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THE STATES' INTEREST IN FEDERAL PROCEDURE

Diego A. Zambrano*

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Recent changes to federal procedure have alarmed state governments. In a series of cases decided in the past ten years, the 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 eighteen major Supreme Court procedure cases since 2007—demanding that federal courts refrain from remaking longstanding principles. Some state legislatures have threatened to invalidate procedural decisions through tactically worded 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 had *no effect on state courts whatsoever*. Why exactly are the States so interested in federal procedure?

This Article presents the first comprehensive study on the relationship between the States and federal procedure. The Article offers three contributions. First, the Article catalogues the States’ wide array of interventions into federal procedure to show that the States have a strong interest in recent procedural changes. Second, the Article builds a typology that explores the multifaceted ways by which federal procedure does in fact affect the States. This review exposes federal-state crosscurrents rooted in legal, economic, and political dynamics. Surprisingly, although Democrats and Republicans are squarely divided on procedural issues, the Article finds that the States’ institutional interest in procedure trumps political ideologies—most state amicus briefs in this context have involved bipartisan coalitions. Third, the 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 current closed-door discussions at the Advisory Committee.

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INTRODUCTION

Developments in the law of procedure have rarely been more important than in the past decade. Recent rulings by the Supreme Court have sought to circumscribe access to justice and the role of litigation in enforcing social norms. In the wake of *Daimler AG v. Bauman* (2014), 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.¹ Similarly, *Twombly* and *Iqbal* (2007, 2009) led to significant doctrinal changes to the motion to dismiss standard and a different calculation for *all* putative plaintiffs.² Extending this pattern, *AT&T v. Concepcion* and *Wal-Mart v. Dukes* (2011, 2013), made it more difficult for class action cases to survive in state and federal court.³ These procedural changes have been powerful—upsetting all areas of substantive law and granting or denying justice based on what some would call technicalities.

Scholars have addressed this procedural retrenchment from many angles,⁴ but they have largely overlooked one key stakeholder: the States. That is not 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 local procedural rules, we might expect them to be as interested in federal procedure as the United States is interested in French procedural rules. The States do not participate in the Advisory Committee that crafts the Federal Rules of Procedure. Nor are State Attorneys General urged (as the U.S. Solicitor General is) to file amicus briefs before the Supreme Court in important procedural cases. Indeed, legal scholars often assume that the States are uninterested in federal procedural

¹ See *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

² *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

³ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

⁴ 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 (2010) [hereinafter Miller, *Double Play*] (criticizing recent changes to pleading as undermining litigation's ethos); Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. P.A. L. REV. 1543 [hereinafter Burbank & Farhang, *Litigation Reform*] (describing how institutional competition between courts and Congress shaped procedural retrenchment); Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317 (2012) (arguing that “conservatives” succeeded in closing access to court 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 (2015) (discussing consequences of retrenchment on transnational litigation); Linda S. Mullenix, *Ending Class Actions As We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399 (2014) (discussing recent changes to class actions); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012) (criticizing the Supreme Court's “attack” on class actions); Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015) (describing the Supreme Court's procedural reforms as causing international legal “isolationism”).

developments and focus solely on how the federal branches shape procedure; consigning the States, and federalism concerns, to irrelevance in this context.⁵

Yet, a review of major federal procedural cases over the last ten years reveals a surprising fact: large coalitions of States have written strident 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 work-arounds to avoid them. There are countless examples, spanning procedural doctrines that directly affect the power of state courts, to those that have *no impact on state courts whatsoever*. Why exactly are the States so interested in federal procedure?

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

The Article first demonstrates that the States' interest in federal procedure is ubiquitous. The States have participated as amici in twelve out of eighteen major Supreme Court procedure cases since 2007.⁶ For example, sixteen States wrote an amicus in *Bell Atlantic Corp. v. Twombly* asking the Supreme Court to increase the burden of federal pleading standards; and forty-six States wrote in *Miss. ex rel. Hood v. AU Optronics Corp.* urging a narrow

⁵ See generally Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014) (discussing a “new era” in federal procedure); Arthur R. Miller, *Mcintyre in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465, 479 (2012) [hereinafter Miller, *Personal Perspective*] (same); Burbank & Farhang, *Litigation Reform supra* note 4 (same). Some scholars that have discussed federal-state relations in this context have addressed federalism in procedure generally or the States' internal rules of procedure. See e.g., Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: “The Political Safeguards” of Translocal Actions*, 156 U. PA. L. REV. 1929 (2008) (discussing interaction between principles of federalism and class action reform); Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703 (2016) (examining the interplay between federal and state rules of procedure); Zach Clopton, *Procedural Retrenchment and the States* (studying recent changes to state courts' internal rules of procedure). But these efforts have not systematically focused on state attempts to influence federal procedure.

⁶ It is not entirely clear given limitations in the data, but the States' amicus interest may be a recent development. In absolute terms, state amicus brief filings in Supreme Court cases have been relatively stable since the 1980s, averaging about 30 a year. 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.

reading of the Class Action Fairness Act.⁷ State legislatures have also played a role: the New York Assembly introduced a bill to effectively reverse *Daimler's* tightening of general jurisdiction, and the California and New Jersey legislatures attempted to skirt *Concepcion's* attack on class action litigation.⁸ These developments necessitate an explanatory theoretical framework.

After documenting the States' interest, the Article then deconstructs the States' interactions with federal courts and procedure.⁹ That inquiry requires a new typology that identifies the wide array of connections and crosscurrents between federal procedure and the States. I propose four broad theoretical and descriptive categories that place the States as: (1) Consumers of federal court services (through the private enforcement of state law); (2) Competitors (as court providers) in the litigation market; (3) Two-sided repeat players in federal litigation; and (4) Political entities. The bulk of the 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 on 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 *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 wages and hours, environmental claims, and consumer protection.¹⁰ To the extent that 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 state-federal

⁷ See *infra* Part II.

⁸ *Id.* In discussing *Concepcion* as a class action case, the Article is focusing 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. However, arbitration clauses that bar joinder, consolidation, or class arbitration can also be an attempt to avoid *any* effective pursuit of legal redress. See generally J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015).

⁹ I use the umbrella term “federal procedure” to cover both doctrines that apply only in federal court, like the Federal Rules of Civil Procedure, the Class Action Fairness Act, or venue rules like 28 U.S.C.A. § 1391; and many federal doctrines that apply in state and federal courts alike because of the Due Process Clause and the Supremacy Clause. However, the Article's main focus is on access-to-court procedural doctrines: jurisdiction, class actions, and pleading.

¹⁰ See *infra* Part III.1.

competition for institutional power, a crucial aspect of the framers' federalist vision.¹¹ 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 States have recently created state specialty business courts with the purpose of "generating litigation business for local lawyers"¹² and "curtail[ing] the increased use of the federal judicial system and alternative dispute resolution by business litigants."¹³ State judges have also sought to preserve important cases in state court to enhance their national status and prestige.¹⁴ Making these motivations explicit, a Philadelphia judge recently intimated 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."¹⁵

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 that States face on a yearly basis¹⁶—I discuss how they are also heavily interested in promoting access to 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.¹⁷ Vindicating the interest of 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.¹⁸ This may explain one of the Article's counterintuitive findings: while many scholars view the States as serving business interests,¹⁹ the Article shows that States have disagreed with the U.S. Chamber of Commerce in most of the recent procedural cases. This finding challenges the misperception that the States are captured by business interest groups.

¹¹ The Federalist No. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹² Omari Scott Simmons, *Delaware's Global Threat*, 41 J. CORP. L. 217, 238 (2015).

¹³ 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).

¹⁴ Cf. Gerhard Wagner, *The Dispute Resolution Market*, 62 BUFF. L. REV. 1085 (2014) (noting that 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.").

¹⁵ Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 288 (2016).

¹⁶ Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 184 (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 . . . 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.") (citations omitted).

¹⁷ Pew Charitable Trusts, *The State Pension Funding Gap: 2014* (Aug. 24, 2016). Available at: <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/08/the-state-pension-funding-gap-2014>

¹⁸ See *infra* Part III.

¹⁹ See *e.g.*, Miller, *Personal Perspective*, *supra* note 5 at 479 ("It should be obvious that procedural stop signs primarily further the interests of defendants, particularly . . . large businesses and governmental entities").

Finally, another dynamic force in this context is rooted in state partisan pressures. Both major parties have adopted nuanced outlooks on federal procedure: Republicans have embraced a restrictive view that encourages courts and Congress to limit litigation generally. Democrats, on the other hand, have embraced the “open courts” paradigm that advocates a loosening of pleading and class action standards, among other things. 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 at the very least that state institutional interests in federal procedure trump political ideologies. Indeed, federalism in civil procedure transcends political divides and can appeal to traditional conservative preferences for state power and to liberals’ commitment to court access. In fact, it is liberal justices who most often protect the States’ role in this context: Justices Sotomayor, Breyer, and Ginsburg have explicitly defended the States’ interest in maintaining open courts for state plaintiffs.²⁰

Federal procedure, in short, has a plural 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. These at-times contradictory interests also translate into state interventions in federal procedure that have an erratic and deeply conflicted feel—sometimes the States support higher pleading standards but other times they oppose them; sometimes they support a broad interpretation of specific jurisdiction and other times they embrace a narrow view. All four typology categories interact in active ways 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 the Article deals with States *qua* States,²¹ in many of these procedural cases, it is State AGs—an office directly elected in 43 States—who have taken the lead, intervening not only through amicus briefs, but also pointed policy letters, testimony in Congressional hearings, and even public comments to proposed changes to the Federal Rules. Because of State AGs’ central role, the Article discusses the wide range of incentives that pushes them to shape federal procedure. This

²⁰ See *infra* Part IV.

²¹ Although the States are certainly not monolithic, their unique role in our constitutional structure often gives them a common institutional outlook of federal procedure. The States are not an “it” but a “they” and in more ways than one: not only are there 50 States, each State is represented in procedural debates by their judiciary, legislature, executive (State AGs), and even non-governmental interest groups. To overcome this diffusion problem, the Article will focus on common institutional agendas that should influence state actors (State AGs, judges, and state legislators) as representatives of the institutions we call “States.”

extended discussion of State AGs' role in national debates is particularly timely: in the past few months Democratic State AGs have vowed to use federal litigation to check the Trump administration.²² The Article provides insights into the relevant motives behind State AGs' political role.

After laying the groundwork for the States' interest in procedure, I argue that the States ought to have an institutionalized voice in procedural debates. Civil procedure is unusual in failing to provide the States with avenues for input. The States are generally represented in federal substantive law through their influence on Congress, but also in administrative law through official bureaucratic partnerships that give them a powerful voice.²³ In federal procedure, however, the Supreme Court and Advisory Committee have occupied the field, shaping procedural devices through extensive rulemaking and judicial interpretation. This domination has left the States without sufficiently robust input channels—to the detriment of both state interests and the improvement of federal procedure.

With this in mind, the 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.²⁴ 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 price-in or internalize procedure's effect on the States.²⁵ More concretely, giving state actors a role in federal procedure—for example, through targeted notice and comment—can provide three major benefits: (1) rich epistemic input that can improve federal decisions (coming from a unique repeat player involved in federal litigation from both defendant and plaintiff sides); (2) democratic pluralism from elected State AGs in an area that lacks substantive input from elected officials; and (3) a defense of state sovereignty. The design of class action litigation, discovery, pleading standards, and jurisdictional tests is currently in flux.²⁶ The States' voice can be a powerful contributor in this debate. For example, state empirical and anecdotal evidence of discovery reform would bring a wealth of information to current Advisory Committee discovery debates. And yet, there is currently no formalized state participation in the Advisory Committee.

²² Vivian Yee, *To Combat Trump, Democrats Ready a G.O.P. Tactic: Lawsuits*, N.Y. TIMES, Dec. 14, 2016.

²³ See e.g., Federalism, 64 F.R. 43255 (obligating administrative agencies to evaluate the federalism consequences of any regulatory changes and to consult with state groups).

²⁴ 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).

²⁵ See e.g., Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 Nw. U. L. Rev. 447 (2013) (discussing the flaws of the current process, including the Advisory Committee's politicization and failure to deal with actual problems).

²⁶ Indeed, the Supreme Court recently granted *certiorari* in more than seven procedure cases, raising questions about *Concepcion* and *Daimler*, among others. The Article has important implications and predictions about the States' possible role in these cases.

For this reason, the Article makes three recommendations for reform to accommodate state interests in a more transparent and institutionalized manner: (1) formalizing the role of state officials in the Advisory Committee; (2) promoting mandatory notice and comment when there are procedural reforms with federalism consequences; and (3) embracing a judicial presumption (announced by Justice Ginsburg) that courts should “interpret [the] Federal Rules with awareness of, and sensitivity to, important state regulatory policies.”²⁷ These three reforms would anchor principles of federalism and the States’ voice as important inputs in procedural debates.

Finally, a word about the Article’s methodology is in order. Most of the critical information—amicus briefs, legislation, court decisions—is publically available. However, I draw unique insights into federalism in procedure from a comprehensive review of the States’ amicus interventions in procedure cases. I do this by systematically reviewing all Supreme Court procedure cases since 1980, compiling state amicus briefs in procedure, and examining State AG partisan affiliations.²⁸ The account that follows also draws from background interviews with the head of the National Association of Attorneys General, State AGs, and Solicitors General.

The Article proceeds as follows. Part I examines major procedural changes over the past decade, including a brief description of recent “procedural retrenchment.” Part II catalogues the States’ involvement in changes to personal jurisdiction, class actions, and pleading standards. Thereafter, Part III—the heart of the Article—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 Supreme Court and Congress have tackled with unprecedented vigor some of the most controversial access-to-court procedural doctrines: personal jurisdiction (a threshold question in every case); class actions (a significant portion of the largest cases); and pleading standards. Scholars have emphasized that these decisions have been doctrinally monumental.²⁹ Arthur Miller warned in 2010 that the Supreme

²⁷ *Shady Grove Ort. Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 437 (2010) (Ginsburg, J., dissenting). Brooke D. Coleman has offered a similar suggestion. Brooke D. Coleman, *Civilizing Federalism*, 89 TUL. L. REV. 307, 355 (2014). See also Stephen B. Burbank & Tobias B. Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17 (2010).

²⁸ I also leverage existing datasets. See *infra* note 302 (discussing prior work by Paul Nolette and Lemos & Quinn on the States’ Supreme Court amicus briefs). See also Appendix A, B, C.

²⁹ Any attempt to do a survey of the literature on these procedural issues would inevitably be incomplete. For some examples on recent pleading literature, see William Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693 n. 2-5 (2016); on class actions, see Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of*

Court was on a roll, pursuing changes to procedure that represented “the latest in a sequence of increasingly restrictive changes during the last quarter century,” and signified a “judicial shift[] in the interpretation of the Rules and the erection of other procedural barriers to a meaningful day in court.”³⁰ Below, the Article discusses how courts and Congress have retrenched major procedural doctrines:

Personal Jurisdiction. In the past six years, the court has remade traditional conceptions of both *specific* personal jurisdiction—which exists when claims arise out of a defendant’s contacts with the forum state—and *general* (so called “all-purpose”) jurisdiction. In *Goodyear* (2011) and *Daimler* (2014), 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 “at home.”³¹ The Court dispensed with the need for lower courts to assess the business interactions between a corporation and a state before concluding that a company is “at home” only in two “paradigmatic” and “ascertainable” locations: a company’s state of formal incorporation and/or principal place of business.³² These two cases, and especially *Daimler*, 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 can be sued went from a few dozen to one or two. For international companies, the effect is even more pronounced: domestic plaintiffs will simply be unable to sue unless they can prove the existence of specific jurisdiction.³³

Adding to this contraction of general jurisdiction, the Court also narrowed the reach of specific jurisdiction in three cases: *J. McIntyre Mach., Ltd. v. Nicastro*, *Walden v. Fiore*, and *Bristol-Myers Squibb Co. v. Superior Court*. In all three cases, the Court weakened prevailing specific jurisdiction theories like “stream of commerce” and “purposeful availment.” Specifically, a plurality in *McIntyre* 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.³⁴ Likewise, in *Walden*, the Court found that a

Categorical Imperatives, 2003 U. CHI. LEGAL F. 177, 183 n. 16 (2003); on general jurisdiction, see Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1347 n. 16-18 (2015); on transnational procedure trends, see Bookman, *supra* note 4.

³⁰ Miller, *Double Play*, *supra* note 4.

³¹ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (U.S. 2011); *Daimler*, 134 S. Ct. 746. See also Tyrrell v. BNSF Ry. Co., -- S. Ct. -- (2017).

³² Though the Court also left open the possibility of jurisdiction existing in other places in an “exceptional case.” *Daimler*, 134 S. Ct. at 762 n.19.

³³ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). Under the prevailing “business contacts test,” weak links subjected foreign companies to jurisdiction in the U.S., such as exporting a substantial amount of products to a state, having active employees therein, or even operating a small branch office. Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 525-530 (2004).

³⁴ *J. McIntyre*, 564 U.S. at 887.

