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State Attorneys General, Regulatory Litigation,
and the New Federalism

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INTRODUCTION

In recent years, the Supreme Court has resurrected judicially-enforced limits on federal power. In a series of landmark rulings, including, among others, *United States v. Lopez*,[1] *United States v. Morrison*,[2] and *New York v. United States*,[3] the Court has relied on two fundamental ideas to reduce the power of Congress to regulate the states: that the federal government is a government of limited, enumerated powers, and that the states are the repositories of residual powers. Part of the justification for this constitutional movement is that limits on federal power protect the "distribution of power fundamental to our federalist system of government."[4] This balance of power, in turn, is linked to a conception of democratic accountability, which suggests that, at least in some instances, federal regulation is less directly accountable to citizens than state regulation.[5] In reality, however, the relationship between federal power, state power, and democratic accountability is considerably more

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1. 514 U.S. 549 (1995).
2. 529 U.S. 598 (2000).
3. 505 U.S. 144 (1992).
4. Gonzales v. Raich, 545 U.S. 1, 42, (2005) (O'Connor, J., dissenting).
5. *See* New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997).

complicated. In the absence of comprehensive federal regulation, state institutions with lower transaction costs can pursue their own regulatory agendas, even when those agendas have significant national ramifications. The result is that where a subset of states cooperates on a regulatory policy, other states may be subjected to that policy's effect without having any influence over the policymaking process. Such a situation puts the values of federalism and democratic accountability in tension with each other.

This Comment will examine how one particular state institution, state attorneys general (SAGs), has operated within a unique set of institutional and political constraints to create state-based regulation with nationwide impact in policy areas including consumer protection,[6] antitrust,[7] environmental regulation,[8] and securities regulation.[9] This state-based regulation casts doubt on one of the principle rationales advanced in the Supreme Court's anti-commandeering line of cases for limiting federal power; namely, that such a move enhances electoral accountability,[10] a concept central to our democracy. If in the absence of federal regulation a series of narrowly accountable state-based actors can create nationwide regulation in a non-legislative fashion, accountability cannot continue to be a coherent justification for a revival of judicially-enforced federalism. While this critique of accountability is not an argument for untrammeled federal regulatory authority, it does call into question the empirical accuracy of the Court's assumptions about how state and federal institutions interact with each other to promote democratic and constitutional values.

In order to understand how SAGs have used litigation to become a regulatory force at the national level, it is important to identify the institutional, political, and legal factors that generate cooperation among these fifty state institutions.[11] These many officers are responsive to different political pressures, and have different personal, political, and policy goals. At first glance, it is perhaps surprising that a cooperative regulatory strategy could

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6. *See* Jason Lynch. *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2003 (2001) (noting that traditionally SAGs exercised their litigation authority to bring intrastate consumer protection suits).

7. *See* Michael S. Greve, *Cartel Federalism? Antitrust Enforcement by State Attorneys General*, 72 CHI. L. REV. 99 (2005).

8. *See The Role of State Attorneys General in Environmental Regulation*, 30 COLUM. J. ENVTL. L. 335, 342-43 (2005) [hereinafter *The Role of Attorneys General*] (describing Connecticut v. Am. Elec. Power Co., No. 04 Civ. 5669, 2004 WL 1685122 (S.D.N.Y. filed July 21, 2004), a multistate suit aimed at reducing the harmful emissions by power plants).

9. *See* Renee M. Jones, *Law, Norms, and the Breakdown of the Board: Promoting Accountability in Corporate Governance*, 92 IOWA L. REV. 105, 145 (2006) (describing how former New York Attorney General used litigation as a tool to force reform in the financial services industry).

10. *See New York*, 505 U.S. at 168.

11. There are in fact more than fifty, if one counts the attorneys general of the District of Columbia, Puerto Rico, and other American territories.

emerge from the interaction of so many diverse actors.[12] It should be even more surprising that it has happened not once, but many times and in a number of different substantive areas. Recognizing how such cooperation and regulation emerges will help us to understand more about the nature of our federal system and help us to make normative recommendations about the proper role of the judiciary in refereeing disputes between the state and federal governments.

This Comment will proceed in five parts. Part I will briefly review the Supreme Court's federalism jurisprudence in the last fifteen years, focusing on the accountability rationale for limiting the power of the federal government. The next three parts will examine the political and institutional environment that permits SAGs to cooperate in regulatory litigation. Part II examines the state-based institutional constraints under which SAGs typically operate. While SAGs have much in common with each other, the variations in these structures between states will in part account for the actual way in which any given SAG regulatory scheme evolves. Part III draws on empirical work by political scientists to explore the ideas developed in Part II in the context of the tobacco litigation of the 1990's. Part III also begins the discussion of the incentives for SAGs to cooperate with each other. Part IV expands on the federal dimension of SAG cooperation.

Finally, Part V argues that the use of regulation through litigation by SAGs undermines democratic accountability in at least two ways. First, regulation by a group of states that has nationwide effects denies the citizens of other states the opportunity to influence the regulatory process. This denial of political access undercuts the accountability rationale. Second, regulation accomplished through litigation is more difficult to overturn than regulation accomplished through legislative or administrative channels, making it less responsive to political changes. Thus, SAG regulation can be less politically accountable over time, as well as across states.

I
ACCOUNTABILITY IN THE SUPREME COURT'S FEDERALISM JURISPRUDENCE

The reinvigoration of judicially-enforced limits on federal power is a reversal of the position that the Court had held for nearly sixty years: that the constitutional structures of the federal government provide a method of politically regulating the relationship between the states and the federal

12. Throughout this Comment, the term "regulation" is used to refer to litigation of SAGs that has consequences for the ways in which business organizations and industries operate. While this litigation is not necessarily regulation in the administrative sense, its effect is to alter the behavior of corporations and business organizations in the same way that administrative actions do. It is for this reason that a variety of scholars have referred to lawsuits designed to change the way businesses operate as "regulation through litigation," or other similar names. *See, e.g.*, REGULATION THROUGH LITIGATION (W. Kip Viscusi ed., 2002).

government. Under this view, whose chief advocate was Professor Herbert Wechsler,[13] the relationship between the states and the federal government was not the proper subject of judicial regulation. Justice Blackmun most forcefully embraced this position on behalf of the Court when he wrote:

> [The] principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself . . . State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.[14]

Nevertheless, the Rehnquist Court reestablished judicially-enforced limits on federal power only a decade later. In cases such as *United States v. Lopez*[15] and *United States v. Morrison*,[16] the Supreme Court cut back on congressional power to regulate the states under the Commerce Clause.[17] In *Lopez*, the Court struck down as beyond Congress' authority under the Commerce Clause the Gun-Free School Zone Act,[18] while in *Morrison* the Court struck down the civil remedy provision of the Violence Against Women Act for lack of Congressional authority under either the Commerce Clause or the Fourteenth Amendment.[19] Similarly, in finding the Religious Freedom and Restoration Act unconstitutional, the Court in *City of Boerne v. Flores*[20] introduced a judicially enforced "congruence and proportionality" test to determine whether congressional regulation under Section 5 of the Fourteenth Amendment was constitutionally permissible.

Finally, and most relevant to the analysis in this Comment, in a line of cases including *New York v. United States*[21] and *Printz v. United States*,[22] the Supreme Court propounded the "anti-commandeering" principle. Under this doctrine, the federal government may not order state legislatures or state executive officers to enact federal regulatory programs because "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."[23] As Justice O'Connor explained:

The Constitution does not protect the sovereignty of States for the

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13. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

14. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550, 552 (1985).

15. *See* 514 U.S. 549 (1995).

16. *See* 529 U.S. 598 (2000).

17. *But cf.* Gonzales v. Raich, 545 U.S. 1 (2005) (holding that the application of the federal Controlled Substances Act to intrastate growers and users of marijuana does not violate the Commerce Clause).

18. 514 U.S. at 551.

19. 529 U.S. at 601.

20. *See* 521 U.S. 507, 520 (1997).

21. *See* 505 U.S. 144 (1992).

22. *See* 521 U.S. 898 (1997).

