



## ARTICLE

**The States' Interest in Federal Procedure**

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**Abstract.** Recent changes to federal procedure have alarmed state governments. In a series of cases decided in the past ten years, the U.S. Supreme Court has restructured basic procedural doctrines on personal jurisdiction, class actions, and pleading, among others. To signal their concern, dozens of state attorneys general have written amicus briefs in twelve out of the eighteen major procedure cases decided by the Supreme Court since 2007, demanding that federal courts refrain from remaking longstanding principles. Some state legislatures have threatened to invalidate procedural decisions through legislation, and even state courts have joined the effort—one state judge claimed that a recent class action decision was “contrary to every legal principle in the book, and I don’t care if the U.S. Supreme Court wrote it or not. It’s wrong.” Repeatedly, the states have expressed “alarm,” argued that some procedural changes are “deeply insulting,” and called some decisions “absurd,” even though many cases seemingly had no effect on state courts whatsoever. Why exactly are the states so interested in federal procedure?

This Article presents the first comprehensive study of the relationship between the states and federal procedure. This Article offers three contributions. First, it catalogs the states’ wide array of interventions into federal procedure to show that the states have a strong interest in recent procedural changes. Second, it builds a typology that explores the multifaceted ways in which federal procedure does in fact affect the states. This review exposes federal-state cross-currents rooted in legal, economic, and political dynamics. Surprisingly, although Democrats and Republicans are squarely divided on procedural issues, this Article finds that the states’ institutional interest in procedure trumps political ideologies; most state amicus briefs in this context have involved bipartisan coalitions.

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Third, this Article draws upon a wealth of federalism and administrative law scholarship to argue that scholars and federal actors should welcome the states' involvement in federal procedure. Giving the states a role would provide rich epistemic benefits, promote democratic values, and improve transparency at the Advisory Committee.

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## Introduction

Developments in the law of federal procedure have rarely been more important than in the past decade. Recent rulings by the U.S. Supreme Court have circumscribed access to justice and the role of litigation in enforcing social norms. In the wake of the 2014 decision in *Daimler AG v. Bauman*,<sup>1</sup> for example, companies gained a new defense against jurisdiction in U.S. courts, placing in jeopardy thousands of cases spanning fields as varied as terror finance, breach of contract, mass torts, and intellectual property.<sup>2</sup> Similarly, 2007's *Bell Atlantic Corp. v. Twombly*<sup>3</sup> and 2009's *Ashcroft v. Iqbal*<sup>4</sup> led to significant doctrinal changes to the motion to dismiss standard and a different calculation for *all* putative plaintiffs.<sup>5</sup> Extending this pattern, *Wal-Mart Stores, Inc. v. Dukes*<sup>6</sup> and *AT&T Mobility LLC v. Concepcion*<sup>7</sup> (both decided in 2011) made it more difficult for class action cases to survive in state and federal court.<sup>8</sup> These procedural changes have been powerful—upsetting all areas of substantive law and granting or denying justice based on what some would call technicalities.<sup>9</sup>

Scholars have addressed this procedural retrenchment from many angles,<sup>10</sup> but they have largely overlooked one key stakeholder: the states. That is not

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1. 134 S. Ct. 746 (2014).
  2. See *infra* notes 47-52 and accompanying text.
  3. 550 U.S. 544 (2007).
  4. 556 U.S. 662 (2009).
  5. See *infra* text accompanying notes 71-78.
  6. 564 U.S. 338 (2011).
  7. 563 U.S. 333 (2011).
  8. See *infra* notes 66-70 and accompanying text. See generally Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011) (discussing the implications of recent class action cases).
  9. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 4-5 (2010) (describing the goal of the Federal Rules of Civil Procedure as, among other things, avoiding technicalities).
  10. See, e.g., Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1082-99 (2015) (arguing that the Court's procedural reforms caused international legal "isolationism"); Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1551-80 (2014) (describing how institutional dynamics between courts and Congress shaped procedural retrenchment); Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317, 318 (2012) (arguing that the Roberts Court has succeeded in "closing the courthouse doors" through procedure); Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995, 1010-37 (2015) (discussing the effect of procedural retrenchment on transnational litigation); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 624-31 (2012) (discussing possible methods of reviving consumer
- footnote continued on next page*

unexpected. The states have no official role in federal procedure and, intuitively, seem to deserve none. After all, federal procedure governs mostly the technical rules of federal, not state, litigation. Because the states are sovereigns with their own court systems and can promulgate their own local procedural rules, we might expect them to be as interested in federal procedure as the United States is interested in French procedure. The states do not participate on the Advisory Committee on the Rules of Civil Procedure. Nor are state attorneys general (AGs) urged (as is the U.S. Solicitor General) to file amicus briefs before the Supreme Court in important procedure cases.<sup>11</sup> Indeed, legal scholars often assume that the states are uninterested in federal procedural developments and focus solely on how the federal branches shape procedure—consigning the states, and federalism concerns, to irrelevance in this context.<sup>12</sup>

Yet a review of major federal procedure cases decided since 2007 reveals a surprising fact: Large coalitions of states have written forceful amicus briefs in most of these cases; some state legislatures have introduced legislation aimed specifically at rejecting federal procedural retrenchment; and state judges have created workarounds to avoid it. There are countless examples spanning from procedural doctrines that directly affect the power of state courts to those that seemingly have *no impact on state courts whatsoever*. Why exactly are the states so interested in federal procedure?

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class actions in the aftermath of the Court's attacks on them); Miller, *supra* note 9, at 10 (criticizing recent changes to pleading standards as undermining litigation's ethos); Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 401-17 (2014) (discussing recent changes to class actions).

11. The Court seems especially likely to call for the views of the Solicitor General when a procedural question is tied up with foreign relations. *See, e.g., Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, No. 16-1220 (U.S. June 26, 2017) (inviting the Solicitor General to file briefs expressing the United States's views).
12. *Cf. Burbank & Farhang, supra* note 10, at 1562-80 (discussing congressional and judicial attempts to retrench federal procedure in the past few decades); Arthur R. Miller, Keynote Address, *McIntyre in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 477-79 (2012) (lamenting recent changes to federal procedure); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1856-77 (2014) (discussing a "new era" in federal procedure). Some scholars who have discussed federal-state relations in this context have addressed federalism in procedure generally or the states' internal rules of procedure. *See, e.g., Zachary D. Clopton, Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 423-45 (2018) (studying recent changes to state courts' internal rules of procedure); Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 711-17 (2016) (examining the interplay between federal and state rules of procedure); Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929, 1930-49 (2008) (discussing the interaction between principles of federalism and class action reform). This Article, by contrast, explores state attempts to influence federal procedure.

This Article presents the first comprehensive study of the relationship between the states and federal procedure. It offers three contributions: First, it catalogs the states' wide array of interventions into federal procedure to show that the states have a strong interest in recent procedural changes. Second, it builds a typology that explores the multifaceted ways in which federal procedure affects the states. This typology provides a reconceptualization of procedure and its multilayered consequences for both federalism and the states. Finally, it argues that the states ought to have an institutionalized role in the development of federal procedure.

This Article first demonstrates that the states' interest in federal procedure is broad and deep. The states have participated as amici in twelve out of the eighteen major Supreme Court procedure cases decided since 2007.<sup>13</sup> For example, sixteen states wrote an amicus brief in *Twombly* asking the Court to increase the burden of federal pleading standards, and forty-six states wrote in *Mississippi ex rel. Hood v. AU Optronics Corp.*<sup>14</sup> urging a narrow reading of the Class Action Fairness Act (CAFA) of 2005.<sup>15</sup> Beyond amicus briefs, state AGs have submitted policy letters and public comments to proposed changes to the Federal Rules of Civil Procedure and have even testified in congressional hearings.<sup>16</sup> State courts have also systematically rejected federal procedural changes, refusing to emulate the new class action and pleading standards in their state court rules.<sup>17</sup> Even state legislatures have played a role: The New York State Assembly introduced a bill to effectively reverse *Bauman's* tightening of general jurisdiction,<sup>18</sup> and the California and New Jersey legislatures attempted to skirt *Concepcion's* attack on class action litigation.<sup>19</sup> These developments necessitate an explanatory theoretical framework.

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13. See *infra* Appendix A; see also *infra* note 88 and accompanying text. It is not entirely clear given limitations in the data, but the states' interest as amici may be a recent development. In absolute terms, state merits amicus brief filings in Supreme Court cases have been relatively stable since the 1980s. See Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. REV. 1229, 1244 (2015) ("[T]he number of cases with state amici has not trended strongly either way from the 1980 Term to the 2013 Term."). However, the states' interest in federal procedure seems to have spiked in the past decade. See *infra* Appendix C, Figure C.2.

14. 134 S. Ct. 736 (2014).

15. See *infra* Part II.A; see also Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

16. See *infra* Part II.B.

17. See *infra* Part II.B.

18. See *infra* text accompanying notes 128-32.

19. See *infra* text accompanying notes 140-45. In discussing *Concepcion* as a class action case, this Article focuses on one particular effect of the arbitration-related decision. See *infra* Part II. Arbitration clauses can be an attempt by businesses to avoid the traditional expenses of litigation. But arbitration clauses that bar joinder, consolidation, or class arbitration can also be an attempt to avoid any effective pursuit of legal redress. See  
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After documenting the states' interest, this Article then deconstructs the states' interactions with federal courts and procedure.<sup>20</sup> That inquiry requires a new typology that identifies the wide array of connections and cross-currents between federal procedure and the states. I propose four broad theoretical and descriptive categories, placing the states as (i) consumers of federal court services (through the private enforcement of state law); (ii) competitors (as court providers) in the litigation market; (iii) two-sided repeat players in federal litigation; and (iv) political entities. The bulk of this Article defines and defends this typology, but a brief explanation of the four categories demonstrates why the present inquiry is especially useful and timely.

First, the states have shown deep concern with federal efforts to block private litigants' access to court. This anxiety is rooted in a state-level enforcement gap: Underfunded state administrative agencies and state AGs depend heavily on private litigants for the enforcement of state statutory provisions not only in state courts but also in federal courts. In other words, the states rely on private federal litigation to enforce state law. For decades, private litigants have been a key enforcement vehicle for states in areas as varied as wage-and-hour, environmental, and consumer protection law.<sup>21</sup> To the extent procedural retrenchment threatens private litigants' access to federal court, the states have sought to halt that process.

Second, among the most important and underexplored sources of state interest in federal procedure is the litigation market. Litigation operates like a market because plaintiffs—and to some extent, defendants—demand dispute resolution tribunals, and courts supply those tribunals. I extend this theoretical market-based model of litigation to place the states (as court providers) in competition with federal courts for business litigation and its positive spillover effects. These economic incentives are strengthened by broader federal-state competition for institutional power, a crucial aspect of the Framers' federalist vision.<sup>22</sup> This theoretical insight predicts that the states will oppose federal changes that come at the expense of their litigation market share. I then review recent developments that seem to validate this account: More than twenty

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generally J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015) (discussing the Court's shift from an arbitration jurisprudence founded on efficiency to one based on freedom of contract).

20. I use the umbrella term "federal procedure" to cover doctrines that apply only in federal court (like the Federal Rules, CAFA, or venue rules such as 28 U.S.C. § 1391) as well as federal doctrines that apply in state and federal courts alike because of the Supremacy Clause and the Fourteenth Amendment's Due Process Clause. However, this Article's main focus is on access-to-court procedural doctrines: jurisdiction, class actions, and pleading.

21. See *infra* Part III.A.

22. Cf. THE FEDERALIST NO. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

states have recently created state specialty business courts with the purpose of “generating litigation business for local lawyers”<sup>23</sup> and “curtail[ing] the increased use of the federal judicial system and alternative dispute resolution by business litigants.”<sup>24</sup> State judges have also sought to keep important cases in state court to enhance their national status and prestige.<sup>25</sup> Making these motivations explicit, a Philadelphia Court of Common Pleas judge recently stated that “the court’s budgetary woes could be helped by reviving Philadelphia’s role as the premier mass torts center in the country,’ that ‘we’re taking business away from other courts,’ and that ‘lawyers are an economic engine for Philadelphia.”<sup>26</sup> This impulse to keep certain cases in state court is sometimes in tension with the states’ attempts to improve access to federal court for state law claims.

Third, the states are two-sided repeat players in federal litigation, as defendants and as plaintiffs. Although at first blush the states might favor procedural barriers to prevent vexatious litigation against state governments—and various studies have documented the barrage of federal lawsuits states face on a yearly basis<sup>27</sup>—I discuss how they are also heavily interested in promoting access to federal court for a particularly powerful party: state pension funds. These funds have over \$2 trillion invested in the securities market and are heavily involved in federal securities litigation.<sup>28</sup> Vindicating the interests of

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23. See Omari Scott Simmons, *Delaware’s Global Threat*, 41 J. CORP. L. 217, 238 (2015); *infra* notes 217-18 and accompanying text; see also Lee Applebaum, *The Steady Growth of Business Courts*, in NAT’L CTR. FOR STATE COURTS, *FUTURE TRENDS IN STATE COURTS 2011: SPECIAL FOCUS ON ACCESS TO JUSTICE* 70, 70-73 (2011), <https://perma.cc/MD8U-BTMH>.

24. Andrew A. Powell, Comment, *It’s Nothing Personal, It’s Just Business: A Commentary on the South Carolina Business Court Pilot Program*, 61 S.C. L. REV. 823, 824 (2010) (citing Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147, 152 (2004)).

25. Cf. Gerhard Wagner, *The Dispute Resolution Market*, 62 BUFF. L. REV. 1085, 1129 (2014) (“[Judges] want to be respected for their abilities by the public at large and by their peer groups including fellow judges and members of the bar.”).

26. Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 288 (2016) (quoting Amaris Elliott-Engel, *For Mass Torts, a New Judge and a Very Public Campaign*, LEGAL INTELLIGENCER (Mar. 16, 2009), <https://perma.cc/AND3-PLHH>).

27. See, e.g., Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 124 n.18 (2011) (“For instance, out of 276,937 civil cases filed in United States District Courts between October 2008 and September 2009, perhaps half may have involved government parties: . . . [including] 273 cases that involved a challenge to the constitutionality of a state statute; 41,000 cases that involved petitions by state prisoners; and about 34,000 cases classified as civil rights, some portion of which might involve state defendants.”).

28. See Pew Charitable Trs., *2014 Snapshot of State Pension Funds* (2016), <https://perma.cc/H63Q-PXWC> [hereinafter *Pew Charitable Trs., 2014 Snapshot*]; *infra* notes 250, 262-63 and accompanying text. See generally PEW CHARITABLE TRS., *THE STATE PENSION*  
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these funds may have pushed the states to favor broader federal discovery, flexible class action requirements, and low pleading standards in the securities litigation context.<sup>29</sup> This may explain one of this Article's counterintuitive findings: While many scholars view the states as serving business interests,<sup>30</sup> this Article shows that states have disagreed with the U.S. Chamber of Commerce in most of the recent major procedure cases.<sup>31</sup> This finding challenges the idea that the states are captured by business interest groups.

Finally, another dynamic force in this context is rooted in state partisan pressures. Both major parties have adopted views on procedural issues: Republicans have embraced a restrictive view that encourages courts and Congress to limit litigation generally; Democrats have embraced the "open courts" paradigm that advocates a loosening of pleading and class action standards, among other things.<sup>32</sup> While this basic partisanship should have predictable results in the realm of advocacy on federal procedure, I show that the amicus briefs are inconsistent with a partisan explanation: The states' procedural positions have been surprisingly bipartisan. Might procedure be one of the last bastions of bipartisanship at the state level? I argue that at the very least, state institutional interests in federal procedure trump political ideologies. Indeed, federalism in civil procedure transcends political divides and can appeal to the traditional conservative preference for state power as well as to the liberal commitment to court access. In fact, liberal Justices have most often protected the states' role in this context: Justices Ginsburg, Breyer, and Sotomayor have explicitly defended the states' interest in maintaining open courts for state plaintiffs.<sup>33</sup>

Federal procedure, in short, has an array of effects on the states that are rooted in legal, economic, and political dynamics. The stakes for the states are high. Changes to federal procedure may hold in the balance the enforcement of state law, the economic health of state courts, and the pension funds of millions of state employees. The states' interests in federal litigation also intersect and come into conflict. These at-times-contradictory interests thus translate into state interventions in federal procedure that have an erratic and deeply conflicted feel—sometimes the states support higher pleading standards, but

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FUNDING GAP: 2014 (2016), <https://perma.cc/S726-BC3B> (discussing data as of fiscal year 2014 from all fifty state-run retirement systems).

29. See *infra* Part III.

30. See, e.g., Miller, *supra* note 12, at 479 ("It should be obvious that procedural stop signs primarily further the interests of defendants, particularly . . . large businesses and governmental entities.").

31. See *infra* note 276 and accompanying text.

32. See Glenn S. Koppel, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 PEPP. L. REV. 455, 474-75 (1997).

33. See *infra* Part IV.

other times they oppose them; sometimes they support a broad interpretation of specific jurisdiction, and other times they embrace a narrow view. All four categories in my typology actively interact in most procedure cases and together emphasize the primary motivators of the states' interest in federal procedure.

The typology also shines a new light on how different state actors respond to federal changes. For example, while this Article deals with states qua states,<sup>34</sup> in many of these procedure cases, state AGs—who in forty-three states are directly elected<sup>35</sup>—have taken the lead, participating in federal debates through amicus briefs, policy letters, and public comments. Because of state AGs' central role, this Article discusses the wide range of incentives pushing them to shape federal procedure. This extended discussion of state AGs' role in national debates is particularly timely: Democratic state AGs are aggressively employing federal litigation to check the Trump Administration.<sup>36</sup> This Article provides insights into the relevant motives behind state AGs' political role.

After laying the groundwork for the states' interest in federal procedure, I argue that the states ought to have an institutionalized voice in federal procedural debates. Civil procedure is unusual in failing to provide the states with avenues for input. The states are generally represented not only in federal substantive law through their influence on Congress but also in federal administrative law through official bureaucratic partnerships that give them a powerful voice.<sup>37</sup> In federal procedure, however, the Supreme Court and the Advisory Committee have occupied the field, shaping procedural devices through extensive rulemaking and judicial interpretation. This domination

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34. Although the states are certainly not monolithic, their unique role in our constitutional structure often gives them a common institutional outlook on federal procedure. But in more ways than one, the states are a *they*, not an *it*: Not only are there fifty states, but also each state is represented in procedural debates by its judiciary, legislature, executive (state AGs), and even nongovernmental interest groups. Cf. Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244, 249 (1992) (arguing that statutory interpretation designed to determine "legislative intent" is incoherent because a legislature is a collection of "many majorities . . . composed of many individuals" (emphasis omitted)). To overcome this diffusion problem, I focus on common institutional agendas that should influence state actors (AGs, judges, and legislators) as representatives of the institutions we call "states."

35. See *About NAAG*, NAT'L ASS'N ATT'YS GEN., <https://perma.cc/9K5Y-AGKY> (archived Apr. 26, 2018).

36. See, e.g., Vivian Yee, *To Combat Trump, Democrats Ready a G.O.P. Tactic: Lawsuits*, N.Y. TIMES (Dec. 14, 2016), <https://perma.cc/MVZ8-LM4V>.

37. See, e.g., Exec. Order No. 13,132, 3 C.F.R. 206 (2000), *reprinted in* 5 U.S.C. § 601 app. at 100 (2016) (obligating administrative agencies to evaluate the federalism consequences of any regulatory changes and to consult with state groups).

has left the states without sufficiently robust input channels—to the detriment of both state interests and the quality of federal procedure.

With this in mind, this Article draws upon a wealth of federalism and administrative law scholarship to argue that giving the states a voice in procedure would optimize procedural decisions at the federal level.<sup>38</sup> Procedure scholars have periodically debated the apparent absence of a “coherent normative theory of civil adjudication.”<sup>39</sup> Settling that debate is not my goal here. Instead, I focus on well-recognized ways to improve federal litigation, including better-informed rulemaking, increased access to justice, time and cost efficiency, and transparent procedural debates. Whether one focuses on longstanding procedural doctrines or recent retrenchment, there is reason to believe that the current method for developing procedure is stale and that federal institutions do not adequately internalize procedure’s effect on the states.<sup>40</sup>

More concretely, giving state actors a role in federal procedure—for example, through targeted notice and comment—can provide three major benefits: (i) rich epistemic input that can improve federal rulemaking (coming from a unique two-sided repeat player involved in federal litigation); (ii) democratic pluralism from elected state AGs in an area that lacks substantive input from elected officials; and (iii) a defense of state sovereignty. The design of class action litigation, discovery, pleading standards, and jurisdictional tests is currently in flux. State voices can be powerful contributors to this debate. For example, empirical and anecdotal evidence of discovery reform in the states<sup>41</sup> would bring a wealth of information to current Advisory Committee discovery debates. Yet there is currently no formalized state participation on the Advisory Committee.

For this reason, this Article makes three recommendations for reform to accommodate state interests in a more transparent and institutionalized manner: (i) formalizing the role of state officials in the Advisory Committee; (ii) promoting mandatory notice and comment for procedural reforms with federalism consequences; and (iii) embracing a judicial presumption (articulated by Justice Ginsburg) that courts should “interpret [the] Federal Rules with

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38. In many ways, the most relevant scholarship comes from administrative law, where scholars have increasingly studied the role of states in administrative agencies. *See, e.g.*, Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 987 (2014).

39. *E.g.*, Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 319-20 (2008).

40. *See, e.g.*, Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 448-66 (2013) (discussing the flaws of the current process, including the Advisory Committee’s politicization and its failure to deal with actual problems).

41. *See infra* notes 336-37 and accompanying text.

awareness of, and sensitivity to, important state regulatory policies.”<sup>42</sup> These three reforms would anchor principles of federalism and the states’ voice as important inputs in procedural debates.

Finally, a word about this Article’s methodology: Most of the critical information—amicus briefs, legislation, court decisions—is publicly available. I draw unique insights into federalism in procedure from a comprehensive review of the states’ amicus intervention in procedure cases. I do this by systematically reviewing all Supreme Court procedure cases since 1980, compiling state amicus briefs filed in the Court, and examining state AG partisan affiliations.<sup>43</sup> The account that follows also draws from background interviews with the head of the National Association of Attorneys General (NAAG), state AGs, and state solicitors general (SGs).

This Article proceeds as follows. Part I examines major procedural changes over the past decade, including a brief description of recent procedural retrenchment. Part II catalogs the states’ involvement in changes to personal jurisdiction, class actions, and pleading standards. Part III—the heart of this Article—then develops a typology of state interests. Finally, Part IV argues that the states should have a role in federal procedure and discusses the institutional value of federalism in this context.

## **I. The Recent History of Procedural Changes**

Before exploring the states’ pointed interventions, a brief description of recent procedural changes is in order. Addressing doctrines that for decades had been elaborated only by lower courts, the U.S. Supreme Court and Congress have recently tackled with unprecedented vigor some of the most controversial access-to-court procedural doctrines: personal jurisdiction (a threshold question in every case); class actions (often high-value and significant cases<sup>44</sup>); and pleading standards. Scholars have emphasized that these decisions have been doctrinally monumental.<sup>45</sup> Arthur Miller warned in 2010 that the

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42. See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 437 (2010) (Ginsburg, J., dissenting). Brooke Coleman has offered a similar suggestion. See Brooke D. Coleman, *Civil-izing Federalism*, 89 TUL. L. REV. 307, 355 (2014).

43. I also leverage existing datasets. See *infra* text accompanying note 417. For a complete explanation and the results of this systematic review, see Appendices A, B, and C below.

44. See Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 813 (2010) (detailing findings from a two-year period in the mid-2010s in which “[d]istrict court judges approved 688 class action settlements . . . involving over \$33 billion”).

45. Any attempt to conduct a survey of the literature on these procedural issues would inevitably be incomplete. For examples of recent pleading literature, see William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 694 nn.3-5 (2016). For examples on class actions, see Linda S. Mullenix, *No Exit: Mandatory Class Actions in*  
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Court was on a roll, pursuing changes to procedure that represented “the latest steps in a long-term trend that has favored increasingly early case disposition” and that signified a “judicial shift[] in the interpretation of the [Federal] Rules and the erection of other procedural barriers to a meaningful day in court.”<sup>46</sup> Below, this Article discusses how courts and Congress have retrenched major procedural doctrines.

*Personal jurisdiction:* In the past seven years, the Court has remade traditional conceptions of both *specific* (or “case-linked”) personal jurisdiction—which exists when claims arise out of a defendant’s contacts with the forum state—and *general* (or “all-purpose”) jurisdiction.<sup>47</sup> In 2011’s *Goodyear Dunlop Tires Operations, S.A. v. Brown*<sup>48</sup> and 2014’s *Bauman* the Court clarified fifty years of general jurisdiction “contacts” jurisprudence by holding that all-purpose jurisdiction is appropriate over a company only when it is “essentially at home.”<sup>49</sup> The Court dispensed with the need for lower courts to assess and weigh the business interactions between a corporation and a state and concluded that a typical company is at home in only two “paradigm[atic]” and “ascertainable” locations: the state of its formal incorporation and the state in which it has its principal place of business.<sup>50</sup> These two cases, especially *Bauman*, cleared up uncertainty over the prevailing “business contacts” test and altered the dominant paradigm, with significant consequences; in effect, for most large domestic corporations, the number of states in which they could be sued went from a few dozen to one or two.<sup>51</sup> For international companies, the

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*the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177, 183 n.16. For examples on general jurisdiction, see Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1347 nn.16-18 (2015). And for examples on transnational procedure trends, see Bookman, *supra* note 10, at 1085 nn.23-28.

46. Miller, *supra* note 9, at 9-10.

47. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 754-56 (2014) (distinguishing general from specific personal jurisdiction).

48. 564 U.S. 915 (2011).

49. See *Bauman*, 134 S. Ct. at 761 (quoting *Goodyear*, 564 U.S. at 919); see also *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558-59 (2017) (affirming the “at home” test).

50. See *Bauman*, 134 S. Ct. at 760. The *Bauman* Court also left open the possibility of jurisdiction existing in other places “in an exceptional case.” *Id.* at 761 n.19.