Nevada district court 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.³⁵ And in *Bristol-Myers* the Court limited the ability of California courts to assert jurisdiction over out-of-state plaintiffs with injuries identical to those of in-state plaintiffs.³⁶ 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.³⁷ In the space of a few years, Congress enacted one major statute (the Class Action Fairness Act) and the Supreme Court decided several cases—almost all authored by the late Justice Scalia—that directly targeted various aspects of the modern class action. In many of these cases, the Court engaged in procedural rulemaking through adjudication or, in other words, it changed the meaning of Federal Rule 23 through cases rather than through the more laborious Advisory Committee process.³⁸

The 2005 Class Action Fairness Act effectively federalized interstate class actions—it moved them from state to federal court—and explicitly sought to tackle the long-term growth of state class action cases.³⁹ The statute’s most important section expanded federal courts’ diversity subject matter jurisdiction to encompass all class actions larger than \$5 million in amount in controversy where there is minimal diversity, *i.e.* any member of the class has different state citizenship than any defendant.⁴⁰ CAFA did not target state law or court procedure, instead, it merely expanded federal jurisdiction to increase removal rates from state courts. Both the House and Senate explained that CAFA’s main goal was to limit the proliferation of state class action cases by giving defendants the opportunity to remove their cases to federal courts.⁴¹

³⁵ 134 S. Ct. 1115 (2014).

³⁶ *Bristol-Myers Squibb Co. v. Sup. Ct. of California*, 137 S. Ct. 1773 (2017).

³⁷ *Burbank & Farhang*, *supra* note 4, at 1603-04 (“some Justices in the Court’s conservative majority have made little effort to conceal their hostility to class actions and the lawyers who bring them.”).

³⁸ [[The Advisory Committee is a creature of the Rules Enabling Act of 1934 and two amendments passed in 1958 and 1988. 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 (with a minimum 6 month waiting period). *See* *Infra* at IV.]]

³⁹ Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdiction Reform*, 156 U. PA. L. REV. 1823 (2008) (noting that CAFA “was the product of an extended and well-organized political campaign.”).

⁴⁰ 28 U.S.C. §1332(d)(2)(A).

⁴¹ Purcell, *supra* note 39 at 1854 (finding that “multistate class actions gave state courts a major role in resolving cases of broad national significance”).

The Supreme Court followed CAFA with a series of decisions limiting federal and state class action litigation with almost surgical precision, including: *AT&T Mobility v. Concepcion* held that the Federal Arbitration Act preempts state doctrines barring class arbitration waivers in consumer contracts—in effect, under the FAA, States cannot prohibit the corporate practice of inserting anti-class action arbitration clauses—leading to the removal of a substantial number of cases from state courts to arbitral tribunals;⁴² *Wal-Mart v. Dukes* increased the burden of proving common class injuries—weakening large class action cases involving employees in multiple states; *Standard Fire Ins. Co. v. Knowles* expanded the reach of CAFA (and therefore contracted state class actions) by holding that a party may not defeat CAFA’s diversity jurisdiction by stipulating damages under \$5 million; *Spokeo, Inc. v. Robins* used Article III standing to increase the burden on class plaintiffs to prove concrete injuries;⁴³ and *Comcast Corp. v. Behrend* raised the Rule 23 predominance requirement of a damages class action.⁴⁴ In all of these cases, the Court used a variety of tools to effectively neuter class actions.

Pleading. Like class actions, pleading is a creature of the Federal Rules of Civil Procedure. The modern Rule 8(a) requires only a pleading that contains “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁴⁵ Since 1957, the Supreme Court interpreted this to mean that a complaint needs only to “give the defendant fair *notice* of what the . . . claim is and the grounds upon which it rests.”⁴⁶ After decades of stability under this easy-to-meet “notice pleading” paradigm, in 2007-2009 the Supreme Court made it substantially more difficult to satisfy pleading requirements in *Tellabs*, *Twombly*, and *Iqbal*. In *Tellabs*, the Court affirmed a Congressional increase of pleading standards for securities claims. Specifically, the Court held that the Private Securities Litigation Reform Act of 1995 imposed a scienter standard that required sufficient evidence so that a court could make “powerful or cogent” inferences and not just “reasonable” ones, which was an alternative interpretation of the statute.⁴⁷ In other words, the Court validated Congress’ heightened pleading standards in securities claims. By contrast, in *Twombly*, the question focused entirely on the Rule 8 standard of pleading: was “notice pleading” adequate or did plaintiffs need to allege sufficient facts that would support the claim. In a tour-de-force of procedural reform, the Supreme Court

⁴² *Concepcion*, 563 U.S. at 336. Gilles & Friedman, *After Class*, *supra* note 4 at 627 (noting that “[a]ll of the doctrinal developments of recent years circumscribing the reach of class actions pale in import next to the game-changing [*Concepcion*] edict 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.”).

⁴³ *Spokeo* presented a novel question of standing under Article III but indirectly also addressed the importance of private class actions as a tool for data protection. No. 13-1339, 2016 WL 2842447, at *1 (U.S. May 16, 2016).

⁴⁴ 133 S. Ct. 1426 (2013).

⁴⁵ Fed. R. Civ. P. 8.

⁴⁶ *Conley v. Gibson*, 355 U.S. 41, 47, (1957) *abrogated by Twombly*, 550 U.S. 544 (emphasis added).

⁴⁷ *Tellabs*, 551 U.S. at 310.

embraced the petitioners’ position and 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 “entitlement to relief.”⁴⁸ A few years later in *Ashcroft v. Iqbal*, the Court affirmed that the plausibility pleading standard applied to all areas of law, not just antitrust cases.

* * *

All of these cases, and others, exemplify what scholars call the Supreme Court’s “procedural retrenchment.” *Goodyear* and *Daimler* narrow the reach of general jurisdiction; *Nicastro* and *Walden* of specific jurisdiction; *Concepcion* and *Wal-Mart* eliminate a wide swath of class action cases; and *Twombly* and *Iqbal* replaced “notice” pleading with “plausibility.” The scholarly reaction has been consistent, describing these changes as “monumental,” “anti-litigation,” a “political project,” and “revolutionary.”⁴⁹ 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.

II. THE STATES’ ATTEMPTS TO INFLUENCE FEDERAL PROCEDURE

This Section explores an overlooked player in all of 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 exemplifies a current procedural paradigm that is divorced from the States’ interests. Below, I show that throughout all of these major procedural retrenchment cases the States have been active participants in federal procedural debates.⁵⁰ Section II.A addresses state filing of amicus briefs in procedure cases, including the type of cases in which they file. Section II.B then identifies state legislation, court decisions, and policy pronouncements on federal procedure issues. These sections will set up the heart of the paper, Part III’s analysis of state interests in federal procedure.

A. State Amicus Briefs

In this Section I catalogue how in most of the above-described cases, State AGs have authored extensive merits briefs 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,

⁴⁸ *Twombly*, 550 U.S. 544.

⁴⁹ See *supra* note 30.

⁵⁰ The Article focuses specifically on areas of “federal procedure” that impact access-to-court and have generated the most scholarly debate: personal jurisdiction, class actions, and pleading. Note that I also refer to the District of Columbia as a state for purposes of this Article.

including state solicitors general and their internal staff.⁵¹ State AGs also pick their cases carefully to avoid diluting their voice. We can therefore assume that amicus participation indicates a non-trivial 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 [84] cases).⁵² Within this period, I systematically reviewed the participation of state coalitions as amici. 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.

My main finding is that in *most* important procedure cases in the past decade, large coalitions of States have submitted extensive merits briefs that make compelling arguments. Their rate of participation is impressive: 12 out of 18 major procedure cases (66%) in the last ten years have provoked state amicus briefs with an average of 21 States per brief.⁵³ Although the States have not uniformly supported one side, they have been at odds only in 3 out of 12 cases. The diversity of participation is notable: every State has signed-on to at least one brief and most States (30) have participated in five or more cases.⁵⁴

The States' interventions have mostly opposed procedural retrenchment. In seven out of the twelve procedure cases (58%) the States promoted an expansive view of civil procedure and rejected the anti-litigation movement.⁵⁵ However, the States' amicus briefs have an erratic feel because they often embrace conflicting interests. For example, in *McIntyre*, addressing the reach of specific jurisdiction in a case where a foreign manufacturer had sold defective products in New Jersey, eighteen States expressed an interest in protecting the reach of products liability laws and argued for a flexible interpretation of purposeful availment.⁵⁶ Ultimately, a plurality of justices disagreed with the States and limited the reach of specific jurisdiction.⁵⁷ Just three years later, in *Walden v. Fiore*—involving a claim in Nevada against a Georgia police officer—nineteen States (out of which *nine* had participated in *McIntyre*) contradicted the *McIntyre* amicus position and argued in favor of a narrow conception of specific jurisdiction.⁵⁸ The States were concerned about the extension of jurisdiction by state courts over state officials from other States. This time, the Court agreed with the States.⁵⁹

⁵¹ Notes on Phone Call with Former State AG (Jan. 11, 2017) (on file with author); Notes on Phone Call with Former State SG (Oct. 7, 2016) (on file with author).

⁵² See Appendix B for discussion of dataset.

⁵³ See Appendix A.

⁵⁴ See Appendix A. See also Figure 3 at 16 (for discussion of repeat state filers) and *infra* Part III (for discussion of political party divisions).

⁵⁵ *Concepcion, Tellabs, Stand. Fire, J. McIntyre, Italian C., Halliburton, and Argentina v. NML*.

⁵⁶ 564 U.S. 873 (2011).

⁵⁷ *McIntyre*, 564 U.S. at 887.

⁵⁸ *McIntyre*, States' Amicus Brief.

⁵⁹ 134 S. Ct. 1115 (2014).

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*, where eight States defended class actions as an important consumer protection tool while two States attacked them,⁶⁰ 46 States successfully argued in *Hood* that CAFA should not be interpreted to disturb State AG authority “inherent in the supreme power of every state” to bring *parens patriae* actions in state court;⁶¹ and thirteen States defended class actions in *Spokeo* as a necessary complement to government enforcement, while eight States disagreed and argued that class actions “endanger the judicial process by creating immense pressure to settle.”⁶² The States also participated in at least five other class action cases.⁶³

The States’ intervention in *Tyson Foods* 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.⁶⁴ Plaintiffs, as a class, argued that time spent “donning and doffing” protective gear constituted compensable work under the Fair Labor Standards Act.⁶⁵ At the class certification stage, the issue boiled down to whether a representative sample on the average time it took the employees to put the gear on was “an impermissible means of establishing classwide liability” under Federal Rule 23. Unexpectedly, a coalition of eight States as amici strenuously defended class actions in the wage and hour context and argued in favor of a flexible interpretation of the Rule 23 predominance requirement—a federal rule that *does not* apply in state court—that could be satisfied through a representative sample.⁶⁶ The Court agreed and held that such a sample may be appropriate.

The States have also penned amicus briefs in other cases that seem to have no relationship to state interests, including *Twombly*, *Tellabs*, and *NML*. In *Twombly*, sixteen States took a strong amicus position supporting higher pleading standards and laying out the States’ interest in “protecting their citizens, corporate or otherwise, from the prospect of unfounded costly

⁶⁰ The States also intervened in similar cases. 21 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. *Standard Fire Insurance Company v. Knowles*, 133 S. Ct. 1345 (2013). The Court held that a party may not defeat CAFA and diversity jurisdiction by stipulating damages under \$5 million. Similarly, 21 States defended class actions in the securities context in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014).

⁶¹ *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 737 (2014). The question presented was whether CAFA’s provisions covering removal of “mass actions” included actions filed by State AGs on behalf of state beneficiaries (*parens patriae*). The Court ultimately agreed with the States.

⁶² *Spokeo, Inc. v. Robins* presented a novel question of standing under Article III but indirectly also addressed the importance of private class actions as a tool for data protection. No. 13-1339, 2016 WL 2842447, at *1 (U.S. May 16, 2016). *See also* *Spokeo*, State Amicus Brief.

⁶³ *See infra* Table 1 at 14. *See also infra* Part III for cases where the states *did not* participate.

⁶⁴ *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016).

⁶⁵ *Id.*

⁶⁶ 136 S. Ct. 1036 (2016).

Please cite to: 70 STAN. L. REV. __ (forthcoming)

lawsuits.”⁶⁷ Conversely, in *Tellabs*, thirty States argued that they had an interest in low pleading standards under the Private Securities Litigation Reform Act (PLSRA) and federal securities laws because they involved the protection of their citizens from securities fraud.⁶⁸ Likewise, in *Republic of Argentina v. NML Capital, Ltd.*, 21 States asserted an interest in the availability of transnational enforcement discovery in federal courts under Rule 69.⁶⁹

Below, Table 1 summarizes the States’ interventions, including the Supreme Court’s holdings; the States’ positions; and the size of the coalitions:

⁶⁷ *Id.*

⁶⁸ *Tellabs*, States’ Amicus Brief (expressing “alarm” about higher pleading standards).

⁶⁹ *NML*, States’ Amicus Brief. Likewise, the States participated as *amici* in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *Merrill Lynch, et al. v. Dabit*, 547 U.S. 71 (2006); *Fox v. Vice*, 563 U.S. 826 (2011).

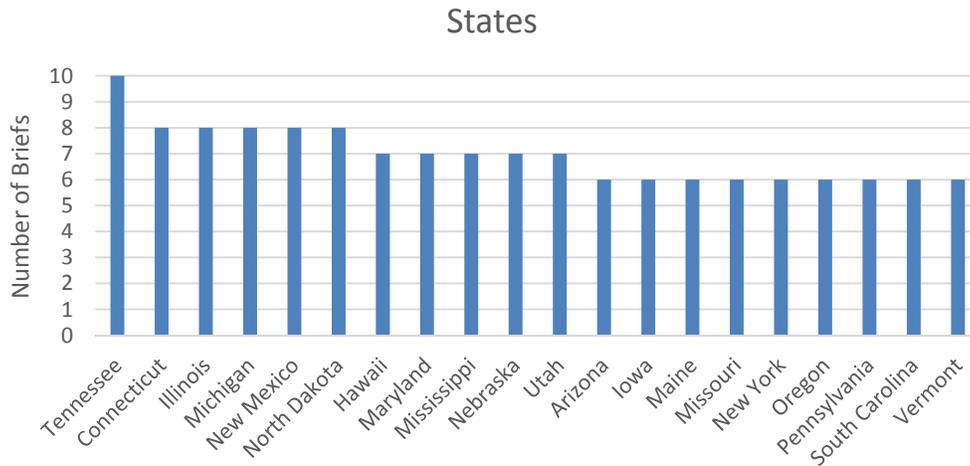
Table 1: Procedural Changes (2007-2016) and the States' Amicus Briefs⁷⁰

Area	Recent Federal Changes	State Amici	State Position
Personal Jurisdiction	<i>J. McIntyre. v. Nicastro</i> (2011)* (Limits specific jurisdiction)	18 States	In favor of expansive reading of purposeful availment. ✖
	<i>Walden v. Fiore</i> (2014) (Limits specific jurisdiction)	19 States	Against broad reading of specific jurisdiction. ✔
Class Actions	<i>AT&T v. Concepcion</i> (2011) (Preempts state law doctrines that prevent consumer arbitration)	10 States	Conflict: eight in favor of class actions ✖, two against ✔.
	<i>Am. Exp. Co. v. Italian Colors</i> (2013)** (Affirms enforcement of arbitration clauses in antitrust context)	22 States	Against arbitration class action waivers ✖.
	<i>Standard Fire v. Knowles</i> (2013)* (Prohibits stipulation of damages to avoid CAFA jurisdiction)	18 States	Conflict: fifteen in favor of CAFA ✔, and three against ✖.
	<i>Halliburton Co. v. Erica P.</i> (2014)** (Affirms fraud-on-the-market theory but allows defenses prior to class cert)	20 States	In favor of securities class action litigation. ∞
	<i>Miss. ex rel. Hood v. AU Optronics Corp.</i> (2014)* (Addresses reach of CAFA)	46 States	In defense of state sovereignty and against broad interpretation of CAFA. ✔
	<i>Tyson Foods. v. Bouaphakeo</i> (2016)** (Addresses Rule 23 Predominance)	8 States	In favor of flexible Rule 23 Predominance Requirement ✔
	<i>Spokeo, Inc. v. Robins</i> (2016)** (Addresses class action standing)	22 States	Conflict: fourteen in support of class action litigation ✖, and eight against ✔.
Pleading	<i>Bell Atlantic Corp. v. Twombly</i> (2007)** (Increases Rule 8 pleading standards)	16 States	In favor of higher pleading standard. ✔
	<i>Tellabs, Inc. v. Makor.</i> (2007)** (Affirms heightened PSLRA pleading)	30 States	Opposed to a heightened PLSRA standard. ✖
Discovery	<i>Argentina v. NML Capital</i> (2014)** (Discusses importance of broad discovery)	21 States	In favor of broad discovery. ✔

⁷⁰ Legend: “✔” successful arguments; “✖” rejected arguments; “∞” neutral arguments; “*” originated in state court; “**” does not affect state courts directly.