23. New York v. United States, 505 U.S. 144, 168 (1992).

> benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.[24]

Thus, in *New York*, the Court invalidated, on the grounds that it usurped the proper role of the states and was inconsistent with the Tenth Amendment, provisions of a state-negotiated and Congressionally-enacted pact requiring states under certain circumstances to take title to low-level radioactive waste.[25] Similarly, in *Printz*, the Court found unconstitutional provisions of the Brady Handgun Violence Prevention Act requiring state officers to execute background checks on prospective gun purchasers.[26]

Yet it is unclear the degree to which justiciable limits on federal power necessarily promote the democratic accountability that is said to justify judicial intervention in these cases. Particularly in situations similar to *New York*, in which the federal regulation is the result of a state-led effort to solve an inter-state problem,[27] permitting federal regulation may actually enhance the accountability of policy, not necessarily as an absolute matter, but relative to the policies that may emerge in the absence of federal regulation. Indeed, this Comment suggests that a doctrine of federalism that is judicially enforceable in some circumstances shifts the locus of state-federal relationships to the courtroom. The effect is to empower a set of state officers who are only narrowly accountable to use litigation to regulate on a national scale. Instead of regulation reflecting the plurality of interests represented in legislative or administrative proceedings, massive regulatory efforts occur in the shadow of the courtroom, with limited input from affected political constituencies.

The rise of SAGs as a regulatory institution in the last twenty years is most obvious in the case of the tobacco litigation, but has also occurred in areas such as securities regulation, environmental regulation, and consumer protection.[28] For example, between 1995 and 1997 SAGs reached multi-state settlements requiring the cessation of illegal activities and the payment of damages in suits against America Online, American Cyanamid, Bausch & Lomb, General Motors, Louisiana Pacific, Mazda, Packard Bell, and Sears Roebuck.[29] The legal, political, and institutional factors, both at the state and federal level, that have led to the increased importance of this institution (or rather fifty institutions) are worth studying because they give us an insight into the degree to which the Court's view of federalism as a source of greater

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24. *Id.* at 181.
25. 505 U.S. at 175.
26. 521 U.S. at 934.
27. 505 U.S. at 151 (noting that the statute at issue was based on a proposal from the National Governor's Association).
28. *See supra* notes 7-10.
29. Lynch, *supra* note 6, at 2006.

political accountability is theoretically and empirically accurate. If a federal system in which limits on the federal government are judicially enforced does not necessarily enhance democratic accountability, as this Comment argues, one must identify other justifications for those limits.

II
STATE ATTORNEYS GENERAL AND STATE CONSTITUTIONAL DESIGN

This Part describes the legal, political, and institutional factors at the state level that affect SAGs' discretion and incentives to act entrepreneurially in pursuing regulation through litigation.

A. Foundations of Autonomy for State Attorneys General

The office of the attorney general is derived from the similar English office that existed during colonial times. Colonial attorneys general represented the Crown's interests in colonial courts. Following the Revolution, the office was reestablished by individual state constitutions or statutes.[30] Today, forty-three state attorneys general are elected, five (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming) are appointed by the governor, one (Maine) is elected by a secret ballot of the state legislature, and the last (Tennessee) is appointed by the state supreme court.[31] The National Association of Attorneys General identifies five functions that the office performs: "(1) rendering advisory opinions on questions of law to government officials; (2) representing the state's legal interests. . .; (3) drafting and promoting legislative proposals; (4) administering certain types of state expenditures in areas such as contracting and state bonding; and (5) disseminating information regarding legal issues confronting the state."[32]

The heart of the attorney general's power is found in the constitutional and statutory arrangements that create the office. Although the exact allocation of litigation authority varies from state to state, attorneys general, for the most part, have a monopoly, or a near monopoly, on the state executive branch's access to the courtroom.[33] This means that litigation as a method to advance policy interests is a tool that rests almost exclusively in the hands of the attorney general. Furthermore, because the attorney general is responsible for defending other state agencies in court, he may also be able to shape the policies of other state agencies with which he has no hierarchical relationship.[34]

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30. Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 THE REVIEW OF POLITICS 525, 527 (1994).

31. Lynch, *supra* note 6, at 2002.

32. Clayton, *supra* note 30, at 528.

33. Lynch, *supra* note 6, at 2003.

34. This monopoly on access to the courtroom is similar the Justice Department's near monopoly over litigation in the federal government. *See* DONALD HOROWITZ, THE JUROCRACY: GOVERNMENT LAWYERS, AGENCY PROGRAMS, AND JUDICIAL DECISIONS 5 (1977).

For example, during his years as New York Attorney General, Eliot Spitzer frequently clashed with David Grandeau, executive director of New York's lobbying commission.[35] In at least one instance, Grandeau publicly accused Spitzer's office of refusing to adopt the commission's preferred interpretation of lobbying laws in court, thereby undercutting its efforts to regulate a wider range of activities.[36]

SAG autonomy is ingrained not only in statutory and state constitutional provisions, but also in the common law. As the Fifth Circuit explained:

> The attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires.[37]

Autonomy (or in other words a lack of accountability) can be thought of as freedom from retaliation by other actors in response to actions that the other actors dislike. In the literature on agency-Congress or Court-Congress relations, spatial models are commonly used to describe this concept.[38] In these models, Congress has an ideal policy position, but has delegated responsibility to either an agency or court for choosing the specific policy (legal or otherwise) that will be implemented.[39] A legislative choice of policy is costly to Congress in terms of time and resources consumed, as well as bargaining costs necessary to create a majority in both houses in favor of a particular policy.[40] The degree of discretion that agencies or courts have in selecting policy is thus determined by the size of the costs to Congress of directly implementing its preferred policy. The agency or court has discretion within bounds that are determined by Congress' "indifference" points. Between the two indifference points, the

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35. *See, e.g.*, Al Baker, *Brief Unity Turns To Discord in Feud Over Lobbying Laws*, NEW YORK TIMES, Dec. 4, 2003, at B6.; Raymond Hernandez, *In New York, A Record Fine Over Lobbying*, NEW YORK TIMES, Nov. 13, 1999, at A1.

36. Al Baker, *Two State Agencies Become Embroiled in a Dust-Up Over Lobbying Rules*, NEW YORK TIMES, Nov. 29, 2003, at B3.

37. Florida *ex rel.* Shevin v. Exxon Corp., 526 F.2d 266, 268 (5th Cir. 1976).

38. *See* Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 311-12 (2005) (describing the history of the use of spatial models to study interbranch relations).

39. John Ferejohn and Barry Weingast, *A Positive Theory of Statutory Interpretation*, 12 INTER'L REV. L. & ECON. 263, 268 (1992).

40. Matthew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 433-34 (1989) (noting that in principal-agent theory, it is costly to a principal to monitor and enforce promises made by the agent); *see also* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 974 (2002) (noting that higher transaction costs make overturning judicial action more difficult).

agency/court is free to choose its own most preferred policy, and thus deviate from Congress' ideal policy, because the cost to Congress of correcting the agency or judicial action exceeds the marginal benefit from the improvement in policy. Outside the indifference points, Congress' marginal benefit from moving policy back to its ideal point exceeds its costs, and thus agency/court discretion is cabined.

B. Executive, Legislative, and Political Constraints on SAGs

Adapting this spatial model of state executive relations provides a way to think about the discretion enjoyed by SAGs. Direct mechanisms for removing the SAG, such as appointment and removal power, considerably reduce the amount of effort necessary to overturn SAG policies of which the governor disapproves, and thus reduces the degree of policy discretion enjoyed by the SAG. But where, as in most states, direct mechanisms are not available to governors for punishing SAGs, the SAGs enjoy a great deal of discretion.[41] Under the most common feature of state constitutional design, an election is the primary vehicle through which the SAG can be removed from office.[42] This eliminates the most obvious constraint on the attorney general, which is the ability of a hierarchically superior officer to remove him from office.

Despite this freedom from the threat of being replaced by the governor, there is still the question of whether a governor may order an attorney general to take a specific course of action. The ease with which a governor can punish a SAG for failure to comply with an order determines whether the power to give the SAG an order is a functionally viable check on the SAG's policy discretion. A constitutional or statutory provision permitting a governor to control the SAG could be enforceable either politically (if the electorate voted out an attorney general who disobeyed a gubernatorial order) or judicially. Generally, judicially enforceable checks on SAG discretion will be less costly and therefore more effective than political checks. For example, where the governor can seek a court order to compel the SAG to obey an order, the costs of enforcing a gubernatorial order will be fairly low.[43] On the other hand, where the governor's only recourse is to advocate for the electoral defeat of the attorney general, the governor's influence over the attorney general will be

41. *See e.g.*, McCubbins, et. al., *supra* note 40, at 435 (noting that the ability to appoint administrators in the federal context gives the President greater influence over administrative policy).

42. Recall that only forty-three of fifty states elect their state attorney general (*see* Introduction, *supra*). In the remaining seven states, the attorney general will be more directly accountable to the institutions that choose the officeholder.

43. *See* People *ex rel.* Deukmejian v. Brown, 172 Cal. Rptr. 478, 482-83 (1981) (holding that the governor retains the "supreme executive power" to determine the public interest in the event of a conflict between the governor and the attorney general, and that the governor could properly seek a court order enjoining the attorney general from representing interests adverse to the governor).

weaker and more uncertain.