51. See Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 228 (2014) (“*Bauman* is likely to be [a] disruptive case, . . . especially . . . in cases brought against large multinational corporations outside of their home state. Given their extensive business activities, such corporations would not have previously contested personal jurisdiction in any state . . . . *Bauman* now gives such corporations a ground to contest jurisdiction outside of their home states . . . .” (footnote omitted)). Under the “business contacts” test in force before *Bauman*, relatively weak jurisdictional links—such as exporting products to a state, having active employees therein, or even operating a small branch office—subjected foreign companies to personal jurisdiction for suits brought in that

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effect was even more pronounced: Domestic plaintiffs simply became unable to sue unless they could prove the existence of specific jurisdiction.<sup>52</sup>

Adding to this contraction of general jurisdiction, the Court also narrowed the reach of specific jurisdiction in three cases: *J. McIntyre Machinery, Ltd. v. Nicastro*,<sup>53</sup> *Walden v. Fiore*,<sup>54</sup> and *Bristol-Myers Squibb Co. v. Superior Court*.<sup>55</sup> In all three cases, the Court weakened prevailing specific jurisdiction theories. Specifically, a plurality of the Court in *Nicastro* held that a New Jersey court could not exercise jurisdiction over a foreign manufacturer that did not explicitly target that state as a market for its products.<sup>56</sup> In *Fiore*, the Court unanimously held that a federal district court in Nevada could not assert jurisdiction over a Georgia police officer who confiscated money from two Nevada citizens in Atlanta because the officer did not intend to create jurisdictional contacts in Nevada.<sup>57</sup> And in *Bristol-Myers Squibb*, the Court limited the ability of California courts to assert jurisdiction over the claims of out-of-state plaintiffs with injuries identical to those of in-state plaintiffs.<sup>58</sup> These three cases limit the power of courts to hear disputes not directly related to in-state contacts.

*Class actions*: Around 2005, Congress and the Supreme Court energized an existing campaign to limit the reach of class action litigation.<sup>59</sup> In the space of a few years, Congress enacted one major statute, CAFA,<sup>60</sup> and the Court decided several cases—almost all authored by the late Justice Scalia—that directly

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state. See, e.g., Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U.L. REV. 491, 525-31 (2004).

52. Cf. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73 (1985) (elaborating the requirements for a plaintiff to sue a defendant who is not at home in a given jurisdiction).

53. 564 U.S. 873 (2011).

54. 134 S. Ct. 1115 (2014).

55. 137 S. Ct. 1773 (2017).

56. See 564 U.S. at 887 (plurality opinion).

57. See 134 S. Ct. at 1119-20, 1126.

58. See 137 S. Ct. at 1781 (faulting the state court for finding specific personal jurisdiction “without identifying any adequate link between the State and the nonresidents’ claims”).

59. See Burbank & Farhang, *supra* note 10, at 1603-04 (“[S]ome Justices in the Court’s conservative majority have made little effort to conceal their hostility to class actions and the lawyers who bring them.”). See generally Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495 (2017) (discussing the long-term counterrevolution against private lawsuits and class actions).

60. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.); see also 28 U.S.C. § 1332(d) (2016) (providing for federal jurisdiction over certain interstate class actions and outlining rules under which federal district courts may or must decline to exercise jurisdiction).

targeted various aspects of the modern class action. In many of these cases, the Court engaged in procedural rulemaking through adjudication—in other words, it changed the meaning of Rule 23 of the Federal Rules through cases rather than through the more laborious Advisory Committee process.<sup>61</sup>

CAFA effectively federalized interstate class actions—it allowed removal of large class action claims from state to federal court—and explicitly sought to tackle the long-term growth of state class action cases.<sup>62</sup> The statute's most important provision expanded federal courts' diversity jurisdiction to encompass all class actions with amounts in controversy above \$5 million where there is minimal diversity—that is, where any member of the class has different state citizenship than any defendant.<sup>63</sup> CAFA did not target state law or court procedure; instead, it merely expanded federal jurisdiction to enable removal of more class action cases from state courts.<sup>64</sup> Both the House and Senate Judiciary Committees explained that CAFA's main goal was to limit the proliferation of state class actions by giving defendants the opportunity to remove their cases to federal court.<sup>65</sup>

The Supreme Court followed CAFA with a series of decisions limiting federal and state class action litigation with almost surgical precision. *Concepcion* held that the Federal Arbitration Act (FAA) preempts state doctrines

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61. The Advisory Committee is a creature of the Rules Enabling Act (REA) and subsequent amendments, most notably in 1988. See Rules Enabling Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072); Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 401, 102 Stat. 4642, 4648-50 (1988) (codified as amended at 28 U.S.C. §§ 2072-2074, 2077). The Committee is composed mostly of federal judges, academics, and practitioners. It meets biannually to consider rule amendment proposals. Any accepted proposal is then included in a draft, along with an explanatory note, that is subject to notice and comment. After the comment period, the amendment must be reexamined and then reviewed sequentially by the Standing Committee, the Judicial Conference, the Supreme Court, and Congress. See Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103-19 (2002) (exploring the civil procedure rulemaking process).
62. See *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 952 (9th Cir. 2009) (“CAFA was designed primarily to curb perceived abuses of the class action device which, in the view of CAFA’s proponents, had often been used to litigate multi-state or even national class actions in state courts.”); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1823-24, 1852 (2008) (noting that CAFA “was the product of an extended and well-organized political campaign” and was motivated by the “shift” of class action cases into state court).
63. See 28 U.S.C. § 1332(d)(2).
64. Giving the federal district courts original jurisdiction over interstate class actions, *see id.*, enables removal of more cases because actions filed in state court may be removed to federal court where federal district courts “have original jurisdiction,” *id.* § 1441(a).
65. See Purcell, *supra* note 62, at 1883-87 (citing H.R. REP. NO. 108-144, at 7-8, 12, 16 (2003); S. REP. NO. 109-14, at 8, 14 (2005); and S. REP. NO. 108-123, at 10, 14-15, 54 (2003)) (discussing CAFA’s legislative history).

barring class arbitration waivers in consumer contracts; in effect, under the FAA, states could no longer prohibit the corporate practice of inserting anti-class action arbitration clauses—which necessarily led to the removal of a substantial number of cases from state courts to arbitral tribunals.<sup>66</sup> *Dukes* increased the burden of proving common class injuries, weakening large class action cases involving employees in multiple states.<sup>67</sup> *Standard Fire Insurance Co. v. Knowles* expanded CAFA's reach (and therefore contracted state class actions) by holding that a party may not defeat diversity jurisdiction under CAFA by stipulating damages under \$5 million.<sup>68</sup> *Spokeo, Inc. v. Robins* used Article III standing doctrine to increase the burden on class plaintiffs to prove concrete injuries.<sup>69</sup> And *Comcast Corp. v. Behrend* increased the difficulty of satisfying the predominance requirement for a damages class action under Rule 23 of the Federal Rules.<sup>70</sup> In all of these cases, the Court used a variety of tools to weaken the availability of the class action device.

*Pleading*: Like class actions, pleading is a creature of the Federal Rules. The modern Rule 8 requires only that a pleading contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>71</sup> Beginning in 1957, the Court interpreted this to mean that a complaint need only “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”<sup>72</sup> After decades of stability under this easy-to-meet “notice pleading” paradigm, between 2007 and 2009 the Court made it substantially more difficult to satisfy pleading requirements with its decisions in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,<sup>73</sup> *Twombly*,<sup>74</sup> and *Iqbal*.<sup>75</sup> In *Tellabs*, the Court affirmed a congressional increase of pleading standards for securities claims. Specifically, *Tellabs* held that the Private Securities Litigation Reform Act

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66. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011); Gilles & Friedman, *supra* note 10, at 627 (“All of the doctrinal developments of recent years circumscribing the reach of class actions pale in import next to the game-changing edict [by the *Concepcion* Court] that companies with possible exceptions that warrant close scrutiny may simply opt out of potential liability by incorporating class action waiver language in their standard form contracts . . .”).

67. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011).

68. See 133 S. Ct. 1345, 1350 (2013).

69. See 136 S. Ct. 1540, 1545 (2016). *Spokeo* presented a novel question of standing under Article III but indirectly also addressed private class actions brought to protect personal data. See *id.* at 1544.

70. See 133 S. Ct. 1426, 1436-37 (2013).

71. FED. R. CIV. P. 8(a)(2).

72. See, e.g., *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (emphasis added), *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

73. See 551 U.S. 308, 322-24 (2007).

74. See 550 U.S. at 556-57.

75. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).



(PSLRA) of 1995 imposed a standard requiring sufficient evidence such that a court could make “powerful or cogent” inferences of scienter, not just “reasonable” ones.<sup>76</sup> In other words, the Court validated Congress’s heightened pleading standards for securities claims. By contrast, in *Twombly*, the question focused entirely on the Rule 8 standard and the adequacy of mere “notice pleading.” In a tour de force of procedural reform, the *Twombly* Court imposed a new, higher pleading standard that required claims “with enough factual matter” to suggest that a plaintiff could prove her claim and a showing of “plausibility of ‘entitle[ment] to relief.’”<sup>77</sup> *Twombly* involved allegations of antitrust violations, but two years later, in *Iqbal*, the Court affirmed that the plausibility pleading standard applied to all areas of law, not just antitrust cases.<sup>78</sup>

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All of these cases, and others, exemplify what scholars call the Court’s procedural retrenchment.<sup>79</sup> *Goodyear* and *Bauman* narrowed the reach of general jurisdiction; *Nicastro* and *Fiore* did the same for specific jurisdiction; *Concepcion* and *Dukes* eliminated a wide swath of class action cases; and *Twombly* and *Iqbal* replaced “notice” with “plausibility” pleading. The scholarly reaction has been consistent, describing these changes as monumental, anti-litigation, political, and revolutionary.<sup>80</sup> As John Coates recently noted, “Overall, procedure scholars from all sides of the political spectrum have agreed that the Roberts Court has, in its procedural decisions, exhibited a pro-business bent, consistent with a political (attitudinal) model.”<sup>81</sup> On the other hand, other scholars have argued that some of these changes have had little effect on case outcomes or on litigation activity more generally.<sup>82</sup> Although there is disagreement over the precise empirical impact of these decisions, as a whole these changes have made it more difficult for claims to survive in federal court.

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76. See 551 U.S. at 323-24; see also Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 and 18 U.S.C.).

77. 550 U.S. at 556-57 (alteration in original) (quoting *DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999)).

78. See 556 U.S. at 678-79.

79. See sources cited *supra* note 10.

80. See, e.g., Miller, *supra* note 9, at 9-10 (“Federal civil procedure has been politicized and subjected to ideological pressures.”).

81. John C. Coates IV, *Securities Litigation in the Roberts Court: An Early Assessment*, 57 ARIZ. L. REV. 1, 30 (2015).

82. See, e.g., William H.J. Hubbard, *The Effects of Twombly and Iqbal*, 14 J. EMPIRICAL LEGAL STUD. 474, 511 (2017) (finding that *Twombly* and *Iqbal* had almost no measurable effect on most case outcomes).

## II. The States' Attempts to Influence Federal Procedure

This Part explores an overlooked player in all these procedural changes: the states. Among the widespread scholarly reaction to procedural retrenchment, there has been almost no consideration of the effect these rules might have on state institutions. This scholarly void demonstrates that the current procedural paradigm is divorced from the states' interests. Below, I show that throughout these major retrenchment cases the states have been active participants in federal procedural debates.<sup>83</sup> Part II.A addresses the filing of amicus briefs by states in procedure cases, including the types of cases in which they file. Part II.B then identifies state legislation, court decisions, and policy pronouncements on federal procedure. These sections set up the heart of this Article: Part III's analysis of the states' interest in federal procedure.

### A. State Amicus Briefs

This Subpart catalogs how in most of the cases described above, state AGs have authored extensive amicus briefs at the merits stage full of rich information and pointed arguments. These amicus interventions are not a trivial act. State AGs expend political capital when they participate in amici coalitions, and they have intricate review processes that require approval by multiple state actors, including state SGs and their internal staffs.<sup>84</sup> Amicus briefs are generally public and are sometimes discussed in the popular press.<sup>85</sup> State AGs thus pick their cases carefully to avoid diluting their voice. We can therefore assume that amicus participation indicates a nontrivial commitment to a particular view.

The analysis below and the following conclusions are based on my review of all procedure cases decided by the Supreme Court since 1980 (approximately eighty-four cases).<sup>86</sup> I systematically reviewed the participation of state coalitions as amici during this period. My research is the first effort to comprehensively study the states' amicus interest in procedure, providing insights into when and why the states file these briefs.

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83. This Article focuses specifically on areas of federal procedure that affect access to courts and have generated the most scholarly debate: personal jurisdiction, class actions, and pleading. Note that I consider the District of Columbia a state for purposes of this Article.

84. Some of the conclusions I draw here are informed by my background conversations with former AGs and SGs. *E.g.*, Telephone Interview with Former State Attorney Gen. (Jan. 11, 2017) (on file with author); Telephone Interview with Former State Solicitor Gen. (Oct. 7, 2016) (on file with author). I granted the interviewees anonymity to facilitate candid discussion.

85. *See, e.g.*, Alexander Burns, *How Attorneys General Became Democrats' Bulwark Against Trump*, N.Y. TIMES (Feb. 6, 2017), <https://perma.cc/UN4A-LLBL>.

86. For a discussion of this dataset, see Appendix B below.

My main finding is that state amicus briefs dealing with procedural issues increased from an intermittent few in the 1980s and 1990s to more than a dozen after 2006.<sup>87</sup> In most important procedure cases in the past decade, large coalitions of states have submitted extensive briefs. Their rate of participation is impressive: Twelve out of the eighteen major procedure cases since 2007 have provoked state amicus briefs with an average of twenty-one states per case.<sup>88</sup> Although the states have not uniformly supported one side, they have been at odds in only three out of twelve cases.<sup>89</sup> The diversity of participation

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87. See *infra* Appendix C, Figure C.2.

88. See, e.g., Brief of Amici Curiae States of Massachusetts et al. in Support of Respondent, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339), 2015 WL 5316995 [hereinafter Brief of Massachusetts et al. in *Spokeo*]; Brief of Illinois et al. as Amici Curiae in Support of Respondents, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016) (No. 14-1146), 2015 WL 5783075 [hereinafter States' Brief in *Bouaphakeo*]; Brief of Amici Curiae State of Oregon et al. Supporting Respondent, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (No. 13-317), 2014 WL 526438 [hereinafter States' Brief in *Halliburton*]; Brief of South Carolina & 20 Other States as Amici Curiae in Support of Respondent, *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014) (No. 12-842), 2014 WL 1319147 [hereinafter States' Brief in *NML Capital*]; Brief of Alabama et al. as Amici Curiae in Support of Petitioner, *Walden v. Fiore*, 134 S. Ct. 1115 (2014) (No. 12-574), 2013 WL 2481929 [hereinafter States' Brief in *Fiore*]; Brief of Amici Curiae State of Illinois & 45 Other States in Support of Petitioner, *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014) (No. 12-1036), 2013 WL 3935881 [hereinafter States' Brief in *Hood*]; Brief of the State of Ohio & 21 Other States as Amici Curiae in Support of Respondents, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (No. 12-133), 2013 U.S. S. Ct. Briefs LEXIS 673 [hereinafter States' Brief in *Italian Colors*]; Brief of Alabama et al., *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588 (2013) (No. 11-1450), 2012 WL 5351712 [hereinafter Brief of Alabama et al. in *Knowles*]; Brief of Amici Curiae Arkansas et al. in Support of Respondents, *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (No. 09-1343), 2010 WL 5192281 [hereinafter States' Brief in *Nicastro*]; Brief for the State of Illinois et al. as Amici Curiae in Support of Respondents, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 3973890 [hereinafter Brief of Illinois et al. in *Concepcion*]; Brief for the State of Arkansas et al. as Amici Curiae in Support of Respondents, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007) (No. 06-484), 2007 WL 760410 [hereinafter Brief of Arkansas et al. in *Tellabs*]; Brief for Ohio & 23 Other States, Territories & Commonwealths as Amici Curiae in Support of Respondents, *Tellabs*, 551 U.S. 308 (No. 06-484), 2007 WL 760409 [hereinafter Brief of Ohio et al. in *Tellabs*]; Brief of the Commonwealth of Virginia & 15 Other States as Amici Curiae in Support of the Petitioners, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2503552 [hereinafter States' Brief in *Twombly*]. For the average number of states per case, see Table 1 below (indicating that there were 250 state amici distributed over a total of 12 cases).

89. States disagreed in *Spokeo*, *Knowles*, and *Concepcion*. For *Spokeo*, compare Brief of Massachusetts et al. in *Spokeo*, *supra* note 88, at 3 (arguing that Article III standing was satisfied), with Brief of Alabama et al. as Amici Curiae in Support of Petitioner at 3-6, *Spokeo*, 136 S. Ct. 1540 (No. 13-1339), 2015 WL 4194152 [hereinafter Brief of Alabama et al. in *Spokeo*] (arguing against standing). For *Knowles*, compare Brief of Alabama et al. in *Knowles*, *supra* note 88, at 4 (arguing for reversal), with Amicus Curiae Brief of the States of Arkansas et al. in Support of the Respondent at 6, *Knowles*, 568 U.S. 588 (No. 11-1450), 2012 WL 6100040 [hereinafter Brief of Arkansas et al. in *Knowles*]

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is notable: Every state has signed on to at least one brief, and most states (thirty) have participated in five or more cases.<sup>90</sup>

The states' interventions have mostly been to oppose procedural re-trenchment. In seven out of the twelve procedure cases, the states promoted an expansive view of civil procedure and rejected the anti-litigation positions.<sup>91</sup> However, the states' amicus briefs have an erratic feel because they often embrace conflicting interests. For example, in *Nicastro*, eighteen states expressed an interest in protecting the reach of products liability laws and argued for a flexible interpretation of "purposeful availment," the process by which an out-of-state defendant intentionally establishes contacts with a forum state and thereby subjects itself to specific personal jurisdiction there.<sup>92</sup> Ultimately, a plurality of Justices disagreed with the states and limited the reach of specific jurisdiction.<sup>93</sup> Just three years later, in *Fiore*, eighteen states (of which *nine* had signed on to the *Nicastro* amicus brief) took a position contrary to the one half of them had taken in *Nicastro*, arguing this time in favor of a narrow conception of specific jurisdiction.<sup>94</sup> In *Fiore*, the states were concerned about the extension of jurisdiction by state courts over state officials from other states.<sup>95</sup> This time, the Court agreed with the states.<sup>96</sup>

Cases addressing the reach of the class action device have generated a considerable amount of interest from the states, including partisan coalitions pitted against each other. Beyond *Concepcion*, in which eight states defended class actions as an important consumer protection tool while two attacked

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(arguing for affirmance). For *Concepcion*, compare Brief of Illinois et al. in *Concepcion*, *supra* note 88, at 5 (arguing against preemption under the FAA), with Brief for Amici Curiae the States of South Carolina & Utah in Support of Petitioner at 6-9, *Concepcion*, 563 U.S. 333 (No. 09-893), 2010 WL 3198844 [hereinafter Brief of South Carolina & Utah in *Concepcion*] (arguing in favor of preemption).

90. See *infra* Appendix A; see also *infra* Figure 1 (showing repeat state filers).

91. See States' Brief in *Halliburton*, *supra* note 88, at 2-4; States' Brief in *NML Capital*, *supra* note 88, at 2-3; States' Brief in *Italian Colors*, *supra* note 88, at 1-2; Brief of Alabama et al. in *Knowles*, *supra* note 88, at 3-4; States' Brief in *Nicastro*, *supra* note 88, at 1-4; Brief of Illinois et al. in *Concepcion*, *supra* note 88, at 5-6; Brief of Arkansas et al. in *Tellabs*, *supra* note 88, at 1-2; Brief of Ohio et al. in *Tellabs*, *supra* note 88, at 1.

92. See States' Brief in *Nicastro*, *supra* note 88, at 1-4.

93. See *Nicastro*, 564 U.S. at 887 (plurality opinion).

94. See States' Brief in *Fiore*, *supra* note 88, at 1-3. Arizona, Hawaii, Kentucky, Maine, Michigan, North Dakota, South Carolina, Tennessee, and Utah all signed on to both briefs.

95. See *id.* at 1-2, 11-17 (arguing in particular that the lower court's extensive view of personal jurisdiction "would have especially bad effects on state and local law-enforcement officers").

96. See *Walden v. Fiore*, 134 S. Ct. 1115, 1126 (2014).

them,<sup>97</sup> forty-six states successfully argued in *Hood* that CAFA should not be interpreted to disturb the authority “inherent in the supreme power of every state” to bring *parens patriae* actions in state court.<sup>98</sup> Thirteen states defended class actions in *Spokeo* as a necessary complement to government enforcement,<sup>99</sup> while eight states disagreed and argued that class actions “endanger the judicial process by creating immense pressure to settle.”<sup>100</sup> States also participated in at least four other class action cases, including some with no direct implications for state courts, such as *American Express Co. v. Italian Colors Restaurant*<sup>101</sup> and *Halliburton Co. v. Erica P. John Fund, Inc.*<sup>102</sup>

The states’ intervention in *Tyson Foods, Inc. v. Bouaphakeo*<sup>103</sup> exemplifies how their interest in procedure extends beyond any apparent effect on the states. That case involved overtime wages claims by employees of a meat processing facility.<sup>104</sup> Plaintiffs, as a class, argued that time spent “donning and doffing protective equipment” constituted compensable work under the Fair Labor Standards Act (FLSA).<sup>105</sup> At the class certification stage, the issue boiled down to whether a representative sample of the average time it took employees to put the gear on was “an impermissible means of establishing

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97. Compare Brief of Illinois et al. in *Concepcion*, *supra* note 88, at 1 (defending the importance of class actions), with Brief of South Carolina & Utah in *Concepcion*, *supra* note 89, at 1-2 (asserting that class actions “are not inherently the best means to ensure prompt and fair recovery”).

States also intervened in related cases. Eighteen states dueled over whether class plaintiffs could avoid CAFA removal to federal court by stipulating that class damages would not reach beyond the \$5 million threshold. Compare Brief of Alabama et al. in *Knowles*, *supra* note 88, at 1-4 (fifteen states opposing this “stipulation maneuver”), with Brief of Arkansas et al. in *Knowles*, *supra* note 89, at 1-4 (three states supporting such stipulations). The Court ultimately held that a party may not defeat diversity jurisdiction under CAFA by stipulating damages under \$5 million. *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 590 (2013). Similarly, twenty-one states defended class actions in the securities context in *Halliburton*. See States’ Brief in *Halliburton*, *supra* note 88, at 1-4.

98. See States’ Brief in *Hood*, *supra* note 88, at 1-2 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982)). The question presented in *Hood* was whether CAFA’s provisions covering removal of mass actions included actions filed by state AGs on behalf of state beneficiaries. See *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 739 (2014). The Court ultimately agreed with the states. See *id.* at 742-44.

99. See Brief of Massachusetts et al. in *Spokeo*, *supra* note 88, at 3.

100. Brief of Alabama et al. in *Spokeo*, *supra* note 89, at 16.

101. 133 S. Ct. 2304 (2013).

102. 134 S. Ct. 2398 (2014). For more information on state participation in the twelve procedure cases, see Table 1 below.

103. 136 S. Ct. 1036 (2016).

104. *Id.* at 1042.

105. *Id.*; see also Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (2016)).

classwide liability” under Rule 23.<sup>106</sup> Unexpectedly, a coalition of eight state amici strenuously defended class actions in the wage-and-hour context, arguing in favor of a flexible interpretation of Rule 23—a federal rule that does not apply in state court.<sup>107</sup> The Court agreed and held that such a sample may be appropriate.<sup>108</sup>

The states have also penned amicus briefs in other cases that seem to have no relationship to state interests, including *Twombly*, *Tellabs*, and *Republic of Argentina v. NML Capital, Ltd.*<sup>109</sup> In *Twombly*, sixteen state amici took a strong position supporting higher pleading standards, relying on the states’ interest “in protecting their citizens, corporate or otherwise, from the prospect of unfounded costly lawsuits.”<sup>110</sup> Conversely, in *Tellabs*, thirty states argued that they had an interest in low pleading standards under the PSLRA and federal securities laws, pointing to the states’ interest in protecting their citizens from securities fraud.<sup>111</sup> Likewise, in *NML Capital*, twenty-one states asserted an interest in the availability of transnational postjudgment enforcement discovery in federal courts under Rule 69 of the Federal Rules.<sup>112</sup>

Table 1 below summarizes the states’ interventions; it provides, for each case, the states’ positions, the Court’s holding, and the size of the state amici coalitions.

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106. See *Bouaphakeo*, 136 S. Ct. at 1048-49.

107. See States’ Brief in *Bouaphakeo*, *supra* note 88, at 1-2, 26-27.

108. See *Bouaphakeo*, 136 S. Ct. at 1045-49.

109. 134 S. Ct. 2250 (2014).

110. States’ Brief in *Twombly*, *supra* note 88, at 16.

111. Brief of Arkansas et al. in *Tellabs*, *supra* note 88, at 30; Brief of Ohio et al. in *Tellabs*, *supra* note 88, at 11 (expressing “alarm[]” about higher pleading standards).

112. See States’ Brief in *NML Capital*, *supra* note 88, at 1-3.

Likewise, the states participated as amici in three other Supreme Court cases that only indirectly involved procedural issues. See Brief of Amici Curiae Arkansas et al. in Support of Respondents, *Fox v. Vice*, 563 U.S. 826 (2011) (No. 10-114), 2011 WL 465732; Brief of the States of Oregon et al. Amici Curiae in Support of Respondent, *Philip Morris USA Inc. v. Williams*, 556 U.S. 178 (2009) (No. 07-1216), 2008 WL 4580042; Brief of New York et al. as Amici Curiae in Support of Respondent, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006) (No. 04-1371), 2005 WL 3543088.