The States’ amicus briefs seem to indicate a deep interest in these developments. It seems unlikely that the States’ activity can be explained by just an overall increase in their rate of amicus filings. In absolute terms, overall state amicus briefs at the merits stage in all cases have been relatively stable since 1980, averaging around 30 per year.⁷¹ Further, as mentioned above, the diversity of state participation is remarkable. Certain States have participated in as many as eight or ten amicus briefs. Below, Figure 1 includes the most common repeat filers:

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



The literature on state amicus briefs outside of the procedure context generally concludes that these briefs are highly influential.⁷² As Kelly Lynch finds, Justices and their clerks take special note of State AG amicus briefs and “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.”⁷³ The Supreme Court even welcomes State AG intervention by exempting them from the requirement that an amicus must obtain consent of the parties or the Court.⁷⁴

In line with these findings, the procedure amicus briefs outlined above had an important impact. The Supreme Court adopted the States’ position—judged by the side that received the most support from the States—in only 55 per cent of cases.⁷⁵ However, in the vast majority of procedure cases the parties’

⁷¹ See Appendix C.

⁷² See generally, Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 782 (2000) (conducting an empirical analysis of the impact of amicus briefs); Lemos & Quinn, *supra* note 6 (same).

⁷³ Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 48 (2004).

⁷⁴ Sup. Ct. R. 37.4.

⁷⁵ See *Standard Fire*; *Hood*; *Walden*; *Tyson Foods*; *NML*; and *Twombly*. For comparison, “[i]n recent decades, when on petitioner’s side . . . the Solicitor General won 75% of the time,

briefs discussed the States’ amicus at-length, and in most of these cases the States raised arguments that no other party or amicus had.⁷⁶ Notably, in *Twombly*, petitioner’s reply brief prominently cited the States’ amicus multiple times, noting that “the States’ attorneys general . . . have urged this Court to reverse the Second Circuit’s decision,” and Justice Stevens discussed the States’ interests in dissent.⁷⁷ Litigants have even used the States’ briefs repeatedly in oral argument. For example, in one case petitioner’s counsel pointed the Justices to a particular page in the States’ amicus and quoted directly from it;⁷⁸ in another, counsel argued in favor of principles of federalism “as evidenced by the 46 States” who intervened as amici.⁷⁹ In short, the amicus briefs influenced the cases and the arguments.

To sum up, these ubiquitous state attempts to influence federal procedure expose a deep interest in the development of procedural jurisprudence. The States have urged the Supreme Court to recognize their public views in their 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. With regards to pleading, only six states have adopted *Twombly*’s plausibility standard and courts in nineteen states have explicitly criticized it.⁸⁰ Recent changes to personal jurisdiction and class actions have provoked even stronger responses. Instead of concentrating on reforming state court procedure, state legislatures and courts have engaged in a debate about the meaning of federal procedure (*e.g.*, the FAA; Due Process) and how it applies to both state and federal courts. Below, I analyze the effect of *Daimler*, CAFA, and *Concepcion* in this context.

Changes to general jurisdiction wrought by *Daimler* have shifted the focus of the jurisdiction analysis from the Due Process Clause 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, *Daimler* clarified *International Shoe* by holding that general jurisdiction is appropriate only in a company’s state of incorporation and

compared to petitioners otherwise winning 61% of the time, and when the Solicitor General filed on respondent’s side, that position prevailed in 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).

⁷⁶ Including in Hood; Tyson Foods; Walden; *Twombly*, etc.

⁷⁷ *Twombly*, Pet. Reply Br. at 14.

⁷⁸ McIntyre, Supreme Court Oral Argument, Jan. 11, 2011. Available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2010/09-1343.pdf (“Mr. Ferguson: Thank you, Your Honor. Justice Breyer, I would – in response to your concern, I would ask you to look at page 29 of the States’ amicus brief . . .”).

⁷⁹ Hood, Supreme Court Oral Argument, Nov. 6, 2013. Available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2013/12-1036_elpd.pdf.

⁸⁰ Clopton, *supra* note 5 at 16.

principal place of business. 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 *Daimler*, plaintiffs around the country have argued that registration to do business in a state—a statutory prerequisite to conducting business in all 50 States—constitutes “consent” to general jurisdiction.⁸¹ Last year, the Second Circuit weighed into the “nettlesome and increasingly contentious” question of consent by emphasizing that it is a question of state law.⁸²

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 “constitutes consent to the jurisdiction of the courts of this state for all actions against such corporation.”⁸³ The New York Advisory Committee on Civil Practice explicitly recommended adoption of the bill. Its main sponsor argued that jurisdiction over New York licensed companies “will save residents and others the expense and inconvenience of traveling to distant fora,”⁸⁴ and that *Daimler* did not address consent to jurisdiction.⁸⁵ Although the New York Assembly passed the bill by a vote of 137-7, it has yet to pass in the Senate.⁸⁶

Charting a parallel path, several state-court decisions have embraced rare theories in order to avoid *Daimler*. Close to a dozen States have embraced the consent theory to find general jurisdiction.⁸⁷ Recently, the New York Appellate Division and a lower court held that *Daimler* did not “change the law with respect to personal jurisdiction based on consent.”⁸⁸ Similarly, the Montana Supreme Court dodged *Daimler* as applying *only* to cases with

⁸¹ Indeed, 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, *Pennoyer's Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler Ag v. Bauman*, 90 N.Y.U. L. REV. 1609, 1647 (2015) (including appendix listing all state statutes); *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”); *St. Clair v. Cox*, 106 U.S. 350, 356 (1882); *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1855); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 632 (2d Cir. 2016) (discussing the consent theory).

⁸² *Brown*, 814 F.3d at 619.

⁸³ Proposed Consent Bill in the New York General Assembly, A. Doc. 6714 (N.Y. 2015), available at: http://assembly.state.ny.us/leg/?default_fld=&bn=A06714&term=2015&Summary=Y&Text=Y

⁸⁴ *Id.*

⁸⁵ The legislation points out that New York courts have overwhelmingly supported the consent to general jurisdiction theory for decades. *Id.* (citing *e.g.*, *Karius v. All States Freight, Inc.*, 176 Misc. at 159; *Robfogel Mill-Andrews Corp. v. Cupples Co.*, 67 Misc.2d 623, 624 (Sup.Ct. Monroe Co. 1971); Restatement of the Law (Second) of Conflict of Laws § 44 (1971)).

⁸⁶ See Proposed Bill *supra* note 83.

⁸⁷ See Clopton, *supra* note 5.

⁸⁸ *Bailen v Air & Liquid Sys. Corp.*, 2014 N.Y. Misc. LEXIS 3554 (N.Y. Sup. Ct. Aug. 5, 2014); *B & M Kingstone, LLC v. Mega Int'l Commercial Bank Co.*, 15 N.Y.S.3d 318, 324 (N.Y. App. Div) (2015).

transnational elements.⁸⁹ And the California Supreme Court expanded specific jurisdiction beyond recognizable limits in order to skirt *Daimler* and allow claims against a company for acts that took place outside of the state.⁹⁰ In *Bristol-Myers*, the California Supreme Court found specific jurisdiction despite the lack of a direct connection between the claims and the state because of the company's "nationwide marketing, promotion and distribution" of a drug. In other words, the court converted specific jurisdiction into what was general jurisdiction pre-*Daimler*. This prompted a reversal from the Supreme Court.⁹¹

State legislatures and courts have been a hive 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, has been the primary catalyst here. The California and New Jersey legislatures have considered bills to limit the reach of *Concepcion*, including a California bill that made denials of motions to compel arbitration unappealable until final judgment.⁹² That bill passed in the California assembly but was ultimately rejected by the state Senate.⁹³ Last year, the California legislature successfully passed two bills that limited arbitration in certain contexts, but a third bill that limited arbitration in labor contracts was vetoed by the governor.⁹⁴ Further, the California legislature has refused to amend current laws barring consumer arbitration, leading Justice Sotomayor 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."⁹⁵

State courts have continued the struggle, engaging in a "tug-of-war"⁹⁶ with the Supreme Court by developing theories that avoid *Concepcion* or cabin it: the Kentucky, North Carolina, and New Hampshire Supreme Courts, as well as California lower courts, have invalidated arbitration clauses for various reasons;⁹⁷ the Washington Supreme Court created a case-by-case approach to

⁸⁹ Tyrrell v. BNSF Ry. Co., 383 Mont. 417 (2015) *rev'd sub nom* Tyrrell v. BNSF Ry. Co., -- S. Ct. -- (2017). For a discussion of the wider impact of *Daimler* on transnational litigation, including discovery, see Diego A. Zambrano, *A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery*, 34 BERKELEY J. INT'L L. 157 (2016).

⁹⁰ *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874 (Cal. 2016).

⁹¹ *Id.* at 804. *Bristol-Myers Squibb Co. v. Superior Court*, -- S.Ct. -- Slip Opinion (2017).

⁹² Myriam Gilles & Gary Friedman, *After Class*, *supra* note 4 at 653-54 (discussing the California bill); New Jersey Assembly Bill No. 4097, 216th Legislature. Available at: www.njleg.state.nj.us/2014/Bills/A4500/4097_11.HTM.

⁹³ California Legislature; Bill AB-1062 Public social services. Available at: http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201120120AB1062

⁹⁴ California Legislature; Bill AB-465 Contracts against public policy. Available at: http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB465.

⁹⁵ *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 474 (2015) (J. Sotomayor, dissenting).

⁹⁶ James Dawson, *Contract After Concepcion: Some Lessons from the State Courts*, 123 YALE L. J. 1 (2014) (discussing existing *Concepcion*-avoiding theories).

⁹⁷ *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 313 (Ky. 2015); *King v. Bryant*, 795 S.E.2d 340 (N.C. 2017); *Finn v. Ballentine Partners, LLC*, 169 N.H. 128 (2016); Dawson, *supra* note 95 at n.24 *citing* *Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773 (2012).

avoid *Concepcion's* alleged ban on only “blanket” anti-arbitration approaches;⁹⁸ the New Jersey Supreme Court held consumer arbitration clauses unenforceable in certain contexts,⁹⁹ and the Missouri Supreme Court held that *Concepcion* does not cover arbitration clauses in contracts of adhesion.¹⁰⁰ In response to these developments, the U.S. Supreme Court has repeatedly intervened to swat down these *Concepcion*-avoiding theories.¹⁰¹

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 to adopt rules that would effectively overrule *Concepcion* in the context of consumer financial products and services contracts.¹⁰² Similarly, powerful state actors publically opposed CAFA.¹⁰³ Below, Table 2 summarizes the states’ statutory and judicial interventions in procedure:

Table 2: Procedural Changes and the States’ Interventions

Area	Recent Federal Changes	State Influence	State Position
Personal Jurisdiction	<i>Daimler AG v. Bauman</i> (Limits general jurisdiction)	State Registration Statutes New York Bill State Court Cases	Varied. Some in favor of broader jurisdiction.
Class Action	Class Action Fairness Act (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>AT&T v. 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 Comment by 18 States	Strong defense of class action litigation.
Pleading	<i>Bell Atlantic Corp. v. Twombly</i> (increases pleading standards)	Widespread state court rejection. Only 6 states have adopted plausibility pleading	Strong defense of notice pleading.

⁹⁸ *Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197, 1203 (Wash. 2013).

⁹⁹ *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 436 (2014).

¹⁰⁰ *Brewer v. Missouri Title Loans*, 364 S.W.3d 486 (2012).

¹⁰¹ See e.g., *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Kindred Nursing Centers Ltd. P'ship v. Clark*, 2017 WL 2039160 at *4 (U.S. May 15, 2017).

¹⁰² Letter from the Attorney Generals of California, et al., to the Director of the Consumer Financial Protection Bureau, Richard Cordray, August 11, 2016. Available at: <http://www.mass.gov/ago/docs/consumer/cfpb-multistate-letter.pdf>.

¹⁰³ See Letter from David A. Brock, president, Conference of Chief Justices (July 19, 1999) (noting that CAFA “would unilaterally transfer jurisdiction of a significant category of cases from state to federal courts.”).

* * *

In conclusion, Part II demonstrates 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, amicus attempts to influence federal procedure span doctrines that apply only in federal courts—like Rule 8 pleading, transnational discovery under Rule 69, and Rule 23 class action requirements—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, like Due Process and arbitration, why is the States’ amicus interest so unprecedented? Moreover, the States’ 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, *Tyson Foods* and *NML* dealt with federal rule standards that, again, 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 Section provides a typology of state interests that seeks to explain how changes to federal procedure can impact 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 procedure before jumping into the States’ interests as follows: Part III.1 describes the States’ interest in the private enforcement of state law in federal court; Part III.2 describes institutional competition between the States and federal government for business litigation; Part III.3 explores the role of States as two-sided repeat players; and finally Part IV.4 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 the Article focuses on the States as institutions. As mentioned above,¹⁰⁴ although the States are not an “it” but a “they,” there are common institutional pressures that apply to the States in the context of federal procedure. Where appropriate, however, I focus on specific actors—like State AGs (responsible for amicus briefs)—and the forces that drive them to share common goals and outlooks of federal procedure.

Second, the typology is not meant to be an exhaustive account of the States’ interests. For example, there is one potential state motive that 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 implicit—in that state courts sometimes follow the reasoning of federal

¹⁰⁴ See *supra* note 22.

procedural decisions—and explicit—in that at least 23 States crib or replicate most of the federal rules.¹⁰⁵ While this may give the States an added interest in how the federal rules are interpreted or changed, the 23 State “replicators” were barely more likely to intervene as amici than other States.¹⁰⁶ Some scholars have also shown that the States have mostly refused to emulate recent procedural retrenchment.¹⁰⁷ For these reasons I emphasize other accounts.

The Simple Account of the States in 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.¹⁰⁸ Because of this, federal courts are deliberately isolated from the States’ possible parochial interests. Second, and most importantly, given that the States have their own local court systems with local procedural rules, *a priori*, one might expect the States to be generally uninterested in the development of federal procedure (especially class actions or pleading standards). A simple account of state behavior would assume 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 (like personal jurisdiction), and FAA preemption might be exceptions because they apply to state courts, too. But even there the States are involved in a *federal* debate and not just changing their internal rules of procedure.

Departing from this simple default of state non-interest, there are several possible cases where the States might pay attention. Below, I proceed by reviewing four major categories of state interests that are not mutually exclusive. As I will explain, in some cases the categories are complementary and in others they are in tension, but on the whole, these categories give the States a rich and variegated perspective into federal litigation.¹⁰⁹

1. *The Private Enforcement of State Law in Federal Court*

One possibility is that the States are interested in federal procedure because they rely on private litigants to enforce state law in *federal courts*. Scholars have long noted that the American legal system reflects a conscious choice in favor of private litigation, instead of administrative action, as a vehicle for the enforcement of public law and policy.¹¹⁰ This choice has

¹⁰⁵ See e.g., John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L. J. 354 (2003) (discussing the existence of state replicators that adopt federal rules almost entirely); Dodson, *supra* note 5 (same).

¹⁰⁶ See Appendix. I compared the amicus filing rates of John Oakley’s 23 state rule “replicators,” see *id.*, with the non-replicators and found an insignificant difference.

¹⁰⁷ See e.g., Clopton, *supra* note 5.

¹⁰⁸ See e.g., *The Federalist* No. 80 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁰⁹ Per Supreme Court Rule 37.3(b), each amicus brief includes a statement of interest.

¹¹⁰ See Sean Farhang, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 60 (2010) (exploring the rise of private enforcement); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV.

produced an American administrative state that is smaller than that of European counterparts but with a much larger private litigation apparatus.¹¹¹ This type of public law litigation involves disputes between private litigants that nonetheless enforce statutory goals and produce positive social externalities. A simple term coined by the Second Circuit in 1943 has evolved to label some of these litigants as “private attorney[s] general.”¹¹²

For several decades, private enforcement has been popular in state legislatures, courts, and administrative agencies.¹¹³ For example, California’s Unfair Competition Law allows suits for “any unlawful, unfair or fraudulent business act” and can be enforced by private parties.¹¹⁴ Likewise, 40 States have passed aggressive wages and hours statutes to regulate the labor market through private claims.¹¹⁵ 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.¹¹⁶ Importantly, in many private enforcement cases, CAFA and other liberal removal rules force state plaintiffs to litigate in *federal* court. Indeed, more than 50% of all federal class claims in the consumer financial context assert concurrent state law claims.¹¹⁷ And state wages and hours statutes are almost exclusively enforced along with Fair Labor Standards Act claims in federal court.¹¹⁸

1281 (1976); Miller, *Double Play*, *supra* note 4 at 72 (recognizing the view that “the 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.”); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1229-30 (2003); Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589 (2005).
¹¹¹ See generally, Burbank & Farhang, *Litigation Reform*, *supra* note 4; J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012).

¹¹² *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943). See also William B. Rubenstein, *On What A “Private Attorney General” Is-and Why It Matters*, 57 VAND. L. REV. 2129 (2004) (providing a historical overview and typology of the concept of a private AG).