In some states, the law is clear that the governor is not permitted to interfere in the state's litigation strategy.[44] For example, in Massachusetts, following the Massachusetts Supreme Court's decision requiring the state to offer marriage licenses to same-sex couples,[45] Governor Mitt Romney, a Republican, sought to initiate litigation to encourage the court to stay its decision pending the possible passage of a state constitutional amendment banning same sex marriage. The attorney general, a Democrat, refused to follow the governor's preferred course of action. Because Massachusetts law was sufficiently clear as to the attorney general's monopolization of litigation authority, the governor was forced to request from the legislature a specific waiver granting him standing to sue in his own capacity.[46] The legislature ultimately did not comply.

In another instance, in a case stemming from the redrawing of district lines in Georgia after the 2000 census, a Republican governor took the state's Democratic attorney general to the state supreme court over who had the right to terminate litigation to which the state was a party.[47] Following his election in 2002, the newly elected Republican governor ordered the reelected attorney general to drop one of the state's appeals before the United States Supreme Court.[48] When the attorney general refused, the governor sued. Even after the U.S. Supreme Court had already ruled on the case,[49] the Georgia Supreme Court declined to find the issue moot, and instead issued an opinion upholding the attorney general's authority to conduct litigation on the state's behalf independent of the governor's wishes on the matter.[50]

As the foregoing discussion illustrates, the governor will often not be an effective check on the SAG.[51] However, the SAG can be constrained by actors other than the governor. In many states the more effective institutional check is the legislature.[52] As the Fifth Circuit in *Florida ex rel. Shevin v. Exxon*[53]

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44. *See, e.g.*, Feeney v. Commonwealth, 366 N.E.2d 1262, 1265-67 (1977) (holding that the attorney general possesses ultimate authority over litigation).

45. Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (2003).

46. *See* Pam Belluck, *Governor of Massachusetts Seeks to Delay Same-Sex Marriages*, NEW YORK TIMES, April 16, 2004, at A12.

47. *See* Perdue v. Baker, 586 S.E.2d 606, 607 (2003).

48. *Id.*

49. *See* Georgia v. Ashcroft, 537 U.S. 1152 (2003).

50. The opinion stated that both offices had responsibility for determining the state's litigation positions. *See Perdue*, 586 S.E.2d at 608. However, the opinion declined to offer any legal devices through which the governor could assert this authority.

51. For an overview of case law from various states regarding the allocation of power between the SAG and the governor, see William Marshall, *Break up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2453-68 (2006).

52. *See* Michael Signar, *Constitutional Crisis in the Commonwealth: Resolving the Conflict between Governors and Attorneys General*, 41 U. RICH. L. REV. 43 (2006), for an

indicated, state legislatures can constrict the SAGs' powers. For example, during the tobacco litigation of the 1990s, (see Part III, infra) the North Carolina legislature passed a statute forbidding the state attorney general, a Democrat and future governor, from filing suit against the tobacco companies.[54]

Another possible check on the SAGs' discretion is the partisan primary. The nature of the two-party system is such that candidates for public office have to sell themselves not only to the median voter in a general election, but also to the median voter within a particular party during a primary election. The median primary voter's preferences may differ substantially from the median general election voter's preferences because political parties, by design, do not represent the entire political spectrum of voter values. Therefore, SAGs may have an incentive to curry favor with party leaders and party loyalists in order to avoid a primary challenge and maximize fundraising in preparation for the general election. In some cases, this needs to serve two masters—the primary and general electorates—might prove to be a constraint on the SAGs' discretion, particularly in states with a strong party leadership to whom the attorney general is beholden. In addition, one might imagine that intra-executive conflict would be reduced when the SAG and the governor share the same party because of the governor's greater leverage over the other members of his party. As such, a governor of the same party would have another more informal means to check the power of the SAG. However, research examining the tobacco litigation has not found support for this proposition.[55]

This intra-governmental conflict can be a means through which other state institutions such as the governor or legislature can impose costs on the attorney general for failure to comply with an order, and it is also a process through which the role of the attorney general in each state is clarified and defined. As such, intra-governmental litigation as a strategy to discipline SAGs can entail costs for the plaintiff-governors as well. In Georgia, for example, the state supreme court upheld the exercise of independent authority by the attorney general, making the SAG's legal authority clear.[56] Future bargaining between the attorney general and other branches of the Georgia government will take place in the shadow of the now-defined rights and status of the attorney general.

More generally, it is variability in the types of institutional constraints discussed in this Part that determine the amount of discretion that the SAG has in setting his own policy goals. As it becomes more difficult or more costly for

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argument that the Virginia legislature should establish a "Governor's counsel" in each state agency in order to limit the influence of the SAG.

53. *See* Florida ex rel. Shevin, 526 F.2d 266, 268 (5th Cir. 1976).

54. MARTHA A. DERTHICK, UP IN SMOKE 164 (2002).

55. *See* Part III, *infra*.

56. *See Perdue*, 586 S.E.2d at 611-12.

other branches to overturn SAG action, or as the SAGs' and other institutions' policy preferences converge, the discretion of the SAG increases. By far the most important factor in these institutional arrangements is independent election, which greatly increases the SAGs' discretion to oppose other state officers.

C. SAG Incentives to Initiate Regulatory Litigation

The policy discretion that results from state constitutional design permits the attorney general to act in an entrepreneurial fashion. Assuming that the attorney general is a self-interested politician seeking to maintain or advance his political career, the attorney general has an ineentive to drive policy change. The median voter theorem provides a clear illustration of the way this incentive functions. Under the median voter theorem, the proposal or candidate favored by the median voter is the proposal or candidate that prevails.[57] In the case of candidates, voters are likely to evaluate the candidate on a number of politically salient policy positions.[58] Because the SAGs' primary role is to act as the state's chief law enforcement officer, voters will likely evaluate a SAG candidate largely on that basis. As such, a candidate for attorney general will seek to impress the median voter (in either a primary or general election) primarily on law enforcement or legal policy issues.

There is no reason, however, to think that the median voter on law enforcement issues is the same as the median voter on issues such as taxation or education. Indeed, there is good reason to believe that for offices with broader responsibilities, such as governor, voters consider a combination of policy positions in evaluating a candidate.[59] This means that an attorney general who aspires to higher office, such as governor or U.S. Senator, has an incentive to raise his profile in policy areas beyond that of law enforcement. By developing a record in areas such as health care or securities regulation, an attorney general can position himself to appeal to the median voter in an election for a higher office.[60]

Thus, the median voter theorem helps explain why SAGs would seek to expand beyond simply law enforcement into other policy areas, despite the fact

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57. *See* ROBERT COOTER, THE STRATEGIC CONSTITUTION 25 (2000).

58. A candidatc's profile is, of course, not simply created by his position on relevant policies, but is also determined to some extent, perhaps to a high extent, by a personality profile. However, a candidate's personal profile is irrelevant for the purposes of institutional analysis.

59. *See, e.g.*, John R. Hibbing, *Ambition in the House: Behavioral Consequences of Higher Office Goals Among U.S. Representatives*, 30 AM. J. POL. SCI. 651 (1986) (finding that members of the U.S. House of Representatives running for the Senate adapt their behavior to appeal to the constituency that they seek to represent).

60. Wayne L. Francis, Lawrence W. Kenny, Rebecca B. Morton & Amy B. Schmidt, *Retrospective Voting and Political Mobility*, 38 AM. J. POL. SCI. 999, 1000 (1994) (presenting evidence that candidates for higher office behavc as if they expect voters for higher office to judge them on their records in "lower" office).

that in seeking higher office they are likely facing the same formal electorate. Because moving to higher office involves capturing a median voter on a multidimensional policy space, rather than the one-dimensional space in which the SAG has already been successful, the SAG has an incentive to innovate within the constraints imposed on his office.

One can also think about the SAGs' incentives in terms of interest groups. The interest groups that are primarily affected by, and thus interested in, the election of the SAG are going to be law enforcement organizations, state bar associations, defense attorneys, and the like.[61] In contrast, many more interest groups are going to be involved in higher profile state races, precisely because a governor or a senator has a much broader range of policies within his ambit. Thus, in seeking to raise money and build support in a bid for higher office, the attorney general must try to reach out to interest groups that may not have a direct interest in the attorney general's core function of law enforcement. Building a coalition to win an election requires support from a range of interests, and that support is presumably more easily assembled if one has a record to run on, rather than mere statements.

