional under a correct understanding of the Court’s precedents.²⁰¹ It buttresses those arguments by referring to many empirical studies that show that domestic violence has an adverse effect on employment and other opportunities of its victims.²⁰² Gender-based violence increases the need for medical and governmental services and thus affects and interferes with interstate commerce.²⁰³ Referring to the many

ESKRIDGE & FEREJOHN, *supra* note 51, at 402; Amar, *supra* note 99, at 1755.

¹⁹⁶ Perhaps it did not escape the notice of the Court that the case came from Florida and that the two amici states that supported Florida also were from the Deep South, while states from other parts of the nation dominated the other amicus brief. It has been argued that many of the Warren Court’s incorporation and other criminal procedure decisions were driven by the perceived need to revamp the criminal justice systems of the South. See, e.g., Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1396–97 (2004) (acknowledging that the *Gideon* decision, among others, allowed federal courts to scrutinize Southern criminal justice systems).

¹⁹⁷ 529 U.S. 598 (2000).

¹⁹⁸ *Id.* at 627.

¹⁹⁹ *Id.* at 654 (Souter, J., dissenting).

²⁰⁰ *Id.*; *id.* at 661 (Breyer, J., dissenting).

²⁰¹ Brief of the States of Arizona et al., as Amici Curiae in Support of Petitioners’ Brief on the Merits at 5–15, *Morrison*, 529 U.S. 598 (Nos. 99-5, 99-29), 1999 WL 1032809, at *5–15.

²⁰² *Id.*

²⁰³ *Id.* at 2, 1999 WL 1032809, at *2.

reports of state court task forces on gender issues,²⁰⁴ the brief also argued that the statute's civil remedy was necessary because "the States' efforts to combat gender-motivated violence, while substantial, [were] not sufficient by themselves to eradicate [the] deeply entrenched problem."²⁰⁵ The brief concluded that the provision did not undermine federalism because it complemented, rather than displaced, existing state and local efforts to combat domestic violence; incorporated by reference state law; and victims of discrimination have available both federal and state remedies in other situations.²⁰⁶ These arguments also had been advanced by many of the same SAGs in testimony before Congress prior to the passage of the law.²⁰⁷

The opposing amicus brief, filed by the SAG of Alabama, offered a spirited argument that the provision, however laudatory as a matter of policy, was nonetheless beyond Congress's powers to enact.²⁰⁸ Beginning with the observation that federalism "is no less a counter-majoritarian right than the Constitution's other structural guarantees of liberty,"²⁰⁹ the brief went on to acknowledge the massive record before Congress and the findings in the law itself regarding the effects of gender violence on interstate commerce.²¹⁰ However, the brief argued that these findings proceeded "at such an imposing level of generality that it is difficult to imagine what intrastate crime, tort, or family law issue would not be covered by them."²¹¹ Likewise, the brief argued

²⁰⁴ *Id.* at 16, 1999 WL 1032809, at *16.

²⁰⁵ *Id.* at 15, 1999 WL 1032809, at *15.

²⁰⁶ *Id.* at 21–22, 1999 WL 1032809, at *21–22.

²⁰⁷ *Morrison*, 529 U.S. 598, 653 (Souter, J., dissenting) (observing that thirty-eight SAGs had supported the would-be statute in Congress).

²⁰⁸ Brief for the State of Alabama as Amicus Curiae in Support of Respondents, *Morrison*, 529 U.S. 598 (Nos. 99-5, 99-29), 1999 WL 1191432 [hereinafter Alabama Amicus Brief]. The Alabama SAG was William Pryor, later appointed by President George W. Bush to the U.S. Court of Appeals for the Eleventh Circuit. The counsel of record and drafter of the brief was Jeffrey Sutton, a frequent (and successful) advocate for states in federalism cases before the Supreme Court and other courts. Sutton was later appointed by President George W. Bush to the U.S. Court of Appeals for the Sixth Circuit. For further discussion of the brief, see William H. Pryor Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1177–79 (2002).

²⁰⁹ Alabama Amicus Brief, *supra* note 208, at 2, 1999 WL 1191432, at *2.

²¹⁰ *Id.* at 15, 1999 WL 1191432, at *15.