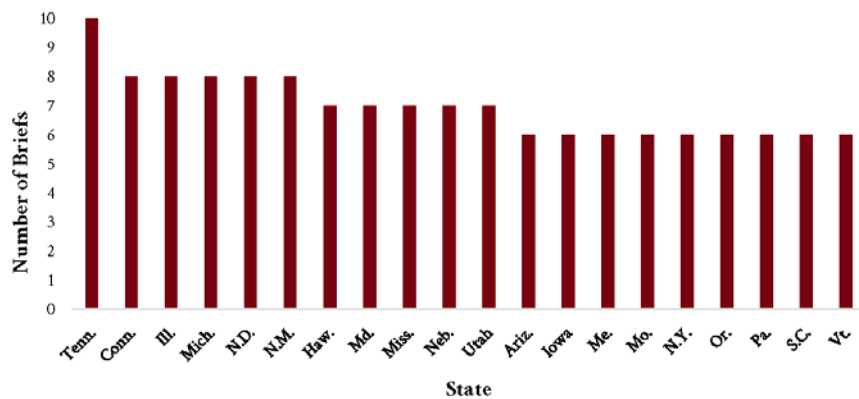
**Table 1**  
Procedural Changes (2007-2016) and States' Briefs as Amici

Area	Recent Federal Changes	Amici	States' Position(s)
<b>Personal Jurisdiction</b>	<i>Nicastro</i> (2011)* (limits specific jurisdiction)	18 states	Expansive reading of purposeful availment* ✓
	<i>Fiore</i> (2014) (limits specific jurisdiction)	19 states	Narrow reading of specific jurisdiction✓
<b>Class Actions</b>	<i>Concepcion</i> (2011) (preempts state law doctrines that prevent consumer arbitration)	10 states	Eight in favor of class actions* Two against✓
	<i>Italian Colors</i> (2013)† (enforces arbitration clauses in antitrust context)	22 states	Against arbitration class action waivers* ✓
	<i>Knowles</i> (2013)* (prohibits stipulation of damages to avoid CAFA jurisdiction)	18 states	Fifteen against stipulations✓ Three in favor* ✓
	<i>Halliburton</i> (2014)† (affirms theory of liability but allows defenses prior to class certification)	20 states	In favor of securities class action litigation✓
	<i>Hood</i> (2014)* (limits CAFA's reach with respect to state <i>parens patriae</i> actions)	46 states	Against a broad interpretation of CAFA✓
	<i>Bouaphakeo</i> (2016)† (bolsters required showing under Rule 23)	8 states	In favor of flexible Rule 23 showing✓
	<i>Spokeo</i> (2016)† (makes class action standing more difficult to show)	22 states	Fourteen in support of standing* Eight against✓
<b>Pleading</b>	<i>Twombly</i> (2007)† (increases pleading standards)	16 states	In favor of higher pleading standard✓
	<i>Tellabs</i> (2007)† (affirms heightened PSLRA pleading)	30 states	Against a heightened PSLRA standard* ✓
<b>Discovery</b>	<i>NML Capital</i> (2014)† (affirms importance of broad postjudgment discovery)	21 states	In favor of broad discovery✓

✓ denotes a successful argument; ✕, an unsuccessful argument; \*, a case that originated in state court; and †, a case that does not directly affect state courts.

The states' amicus briefs seem to indicate a deep interest in these procedural developments; it seems unlikely that the states' activity can be explained by an overall increase in their rate of amicus brief filings. My systematic review of amicus briefs filed with the Supreme Court finds that in absolute terms, state filings at the merits stage have been relatively stable since 1980, averaging around thirty per year.<sup>113</sup> Further, as mentioned above, the diversity of state participation is remarkable. Certain states have signed on to as many as eight or ten amicus briefs. Figure 1 below displays the most common repeat filers.

**Figure 1**  
Merits Briefs in Procedure Cases by Top Filing States Since 2007



The literature on state amicus briefs generally concludes that these briefs are highly influential.<sup>114</sup> Kelly Lynch has found that Justices and their clerks take special note of state AG amicus briefs: “Following the solicitor general, amicus briefs filed by states [are] the next most frequently cited government entity as being important enough to always warrant close consideration.”<sup>115</sup> The Court even welcomes state AG intervention by exempting them from the

113. See *infra* Appendix C, Figure C.1. I based my count on data from Paul Nolette, *State Litigation During the Obama Administration: Diverging Agendas in an Era of Polarized Politics*, 44 PUBLIUS: J. FEDERALISM 451, 455-56, 468 n.5 (2014). Margaret Lemos and Kevin Quinn, however, have found this number to be closer to twenty per year. See Lemos & Quinn, *supra* note 13, at 1244.

114. See, e.g., Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 787-819 (2000) (conducting an empirical analysis of the impact of amicus briefs and noting scholarship discussing how states are “especially successful in influencing the Court through amicus curiae submissions”).

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



requirement that an amicus must obtain consent of the parties or of the Court.<sup>116</sup>

In line with these findings, the amicus briefs on procedural issues outlined above seemed to have had a significant impact. The Court adopted the states' position—as judged by the side that received the most support from the states—in only seven of the twelve cases.<sup>117</sup> However, in the vast majority of procedure cases, the parties' briefs discussed the states' amicus briefs, and in most of these cases, the states raised arguments that no other party or amicus had.<sup>118</sup> Notably, in *Twombly*, the petitioner's merits reply brief prominently cited the states' amicus brief multiple times, noting for example that “the states' attorneys general . . . have urged this Court to reverse the Second Circuit's decision,”<sup>119</sup> and Justice Stevens discussed the states' interests in his dissent.<sup>120</sup>

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116. See SUP. CT. R. 37.4 (exempting the U.S. Solicitor General, federal agencies, states, and local government entities from the motion-for-leave requirement).

117. See *supra* Table 1 (indicating that the states' argument was successful in *Bouaphakeo*, *Fiore*, *Halliburton*, *Hood*, *Knowles*, *NML Capital*, and *Twombly*). For comparison,

In recent decades, when on petitioner's side . . . , the Solicitor General won 75% of the time, compared to petitioners otherwise winning 61% of the time, and when the Solicitor General filed on respondent's side, that position prevailed . . . 52.4% of the time, compared to a success rate of only 35.4% for respondents in the absence of the Solicitor General's support.

Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1494 (2008).

118. See, e.g., Reply Brief of Petitioner at 8 n.6, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016) (No. 14-1146), 2015 WL 6445775 (“Nor is it necessary to lower the burden of proof of liability to enable effective enforcement that will deter wage-and-hour law violations.” (citing States' Brief in *Bouaphakeo*, *supra* note 88, at 26-32)); Reply Brief for Petitioner at 11, *Walden v. Fiore*, 134 S. Ct. 1115 (2014) (No. 12-574), 2013 WL 4587967 (“[Eighteen] states (and the District of Columbia) have argued forcefully that the interests to which respondents point are ‘outweighed by their interest in protecting their residents from being haled, unfairly, into other States’ courts as defendants,’ and not a single state has chosen to support respondents.” (citation omitted) (quoting States' Brief in *Fiore*, *supra* note 88, at 1)); Reply Brief for Petitioner at 1, *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014) (No. 12-1036), 2013 WL 5532272 (“Ultimately, this case is about federalism, as demonstrated by the 46 States supporting Petitioner as amici. States have compelling reasons to file *parens patriae* actions in state courts and should not be made dependent on federal courts to enforce state law.”); Reply Brief for Petitioners at 14, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 3265610 [hereinafter *Twombly* Reply Brief] (“The United States [and] the states' attorneys general . . . have urged this Court to reverse the Second Circuit's decision precisely because, by failing to require adequate factual allegations in support of an antitrust conspiracy claim, the court's standard ‘perversely risks turning a sign of healthy competition [parallel conduct] into a green light for strike suits and *in terrorem* settlement demands.” (third alteration in original) (quoting Brief for the United States as Amicus Curiae Supporting Petitioners at 25, *Twombly*, 550 U.S. 544 (No. 05-1126), 2006 WL 2482696)).

119. *Twombly* Reply Brief, *supra* note 118, at 14-17 (“As the United States and the attorneys general of 16 states have concluded, the allegations in this complaint do not support any such reasonable inference [of conspiracy].”).

120. *Twombly*, 550 U.S. at 578-79 (Stevens, J., dissenting) (“[Twenty-six] States and the District of Columbia utilize as their standard for dismissal of a complaint the very

*footnote continued on next page*

Litigants have even mentioned the states' briefs during oral argument. For example, in one case, petitioner's counsel pointed the Justices to a particular page in the states' brief and quoted directly from it;<sup>121</sup> in another, counsel argued in favor of principles of federalism "as evidenced by the 46 States" who intervened as amici.<sup>122</sup> In short, the amicus briefs influenced the cases and the arguments.

To sum up, these state attempts to influence federal procedure expose a deep interest in the development of procedural jurisprudence. The states have publicly urged the Court to recognize their views in its decisions and have endeavored to shape federal litigation.

#### B. State Legislation, Court Decisions, and Policy Statements

The states have also actively responded to procedural changes through legislation, state court decisions, and policy pronouncements. Only six states have adopted *Twombly's* plausibility pleading standard as their own, and courts in nineteen states have explicitly criticized it.<sup>123</sup> Recent changes to the law surrounding personal jurisdiction and class actions have provoked even stronger responses. As explained in this Subpart, instead of concentrating on reforming state court procedure, state legislatures and courts have actively resisted recent changes to federal procedure. Indeed, state courts have taken surprisingly extreme measures to limit the reach of federal procedural decisions. Below, I analyze the effect of *Bauman*, CAFA, and *Concepcion* in this context.

Changes to general jurisdiction wrought by *Bauman*<sup>124</sup> have shifted the focus of jurisdiction analysis from federal constitutional law to state law. This has given state legislatures and courts remarkable power—which they seem poised to exercise—to shape jurisdiction in state and federal courts. As explained above, *Bauman* held that general jurisdiction is appropriate only where a defendant is "at home"—for a corporation, its state of incorporation and the state in which it has its principal place of business.<sup>125</sup>

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language the majority repudiates . . . . I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so.").

121. See Transcript of Oral Argument at 59, *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (No. 09-1343), 2011 WL 87745, at \*57.

122. See Transcript of Oral Argument at 3, *Hood*, 134 S. Ct. 736 (No. 12-1036), 2013 WL 6908179.

123. See Clopton, *supra* note 12, at 427 & tbl.A.

124. See *supra* notes 47-52 and accompanying text.

125. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 751, 760-62 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

Rather than heralding a smooth remake of general jurisdiction, however, lower courts and litigants have struggled to adapt to the new standard. This tussle has involved a surprising interaction between federal jurisprudence and state law because, in their efforts to avoid *Bauman*, plaintiffs around the country have argued that registration to do business in a state—a statutory prerequisite to conducting business in all fifty states—constitutes “consent” to general jurisdiction.<sup>126</sup> Last year, the Second Circuit weighed in on the “nettlesome and increasingly contentious question” of consent, ultimately determining that it is a question of state law.<sup>127</sup>

Responding to these changes, the New York State Legislature has considered bills to amend New York’s registration-to-do-business statute such that a foreign corporation’s registration to do business in New York would “constitute[] consent to the jurisdiction of the courts of this state for all actions against such corporation.”<sup>128</sup> New York’s Advisory Committee on Civil Practice explicitly recommended adoption of the bill.<sup>129</sup> Its main sponsor argued that jurisdiction over New York-licensed companies “will save New York residents . . . the expense and inconvenience of traveling to distant

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126. All fifty states require that out-of-state companies register to do business therein and appoint an agent for service of process. See Kevin D. Benish, Note, *Pennoyer’s Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler AG v. Bauman*, 90 N.Y.U. L. REV. 1609 app. at 1647-61 (2015) (listing all state statutes). For an articulation of the consent theory of general jurisdiction, see *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 631-33 (2d Cir. 2016). See also *Int’l Harvester Co. of Am. v. Kentucky*, 234 U.S. 579, 589 (1914) (“We are satisfied that the presence of a corporation within a State necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the State . . . .”); *St. Clair v. Cox*, 106 U.S. 350, 356 (1882) (discussing how a state may grant foreign corporations permission to do business within its territory in exchange for a promise to consent to jurisdiction); *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1856) (providing that one state’s corporation can transact business in a second state “only with the consent, express or implied, of” the second state and subject to the second state’s conditions). Some courts have cast doubt on the extent to which *International Harvester* and similar cases remain good law. See, e.g., *Barrett v. Union Pac. R.R. Co.*, 390 P.3d 1031, 1040 n.19 (Or. 2017).

127. See *Brown*, 814 F.3d at 622-23. Various practitioner reports have noted that litigants continue to look for ways to avoid *Bauman*. See, e.g., *2016 Year-End Transnational Litigation Update*, GIBSON DUNN (Apr. 18, 2017), <https://perma.cc/9U7B-3ETQ> (“[L]itigants continue to search for methods to secure jurisdiction over defendants . . . .”); Solomon B. Shinerock & Kelly Newsome, *The Real Impact of Daimler v. Bauman*, LAW360 (Jan. 5, 2015, 1:27 PM EST), <https://perma.cc/Z7SX-STMW> (mentioning the jurisdictional “difficulties litigants will likely face in pursuing judgment enforcement actions and discovery against non-U.S. defendants and third parties”).

128. See Assemb. 6714, 2015-2016 Leg., Reg. Sess. § 2 (N.Y. 2015).

129. See Memorandum in Support of Legislation, Assemb. 6714 (N.Y. 2016), <https://perma.cc/4QAR-KQVM> (“This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of his Advisory Committee on Civil Practice.”).

forums” and that *Bauman* did not address consent to jurisdiction.<sup>130</sup> Although the state assembly passed the bill by a vote of 135 to 7,<sup>131</sup> it has yet to pass in the state senate.<sup>132</sup>

Charting a parallel path, several state court decisions have embraced unusual theories in order to avoid *Bauman*. At least ten states have embraced the consent theory to find general jurisdiction.<sup>133</sup> Recently, two New York courts held that *Bauman* did not “change the law with respect to personal jurisdiction based on consent.”<sup>134</sup> Similarly, the Montana Supreme Court dodged *Bauman* by interpreting it as applying *only* to cases with transnational elements.<sup>135</sup> And the California Supreme Court expanded specific jurisdiction beyond recognizable limits in order to skirt *Bauman* and allow claims against a company for acts that took place outside of the state.<sup>136</sup> In *Bristol-Myers Squibb*, the California Supreme Court found specific jurisdiction—despite the lack of a purposeful availment-type connection between the out-of-state plaintiffs’ claims and the state—because of the defendant company’s “nationwide marketing, promotion, and distribution” of a drug.<sup>137</sup> In other words, the court

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130. *Id.* The legislation’s sponsor also points out that New York courts have overwhelmingly supported the consent-to-general-jurisdiction theory for decades. *See id.* (citing *Robfogel Mill-Andrews Corp. v. Cupples Co.*, 323 N.Y.S.2d 381, 382-83 (Sup. Ct. 1971); *Karius v. All States Freight, Inc.*, 26 N.Y.S.2d 738, 742 (Sup. Ct. 1941); and RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 44 (AM. LAW INST. 1971)).

131. *See S04846 Floor Votes*, N.Y. ST. ASSEMBLY, <https://perma.cc/FR8J-P7CF> (archived Apr. 21, 2018).

132. *See S04846 Floor Votes*, N.Y. ST. ASSEMBLY, <https://perma.cc/MJV5-2MYQ> (archived Apr. 21, 2018); *see also S04846 Summary*, N.Y. ST. ASSEMBLY, <https://perma.cc/2KVE-FCSN> (archived Apr. 21, 2018).

133. *See Clopton*, *supra* note 12, at 441-42, 442 n.260.

134. *Bailen v. Air & Liquid Sys. Corp.*, No. 190318/12, 2014 WL 3885949, at \*4 (N.Y. Sup. Ct. Aug. 5, 2014); *accord B&M Kingstone, LLC v. Mega Int’l Commercial Bank Co.*, 15 N.Y.S.3d 318, 322-24 (App. Div. 2015).

135. *See Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 6 (Mont. 2016), *rev’d*, 137 S. Ct. 1549 (2017). For a discussion of the wider impact of *Bauman* on transnational litigation, including discovery, see Diego Zambrano, *A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery*, 34 BERKELEY J. INT’L L. 157, 164-67 (2016) (addressing the relationship between personal jurisdiction and discovery).

136. *See Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874, 890-91 (Cal. 2016), *rev’d*, 137 S. Ct. 1773 (2017). State court challenges to Supreme Court personal jurisdiction decisions are nothing new; they trace all the way back to *Pennoyer v. Neff*, 95 U.S. 714 (1878). *See* Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1309-13 (2017) (noting that some state courts “resisted” *Pennoyer* “for decades” and “obstinately rejected *Pennoyer*’s due process language”).

137. *See* 377 P.3d at 888-91.

converted specific jurisdiction into something more akin to pre-*Bauman* general jurisdiction.<sup>138</sup> This prompted a reversal from the Supreme Court.<sup>139</sup>

State legislatures and courts have been hives of activity in response to class action retrenchment as well. The Supreme Court's decision in *Concepcion*, which promoted the enforcement of arbitration provisions to the detriment of class action cases,<sup>140</sup> has been the primary catalyst here. State legislatures in California, New Jersey, and New York have considered bills to limit the reach of *Concepcion*, with California's bill making denials of motions to compel arbitration unappealable until final judgment.<sup>141</sup> California's bill passed in the state assembly but was ultimately rejected by the state senate.<sup>142</sup> In the past few years, the California legislature has successfully passed several bills that limited or regulated arbitration in certain contexts,<sup>143</sup> but a bill that limited mandatory arbitration in employment contracts was vetoed by the governor.<sup>144</sup> Further, the California legislature has refused to amend current laws barring consumer arbitration, leading Justice Ginsburg to note that "despite this Court's rejection of the [California anti-arbitration] rule in *Concepcion*, the California Legislature has not capitulated; it has retained without change [its] class-waiver prohibition."<sup>145</sup>

State courts have continued the struggle, engaging in a "tug-of-war" with the Court by developing theories that avoid *Concepcion* or cabin it.<sup>146</sup> The courts of last resort in Kentucky, New Hampshire, and North Carolina, as well as lower courts in California, have invalidated arbitration clauses for various reasons;<sup>147</sup>

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138. For the state of general jurisdiction law in the corporate context before *Bauman*, see note 51 above.

139. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781, 1784 (2017).

140. See *supra* note 66 and accompanying text.

141. See Assemb. 1062, 2011-2012 Leg., Reg. Sess. (Cal. 2011); Gen. Assemb. 4097, 216th Leg., 2014-2015 Leg. Sess. (N.J. 2015); Assemb. 8784, 2017-2018 Leg., Reg. Sess. (N.Y. 2017); Assemb. 5240, 2017-2018 Leg., Reg. Sess. (N.Y. 2017); see also Gilles & Friedman, *supra* note 10, at 653-54 (discussing the California bill).

142. See *AB-1062: Public Social Services; Status*, CAL. LEGIS. INFO., <https://perma.cc/5S5K-TBYF> (archived Apr. 21, 2018).

143. See Act of Oct. 4, 2017, ch. 480, 2017 Cal. Stat. 3627 (codified at CAL. CIV. PROC. CODE § 1281.2 (West 2018)); Act of Sept. 25, 2016, ch. 632, 2016 Cal. Stat. 4541 (codified at CAL. LAB. CODE § 925 (West 2018)); Act of Sept. 25, 2016, ch. 626, 2016 Cal. Stat. 4533 (codified at CAL. CIV. PROC. CODE § 1282.5).

144. See Assemb. 465, 2015-2016 Leg., Reg. Sess. (Cal. 2015); *AB-465: Contracts Against Public Policy; Status*, CAL. LEGIS. INFO., <https://perma.cc/X46S-263H> (archived Apr. 21, 2018).

145. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 474 n.2 (2015) (Ginsburg, J., dissenting).

146. See James Dawson, Comment, *Contract After Concepcion: Some Lessons from the State Courts*, 124 YALE L.J. 233, 234 (2014).

147. See *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 313 (Ky. 2015), *rev'd in part, vacated in part, and remanded sub nom. Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017); *Finn v. Ballentine Partners, LLC*, 143 A.3d 859, 869-72 (N.H. 2016);

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the Washington Supreme Court created a case-by-case approach to avoid what it perceived to be *Concepcion's* ban on only blanket or “overbroad” anti-arbitration approaches;<sup>148</sup> the New Jersey Supreme Court held consumer arbitration clauses unenforceable in certain contexts;<sup>149</sup> and the Missouri Supreme Court held that *Concepcion* does not cover arbitration clauses in contracts of adhesion.<sup>150</sup> In response to these developments, the U.S. Supreme Court has repeatedly intervened to swat down these *Concepcion*-avoiding theories.<sup>151</sup>

Beyond legislation and state court decisions, state attempts to influence federal procedure extend to other tools, including policy pronouncements. For example, a coalition of eighteen state AGs called on the Consumer Financial Protection Bureau (CFPB) to adopt rules that would effectively overrule *Concepcion* in the context of contracts for consumer financial products and services.<sup>152</sup> Similarly, powerful state actors publicly opposed early versions of CAFA because it “would unilaterally transfer jurisdiction of a significant category of cases from state to federal courts.”<sup>153</sup> Table 2 below summarizes the states' interventions in procedure.

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King v. Bryant, 795 S.E.2d 340, 350-52 (N.C.), *cert. denied*, 138 S. Ct. 314 (2017); Dawson, *supra* note 146, at 236-37, 237 nn.22-24 (collecting California lower court decisions).

148. See *Gandee v. LDL Freedom Enters.*, 293 P.3d 1197, 1202-03 (Wash. 2013).

149. See *Atalese v. U.S. Legal Servs. Grp.*, 99 A.3d 306, 309 (N.J. 2014).

150. See *Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 493 (Mo. 2012).

151. See, e.g., *Kindred Nursing Ctrs.*, 137 S. Ct. at 1425, 1427; *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015).

152. See Letter from Maura Healey, Attorney Gen. of Mass., et al. to Richard Cordray, Dir., and Monica Jackson, Office of the Exec. Sec'y, Consumer Fin. Prot. Bureau 1, 6-7 (Aug. 11, 2016), <https://perma.cc/2T22-S8FQ>.

153. See *Interstate Class Action Jurisdiction Act of 1999 and Workplace Goods Job Growth and Competitiveness Act of 1999: Hearing on H.R. 1875 and H.R. 2005 Before the H. Comm. on the Judiciary*, 106th Cong. 14 (2000) (statement of David A. Brock, President, Conference of C.J.s).

**Table 2**  
Procedural Changes and the States' Interventions

Area	Recent Federal Changes	Forms of State Influence	State Position
<b>Personal Jurisdiction</b>	<i>Bauman</i> (limits general jurisdiction)	State registration statutes, New York bill, state court cases	Varied; some in favor of broader jurisdiction
<b>Class Action</b>	CAFA (expands federal jurisdiction over class action cases)	State court cases, state civil procedure, letter by state actors	Varied; some in favor of state class action litigation
	<i>Concepcion</i> (preempts state law doctrines that prevent consumer arbitration)	California bill, New Jersey bill, state court cases	Some state courts have circumvented <i>Concepcion</i>
	Growth of consumer arbitration	Public comments	Strong defense of class action litigation
<b>Pleading</b>	<i>Twombly</i> (increases pleading standards)	State court rejection of plausibility pleading	Strong defense of notice pleading

\* \* \*

This Part has demonstrated that changes in federal civil procedure have prompted concern among the states. Notably, in challenging *Spokeo*, *Italian Colors*, and other cases, state legislatures and courts have inserted themselves into a debate about federal, and not just state, procedure. Indeed, state amici's attempts to influence federal procedure run the gamut from doctrines that apply only in federal courts—such as pleading under Rule 8 of the Federal Rules, transnational discovery under Rule 69, and class action requirements under Rule 23—all the way to due process notions of personal jurisdiction that apply in both federal and state courts. Even in areas where the states are directly affected, such as due process and arbitration, why did state amici's interest spike in 2006? Moreover, that the states have similar interests in all of these doctrines is quite puzzling. Why would the states mind whether the federal pleading standard at issue in *Twombly* is notice or plausibility? Similarly, *Bouaphakeo* and *NML Capital* dealt with federal rules that apply only in federal court. Why exactly are the states concerned with recent developments in federal procedure?

### III. Typology of State Interests in Federal Procedure

This Part provides a typology of state interests in an effort to explain how changes to federal procedure can affect the states. The typology challenges the foundational assumption behind the states' current isolation from federal procedure: that the states have little at stake in the specific rules that govern litigation in federal court. I first explain the simple account of the states' role in federal procedure before jumping into the states' interests: Part III.A describes the states' interest in the private enforcement of state law in federal court; Part III.B describes institutional competition between state and federal courts for business litigation; Part III.C explores the role of the states as two-sided repeat players; and finally, Part IV.D details the role of political partisanship in procedure.

Before analyzing the states' role, two points of clarification are in order. First, in constructing this typology, this Article focuses on the states as institutions. As mentioned above, although the states are not an *it* but a *they*,<sup>154</sup> there are common institutional pressures that apply to the states in the context of federal procedure. Many of the accounts discussed below involve concerted action by state legislatures, executives, and courts. In some areas, however, I do focus on specific state actors—such as state AGs or state judges—and the forces that drive their common goals and outlooks with respect to federal procedure. I do this both because state AGs and state judges have particular incentives to influence federal litigation and because they are sometimes the only state players who can do so. I also focus on areas where *most* states—not just California, New York, or Delaware—have expressed concerns.

Second, the typology is not meant to be an exhaustive or even a causal account of the states' interests. Instead, it aims to analyze the most salient institutional interactions between the states and federal courts that *should* influence how the states react to procedural changes. In simpler terms, the typology is focused on what is at stake for the states in federal procedure. But it is undoubtedly true that state actors may be motivated by other factors. For example, there is one potential state motive I will leave largely unexplored: the states' tendency to emulate or replicate the Federal Rules. Scholars have long noted that this state modeling is both informal—in that state courts sometimes follow the reasoning of federal procedural decisions—and formal—in that at least twenty-three states borrow from or replicate most of the Federal Rules.<sup>155</sup>

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154. See *supra* note 34.

155. See, e.g., Dodson, *supra* note 12, at 711-18 (discussing how states faced with state procedural rules that “mirror[] the federal rule[s]” often treat federal case law “as presumptively controlling”); John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1425 (1986) (discussing “the 23 federal replica jurisdictions” as well as states that have adopted significant portions of federal procedure law). *But see* John B. Oakley, *A Fresh footnote continued on next page*



While this may give the states an added interest in how the Federal Rules are interpreted or changed, the twenty-three state “replicators” were barely more likely to intervene as amici than other states.<sup>156</sup> Some scholars have also shown that the states have mostly refused to emulate recent procedural retrenchment.<sup>157</sup> For these reasons I emphasize other accounts.

Before proceeding, it is important to first outline what I call the “simple account” of the states in federal procedure. There are two foundational premises behind the states’ noninvolvement in federal procedure. First, the Framers designed diversity jurisdiction to provide a neutral forum for interstate quarrels and to avoid bias against out-of-state litigants.<sup>158</sup> Federal courts, therefore, are deliberately isolated from the states’ possibly parochial interests. Second, and most importantly, given that the states have their own local court systems with local procedural rules, one might expect the states to be generally uninterested in the development of federal procedure (especially class actions or pleading standards). The simple account of state behavior thus assumes that state officials do not mind what happens to federal procedure as long as those rules apply only in federal court. Due process-based rules (such as personal jurisdiction) and FAA preemption might be exceptions because they directly apply to state courts.

But this Article demonstrates that the states in fact are (i) engaged in a dialogue with federal institutions about the contours of civil procedure (and not just responding by changing their state rules of procedure) and (ii) expressing similar concerns about access to court, federal-state competition, and the states’ role as repeat players. In other words, the states’ interests are similar in the cases that affect them directly and those that affect them indirectly.