D. Resource Constraints

Simply having an incentive to innovate is not a sufficient condition to ensure that innovation will occur, nor is the absence of formal hierarchical restraints. To be successful policy entrepreneurs, SAGs must have the organizational resources necessary to prosecute more than just the run-of-the-mill crimes, and the power to determine what cases are pursued. This point can be illustrated by comparison with the federal judiciary. The writ of certiorari gives the Supreme Court virtually complete discretion over its docket.[62] In contrast, the federal appeals courts have mandatory jurisdiction over appeals from the district courts.[63] The result is that, unlike the Supreme Court, the federal appellate courts spend a large portion of their limited resources correcting errors made in the district courts.[64] In contrast, the Supreme Court

61. This model can be complicated where political interest groups concerned with non-law enforcement issues into which a SAG expands anticipate either his innovation or his future campaigns for higher office. In such situations, interest groups with little interest in the SAG office may try to influence voters in SAG elections. Because most voters presumably choose a SAG based on law enforcement issues, such political interest groups will try to frame a candidate one way or another on law enforcement issues. However, the fact that their involvement is motivated by non-law enforcement concerns means that such considerations can play a role in SAG elections.

62. Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 277 (2006) (noting that in 1988 Congress removed most of the Supreme Court's mandatory jurisdiction).

63. Susan B. Haire, Stefanie A. Lindquist & Donald R. Songer, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC'Y. REV. 143, 145 (2003).

64. *Id.*

can hear cases based on the issues that it feels are within its competence to decide and in which it feels it can produce a practical result.

The ability of litigators or prosecutors to affect policy is subject to similar resource considerations. Although prosecutors have largely unreviewable discretion in terms of the cases that they bring,[65] this is not the same as having the resources to bring any case they may wish to bring. A sample of cases in a government lawyer's office might include routine criminal prosecutions, defenses of state agencies, civil enforcement actions, and more novel "regulatory cases." The greatest ability to determine policy is in civil enforcement and regulatory cases, in which the government lawyer can effectively exercise the power of selection. However, a small government office could easily find itself without the resources to pursue these more innovative claims. A local county prosecutor, for example, may be so overwhelmed with standard criminal prosecutions that he or she lacks the resources to file more innovative lawsuits. In effect, his or her "docket" consumes the finite resources of the office and restricts his or her ability to affect policy.

In contrast, SAGs have considerably more resources at their disposal. Studies conducted in the 1980s and 1990s indicated a huge increase in the size of SAG offices and staffs.[66] The increase in organizational resources can translate into greater discretion in how to use those resources.[67] SAGs have also been quite creative in seeking to expand the resources at their disposal, particularly by hiring outside counsel on a eontingency fee basis.[68] This tactic was particularly effective in the tobacco litigation of the 1990s, in which plaintiffs' law firms reinvested much of the money earned from asbestos litigation into developing cases against the tobacco companies on behalf of the SAGs who hired them.[69]

SAGs are also less limited, relative to private attorneys, in their ability to find an appropriate case to use as a vehicle to advance a policy agenda.[70] Because their authority is predicated to some extent on the "public interest" conception of their role that is embedded in the common law tradition, SAGs

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65. Mariano-Florentino Cuellar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 241 (2006) (noting that courts rarely if ever review prosecutors criminal charging decisions).

66. *See* Clayton, *supra* note 30, at 538.

67. *Cf. The Role of State Attorneys General in Environmental Regulation*, 30 COLUM. J. ENVTL. L. 335, 342-43 (2005) (Maine Attorney General Stephen Rowe describes his office's decision not to join an interstate environmental suit, Connecticut v. Am. Elec. Power Co., No. 04 Civ. 5669, 2004 WL 1685122 (S.D.N.Y. filed July 21, 2004) as "basically logistical. We saw it as being resource intensive.").

68. *See* Derthick, *supra* note 54, at 164.

69. *Id.*, at 73.

70. *See, e.g.*, Stephen Paul Mahinka & Kathleen M. Sanzo, *Multistate Antitrust and Consumer Protection Investigations: Practical Concerns*, 63 ANTITRUST L.J. 213, 215 (1994) (describing how states may pursue antitrust cases on their own behalf as direct purchasers, as well as on behalf of their consumers under the parens patriae provisions of federal antitrust laws).

are able to bring lawsuits with sweeping regulatory implications that private litigants would be unable to bring for lack of standing or other legal reasons.[71] This was certainly the case with the tobacco litigation. Private efforts to sue the tobacco companies had largely foundered both on the disparate resources that the two parties possessed, as well as legal difficulties stemming from proving causation between smoking a particular brand of cigarettes and the injuries suffered, and overcoming contributory negligence doctrines such as "assumption of risk."[72] The states were able to get around these difficulties by asserting their own rights to compensation as healthcare providers. Similarly, in *Connecticut v. American Electric Power Co.*, eight SAGs sued six power companies, seeking injunctive relief to compel the defendants to reduce their emission of greenhouse gases.[73] The suit presents a variety of standing issues, most notably whether SAGs can, by invoking "parens patriae" standing, circumvent standing limitations that would prevent citizen suits with similar claims.[74]

In sum, state constitutional design ereates a unique institutional environment that can encourage SAGs to pursue a litigation-based regulatory agenda that is outside the normal purview of a law enforcement officer. A constitutional design that removes formal hierarchical accountability within the executive branch and gives a monopoly (or near monopoly) on litigation to the SAG creates few formal institutional constraints on the SAGs' policy discretion. A median voter or interest group model can be used to understand the SAGs' incentives to innovate. A constitutional design that fragments executive authority across multiple offices encourages elected officials to infringe on each other's policy turf for political gain. Furthermore, as the next Part will illustrate, other types of constraints that might be thought to operate, such as resource constraints imposed in the budgeting process or party discipline outside the scope of formal constitutional checks, seem to have little effect on SAGs.[75] Instead, state constitutional arrangements generally give the SAG a free hand to use litigation to engage in regulation.

III
TOBACCO LITIGATION: A CASE STUDY

In the following Part, I consider the state-based institutional and political

71. Florida ex rel. Shevin, 526 F.2d 266, 268.

72. Derthick, *supra* note 54, at 32.

73. No. 04 Civ. 5669, 2004 WL 1685122 (S.D.N.Y. filed July 21, 2004).

74. For a complete treatment of the standing issues presented by Connecticut v. Am. Elec. Power. Co., *see* Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 294 (2005).

75. *See* Part III, *infra*.

constraints described in the preceding Part in the context of the tobacco litigation of the 1990s, drawing on empirical research undertaken by political scientists. I also introduce a preliminary discussion of national incentives for state-based cooperation in multi-state litigation. A more complete discussion of national incentives is deferred until Part IV.

A. SAG Lawsuits Against the Tobacco Companies

Tobacco litigation has come under enormous scrutiny in part for the same reasons that the Supreme Court has on occasion resisted congressional efforts to regulate the states: accountability.[76] Many commentators argue that a settlement between the states and the tobacco companies, requiring the tobacco companies to make payments into state treasuries based on their share of the tobacco market,[77] essentially an excise tax on tobacco products,[78] amounts to an end run around the legislative process.[79] Where, these scholars wonder, is the democratic accountability when de facto taxes are levied through broad sweeping settlements backed by the force of consent decrees?[80]

The wave of tobacco litigation by states began in 1994 when Attorney General Michael Moore of Mississippi filed the first lawsuit under the novel theory that the state should be able to recover from the tobacco companies the expenses paid from Medicaid funds on behalf of smokers.[81] Moore designed this theory specifically to get around what had been a successful defense in private suits against the tobacco companies, namely the tort doctrine of "assumption of risk."[82] Moore argued that because the state had never assumed the risk of its citizens smoking, tobacco companies were unable to use the "assumption of risk" defense.

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76. *See, e.g.*, Michael Dubow, *Restraining State Attorneys General, Curbing Government Lawsuit Abuse*, 437 POL'Y ANALYSIS 1, 6 (2002) (arguing that the policies implemented by the Master Settlement Agreement were more appropriately the products of legislative, rather than judicial proceedings); Robert B. Reich, *Don't Democrats Believe in Democracy?* WALL ST. J., Jan. 12, 2000, at A22 (calling regulation through litigation "faux legislation, which sacrifices democracy.").

77. The settlement also placed restrictions on certain advertising tacties, sueh as using cartoons in advertisements for tobacco, or sponsoring public events such as coneerts. *See* Nat'l Ass'n of Attorneys Gen., *Multistate Settlement with Tobacco Industry* at 12, http://www.library.ucsf.edu/tobacco/litigation/msa.pdf (last visited January 8, 2007).

78. *See* W. Kip Viscusi, *Tobacco: Regulation and Taxation Through Litigation, in* REGULATION THROUGH LITIGATION 23 (W. Kip Viscusi ed., 2002) (characterizing the tobacco settlement as an excise tax on tobacco products).