²¹¹ *Id.* at 16, 1999 WL 1191432, at *16.

that the record of the alleged inadequacies of state criminal justice systems regarding gender violence consisted of a “smattering of highly-generalized and conclusory statements.”²¹² The brief closed by arguing that state sovereignty should not be protected “for [its] own stake,” but to limit Congress to its enumerated powers and to preserve the virtues of “divided and dispersed government.”²¹³

The SAG amicus briefs in *Morrison* both address, as they see it, the virtues of federalism at stake, but neither unpacks that idea in satisfying detail. The amicus brief supporting the provision admirably refers to a host of scholarly and other work on the consequences of gender violence. Other than referencing an effect on interstate commerce, however, it never expressly explains why each state should not be able to approach this issue as it sees fit—that is, why the national, uniform solution embodied in the statute’s remedy is necessary or proper.²¹⁴ The brief is most convincing when it points out that the statutory remedy does not preempt state law and simply provides a supplement to existing remedies under state law.²¹⁵

The opposing SAG brief sought to undermine the need and propriety for a national solution by arguing that existing state law

²¹² *Id.* at 19, 1999 WL 1191432, at *19. The brief also noted that “every State in the country offers a tort remedy for” gender-based crimes and listed those remedies in an Appendix. *Id.* at 1–2, 25, 1999 WL 1191432, at *1–2, *25.

²¹³ *Id.* at 24–25, 1999 WL 1191432, at *24–25. The brief added that the criticism of state criminal justice systems as being allegedly inadequate to deal with gender violence must be placed in the context of the Court’s incorporation decisions, which impose “counter-majoritarian limitations on the States when it comes to local efforts to ferret out and punish crime, or even to curb the underlying social problems that prompt gender violence.” *Id.* at 23, 1999 WL 1191432, at *23. The brief did not mean to “question these rulings,” but rather “to embrace them,” as they “confirm the essential point of [the] brief, namely, that even the most virtuous public policy objectives—[like] . . . rooting out gender-motivated violence—have appropriate limitations.” *Id.* at 24, 1999 WL 1191432, at *24.

²¹⁴ In his *Morrison* dissent, Justice Souter argued that Congress rationally concluded that a national solution was necessary because gender-based violence, like racial discrimination in employment and public accommodations, reduced mobility of people, and the production and consumption of goods in interstate commerce. *Morrison*, 529 U.S. 598, 635–36 (2000) (Souter, J., dissenting).

²¹⁵ In his *Morrison* dissent, Justice Breyer pointed out that portions of the statute deferred to state interests by excluding divorce, alimony, and child custody—areas usually governed by state law—from its coverage. *Id.* at 662 (Breyer, J., dissenting) (citing 42 U.S.C. § 13981(e)(4) (2006)). The multi-faceted nature of a statute like the one at issue illustrates the benefits of caution in too-easily characterizing SAG amicus briefs as being for or against a presumed state interest.

remedies were, in fact, adequate, despite the frequent assertions to the contrary by the other amicus brief. The brief opposing the statute takes a functionalist turn by arguing that federalism should not be enforced for its own sake, but it does not expressly state why “divided and dispersed government” will lead to a more optimal solution to remedying gender violence as opposed to a national solution.

The opinions in *Morrison* do not engage in much functionalist analysis and hence have relatively little discussion of the substantive arguments raised in either SAG amicus brief. The majority opinion is largely a straightforward application of precedents regarding congressional power under the Commerce Clause and Section Five of the Fourteenth Amendment to regulate activity within, and traditionally regulated by, the states.²¹⁶ The majority also declined to leave the resolution of the issue to the political process—that is, to abandon judicial scrutiny of federalism challenges to the law.²¹⁷ The dissents also engaged in traditional doctrinal analysis regarding congressional power but also embraced the proposition that Congress had adequately considered state interests during the legislative process that led to the enactment of the provision.²¹⁸ Beyond that, the dissents had relatively little explicit discussion of functionalism issues.

3. *McDonald v. City of Chicago*. A third example is the SAG amicus briefs filed in *McDonald*.²¹⁹ There the Court held that the individual right to bear arms found in the Second Amendment was incorporated against the states.²²⁰ The majority took notice of the thirty-eight SAGs who filed an amicus brief in support of that result²²¹ and made no mention of the three SAGs who filed an amicus brief against incorporation. Among the dissenters, Justice

²¹⁶ *Morrison*, 529 U.S. at 607–27. Another scholar argues that the majority incorporated functionalist arguments by reference by citing authority (e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991)) that *did* explicitly discuss such arguments and by addressing those issues in a long footnote. *Eid*, *supra* note 79, at 1210–13 (citing, *inter alia*, *Morrison*, 529 U.S. at 616–17 n.7).

²¹⁷ *Morrison*, 529 U.S. at 608 n.3, 616–17 n.7.

²¹⁸ *Id.* at 652–54 (Souter, J., dissenting); *id.* at 660–64 (Breyer, J., dissenting).

²¹⁹ *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

²²⁰ *Id.* at 3026.

²²¹ *Id.* at 3049.