Departing from this simple default of state noninterest, there are several possible cases where the states might pay attention. Below, I review four major

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*Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 355-59 (2002/2003) (“[I]t is arguable that there are no longer any true replicas of the [Federal Rules] to be found among the local procedural systems of the fifty states and the District of Columbia.”).

156. Using the data from Appendix A below, I compared the amicus filing rates of John Oakley’s twenty-three state rule replicators, *see* Oakley, *supra* note 155, at 355-57 (listing Alabama, Alaska, Arizona, Colorado, the District of Columbia, Hawaii, Indiana, Kentucky, Maine, Massachusetts, Minnesota, Montana, New Mexico, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wyoming), with the remaining states and found an unimportant difference. Taking into account that each state could have signed on to a procedure brief in approximately eighteen procedure cases, replicators participated in 121 out of 414 (29%) opportunities while the remaining states participated in 129 out of 504 opportunities (26%).

157. *See, e.g.*, Clopton, *supra* note 12, at 423-45.

158. *See, e.g.*, THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 22, at 477-79.

categories of state interests that are not mutually exclusive. As I will explain, in some cases the interests are complementary and in others they are in tension—indeed, they seem to be in direct conflict with one another at times—but on the whole, these categories give the states a rich and varied perspective on federal litigation.

A. The Private Enforcement of State Law in Federal Court

One possibility is that the states are interested in federal procedure because private litigants enforce state law in federal courts. Scholars have long noted that the U.S. legal system relies on private litigation instead of administrative action as a vehicle for the enforcement of public law and policy.<sup>159</sup> This system is largely the result of congressional choices in favor of ex post private enforcement rather than ex ante government regulation.<sup>160</sup> These choices have produced a nation with a smaller administrative state than those of its European counterparts but which has a much larger private litigation apparatus.<sup>161</sup> Private enforcement involves disputes between private litigants that nonetheless promote statutory goals and produce positive social externalities. For that reason, courts have sometimes labeled private enforcement litigants “private Attorney[s] General[.]”<sup>162</sup>

For several decades, private enforcement has been popular in state legislatures, courts, and administrative agencies.<sup>163</sup> For example, California unfair

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159. See SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 60, 64-65 (2010) (exploring the rise of private enforcement); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 6-9 (2d prtg. 2003); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1033-37, 1043-47 (1968); Miller, *supra* note 9, at 71-72 (“[T]he federal courts are instruments for the private enforcement of public law and policy . . . . What seems to be increasingly overlooked is that the modes of civil procedure are the mechanisms for operating an important societal regulatory system.”); Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 597-607 (2005); see also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288-1304 (1976) (analyzing public law litigation generally).

160. See J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1140 (2012).

161. See *id.* at 1140, 1148, 1214; see also Burbank & Farhang, *supra* note 10, at 1547 (discussing “the rise of the litigation state” in the United States (capitalization altered)).

162. See, e.g., *Associated Indus. of N.Y. State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), *vacated as moot per curiam*, 320 U.S. 707 (1943); see also William B. Rubenstein, *On What a “Private Attorney General” Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2133-37 (2004) (providing a historical overview and typology of the concept of private attorneys general).

163. Stephen Burbank and Sean Farhang have shown that congressional reliance on private litigation to enforce federal statutes “exploded in the late 1960s” and thereafter as a result of conscious choices by Congress. See Burbank & Farhang, *supra* note 10, at 1547.

*footnote continued on next page*

competition law allows suits for “any unlawful, unfair or fraudulent business act or practice” to be brought by private parties.<sup>164</sup> Likewise, forty states and the District of Columbia have passed wage-and-hour statutes to regulate the labor market through private claims.<sup>165</sup> Recently, scholars have noted that state statutes with private rights of action have proliferated in areas as varied as employment, securities fraud, antitrust, and environmental law.<sup>166</sup>

The states’ overt reliance on private enforcement may be explained by budget constraints.<sup>167</sup> Many state AGs are chronically underfunded, especially after the 2007-2008 financial crisis and ensuing recession.<sup>168</sup> As a result, state AGs may face significant resource constraints unparalleled in the federal government.<sup>169</sup> Indeed, the states routinely admit that their administrative agencies lack funding and depend on private litigants.<sup>170</sup> This creates an

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But “state legislatures, state courts, and state administrative agencies” also “create[] private attorneys general.” Rubenstein, *supra* note 162, at 2130-31.

164. See CAL. BUS. & PROF. CODE § 17200 (West 2018), *invalidated in part as preempted by* Media.net Advert. FZ-LLC v. NetSeer, Inc., 198 F. Supp. 3d 1083 (N.D. Cal. 2016); *id.* § 17203 (providing for injunctive relief and that “[a]ny person may pursue representative claims or relief on behalf of others” provided certain standing requirements are met), *invalidated in part as preempted by* Guadagno v. E\*Trade Bank, 592 F. Supp. 2d 1263 (C.D. Cal. 2008); *id.* § 17204 (providing the standing requirements for representative actions under section 17203).

165. See States’ Brief in *Bouaphakeo*, *supra* note 88, at 10-11, 18-22; *id.* at 11 n.13 (collecting statutes).

166. See, e.g., Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 12-13 (2002); Miller, *supra* note 9, at 76.

167. Cf. FARHANG, *supra* note 159, at 71-72, 81 (discussing, but ultimately finding no support for, the hypothesis that legislatures turn to private enforcement “because it shifts the costs of regulation away from the state and to private parties”).

168. See *Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 31, 39-41 (2012) (statement of Amy Widman, Assistant Professor of Law, Northern Illinois University College of Law) (noting that state AGs “are often underfunded and understaffed”). For the effects of the Great Recession on state budgets in general and on state judicial systems in particular, see note 310 and accompanying text below.

169. Cf. Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 696 (2003) (“While state antitrust enforcers enjoy [a few] comparative advantages, federal enforcers enjoy boundless advantages. The two federal antitrust enforcement agencies . . . enjoy comparatively massive resources . . . .”); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 752, 761 (2011) (noting that “state and federal agencies differ along various axes, including their size, resources, degree of specialization, transparency, [and] political affiliation” and that “state attorneys general face resource constraints that limit the scope of possible enforcement actions”).

170. See, e.g., States’ Brief in *Bouaphakeo*, *supra* note 88, at 18-22.

enforcement gap that pushes the states to embrace a private enforcement regime through litigation in state and federal court.<sup>171</sup>

A key development in this context is that state private enforcement cases often end up in federal court. Much of this is due to CAFA, supplemental jurisdiction, and liberal removal rules that force state plaintiffs to litigate in federal court.<sup>172</sup> State plaintiffs pursuing broad remedies typically file both state and federal claims. Indeed, more than half of all class complaints filed in federal court in the consumer financial context assert concurrent state law claims.<sup>173</sup> State wage-and-hour statutes are largely enforced along with FLSA claims in federal court.<sup>174</sup> And even when putative class actions originally filed in state court are removed to and then denied certification in federal court, they are not remanded to state court.<sup>175</sup> Given existing constitutional limits, there is little state legislatures or courts can do to keep these cases in state courts. As a result, the states' ex post private regulatory systems are to some extent channeled through federal courts.

Beyond an interest in private enforcement, state officials have electoral reasons to maintain access to court for private litigants. The simplest explanation, as Burbank and Farhang argue, is that “[r]etrenching rights is electorally dangerous” because “people are substantially more likely to mobilize

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171. See, e.g., *Sams v. State Attorneys Gen. (In re Cardizem CD Antitrust Litig.)*, 481 F.3d 355, 357 (6th Cir. 2007) (involving AGs from all fifty states and the District of Columbia joining litigation in federal district court); Settlement Agreement Between Plaintiff States & Bristol-Myers Squibb Co. et al. Regarding Buspar at 9-10, *Alabama v. Bristol-Myers Squibb*, No. 1:01-CV-11401 (S.D.N.Y. Mar. 14, 2003) (setting out the terms of a settlement between state AGs and pharmaceutical companies); Gilles & Friedman, *supra* note 10, at 668-69, 668 n.206 (“[I]n recent years, the states’ major pharmaceutical-drug antitrust cases have followed on-going private litigations and were generally settled along with the private actions.” (alteration in original) (quoting Jay L. Himes, *When Caught with Your Hand in the Cookie Jar . . . Argue Standing*, 41 RUTGERS L.J. 187, 217 (2009))); Miller, *supra* note 9, at 73 (“[T]here are numerous state law claims—often substantively parallel to federal claims—raising important public policy issues of state law that are heard in the federal courts.”); see also Steven B. Hantler et al., *Is the “Crisis” in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121, 1159 & nn.174-77 (2005) (listing examples of state AGs piggybacking on regulatory and litigation activity by federal entities).

172. See generally EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958* (1992) (discussing extensively the relationship between a “social litigation system” and diversity jurisdiction and removal).

173. See CONSUMER FIN. PROT. BUREAU, *ARBITRATION STUDY: REPORT TO CONGRESS* § 6.5.1, at 19-21, 20 fig.1, 21 fig.2 (2015), <https://perma.cc/L5CF-C8RZ>.

174. See *infra* text accompanying notes 186-88.

175. See Clopton, *supra* note 12, at 444 & n.281 (collecting cases).

to avoid losing existing rights and interests than they are to secure new ones.”<sup>176</sup> The states may therefore promote open courts for their citizens.

This account of the states’ reliance on private enforcement would predict that the states will intervene in federal procedure when changes affect the power of state plaintiffs to bring private enforcement claims—in areas like wage-and-hour or securities litigation—in federal court.

A systematic review of the states’ asserted interests, as contained in the amicus briefs, and of the states’ arguments in many of these cases indicates that states’ views of private enforcement do seem to influence their outlook on federal procedure. As described in Part I above, recent procedural changes implicate the ability of plaintiffs to access courts and consequently limit the power of private attorneys general. Whether in the form of more demanding pleading standards, stricter class action rules, or more stringent general jurisdiction requirements, such procedural barriers make it more difficult for putative plaintiffs to bring meritorious claims in both state and federal court.<sup>177</sup> Consider *Twombly*’s ratcheting up of pleading standards from simple notice to plausibility or *Concepcion*’s and CAFA’s limitations on state class actions. Scholars have widely recognized that these changes have been anti-litigation.<sup>178</sup> Miller and others have pointedly argued that *Twombly* and CAFA strike directly at our private litigation regulatory system.<sup>179</sup> Indeed, they also affect state private enforcement systems by stripping cases from both federal and state courts. This means that contrary to the expectations of state legislatures, state statutes may be systematically underenforced. Even more,

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176. STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 220-21 (2017).

177. There is a lot of debate on the empirical validity of this statement, however. See generally David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013); Jonah B. Gelbach, *Material Facts in the Debate over Twombly and Iqbal*, 68 STAN. L. REV. 369 (2016); Hubbard, *supra* note 82.

178. See, e.g., Gilles & Friedman, *supra* note 10, at 660 (“The net result of all this standard tightening, predictably, has been a drop-off in the number of class actions certified. Further depressing class action activity, at least so far as state law claims are concerned, is [CAFA] . . . .” (footnote omitted)).

179. See, e.g., Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1517 (2008) (reporting “concern[s] that CAFA will retard state regulation of harmful activity”); David Marcus, Erie, *The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1286 (2007) (“Some of [CAFA’s] principal proponents identified the supposed illegitimacy of large-scale economic regulation through private litigation based on state law causes of action as a chief rationale for the statute.”); Miller, *supra* note 9, at 71-72 (discussing the likely chilling effects of plausibility pleading on meritorious claims).

limiting access to court may also damage the ability of state regulatory agencies to piggyback on private plaintiffs and class action claims.<sup>180</sup>

It is therefore unsurprising that state actors have repeatedly promoted access to court and the cause of private attorneys general in their interventions in federal procedure. The twelve amicus briefs discussed in Part II.A above consistently mention phrases such as *private action*, *private attorney general*, *private class actions*, and *private plaintiffs* next to positive modifiers such as *necessary*, *important*, *effective*, *central*, *essential*, *key*, and *supplemental* (to the work of public agencies).<sup>181</sup> For example, in many of the amicus briefs the states embraced the theory that class actions are a crucial regulatory tool.<sup>182</sup> One group of *Concepcion* amici called consumer class actions “an important complement to government efforts at safeguarding consumers against fraudulent and deceitful practices.”<sup>183</sup> One of the two state amici briefs in *Spokeo* argued that because of limited state resources, “[t]he Amici States necessarily rely on private litigants to supplement their efforts, particularly where, as here, substantial private interests are at stake.”<sup>184</sup> Likewise, in their letter to the CFPB, nineteen state AGs argued that class actions “supplement the efforts of law enforcement and regulatory agencies.”<sup>185</sup>

*Bouaphakeo* represents a paradigmatic example of federal courts enforcing state law. The FLSA, the federal wage-and-hour statute, provides a collective action remedy that allows opt-in classes.<sup>186</sup> Accordingly, the class action device and larger opt-out classes of Rule 23 cannot be used for FLSA claims.<sup>187</sup> State litigants seeking complementary classes—and the better institutional quality

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180. A recent study by the CFPB, for example, found considerable overlap between private and public claims. See CONSUMER FIN. PROT. BUREAU, *supra* note 173, § 9.3.

181. I conducted this analysis by hand, analyzing the twelve briefs through targeted search terms for references to private claimants.

182. See, e.g., Brief of Massachusetts et al. in *Spokeo*, *supra* note 88, at 35; Brief of Illinois et al. in *Concepcion*, *supra* note 88, at 1; see also Gilles & Friedman, *supra* note 10, at 626 (“In modern times, the principal means whereby private actors seek to redress public harms is the class action—a device that has become steeped in controversy.”).

183. Brief of Illinois et al. in *Concepcion*, *supra* note 88, at 1.

184. Brief of Massachusetts et al. in *Spokeo*, *supra* note 88, at 35.

185. Letter from Maura Healey to Richard Cordray and Monica Jackson, *supra* note 152, at 2 (quoting *Kraus v. Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 725 (Cal. 2000), *superseded in other part by statute*, Initiative Measure of Nov. 2, 2004, Proposition No. 64 (Cal.) (codified in scattered sections of the California Business and Professions Code), *as recognized in Arias v. Superior Court*, 209 P.3d 923 (Cal. 2009)).

186. See 29 U.S.C. § 216(b) (2016), *amended by Consolidated Appropriations Act*, H.R. 1625, 115th Cong. (2018) (enacted) (to be codified in scattered sections of the U.S. Code).

187. See Andrew C. Brunsdon, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 269, 274 (2008) (discussing the interplay between the FLSA’s opt-in provision and Rule 23’s opt-out provision); see also FED. R. CIV. P. 23(b)(3).

provided by federal courts—therefore file claims in federal court seeking both to enforce state wage-and-hour statutes (through Rule 23 class actions) and to litigate FLSA claims. In this sense, bringing state law claims in federal court (or facing removal of those claims) is inevitable for employees pursuing comprehensive remedies. Accordingly, in *Bouaphakeo*, eight states argued in favor of a flexible Rule 23 predominance requirement, emphasizing that “states depend on private attorneys general” and that “state claims are often brought as Rule 23 class actions alongside FLSA collective actions.”<sup>188</sup>

The states’ intervention in federal pleading standards also reflects concerns with the notion of the private attorney general. In *Tellabs*, twenty-three state AGs opposed a higher pleading standard for the PSLRA and federal securities laws precisely because it would deter private lawsuits in an area that relies heavily on private litigants to file meritorious claims in federal court.<sup>189</sup> Although at times disagreeing with each other, the states are grappling with what has been called “the most critical dilemma of modern procedure”: “how to provide sufficient access to court in a society that depends heavily upon private litigation for compensation for injury and the enforcement of important social norms.”<sup>190</sup>

The primary lesson of this category is that we should reconceptualize federal courts not only as a branch of the federal government but also as an enforcement arm of state governments. Such a view of federal courts would naturally promote the states’ involvement in procedural debates because state elected officials are democratically accountable for the enforcement of state law and are experts on the goals and design of state statutory regimes. This means, then, that the states’ input in this area may promote some of the normative goals outlined above: better-informed rulemaking, increased access to justice, and more transparent procedural debates.

While the private enforcement factor is helpful, it provides at best only a partial account of the states’ motivations. It is by no means a sufficient explanation because it does not account for state amici briefs seeking to undercut class actions, opposition to broad specific jurisdiction (*Fiore*), or some interventions into federal pleading and discovery (*NML Capital*). The notion that states are motivated only by the desire to enhance private enforcement is further belied by the states’ stance in *Twombly*, where they favored a heightened pleading standard. A comprehensive picture of the states’ motivations has to account for the full complexity of views embraced by the states, including their continued and forceful defenses of their sovereignty.

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188. See States’ Brief in *Bouaphakeo*, *supra* note 88, at 12, 18 (capitalization altered).

189. See Brief of Ohio et al. in *Tellabs*, *supra* note 88, at 1-3.

190. Burbank, *supra* note 179, at 1484.

## B. Institutional Competition: State Power and Litigation Market Share

Scholars have argued that litigation operates like a market because litigants demand tribunals and governments supply them.<sup>191</sup> Below, I extend this theoretical market-based model of litigation to argue that the states may respond to institutional and economic incentives to preserve the power of their judicial systems. To the extent this power is threatened by changes to federal procedure, the states may seek to intervene in that process. Possible incentives include: court filing fees and economic spillover effects in the form of taxes, attorneys' fees, banking fees, and collateral business; regulatory control that allows elected officials to generate political rewards; and vibrant state institutions that increase the prestige of local officials. This theory predicts that to the extent federal changes strip litigation from state courts, we might observe state intervention in federal procedure in an effort to preserve state power. Below, I first lay out the theoretical groundings for this mechanism before reviewing recent changes at the state level.

### 1. Federal-state institutional competition in theory

Institutional self-interest leads different departments of government as well as state actors to compete for power in the regulation of social and economic behavior.<sup>192</sup> This competition is fueled by various factors, including economic gains and a desire to enlarge an institution's authority. Erin O'Hara and Larry Ribstein have argued that litigation may be seen as a product for which litigants can shop.<sup>193</sup> On the demand side, plaintiffs' attorneys and litigants in general seek beneficial laws and forums.<sup>194</sup> On the supply side, legislators, courts, and tribunals—state, federal, commercial, and international—compete to attract disputes for resolution.<sup>195</sup>

Courts compete for litigants because the economic payoff and spillover effects are significant. The benefits include “taxes, fees for lawyers and other

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191. See, e.g., ERIN A. O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 166 (2009); Childress, *supra* note 10, at 1008; Wulf A. Kaal & Richard W. Painter, *Forum Competition and Choice of Law Competition in Securities Law After Morrison v. National Australia Bank*, 97 MINN. L. REV. 132, 144 (2012); see also William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 236-40, 284 (1979) (interrogating the conditions under which litigation may or may not operate like a market).

192. Cf. WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 36-42 (1971) (arguing that bureaucrats seek to maximize the “total budget of their bureau” because, among other things, they care about power (emphasis omitted)).

193. See O'HARA & RIBSTEIN, *supra* note 191, at 3-4, 65-80.

194. See, e.g., Donald Earl Childress III, *Essay, General Jurisdiction and the Transnational Law Market*, 66 VAND. L. REV. EN BANC 67, 75 (2013).

195. See Kaal & Painter, *supra* note 191, at 144 (discussing jurisdictions' attempts to “attract users”).



professionals, private sector opportunities for government officials and judges, and collateral benefits for other businesses in the jurisdiction such as banks and broker-dealers.<sup>196</sup> Courts may also want complex cases to showcase to businesses the strength and sophistication of their local institutions, perhaps believing that efficient and respected courts can improve the local business environment.<sup>197</sup>

Beyond these economic reasons, there may be reputational and political incentives.<sup>198</sup> Vibrant state institutions enhance a judge's or elected official's national standing. Judges, who seemingly would have nothing to gain financially from attracting cases, nonetheless "care about both popularity and prestige."<sup>199</sup> Judges' prestige grows when they handle important national cases. These state actors "want to be respected for their abilities by the public at large and by their peer groups including fellow judges and members of the bar."<sup>200</sup> Many judges have noted that prestige seeking is a common judicial goal.<sup>201</sup> Politically, a vibrant legal industry keeps a significant and powerful constituency (lawyers) happy. Ambitious state AGs also seek to enhance their reputations in order to win reelection or run for a new office.<sup>202</sup> And state legislatures "take an interest in the well-being of the local bar" and of businesses who wish to have efficient dispute resolution mechanisms.<sup>203</sup>

Institutional competition can also emerge from elected officials' desire to maximize their departments' power.<sup>204</sup> Growing institutional power can allow

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196. *Id.*

197. *See, e.g.,* Wagner, *supra* note 25, at 1142 (discussing a New York court designed "to offer high-quality judicial services for the resolution of high-stakes commercial cases in an effort to attract more such business to the state"); *About the Court: Complex Business Litigation Court*, NINTH JUD. CIR. CT. FLA., <https://perma.cc/22P3-JAND> (archived Apr. 25, 2018) ("The theory that a specialized Business Court will draw big businesses to Central Florida has prove[d] true in the states where Business Courts have been established.").

198. *See, e.g.,* Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2147 (2015) (examining the reputational and political incentives for state attorneys general); Wagner, *supra* note 25, at 1129-30 (discussing judges' interests in maintaining their reputations in the eyes of their colleagues).

199. Wagner, *supra* note 25, at 1129.

200. *Id.* (discussing judicial goals in general and citing, among others, Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 129 (1983)).

201. *See, e.g.,* Richard A. Posner, *What Do Judges and Justices Maximize?: (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 13-14 (1993).

202. *See* Devins & Prakash, *supra* note 198, at 2143-44.

203. *See* Wagner, *supra* note 25, at 1131, 1141-42.

204. *Cf.* THE FEDERALIST NO. 51 (James Madison), *supra* note 22, at 321-22 (discussing how a well-constituted government would recognize that "each department should have a will of its own," with governmental structures ensuring that "[a]mbition [is] made to  
*footnote continued on next page*

ambitious officials to “generate political rewards either by exercising regulatory options or by credibly threatening to exercise options and then refraining.”<sup>205</sup> There is a rich literature on institutional self-aggrandizement in the context of administrative agencies, one that typically assumes that “public agencies act to maximize their powers, just as private firms seek to maximize revenues or profits.”<sup>206</sup> Despite this well-established proposition, many recent scholars have argued that public officials face mixed incentives.<sup>207</sup> For example, elected officials may try to avoid being blamed by voters in particular situations by delegating their power to other agencies or branches.<sup>208</sup> This can produce a mixed record where governmental actors attempt to expand or contract their power strategically depending on demands made by their constituents.

Institutional competition can have a particular effect in the area of federalism. State officials may seek to preserve the power of state governments vis-à-vis the federal government in circumstances where they face competitive constituency pressures.<sup>209</sup> Indeed, this competitive dynamic is there by design: Federal-state competition, or “vertical competition,” was a crucial aspect of “the framers’ vision of the federalist system.”<sup>210</sup> The expectation was that federal-state competition would be natural in a system of overlapping regulatory

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counteract ambition”). *But see* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2317-18 (2006) (arguing that institutions do not have “wills or interests of their own”).

205. Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 935 (2005). Note, however, that Levinson qualifies the quoted language with the preface “[o]ne might think.” *Id.* Indeed, he points out that officials may not necessarily be interested in expanding their jurisdiction. *See id.*
206. *See* John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641, 702 (1999); *see also, e.g.*, NISKANEN, *supra* note 192, at 38-42.
207. *See, e.g.*, Levinson, *supra* note 205, at 935.
208. *Cf. id.* (“If government officials cannot take credit for solving a problem, they will have every incentive to pass the buck by disclaiming jurisdiction over it.”).
209. *See, e.g.*, DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 116-17 (1995) (outlining “significant structural reasons for the retention of state authority in so many areas of general importance”); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 259-61 (2000) (discussing Madison’s arguments that state officials’ close relationships with their constituents would give them strong influence in contests with the federal government).
210. Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 J. CORP. L. 625, 634-35 (2004); *see also* THE FEDERALIST NO. 17 (Alexander Hamilton), *supra* note 22, at 121-22 (discussing the states’ ability to oppose federal encroachment and to capture the “confidence and good will” of their citizens).

powers and would produce salutary consequences, as fear of losing power to state or federal entities would incentivize officials to improve performance.<sup>211</sup>

This federal-state institutional competition should, in theory, be especially salient in the procedure arena. William Landes and Richard Posner long ago theorized an economic view of adjudication systems in which state and federal courts compete for litigants, noting that “state and federal courts are competitors with regard to dispute resolutions in the areas of their overlapping jurisdiction.”<sup>212</sup> One way for the states to compete for market share is to enhance the attractiveness of their courts by providing, for example, large damages awards; easy-to-satisfy aggregate litigation devices such as class actions; generous and flexible substantive law; or broad jurisdiction to adjudicate or enforce awards. Many of these examples directly implicate the rules of civil procedure because they offer an easy way to make a court more attractive to plaintiffs. Given the power of procedure as a competitive tool, many procedural doctrines cover areas where federal-state competition is arguably a zero-sum game—that is, where any enlargement of federal jurisdiction necessarily comes at the expense of state jurisdiction.

To summarize, the theory as applied to state governments takes the following steps: (i) states are motivated (by reputation, pecuniary interest, and institutional will) to maintain business litigation in state courts; (ii) changes to federal procedure can threaten state business litigation; and therefore (iii) state actors might act to maintain litigation in state courts.

## 2. Evidence of federal-state institutional competition

Several developments in state and federal courts seem to validate the competition theory. First, state governments have repeatedly and explicitly sought to attract business litigation. Delaware, for example, markets itself as a haven for corporate litigation.<sup>213</sup> In return, Delaware reaps the benefits of its pro-corporate reputation in the form of franchise taxes and attorneys’ fees.<sup>214</sup>

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211. See Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 352-53 (2003).

212. See Landes & Posner, *supra* note 191, at 258.

213. See William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 668 (1974); Simmons, *supra* note 23, at 220, 224-52 (discussing “Delaware’s legal regime [as] a global brand”). As is recognized in the corporate law literature, one of Delaware’s main competitors is the federal government. See Mark J. Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588, 600 (2003). Delaware also tries to ensure that its own lawyers partake in local litigation. See Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 57-58 (2008).