79. *See* Derthick, *supra* note 54.

80. *See* Derthick, *supra* note 54, at 220.

81. Thomas A. Schmeling, *Stag Hunting with the State AG: Anti-Tobacco Litigation and the Emergence of Cooperation Among State Attorneys General*, 25 LAW & POL'Y 429, 431 (2003).

82. Derthick, *supra* note 54, at 75 ("[T]he state would ask to be indemnified, as an innocent third party, for its medical expenditures on behalf of smokers.").

As Mississippi's case cleared its preliminary hurdles,[83] other states began to gain interest, leading to the filing of more suits.[84] Although certain states resisted, other state legislatures actively encouraged the suits. In Florida, for example, the state legislature amended the laws to virtually guarantee victory for the state by removing the tobacco companies' defenses.[85] Specifically, the Florida legislature removed all affirmative common law defenses normally available to a liable third party, such as the assumption of risk defense and comparative negligence.[86]

Four states, Mississippi, Massachusetts, Minnesota, and Florida, were the first to settle their cases.[87] However, as more states filed suits, there was a push to reach a general settlement.[88] Negotiators for the states and the tobacco companies reached such an agreement in 1997.[89] The 1997 settlement contained extensive liability protections for the tobacco industry, and thus required Congressional action.[90] However, the settlement died in Congress.[91] Congressional defeat was assured by the fact that a number of interests not represented in the initial state-industry negotiations were now admitted to the congressional bargaining process.[92] These interests included trial lawyers unhappy about the curtailing of future liability, activists who felt that the settlement did not go far enough, and tobacco farmers who stood to lose financially from reduced consumption of tobacco.[93] The result was legislative deadlock. In effect, the ball was back in the SAGs' court.

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83. Those hurdles included a petition from the Governor to the state supreme court claiming that the attorney general lacked the authority to litigate on behalf of the state without an agency client, a claim which was later successful in West Virginia. *See* Derthick, *supra* note 54, at 79.

84. Schmeling, *supra* note 81, at 431, 433 (noting that West Virginia and Minnesota filed suits similar to Mississippi's suit later in 1994, and that 42 states filed within 4 years of the initial suit).

85. Derthick, *supra* note 54, at 79.

86. *Id.*

87. 1994 Fla. Sess. Law Serv. Ch. 94-251, § 4 (C.S.S.B. 2110) (West) (amending § 409.910(1) Fla. Stat. to read "Principles of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third party resources").

88. *Id.*

89. Derthick, *supra* note 54, at 83.

90. *Id.* at 84.

91. David S. Samford, *Cutting Deals in Smoke-Free Rooms: A Case Study in Public Choice Theory*, 87 KY. L.J. 845, 846 (1999). On June 17, 1998, the Senate voted on a cloture motion, seeking to end debate on Senate Bill 1415, the Universal Tobacco Settlement Act. The vote failed by a vote 57-42 in favor (60 votes are needed to pass a cloture motion), and thus the initial settlement failed to win congressional approval. *Id.*

92. *Id.* at 865-77 (describing the interest groups that participated in the Congressional negotiations over the 1997 settlement, and noting that that interests such as those of tobacco growers were initially excluded only to be added in to the final version of the bill), Derthick, *supra* note 54, at 143.

93. *Id.*

The state legislatures then began to pressure their SAGs to complete a deal that would be a huge boon for state treasuries.[94] On the other side, tobacco companies were hungry for the certainty that would come with a settlement extinguishing their liability to the states.[95] The result was the Master Settlement Agreement (MSA) reached in 1998, which required a combination of consent decrees from the various courts in which litigation was pending, as well as action by the state legislatures.[96] Eager for the financial windfall, the legislatures enacted the relevant pieces of the agreement, which, by pegging payments from tobaceo companies to market share, gave the states an indirect interest in protecting the financial solvency of the tobacco companies.[97]

B. Key Factors Driving SAGs to File Suit

There are two studies that attempt to use time series data to analyze the factors that caused SAGs to file suit against the tobaeco companies. The earlier study, conducted by Spill, Licari, and Ray, emphasizes state-based constraints (discussed in Part II *supra*).[98] The authors found that Democratic SAGs are more likely to file suit than Republican SAGs, although the probability of a Republican filing suit approaches that of a Democrat asymptotically over time.[99] Furthermore, their findings suggest that the political affiliation of the governor is not significant.[100] While they had postulated that Republican governors might act as a constraint on Democratic SAGs, either through direct pressure or through control of the budgetary process, they find that SAGs tend to operate independently of the party affiliation of the governor.[101] Additionally, the authors found that SAGs were responsive to the expected value of the payout, measured by the likelihood of success at any given point in time (the public goods aspect of the tobacco litigation) and the amount of money the state stood to gain from Medicaid reimbursements.[102] Moreover, tobacco production in the state seemed to act as a drag on states' desire to file.[103]

Thomas Schmeling's more recent study focuses specifically on the public good aspect of the tobacco litigation, inquiring into the ways in which the

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94. Derthick, *supra* note 54, at 172.

95. *Id.* at 170 (noting that the tobacco industry had always wanted a comprehensive settlement).

96. *Id.* at 182.

97. *Id.* at 197.

98. *See* Rorie L. Spill, Michael J. Licari, & Leonard Ray, *Taking on Tobacco: Policy Entrepreneurship and the Tobacco Litigation.* 54 POL. RES. Q. 605 (2001).

99. *See id.* at 615, 618.

100. *See id.* at 615-16.

101. *Id.* at 616.

102. *Id.*

103. *Id.* at 617.

decision-making processes of the different SAGs' were interdependent.[104] He begins from the proposition that the SAGs never hoped to recover in a series of jury verdicts, but rather hoped to bring the industry to the bargaining table through the collective application of pressure.[105] Arguing that the free-rider problem endemic to public goods should have prevented SAGs from filing a potentially risky suit in support of the efforts of other SAGs,[106] Schmeling rejects the idea that selective benefits in the form of personal political benefits helped solve the collective action problem.[107] Instead, Schmeling argues that the selective benefit the SAGs received was the increased probability of forcing a settlement.[108] In other words, as the number of states filing suit against the tobacco companies increased, the odds that the tobacco companies would seek a broad settlement became higher. While free riding would be a problem when only a few states had filed, and thus the probability of a settlement was low, and at the end when the probability of settlement was very high,[109] individual states have the opportunity to have a meaningful impact on the production of a public good from which they all benefit in the middle part of the litigation process.[110] Thus, once a certain number of states have filed suit, the collective action problem is solved because it is individually rational for new states to file suit.

The question then becomes why the initial states filed suit. The answer, Schmeling suggests, is the heterogeneity with respect to the value and cost of contribution among the states.[111] In other words, the cost of producing an increase in the probability of a settlement varies from state to state, as does the expected return from investing the resources necessary to file suit. Those states with low costs to filing suit (in terms of state-based institutional or political constraints) and high expected returns can make the initial investment, which increases the likelihood of an overall settlement. This increase in the likelihood of an overall settlement increases the expected return from filing suit for those SAGs for whom the cost of filing is higher.[112]

Schmeling's study reintroduces the political, legal, and institutional

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104. Schmeling, *supra* note 81, at 429.

105. *Id.* at 432.

106. For an analysis of public goods, *see generally* MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION (1971).

107. Schmeling, *supra* note 81, at 436. ("It is not at all clear that any political benefits flowed from the suits . . .").

108. *Id.* at 439.

109. To limit their future liability, the tobacco companies insisted that all states be party to the settlement, thus negating the need for those states that had not yet filed to do so. *See* Schmeling, *supra* note 81, at 435.

110. Schmeling, *supra* note 81, at 439.

111. *Id.* at 440

112. *Id.* (discussing how an increase in the probability of creating a public good, in this case a settlement, increases the likelihood of contributing to the creation of the public good, i.e., filing suit).

determinants that are otherwise lacking in his account of the tobacco litigation. While his statistical findings privilege the notion of interdependence—that the production function of the public good depends on the action of multiple SAGs—Schmeling does find, similar to Spill, Licari, and Ray, that the party of the SAG and the expected value of participation in terms of Medicaid expenditures and economic harm to an indigenous tobacco industry have an effect on the decision to file as well.[113] Thus, while Schemling's theory is driven by the external effects that the SAGs havc on each other, his results leave room for state-based factors to explain the observed variation in SAG behavior.