Stevens also took note of the former amicus brief and attempted to discount its significance.²²²

The opposing SAG amicus briefs in *McDonald* squarely addressed federalism issues. The brief supporting incorporation of the Second Amendment, in addition to making standard doctrinal and historical arguments in favor of incorporation, advanced three functional arguments: (1) a uniform right to keep and bear arms was historically necessary to preempt “actions by local governments”;²²³ (2) the right “against state and local governments is essentially important in an era of robust travel and commerce”;²²⁴ and (3) “the States have an interest in the proper interpretation of the Second Amendment in order to facilitate the development of similar protections under state law.”²²⁵ The brief also argued that federalism would not be undermined by incorporation. The brief agreed that one of the virtues of federalism is to have states serve as laboratories of experimentation but asserted that discretion should not include “the power to experiment with the fundamental liberties of citizens.”²²⁶ “State and local experimentation with reasonable firearm regulations will continue under the Second Amendment,” the brief added, and a national solution “will simply prevent local governments, like the federal government, from abrogating the fundamental, individual right to keep and bear arms.”²²⁷

The anti-incorporation, opposing amicus brief—filed by three SAGs (including the one from Illinois, where the suit

²²² *Id.* at 3115 n.47 (Stevens, J., dissenting); see *supra* notes 11–16, 140–41 and accompanying text. In his dissent, Justice Breyer did not expressly weigh either of the SAG amicus briefs, but he did observe that the majority cited two amicus briefs (one of which was the amicus brief joined by thirty-eight SAGs) to show that there was a “popular consensus” in favor of a “private self-defense right.” *McDonald*, 130 S. Ct. at 3124 (Breyer, J., dissenting). He added that “numerous *amici* briefs have been filed opposing incorporation as well. Moreover, every State regulates firearms extensively, and public opinion is sharply divided on the appropriate level of regulation.” *Id.*

²²³ Brief of the States of Texas et al. as Amici Curiae in Support of Petitioners at 1, *McDonald*, 130 S. Ct. 3020 (No. 08-1521), 2009 WL 4378909, at *1 [hereinafter Texas Amicus Brief].

²²⁴ *Id.*

²²⁵ *Id.* at 2, 2009 WL 4378909, at *2.

²²⁶ *Id.* at 22, 2009 WL 4378909, at *22 (quoting *Pointer v. Texas*, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring)).

²²⁷ *Id.* at 23–24, 2009 WL 4378909, at *23–24.

commenced)—also addressed federalism issues. It, too, invoked the familiar metaphor of states as experimenting laboratories and cited language from Court cases that had “precluded individual States from imposing their policy choices on others.”²²⁸ Responding directly to the earlier-filed SAG amicus brief on the other side, the three-state brief argued that states “have adopted a variety of approaches to gun regulation, each reflecting the particular needs and concerns of their residents.”²²⁹ It noted that many states “have laws regulating the sale of firearms and ammunition that are more stringent than federal law,” and forty-four states have analogues to the Second Amendment in their state constitutions.²³⁰ Forty-three of those states preempt some or all *local* gun regulation, so it followed that “there is no reason to believe that incorporation is necessary to police municipal gun regulations. The States are already doing this themselves.”²³¹ Finally, with regard to the argument that state courts would welcome doctrinal guidance from federal courts on the right to bear arms, the brief argued that the analogues in many state constitutions “are more specific than the Second Amendment,” so state courts are already “experienced, capable adjudicators of gun-rights challenges.”²³²

Both amicus briefs filed by the SAGs in *McDonald* should be given credit for addressing the federalism issues advocated in this Article. That said, neither brief satisfactorily considers the issues they raise. Thus, the three reasons for a national rule as advanced by the amicus brief filed by the thirty-eight SAGs are ultimately unpersuasive, at least in the way they are detailed in the brief. The brief refers to interfering with the right to travel,²³³ but that proves too much. All rights would need to be nationalized if interference with the right to travel were taken seriously as a factor.²³⁴ The

²²⁸ Illinois Amicus Brief, *supra* note 11, at 5–6, 2010 WL 59029, at *5–6. On the last point, the brief cited *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571–72 (1996), which held that, as a matter of conflict of laws and substantive due process, one state could not award punitive damages regarding the behavior of a defendant that took place in another state.

²²⁹ Illinois Amicus Brief, *supra* note 11, at 19, 2010 WL 59029, at *19.

²³⁰ *Id.* at 19–20, 2010 WL 59029, at *19–20.

²³¹ *Id.* at 21, 2010 WL 59029, at *21.

²³² *Id.* at 25–26, 2010 WL 59029, at *25–26.

²³³ See *supra* note 224 and accompanying text.