214. See Simmons, *supra* note 23, at 227; see also Helen Hershkoff & Marcel Kahan, *Forum-Selection Provisions in Corporate “Contracts”* 2, 5-6 (N.Y. Univ. Sch. of Law, Law & Economics Research Paper Series, Working Paper No. 17-28, 2017), <https://perma.cc/D223-557Y> (discussing Delaware’s authorizing companies “to adopt an exclusive

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Chasing these same benefits, New York has passed laws inviting sizable contracts (over \$1 million) to select the state as a forum regardless of any other contacts in the state.<sup>215</sup> That statute and other New York laws offer benefits similar to Delaware's.<sup>216</sup>

Remarkably, at least twenty-three states have created state specialty business courts patterned after Delaware's system and fashioned with the explicit purposes of (among other things) "generating litigation business for local lawyers"<sup>217</sup> and "curtail[ing] the increased use of the federal judicial system and alternative dispute resolution by business litigants."<sup>218</sup> The popularity of these business courts is strong evidence of litigation competition.

Second, there is widespread evidence that rules of jurisdiction, pleading, or venue, as well as other procedural doctrines, can have a significant impact on business litigation by encouraging forum shopping.<sup>219</sup> For example, despite uniform federal patent law, litigants turned the procedurally friendly Eastern District of Texas into the nation's second most active forum for patent cases precisely because of its local procedural rules.<sup>220</sup> (The U.S. Supreme Court, however, recently dealt a severe blow to this forum shopping.<sup>221</sup>) Especially

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forum for corporate litigation . . . provided that Delaware is among the selected fora"); Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, 1 STAN. J. COMPLEX LITIG. 51, 53 (2012) ("Delaware has taken steps to keep its cases in its state courts.").

215. See N.Y. GEN. OBLIG. LAW § 5-1402(1) (McKinney 2018).

216. Cf. Wagner, *supra* note 25, at 1141-42 (discussing ways in which New York has made itself more attractive as a venue for commercial disputes).

217. Simmons, *supra* note 23, at 238.

218. Powell, *supra* note 24, at 824; see Applebaum, *supra* note 23, at 70-73 (finding that "specialized business courts [are] being created within 22 states, with West Virginia on the verge of making that 23," and noting that the motivation to create such courts was to address state trial judges' lack of knowledge and experience in addressing commercial disputes); see also Mark H. Alcott, *The Formation of New York's Commercial Division: A History & Memoir*, 11 JUD. NOTICE 51, 51-52 (2016) (noting that commercial litigants' increased use of the federal system, among other alternatives, "troubled" members of the New York bar who felt that state courts "were largely being abandoned" and who wanted to reestablish state courts as "the paramount center for commercial litigation"); Bach & Applebaum, *supra* note 24, at 152 (discussing how New York's experimentation with business courts "arose at a time of failing confidence in the state trial courts' ability to address business litigation"). See generally Richard L. Renck & Carmen H. Thomas, *Recent Developments in Business Commercial Courts in the United States and Abroad*, BUS. L. TODAY, May 2014, at 1 (discussing developments in state business courts).

219. See generally Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553 (1989) (defining and discussing the phenomenon of forum shopping).

220. See J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 632-34 (2015).

221. See *TC Heartland LLC v. Kraft Foods Grp. Brands*, 137 S. Ct. 1514, 1517 (2017) ("We . . . hold that a domestic corporation 'resides' only in its State of incorporation for purposes of the patent venue statute." (quoting 28 U.S.C. § 1400(b)).

relevant for this Article's purposes, there is also evidence that changes in procedural rules can induce "vertical" forum shopping, in which cases move from state to federal court or vice versa. William Hubbard has demonstrated that a single Supreme Court ruling, *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,<sup>222</sup> on the application of a state statute barring certain class actions, caused plaintiffs to shift their filings from state to federal court.<sup>223</sup> Based on this finding, he concluded that "vertical forum shopping is not a *de minimis* concern for judges or policymakers."<sup>224</sup>

Third, judges have shown that they will try where possible to bring home the proverbial bacon—lawsuits.<sup>225</sup> Daniel Klerman and Greg Reilly have argued that patent litigation in the Eastern District of Texas brought economic benefits "to the local bar specifically and to the public more broadly" and that it was possible that local judges "sought to attract patent litigation, at least in part, to help local lawyers struggling in the face of tort reform."<sup>226</sup> During the initial creation of state business courts in the 1990s, state supreme court justices claimed that new courts were needed to bring back commercial litigants.<sup>227</sup> Encapsulating this logic, a state appellate judge recently confessed: "[W]hen we're competing with other states for business clients, we want to one-up every other state to get [the business] to our state, so we try to streamline the [litigation] system."<sup>228</sup> Along the same lines, state AGs frequently run on campaign promises of more shareholder litigation.<sup>229</sup> Of course, "attorneys have strong incentives to lobby the state to supply legal innovations that can

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222. 559 U.S. 393 (2010).

223. See William H.J. Hubbard, *An Empirical Study of the Effect of Shady Grove v. Allstate on Forum Shopping in the New York Courts*, 10 J.L. ECON. & POL'Y 151, 153 (2013).

224. *Id.*

225. See Anderson, *supra* note 220, at 664-65 (discussing how judges' relationships with the local bar may encourage them to "bring[] in business for local attorneys"); Klerman & Reilly, *supra* note 26, at 272-77 (discussing personal and community-based reasons why judges may want to attract business litigation).

226. See Klerman & Reilly, *supra* note 26, at 272-73.

227. See, e.g., JUDITH S. KAYE, *THE STATE OF THE JUDICIARY*, 1993, at 12-13 (1994) ("[W]e were faced with the reality that the business community and the commercial bar preferred to litigate in federal court or alternative private forums, where they expected to escape the delays too often encountered in our overburdened State courts. This state of affairs was intolerable.").

228. See POUND CIVIL JUSTICE INST., *FORCED ARBITRATION AND THE FATE OF THE 7TH AMENDMENT: THE CORE OF AMERICA'S LEGAL SYSTEM AT STAKE?* 97, 100 (2015), <https://perma.cc/D7L4-GA3N>. Another judge claimed that *Concepcion* and *Italian Colors* are "contrary to every legal principle in the book, and I don't care if the U.S. Supreme Court wrote [them] or not. [They're] wrong." See *id.* at 128.

229. See, e.g., Mark Maremont et al., *Trial Lawyers Contribute, Shareholder Suits Follow*, WALL ST. J. (updated Feb. 3, 2010, 12:01 AM ET), <https://perma.cc/9MJS-VFK5> (discussing Ohio's former attorney general Marc Dann).

generate fees for local lawyers.”<sup>230</sup> In sum, state officials’ close relationship with local bars pushes them to attempt to increase litigation market share.

All of this evidence supports the institutional competition mechanism. This theory generates a clear prediction: State policymakers will contest federal procedure changes where they threaten state business litigation.

### 3. Procedural retrenchment and the states

Recent procedural changes do seem to threaten at least some state business litigation. As discussed in Subpart B.2 above, the legislative history behind the creation of some state business courts is riddled with statements about disappearing commercial litigants who are increasingly opting for arbitration.<sup>231</sup> But perhaps the clearest example is in the class action context. Both CAFA and *Concepcion* affect the level of class action litigation in state courts: There is empirical evidence that CAFA shifted a substantial number of state cases to federal court, and *Concepcion* allowed for the widespread use of arbitration.<sup>232</sup> To the extent state officials consider alternative dispute resolution bodies as insufficiently advancing state goals, the removal of state class action litigation poses a threat.<sup>233</sup> Moreover, class actions are highly prized by state plaintiffs’ attorneys,<sup>234</sup> who presumably fear stricter federal class certification rules or the competitive pressure of lawyers more experienced in federal courts or arbitral tribunals.

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230. See John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1931 (2012) (citing Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 367 (2003)).

231. See, e.g., KAYE, *supra* note 227, at 100.

232. For evidence on CAFA, see Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1607 (2008) (“There is little question that CAFA has succeeded in shifting much class action litigation from state court to federal court since it went into effect . . . .”); and Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1750-57 (2008) (describing the empirical evidence). For *Concepcion*, see Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 876 (2008) (exploring the use of arbitration provisions before *Concepcion*); Gilles & Friedman, *supra* note 10, at 639-47 (theorizing “[u]nder what circumstances . . . courts [could] decline to enforce class action waivers” in the wake of *Concepcion*); and CONSUMER FIN. PROT. BUREAU, *supra* note 173, app. A, § 3.5 (discussing the use of arbitration in certain industries and changes since *Concepcion*).

233. Cf. Glover, *supra* note 19, at 3064-68 (discussing arbitration’s harm to public adjudication and substantive law).

234. See, e.g., H.R. REP. NO. 114-422, at 2-5 (2016) (finding that plaintiffs’ attorneys increasingly prefer state court); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 443 (1992) (finding that “many plaintiff attorneys prefer state courts because of the lesser emphasis on burdensome procedural rules”).

If this model is correct, then lobbying pressures by local attorneys may lead to state AG and legislative interventions that seek to preserve the power of state courts. In order to review this possibility in a contained case study, I identified the state AGs who most commonly signed on to amicus briefs in six cases that involved the possibility of a judicial shift from state courts to federal courts or arbitration.<sup>235</sup> After identifying four state AGs who overlapped in tenure from 2006 to 2016 and signed on to an amicus brief in four of the six cases, I then used an elections database to examine the state AGs' political donations from the legal industry, including lobbyists, as compared to a benchmark state AG.<sup>236</sup> Figure 2 below summarizes my findings.

**Figure 2**  
Active State AGs in Favor of Greater State Market Share  
by Percent of Total Received Donations from the Legal Industry

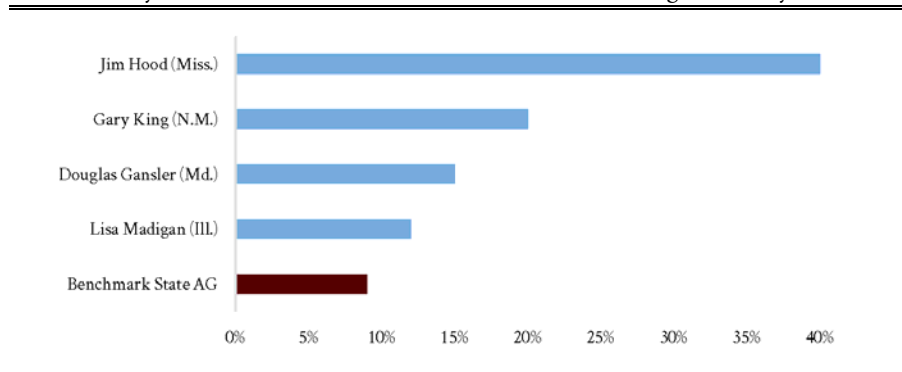


Figure 2 indicates that state AGs who filed in a majority of the six state litigation cases seem to have received disproportionately large donations from the legal industry. This finding suggests that the competitive influence of the litigation marketplace and lawyers' lobbying efforts might explain why the states defend their preference for state judicial forums. As expected, state AGs

235. The six cases were *Spokeo*, *Knowles*, *Nicastro*, and *Twombly* (which involved shifts between state and federal courts) as well as *Italian Colors* and *Concepcion* (which involved shifts to arbitration).

236. The four active state AGs were Jim Hood of Mississippi, Gary King of New Mexico, Douglas Gansler of Maryland, and Lisa Madigan of Illinois. Data for donations from the legal industry were calculated as of January 6, 2018 based on the National Institute on Money in State Politics's online database. See FOLLOWTHEMONEY.ORG, <https://perma.cc/DYQ2-ZX6T> (archived Apr. 25, 2018). For the "benchmark" state AG, I averaged the donation percentages for state AGs who mostly overlapped in tenure with the four active AGs but who intervened (i) in one or fewer of the six cases or (ii) against greater state market share: John Suthers of Colorado, Lawrence Wasden of Idaho, Greg Zoeller of Indiana, Jon Bruning of Nebraska, and Wayne Stenehjem of North Dakota.

have repeatedly complained in amicus briefs that shifting state law cases to federal court is harmful to the development of state law and increases the potential for differential treatment of similarly situated parties.<sup>237</sup> One group of states specifically chided its opponents in *Concepcion* for “ask[ing] federal courts to second-guess decades of state contract law” and noted that its interest involved “preserv[ing] States’ historical ability to develop and enforce contract law.”<sup>238</sup> Thus, the states’ interest in federal procedure may be partly born out of an institutional will—coupled with economic and political incentives—to preserve state judicial power.

Similarly, in at least two cases, the state amicus briefs were entirely oriented around institutional competition. State amici in *Hood* and *Knowles* explained that their primary interest was in protecting states’ “sovereign dignity”<sup>239</sup> and “in vindicating principles of federalism and in preserving the ability of their citizens to adjudicate controversies within their own jurisdiction.”<sup>240</sup> The briefs concentrated on the idea that states are sovereign entities with the inherent right to defend their citizens and to maintain courts that are competent and that “enjoy a near co-equal status” with federal courts.<sup>241</sup> These briefs exemplify the power of institutional will: State AGs will at times forcefully defend the authority of their state governments.<sup>242</sup>

That state officials seek to preserve their state’s litigation market share also makes sense of state interventions into federal jurisdiction and pleading standards. Broad jurisdiction helps states maintain litigation against out-of-state businesses. By contrast, enlarging federal jurisdiction diminishes state court flexibility and can present a threat to the states. Pleading standards are another tool by which federal courts can expand or contract their dockets. The theory outlined above would predict the following three conclusions.

First, the states are deeply concerned with federal pleading standards both because a standard more lenient than that under state law can lead to plaintiffs’ vertically forum shopping into federal court and because a more demanding

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237. See, e.g., States’ Brief in *Hood*, *supra* note 88, at 6-7, 21-24.

238. Brief of Illinois et al. in *Concepcion*, *supra* note 88, at 1.

239. States’ Brief in *Hood*, *supra* note 88, at 6.

240. Brief of Arkansas et al. in *Knowles*, *supra* note 89, at 1. Indeed, three states complained in *Knowles* that it was “deeply insulting” that the petitioner would question the competency of state courts. See *id.* at 10.

241. See, e.g., *id.* at 4.

242. *But see* Brief of Alabama et al. in *Knowles*, *supra* note 88, at 1-4, 13-14 (involving fifteen state AGs advocating in favor of federal intervention). As I explain in Part III.D below, these state amici’s argument for federal intervention is perhaps best explained by the political factors involved.



federal standard increases defendants' incentives to remove to federal court.<sup>243</sup> Either way, changes to federal pleading standards directly affect the volume of litigation in state courts.

Second, competition for regulation can be more intense in specific areas of law that state AGs prioritize. In other words, whether and to what extent a state has an incentive to compete for market share may vary depending on the underlying substantive area of law at issue. This forces state AGs to make case-by-case determinations whether to file an amicus brief. For instance, a lower pleading standard in the *Twombly* antitrust context would increase private claimants' competition with state antitrust regulation efforts, a position state AGs complained about: "Private antitrust enforcement operates in inherent tension with [state and federal] regulatory structures."<sup>244</sup> In the antitrust context, the states did not perceive a need for private attorneys general because, as argued in the amicus brief, they considered themselves more than proficient at prosecuting antitrust violations.<sup>245</sup> State AGs can collect attorneys' fees for successful suits prosecuting federal antitrust violations,<sup>246</sup> and cy pres doctrine allows them to also distribute excess awards to state charities, giving state AGs reason to jealously defend their authority to bring these claims.<sup>247</sup> Their interest in *Twombly*, therefore, flowed naturally from

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243. See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 832 n.41 (2010) ("The . . . disparity between lenient state pleading and robust federal gatekeeping will increase the considerable incentive to remove."); Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1923-26, 1926 fig.1 (2009) (arguing that there was a notable increase in removal rates over the three decades from the mid-1970s through the mid-2000s).

244. States' Brief in *Twombly*, *supra* note 88, at 16.

245. *Id.* at 14-15. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 delegated to state AGs the power to enforce federal antitrust law, specifying that state AGs can file claims in defense of state consumers injured by antitrust practices. See Pub. L. No. 94-435, § 301, 90 Stat. 1383, 1394-96 (codified as amended at 15 U.S.C. §§ 15c-15h (2016)); see also 15 U.S.C. § 15c (providing for state AG actions). States have embraced this power and have been active in the area, increasing the filing of antitrust cases even as the federal government has not. See Katherine Mason Jones, *Federalism and Concurrent Jurisdiction in Global Markets: Why a Combination of National and State Antitrust Enforcement Is a Model for Effective Economic Regulation*, 30 NW. J. INT'L L. & BUS. 285, 296 (2010).

246. See 15 U.S.C. § 15c(a)(2), (d).

247. See Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 364 (1999). Surely, state AGs also curry favor with state businesses by pursuing out-of-state competitors.

their wish to maintain power,<sup>248</sup> and it explains why the states did not intervene in *Iqbal*, another important pleading case.<sup>249</sup>

Third, in contexts where state officials do not compete with federal courts, but rather are actually users of federal courts as plaintiffs, they have incentives to prefer lower pleading standards. Thus, in *Tellabs*, state amici defended a lower pleading standard in the PSLRA context because of the traditional role of state pension funds “in enforcing and deterring violations of the securities laws and in recovering losses for investors and pensioners victimized by fraud.”<sup>250</sup>

In sum, the institutional competition account receives support from recent developments and illuminates the interests of the states in many of their procedural interventions. Further, it (i) describes why the states sign on to amicus briefs defending state sovereignty and the integrity of state court systems and (ii) highlights why states act competitively toward federal courts. This account also suggests that state participation in federal procedural debates may promote a normatively fairer division of judicial power between state and federal courts.<sup>251</sup>

Nonetheless, an institutional competition view does not explain the entirety of the states' behavior. Admittedly, the states' competitive interest seems to be in direct conflict with their concerns about access to federal court for private litigants. But one way to make sense of this tension is to note that the states seem to be interested in competing only in a small sliver of corporate law cases. Both the Delaware model and the states' efforts to create business courts with large amount-in-controversy requirements seem to support this explanation. Outside these complex business cases, the states may even prefer to offload cases to federal court for budget constraint reasons. As has been noted by some, state courts are chronically underfunded to the point where even “keeping doors open is a problem.”<sup>252</sup> This Subpart, therefore, mainly addresses profitable business litigation from which the local bar will benefit disproportionately.

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248. See Jones, *supra* note 245, at 303-04 (“Not surprisingly, many of the most vocal opponents of limiting *parens patriae* authority of state attorneys general have been state attorneys general themselves . . .”).

249. Unlike *Twombly*, *Iqbal* involved claims by individuals against government officials, see *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009); it did not involve the type of claim that state AGs prize or the power of state AGs to bring claims in federal court at all.

250. See Brief of Arkansas et al. in *Tellabs*, *supra* note 88, at 1.

251. For more on the normative implications of state interventions in federal procedure, see Part IV below.

252. See Resnik, *supra* note 8, at 107.

C. Two-Sided Repeat Players: State Governments as Federal Litigants

While the states seek to promote private attorneys general, they might also be concerned with claims against state governments and businesses. These two types of entities are the targets of thousands of claims, giving them a stake in the long-term development of litigation rules. As such, states and businesses are repeat players interested in shaping civil procedure.

Scholars have long outlined the interest of repeat defendants in erecting “procedural stop signs” to bar or limit claims against them.<sup>253</sup> Commenting on recent changes to procedure, Miller called it “obvious that procedural stop signs primarily further the interests of defendants, particularly those defendants who are repeat players in the civil justice arena—large businesses and governmental entities.”<sup>254</sup> Repeat players benefit by increasing the complexity of litigation and making it easier to avoid claims.

The states are prominent two-sided repeat players in federal litigation. Some studies show that state governments are heavily involved as defendants in federal litigation.<sup>255</sup> Cases against state governments are varied and include claims under § 1983,<sup>256</sup> the Civil Rights Act,<sup>257</sup> election law, and environmental laws, among others. Given their status as repeat defendants, the states have an incentive to reduce litigation in federal court.<sup>258</sup>

That the states are repeat defendants should not obscure the fact that they are repeat plaintiffs, too. As recently explained by Noah Purcell, Washington’s SG: “We provide legal services to more than 230 state agencies . . . in both plaintiff and defense roles, across a wide range of litigation,” including many cases “litigated in federal court.”<sup>259</sup> State AGs use *parens patriae* suits or explicit statutory authority to enforce both state and federal law in federal court in

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253. See, e.g., Miller, *supra* note 12, at 470-72. See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y 95 (1974) (introducing the concept of litigation repeat players).

254. Miller, *supra* note 12, at 479.

255. See, e.g., DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 78-82, 82 tbl.4.1, 85-87 (2000); Ryan J. Owens & Patrick C. Wohlfarth, *State Solicitors General, Appellate Expertise, and State Success Before the U.S. Supreme Court*, 48 LAW & SOC’Y REV. 657, 660-61 (2014); Reinert, *supra* note 27, at 123 n.18, 164.

256. 42 U.S.C. § 1983 (2016).

257. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of the U.S. Code).

258. Cf. Burbank & Farhang, *supra* note 10, at 1558-59, 1566 (noting that “lobbying priorities” for state governments could include reducing “private enforcement pressures” and that Reagan Administration officials recognized that states and cities had a possible interest in blunting suits).

259. Letter from Noah G. Purcell, Wash. State Solicitor Gen., to Comm. on Rules of Practice & Procedure, Admin. Office of the U.S. Courts 1 (Feb. 4, 2014), <https://perma.cc/UAJ4-6B87>.

areas such as consumer protection, antitrust, and deceptive trade, among others.<sup>260</sup> In the past, state AGs have “vigorously opposed anything that pared back their . . . powers under the *parens patriae* provisions of federal statutes.”<sup>261</sup>

The states are also routinely involved in federal securities litigation through state pension funds. These funds have assets of over \$2 trillion and are accordingly heavily invested in the general well-being of the securities marketplace.<sup>262</sup> Indeed, as a consequence of the PSLRA—which encourages institutional class plaintiffs—in 2015 more than 39% of securities class action settlements included a public pension fund as the lead plaintiff.<sup>263</sup> This gives the states a direct financial stake in federal procedure.

Apart from states, large businesses are the most important repeat players in the game of litigation. Certain industries, including pharmaceuticals and medical device manufacturers, have historically been the target of thousands of tort claims.<sup>264</sup> Since the 1980s, however, mass personal injury litigation has expanded to threaten other industries such as asbestos, hotels, food, diet supplements, and chemicals.<sup>265</sup> To counter the litigation expansion, businesses have become strong proponents of restrictive procedure.<sup>266</sup>

The states' interventions into federal procedure may be a simple attempt to protect businesses, state governments, and state pension funds. In *Twombly*, for instance, the states sought to protect businesses from unmeritorious antitrust claims and, indirectly, to shield state governments from a deluge of suits because “States and state officials must constantly defend a host of complex

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260. See Gilles & Friedman, *supra* note 10, at 662; Amy Widman & Prentiss Cox, *State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 CARDOZO L. REV. 53, 56-57 (2011).

261. David Freeman Engstrom, *Jacobins at Justice: The (Failed) Class Action Revolution of 1978 and the Puzzle of American Procedural Political Economy*, 165 U. PA. L. REV. 1531, 1552-53 (2017) (discussing the role of state AGs in opposing the 1978 proposed reforms to class action procedures).

262. See Pew Charitable Trs., 2014 Snapshot, *supra* note 28. For news reports on state pension fund litigation, see, for example, Susanna Kim, *Top Five State Pension Fund Lawsuit Settlements*, ABC NEWS (Jan. 6, 2011), <https://perma.cc/GQP8-K4KZ>.

263. CORNERSTONE RESEARCH, SECURITIES CLASS ACTION SETTLEMENTS: 2015 REVIEW AND ANALYSIS 16 fig.15 (2016), <https://perma.cc/4C4W-72TZ>; see Stephen J. Choi et al., *Do Institutions Matter?: The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 WASH. U. L.Q. 869, 872, 889 (2005) (finding a “substantial increase” in public pension funds as litigants after the PSLRA); see also James D. Cox et al., *Does the Plaintiff Matter?: An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 COLUM. L. REV. 1587, 1591 (2006) (finding that public pension fund claims are larger on average than claims with other lead plaintiffs).

264. See Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-legal Analysis*, 59 BROOK. L. REV. 961, 961, 977-97 (1993).

265. See *id.* at 961, 972-77, 998-1006; Koppel, *supra* note 32, at 478.

266. See *supra* Koppel, *supra* note 32, at 478.

cases in federal courts.”<sup>267</sup> Although this is at cross purposes and arguably contradictory with their protection of private attorneys general, the states have been able to argue both interests almost in tandem.

Repeat-player incentives seemed to influence the states' involvement in specific jurisdiction cases. Although the states were in favor of broad specific jurisdiction in *Nicastro*, they reversed course in *Fiore*.<sup>268</sup> Surprisingly, nine state AGs signed on to both of these seemingly contradictory briefs.<sup>269</sup> This may be explained by the fact that *Fiore* involved a broad assertion of jurisdiction over a state official defendant.<sup>270</sup> Indeed, the state amici in *Fiore* specifically argued that a broad view of jurisdiction “would subject a State’s law-enforcement officers to suit in the State of nearly every person with whom those officers interact during the course of their duties.”<sup>271</sup>

On the other hand, the states welcome pro-litigation changes in areas where they are not repeat defendants but repeat plaintiffs, especially as market participants (through pension funds) or law enforcers (through *parens patriae* suits). This factor can even overpower contrary interests in situations where business interests are likely to be harmed. For instance, a higher securities litigation scienter pleading standard (at issue in *Tellabs*) would have harmed state pension fund litigation, so thirty states called for a lower standard.<sup>272</sup> Likewise, in *Halliburton*—a securities class action case—the states claimed to have an interest in the case “because state employee pension funds are often the plaintiffs with the largest claims.”<sup>273</sup> The states in *NML Capital* went as far as to claim that weak federal discovery would “jeopardize[]” the states’ “billions of dollars in foreign sovereign debt [invested] through their public pension funds.”<sup>274</sup> The states have also repeatedly defended the power of state AGs to bring *parens patriae* suits in federal court, including in the brief with the most state signatories (forty-six states).<sup>275</sup>

There are, however, limits to the power of the repeat-player interest. Beyond defending the states’ institutional interests as repeat players, if the

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267. States’ Brief in *Twombly*, *supra* note 88, at 1-2.

268. Compare States’ Brief in *Nicastro*, *supra* note 88, at 1-4 (arguing in favor of personal jurisdiction), with States’ Brief in *Fiore*, *supra* note 88, at 1-2 (arguing against personal jurisdiction).

269. See *infra* Appendix A (demonstrating that Arizona, Hawaii, Kentucky, Maine, Michigan, North Dakota, South Carolina, Tennessee, and Utah signed on to both).