This heterogeneity thesis demands closer examination, because it is only half correct. As Professor Martha Derthick notes, SAG cooperation was made possible by the nationalization of interest groups and the increased homogenization of policy preferences and politics across state and regional boundaries.[114] In other words, median voters or interest group politics were sufficiently similar across state and regional boundaries that tobacco regulation was widely perceived as a public good worth pursuing. This suggests an interesting conclusion. While heterogeneity of cost structures (i.e., variation in state institutional constraints) may be necessary for the initial investment to occur, a certain homogeneity of political preferences may be necessary to induce cooperation. If the variation in political conditions is too large, the value of creating a public good will not be sufficiently great to induce enough SAGs to participate in the litigation, regardless of the certainty that the public good will be produced. Under these conditions, cooperation will falter.

Thus, the example of tobacco suggests that in creating the conditions for cooperation, there is an optimal amount of variation in state institutional and political constraints. Too much political variation will render cooperation impossible, but too little institutional variation may prevent initiation of policy innovation by those with the lowest costs to initial investment. Furthermore, although a certain degree of homogeneity of political constraints will always be relevant as a condition for cooperation, heterogeneity of institutional constraints may not be necessary if everyone's costs to production are sufficiently low.

More generally, the tobacco litigation illustrates the conditions under which SAGs can use litigation as an effective regulatory tool against private industry. In order to press a national industry into a settlement with the states, multiple states will have to coordinate their litigation positions, thus raising the potential liability of the industry in question. Variation in state institutions can be important in jump-starting cooperation because not all states will be similarly situated with respect to their interest in or ability to pursue a

113. *Id.* at 442-43.
114. Derthick, *supra* note 54, at 106.

regulatory lawsuit. However, once a cooperative effort has begun, there must be a sufficiently high degree of political support across states for the regulatory litigation's stated objectives to induce more SAGs to join the effort. Furthermore, as Part IV explains in greater detail, the effects produced by regulatory litigation can induce both greater cooperation among SAGs as well as greater regulation from federal agencies.

IV
THE FEDERAL SYSTEM AND THE INCENTIVES FOR COOPERATION

In this Part, I explicate in greater detail the incentives for SAGs to cooperate with each other at the federal level, and the institutions that they have created to assist in this cooperation. I also consider how states decide whether to pursue a single case or multiple cases in multiple courts, as well as the competitive relationship that can exist between SAGs and federal regulatory agencies.

A. Constraints and Incentives to Join in Multi-State Litigation

While state constitutional constraints on SAG litigation are fairly limited, SAGs can impose constraints on, and create incentives for, each other when they engage in regulatory or political litigation with interstate ramifications. Litigation by a single SAG or a group of SAGs can create externalized costs and benefits, which in turn give SAGs a strong incentive to coordinate their activities in areas of overlapping concern. From the perspective of SAGs, these costs come in two forms. First, regulatory spillover, when policies in one state have effects in one or more other states, can create public costs and benefits.[115] Second, the SAGs' level of control over these forces and their impact on the SAGs' home state can have personal political consequences in terms of the SAG's potential to hold onto his or her office, or obtain higher office. Combined with the relative freedom provided by state institutions discussed in Part II, the model here explains the factors driving cooperation among SAGs and how federalism can produce a regulatory regime through a system of decentralized competition between SAGs and the federal government.

Regulatory spillovers create a strong incentive for SAGs to coordinate their efforts. These spillovers, or externalities, have two basic sources: the collateral effects of legal rulings and the political "bandwagon effect." With respect to the first, legal rulings that resolve the permissibility (on either constitutional or statutory grounds) of any state or federal law, regulation, or interpretation of either a law or regulation, can resolve that issue in every state. For example, in *S.D. Warren Co. v. Maine Board of Environmental*

115. In the language of economics, these costs are negative and positive externalities. *See* COOTER, *supra* note 57, at 106.

Protection,[116] Thirty-three states submitted an amicus brief arguing that the ability of states to regulate the construction and operation of hydroelectric plants was not preempted by federal legislation.[117] Although the specific facts of the case involve Maine, the legal issue affects many, if not all, states. In such cases, the incentive for SAGs to coordinate and cooperate is obvious. Because the effects of a court decision may be national, there is greater reason for SAGs to be involved in order to influence the outcome. This helps explain the participation of SAGs as amici curiae, as well as the fact that, after the Solicitor General's office, the SAGs collectively are the entity that appears most frequently before the Supreme Court.[118]

With respect to the bandwagon effect, the incentives are a bit more complicated. The bandwagon effect is when multiple SAGs join a particular litigation effort. When these lawsuits are between the states and private industries, these lawsuits are the classic examples of regulation through litigation. States seek to use their advantage in court, particularly their own courts, to obtain a regulatory outcome in a particular industry. The tobacco cases of the 1990s are the clearest example of this type of effort,[119] although the ongoing environmental litigation is also significant.[120] As Connecticut Attorney General Blumenthal said of *Connecticut v. American Electric Power Co.*, "[W]e are seeking relief that includes no money damages . . . We're trying to change the way the [electric power plant] industry does business."[121]

The decision as to whether or not to join a regulatory effort that other SAGs have begun will likely be subject to a cost-benefit calculation. It is in making these decisions that the variation in state institutions discussed above will have the most impact. The greater the constraints placed on the attorney general from within the state, the less free he is to respond to pressures from outside the state. In other words, the range of the SAGs' discretion, determined in part by the variation in state institutional constraints, determines the freedom that a SAG has to join a multi-state suit. For example, during the tobacco litigation, eight states refrained from filing suit against the tobacco companies.[122] Many of these states were major tobacco producers and thus expected to be hurt by the success of suits against tobacco companies.[123] In the case of North Carolina, the Legislature forbade the attorney general by statute

116. 126 S. Ct. 1843 (2006).

117. *Id.* at 1853 ("Changes in the river . . . fall within a state's legitimate legislative business and the Clean Water Act provides for a system that respects the states' concerns.").

118. Clayton, *supra* note 30, at 533.

119. *See* Derthick, *supra* note 54, *see also* Robert Kagan and William Nelson, *The Politics of Tobacco Regulation in the United States*, *in* REGULATING TOBACCO (2001).

120. *See The Role of Attorneys General*, *supra* note 8.

121. *Id.* at 340.

122. The eight states were Alabama, Delaware, Kentucky, North Carolina, North Dakota, Tennessee, Wyoming, and Virginia. *See* Schmeling, *supra* note 81, at 435.

123. Deathrick, *supra* note 54, at 163.

from filing.[124] Similarly, Maine Attorney General Stephen Rowe stated that the reason that his office did not join Connecticut's suit against Midwest power plants was "basically logistical. We saw it as being resource intensive."[125] Because his office lacked the resources to pursue a novel environmental claim in conjunction with its priorities, it could not join a suit in which it might otherwise have participated.

There comes a point, however, at which withholding participation in order to prevent state-based costs ceases to be a strong strategy. When it became clear that the SAGs' efforts to regulate tobacco were going to result in a de facto tax on tobacco products, even states such as North Carolina joined in the settlement (although it did so without ever filing suit).[126] Once the actions of other states ensured that the harm to the tobacco industry was certain to occur, and only the magnitude and distribution of monetary payments remained to be determined, there was little point in the state refusing to pursue a settlement with the tobacco companies.[127]

The role of the judiciary in these cases is particularly important. In effect, the courts create a forum in which SAGs can pursue regulation through litigation. By bringing suit in multiple courts and multiple court systems, the SAGs can raise the expected cost of defending against this litigation to potentially astronomical heights.[128] When this type of parallel coordinated litigation occurs, the SAGs need not prevail on every front. They merely need to prevail in enough courts to threaten their target with future liability in other courts in which they are not currently facing suit, or in which they have previously prevailed on related claims.[129]

Of course, multiple lawsuits increase the coordination problems. An alternative strategy is to file a single suit with multiple plaintiffs in federal district or state trial court. With access to fifty different state systems and twelve federal circuits, SAGs are collectively able to forum-shop for the venue that is most appropriate for their case. Connecticut and its partner states have adopted this alternative strategy in their ongoing environmental litigation.[130] As Connecticut Attorney General Richard Blumenthal said, "We're also lucky

124. *Id.* at 172.

125. *The Role of Attorneys General*, *supra* note 8, at 342-43.

126. Derthick, *supra* note 54, at 172 ("North Carolina . . . had the choice of either participating and having its consumers of cigarettes pay higher prices while the state received a share of the new revenue, or not participating, in which case its consumers would still pay the higher prices but the state government would receive nothing.").

127. Schmeling, *supra* note 81, at 435.

128. *Id.* at 433 ("[T]he prospect of fifty state governments filing suit at once would alter the calculations of risk to the companies. In 1996 alone, the [tobacco] industry was estimated to have spent $600 million on legal fees, without having taken one case to trial.").

129. Derthick, *supra* note 54, at 170 (noting that the tobacco companies actually prevailed in a number of the suits brought by states).