²³⁴ In this author’s view, there would need to be some additional arguments or information

brief also contended that incorporation was necessary to prevent political subdivisions of a state from undermining the right to bear arms.²³⁵ But as the opposing SAG amicus brief observed, most states could deal with that problem, it seems, by passing legislation to preempt local practice.²³⁶ Finally, the brief argued that incorporation would help state courts apply their own constitutional provisions on gun rights.²³⁷ This, too, seems an overstatement because state courts are free to follow federal law in construing state constitutional provisions in the absence of incorporation. Indeed, incorporation of the Second Amendment as a practical matter likely will result in federal law preempting the analogous state provisions. Moreover, because forty-four states already have analogues to the Second Amendment in their own constitutions, the thirty-eight SAGs arguably did not need to spend much political capital in joining the brief.²³⁸

For its part, the amicus brief filed by the three SAGs does a better job of attacking the other amicus brief than affirmatively advancing the case why a minority of states should not have to follow a uniform, nationalized rule on gun rights. The brief refers to differences among the states as a justification for different approaches, but that too proves too much. The logical result of that reasoning is to call into question the whole enterprise of incorporation, which has little sympathy for local variation. Critics of incorporation have long made this point,²³⁹ and it was reiterated by Justice Alito's opinion in *McDonald*: he conceded that incorporation of a federal right brings experimentation by states to

presented that different regulatory regimes among the states "affect the ability of Americans to participate fairly and fully in interstate networks of transportation and communication," not merely that it makes travel more inconvenient. Balkin, *supra* note 153, at 36. The latter seems to be the inadequate case argued in *McDonald* for states having different regulations of gun rights.

²³⁵ See Texas Amicus Brief, *supra* note 223, at 1, 2009 WL 4378909, at *1.

²³⁶ See Illinois Amicus Brief, *supra* note 11, at 21, 2010 WL 59029, at *21.

²³⁷ See Texas Amicus Brief, *supra* note 223, at 2, 2009 WL 4378909, at *2.

²³⁸ For a similar critique of the amicus brief by the thirty-eight SAGs in *McDonald*, see generally Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 109 HARV. L. REV. F. 108 (2011).

²³⁹ Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953–56 (1965); Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 64 (1996).

an end, or at least considerably restricts it.²⁴⁰ But he added without elaboration that “[s]tate and local experimentation with reasonable firearms regulation will continue under the Second Amendment,” quoting the SAG amicus brief by the thirty-eight states.²⁴¹ In contrast, the dissents in *McDonald* were much more sympathetic to the virtues of state experimentation, noting that “relevant background conditions diverge so much across jurisdictions”²⁴² and that incorporation would “destabilize” existing, different state regulation of firearms.²⁴³

Perhaps this largely skeptical evaluation of the SAG amicus briefs in *Gideon*, *Morrison*, and *McDonald* is too harsh. However, this Article posits that for the anti-state interest positions of those briefs to be taken seriously, they should advance convincing functionalist arguments for why a national, uniform solution to a particular issue is necessary and proper vis-à-vis federalism values. Yet the Court itself, even while it engages in a blend of formalist and functional reasoning in deciding many federalism cases, has not paid much attention to the sort of arguments with which this Article is concerned. Perhaps it is surprising, therefore, that the SAG amicus briefs engage in as much functional analysis as they do. But certainly it seems if the Court itself were to take such arguments seriously, when it otherwise takes care to note when a large number of SAGs advocate on behalf of the federal interest, then the SAG amicus briefs also would take those arguments more seriously and thus be more convincing.

V. CONCLUSION

SAGs have been actively filing amicus briefs before the Supreme Court, and other courts, for decades. These amicus briefs, not surprisingly, typically argue in favor of the state

²⁴⁰ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010). Alito earlier noted that there “is nothing new in the argument that, in order to respect federalism and allow useful state experimentation, a federal constitutional right should not be fully binding on the States.” *Id.* at 3046. While that argument had been “made repeatedly and eloquently by Members of this Court” (citing numerous opinions by Justice Harlan), it had been rejected. *Id.*

²⁴¹ *Id.* (quoting Texas Amicus Brief, *supra* note 223, at 23).

²⁴² *Id.* at 3114 (Stevens, J., dissenting).

²⁴³ *Id.* at 3131 (Breyer, J., dissenting).

interest when a court is confronted with a legal challenge to the exercise or application of federal law at the expense of state power. More recently in such federalism cases, large numbers of SAGs increasingly have joined in filing one amicus brief, and the Court episodically has been relying on such filings in the course of their opinions, especially when the amicus brief takes a position against the presumed state interest in a particular case. Reasons exist both to be in favor and skeptical of courts giving jurisprudential weight to SAG amicus briefs in those unusual situations. The best way to resolve those tensions is for the Court to give weight to a SAG amicus brief that argues against a state interest *only when* the brief specifically makes convincing functionalist arguments to support the proposition that all states should follow federal law on an issue and that the need for national uniformity outweighs the federalism values of interstate competition and safeguarding local variation that would be compromised.