270. See *Walden v. Fiore*, 134 S. Ct. 1115, 1119 (2014).

271. States’ Brief in *Fiore*, *supra* note 88, at 1.

272. See Brief of Arkansas et al. in *Tellabs*, *supra* note 88, at 1-2; Brief of Ohio et al. in *Tellabs*, *supra* note 88, at 1-3.

273. States’ Brief in *Halliburton*, *supra* note 88, at 1.

274. States’ Brief in *NML Capital*, *supra* note 88, at 1.

275. See, e.g., States’ Brief in *Hood*, *supra* note 88, at 1-2; see also *infra* Appendix A.

states intervene in procedure in order to protect businesses, then one might expect them to agree with the stances of the U.S. Chamber of Commerce (a rough proxy for business interests). But a comparison of the state amici's stances with those of the Chamber shows that they mostly disagree. The rate of alignment is weak—the Chamber and the majority of the state amici supported the same side in only three (*Fiore*, *Twombly*, and *Knowles*) out of the ten cases in which both states and the Chamber participated.<sup>276</sup> This suggests that the states may not be captured and do not serve at the mercy of business interests. Moreover, it also indicates that the states are unique repeat players in that they have concerns equally related to being both plaintiffs and defendants. In the long run, then, the states may be incentivized to promote normatively desirable procedural rules that are not systematically skewed toward the plaintiffs' bar or the Chamber.

The involvement of states as repeat players also fails to account for their disagreements in the class action context. The repeat-player interest should operate equally on all states, and yet they disagreed in *Spokeo*, *Knowles*, and

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276. See Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 1, *Walden v. Fiore*, 134 S. Ct. 1115, 1119 (2014) (No. 12-574), 2013 WL 2445026; Brief of the Chamber of Commerce of the United States of America & the Retail Litigation Center, Inc. as Amici Curiae in Support of Petitioner at 3-7, *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588 (2013) (No. 11-1450), 2012 WL 5375597; Brief of the Chamber of Commerce of the United States of America et al. as Amici Curiae in Support of Petitioners at 6-8, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2474076. The Chamber also participated as amicus in *Tellabs*, see Brief for the Securities Industry & Financial Markets Ass'n & the Chamber of Commerce of the United States of America as Amici Curiae in Support of Petitioners at 2-3, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007) (No. 06-484), 2007 WL 432762 (arguing for a rigorous scienter requirement); in *Concepcion*, see Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 2-4, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 3167313 (arguing in favor of arbitration); in *Nicastro*, see Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 2-5, *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (No. 09-1343), 2010 WL 4803147 (arguing against personal jurisdiction); in *Italian Colors*, see Brief of the Chamber of Commerce of the United States of America & Business Roundtable as Amici Curiae in Support of Petitioners at 2-5, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (No. 12-133), 2012 WL 6759408 (again arguing in favor of arbitration); in *Halliburton*, see Brief for Chamber of Commerce of the United States of America et al. as Amici Curiae Supporting Petitioners at 3-5, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (No. 13-317), 2014 WL 108360 (supporting the petitioners and criticizing class actions); in *Spokeo*, see Brief of the Chamber of Commerce of the United States of America et al. as Amici Curiae in Support of Petitioner at 4-7, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339), 2015 WL 4148650 (arguing for a restrictive view of standing); and in *Bouaphakeo*, see Brief of the Chamber of Commerce of the United States of America et al. as Amici Curiae in Support of Petitioner at 4-5, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016) (No. 14-1146), 2015 WL 4967193 (arguing for a restrictive interpretation of Rule 23). For a summary of the state amici's positions in these cases, see Table 1 above.

*Concepcion*.<sup>277</sup> This portends deeper motives that are ideological, not solely a result of repeat-player status.

#### D. Political Ideology

This Subpart explores several features behind the potent role of politics in procedure. First, it expounds the different positions taken by the major political parties on issues of procedure and discusses the possible partisan nature of amicus briefs. Second, it reviews the partisan affiliation of state AGs who filed amicus briefs.

It is incumbent to first tackle the issue of political party identification with particular views of procedure. There are two relevant competing accounts of how political parties behave. The group-centered model posits that parties respond mainly to pressure from powerful interest groups and donors.<sup>278</sup> By contrast, the politician-centered model argues—in the vein of rational choice theory—that politicians seek to maximize their votes and thus respond to the preferences of the median voter.<sup>279</sup> The analysis below leans on the group-centered model because while the median voter seems to have no strong preferences regarding specific procedural doctrines, political parties do.<sup>280</sup> Glenn Koppel has concisely described the current state of procedural politics: “Republicans, urged on by business interests, generally support the reformers and the restrictive adjudicatory procedure paradigm, while Democrats, backed by groups such as trial lawyers and public interest lawyers, support the traditional open courts paradigm.”<sup>281</sup>

These political views translate well into procedural issues. For instance, contrasting political views of litigation have been the root cause of disagreement about class actions and pleading standards. One narrative pushed by corporate defendants and segments of the Republican Party is that heightened pleading standards are necessary to deter frivolous litigation, class action harassment, and the excessive burdens of discovery.<sup>282</sup> The opposing narrative, closer to the Democratic view, argues that heightened pleading

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277. See *supra* Table 1.

278. See, e.g., Michael A. Livermore, *Political Parties and Presidential Oversight*, 67 ALA. L. REV. 45, 88-89 (2015).

279. See *id.* at 87.

280. See Koppel, *supra* note 32, at 475 (“The two political parties have taken sides in this conflict of the procedural paradigms.”).

281. *Id.*

282. See, e.g., Burbank & Farhang, *supra* note 10, at 1545, 1604-05 (discussing the Court’s pleading decisions as part of a long effort—started by Republicans—to engage in “litigation reform”); Mullenix, *supra* note 10, at 413-15 (addressing corporate defendants’ arguments in the context of class actions).

standards deter meritorious claims, deny fundamental justice, and deter private attorneys general whose claims are necessary to enforce public policy.<sup>283</sup> These two views show the ease with which political identification can transform into well-developed procedural narratives.

National-level political debates on procedural issues have affected state AGs in several different ways. To begin, business and plaintiffs' attorneys groups have concentrated much of their recent lobbying on state AGs, forty-three of whom serve in elected positions.<sup>284</sup> Unlike judicial elections, state AG elections are explicitly partisan.<sup>285</sup> In the early 2000s, the U.S. Chamber of Commerce began a well-funded and highly effective campaign, spending over \$100 million, to defeat unfriendly judges and state AGs.<sup>286</sup> On the other side of the political divide, plaintiffs' attorneys have also unleashed well-funded operations aimed at state AG elections.<sup>287</sup>

Not only are state AG elections increasingly visible and partisan, but other incentives also make the office more political than ever. For instance, the state AG position is a stepping stone to the governorship—between 2009 and 2012, in states with elected AGs, about 37% of gubernatorial elections included a state AG as a candidate.<sup>288</sup> Other studies show that sizable percentages of state AGs run for governor or Congress.<sup>289</sup> Moreover, the relationship between state AGs and influential legal groups has grown even closer with the advent of

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283. See, e.g., Brief of the American Antitrust Institute in Support of Respondents at 15-16, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 2966601. Democrats in Congress even considered attempting to overturn *Twombly* and *Iqbal* via legislation. See *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 8 (2009) (statement of Sen. Leahy).

284. See, e.g., Gilles & Friedman, *supra* note 10, at 673-75; see also John H. Beisner et al., *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1456 (2005) (explaining how state AGs are accountable to local interests at the ballot box); *About NAAG*, *supra* note 35.

285. See Jillian Edmonds, *Scandal: The Growing Need for a Code of Conduct in Attorney General Elections*, 27 GEO. J. LEGAL ETHICS 505, 511 (2014).

286. See Gilles & Friedman, *supra* note 10, at 673 n.229; see also *id.* at 673-75 ("The ability of business groups to amass war chests targeting consumer-friendly AGs may prove formidable in some states. And while trial lawyers are likely to provide a counterweight to some extent, these are perilous waters . . ." (footnote omitted)).

287. See CTR. FOR LEGAL POLICY AT THE MANHATTAN INST., TRIAL LAWYERS INC.: ATTORNEYS GENERAL; A REPORT ON THE ALLIANCE BETWEEN STATE AGS AND THE PLAINTIFFS' BAR 2011, at 11-13 (2011), <https://perma.cc/2N2U-WF54>.

288. See Note, *Appointing State Attorneys General: Evaluating the Unbundled State Executive*, 127 HARV. L. REV. 973, 983 (2014).

289. See Devins & Prakash, *supra* note 198, at 2144.



contingency fee arrangements in which state AGs employ private firms to represent state governments.<sup>290</sup>

This growing politicization of state AG offices may be reflected in their amicus briefs.<sup>291</sup> Some political scientists have argued that amicus briefs are just another form of interest group lobbying influenced by broader political agendas.<sup>292</sup> This literature supports the idea that political ideology may influence state AGs' decisions to file amicus briefs.

Given all of the above—that procedure is increasingly partisan, state AGs are responsive to their donors, and amicus briefs serve as signaling devices—it follows that changes to federal procedure affecting important political actors may provoke action by state AGs. One might even expect that *elected* state AGs should, on average, participate in more amicus briefs than *appointed* state AGs. The procedure-related amicus briefs studied in this Article, however, do not support this account: Both the forty-three states with elected AGs and the seven states with appointed AGs participated on average in 4.9 amicus briefs.<sup>293</sup> Though the sample size is small, this seems to go against the signaling theory.

On the partisan front, the doctrinal procedural developments that began in the 1980s, grew stronger in the 2000s, and continue today constitute a Republican-supported retrenchment of procedural doctrines.<sup>294</sup> This potent mixture of politics and procedure suggests that Republicans and Democrats should rarely, if ever, appear together in amicus briefs. To examine this possibility, Figure 3 below summarizes the partisan distribution of amicus briefs in procedure cases where all state amici supported the same party (what I call “single-brief” cases).

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290. See Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 COLUM. J.L. & SOC. PROBS. 587, 588-89 (2009).

291. See Lemos & Quinn, *supra* note 13, at 1254 (noting that “partisanship appears to be ascendant” in the authors’ set of studied amicus briefs).

292. See Thomas G. Hansford, *Information Provision, Organizational Constraints, and the Decision to Submit an Amicus Curiae Brief in a U.S. Supreme Court Case*, 57 POL. RES. Q. 219, 226 (2004); Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1911 & n.47 (2016) (collecting sources).

293. This calculation is based on Appendix A below. Note that I exclude the District of Columbia because it recently switched from appointing to electing its AG. See T. Rees Shapiro & Mike DeBonis, *Karl Racine Wins First-Ever Race for D.C. Attorney General*, WASH. POST (Nov. 4, 2014), <https://perma.cc/SS9A-KA4H>. State AGs are appointed by the governor in Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming; selected by secret ballot of the legislature in Maine; and selected by the state supreme court in Tennessee. *About NAAG*, *supra* note 35.

294. See, e.g., Burbank & Farhang, *supra* note 10, at 1591-613.

**Figure 3**  
Amicus Briefs by State AG Party in Single-Brief Cases

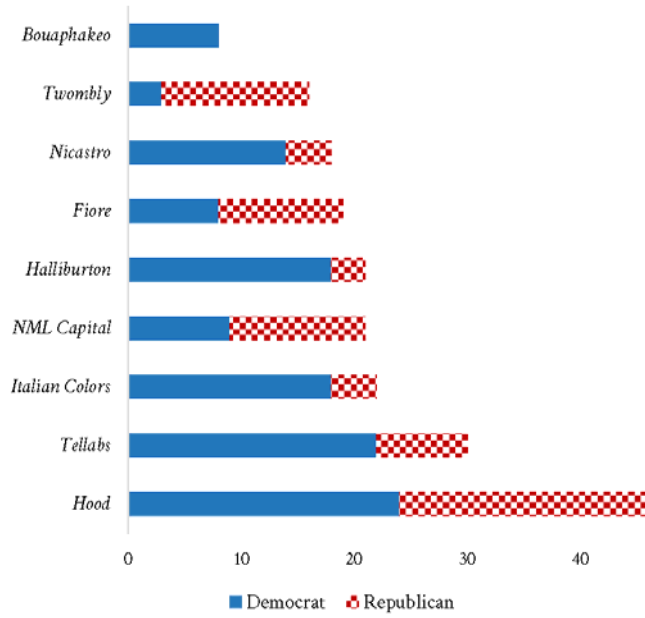
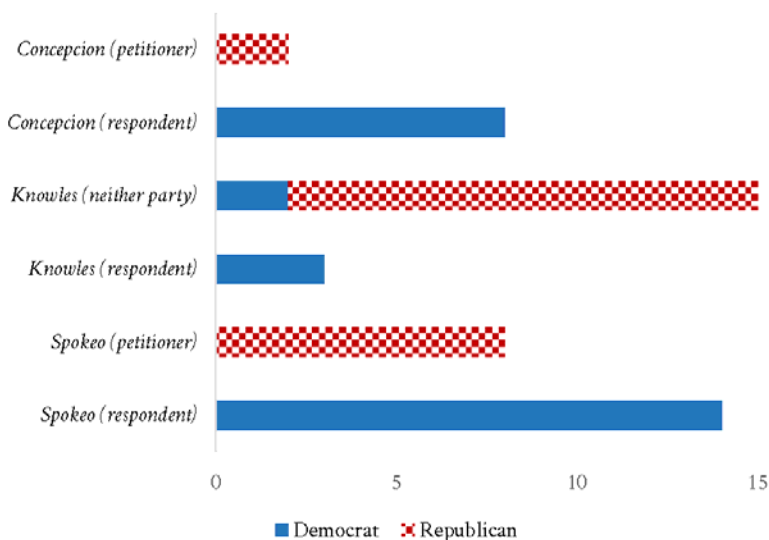


Figure 4 below summarizes the partisan distribution of state amicus briefs in procedure cases where the states supported multiple parties.

**Figure 4**  
Amicus Briefs by State AG Party in Multiple-Brief Cases



The amicus briefs are mostly inconsistent with a partisan explanation. In eight out of the nine cases where all state amici supported one party, state AGs joined bipartisan coalitions with healthy levels of involvement from both parties. Specifically, amicus briefs regarding jurisdiction, pleading, and have involved substantial bipartisan support. For example, in *Fiore*, *NML Capital*, and *Tellabs*, the states were represented by large coalitions of Republicans and Democrats,<sup>295</sup> likely because all three cases involved the states' interests as repeat players—either because a state official was being directly sued, as in *Fiore*,<sup>296</sup> or because state pension funds were common plaintiffs, as in *NML Capital* and *Tellabs*.<sup>297</sup> As such, repeat-player interests seem to trump ideology.

One important caveat is that in *Bouaphakeo* and the three class action cases where the state amici produced multiple briefs (*Concepcion*, *Knowles*, and *Spokeo*), there does seem to be a cleaner partisan division. The differences that seem to explain are disparity is that these cases (i) dealt with class actions and (ii) implicated no core state interest (such as the *parens patriae* suits in *Hood*).

295. See *supra* Figure 3.

296. *Walden v. Fiore*, 134 S. Ct. 1115, 1119 (2014).

297. See States' Brief in *NML Capital*, *supra* note 88, at 1; Brief of Arkansas et al. in *Tellabs*, *supra* note 88, at 1.

That class action cases are a political outlier is consistent with the broader development of CAFA and jurisprudence in that area. Changes to class action procedures have been openly sponsored by Republicans and business interests and rejected by plaintiffs' attorneys and Democrats. CAFA, for instance, was heavily partisan and passed the Senate and House with overwhelming Republican support despite substantial opposition from Democrats.<sup>298</sup> This partisan division was also on display at the Supreme Court. While many of the pleading and jurisdiction cases were decided with large majorities—for instance, *Bauman* (9-0),<sup>299</sup> *Twombly* (7-2),<sup>300</sup> *Tellabs* (8-1),<sup>301</sup> and *Fiore* (9-0)<sup>302</sup>—a number of class action cases have been decided by 5-4 or 5-3 majorities along ideological lines, including *Dukes*,<sup>303</sup> *Concepcion*,<sup>304</sup> and *Italian Colors*.<sup>305</sup>

Why are class actions a particularly political area of procedure? Likely because they are associated with consumer cases against businesses.<sup>306</sup> Unlike class actions, other procedural doctrines (jurisdiction, pleading, and discovery, for instance) are truly universal in that *all* parties are affected by those doctrines, including businesses that wish to litigate as plaintiffs. (And business-to-business litigation is a nontrivial slice of the federal docket.)<sup>307</sup> But constraining the reach of class actions does not negatively affect businesses because businesses are essentially never involved as plaintiffs in those cases—only as defendants. It is therefore an easy issue for political mobilization and lobbying.

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298. See S. 5 (109th): *Class Action Fairness Act of 2005*, GOVTRACK, <https://perma.cc/CTW5-5XEY> (archived Apr. 26, 2018) (showing that CAFA passed in the Senate by a vote of 72 to 26, with not a single Republican senator voting against it).

299. *Daimler AG v. Bauman*, 134 S. Ct. 746, 750 (2014). I count Justice Sotomayor, who concurred in the judgment, *see id.* at 763 (Sotomayor, J., concurring in the judgment), with the majority.

300. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2006).

301. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 311 (2007). I count Justices Scalia and Alito, who concurred in the judgment, *see id.* at 329 (Scalia, J., concurring in the judgment); *id.* at 333 (Alito, J., concurring in the judgment), with the majority.

302. *Walden v. Fiore*, 134 S. Ct. 1115, 1118 (2014).

303. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 340 (2011) (unanimous in part and 5-4 in part).

304. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 334 (2011) (5-4 decision).

305. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2307 (2013) (5-3 decision).

306. See generally Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843 (2016) (discussing the scholarly, legislative, and judicial focus on aggregate-damages class actions rather than the other types of class actions).

307. Cf. Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1288-90 (2005) (discussing the prevalence of business-to-business litigation).

In conclusion, with the exception of class action cases not involving core interests, ideology does not seem to explain the states' interest in federal procedure.<sup>308</sup>

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This Part has described the factors that influence the states' interest in federal procedure and provided support for each of the four main interests. The typology of state interests reveals that state behavior is by no means a result of any single factor. Rather, it is probably a consequence of a combination of the above-outlined interests and others. Moreover, the typology shows that the states' interests conflict and pull in different directions. Sometimes the states care about access to federal court for private litigants; at other times, they prefer to keep business litigation in state court. And while the states are repeat defendants in federal court, they are repeat plaintiffs, too. On the one hand, some of these contradictory motivations may be reconcilable. For example, the states seem to be competing for only a small sliver of corporate law cases that bring Delaware-like prestige and spillover effects. They are otherwise in favor of greater access to federal court. On the other hand, like any complex institution, the states may just have a utility function that is sometimes self-contradictory and that points in different directions.

It is also important to recognize, again, that the states' interests are not homogeneous and that each state is represented by distinct branches. Within each state, state legislative and executive branches (such as representatives and state AGs) may have interests distinct from those of state judges. This Part emphasized areas where the incentives of these different branches seem to be aligned. But with respect to certain interests, such as the states' desire to attract business to state courts or to protect state pension funds, legislators and state AGs may experience stronger pressures than do state judges. The conclusions reached in this Part must be read with awareness of that limitation. This Article refers to a simplified "state" interest only to make broader institutional arguments.

Below, I summarize the ways to conceptualize state involvement in federal procedure:

1. The simplest assumption is that the states are not deeply interested in federal procedure. The only exception might be personal jurisdiction cases—but likely not pleading or class actions.
2. The states might have a strong interest in promoting the private enforcement of state law either through expansive class actions or low pleading standards in particular areas of law.

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308. Cf. Lemos & Quinn, *supra* note 13, at 1249-51 (reviewing state AGs' partisanship in amicus briefs across all Supreme Court cases and arriving at a similar conclusion).

3. The states compete with federal courts for litigation market share and might therefore respond to changes in federal procedure that threaten state business litigation.
4. The states jealously guard their sovereignty. They are thus concerned about cases that can affect their institutional power.
5. The states as repeat-player defendants are interested in decreasing vexatious litigation against state officials.
6. The states as repeat-player plaintiffs are heavily interested in staving off procedural doctrines that would make meritorious claims by state plaintiffs more difficult to bring or maintain.
7. Finally, the states are not politically inclined to intervene in procedure, except in class action cases that involve CAFA and do not affect core state interests.

This summary does not, and is not meant to, estimate with precision how each interest influences state decisions in each case. Indeed, different combinations of these factors can produce widely divergent behavior. Moreover, some of these factors are likely more important than others. For example, concerns over the enforcement of the states' statutory regimes explicitly motivated many of their interventions. And the facts that state governments face thousands of suits every year and that state AGs are repeat plaintiffs in federal court also seem particularly salient in many cases. Conversely, competition for business litigation and the influence of partisan politics seem limited to a small number of cases.

This summary not only clarifies the states' interest in procedure but also explains why the states have stayed out of a variety of cases. For example, the states did not intervene in *Dukes*—a major class action case that increased the burden of proving common class injuries under Rule 23 of the Federal Rules—likely because the substantive claim was under Title VII and involved an unusually large class.<sup>309</sup> In other words, *Dukes* did not involve the enforcement of state law through private attorneys general or the states as repeat players. Nor did it deprive the states of litigation likely to be brought in state court or diminish core state powers. Most other cases in which the states failed to intervene similarly did not involve the states' core interests in procedure.

This model also points to other possible exogenous events that may have increased the states' interest in federal procedure, including the Great

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309. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 355-56 (2011); see also Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e, 2000e-1 to -16, 2000e-17 (2016)).

Recession and resulting pressures on state budgets,<sup>310</sup> PSLRA reforms,<sup>311</sup> the proliferation of federal statutes that provide for state AG enforcement,<sup>312</sup> and the expansion of arbitration.<sup>313</sup> As a whole, the states' involvement in federal procedure seems motivated by classifiable institutional forces.

#### IV. The States' Voice in Federal Procedure

Thus far, this Article has demonstrated that the states seek to shape federal procedure and have varied reasons for doing so. This Part argues that the states should have an institutionalized role in shaping federal procedure because they have a wealth of relevant information for federal rulemaking and the right incentives to improve the Federal Rules. Indeed, the states seem primarily concerned with the enforcement of state law in federal court and their role as two-sided repeat players. They can therefore promote values that would improve federal litigation and rulemaking.

This Part proceeds as follows. Part IV.A argues that the states can provide substantial epistemic and democratic benefits to federal procedure. Part IV.B then discusses possible drawbacks to the states' involvement but concludes that on balance, the states' involvement would be beneficial. Finally, Part IV.C offers specific policy prescriptions for how to give the states a role in this area of law, including through a representative to the Advisory Committee, targeted notice and comment, and a judicial presumption.

At the outset, it is important to recognize that civil procedure is unusual in failing to provide the states with robust avenues for input. Even though it is subject to congressional control, procedure is usually dominated by the Advisory Committee and the Supreme Court<sup>314</sup>—two entities isolated from substantive public or state input. By contrast, other areas of law provide

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310. The effect of the financial crisis on state judiciaries' budgets has been documented by others. See, e.g., Peter T. Grossi, Jr. et al., *Crisis in the Courts: Reconnaissance and Recommendations*, in NAT'L CTR. FOR STATE COURTS, *FUTURE TRENDS IN STATE COURTS*, 2012, at 83, 85 (Carol R. Flango et al. eds., 2012), <https://perma.cc/U2BR-V3RF> (noting that the "recession . . . has led legislatures to reduce access to our justice system" (emphasis omitted)); see also Resnik, *supra* note 8, at 107 (discussing the budget crisis in state courts).

311. See *supra* text accompanying note 76.

312. See Widman & Cox, *supra* note 260, at 56-57.

313. See Myriam E. Gilles, *The End of Doctrine: Private Arbitration, Public Law and the Anti-lawsuit Movement* 26-33 (Cardozo Legal Studies Research Paper No. 436, Aug. 2014) (unpublished manuscript), <https://perma.cc/52QA-4V3R>.

314. See Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1561 (2015) (noting that "Congress [has] long ceded [leadership] to the federal judiciary in fashioning procedural law" and that "[t]he federal judiciary's control over procedure is not limited to interpreting the governing rules" because it also includes "court rulemaking").

extensive opportunities for state participation. With regard to federal substantive law, the states are able to leverage significant political power in the Senate and the House, especially because members of Congress are elected by state or by district within a state.<sup>315</sup> Areas outside Congress's direct control such as administrative law have also experienced a decades-long trend of increasing state involvement through official bureaucratic partnerships with state actors.<sup>316</sup> Executive Order 13,132 (EO 13,132) obligates administrative agencies to consider state interests and consult with state officials regarding any proposed regulation that may affect the states.<sup>317</sup> To be sure, the states can currently file public comments to proposed rule changes; they can submit amicus briefs in Supreme Court cases; and there is often a state judge on the Advisory Committee. But as I explain in Part IV.C below, these information avenues are not sufficiently robust and may, at times, be counterproductive.

There are reasons to be worried about procedure's outlier status. As explained through the typology in Part III above, changes to federal procedure have widespread effects on the states. In its current form, however, federal procedure has no way to account for these effects prior to an amicus brief or public comment. Even if federal preemption of state judicial power is justified, the federal government should at least consider the states' views. I put forth below an instrumental reason, beyond federalism principles, to welcome the states' participation: Their input can actually improve procedural rulemaking.

#### A. Federal Courts Should Pay Deference to the States' Views

The states' involvement in federal procedure can improve the federal rulemaking process. To reach this conclusion it is not necessary to accept the states' ultimate positions on all procedural issues, but rather only to acknowledge that their input will enhance procedural debates. Indeed, the typology in Part III above gives federal policymakers the necessary tools to determine *when* the states' input is likely to be helpful and when it might be suspect. In this Subpart, I employ various theories of federalism and democracy

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315. *Cf.* Kramer, *supra* note 209, at 278-92 (arguing that the party system protects federalism).

316. *See generally* Seifter, *supra* note 38, at 961-79 (providing a "primer" on state interest groups "and their role in federal regulation"). For a general discussion of cooperative federalism and some examples, see DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 162 (2d ed. 1972); Susan Rose-Ackerman, *Cooperative Federalism and Co-optation*, 92 *YALE L.J.* 1344, 1344, 1347-48 (1983); and Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 *N.C. L. REV.* 663, 668-69 (2001).