¹¹³ Burbank & Farhang, *Litigation Reform*, *supra* note 4, at 1547. Stephen Burbank and Sean Farhang have shown that Congressional reliance on private litigation to enforce federal statutes “exploded in the late 1960s” and the following decades as a result of conscious statutory choices by Congress. This same explosion took place in the States. See Rubenstein, *supra* note 112 at 2130.

¹¹⁴ Cal. Bus. & Prof. Code §§ 17200-17208.

¹¹⁵ Bruce Goldstein, Marc Linder, Laurence E. Norton, II, Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1055-1061 (1999).

¹¹⁶ See e.g., Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 12-13 (2002); Miller, *Double Play*, *supra* note 4 at 761; Private Attorney General Doctrine - State Cases, 106 A.L.R. 5th 523, 523 (2004).

¹¹⁷ Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street and Consumer Protection Act § 1028(a), Consumer Fin. Protection Bureau Sec. 6, 20 (2015).

¹¹⁸ See *infra* at 27.

The States' overt reliance on private enforcement is likely explained by budget constraints.¹¹⁹ Many State AGs are chronically underfunded and especially so after the financial crisis and ensuing recession. As a result, State AGs face significant resource constraints unparalleled in the federal government.¹²⁰ Indeed, the States routinely admit that their administrative agencies lack funding and depend on private litigants.¹²¹ This creates an enforcement gap that pushes States to embrace a private enforcement regime through litigation in state and federal court.¹²²

Beyond a targeted 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 to avoid losing existing rights and interests than they are to secure new ones.”¹²³ 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 certain areas like wages and hours, securities litigation, etc.—in federal court.

A systematic review of the States' asserted interests—contained in the amicus briefs—and their apparent arguments in many of these cases indicates that their views of private enforcement do seem to influence their outlook of federal procedure. As described in Part I, recent procedural changes implicate the ability of plaintiffs to access courts and consequently limit the power of private attorneys general. Whether it is changes to pleading standards, stricter class action rules, or stringent general jurisdiction requirements, procedural

¹¹⁹ See *supra* Farhang note 110 at 71 (discussing the budget constraint hypothesis).

¹²⁰ Maggie Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 761 (2011); Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law: Hearing Before the Subcomm. on the Constitution, 112th Cong. 30 (2012) (statement of Amy Widman) (noting State AGs are often underfunded and understaffed).

¹²¹ Tyson Foods, States' Amicus Brief.

¹²² See e.g., Miller, *Double Play*, *supra* note 4 at 73 (“there 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.”); Gilles & Friedman, *After Class*, *supra* note 4 at 669 (citing Jay L. Himes, *When Caught with Your Hand in the Cookie Jar...Argue Standing*, 41 RUTGERS L. J. 187, 217 (2009) (“[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.”); Settlement Agreement between Plaintiff States and Bristol-Myers Squibb Co, Watson Pharma, Inc and Danbury Pharmacal, Inc Regarding Buspar, In re Buspirone Litigation, No 01-CV-11401 (S.D.N.Y. March 7, 2003) (reviewing state AGs settlements with pharmaceutical companies); In re Cardizem CD Antitrust Litigation, 481 F3d 355, 357 (6th Cir 2007). See also Steven B. Hantler, Mark A. Behrens, and Leah Lorber, *Is the “Crisis” in the Civil Justice System Real or Imagined?*, 38 LOYOLA LA. L. REV. 1121, 1160-61 (2005) (listing examples of state AGs piggybacking on regulatory and litigation activity by federal entities and private lawyers).

¹²³ Burbank & Farhang, *Rights and Retrenchment* at 285 (manuscript).

barriers make it more difficult for putative plaintiffs to bring meritorious claims in both state and federal court.¹²⁴ Consider *Twombly*, for example, a case that increased pleading standards from simple “notice” to “plausibility”; or *Concepcion* and CAFA which limit state class actions.¹²⁵ Scholars have widely recognized that these changes have been anti-litigation.¹²⁶ Arthur Miller and others have pointedly argued that *Twombly* and CAFA strike directly at our private litigation regulatory system.¹²⁷ Indeed, they strike disproportionately at *state* regulatory systems by removing cases from both federal and state court. Even more, limiting access to court also damages the ability of state regulatory agencies to piggy-back on private AGs and class action claims.¹²⁸

It is therefore not surprising that state actors have repeatedly promoted access to court and the cause of private attorneys general in their interventions into federal procedure. The twelve amicus briefs consistently mention phrases like “private action,” “private attorney general,” “private class actions,” and “private plaintiffs,” next to positive modifiers like “necessary,” “important,” “effective,” “central,” “essential,” “play a key/central role,” and “supplemental” to the work of public agencies.¹²⁹ For example, in many of the amicus briefs the States embraced the theory that class actions are a crucial regulatory tool.¹³⁰ The *Concepcion* amicus called consumer class actions “an important complement to government efforts at safeguarding consumers against fraudulent and deceitful practices.”¹³¹ One of the two *Spokeo* amicus briefs argued that limited state resources means that “[t]he Amici States necessarily rely on private litigants to supplement their efforts, particularly where, as here, substantial private interests are at stake.”¹³² Likewise, in their letter to the Consumer Financial Protection Bureau, the State AGs argued that they simply cannot “handle” all the complaints they receive.¹³³

The recent class action case *Tyson Foods* represents a paradigmatic example of federal courts enforcing state law. The federal wage and hour

¹²⁴ Although there is a lot of debate on the empirical validity of this statement. See e.g., William Hubbard, *The Empirical Effects of Twombly and Iqbal* (forthcoming 2017).

¹²⁵ Miller, *Double Play*, *supra* note 4 at 77.

¹²⁶ Gilles & Friedman, *After Class*, *supra* note 4 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 the Class Action Fairness Act of 2005.”).

¹²⁷ E.g., Miller, *Double Play*, *supra* note 4 at 72.

¹²⁸ Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street and Consumer Protection Act § 1028(a), Consumer Fin. Protection Bureau (2015) (discussing overlap between private and public claims).

¹²⁹ I conducted this systematized analysis by hand, analyzing the twelve briefs through targeted search terms for references to private claimants.

¹³⁰ Gilles & Friedman, *After Class*, *supra* note 4 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”).

¹³¹ *Concepcion*, States’ Amicus Brief.

¹³² *Spokeo*, States’ Amicus Brief.

¹³³ *Id.* at 2 n. 2.

statute, the Fair Labor Standards Act, provides its own collective action remedy that allows opt-in classes. Because of that, the Rule 23 class action device, and its larger opt-out classes, cannot be utilized for FLSA claims. State litigants seeking complementary classes—and the better institutional quality provided by federal courts—therefore file claims in federal court seeking the enforcement of both state law wages and hours statutes (through Rule 23 class actions) and FLSA claims. In this sense, bringing state law claims in federal courts (or facing removal of those claims) is inevitable for employees pursuing comprehensive remedies. By consequence, in *Tyson Foods*, eight States argued in favor of a flexible Rule 23 predominance requirement because “States depend on the private attorneys general” and “state claims are often brought as Rule 23 class actions alongside FLSA collective actions.”¹³⁴

The States’ intervention into federal *pleading* standards also reflects concerns with private AGs. In *Tellabs*, 23 State AGs opposed a higher pleading standard for the PLSRA and federal securities laws precisely because it would deter private lawsuits in an area that relies heavily on state private attorneys general in federal court.¹³⁵ Although at times disagreeing with each other, the States are grappling with what has been called “the most critical dilemma of modern procedure, that is, 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.”¹³⁶

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 amicus briefs against class actions, opposition to broad specific jurisdiction (*Walden*), and some interventions into federal pleading and discovery (*NML*). A sole interest in promoting private AGs is even contradicted by the States’ stance in *Twombly* where they favored a higher 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.

2. *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.¹³⁷ Below, I extend this theoretical market-based model of litigation to argue that the States may

¹³⁴ Tyson Foods, States’ Amicus Brief.

¹³⁵ Tellabs, States’ Amicus Brief.

¹³⁶ Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1484 (2008).

¹³⁷ See e.g., William M. Landes and Richard A. Posner, *Adjudication as a Private Good*, *Journal of Legal Studies*, J. LEGAL STUDIES (1974); Erin O’Hara & Larry E. Ribstein, THE LAW MARKET 166 (2009); 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); Donald E. Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995 (2015).

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, attorney's 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 remove litigation from state courts, we might observe state intervention into federal procedure with a view to preserving state power. Below, I first lay out the theoretical groundings for this mechanism before reviewing recent changes at the state level.

The Theory. Institutional self-interest leads different departments of government and state actors to compete for power in the regulation of social and economic behavior.¹³⁸ This competition is fueled by various factors, including among others, 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.¹³⁹ On the demand side, plaintiffs' attorneys and litigants in general seek beneficial laws and fora.¹⁴⁰ On the supply side, legislators, courts, and tribunals—state, federal, commercial arbitration, and international organizations—compete to attract litigation.¹⁴¹

Court providers compete because the economic payoff and spillover effects are significant. They include, “taxes, fees for lawyers and other professionals, private sector opportunities for government officials and judges, and collateral benefits for other businesses in the jurisdiction such as banks and broker-dealers.”¹⁴² Court providers may also want complex cases to showcase to businesses the strength and sophistication of their local institutions. Indeed, efficient and respected courts can improve a state's business environment.

Beyond these economic reasons, there are reputational and political incentives.¹⁴³ Vibrant state institutions enhance a judges' or elected official's national standing. For judges, despite the fact that they have no apparent financial gain from attracting cases, “they care about both popularity and prestige.”¹⁴⁴ Local 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.”¹⁴⁵ Many judges have noted that prestige-seeking is a common judicial

¹³⁸ See William A. Niskanen, Jr., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

¹³⁹ See O'Hara & Ribstein, *supra* note 137.

¹⁴⁰ See e.g., Pamela Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. (forthcoming).

¹⁴¹ Kaal & Painter, *Forum Competition*, *supra* note 137 at 144.

¹⁴² *Id.* at 140.

¹⁴³ See Neal Devins, Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100 (2015); Wagner, *supra* note 15.

¹⁴⁴ Wagner, *supra* note 14 at 1129.

¹⁴⁵ *Id.*

goal.¹⁴⁶ Politically, a vibrant legal industry keeps a significant and powerful constituency (lawyers) happy. Ambitious State AGs also seek to enhance their reputations to win reelection or run for governor.¹⁴⁷ 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.¹⁴⁸

Institutional competition can also emerge from elected officials’ inherent will to maximize their department’s power.¹⁴⁹ Growing institutional power can allow ambitious officials to “generate political rewards either by exercising regulatory options or by credibly threatening to exercise options and then refraining.”¹⁵⁰ There is a rich literature on institutional self-aggrandizement in the context of administrative agencies which finds that “public agencies act to maximize their powers, just as private firms seek to maximize revenues or profits.”¹⁵¹ Despite this well-established proposition, many recent scholars have argued that public officials face mixed incentives.¹⁵² For example, elected officials may try to avoid voter blame in particular situations by delegating their power to other agencies or branches.¹⁵³ This can produce a mixed record where governmental actors will attempt to expand or contract their power strategically depending on constituency demands.

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.¹⁵⁴ Indeed, this competitive dynamic is there by design: Federal-state competition, so called “vertical competition,” was a crucial aspect of “the framers’ vision of the federalist system.”¹⁵⁵ The expectation was that state-federal competition would be natural in a system of overlapping regulatory

¹⁴⁶ See e.g., Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

¹⁴⁷ Devins & Prakash, *supra* note 143 at 2143.

¹⁴⁸ Wagner, *supra* note 14.

¹⁴⁹ The Federalist No. 51 (February 6, 1788). *But see* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2317 (2006) (arguing that institutions do not seek to maximize power).

¹⁵⁰ *But see* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 935 (2005) (arguing that institutions have no incentives to increase their power).

¹⁵¹ See e.g., William A. Niskanen Jr., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 38-42 (1971); John C. Coffee, *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Significance*, 93 NW. U. L. REV. 641, 702 (1999).

¹⁵² Levinson, *Empire*, *supra* note 150 at 935.

¹⁵³ *Id.*

¹⁵⁴ See, e.g., Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 252-65 (2000); David L. Shapiro, FEDERALISM: A DIALOGUE 116-17 (1995).

¹⁵⁵ Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 J. CORP. L. 625, 634 (2004). *See also* The Federalist No. 17 (Alexander Hamilton).

powers and would produce salutary consequences as fear of losing power to state or federal entities would incentivize officials to improve performance.¹⁵⁶

This federal-state institutional competition should, in theory, be especially salient in procedure. William Landes and Richard Posner long ago recognized that an economic view of adjudication systems accurately predicts competition among state and federal courts, noting that “state and federal courts are competitors with regard to dispute resolutions in the areas of their overlapping jurisdiction.”¹⁵⁷ One way for the States to compete for market share is to enhance the attractiveness of their courts by providing, for example, (a) larger damage awards; (b) easy to satisfy aggregate litigation devices (*e.g.*, class actions); (c) generous and flexible substantive law; and (d) broad jurisdiction to adjudicate and to 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 state-federal competition is a zero-sum game—any enlargement of federal court jurisdiction comes at the expense of state jurisdiction.

To summarize, the theory takes the following steps: (1) States are motivated (by reputation, pecuniary reasons, and institutional will) to maintain business litigation in state courts; (2) changes to federal procedure can threaten state business litigation; therefore (3) state actors might act to maintain litigation in state courts.

There are several developments in state and federal courts that 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.¹⁵⁸ In return, Delaware prominently reaps the benefits of its pro-corporate reputation in the form of franchise taxes and attorney’s fees.¹⁵⁹ Chasing these same benefits, New York has passed laws inviting sizable contracts (over \$250,000) to select the State as a forum

¹⁵⁶ See generally Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 352 (2003).

¹⁵⁷ Landes and Posner *supra* note 137 at 258.

¹⁵⁸ Omari Scott Simmons, *Delaware's Global Threat*, 41 J. CORP. L. 217, 224 (2015); William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974); Robert K. Rasmussen & Randall S. Thomas, *Whither the Race? A Comment on the Effects of the Delawarization of Corporate Reorganizations*, 54 VAND. L. REV. 283, 289-90 (2001). As is recognized in the corporate law literature, one of Delaware’s main competitor is the federal government. Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003). Delaware also tries to ensure that its lawyers partake in local litigation. Jens Dammann, Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 58 (2008)

¹⁵⁹ Simmons, *supra* note 13 at 227. See also Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, 1 STAN. J. COMPLEX LITIG. 51, 53 (2012) (noting that “Delaware has taken steps to keep its cases in its state courts” and examining the proliferation of state statutes that grant exclusive jurisdiction to state courts).

regardless of any other contacts therein.¹⁶⁰ That statute and others laws gives New York benefits similar to those in Delaware.¹⁶¹

Remarkably, at least *twenty-three* States have recently created state specialty “business courts” patterned after Delaware’s system and fashioned with the explicit purpose of, among other things, “generating litigation business for local lawyers”¹⁶² and “curtail[ing] the increased use of the federal judicial system and alternative dispute resolution by business litigants.”¹⁶³ The popularity of these business courts is strong evidence of litigation competition.

Second, there is widespread evidence that jurisdictional, pleading, venue rules, and other procedural doctrines can have a dramatic impact on business litigation by encouraging forum shopping.¹⁶⁴ For example, there is empirical evidence that different securities litigation pleading standards affect filing rates by district.¹⁶⁵ Likewise, despite uniform federal patent law, litigants have 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.¹⁶⁶ Especially relevant for our purposes, there is also evidence that changes in procedural rules can induce “vertical” forum shopping where cases move from state to federal court. William Hubbard has demonstrated that a single Supreme Court procedural ruling, on the application of a state statute barring certain class actions, caused plaintiffs to shift their filings from state to federal court.¹⁶⁷ Based on this, he concluded that vertical forum shopping is not a small “concern for judges or policymakers.”¹⁶⁸

Third, judges and legislators have shown that they will try where possible to bring home the proverbial bacon—lawsuits.¹⁶⁹ Daniel Klerman and

¹⁶⁰ N.Y. Gen. Oblig. Law § 5-1402.

¹⁶¹ Wagner, *supra* note 14.

¹⁶² Simmons, *supra* note 13 at 238; Adam Feit, *Tort Reform, One State at a Time: Recent Developments in Class Actions and Complex Litigation in New York, Illinois, Texas, and Florida*, 41 LOY. L.A. L. REV. 899, 954 (2008).

¹⁶³ Bach & Applebaum, *supra* note 14 at 152; Richard L. Renck, Carmen H. Thomas, *Recent Developments in Business Commercial Courts in the United States and Abroad*, BUS. L. TODAY 1 (2014); Lee Applebaum, *The Steady Growth of Business Courts*, FUTURE TRENDS IN STATE COURTS 70 (Carol R. Flango et al. eds., 2011); Mark H. Alcott, *The Formation of New York’s Commercial Division - A Personal Reminiscence*, 11 JUD. NOTICE 50, 51 (2016) (noting that commercial litigants’ increased use of the federal system, among other alternatives, “troubled” New York judges who felt that state courts “were largely being abandoned” and wanted to reestablish state courts as “the paramount center for commercial litigation.”).

¹⁶⁴ See e.g., Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167 (2000).