130. *The Role of Attorneys General*, *supra* note 8, at 346.

because we're in one court . . . [f]or tobacco, we were in 50 different states, 50 different courts, so we had to make sure that one state wasn't saying something that would hurt another state . . . here the coordination problem is better."[131]

The decision to pursue multiple litigations versus a single litigation will be based on factors related not only to coordination costs, but also to the expected return from investing resources in a case.[132] For example, the innovation that made the tobacco litigation possible was primarily legal. The states were able to avoid the tobacco companies' "assumption of risk" and contributory negligence defenses by asserting their own rights as health care providers. Because they were seeking monetary damages, the states were able to increase the expected cost of the lawsuits through filing in multiple courts.[133] Furthermore, states were able to benefit from the scientific research the tobacco companies themselves had done.[134] In contrast, where, as in *Connecticut vs. American Electric Power Co.*, damages are not being sought, there is not the financial incentive to litigate in multiple courts. The savings from pooled resources outweighs the benefits from being in multiple courts.

Faced with this need to coordinate their activities, it should come as no surprise that SAGs have their own national organization, the National Association of Attorneys General (NAAG). NAAG was originally founded in 1907, but in the last twenty-five years it has become an increasingly significant player in the national regulatory scene.[135] Although it provides a variety of functions to its members, including moot court preparation for Supreme Court appearances and a lobbying presence in Washington, the most important function that NAAG performs is coordinating litigation positions between states.[136] Through a series of policy-specific projects, NAAG encourages the centralization of litigation projects in areas of overlapping interest to SAGs.[137] Furthermore, NAAG provides a central body to encourage other SAGs to join a lawsuit.[138] For example, in 1992, NAAG was successful in persuading forty-nine states and the District of Columbia to file *amicus* briefs in support of Wisconsin's hate crime legislation, which was facing a First Amendment challenge.[139]

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131. *Id.*

132. *Id.* (discussing the tradeoff between the increase in resources from having additional states join a suit and the greater difficulty in reaching decisions with more parties).

133. *See supra* Part III.

134. Katherine Culliton, *The Impact of Alcohol and Tobacco Advertising on the Latino Community as a Civil Rights Issue*, 16 BERKELEY LA RAZA L.J. 71, 104 (2005).

135. Clayton, *supra* note 30, at 540.

136. *See generally* Clayton, *supra* note 30.

137. *Id.*

138. *Id.* at 542-43.

139. *Id.* at 543.

B. SAGs and the Federal "Regulation Gap"

A number of scholars have suggested that federal regulatory retrenchment, or, in other words, the reduction of federal regulation and oversight of private industry, is the cause of the increased activity of the SAGs over the last twenty-five years.[140] This argument suggests that SAG discretion to regulate depends on federal regulatory preferences and constraints on federal action. To translate this argument into the framework employed in this Comment, state discretion to regulate an activity or industry can be thought of using the same spatial model that was used to explain SAG discretion with respect to state actors.[141] The more difficult it is for Congress and federal agencies to regulate an activity or to preempt state regulation of that activity, or the less they are inclined to do so, the more discretion the states will enjoy. In other words, SAG activism may be caused not only by a federal preference for reduced federal regulation, but by judicially-imposed limits on federal power that create a regulatory gap, as well as intra-state dynamics such as states' increasing need to regulate industries on the cheap, and the inchoate public demand for regulation of certain industries on which SAGs are able to capitalize.

Thus, federal regulatory strategies (chosen in light of political preferences and legal constraints) and political entrepreneurialism do explain why states have targeted particular industries, namely those in which there was a public demand for regulation left unfulfilled by federal regulators. For example, former New York Attorney General (now Governor) Eliot Spitzer's aggressive campaign against Wall Street firms was made possible in large part by the lax regulatory stance taken by the SEC during Harvey Pitt's tenure as Chairman.[142] Likewise, the tobacco litigation followed a failed attempt by the FDA to introduce more stringent regulations,[143] and the current environmental suits were prompted in part by the regulatory space created by the EPA's interpretation of the Clean Air Act as not covering CO_2.[144]

The SAGs' ability to use litigation to regulate industries can also spur federal action. To illustrate, following both the SAGs' success against the tobacco companies in the 1990s and Eliot Spitzer's success against Wall Street in the wake of the Enron scandal, federal agencies responded by upping their enforcement efforts. The Justice Department sued the tobacco companies on behalf of the federal government,[145] and the SEC increased its policing of corporate malfeasance.[146] Thus, SAGs can create regulation through mutual

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140. *See Id.* at 531; *see also* Spill, et. al, *supra* note 98.

141. *See* Part II, *supra.*

142. *See* James Traub, *The Attorney General Goes to War*, NEW YORK TIMES, June 16, 2002, at S6.

143. *See* Derthiek, *supra* note 54, at 54.

144. *The Role of Attorneys General, supra* note 8, at 339.

145. *See* Derthick, *supra* note 54, at 194.

146. Traub, *supra* note 133.

cooperation, but they can also promote regulation through competition with federal regulators.

In sum, state attorneys general face not only state-based institutional constraints, but a number of constraints from the structure of the federal system. The nature of the legal and political environment in the United States means that the actions of an individual SAG will frequently have ramifications for other states, and thus for other SAGs. In an attempt to manage these externalities, SAGs increasingly cooperate and coordinate their actions, as evidenced by the rise of the NAAG as a centralizing force. This coordination has allowed the SAGs to pursue a more aggressive regulatory agenda, but has also introduced costs associated with coordinating so many disparate actors and interests. Finally, the SAGs operate in a policy space that is also occupied by the federal government and its various agencies. Regulatory space left by the federal government will often determine where the SAGs' regulatory opportunities lie, and SAG regulation in those areas may in turn prompt greater federal regulation in the same areas. Thus, the SAGs are not only complementary to, but competitive with, federal regulators.

V
FEDERALISM AND ACCOUNTABILITY: CONSTITUTIONAL VALUES IN TENSION

As the tobacco case illustrates, the fact that Congress or federal agencies do not, for either political or legal reasons, enact a strong regulatory program does not necessarily mean that a nationwide regulatory regime will not emerge. This Comment has argued that the unique institutional structures within which SAGs operate, both at the state and federal levels, under certain circumstances foster cooperation between the states that can result in nationwide regulation even in the absence of federal action. This phenomenon coincides with, and may to some extent be caused by, the revival of judicially enforced limits on federal power, which are predicated in part on the idea that federal regulation can in some situations be insufficiently accountable to the people.

What this Comment suggests, and the tobacco litigation example illustrates, is that the justifications for judicially-enforced limits on federal power should reflect a more nuanced understanding of the ways in which the states and the federal government interact with each other. In *New York v. United States*,[147] which gives us the strongest statement of the Supreme Court's accountability argument, the Court invalidated, on the grounds that it usurped the proper role of the states, provisions of a state-negotiated and Congressionally-enacted pact requiring states under certain circumstances to take title to low-level radioactive waste.[148] The act at issue in *New York*, based

147. 505 U.S. 144, 168 (1992).
148. *Id.*

largely on a proposal submitted by the National Governors' Association,[149] bears a startling resemblance to the initial 1997 tobacco settlement, which Congress declined to enact, in that both were failed attempts by state governments to use federal law to enhance their ability to cooperate.

The question posed at the beginning of this paper was whether state cooperation that did not require Congressional action, such as in the tobacco litigation, undermines the justification for negating compacts like the nuclear waste compact in *New York*. If states find other ways to pass regional or nationwide regulations that do not require Congressional involvement, does blocking such agreements create greater political accountability to voters, as the Supreme Court has suggested? Indeed, some commentators have suggested that regulation by litigation is bad precisely because it undermines democratic accountability.[150] With fewer interests involved in the bargaining process, the public's desires may be frustrated.

SAG cooperation presents at least one accountability problem that does not appear with Congressional regulation: the negative externalities that states impose on each other. If states such as North Carolina do not wish to burden the tobacco companies with extra financial obligations and legal liability, they must not only prevail in Congress, but they must prevent cooperation among the SAGs as well. In regulatory litigation, however, holdouts have little power. A group of states targeting an industry does not need the permission of other states whom the lawsuit impacts. Because an industry will often find it cheaper to change its national operations rather than its operations in only a group of states, lawsuits seeking to change the way in which businesses operate can have national effects without national input.[151] Furthermore, unlike in a legislative environment where bargaining can give holdouts or minoritics some influence over policies they oppose, the power of a single state to bargain directly with institutions in other states is limited. There is therefore no built-in check to preserve the integrity of decisions by voters of a single state to dissent from the norm.