317. *See* Exec. Order No. 13,132, § 3, 3 *C.F.R.* 206, 207-08 (2000), *reprinted in* 5 *U.S.C. § 601 app.* at 100 (2016). This Executive Order has bite. *See, e.g.*, Jackson v. Pfizer, Inc., 432 F. Supp. 2d 964, 968 n.3 (D. Neb. 2006) ("The FDA failed to comply with its requirements [under EO 13,132] to communicate with the states and to allow the states an opportunity to participate in the proceedings . . .").



to show how the states' voice would be valuable in achieving important goals in the procedure context.<sup>318</sup>

As an initial matter, the typology suggests that the states' input may be normatively desirable. In many cases, the states seem to promote widely accepted normative goals: better-informed rulemaking, increased access to justice, time and cost efficiency, and transparent procedural debates. The states care about rulemaking and procedural decisions because they are primarily motivated by concerns with how state law is enforced in federal court. This means that *access* to federal courts is, in many cases, an explicit state goal. Moreover, because they are some of the most frequent litigants in federal courts—as repeat plaintiffs and defendants—the states benefit from cheap and efficient federal procedure. Unlike other actors, like the U.S. Chamber of Commerce or the plaintiffs' bar, this means that the states' input may often be in favor of the efficient administration of federal litigation. In other words, the states' incentives are to some extent aligned with the goals of the Federal Rules and the federal judiciary. Although the states are also competitors, this interest seems to extend only to corporate cases and, in any case, may promote a better distribution of judicial power.

As discussed in this Subpart, at least three competing normative accounts of federalism are relevant for our purposes. Under the sovereignty account, scholars and courts argue that the states should have an empire all their own, isolated and independent from federal rule.<sup>319</sup> Should the federal government seek to regulate an area of state dominion, sovereigntists believe that courts ought to step in and delineate the structural boundaries of federal and state power.<sup>320</sup> By contrast, process federalists emphasize political safeguards and the structural power states can exercise over the federal government.<sup>321</sup> This process view relies mostly on *ex ante* bargaining between state and federal officials, not actions in the courts, to constrain the reach of federal law.<sup>322</sup> A third account, known as cooperative federalism, posits that instead of competitive dynamics, scholars should focus on the ways federal and state

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318. For related literature, see Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229 (1994); Randy E. Barnett, *Three Federalisms*, 39 LOY. U. CHI. L.J. 285 (2008); Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633 (2006); Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010); and Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007).

319. See, e.g., Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1553-54 (2012); Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1194-95 (1977).

320. See, e.g., Gerken, *supra* note 319, at 1554.

321. See, e.g., *id.* at 1554-56; Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1357-59 (2001).

322. See Gerken, *supra* note 319, at 1563.

officials regulate intrastate activity in a collaborative fashion.<sup>323</sup> This cooperation can foster an interdependence that gives the states power and discretion in the administration of federal policies.<sup>324</sup> Below, I implicitly employ all three models but rely on a view of federalism that stresses the need for ex ante bargaining in the creation and shaping of procedural rules. As I argue below, this approach can promote long-term information exchange that could improve procedural rulemaking.

The Supreme Court and scholarly commentary have traditionally recognized that federalism promotes significant objectives, including policy experimentation, the diffusion of power, and federal-state competition.<sup>325</sup> More formally, the literature typically outlines three mostly functionalist benefits: (i) independent and robust state governments are privy to valuable and localized information; (ii) state governments are democratically accountable in a unique way; and (iii) a healthy respect for the sovereignty of state governments maintains proper structural boundaries.<sup>326</sup> Below, I argue that these three benefits have a place in the procedure context.

#### 1. The states as databases

The states can provide unique and valuable epistemic benefits to courts and the Advisory Committee because they are repeat litigators and interest aggregators. As such, they can at minimum provide empirical evidence relevant to the functioning of procedure, including evidence about discovery costs, length of cases, trial costs, motion frequency, and so on; anecdotal evidence of state experience in federal court; detailed analyses of litigation techniques; and governmental experience on issues of administrability and efficiency.

The value of empirical evidence and experiential information in litigation has been at the heart of recent debates over procedure. Critics of the Advisory Committee have demanded increased empirical rigor for more than two decades.<sup>327</sup> These critics are largely correct. Procedure has been partly isolated from the pressures applied in administrative law, an area where scholars widely recognize that “[i]nformation is the lifeblood of regulatory policy.”<sup>328</sup>

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323. *See id.* at 1556-60.

324. *See id.* at 1557.

325. *See id.* at 1552 & n.6.

326. *See, e.g.,* *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

327. *See, e.g.,* Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 841-42 (1993); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 484-89 (1993).

328. Cary Coglianese et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 277 (2004).

Information produces better decisions that address actual problems, unpacks complex and nuanced regulatory issues, and channels expertise to the right areas.<sup>329</sup> These administrative law insights should apply to the Advisory Committee's role as a periodic surveyor of federal litigation and the Federal Rules.<sup>330</sup> In that role, the Committee relies on information from a variety of sources, including practitioners, academics, and judges.<sup>331</sup> So do courts when they engage in procedural rulemaking through adjudication. Justice Stevens admitted as much in his *Twombly* dissent, in which he asked for "far more informed deliberation"—presumably involving empirical evidence—before remaking pleading standards.<sup>332</sup>

The Justices' own inexperience underlies their need for information: Most of them have little familiarity with modern litigation at the trial level because even the Justices who were legendary litigators, like Chief Justice Roberts and Justice Ginsburg, practiced decades ago and practiced mostly appellate litigation.<sup>333</sup> Improving information inputs is therefore necessary in procedure.

The states can leverage a massive data-generating apparatus that can feed the Supreme Court and the Advisory Committee important information about civil litigation. Each state gathers reams of data on litigation in state and federal courts. Over the past five years, states as varied as Alaska, Kansas, Maryland, and Nebraska have been praised by the National Center for State Courts (NCSC) for collecting and reporting high-quality court data.<sup>334</sup> Both the NCSC and the Conference of State Court Administrators routinely publish illuminating data drawn from state agencies on civil litigation at the state level, including information on discovery costs, length of cases, frequency of

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329. See, e.g., Seifter, *supra* note 38, at 993.

330. The Advisory Committee's process has become increasingly rigorous. For example, in evaluating changes to Rule 23 of the Federal Rules, the Committee "generated, studied, and received voluminous comments on a series of proposals" over a six-year period. Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), A Good Rulemaking*, 69 TENN. L. REV. 97, 102 (2001).

331. Cf. Burbank, *supra* note 327, at 845-46 (criticizing a Committee study that relied only on "thought experiments by judges and law professors" and hearings involving "the practicing bar").

332. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 579 (2007) (Stevens, J., dissenting).

333. Cf. Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 148-49 (2006) (arguing that we need "more district court judges [on] . . . the Supreme Court"). Richard Posner recently criticized the Justices precisely for lacking trial experience. See Debra Cassens Weiss, *Posner Says Supreme Court is "Awful," Top Two Justices Are OK but Not Great*, ABA J. (Oct. 25, 2016, 9:20 AM CDT), <https://perma.cc/7TER-3YVR>.

334. See COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2013 STATE COURT CASELOADS (2015), <https://perma.cc/36RD-DR6W>.

motions, and so on.<sup>335</sup> This is the kind of data Justice Stevens demanded in *Twombly* and that current procedural debates need. This information would be particularly useful because many states have replicated the Federal Rules for their local procedure. Thus, what is good for the states can be good for federal courts.

The states are also connected to on-the-ground facts that allow them to serve as “laboratories” of procedure, experimenting with different procedural devices, their reach, and their effectiveness.<sup>336</sup> Many states have been at the cutting edge of procedural innovations on various fronts, including pilot projects on discovery reforms<sup>337</sup> and inventive jury verdict rules.<sup>338</sup> Indeed, states like Arizona have revolutionized “traditional practices” and have been models for other states.<sup>339</sup> In a surprising finding, “seventy percent of lawyers who practice in both federal and Arizona state court prefer the state disclosure system to the federal one.”<sup>340</sup> In other polls, litigants have also expressed high satisfaction rates with state procedure.<sup>341</sup> This does not necessarily mean that state procedure is optimal, but it does indicate that the states have plenty to contribute to procedural debates. It is therefore unsurprising that the Advisory Committee has explicitly recognized that “[s]tate practices remain a potentially valuable source of information in considering revisions of federal procedure.”<sup>342</sup>

Current debates over the latest form of procedural retrenchment—discovery reform—provide an excellent illustration of the states’ possible epistemic role in procedure. In their current iteration, debates often start from the premise that discovery costs are too high and that courts and the Advisory

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335. See generally CIVIL JUSTICE INITIATIVE, NAT’L CTR. FOR STATE COURTS, *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* (n.d.), <https://perma.cc/N446-KQJT>; Conference of State Court Adm’rs, *White Paper on Promoting a Culture of Accountability and Transparency: Court System Performance Measures* (2008), <https://perma.cc/CH3N-XLG3>.

336. This is an extension of the states-as-laboratories-of-democracy argument. For a source discussing this concept, see Amar, *supra* note 318, at 1234.

337. Arizona’s is particularly illuminating: The state adopted a “robust mandatory disclosure rule” that now enjoys “overwhelming support” and popularity. See Draft Minutes of Jan. 8-9, 2015, in COMMITTEE ON CIVIL RULES: APRIL 2015, at 19, 34 (2015), <https://perma.cc/6W4B-NHG2>.

338. See Draft Minutes of Oct. 30, 2014, in COMMITTEE ON CIVIL RULES, *supra* note 337, at 39, 58-61.

339. See *id.* at 60.

340. Draft Minutes of Jan. 8-9, 2015, *supra* note 337, at 34.

341. See Jesse Rutledge, *The State of State Courts: Reviewing Public Opinion*, CT. MANAGER, Spring 2016, at 1, 7. For example, in a survey conducted by the NCSC, 70% of those polled expressed satisfaction with the fairness of state court process. See *id.*

342. Pilot Projects (n.d.), in COMMITTEE ON CIVIL RULES, *supra* note 337, at 457, 458.

Committee should find ways to limit them.<sup>343</sup> But as highlighted by Hubbard, these questions are ultimately empirical and depend on knowledge “about the timing, volume, and cost of discovery in our civil justice system.”<sup>344</sup> Judges, litigators, and other policymakers, however, have no access to this empirical information, partly because little of it exists. I reviewed the minutes of several recent Advisory Committee meetings on discovery and found that most discussions began with an anecdote by a committee member about reform at the state level. However, the discussions often concluded with a call for more information precisely because there was no knowledgeable state official present.<sup>345</sup>

In this void, the states can provide crucial second-best information.<sup>346</sup> The states have experimented with discovery reform for decades and, as Koppel notes, “The proliferation of diverse state discovery rules has created fertile soil

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343. See generally Stephen B. Burbank & Sean Farhang, Rulemaking and the Counterrevolution Against Federal Litigation: Discovery 5-14 (2016), <https://perma.cc/WXN6-6WTE> (discussing the long history of proposed reforms to address discovery costs).

344. William H.J. Hubbard, *The Discovery Sombrero and Other Metaphors for Litigation*, 64 CATH. U. L. REV. 867, 867 (2015) (discussing the lack of empirical information about discovery).

345. See, e.g., Draft Minutes of Jan. 8-9, 2015, *supra* note 337, at 28 (“A judge . . . asked the advisory committee to amend [a rule of habeas corpus procedure that] . . . requires a State to give a habeas petitioner copies of all exhibits attached to its response. . . . [T]he advisory committee unanimously rejected this proposal. Every court expects these documents to be provided, and the States themselves have not complained about the problem.”); *id.* at 29 (“The advisory committee considered several proposals to amend Civil Rule 68 . . . . The committee has studied the Rule twice in the last two decades. . . . Nevertheless, . . . the committee is once again looking at the question—this time by surveying how the States implement their own offer-of-judgment procedures. The committee will consider next steps at its April meeting.” (citing FED. R. CIV. P. 68)); Draft Minutes of Oct. 30, 2014, *supra* note 338, at 51-53 (“Finally, it is argued that information about third-party financing can be useful in determining sanctions. Support is found in a case from a Florida state court. . . . There is much to learn. . . . Another member agreed that the question is premature.”); *id.* at 59 (“Otherwise, the question is whether it is better to defer to state practice either from a pragmatic desire to reduce removals or from an Erie-like sensitivity . . . .”); *id.* at 60 (“Brief discussion found no confident answer to the question of how many states permit majority verdicts. . . . The question turned to other aspects of jury practice. Some states are beginning to follow Arizona . . . .”); *id.* at 65-67 (“Discussion began with experience in Georgia. . . . It was noted that California provides expert-witness fees . . . . The value of undertaking a study of state practices was repeated. . . . State models might provide useful guidance. . . . The discussion closed by concluding that the time has not come to appoint a Subcommittee to study Rule 68, but that it will be useful to undertake a study of state practices in time for consideration at the next meeting.”); *id.* at 71 (considering a suggestion “drawn from California practice”).

346. The first-best solution might be a strengthened Federal Judicial Center with a larger budget and staff.

for empirical evaluation of . . . reforms to assess their efficacy.”<sup>347</sup> For example, Colorado and New Hampshire launched pilot projects in 2010 and 2012, respectively, that experimented with proportionality rules and other discovery innovations.<sup>348</sup> Similarly, Delaware, Idaho, Iowa, Massachusetts, New York, Texas, and Utah have conducted discovery pilot projects in the last five years.<sup>349</sup> State officials are equipped to disseminate this information to the Advisory Committee.<sup>350</sup>

Beyond empirical data, the states can give courts and the Advisory Committee rich anecdotal evidence about litigation at the ground level. As Part III above explained, the states are nonbusiness repeat players with extensive experience in federal courts. They are unique repeat players because their perspective is influenced by on-the-ground concerns as both plaintiffs and defendants. The states could provide information ranging from descriptions of experience with low pleading standards and the effectiveness of state wage-and-hour complaints to information surrounding state litigation of antitrust claims in federal court.<sup>351</sup>

The states' input is also uniquely valuable because it reflects an aggregation of different geographically and politically diverse sources of information. This aggregation produces valuable condensed information and provides substantial benefits, including emphasis on common goals and a distillation of varied litigation experiences. To that end, most of the amicus briefs discussed above involved coalitions of states that presented views related to consumer protection, access to court, and business concerns. In submitting these briefs,

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347. Glenn S. Koppel, *Toward A New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1209 (2005).

348. See Nat'l Ctr. for State Courts, Appendix D: Pilot Projects, Rule Changes, and Other Innovations in State Courts Around the Country 2-3, 5-6 (2016), <https://perma.cc/N96Q-DWNG> [hereinafter NCSC, Pilot Projects]. This source was an appendix to an NCSC report on civil justice. See NAT'L CTR. FOR STATE COURTS, CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL 43 (2016), <https://perma.cc/CD6C-E2SP> (listing the appendices). Minnesota also recently adopted a proportionality rule into its discovery regime. NCSC, Pilot Projects, *supra*, at 5.

349. See NCSC, Pilot Projects, *supra* note 348, at 3-4, 6-8.

350. Elected and appointed state officials, like state AGs and judges, have the necessary institutional competence and litigation experience to communicate with the Advisory Committee. Moreover, they can rely on empirical information collected by the NCSC.

351. Examples include the usefulness of state investigatory practices such as the civil investigative demand, see States' Brief in *Twombly*, *supra* note 88, at 14; the differential reach of state personal jurisdiction doctrine, see States' Brief in *Fiore*, *supra* note 88, at 6; experiences with *parens patriae* suits, see States' Brief in *Hood*, *supra* note 88, at 8-20; the enforcement role of state pension funds, see States' Brief in *NML Capital*, *supra* note 88, at 1-10; Brief of Ohio et al. in *Tellabs*, *supra* note 88, at 2-10; and the strength of other state investigatory techniques as an alternative to class action litigation, see Brief of South Carolina & Utah in *Concepcion*, *supra* note 89, at 4-6.

the states provide valuable instruments full of repeat-player aggregative knowledge.<sup>352</sup> This kind of knowledge can be disseminated by state AGs or judges who are experienced in litigation, have widespread access to various levers of state power, and are exposed to a variety of state interest groups. Take *Twombly*, for example, in which the states favored higher pleading standards.<sup>353</sup> The state amici's position was presumably based on state AGs' experience both as defendants and as antitrust plaintiffs in federal courts. In these cases, among others, the states can provide nuanced information tailored to the issues.

## 2. The states' democratic values

The states can also fill the current democratic gap in procedural rulemaking. The main benefit here is not democracy for its own sake, but rather the possibility of a better Advisory Committee and improved procedural rules.

Civil procedure is by design technocratic because it is, in theory, neutral and specialized. Indeed, procedure falls into what H.L.A. Hart called the secondary rules of adjudication, which by definition do not govern primary conduct.<sup>354</sup> But procedure has always involved normative considerations that implicate deep democratic values. One problem in this context is that procedure is currently controlled by the Supreme Court and the Advisory Committee, two institutions that are democratically isolated. Because of this, normative procedural debates have been overly influenced by a narrow set of voices.<sup>355</sup> This system is not problematic just because it is undemocratic; indeed, undemocratic agencies and courts are an important feature of a liberal democracy. The difficulties arise, however, when the isolation of the Court and the Committee deprives them of meaningful input from different sources. This is particularly so in the context of procedure because, to the extent the Court and the Committee respond to public opinion, they are less likely to do so in

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352. Miriam Seifter worries that aggregation may actually mute diverse state interests in regulatory policies, especially in the context of state interest groups, *see* Seifter, *supra* note 38, at 995-96, but that concern is less pressing when it comes to procedure, an area in which the states are generally affected equally regardless of their geographic distribution.

353. States' Brief in *Twombly*, *supra* note 88, at 1-2.

354. *See* H.L.A. HART, *THE CONCEPT OF LAW* 81, 91-99 (3d ed. 2012).

355. Congress does express interest in the rules from time to time. *See* Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 796-822 (2017). Generally, however, the congressional voice is silent. As Justice Frankfurter noted long ago, "[L]ittle significance attaches to the fact that the [Federal] Rules, in accordance with the statute, remained on the table of two Houses of Congress without evoking any objection . . ." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting).

areas that are technical and opaque.<sup>356</sup> Moreover, the case-by-case common law approach lends itself to seemingly innocuous but long-term significant procedural changes.<sup>357</sup> One worrisome aspect of the recent Court-led procedural retrenchment is that important changes have not gone through the Advisory Committee process and have lacked input from elected officials.

It seems likely that Advisory Committee decisions suffer from a democratic deficit.<sup>358</sup> The Committee is unelected and is composed of “judge[s], practitioner[s], academic[s], or ex officio representative[s] of the Federal Government.”<sup>359</sup> In the past three decades, federal judges have dominated it, representing over half the members in 2014.<sup>360</sup> As Posner once noted, federal judges have incentives to promote rules that ease their docket pressures and prevent trials.<sup>361</sup> To the extent procedural issues are a cover for substantive debates over policy or workload preferences, a democratic deficit is worrisome. Commentators have recently labeled the Committee a tool of business interests, one intent on “pricing the poor and middle class out of court.”<sup>362</sup> Several scholars have complained about ideological purity, too, arguing that the Committee is overwhelmingly composed of partisan judges, business interests, and practitioners.<sup>363</sup> Whether those claims are true or not, the Committee’s composition may have weakened the legitimacy of its rules.

Procedural rulemaking would benefit from democratic pressures because a diversity of voices can improve the rules. Under a pluralist view of democracy, policy should result from transparent debates among officials who represent a wide range of views. The benefits of this democratic process are manifold—it allows for changes to reflect current concerns; prevents interest group capture; and promotes greater acceptance and legitimacy of new rules.<sup>364</sup> Despite its vaunted technicality, procedure increasingly needs these benefits. Although

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356. Cf. BURBANK & FARHANG, *supra* note 176, at 192 (“[T]he Court’s decisions on rights enforcement, because of their lower public visibility, are less constrained by public opinion and less tethered to democratic governance.”).

357. *See id.* at 219-23.

358. *See id.* at 223-24.

359. *Id.* at 77.

360. *Id.* at 78 fig.3.1, 79.

361. *See* RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 66-67 (1985).

362. *See* Letter from Stephen B. Burbank, David Berger Professor for the Admin. of Justice, Univ. of Pa. Law Sch., to Comm. on Rules of Practice & Procedure 18 (Feb. 10, 2014), <https://perma.cc/RGF2-TX8B>; *see also, e.g.*, Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 580-81 (2001) (lamenting interest group capture of the Advisory Committee).

363. *See, e.g.*, BURBANK & FARHANG, *supra* note 176, at 77-95.

364. *See generally* ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* (1967).



democratic values are not, and should not be, the benchmark for procedure—after all, technocrats are *necessary* in this context—inclusive institutions can improve procedural debates by connecting the isolated Supreme Court and the isolated Advisory Committee with public concerns.

The states could partly ameliorate these concerns by exposing the Court and Committee to different perspectives in at least three ways. First, a state representative to the Advisory Committee could serve as an aggregator of diverse state views.<sup>365</sup> State aggregation would allow for the broad representation of diverse interests and prevent interest group capture. Individually, each state's posture on procedural issues may be a reflection of public choice stories occurring upstream—special interests with a powerful voice in local state capitals. Together, however, a coalition of states cross-checks each state's impulses and concatenates myriad local interests into powerful wholes. For example, the state amicus briefs suggest that the states disagree with the U.S. Chamber of Commerce in most procedure cases.<sup>366</sup> On the other hand, they have incentives to disagree with plaintiffs' attorneys, too.<sup>367</sup> Because the states aggregate plaintiff and defendant roles as well as administrative concerns over state law, they can improve procedure, especially in cross-party issues like jurisdiction and pleading (though less so in class actions). Giving the states a role in procedure can provide other benefits, including emphasis on common goals (and the concomitant elimination of outlier views) and a distillation of varied litigation experiences.

Second, elected state AGs or judges can provide the missing link between the Supreme Court-Advisory Committee duo on the one hand and the public on the other. A state voice in procedure can act as a conduit for different interest groups. As the directly elected officials with the greatest stake in federal procedure, state AGs and judges bring a rich diversity of voices that are ultimately responsive to the public. Scholars have recognized as much. Catherine Sharkey, for instance, has argued that regulatory agencies should explicitly consult with state AGs because they are “well positioned to alert any and all interested participants in the [administrative law] rulemaking process.”<sup>368</sup> Similarly, Judith Resnik and colleagues have argued that in the context of translocal organizations that include state actors, one “could conceptualize [their] work within pluralist theory as improving deliberative democracy by bringing in not only more voices but a particularly interesting

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365. Cf. Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1245-46 (2012) (discussing the “aggregative view” of democracy).

366. See *supra* note 276 and accompanying text.

367. See *supra* Part III.C (discussing the states' status as repeat defendants).

368. Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 588 (2012).

set of voices.”<sup>369</sup> State officials must navigate political circles and pressures from both businesses and the plaintiffs’ bar. This exposes them to a diversity of legal interests, which in turn makes them important democratic actors in procedure. An Advisory Committee with state representation would provide at least the possibility of pluralistic debates with input from dozens of Republican and Democratic groups, along with a variety of interests, both business and consumer oriented.

Third, the states can provide transparency. Scholars have periodically expressed concerns with the opaque nature of procedural rulemaking.<sup>370</sup> The Committee often holds public hearings, but academics worry that interest groups have an outsized voice in the process.<sup>371</sup> Because the office of state AG is a stepping stone to governorships, however, state AGs’ role is closely policed by various interest groups and can serve as a backdoor entry for increased public interest in procedural changes. This interest is not inherently beneficial, but it might pressure the Court and the Committee to slow any efforts to remake the Federal Rules and might encourage further dialogue or bargaining.

### 3. The states’ concerns about judicial power

Concerns about state sovereignty are particularly pointed in procedure, an area where few institutions are in a position to defend federalism. As Parts II and III above show, recent procedural decisions may disrupt the traditional division of judicial power between federal and state courts by concentrating an increasing number of cases in federal court despite protests from the states.<sup>372</sup> There are at least two sovereignty-related reasons why states’ input would be relevant.

First, state governments have reasons to prefer state courts over federal courts. For one, retaining important cases in state court promotes public and private investment in those courts and improves the development of state

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369. Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 768 (2008).

370. See, e.g., Freer, *supra* note 40, at 448-66.

371. See, e.g., *id.* at 460-61.

372. Article III of the U.S. Constitution vests judicial power “in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1. The Framers sought to create a federal court system concerned only with well-defined areas, specifically matters of “national jurisdiction.” See THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 22, at 485; see also Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 LAW & HIST. REV. 205, 214-15 (2012) (“[T]he inferior federal courts were understood by [Founding-era] contemporaries to possess only a specific quantum of jurisdiction.”).

law.<sup>373</sup> Indeed, under the *Erie* doctrine, federal courts cannot engage in state law innovation.<sup>374</sup> The states have argued as amici that diverting state law cases to federal court will “stunt the development of those laws.”<sup>375</sup> Moreover, a loss of important cases “undermine[s] rationales for public and private investments” in courts and for the maintenance of appropriate funding levels.<sup>376</sup> Beyond removing state court control over state law, a shift to federal court increases the potential for differential treatment of similarly situated parties: State and federal courts may apply state law differently, even when cases call for similar treatment. This can entail a substantial increase in litigation costs and delay because federal courts may end up certifying state law questions to state courts.

Second, stronger checks on federal disruption of procedure can enhance access to state courts and improve procedural doctrines. The current interaction between retrenching federal courts and unretrenched state courts could allow states to provide the kind of open forums federal courts seem eager to abandon. Indeed, as a general matter, we should expect the states to have a greater interest in litigation because the vast majority of it takes place in state courts.<sup>377</sup> While the federal judiciary continues to close its doors, the states have refused to mimic this retrenchment. Under a “dialectical” model of federalism, cases of overlapping jurisdiction can lead to federal-state dialogue that is primarily “premised upon conflict and indeterminacy [sic].”<sup>378</sup> By struggling over the meaning of procedural changes, federal and state exchanges of information can result in optimal doctrines. As long as the states have the constitutional space to disagree with the federal government on questions of procedure—and the flexibility to act as procedural laboratories—they can provide a more hospitable litigation environment.<sup>379</sup> Allowing the states a voice in procedure can thus improve access to court and complement any resource constraints that may exist in federal agencies.<sup>380</sup>

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373. Cf. Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1802 (2014) (making this argument in the context of federal courts).

374. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938).

375. E.g., States' Brief in *Hood*, *supra* note 88, at 21.

376. Cf. Resnik, *supra* note 373, at 1802.

377. CIVIL JUSTICE INITIATIVE, *supra* note 335, at 6 n.36 (“In 2013, litigants filed approximately 16.9 million civil cases in state courts compared to 259,489 civil cases filed in U.S. District Courts.”).

378. Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1048 (1977); see also SHAPIRO, *supra* note 209, at 107-40 (presenting a dialogue-based theory of federalism).

379. See, e.g., Clopton, *supra* note 12, at 413-14.

380. Cf. *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2485 (2013) (Sotomayor, J., dissenting) (discussing how state tort suits “can help fill the gaps in federal regulation”).