¹⁶⁵ James D. Cox et. al., *Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses*, 2009 WIS. L. REV. 421 (2009).

¹⁶⁶ J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 634 (2015). Although the Supreme Court recently dealt a death blow to this forum shopping in *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017).

¹⁶⁷ 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 (2013).

¹⁶⁸ *Id.*

¹⁶⁹ Anderson, *supra* note 166 at 664; Klerman & Reilly, *Forum Selling*, *supra* note 15 at 274-77.

Greg Reilly have argued that patent litigation in the Eastern District of Texas brought economic benefits to the “local bar and to the public more broadly” and that local judges “sought to attract patent litigation, at least in part, to help local lawyers struggling in the face of tort reform.”¹⁷⁰ During the initial creation of state business courts in the 1990s, many state Supreme Court justices claimed that new courts were needed to bring back commercial litigants.¹⁷¹ Encapsulating the logic, a recent state appellate judge confessed that “when 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.”¹⁷² Along the same lines, State AGs, like Ohio’s former AG, Marc Dann, frequently run on campaign promises of more shareholder litigation.¹⁷³ Of course, “attorneys have strong incentives to lobby the state to supply legal innovations that can generate fees for local lawyers.”¹⁷⁴ In sum, the close relationship between local bars and judges and legislators pushes them to increase litigation market share.

All of this evidence supports the institutional competition mechanism. This theory generates a clear prediction: State policymakers should contest federal procedure changes where they threaten state business litigation.¹⁷⁵

Procedural Retrenchment and the States. Recent procedural changes do seem to threaten at least some state business litigation.¹⁷⁶ The clearest example is in the class action context. Both CAFA and *Concepcion* impact the level of class action litigation in state courts—there is empirical evidence that CAFA removed a substantial number of state cases to federal courts, and *Concepcion* allowed the widespread use of arbitration.¹⁷⁷ To the extent that state officials

¹⁷⁰ Klerman & Reilly, *Forum Selling* *supra* note 16.

¹⁷¹ See e.g., New York Chief Judge Judith Kaye, *The State of the Judiciary 1993*, at 12-13 (January 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.”).

¹⁷² Pound Civil Justice Institute, *Report of the 2014 Forum For State Appellate Court Judges: Forced Arbitration and the Fate of the 7th Amendment*. Available at: [permalink](#). At the same conference, another judge claimed that *Concepcion* “is 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.” *Id.*

¹⁷³ Mark Maremont et al., *Trial Lawyers Contribute, Shareholder Suits Follow*, WALL ST. J., Feb. 3, 2010.

¹⁷⁴ John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1931 (2012).

¹⁷⁵ Cf. Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 367 (2003).

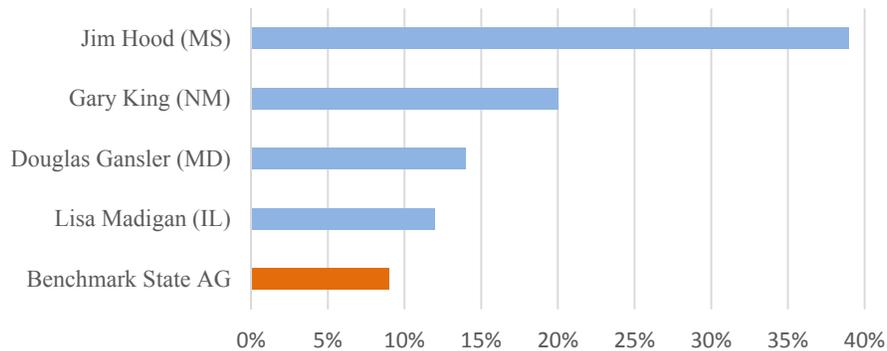
¹⁷⁶ Burbank & Farhang, *Litigation Reform*, *supra* note 4, at 1613; Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 104-06 (2011).

¹⁷⁷ For evidence on CAFA see Howard M. Erichson, *Cafa's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593 (2008) (“There is little question that CAFA has succeeded in shifting much class action litigation from state court to federal court.”); 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 (2008) (describing the empirical evidence). For *Concepcion* see Myriam Gilles & Gary Friedman, *After Class*, *supra* note 4;

consider these alternative bodies as insufficiently adhering to state goals, then the removal of state class action litigation is a threat.¹⁷⁸ Moreover, class actions are highly prized by state plaintiffs' attorneys who may fear stricter federal class rules or the competitive pressure of lawyers more experienced in federal courts or arbitral tribunals.¹⁷⁹

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, I identified the most common State AG amicus filers in six cases that sought to protect state court market share (as I explain below) and examined the State AGs' political donations from the legal industry as compared to the average State AG. Figure 2 below summarizes my findings:

Figure 2: Pro State-Market-share State AGs by % of Total Received Donations from the Legal Industry¹⁸⁰



This finding is not determinative but it does suggest that the competitive influence of the litigation marketplace and lawyers' lobbying

Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *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*). Cf. Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street and Consumer Protection Act § 1028(a), Consumer Fin. Protection Bureau (2015) (discussing the use of arbitration in certain industries), Available at [\[permalink\]](#).

¹⁷⁸ See J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015) (discussing arbitration's harm to public adjudication and substantive law).

¹⁷⁹ See e.g., Congressional Report on Fraudulent Joinder Prevention Act (H.R. 3624) 114th Cong. 114-422 (2016) (finding that plaintiffs' attorneys increasingly prefer state court); Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis*. Available at: http://www.instituteforlegalreform.com/uploads/sites/1/Class_Action_Study.pdf.

¹⁸⁰ The six cases are *McyIntire*; *Concepcion*; *Italian Colors*; *Standard Fire*; *Twombly*; and *Spokeo*. I obtained the data from The National Institute on Money in State Politics. Database available at: www.followthemoney.org. The benchmark is made up of State AGs who mostly overlapped in tenure (2006-2016) with the most active AGs but who intervened in (1) one or fewer of these cases or (2) against state market share (Lawrence Wasden; John Suthers; Wayne Stenehjem; Jon Bruning; and Greg Zoeller).

efforts might explain why in some amicus briefs the States vociferously defend their preference for state judicial fora. As expected, State AGs like Gary King have repeatedly complained in amicus briefs that shifting state law cases to federal court is harmful to the development of those laws and increases the potential for differential treatment of similarly situated parties.¹⁸¹ The States specifically chided opponents in *Concepcion* for asking “federal courts to second-guess decades of state contract law Because the decision below preserves States’ historical ability to develop and enforce contract law, the Amici States have a significant interest”¹⁸² That “interest” in federal litigation may be partly borne out of an institutional will—coupled with economic and political incentives—to preserve state judicial power.

Similarly, in at least two cases, the States’ amicus brief was entirely oriented around institutional competition.¹⁸³ In *Hood* and *Standard Fire*, the States explained their primary interest in protecting the “State’s sovereign dignity”¹⁸⁴ and “in vindicating principles of federalism and in preserving the ability of their citizens to adjudicate controversies within their own jurisdiction.”¹⁸⁵ The briefs concentrated ardently on the idea that States are sovereign entities with the inherent right to defend their citizens and to maintain courts that are competent and enjoy “a near co-equal status” with federal courts.¹⁸⁶ These briefs exemplify the power of “institutional will”: State AGs will at times forcefully defend the authority of their state governments.¹⁸⁷

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, an enlarging federal jurisdiction that diminishes state court flexibility can present a threat to the States. Pleading standards are another tool by which federal courts can expand or contract their docket. The theory outlined above would predict the following:

First, the States are deeply concerned with federal pleading standards because a standard more lenient than state law can lead to “vertical forum shopping,” which is the filing of claims in federal, not state, court.¹⁸⁸ On the

¹⁸¹ See e.g., Hood, States’ Amicus Brief (supported by 46 states).

¹⁸² Concepcion, States’ Amicus Brief.

¹⁸³ Hood (46 States) and Standard Fire (three States) amicus briefs against the enlargement of CAFA contains perhaps the clearest expression of institutional competition.

¹⁸⁴ Hood, States’ Amicus Brief.

¹⁸⁵ Standard Fire, States’ Amicus Brief. Indeed, three states complained in Standard Fire that it was “deeply insulting” that petitioner would question the competency of state courts. Standard Fire, States’ Amicus Brief in support of Respondent.

¹⁸⁶ Hood, States’ Amicus Brief.

¹⁸⁷ The Standard Fire amicus written by fifteen States in support of CAFA explicitly advocated federal intervention. This is likely explained by the political factors involved (see next section).

¹⁸⁸ Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 861 (2010) (“The resulting disparity between lenient state pleading and robust federal gatekeeping will increase the considerable incentive to remove.”); see also Kevin M.

other hand, more strenuous federal pleading increases defendants' incentives to remove cases to federal court.¹⁸⁹ Either way, changes to federal pleading standards directly affect the volume of litigation in state courts.

Second, competition for regulation can be particularly pointed in specific areas of law. To wit, a low pleading standard in the *Twombly* antitrust context increased private claimant competition to state antitrust regulation efforts, a position that State AGs complained about. Specifically, the State AGs claimed that, “[p]rivate antitrust enforcement operates in inherent tension with [state] regulatory structures.”¹⁹⁰ As expected, that is precisely a context where the States do *not* believe they need private AGs because, as argued in the amicus brief, States are more than proficient at prosecuting antitrust violations.¹⁹¹ Under Section 4 of the Clayton Act State AGs can collect attorneys' fees, 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.¹⁹² Their interest in *Twombly*, therefore, flows naturally from their wish to maintain power and explains why the states *did not* intervene in another important pleading case, *Iqbal*.¹⁹³

Third, in contexts where state officials do not compete with, but are actually *users of*—as plaintiffs—federal courts, they have incentives to prefer lower pleading standards. Thus in *Tellabs* the States 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.”¹⁹⁴

In sum, the institutional competition account receives support from recent developments. It illuminates the interests of the States in many of their procedural interventions. Further, it (1) describes why the States write amicus

Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1922-27 (2009) (arguing that there has been a remarkable increase in removal over the past few decades).

¹⁸⁹ See Clermont, *Litigation Realities Redux*, *supra* note 188 at 1922-27 (2009) (providing data that show a sizable increase in the removal rate over the last twenty years).

¹⁹⁰ *Twombly*, States' Amicus Brief at 11.

¹⁹¹ The Hart-Scott-Rodino Antitrust Improvements Act (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. States have embraced this power and have been active in the area, increasing the filing of antitrust cases even when the federal government has not. 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).

¹⁹² 15 U.S.C. 15 § (1976); 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.

¹⁹³ Jones, *supra* note 191 at 303 (“Not surprisingly, many of the most vocal opponents of limiting parens patriae authority of state attorneys general have been state attorneys general themselves.”).

¹⁹⁴ *Tellabs*, States' Amicus Brief.

briefs defending State sovereignty and the integrity of their court systems; and (2) highlights why States act competitively towards federal courts. Nonetheless, this view does not explain the entirety of the States' behavior. Indeed, the States are often happy to offload non-business related cases to federal court for budget constraint reasons. As has been widely noted, state courts are chronically underfunded to the point where even "keeping doors open is a problem."¹⁹⁵ The focus of this section, however, is the profitable business litigation areas where the local bar will benefit disproportionately and will therefore lobby to maintain cases in state court.

3. *Two-Sided Repeat Player: State Governments as Federal Litigants*

While the States seek to promote private AGs, they might also be concerned with claims against state governments and businesses. These two 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 ("RPs") interested in shaping civil procedure.

Scholars have long outlined the interest of repeat defendants in erecting "procedural stop signs" to bar claims against them.¹⁹⁶ Commenting on recent changes to procedure, Arthur 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."¹⁹⁷ 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.¹⁹⁸ Cases against state governments are varied and include claims under Section 1983, the civil rights act, election law, and environmental claims, among others. Given their status as repeat defendants, the States have historically supported efforts to reduce litigation in federal court.¹⁹⁹

That the States are repeat defendants should not obscure the fact that they are repeat plaintiffs, too. As recently explained by Washington's State AG, Bob Ferguson: "[w]e provide legal services to more than 230 state agencies . . . in both plaintiff and defense roles, across a wide range of litigation" including

¹⁹⁵ Resnik, *supra* note 176 at 107.

¹⁹⁶ Miller, *Personal Perspective*, *supra* note 5 at 480. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

¹⁹⁷ *Id.*

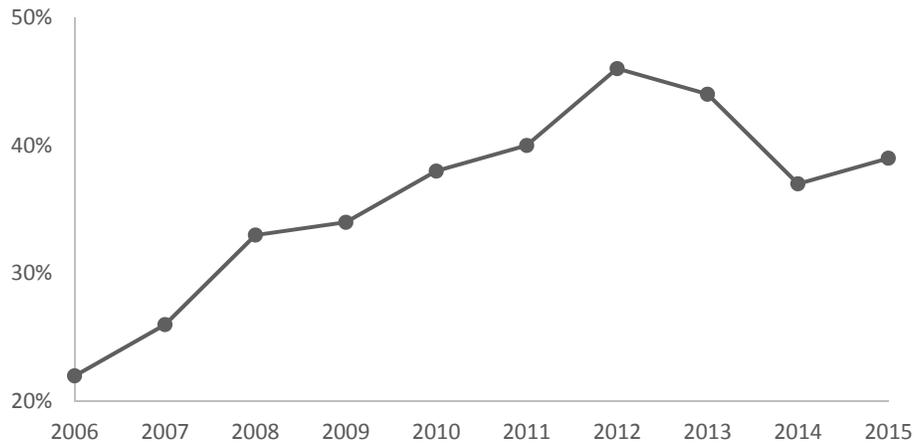
¹⁹⁸ See Reinert *supra* at 17 (detailing the large number of yearly complaints against States). See also David F. Engstrom, *Jacobins at Justice: The (Failed) Class Action Revolution of 1978 and the Puzzle of American Procedural Political Economy*, 165 U. PA. L. REV. (forthcoming 2017) (discussing the role of State AGs in opposing the 1978 proposed reforms to class actions).

¹⁹⁹ Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1013 (1993); Burbank & Farhang, *Litigation Reform*, *supra* note 4, at 1566.

many cases “litigated in federal court.”²⁰⁰ State AGs use *parens patriae* suits to enforce both state and federal law in federal court; in areas like civil rights, consumer protection, Dodd-Frank violations, and fair housing, among others.²⁰¹

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.²⁰² Indeed, as a consequence of the Private Securities Litigation Reform Act (1995)—which encourages institutional class plaintiffs—in 2015 more than 39% of securities class action settlements included a pension fund as lead plaintiff.²⁰³ Among these, state public pension funds were some of the most active lead plaintiffs.²⁰⁴ This gives the States a direct financial stake in federal procedure. Figure 3 below outlines the recent growth of pension funds as lead plaintiffs in securities class action settlements:

Figure 3: Securities Class Action Settlements with Pension Funds as Lead Plaintiffs²⁰⁵



²⁰⁰ Public Comment on behalf of the Attorney General of Washington, Feb. 4, 2014. Available at: <https://www.regulations.gov/document?D=USC-RULES-CV-2013-0002-0677>

²⁰¹ See e.g., Gilles & Friedman, *After Class*, *supra* note 4 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 (2011); 740 Ill. Comp. Stat. 10/7(2) (2010) (authorizing State AG to bring antitrust *parens patriae* suits).

²⁰² See Pew, *supra* note 17. For news reports on state pension fund litigation, see e.g., ABC News, *Top Five State Pension Fund Lawsuit Settlements*, (Jan. 6, 2011). Available at [\[Permalink\]](#);

²⁰³ Cornerstone Research, *Securities Class Action Settlements: 2015 Review and Analysis*. Available at: [\[permalink\]](#). See also Stephen Choi, Jill E. Fisch, A.C. Pritchard, *Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 WASH. U. L. Q. 870 (2005) (finding a large increase in public pension funds as lead plaintiffs after the PSLRA).

²⁰⁴ See Choi, et al., *supra* note 203 at 889. 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 (2006) (finding that public pension fund claims are larger on average).

²⁰⁵ Cornerstone Research Report. See *id.* (reproduced with permission from authors).

Apart from States, large businesses are the most important repeat player in the game of litigation. Certain industries have historically been the target of thousands of tort claims, including auto makers and medical device manufacturers. Since the 1980s, however, mass personal injury litigation expanded to threaten new industries, including pharmaceuticals, asbestos, hotels, food, diet supplements, and chemicals.²⁰⁶ To counter the litigation expansion, businesses became strong proponents of restrictive procedure.²⁰⁷

The States' interventions into federal procedure may be a simple attempt to protect repeat defendant businesses, state governments, and state pension funds. Although this is at cross purposes and contradictory with their protection of private AGs, the States have been able to argue both interests almost in tandem. In *Twombly*, 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 cases in federal courts."²⁰⁸

Repeat player incentives seemed to influence the States' involvement in specific jurisdiction cases. Although the States were in favor of broad specific jurisdiction in *McIntyre*, they reversed course in *Walden*. Surprisingly, nine States participated in both of these contradicting opinions. This may be explained by the fact that *Walden* involved the broad assertion of jurisdiction over state actors (the defendant was a Georgia officer). Indeed, the States specifically mentioned that a "contrary rule 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."²⁰⁹

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 (*parens patriae* suits). This factor can even overpower cases where business interests are likely to be harmed. For instance, a higher securities litigation pleading standard, at issue in *Tellabs*, would have harmed state pension fund litigation. Therefore, 30 States called for a lower scienter pleading standard.²¹⁰ Likewise, in *Halliburton*—a securities class action case—the States claimed to have an interest because "state employee pension funds are often the plaintiffs with the largest claims."²¹¹ The States went as far in *NML* as to claim that weak federal discovery would "jeopardize" the States' "billions of dollars in foreign

²⁰⁶ Glenn S. Koppel, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 PEPP. L. REV. 455, 478 (1997) [hereinafter Koppel, *Populism*].