Judicially-enforced limits on federal power, whatever their rationale, can make nationwide regulatory schemes more difficult to enact. However, if a demand for regulation exists among the public, there is an incentive for politicians to provide regulation. If the transaction costs of providing the regulation at the federal level are too high, either because there are too many competing interests with which to bargain, a single interest is powerful enough to block the regulation, or because of judicial review of regulation, then other political actors have an incentive to provide that regulation. As the tobacco case study illustrates, SAG cooperation can produce regulation with much lower

149. *Id.* at 151.
150. Derthick, *supra* note 54, at 220.
151. *See* Lynch, *supra* note 6, at 2009.

transaction costs than legislatures. Because at most fifty people, and in practice many fewer,[152] need to agree to pursue a regulatory agenda, and because those fifty people are responsible to largely separate institutional structures, cooperation can emerge if an issue is conducive to regulation through litigation.

The externalities that SAGs can impose on other states mean that the overall accountability of the regulatory scheme is reduced. In order for accountability to be a coherent justification for federalism, it must increase the ability of individual voters to influence public policies that have a direct impact on them. To the extent that cooperative SAG litigation can enact regulatory schemes that affect other states involuntarily, and to the extent that such actions occur in response to a lack of federal regulation, judicially-enforced limits on federal regulation can actually undermine their stated justification of supporting federalism. Although state *governments* as a whole may benefit from the protection, individual voters may be left vulnerable to externalities that are not taken into account in the joint political market. In effect, judicially-imposed federalism will in some circumstances substitute a judicial market for regulation for a legislative market. In other words, if lawsuits can be used to regulate the operation of industries, either through multi-million dollar damage awards payable to state treasuries or through an injunction or consent decree requiring the abatement of certain business practices, regulation will increasingly emerge from the courtroom rather than from Congress. This outcome harms accountability because the judiciary is, by design, less responsive to concerns not represented by parties immediately before it.

To return to the tobacco example, the Master Settlement Agreement (MSA) essentially levied a tax on tobacco products across the nation. States like North Carolina could not avoid the tax, and so logic dictated that they at least participate in the profits from the tax. This result calls into question whether leaving the states to regulate themselves actually protects the choices of individual states, or whether it simply protects the states from federal regulation. North Carolinians basically had the issue decided for them by SAGs from other states, institutions over which they had no influence. In Congress, at least, North Carolina's representatives might have been able to exercise some degree of influence.

While at first blush these regulatory spillovers seem as if they could implicate the Supreme Court's Dormant Commerce Clause doctrine, which places limits on states' ability to regulate interstate commerce, in fact the Dormant Commerce Clause is of little use in checking interstate regulation effected through regulatory litigation. The Dormant Commerce Clause can only properly be applied to state laws.[153] Regulatory litigation by SAGs predicated

152. *Id.* (noting that only a few states may be necessary to affect national change).
153. *See* Lynch, *supra* note 6, at 2023-24.

on constitutional state laws cannot be challenged, only the law themselves.[154] Thus, if the regulatory objectives of potentially unconstitutional (on Dormant Commerce Clause grounds) legislation can be achieved through regulatory litigation, the regulation can be insulated from federal judicial review. This ability to accomplish state regulatory objectives without federal policing of state regulation of interstate commerce gives states an incentive to shift regulation from the legislature to the SAG, a move that further reduces accountability, albeit at the state level.

Regulatory litigation by SAGs also reduces accountability to the public over time. As Professor Robert Kagan has noted, regulation accomplished through litigation is considerably less flexible than other types of regulation.[155] Regulatory regimes passed by statute or administrative regulation can be overturned through a new statute or regulation. The fact that legislation can always be undone by the same body that initially enacted it distinguishes it from regulatory litigation. In the case of SAG litigation, settlements backed by the force of consent decrees create judicially enforceable rights, thus giving every player a veto over the revision of the settlements.[156] This creates a familiar holdout problem, in which bargaining to a Pareto-improving solution (i.e., a solution in which no party is worse off and at least one party is better off than under the status quo) can be blocked by the requirement of unanimity.

The result is that regulation accomplished through litigation cannot be easily amended or undone when it no longer fits the public's policy interests. This problem is the reverse of the transaction costs argument that explains how regulatory litigation occurs. While the transaction costs of accomplishing the litigation initially are lower than the transaction costs of accomplishing the same purpose in a legislative format, the costs of undoing the resulting regulation are extremely high. Higher transaction costs of overturning regulation necessarily reduce accountability by reducing the responsiveness of regulatory schemes to political will.

Additionally, compliance with regulatory schemes stemming from litigation may be considerably more difficult to obtain than compliance with other types of regulatory schemes. Parties left outside of the bargaining process are unlikely to abide by the settlement terms, and litigators will often be unable to get the involvement of all of the relevant parties even if they want to. In the instance of tobacco, for example, following the MSA a number of small tobacco producers began producing cigarettes that cut into the market share of the big tobacco companies.[157] Although state laws enacted pursuant to the MSA purported to constrain tobacco producers who were not party to the MSA,

154. *Id.*
155. ROBERT KAGAN, ADVERSARIAL LEGALISM 182 (2001).
156. With respect to parts of a settlement that require legislation, this will not be true.
157. *See* Derthick, *supra* note 55, at 186.

in reality enforcement is extremely costly.

It may be objected that SAGs will only cooperate in instances in which they are converging on best practices. Regulation that emerges through this cooperative process will enjoy a presumption of superiority because it has been adopted by a number of different entities. Those regulatory policies that are not superior will not be adopted by other states, and state-based innovation will lead to an improvement over centrally imposed solutions. Indeed, the argument that states act as laboratories for experimenting with, and perfecting policies, has often been advanced as a justification for federalism.[158]

The incentive-structures that influence policymaking by SAGs undercut the "states as laboratories" argument. Under this argument, state-level innovation and cooperation aimed at diffusing such innovation should lead to the adoption of optimal policies. States should mimic those policies of other states that are particularly effective or efficient. However, SAGs are not necessarily responding to general efficiency concerns. Instead, as argued in the body of this Comment, SAG action is incentivized and constrained by institutions that are responding to political pressures, and SAGs are not immune to personal political considerations. There is also an element of path dependence to regulation by litigation. As Schmeling's production function demonstrates, the benefits of joining in a regulatory lawsuit increase as more states join the effort. Thus, the regulatory scheme that is first imposed may not necessarily have been the best, but other SAGs can be induced to join by the high likelihood of success of the initial regulatory scheme. Finally, the fact that regulation by litigation is more difficult to overturn means that once it has been accomplished, new alternatives and solutions are far more likely to be blocked. The result is that political accountability suffers.

In sum, cooperative outcomes may actually undermine accountability insofar as unanimity is not required and bargaining across issues is more difficult than in a legislative context. Furthermore, the nature of regulatory litigation prevents accountability because it is less responsive to the shifting preferences of the electorate. Lastly, the fact that SAGs respond to individual incentives and constraints rather than efficiency concerns means that the regulatory policies they develop are not necessarily going to be superior to the status quo. Thus, the institutional and political constraints operating on individual state officers may cause the adoption of policies that cannot easily be amended if a broader set of interests subsequently wants to overturn the results of regulation through litigation.

158. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); Gonzales v. Raich, 545 U.S. 1, 43 (2005) (O'Connor, J., dissenting).

CONCLUSION

A central tenet of American democracy has always been the accountability of elected officials to voters. The Founding Fathers designed a dual system of separated powers to check political leaders' ability to exercise power that was not responsive to a plurality of interests. Power was divided between the three branches of the federal government, and between the federal government and the state governments. Over time, however, power increasingly has become concentrated in the federal government. As a response, the Supreme Court has attempted to resurrect judicially enforceable limits on federal regulation and the preemption of state power. The result has been increased transaction costs to certain types of federal regulation in the name of promoting democratic accountability.

However, greater accountability has not necessarily been achieved. Higher transaction costs to regulation at the federal level give greater discretion to state actors to produce their own regulation. State institutions with considerably lower transaction costs to regulation have been able to fill the regulatory void left by the federal government. Specifically, a number of institutional factors have combined to make collaboration in regulation through litigation possible among state attorneys general. This cooperation has led to de facto regulation of a number of industries on a nationwide scale, but the subsequent responsiveness of that regulation to political pressure is reduced by the unique institutions that have shaped it. Furthermore, both the process and the end result of these regulatory efforts call into question whether the accountability rationale is sustainable as a justification for judicially-enforced limits on federalism. State governments, by constitutional design, are considerably more fragmented than the federal government. The result is that individual actors such as the SAGs can have a huge effect in not only their own state, but the entire nation, while remaining "accountable" to only a small portion of the electorate. Such relatively unaccountable regulation is presumably not what the Supreme Court had in mind when it began policing the powers of the federal government.