B. Concerns About the States' Involvement

If the states are to be given an institutionalized role in federal procedure, we must first recognize that significant drawbacks exist. Chief among these is that the states may be swayed by the influence of parochial concerns or by interest group capture. The states have exhibited this behavior in procedure by reversing their policy preferences where it directly helps state actors.<sup>381</sup> Theoretically, the states may respond to local attorneys who are experienced in state but not federal court and who stand to benefit from local litigation rather than the federalization of claims. This may lead them to defend the private attorneys general idea even in cases where federal changes federalize, but do not eliminate, causes of action. The states may also promote reforms that benefit state pension funds at the expense of other litigants.

Because the states have contradictory motivations, at times promoting civil litigation but opposing it when it affects them directly, they also seem to oppose transsubstantivity—the idea that civil procedure should apply equally to all areas of law.<sup>382</sup> The varying influence of state institutional interests and business and pecuniary concerns produces differential outcomes that are better accommodated by non-transsubstantive standards. This has been directly at odds with the recent goals of the Supreme Court.<sup>383</sup> While the states' position is optimal from the perspective of a repeat player with variegated litigation positions, it promotes disuniformity and may raise the cost of compliance for private parties.

Another concern with increased state involvement is the danger of state bias against out-of-state interests—the precise reason why federal courts exist<sup>384</sup>—especially if the states are competitors in the litigation market. Why would system designers want to place a competitor on the Advisory Committee, the de facto board of directors of the Federal Rules? In that position, state actors could push detrimental reforms in order to enhance the states' competitiveness, or one state could push its own interests at the expense of other states and of the federal courts.

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381. See *supra* text accompanying notes 92-95 (discussing the states' differing positions in *Nicastro* and *Fiore*).

382. See, e.g., David Marcus, *The Past, Present, and Future of Trans-substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 372 (2010) (defining transsubstantivity, at least in this context, as “the notion that the Federal Rules apply equally to all areas of substantive legal doctrine”).

383. In some cases, the modern Court has increasingly pursued simplicity and ascertainability above all else. See, e.g., *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014).

384. See Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 122-36 (2003) (discussing the historical roots of diversity jurisdiction as being concerned with “local bias or prejudice”).

All of these concerns are valid, but they do not defeat the enterprise. Concerns about state politicization, capture, or parochialism should be moderated for a variety of reasons. To begin, parochialism may be checked by state coalitions, in which each state's interest is subsumed within the interests of the whole. As for politicization and group capture, Part III above dismisses these concerns: The states generally embrace an independent view divorced of partisan concerns and business interests because they are often both plaintiffs and defendants. This Article's typology also identifies areas that are more likely to be political (class actions, for instance). In these areas, federal policymakers can and should discount the states' input. Further, placing a competitor like the states on the Advisory Committee would probably not be harmful because that competitor is also a direct consumer (through *parens patriae* and pension fund litigation) and an indirect consumer (through private attorneys general). The states are therefore incentivized to improve federal procedure, not to weaken it. Overall, the states are not simply another interest group; they are sovereigns who seem willing to participate in the governance of federal procedure to benefit both the system itself and their institutional (not partisan or captured) interests.

In this context, another appealing quality of the states' role is that defending federalism in civil procedure can appeal to conservatives' preferences for federalism and liberals' commitment to court access. It is admittedly an oversimplification to claim that federalism appeals only to conservatives. But conservative Justices have for decades embraced the ideas of states' rights and limitations on federal power.<sup>385</sup> The benefits of federalism, including the dispersion of power and experimentation, apply in the judicial context as much as in the executive or legislative contexts. And somewhat counterintuitively, in the specific area of federal procedure, it is the liberal Justices who most often defend state courts and the states' voice.<sup>386</sup> As Brooke Coleman has noted, "[T]he liberal Justices suspect that state courts, state law remedies, and civil juries might provide a more winnable set of circumstances for individual plaintiffs than the federal regime."<sup>387</sup> In other words, state courts and the states' input can promote access to justice. That is why Justice Sotomayor supported state concerns in her *Bauman* concurrence<sup>388</sup> and why Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan) recognized in his *Concepcion* dissent the importance of respecting federalism.<sup>389</sup> The proposal made here—giving

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385. See, e.g., Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 468-69 (2002); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 3 (2004).

386. See Coleman, *supra* note 42, at 331-33.

387. *Id.* at 331.

388. See *Bauman*, 134 S. Ct. at 772 (Sotomayor, J., concurring in the judgment).

389. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 367 (2011) (Breyer, J., dissenting).

the states a role in shaping the Federal Rules—may therefore appeal to both sides.<sup>390</sup>

One major caveat to the argument is also important here: Whether the states' input is desirable or not, state AGs and courts are actively and aggressively providing it. The states have submitted amicus briefs and comments on proposed rule changes, and they have even engaged in judicial resistance.<sup>391</sup> Thus, in many ways, the goals of this Article are twofold: (i) to promote a better channel for the states' input and (ii) to encourage federal policymakers to act as sophisticated consumers of the states' information. The states are not necessarily going to always act with the public interest at heart. But formalizing their input is better than leaving it to amicus briefs, and understanding their institutional incentives can only improve rulemaking.

Moreover, as a whole, any concerns should be downplayed because this Article ultimately advocates for only a limited additional outlet for states. Continued amicus briefs by states can provide valuable information for federal judges or can be ignored with no consequences. State judicial decisions that experiment with federal doctrines can be overturned. And state legislative responses to procedural retrenchment can also be limited by federal law. In sum, giving the states a voice brings the potential of benefit or harm, but it does not make their recommendations binding; it only enhances the sum of information available.

### C. How Federal Institutions Should Accommodate the States' Views

Assuming that the states' involvement in federal procedure is salutary, how should their role be accommodated? This Subpart argues that (i) the states should have a formal role in the Advisory Committee or at least the possibility of targeted notice and comment on any proposed rule; and (ii) the Federal Rules should incorporate principles of federalism.

It is important to first understand why current channels of state input are insufficient. The states' influence over Congress, which has the power to overturn any proposed amendment to the rules, is not a promising avenue. Not only has recent scholarship emphasized that congressional debates are shaped by national interests and not state or local concerns, but Congress itself has also repeatedly shown that it has no interest in policing the Advisory Committee's changes to the rules.<sup>392</sup> Both of the current alternatives to Congress—amicus

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390. State AGs' democratic bona fides, however, may be weak. *Cf.* Seifter, *supra* note 38, at 995-96.

391. *See supra* Part II.

392. Many scholars have discredited the possibility that the states could leverage political power in Congress. *See, e.g.,* Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 47 (2008); Larry Kramer, *footnote continued on next page*

briefs and public comments on proposed rules—suffer from significant problems.

First, these input avenues risk placing the states on equal grounds with nongovernmental actors, business interests, and other interest groups. This can drown the states' voice among dozens of amicus briefs and thousands of public comments. Although some research has indicated that the Justices consider the states' views,<sup>393</sup> this may not hold as true in the procedure context, where the states' position succeeded in only seven of the twelve cases.<sup>394</sup>

Second, opportunities for amicus briefs and public comments come at too late a stage; by the time the Court decides a case or a rule is proposed, the procedural decision is often baked in. In other words, the procedural sausage is actually made at earlier stages: Advisory Committee meetings and reports to the Chief Justice by the Judicial Conference.<sup>395</sup> Finally, amicus briefs and public comments limit state input to a choke point that is easy to politicize because Supreme Court cases are closely watched by interest groups. Advisory Committee meetings or similar forums are better placed to encourage discussions about procedural issues.

Instead of through amicus briefs or public comments, the states' input should be accommodated at an earlier stage when a broader diversity of state interests can participate. There are many opportunities for the federal government to improve intergovernmental negotiations or, in other words, to create and improve forums for federal-state discussions on procedural issues.<sup>396</sup> For example, the Advisory Committee could directly request comments from state AGs or state SGs for any proposed rule that may have federalism implications (as defined below). The Committee sometimes receives comments from state AGs during public notice and comment—but not nearly as much

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*Understanding Federalism*, 47 VAND. L. REV. 1485, 1543-44 (1994); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 17-18 (1988); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2050 (2008). *But see* 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, 552 (1954) (arguing that members of Congress reflect the preferences of their states).

393. *See* Kearney & Merrill, *supra* note 114, at 787-819.

394. *See supra* note 117 and accompanying text.

395. *See generally* Burbank & Farhang, *supra* note 314 (discussing the rulemaking at the Advisory Committee through the lens of procedural retrenchment).

396. *See* Samuel R. Bagenstos, *The Anti-leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 920 (2013) (noting that the Court has encouraged federal-state negotiations in the context of administrative decisions and that recent decisions “may . . . set[] a new, state-friendly context for vertical intergovernmental negotiations”).

input as that seen in amicus briefs.<sup>397</sup> Moreover, some large states like California are currently underrepresented in the submission of amicus briefs.<sup>398</sup> In order to encourage more participation, the Committee could develop routes of communication that are open only for the states and not for other stakeholders.

Alternatively, an even more direct solution would be to target membership on the Advisory Committee itself. As explained above, the Committee is currently composed mostly of federal judges, academics, and practitioners, as well as a state supreme court justice.<sup>399</sup> But that single state member is not there to formally represent the states' institutional interests in procedure, nor is she a formal conduit for state AG or state SG input. Formal judicial, state AG, or state SG membership on the Advisory Committee would allow the airing of diverse state interests and would give the states significant leverage over procedural debates. The Committee is heavily influential; it has the power to shape legislation,<sup>400</sup> can change rule language and therefore override even Supreme Court decisions,<sup>401</sup> and serves as a hub for federal civil procedure generally.<sup>402</sup> The states' role could be formally accommodated based on examples from analogous areas. Administrative law is instructive: Miriam Seifter has noted, for example, that "many [state] groups are now given formal roles in federal [administrative] rulemaking . . . and have been pivotal players in recent policy developments."<sup>403</sup> Alternatively, the Committee on Federal-

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397. Most important retrenchment changes have taken place through judicial decisions rather than rule amendments. Indeed, the 2015 discovery amendments seem to be the first major amendment-based retrenchment effort, and the states did file comments on that proposal. *See, e.g.*, Letter from Noah G. Purcell to Comm. on Rules of Practice & Procedure, *supra* note 259.

398. *See infra* Appendix A (indicating that California participated in only two of the twelve studied procedure cases).

399. *See supra* text accompanying note 359. State judge committee members have included Richard Holmes (1991-1993), Christine Durham (1994-1999), Nathan Hecht (2000-2005), Randall Shepard (2006-2011), and David Nahmias (2013-present). I thank Stephen Burbank for providing me with this information.

400. *See* Burbank, *supra* note 179, at 1513-15 (discussing the Committee's active role during early debates on what became CAFA).

401. *See* Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 MINN. L. REV. 2167, 2176 n.45 (2017) ("The Advisory Committee is . . . free to 'correct' interpretive errors by the Supreme Court."); Struve, *supra* note 61, at 1123 (discussing amendments in 1993 that displaced a Supreme Court decision).

402. Indeed, "the Court sometimes relies heavily on the views of an Advisory Committee Reporter." Struve, *supra* note 61, at 1157 n.243 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-19 (1997)).

403. Seifter, *supra* note 38, at 956; *see also* Sharkey, *supra* note 368, at 584-90 (arguing that administrative agencies should consult with state AGs, among other state actors).



State Jurisdiction—on which several state supreme court justices sit—can also be a model for greater federal-state cross-pollination.<sup>404</sup>

To be sure, there are many reasons why a state consensus opinion is elusive and difficult to represent. Seifter, for example, has discussed the problem of finding a “state view” in administrative law.<sup>405</sup> Although there are state interest groups, not all states participate equally; sometimes “the groups take positions despite internal dissent”; there are internal principal-agent governance problems; and there is the ever-existing threat of capture.<sup>406</sup>

Despite these difficulties, the states’ role in federal procedure could be represented by a single actor who could stand for state consensus opinions. Although it could be difficult to identify consensus choices, there are various current institutions in which the states seem to reach common ground. For example, existing bodies like NAAG, the Conference of Chief Justices (CCJ), or the National Association of State Legislatures could create a process for selecting a state civil procedure taskforce or judicial representatives to the Advisory Committee. A committee composed of two or four state AGs (half Democrats and half Republicans), two state supreme court justices, and two state SGs could then produce reports on the states’ interests in federal civil procedure. State organizations such as NAAG or the CCJ could even use the current state judge member of the Advisory Committee as a formal conduit for the states’ input.

Both the targeted notice-and-comment method proposed above and state committee membership should then be institutionalized in one of three ways: (i) through a congressional amendment to the Rules Enabling Act (REA);<sup>407</sup> (ii) a formal change to the Committee’s process; or (iii) an amendment to the Federal Rules.

The first approach would be straightforward but difficult. Congress enacted the REA in 1934 and originally delegated rulemaking power only to the Supreme Court.<sup>408</sup> In several amendments since 1934, however, Congress has created or empowered other bodies in the process: the Advisory Committee, the Standing Committee, and the public (in the form of public

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404. See Burbank, *supra* note 179, at 1514-15 (discussing the role of the Committee on Federal-State Jurisdiction in opposing parts of CAFA); Russell Wheeler, A New Judge’s Introduction to Federal Judicial Administration 17 (2003), <https://perma.cc/3472-F34Q> (“State judges . . . serve on the Federal-State Jurisdiction Committee of the Judicial Conference . . .”).

405. See Seifter, *supra* note 38, at 1001-12.

406. See *id.* at 1001.

407. See *supra* note 61.

408. See Rules Enabling Act of 1934, Pub L. No. 73-416, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2016)). For the complete modern provisions of the REA, see 28 U.S.C. §§ 2071-2075, 2077.

comment),<sup>409</sup> Empowering the states would be a natural step in this evolution and would dovetail well with changes in administrative law. Section 2073 of the modern REA authorizes the Judicial Conference to appoint committees consisting of practitioners and judges and requires, among other things, that the Committee present detailed reports on pending rules.<sup>410</sup> My proposed changes to § 2073 would provide the following (with amendments noted in italics):

(a) . . . (2) The Judicial Conference may authorize the appointment of committees to assist the Conference . . . Each such committee shall consist of members of the bench and the professional bar, *state officials*, and trial and appellate judges *from state and federal courts* . . .

. . . .

(d) In making a recommendation under this section . . . , the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, *an explanatory note on changes that have any federalism implications*, and a written report explaining the body's action . . . .

Following the lead of EO 13,132—which instructs administrative agencies to consider the federalism consequences of any proposed rule<sup>411</sup>—“federalism implications” would be defined as proposed rules “that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”<sup>412</sup> These changes would encourage dialogue at the Advisory Committee level on all the possible ramifications federal procedure could have for the states.

Given that congressional action is unlikely, however, the Advisory Committee could, as a matter of course, invite state input through public comments and encourage state actors to participate in meetings and debates on a permanent basis rather than through the current ad hoc system. State SGs might be particularly qualified for this role.

While these changes might promote the values discussed above, they would cover only procedural rulemaking, not judicial decisions. Accordingly, such a rule could be complemented by judicial recognition (akin to a presumption), in procedural decisions, that the states' opinions on and experience with procedural issues are worthy of deference. Fortunately, Justice Ginsburg has already done some legwork on this proposal, announcing in her *Shady Grove* dissent that she “would continue to interpret Federal Rules with

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409. See Struve, *supra* note 61, at 1105-09.

410. See 28 U.S.C. § 2073(a)(2), (d).

411. See *supra* text accompanying note 317.

412. Exec. Order No. 13,132, § 1(a), 3 C.F.R. 206, 206 (2000), *reprinted in* 5 U.S.C. § 601 app. at 100 (2016).

awareness of, and sensitivity to, important state regulatory policies.”<sup>413</sup> Courts should explicitly incorporate Justice Ginsburg’s suggestion. Such a change would make procedure’s commitment to federalism, and the states’ interests, explicit. It would promote all of the values discussed above but, above all, it would encourage better procedural rules. These reforms would ease the role of states in important federal procedural changes.

### **Conclusion**

The states are stakeholders in federal procedure with complex interests. As I have attempted to show, civil procedure is inextricably linked to federalism in a variety of previously undertheorized and even unrecognized ways. State interest has been provoked by recent U.S. Supreme Court decisions that have upended important procedural doctrines. The states have responded by attempting to influence procedural law through various methods, including legislation, amicus briefs, public comments, and state court decisions. The states’ protest can be explained not only by an interest in the enforcement of state law in federal court but also by federal-state institutional competition, their role as two-sided repeat players, and political ideology. These forces together provide a comprehensive picture of the states’ behavior.

Reviewing the states’ role in federal procedure offers a fuller view of the Court’s recent procedural retrenchment. This Article highlights the wide array of effects that retrenchment at the federal level can have on the states, and it reveals the legitimacy of state concerns about the distribution of power in procedure. Indeed, procedure has such an oversized impact on the states that state AGs should make it even more of a priority.

Taking a normative approach, this Article concludes that states have a right to be concerned about the boundaries of federalism in the context of procedure. A robust view of the states’ role would improve federal procedure because of the states’ wealth of litigation information, democratic bona fides, and unique two-sided view of federal litigation.

As a whole, this Article shows that the effects of procedure are wide-ranging and influence institutions in unforeseen ways. This Article is but a first look at the relationship between the states and the federal government in this area—one that should spark more detailed discussions.

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413. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 437 (2010) (Ginsburg, J., dissenting); *see also* Coleman, *supra* note 42, at 355 (discussing how Justices’ positions in procedure cases often “stray from the positions they take in traditional federalism cases”).

**Appendix A**  
**State Amicus Briefs in Procedure by Political Party<sup>414</sup>**

	<i>Tellabs</i>	<i>Tuombly</i>	<i>Nicastro</i>	<i>Concepcion</i>	<i>Italian Colors</i>	<i>Knowles</i>	<i>Hood</i>	<i>Fiore</i>	<i>NML Capital</i>	<i>Halliburton</i>	<i>Spokeo</i>	<i>Bouaphakeo</i>
Ala.		Dark				Dark		Dark	Dark		Dark	
Alaska	Dark						Dark		Dark			
Ariz.			Light		Dark	Dark		Dark	Dark			
Ark.	Light		Light			Light	Light			Light		
Cal.	Light						Light					
Colo.		Dark					Dark				Dark	
Conn.	Light				Light	Light	Light		Light	Light	Light	Light
Del.	Light					Light	Light				Light	
D.C.				Light				Light			Light	
Fla.						Dark	Dark					
Ga.						Dark		Dark	Dark			
Haw.			Light		Light		Light	Light	Light	Light	Light	
Idaho	Dark	Dark					Dark	Dark		Dark		
Ill.	Light		Light	Light	Light		Light			Light	Light	Light
Ind.		Dark				Dark	Dark	Dark		Dark		
Iowa	Light		Light		Light		Light		Light	Light		
Kan.		Dark				Dark	Dark					
Ky.			Light				Light	Light		Light		
La.			Dark				Dark					
Me.			Light		Light		Light	Light		Light	Light	
Md.	Light		Light	Light	Light		Light				Light	Light
Mass.	Light				Light		Light				Light	Light
Mich.	Dark	Dark	Dark			Dark	Dark	Dark	Dark		Dark	
Minn.	Light			Light			Light				Light	
Miss.	Light				Light	Light		Light	Light	Light	Light	
Mo.	Light		Light		Light		Light	Light	Light	Light		
Mont.				Light			Dark	Dark	Dark			
Neb.	Dark	Dark				Dark	Dark	Dark			Dark	

414. Dark shading denotes Republican state AGs; light shading, Democratic state AGs; and diagonal stripes, nonpartisan state AGs. A white box indicates that the state did not participate.

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	<i>Tellabs</i>	<i>Tuombly</i>	<i>Nicastro</i>	<i>Concepcion</i>	<i>Italian Colors</i>	<i>Knowles</i>	<i>Hood</i>	<i>Fiore</i>	<i>NML Capital</i>	<i>Halliburton</i>	<i>Spokeo</i>	<i>Bouaphakeo</i>
Nev.	Blue				Blue		Blue					
N.H.	Red	Red					Blue	Blue				
N.J.	Blue											
N.M.	Blue		Blue	Blue	Blue		Blue		Blue	Blue	Blue	
N.Y.	Blue				Blue		Blue			Blue	Blue	Blue
N.C.							Blue			Blue		
N.D.	Red	Red	Red			Red	Red	Red	Red	Red		
Ohio	Blue				Red	Red	Red		Red			
Okla.	Blue	Blue	Blue				Red		Red			
Or.	Blue						Blue		Blue	Blue	Blue	Blue
Pa.		Red			Blue		Blue	Blue		Blue		Blue
R.I.	Blue	Blue			Blue		Blue			Blue		
S.C.			Red	Red	Red		Red	Red	Red			
S.D.	Red	Red				Red	Red					
Tenn.	Blue	Grey	Blue	Blue	Blue		Blue	Blue	Blue	Blue	Red	
Tex.						Red	Red		Red			
Utah	Red	Red	Red	Red	Red		Red	Red				
Vt.	Blue			Blue	Blue		Blue		Blue	Blue		
Va.		Red					Red					
Wash.					Blue	Red	Blue			Blue	Blue	Blue
W. Va.	Blue		Blue			Blue	Red				Red	
Wis.							Red				Red	
Wyo.					Blue		Red				Red	

**Appendix B**  
**U.S. Supreme Court Procedure Cases (1980-2016)**

In order to review all access-to-justice-related procedure cases decided by the U.S. Supreme Court, I began with the set of all Supreme Court decisions since 1980 as gathered by the Washington University Law School Database.<sup>415</sup> I chose 1980 because of the wide availability of amicus briefs filed since that Term. I then pared down the number of decisions by relevant categories provided by the database: “Economic Activity,” “Judicial Power,” “Due Process,” “Private Action,” “Miscellaneous,” and so on.<sup>416</sup> This elimination left me with thousands of cases.

After that initial round, I started a parallel tracking of procedure cases by reviewing all case citations in recent briefs submitted to the Court in prominent cases presenting issues of class actions, personal jurisdiction, and pleading. I then read the cited cases and examined whether they presented procedural questions—that is, issues related to the Federal Rules, personal jurisdiction, class actions, or other related concepts. This allowed me to identify dozens of cases. Importantly, I used the specific codes assigned to the procedure cases in the database to further limit the categories of cases.

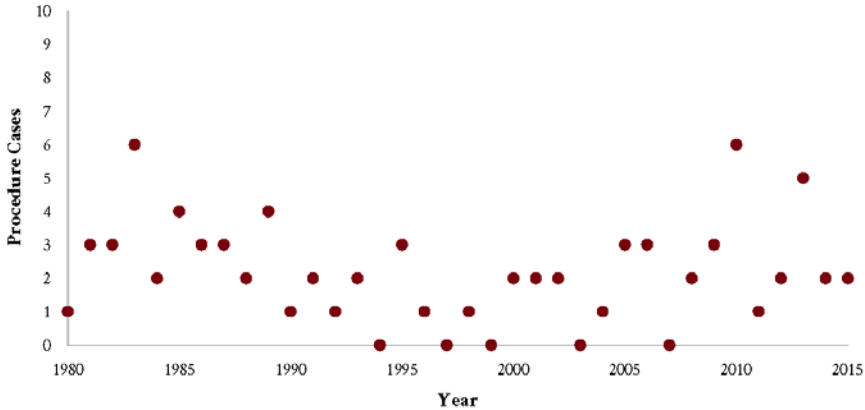
After a systematic comparison of cases found through my review of Supreme Court briefs and the database, I was left with a few hundred cases. I then further limited these by reading the cases to make sure they truly addressed a procedural issue. This left me with a final count of eighty-four cases. Figure B.1 below details the yearly distribution of these eighty-four cases from 1980 to 2016.

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415. *The Supreme Court Database*, WASH. U. LAW, <https://perma.cc/UN86-YBZ3> (archived Apr. 26, 2018).

416. *Id.*

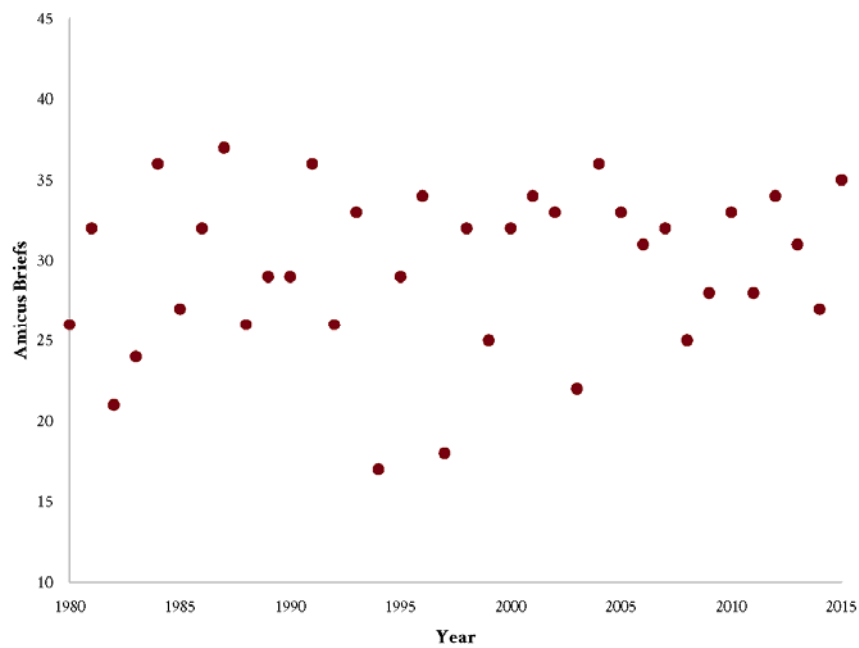
**Figure B.1**  
Supreme Court Procedure Cases by Year (1980-2016)



**Appendix C**  
**State Amicus Briefs (1980-2016)**

To review all state amicus briefs filed in the U.S. Supreme Court, I began with Paul Nolette's compilation of LexisNexis data.<sup>417</sup> I limited the search to briefs filed at the merits stage. I then gathered data for the last few years by reviewing all of the Court's dockets from 2013 to 2016. Figure C.1 below shows the filing of state amicus briefs in merits cases since 1980 (by Term).

**Figure C.1**  
State Amicus Briefs at the Merits Stage in All Cases



Using the Court's eighty-four procedure cases as discussed in Appendix B above, I then tallied the state amicus briefs in the specific area of civil procedure. Figure C.2 below shows that state amicus briefs dealing with procedural issues spiked in 2006 and 2007.

417. Nolette, *supra* note 113, at 455-56, 468 n.5.



**Figure C.2**  
State Amicus Briefs at the Merits Stage in Procedure Cases