²⁰⁷ Koppel, *Id.* at 478.

²⁰⁸ *Id.*

²⁰⁹ *Walden*, States' Amicus Brief.

²¹⁰ *Tellabs*, States' Amicus Brief.

²¹¹ *Halliburton*, States' Amicus Brief.

sovereign debt [invested] through their public pension funds.”²¹² The States have also repeatedly defended the power of State AGs to bring *parens patriae* suits in federal court, including in the most supported brief (46 states).²¹³

There are, however, limits to the power of the RP interest. Beyond defending the States’ institutional interests as RPs, if the States intervene in procedure in order to protect businesses, then they should agree with the stances of the Chamber of Commerce (a rough proxy for “business interests”). But a comparison of the States’ amicus stances with amicus positions of the Chamber of Commerce shows that they mostly disagree. The rate of alignment is weak—the States and the Chamber supported the same side in only two out of the ten cases (20%) in which both participated (*Walden* and *Twombly*). This suggests that the States may not be captured and do not serve at the mercy of business interests.

The involvement of States as repeat players also fails to account for their disagreements in the class action context. A repeat-player interest should shape the behavior of all States and yet they have disagreed with venom in *Spokeo*, *Standard Fire*, and *Concepcion*. This portends deeper motives that are ideological and not solely a result of RP status.

4. Political Ideology

This Section 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.²¹⁴ On the other hand, a “politician centered” model argues—in the vein of rational choice—that politicians seek to maximize their votes and thus respond to the preferences of the median voter.²¹⁵ The analysis below leans on the group centered model because while the median voter seems to have no preferences regarding specific procedural doctrines, political parties do. 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

²¹² NML, States’ Amicus Brief.

²¹³ Hood, States’ Amicus Brief.

²¹⁴ See e.g., Marty Cohen Et Al., THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM 40 (2008).

²¹⁵ See e.g., Michael A. Livermore, *Political Parties and Presidential Oversight*, 67 ALA. L. REV. 45 (2015).

paradigm, while Democrats, backed by groups such as trial lawyers and public interest lawyers, support the traditional open courts paradigm.²¹⁶

These political views translate well into procedural issues. For instance, contrasting political views of litigation have been the root cause of disagreement about pleading standards. One narrative pushed by corporate defendants and segments of the Republican Party is that heightened pleading is necessary to deter frivolous litigation, class-action harassment, and the excessive burdens of discovery.²¹⁷ The opposing narrative, closer to the Democratic view, argues that heightened pleading standards deter meritorious claims, can deny fundamental justice, and deter private attorneys general whose claims are necessary to enforce public policy.²¹⁸ These two views show the ease with which political identification can transform into well-developed procedural narratives.

National-level political debates on procedural issues has moved on to State AGs in several different ways. To begin, business and plaintiffs' attorneys groups have concentrated much of their recent lobbying on State AGs, which is an elected office in 43 States.²¹⁹ Unlike judicial elections, State AG elections are explicitly partisan.²²⁰ 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.²²¹ On the other side of the political divide, plaintiffs' attorneys groups have also unleashed well-funded operations aimed at State AG elections.²²²

Not only are State AG elections increasingly visible and partisan, other incentives make the office more political than ever. For instance, the State AG position is a stepping stone to governorships—in a recent election year, 37% of gubernatorial elections included a State AG candidate.²²³ Other studies show

²¹⁶ Koppel, *Populism*, *supra* note 206 at 475.

²¹⁷ Mullenix, *Ending Class Actions*, *supra* note 4 at 413.

²¹⁸ American Antitrust Institute Amicus Brief, Twombly, 2006 WL 2966601 (2006).

²¹⁹ About NAAG, National Association of Attorneys General, www.naag.org/about_naag.php; John H. Beisner, Matthew Shors, Jessica Davidson Miller, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1456 (2005).

²²⁰ Jillian Edmonds, *Scandal: The Growing Need for A Code of Conduct in Attorney General Elections*, 27 GEO. J. LEGAL ETHICS 505, 511 (2014).

²²¹ Gilles & Friedman, *supra* note 4 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”) (citing among others, Robert Lenzner and Matthew Miller, *Buying Justice*, *Forbes* (July 21, 2003), online at http://www.forbes.com/free_forbes/2003/0721/064.html).

²²² Center for Legal Policy at the Manhattan Institute, *Trial Lawyers Inc.: A Report on the Alliance between State AGs and the Plaintiffs' Bar 2011* (compiling data on lawyer donations to State AGs).

²²³ *Appointing State Attorneys General: Evaluating the Unbundled State Executive*, 127 HARV. L. REV. 973, 983 (2014).

that sizable percentages of State AGs run for Governor or Congress.²²⁴ Moreover, the relationship between State AGs and influential legal groups has grown even closer with the advent of contingency fee arrangements whereby State AGs employ private firms to represent state governments.²²⁵

This growing politicization of State AG offices may be reflected in their amicus briefs.²²⁶ At least one political scientist has theorized that amicus briefs serve as a signaling device: groups that seek financial support draft these briefs strategically in cases that are salient to their donors.²²⁷ This literature supports the idea that political ideology influences State AG decisions.

Given all of the above—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 that impact 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 amicus briefs do not support this account: both the group of 43 elected State AGs and the group of 7 appointed State AGs participated on average in exactly 4.9 procedure amicus briefs.²²⁸ Though the sample size is small, this seems to go against the signaling theory in procedure.

On the partisan front, the doctrinal procedural developments that began in the 1990s, strengthened in the 2000s, and continue today constitute a Republican-supported retrenchment of procedural doctrines.²²⁹ This potent mixture of politics and procedure means that Republicans and Democrats should rarely, if ever, appear together in amicus briefs in procedure. To examine this possibility, Figure 4 below summarizes the partisan distribution of amicus briefs in procedure cases where the States supported a single party:

²²⁴ Devins & Prakash, *supra* note 143 at 2100.

²²⁵ See Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 COLUM. J.L. & SOC. PROBS. 587, 589 (2009).

²²⁶ Lemos & Quinn, *supra* note 6 at 1254 (“partisanship appears to be ascendant.”).

²²⁷ See generally, 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).

²²⁸ See Appendix A. I exclude D.C. here because they switched from appointment to elections.

²²⁹ See e.g., Burbank & Farhang, *Litigation Reform*, *supra* note 4, at 1613.

Figure 4: Procedural Amicus Briefs by State AG Party in Single-Brief Cases

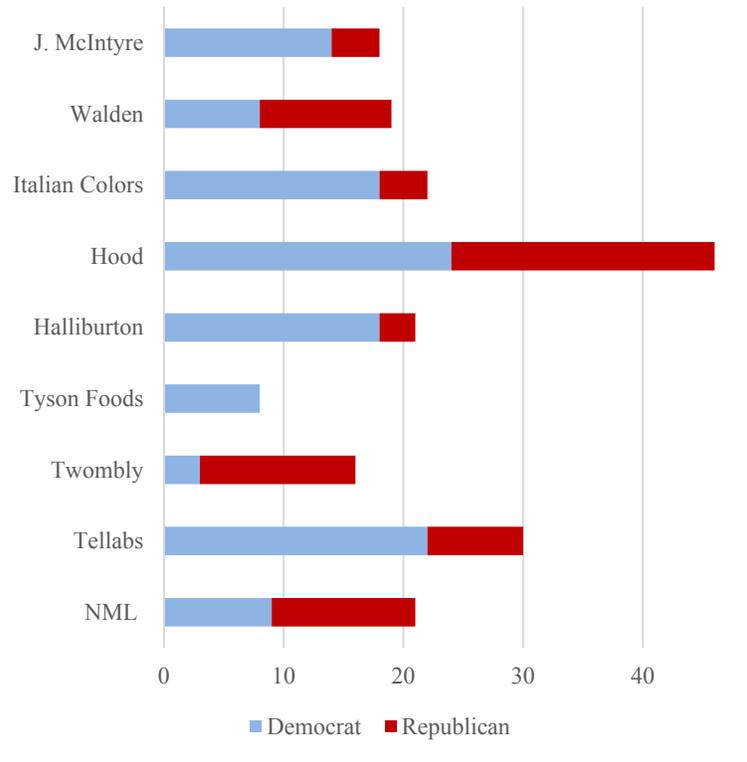
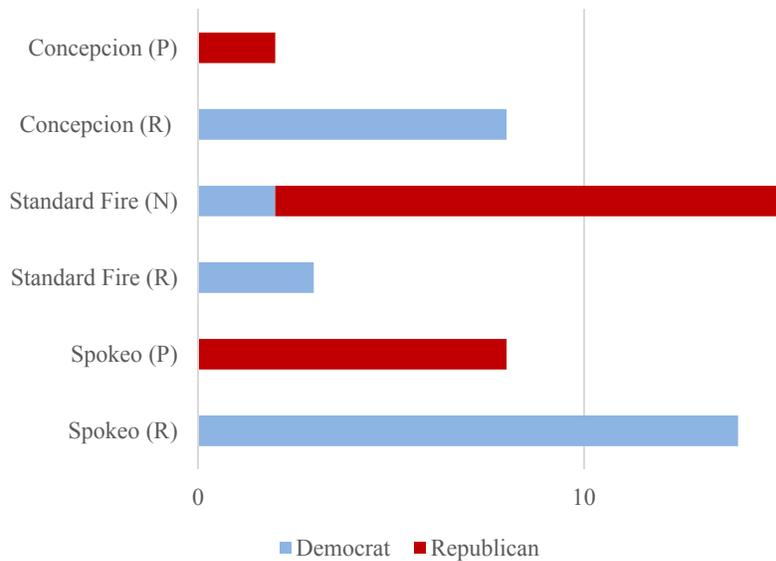


Figure 5 below summarizes the partisan distribution of State amicus briefs in procedure cases where the States supported multiple parties:

Figure 5: Procedural Amicus Briefs by AG Party in Multiple-Brief Cases



The amicus briefs are mostly inconsistent with a partisan explanation. In eight out of nine amicus briefs where the States supported one party, State AGs joined bipartisan coalitions with healthy levels of involvement from both parties. Specifically, amicus briefs regarding jurisdiction, discovery, and pleading have involved substantial bipartisan support. For example, in *Walden*, *NML*, and *Tellabs*, the States were represented by large coalitions of Republicans and Democrats, likely because all three cases involved the States as a Repeat Player either because a state official was being directly sued (*Walden*), or state pension funds were common plaintiffs (*NML* and *Tellabs*). As such, RP interests seem to trump ideology.

The only caveat is that in *Tyson Foods* and the three class action cases where the States drafted multiple briefs, there does seem to be a cleaner partisan division. The only differences that seems to explain this disparity is that these cases dealt with (a) class actions and (b) there was no core state interest at issue (like the *parens patriae* suits in *Hood*).

That class action cases are a political outlier is consistent with the broader development of CAFA and jurisprudence in that area. Changes to class actions have been openly sponsored by Republicans and business interests and rejected by plaintiffs' attorneys and Democrats. In the context of CAFA, the bill was heavily partisan and passed the Senate and House with overwhelming Republican support and substantial opposition from Democrats.²³⁰ This partisan division was also on display at the Supreme Court. While many of the pleading and jurisdiction cases have been decided with large majorities—e.g., *Daimler* (9-0), *Twombly* (7-2), *Tellabs* (8-1), *Walden* (9-0)²³¹—a number of class action cases have been decided by 5-4 or 5-3 majorities along ideological lines—e.g., *Wal-Mart*, *Concepcion*, *Italian Colors*.

Why are class actions a particularly political area of procedure? Likely because they are associated with consumer cases against businesses.²³² Unlike class actions, other procedural doctrines (e.g., pleading, discovery, and jurisdiction) are truly transubstantive in that *all* parties are affected by those doctrines, including businesses who wish to litigate as plaintiffs (and business-to-business litigation is a non-trivial slice of the federal docket). But constraining the reach of class actions does not negatively affect businesses because they are never involved as plaintiffs in those cases—only as defendants. It is therefore an easy issue for political mobilization and lobbying.

²³⁰ S. 5 (109th): Class Action Fairness Act of 2005, Vote in the Senate of the United States on February 10, 2005. Available at: <https://www.govtrack.us/congress/votes/109-2005/s9>.

²³¹ Note that I am including concurrences as a vote in favor.

²³² See Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843 (2016).

In conclusion, outside of class action cases that do not involve core interests, ideology does not seem to explain state interest in federal procedure.²³³

* * *

Part III described the factors that influence state 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. Below, I summarize the categories of state involvement in 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.
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 RP defendants are interested in decreasing vexatious litigation against state officials.
6. The States as RP plaintiffs are heavily interested in procedural doctrines that impact claims by state pension funds.
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. However, this summary not only clarifies the States' interest in procedure, it also explains why the States have stayed out of a variety of cases. For example, the States did not intervene in *Wal-Mart Stores, Inc. v. Dukes*—a major class action case that increased the burden of proving common class injuries under Federal Rule 23—because the substantive claim was under Title VII and involved an

²³³ See also Lemos & Quinn, *supra* note 6 at 1250 (reviewing State AG partisanship in amicus briefs in all Supreme Court cases and arriving at a similar conclusion).

unusually large class.²³⁴ In other words, *Wal-Mart* did not involve the enforcement of state law through private AGs or the States as RP players. Nor did it deprive the states of litigation likely to be brought in state court or diminish core state powers. Most other cases where the States failed to intervene similarly did not involve the States' core interests in procedure.

This model also points to other possible exogenous events, like the financial crisis, PSLRA reforms, the growth of statutes that provide for State AG enforcement, and the expansion of arbitration, that may have increased the States' interest in federal procedure.²³⁵ As a whole, what is clear is that the States' involvement in federal procedure is motivated by institutional forces.

IV. THE STATES' VOICE IN FEDERAL PROCEDURE

Having explored evidence that the States seek to shape federal procedure and have varied reasons for doing so, this Part explains the normative ramifications of this phenomenon. The main argument made here is novel: the States should have an institutionalized role in federal procedure. They should have that role not because they have the right to defend their sovereignty, but because their input would actually improve procedural rules. Their role could be accommodated through a unified representative in the advisory committee, targeted notice and comment, and a judicial presumption. Section IV.A argues that the States can provide substantial epistemic and pluralism benefits to federal procedure. Section IV.B then discusses possible drawbacks from the States' involvement, but concludes that, on balance, the States' role would be beneficial. Finally, Section IV.C offers specific policy prescriptions on how to give the States a role in this area of law.

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—two entities isolated from substantive public or state input. By contrast, other areas of law provide extensive opportunities for state participation. With regards to federal substantive law, the States are able to leverage significant political power in the Senate and the House, especially because Congressmen are elected by state (or district within a state). Areas outside of Congress's direct control, like administrative law, have also experienced a decades-long trend of increasing state involvement through official bureaucratic partnerships with state actors. Executive Order 13,132 obligates administrative agencies to consider state interests and consult state officials regarding any proposed regulation that may affect the States.²³⁶ To be sure, the States can file public comments to proposed

²³⁴ 64 U.S. 338 (2011).

²³⁵ See generally Myriam E. Gilles, *The End of Doctrine: Private Arbitration, Public Law and the Anti-Lawsuit Movement* (manuscript).

²³⁶ Federalism, 64 F.R. 43255. 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

rule changes, they can also submit amicus briefs in Supreme Court cases, and there is often a state judge in the Advisory Committee. But as I explain below in Section IV.C, 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 Part III typology, 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. Federalism principles counsel that the States should not be deprived of power without at least a consideration of their views. But in order to accept this argument, there is no need to have a normative commitment to federalism. Below, I put forth an instrumental reason to welcome the States' participation: their input can actually improve federal procedure.

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

The States' involvement in procedure can improve the process by which procedural changes are made. To reach this conclusion it is not necessary to accept the States' ultimate positions in all these procedural issues, only that their input will enhance procedural debates. Indeed, the typology gives federal policymakers the necessary tools to determine *when* the States' input is likely to be helpful and when it might be useless. In this Section, I also employ various theories of federalism and democracy to show how the States' voice is valuable in achieving important goals in the procedure context.²³⁷

The relationship between the States and the federal government—in the area of procedure and otherwise—is mediated by our conception of federalism. That concept encompasses the full panoply of interests, structural design, constitutional doctrines, and institutional trappings that explain how the States and federal government interact with each other. There are at least three competing normative accounts of federalism that are relevant for our purposes. Under the “dual sovereignty” account, scholars and courts argue that the States should have an empire all of their own, isolated and independent from federal rule. 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.²³⁸ By contrast, “process” federalists emphasize political safeguards and the structural power that States can exercise

requirements [under Executive Order 13,132] to communicate with the States and to allow the States an opportunity to participate in the proceedings.”)

²³⁷ For related literature, see Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010); 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); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007).

²³⁸ Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1553-54 (2012). See also Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044 (2014) (discussing federalism's textual and historical grounding).

over the federal government. This process view relies mostly on *ex ante* bargaining between state and federal officials, not courts, to constrain the reach of federal law.²³⁹ A third account, known as “cooperative federalism,” posits that instead of competitive dynamics, scholars should focus on the ways that federal and state officials regulate intra-state activity in a collaborative fashion.²⁴⁰ This cooperation can foster an interdependence that gives the States power and discretion in the administration of federal policies.²⁴¹ 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.

The Supreme Court and scholarly commentary have traditionally recognized that federalism promotes significant objectives, including policy experimentation, the fragmentation of power, and federal-state competition. More formally, the literature typically outlines three mostly functionalist goals: (1) Independent and robust state governments are privy to valuable and localized information; (2) State governments are democratically accountable in a unique way; and (3) A healthy respect for the sovereignty of state governments maintains proper structural boundaries.²⁴² Below, I argue that these three benefits can have a place in the procedure context.

1. *The States as Information 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 the following information: empirical evidence relevant to the functioning of procedure (discovery costs, length of cases, trial costs, motion frequency, etc.); anecdotal evidence of state experience in federal court; detailed analyses of litigation techniques; and governmental experience on 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.²⁴³ These critics are largely correct. Procedure has been partly isolated from the pressures applied in administrative law where scholars widely recognize that “information is the lifeblood of regulatory policy.”²⁴⁴

²³⁹ Gerken, *supra* note 237 at 1554-56; Kramer, *supra* note 154; Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349 (2001).

²⁴⁰ *Id.* at 1556-1560. See also Susan Rose-Ackerman, *Cooperative Federalism and Co-Optation*, 92 YALE L.J. 1344 (1983).

²⁴¹ *Id.* at 1557.

²⁴² Seifter, *supra* note 25 at 959; Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (noting that federalism allows for democratic accountability at the state level).

²⁴³ See e.g., Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841 (1993); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 484-89 (1993).

²⁴⁴ Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 277 (2004).

Information produces better decisions that fit actual problems, unpacks complex and nuanced regulatory issues, and channels expertise to the right areas.²⁴⁵ These administrative law insights should apply to the Advisory Committee's role as a periodic surveyor of federal litigation and the Federal Rules.²⁴⁶ In that role, the Committee relies on information from a variety of sources, including practitioners, academics, and judges. So do courts when they engage in procedural rulemaking through adjudication. Justice Stevens admitted as much in his *Twombly* dissent where he asked for more "empirical" evidence before remaking pleading standards.²⁴⁷

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 that were legendary litigators, like Roberts and Ginsburg, practiced decades ago and mostly appellate litigation. Improving information inputs is therefore necessary in procedure.

The States as RP Litigation Databases. The States can leverage a massive data-generating apparatus that can feed federal courts and the Advisory Committee with important information about civil litigation. Each state gathers reams of data on state litigation at the state and federal court levels. 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 high-quality court data.²⁴⁸ 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 motions, etc.²⁴⁹ This is the kind of data that Justice Stevens demanded in *Twombly* and that current procedural debates need. This information is particularly useful because many States have replicated the federal rules in their local procedural rules. 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.²⁵⁰ Many States have been at the cutting-edge of procedural innovations on various fronts, including pilot

²⁴⁵ See e.g., Seifter, *supra* note 25 at 993.

²⁴⁶ The Advisory Committee's process has become increasingly rigorous. For example, in evaluating changes to Rule 23 it "generated, studied, and received voluminous comments on a series of proposals" over a six-year term. Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), A Good Rulemaking*, 69 TENN. L. REV. 97, 102 (2001).

²⁴⁷ *Twombly*, 550 U.S. at 579 (J. Stevens, dissenting).

²⁴⁸ NCSC - Examining the Work of State Courts: An Overview of 2013 State Court Caseloads Available at : http://www.courtstatistics.org/~media/Microsites/Files/CSP/EWSC_CSP_2015.ashx.

²⁴⁹ Peggy E. Bruggman - Public Law Research Institute, Reducing the Costs of Civil litigation, Available at: <https://gov.uchastings.edu/public-law/docs/plri/discov.pdf>.

²⁵⁰ This is an extension of the "laboratories of democracy" argument. For explanations, see e.g. Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1234 (1994).

projects on discovery reforms²⁵¹ and inventive state jury verdict rules.²⁵² Indeed, States like Arizona have revolutionized “traditional practices” and have been a model for other States.²⁵³ 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.”²⁵⁴ In other polls, litigants have also expressed high satisfaction rates with state procedure.²⁵⁵ 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 “State practices remain a potentially valuable source of information in considering revisions of federal procedure.”²⁵⁶

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, most debates start from the premise that discovery costs are too high and that courts and the Committee should find ways to limit them. But as highlighted by William Hubbard, these questions are ultimately empirical and depend on knowledge about “timing, volume, and cost of discovery in our civil justice system.”²⁵⁷ Judges, litigators, and other policy makers, however, have no access to this empirical information, partly because little of it exists. I reviewed the minutes of several 2015 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 state official present.²⁵⁸

In this void, the States can provide crucial second-best information. The States have experimented with discovery reform for decades, and “[this] proliferation of diverse state discovery rules has created fertile soil for empirical evaluation of . . . reforms to assess their efficacy.”²⁵⁹ For example, Colorado and New Hampshire launched pilot projects in 2010 and 2012 that

²⁵¹ Arizona being a particularly illuminating one—the state adopted a “robust mandatory disclosure rule” that became quite popular. Advisory Committee on Civil Rules, 34 (April 9-10, 2015). Available at: http://www.uscourts.gov/sites/default/files/fr_import/CV2015-04.pdf.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Jesse Rutledge, *The State of State Courts: Reviewing Public Opinion*, Available at: http://nacmconference.org/wp-content/uploads/2014/01/State-of-the-State-Courts-CM31.1_ReviewingPublicOpinion_Rutledge.pdf. For example, in a survey conducted by the National Center for State Courts, seventy percent of those polled expressed satisfaction with the fairness of state court process.

²⁵⁶ *Id.* at 458.

²⁵⁷ See generally, William H. J. Hubbard, *The Discovery Sombrero and Other Metaphors for Litigation*, 64 CATH. U. L. REV. 867 (2015).

²⁵⁸ Advisory Committee, *supra* note 242.

²⁵⁹ 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 (2005) [hereinafter Koppel, *Federalism*].

experimented with proportionality rules and other discovery innovations.²⁶⁰ Similarly, Idaho, Delaware, Massachusetts, Iowa, New York, Texas, and Utah have conducted discovery pilot projects in the last five years.²⁶¹ State officials are equipped to disseminate this information to the Advisory Committee.²⁶²

Beyond empirical data, the States can give courts and the Committee rich anecdotal evidence about litigation at the ground level. As Part III explained, the States are non-business repeat players with extensive experience in federal courts. They are unique RPs because their perspective is influenced by governmental on-the-ground plaintiff and defendant concerns. The States could provide information ranging from descriptions of experience with low pleading standards and the effectiveness of state wage-and-hour complaints, to state litigation of antitrust claims in federal court.²⁶³

The States' input is also uniquely valuable because it reflects an aggregation of different information sources, geographically and political diverse. 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 procedure briefs involved coalitions of at least eight States that presented views related to consumer protection, access to court, and business concerns. In submitting these briefs, the States provide valuable instruments full of RP aggregative knowledge.²⁶⁴ This kind of knowledge can be disseminated by State AGs or Judges because most of them are elected, 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, where the States favored higher pleading standards. Their input was based on State AG experience as both 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*

In this Section, I argue that the States can fill the current democratic gap in procedural rulemaking. The main benefit here is not democracy for its

²⁶⁰ Appendix D: Pilot Projects, Rule Changes, and Other Innovations in State Courts Around the Country: Available at: <http://iaals.du.edu/sites/default/files/documents/publications/ccj-cji-appendices-d.pdf>.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ The usefulness of state investigatory practices like the Civil Investigative Demand (*Twombly*); the differential reach of state long-arm statutes (*Walden*); experiences with *parens patriae* suits (*Hood v. AU Optronics Corp.*); the enforcement role of state pension funds (*Tellabs, NML v. Argentina*); and the strength of other state investigative techniques as an alternative to class action litigation (*Concepcion*).

²⁶⁴ Miriam Seifter worries that aggregation may actually mute diverse state interests in regulatory policies—especially in the context of translocal groups—but that concern is void in procedure where the States are generally affected equally regardless of their geographic distribution. Seifter, *supra* note 25 at 995-96.

own sake, but the possibility of a better Advisory Committee with improved debates that represent diverse interests and produce optimal procedural rules.

Civil procedure is by design technocratic because it is, in theory, neutral and specialized—it has little substantive import. Indeed, procedure falls into what Professor H.L.A. Hart called the “secondary” rules of adjudication which, by definition, do not govern primary conduct.²⁶⁵ But as procedure has grown more complex, it has come to envelop several normative considerations that implicate deep democratic values. Because procedure is currently controlled by undemocratic institutions, however, normative debates have been captured by a narrow set of voices. The two institutions responsible for most procedural changes—the Supreme Court and the Civil Rules’ Advisory Committee—suffer from an unhealthy level of democratic isolation.²⁶⁶ As alluded to throughout the Article, this has given the Supreme Court almost unfettered power over procedural questions. This judicial supremacy over procedure is not problematic just because it is undemocratic; indeed, undemocratic courts are an important feature of a liberal democracy. The difficulties arise, however, when courts’ undemocratic isolation deprives them of meaningful input from diverse sources. This is particularly so in the context of procedure because to the extent that the Court does respond to public opinion, it is less likely to do so in areas that are technical and opaque.²⁶⁷ Moreover, the case-by-case common law approach lends itself to seemingly innocuous but long-term significant procedural changes.²⁶⁸ One worrisome aspect of recent procedural retrenchment is that the changes have been political, have not even gone through the limited Advisory Committee process, and have lacked input from elected officials.

A similar democratic deficit exists in Advisory Committee decisions.²⁶⁹ The Committee is unelected and is composed of “judges, practitioners, academics, or ex officio representatives of the Federal Government.”²⁷⁰ In the past three decades, federal judges have dominated it, representing over half of the members in 2015.²⁷¹ To the extent procedural issues are a cover for substantive debates over policy, the democratic deficit is worrisome. Commentators have recently bemoaned the Committee as a tool of business interests, intent on “pricing the poor and middle class out of court.”²⁷² Several

²⁶⁵ H.L.A. HART, *THE CONCEPT OF LAW* 90 (Penelope A. Bulloch & Joseph Raz eds., 3d ed. 2012).

²⁶⁶ Although Congress does express interest in the rules from time to time. See Bookman and Noll, *Ad Hoc Procedure* (forthcoming N.Y.U. L. REV.).

²⁶⁷ Burbank & Farhang, *Rights and Retrenchment* (Manuscript).

²⁶⁸ *Id.* at 289.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Stephen B. Burbank, Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 10, 2014). Available at: <https://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0729>. *E.g.*, W.

scholars have complained about ideological purity, too, highlighting that the Committee is overwhelmingly composed of partisan judges, business interests, and practitioners.²⁷³ The Committee's failure to represent a diversity of voices has weakened the public legitimacy of its rules.

Procedure should be subjected to democratic pressures because a diversity of voices would improve procedural rules. Under a pluralist view of democracy, policy should result from transparent debates among officials that represent a wide range of views.²⁷⁴ 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. Despite its vaunted technicality, procedure increasingly needs these benefits. Although democratic values are not, and should not be, the benchmark for procedure—after all, expertise is *necessary* in this context—inclusive institutions can improve procedural debates by connecting an isolated Court and Advisory Committee with public concerns.

The States' Accountability. The States can partly ameliorate these concerns by exposing the Court and Advisory Committee to different perspectives. This modicum of pluralist input can occur in three ways:

First, a state representative in the advisory committee can serve as an aggregator of diverse state views.²⁷⁵ State aggregation allows for the broad representation of diverse interests and prevents 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 capitols. Together, however, a coalition of States cross-check each State's impulses and concatenates myriad local interests into powerful wholes. The best evidence for this is this Article's finding that the States disagree with the Chamber of Commerce in 80% of procedure cases.²⁷⁶ This aggregation 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, state AGs or state judges can provide the missing link between the Advisory Committee-Court duo and the public. As in the political actor

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).

²⁷³ Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083 (2015).

²⁷⁴ See generally Robert A. Dahl, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT (1967).

²⁷⁵ Lumen N. Mulligan, Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188 (2012).

²⁷⁶ See *Infra* Part III.

model in administrative law, a state voice in procedure can act as a conduit for different interest groups. As the *only* directly elected officials who have a stake in federal procedure, State AGs and state judges bring a rich diversity of voices that are ultimately responsive to the public. Judith Resnik, Joshua Civin, and Joseph Frueh have argued that in the context of translocal organizations that include state actors, “we could conceptualize [their] work within pluralist theory as improving deliberative democracy by bringing in not only more voices but a particularly interesting set of voices.”²⁷⁷ State officials must navigate political circles and pressures from both businesses and plaintiffs’ bars. This exposes them to a diversity of legal interest that makes them important democratic actors in procedure. An Advisory Committee with state representation provides at least the possibility of pluralistic debates with input from dozens of Republican and Democratic groups, along with a variety of interests, business *and* consumer oriented.

Third, the States can provide transparency. Because State AGs are a stepping stone to governorships, their role is closely policed by interest groups. This phenomenon can serve as a backdoor entry for increased public interest in procedural changes. This interest is not inherently beneficial but it would pressure the Court and the Advisory Committee to slow any efforts to remake the Rules and would encourage further dialogue or bargaining.

3. *The States’ Concerns About Judicial Power*

Concerns about state sovereignty are particularly pointed in procedure where there are no institutions in a position to defend federalism. As Parts II and III show, recent procedural decisions may disrupt the traditional division of judicial power between federal and state courts by concentrating an increasing amount of cases in federal court despite protests from the States.²⁷⁸ There are at least two reasons why the States should have a voice in procedure:

First, state governments have reasons to prefer state over federal courts. For one, maintaining important cases in state court promotes public and private investment in those courts and improves the development of state law. Indeed, under *Erie*, federal courts cannot engage in state law innovations. The States have argued as amici that diverting state law cases to federal court will “stunt the development of those laws.”²⁷⁹ Moreover, a loss of important cases

²⁷⁷ Judith Resnik, Joshua Civin, Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (Togas)*, 50 ARIZ. L. REV. 709, 768 (2008).

²⁷⁸ Article III of the U.S. Constitution vests judicial power in “one Supreme Court” and in “such inferior courts as Congress may from time to time ordain and establish.” The framers sought to create a federal court system concerned only with well-defined areas, specifically matters of “national jurisdiction.” The Federalist No. 81, at 485 (Alexander Hamilton) (Clinton Rossiter ed., 1961). See also Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 LAW AND HISTORY REVIEW 205 (2012) (“... federal courts were understood by [founding era] contemporaries to possess only a specific quantum of jurisdiction.”).

²⁷⁹ Hood, States’ Amicus Brief.

undermines “rationales for [] investment in state courts” and the maintenance of appropriate funding levels.²⁸⁰ Beyond removing state court flexibility over state law, a shift to federal court increases the potential for differential treatment of similarly situated parties.²⁸¹ In other words, States and federal courts may apply state law differently 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 fora that federal courts seem eager to abandon.²⁸² 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. While the federal judiciary continues to close access to court, 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.”²⁸³ 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—the States can provide a more hospitable state litigation environment.²⁸⁴ Allowing the States a voice in procedure can thus improve access to court and complement any resource constraints that may exist in federal agencies.²⁸⁵

B. Concerns About the States’ Involvement

If the States are given an institutionalized role in federal procedure, it is important to 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. Theoretically, the States may respond to local attorneys who are experienced in state but not federal courts and who benefit from local litigation rather than the federalization of claims. This may lead them to defend the “private attorney general” 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.

²⁸⁰ 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).

²⁸¹ *Id.*

²⁸² See Clopton, *supra* note 5.

²⁸³ Robert M. Cover and T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

²⁸⁴ See Clopton, *supra* note 5.

²⁸⁵ *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2485 (2013) (Sotomayor, J., dissenting).

Because the States have contradictory motivations, at times promoting civil litigation but opposing it when it affects them directly, they also seem to oppose transubstantivity. The varying influence of state institutional interests, business, and pecuniary concerns, produces differential outcomes that are better accommodated by non-transubstantive standards. This has been directly at odds with the recent goals of the Supreme Court. 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, and therefore may well be undesirable.

Another concern with increased state involvement is the danger of state bias against out-of-state interests—the precise reason why federal courts exist—especially if the States are competitors in the litigation market. Why would system designers want to place a competitor in 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 a state could push single-state interests at the expense of federal courts.

All of these concerns are valid but they do not defeat the enterprise. Any concerns about state politicization, capture, or parochialism should be moderated for a variety of reasons. To begin, parochialism is checked by the proposed participation of state *coalitions* where each state's interest is subsumed to the interests of the whole. As for politicization and group capture, Part III 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. The typology also identifies areas that are more likely to be political (CAFA). In these areas, federal policymakers can and should ignore the States' input. Further, placing a competitor like the States in 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 AGs). 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 to the States' role is that defending federalism in civil procedure can appeal to traditional conservative preferences for federalism and liberals' commitment to court access. To be clear, it is the liberal Justices who most often defend the States' voice in procedure.²⁸⁶ Brooke Coleman has noted that “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.”²⁸⁷ To wit,

²⁸⁶ See generally Coleman, *supra* note 28.

²⁸⁷ *Id.* at 331.

Justice Sotomayor supported state concerns in her *Daimler* concurrence,²⁸⁸ and Justice Breyer (joined by Ginsburg and Kagan) recognized in his *Concepcion* dissent that respect for federalism was necessary in that context.²⁸⁹ The promise of a bipartisan solution can only strengthen the argument that the States deserve a voice in procedure.²⁹⁰

Indeed, as a whole, any concerns should be downplayed because the Article is ultimately promoting limited outlets for States. So, 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 a Due Process finding. 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 total sum of information available.

C. How Federal Institutions Should Accommodate State Views

Assuming that the States' involvement in federal procedure is salutary, how should their role be accommodated? This Section argues that (1) 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 (2) 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, Congress itself has repeatedly shown it has no interest in policing Advisory Committee changes to the rules.²⁹¹ Both of the current alternatives to Congress—amicus briefs and public comments on proposed Advisory Committee rules—suffer significant problems. First, these input avenues risk placing the States on equal grounds with non-governmental actors, business interests, and other interest groups. This can drown the States' voice among dozens of amicus briefs and thousands of public comments. Second, opportunities for amicus briefs and public

²⁸⁸ *Daimler*, 134 S. Ct. at 746 (J. Sotomayor, concurring).

²⁸⁹ *Concepcion*, 563 U.S. at 367 (J. Ginsburg, dissenting).

²⁹⁰ Although State AGs' democratic bona fides are weak. Seifter, *supra* note 25 at 995-96.

²⁹¹ Many scholars have discredited the possibility that the States could leverage political power in the Senate or House. See generally e.g., Larry Kramer, *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 (1988); Gillian E. Metzger, *Administrative Law As the New Federalism*, 57 DUKE L.J. 2023, 2050 (2008); Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 47 (2008). See also 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).

comments come at too late a stage; by the time the Supreme Court decides a case, or a rule has been proposed, the procedural decision is often baked in. In other words, the procedural “sausage” is actually made at earlier stages: yearly Advisory Committee meetings and reports to the Chief Justice by the Judicial Conference. 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 fora are better placed to encourage background discussions about procedural issues.

The States’ input should be accommodated at an earlier stage when a broader diversity of state interests can participate. Here, I propose three relatively unobtrusive ways to increase state input: The Advisory Committee should invite State AGs’ input on proposed changes (notice and comment), the States should have a formal role in the Advisory Committee, and the Federal Rules should incorporate deference to principles of federalism.

There are many opportunities for the federal government to improve intergovernmental negotiations, or in other words, to create and improve fora for federal-state discussions on procedural-federalism issues.²⁹² For example, the Advisory Committee could directly request comments from State AGs or 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 input as that seen in amicus briefs.²⁹³ Moreover, some large States like California are currently underrepresented in the submission of amicus briefs. In order to encourage more participation, the Committee could develop routes of communication that are open only for the States and not other stakeholders. Alternatively, an even more direct solution would be to target membership in the Advisory Committee itself. As explained above, the Committee is currently composed mostly of federal judges, academics, and practitioners. An increase in state representation would allow the airing of diverse state interests and would improve Advisory Committee expertise. Administrative law should be the model: Miriam Seifter has noted, for example, that “many [translocal state] groups are now given formal roles in federal [administrative] rulemaking . . . and have been pivotal players in recent policy developments.”²⁹⁴

The States’ role in federal procedure should be represented by a single actor that can stand for state consensus opinions. Although it could be difficult

²⁹² Samuel R. Bagenstos, *The Anti-leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 920 (2013) (noting that the Supreme Court has encouraged state-federal negotiations in the context of administrative decisions and that recent decisions “may . . . set[] a new, state-friendly context for vertical intergovernmental negotiations”).

²⁹³ Most important retrenchment changes have taken place in judicial decisions, not 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.

²⁹⁴ Seifter, *supra* note 25 at 956. See also Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 584 (2012) (arguing that administrative agencies should consult with SAGs, among other state actors).

to identify consensus choices, there are various current institutions where the States do reach common ground. For example, existing bodies like the National Association of Attorneys General or National Association of State Legislatures could create a process for selecting judicial representatives to the Advisory Committee. Both the targeted notice and comment method proposed above and state committee membership should then be institutionalized in one of three ways: (1) Through a Congressional amendment to the REA; (2) A formal change to the Committee's process; or (3) An amendment to the Federal Rules.

The first approach would be more difficult but straightforward. Congress enacted the REA in 1934 and originally delegated rulemaking power only to the Supreme Court. In several amendments since, 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 comment).²⁹⁵ Empowering the States would be a natural step in this evolution and would dovetail well with changes in Administrative Law. Section 2073 of the REA currently authorizes the Judicial Conference to appoint committees consisting of practitioners and judges, and requires, among other things, the Committee to present detailed reports on pending rules. My proposed changes to Section 2073 provide the following (bolded language):

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 . . .

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**.

Following the lead of Executive Order 13,132—which instructs administrative agencies to consider the federalism consequences of any proposed rule²⁹⁶—“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.”²⁹⁷ These changes would encourage dialogue at the Advisory Committee level on all the possible ramifications that federal procedure can have on the States.

²⁹⁵ See Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099 (2002).

²⁹⁶ Federalism, 64 F.R. 43255.

²⁹⁷ *Id.*

Given that Congressional action is unlikely, however, the Advisory Committee could, as a matter of course, invite state input through public comments and state actors to participate in meetings and debates on a permanent basis rather than the current *ad hoc* system that only rarely includes state judges.²⁹⁸ State SGs might be particularly qualified for this role.

While these changes might promote the values discussed above, they would not cover judicial decisions on jurisdiction. Accordingly, such a rule could be complemented by a doctrinal change to procedural decisions (akin to a presumption) of judicial recognition of federalism in procedural cases. Fortunately, Justice Ginsburg has already done some leg-work on this proposal, announcing in her *Shady Grove* dissent that she “would continue to interpret Federal Rules with awareness of, and sensitivity to, important state regulatory policies.”²⁹⁹ The Committee could explicitly incorporate Justice Ginsburg’s suggestion and amend Federal Rule 1 to read as follows (bolded language):

[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding. **The rules should also be construed with awareness of, and sensitivity to, important State regulatory policies.**

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 optimal procedural rules. These reforms would ease the role of States in important federal procedural changes.

CONCLUSION

The States are stakeholders of 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 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’ protestations can be explained not only by an interest in private AGs and repeat players, but also by two dynamic forces: federal-state institutional competition and the influence of political ideology. These forces together provide a systematic picture of the States’ behavior.

²⁹⁸ See generally Struve, *supra* note 294 at 1105-1006 (describing the rulemaking process). See also Burbank & Farhang, *Rights and Retrenchment* at __ (manuscript) (discussing state judge membership in the advisory committee as including: Richard Holmes (1991-93); Christine Durham (1994-99); Nathan Hecht (2000-05), Randall Shepard (2006-11); and David Nahmias (2013-Present)).

²⁹⁹ *Shady Grove*, 559 U.S. at 437 (Ginsburg, J., dissenting). Brooke D. Coleman offers a similar suggestion. Coleman, *supra* note 28 at 355.

Reviewing the States' role in federal procedure offers a fuller view on the Court's recent "procedural retrenchment." The 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 AG offices in California and other states should make it even more of a priority.

Taking a normative approach, the Article concluded that States have a right to be concerned about the boundaries of federalism in the context of procedure. A robust view of federalism principles would improve federal procedure because it produces a healthy information exchange, promotes democratic pluralism, and improves access to court.

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

APPENDIX A: State Amicus Briefs in Procedure by Political Party³⁰⁰

	Tellabs	Twombly	Nicastro	Concep.	Italian Co.	Standard Fire	Miss. Hood	Walden	NML	Halibur.	Spokeo	Tyson Foods
AL		Red				Red		Red	Red		Red	
AK	Red						Red		Red			
AZ			Blue		Red	Red	Red	Red	Red			
AR	Blue		Blue			Blue	Blue			Blue		
CA	Blue						Blue					
CO		Red					Red				Red	
CT	Blue				Blue		Blue		Blue	Blue	Blue	Blue
DE	Blue						Blue				Blue	
DC				Blue				Blue			Blue	
FL						Red	Red					
GA								Red	Red			
HI			Blue		Blue		Blue	Blue	Blue	Blue	Blue	
ID	Red	Red					Red	Red				
IL	Blue		Blue		Blue		Blue				Blue	Blue
IN		Red				Red	Red	Red		Red		
IA	Blue		Blue		Blue		Blue		Blue	Blue		
KS		Red				Red	Red					
KY			Blue				Blue			Blue		
LA			Red				Red					
ME			Blue		Blue		Blue			Blue	Blue	
MD	Blue		Blue	Blue	Blue		Blue				Blue	Blue
MA	Blue				Blue		Blue				Blue	Blue
MI	Red	Red	Red			Red	Red	Red	Red		Red	
MN	Blue			Blue			Blue				Blue	
MS	Blue				Blue		Blue		Blue	Blue	Blue	
MO			Blue		Blue		Blue		Blue	Blue		
MT				Blue			Red	Red	Red			
NE	Red	Red				Red	Red	Red	Red		Red	
NV	Blue				Blue		Blue					
NH	Red	Red					Blue	Blue				
NJ	Blue											
NM			Blue	Blue	Blue		Blue		Blue	Blue	Blue	
NY	Blue				Blue		Blue				Blue	Blue
NC							Blue		Blue	Blue		
ND	Red	Red	Red			Red	Red	Red	Red	Red		
OH	Blue				Red	Red	Red		Red			
OK		Blue	Blue				Red		Red			
OR	Blue						Blue		Blue	Blue	Blue	Blue
PA		Red			Blue		Blue			Blue		Blue
RI	Blue	Blue			Blue		Blue			Blue		
SC			Red	Red	Red		Red	Red	Red			
SD	Red	Red				Red	Red					
TN	Blue	Blue	Blue	Blue	Blue		Blue	Blue	Blue	Blue	Red	
TX						Red	Red		Red			
UT	Red	Red	Red	Red	Red		Red	Red				
VT	Blue			Blue	Blue		Blue		Blue			
VA		Red					Red					
WA					Blue	Red	Blue			Blue	Blue	Blue
WV	Blue		Blue			Blue	Red				Red	
WI					Blue		Red				Red	
WY					Blue		Red				Red	

³⁰⁰ Red/Dark: Republican State AGs. Blue/Light: Democrat State AGs.

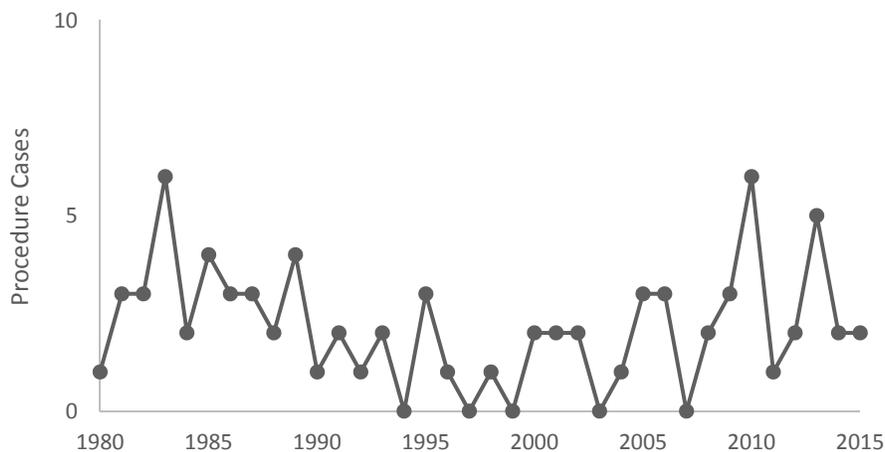
APPENDIX B: Supreme Court Procedure Cases (1980-2016)

In order to review all Supreme Court access-to-justice procedure cases, I began with the set of all Supreme Court decisions since 1980 (as gathered by the Washington University Law School Database (the “Database”).³⁰¹ I chose 1980 because of the wide availability of amicus briefs filed since that term. I then pared down the number of decisions by the relevant categories provided in the Database: Economic Activity, Judicial Power, Due Process, Miscellaneous, Private Action, etc. 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 Supreme Court in prominent cases presenting issues of class actions, personal jurisdiction, and pleading. For example, I read the briefs submitted by both parties in *Wal-Mart v. Dukes* and tracked all the cases cited therein. I then read the cited cases and examined whether they presented “procedural questions,” *i.e.* issues related to the Federal Rules of Civil Procedure, 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 the Supreme Court briefs review 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 [84] cases. Below, Figure 6 details the yearly distribution of cases from 1980-2016:

Figure 6: Number of Supreme Court Procedure Cases by Year (1980-2016)

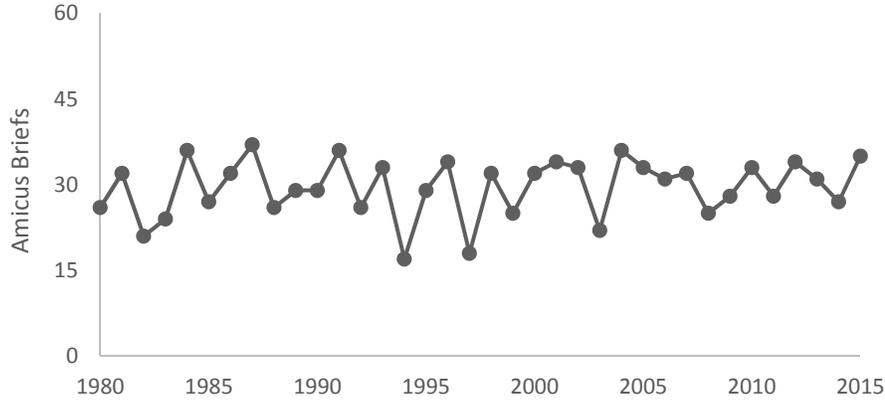


³⁰¹ The Supreme Court Database. Available at: [\[permalink\]](#).

APPENDIX C: State Amicus Briefs (1980-2016)

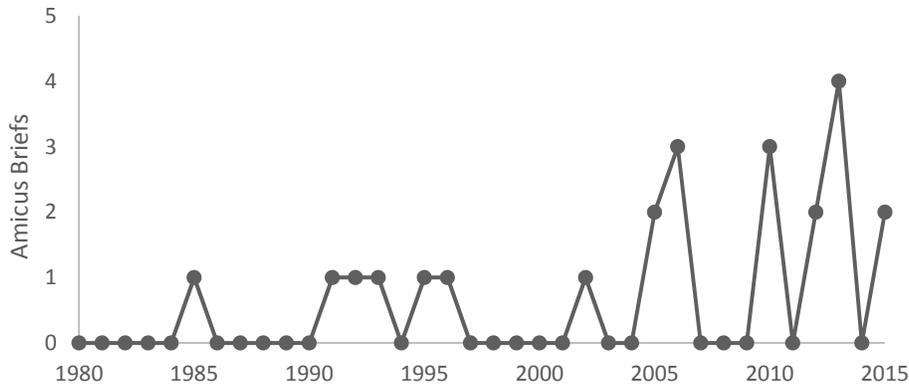
To review all state amicus briefs filed in front of the Supreme Court, I first began with Lexis Nexis data compiled by Paul Nolette.³⁰² I then supplemented the last few years by reviewing all Supreme Court case dockets (2013-2016). Figure 7 below shows the filing of state amicus briefs at the merits stage in all cases since 1980, averaging around 30 per year:

Figure 7: State Amicus Briefs at Merits Stage in All Cases



Using the Supreme Court procedure cases discussed in Appendix B, I then tallied the filing of amicus briefs in the specific area of civil procedure. Figure 8 below shows that state amicus briefs dealing with procedural issues spiked in 2006-07:

Figure 8. State Amicus Briefs at Merits Stage in Procedure Cases



³⁰² Paul Nolette, State Litigation during the Obama Administration: Diverging Agendas in an Era of Polarized Politics, PUBLIUS: THE JOURNAL OF FEDERALISM 44(3), 451-474 (2014). See also Lemos & Quinn, *supra* note 6 at 1244 (discussing similar data).