

COMMENTS

KEEPING THEM HONEST: HOW STATE ATTORNEYS GENERAL USE MULTISTATE LITIGATION TO EXERT MEANINGFUL OVERSIGHT OVER ADMINISTRATIVE AGENCIES IN THE TRUMP ERA

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INTRODUCTION

The United States is deeply divided politically.¹ This political division is

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1. See Clare Foran, *America’s Political Divide Intensified During Trump’s First Year as President*, ATLANTIC (Oct. 5, 2017), www.theatlantic.com/politics/archive/2017/10/trump-partisan-divide-republicans-democrats/541917/ (noting the increase in partisan divide during the

compounded by the persistent feeling that the country's democratic norms and institutions are slowly crumbling.² But, the reality is not as bleak as the media's portrayal makes it seem.³ The framers of the U.S. Constitution built a dynamic and flexible governmental system capable of adapting to the instabilities caused by radical political developments.⁴ The newest adaptation in this ever-changing system is the way State Attorneys General (State AGs) have emerged as powerful democratic checks on unlawful actions by unmonitored federal agencies.⁵

In 2017, State AGs shattered the record for state-conducted lawsuits against the federal government in a single year.⁶ State AGs also achieved significant results such as suspending the Trump Administration's controversial travel ban⁷ and enjoining the U.S. Department of Homeland Security (DHS) from rescinding the Obama-era Deferred Action for Childhood Arrivals (DACA) program.⁸ Given this impact, there are many concerns about State AG litigation, including separation of powers, federalism, and the broader critique of State AGs as a hyperpolarized political tool.⁹ This Comment argues that the increased activity of State AGs is an overall positive development in light of an Administration that seems intent upon using unlawful administrative action to achieve its goals.

first year of President Donald J. Trump's administration).

2. See Steven Levitsky & Daniel Ziblatt, *How Wobbly is Our Democracy?*, N.Y. TIMES (Jan. 27, 2018), www.nytimes.com/2018/01/27/opinion/sunday/democracy-polarization.html (discussing the subtle erosion of norms and institutions in U.S. democracy and how it endangers a democratic system).

3. *But see id.* (suggesting that "nothing intrinsic in American culture . . . immunizes us against [democracy's] breakdown").

4. See *infra* Section III.C.

5. See Alan Neuhauser, *State Attorneys General Lead the Charge Against President Donald Trump*, U.S. NEWS (Oct. 27, 2017, 12:01 AM), www.usnews.com/news/best-states/articles/2017-10-27/state-attorneys-general-lead-the-charge-against-president-donald-trump (explaining how State Attorneys General (State AGs) have emerged as the leaders of the Democratic Party opposing President Trump's policy agenda).

6. See Reid Wilson, *Democratic AGs Sue Trump at Record Pace*, THE HILL (Jan. 2, 2018), <https://thehill.com/homenews/state-watch/367147-democratic-ags-sue-trump-at-record-pace> (counting fifty lawsuits in total in 2017).

7. See *Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1140 (D. Haw. 2017) (stalling implementation of the travel ban).

8. See *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 438 (E.D.N.Y. 2018) (temporarily enjoining the U.S. Department of Homeland Security (DHS) from ending the Deferred Action for Childhood Arrivals (DACA) program).

9. See *infra* Section III.C.

Part I will trace how State AGs, the state executive's chief counsel, have evolved into independent political actors who use their resources, expertise, and acumen to achieve favorable policy objectives through multistate litigation. Part II will explain why State AGs are uniquely poised to bring legal action against the federal government and achieve meaningful legal outcomes. Part III will explain why this new trend—despite legitimate concerns that State AGs are becoming a partisan tool—is a net-positive development in an era where meaningful oversight of agencies is desperately lacking. Finally, Part IV will advocate for the creation of an independent regulatory body within the U.S. Department of Justice (DOJ) solely dedicated to the regulation of multistate litigation.

I. RISE OF THE STATE ATTORNEY GENERAL

The high-profile litigation between the states and the federal government is hard to ignore.¹⁰ There has been an increase in legal activism by State AGs who represent states that are historically Democratic strongholds.¹¹ However, in terms of modern U.S. history, this increasingly prominent—and highly partisan—dynamic between the states and the federal government is relatively new.¹² Historically, the Office of the State Attorney General was a slightly antiquated import from the pre-colonial English legal system.¹³ Presently, every state has an attorney general, the majority of whom

10. See Lisa Friedman & John Schwartz, *Borrowing G.O.P. Playbook, Democratic States Sue the Government and Rack Up Wins*, N.Y. TIMES (Mar. 21, 2018), www.nytimes.com/2018/03/21/climate/attorneys-general-trump-environment-lawsuits.html (reporting the high volume of publicized lawsuits against the Trump Administration, including actions related to environmental, immigration, and health care issues).

11. See, e.g., Neuhauser, *supra* note 5 (statement of Massachusetts Attorney General (AG) Maura Healy) (“Who’s going to be there to defend students or residents or consumers or the environment when this Administration is upending so many long-standing protections and turning the rule of law on its head? . . . The role of AG has never been more important.”).

12. See Mark L. Earley, “*Special Solitude*”: *The Growing Power of State Attorneys General*, 52 U. RICH. L. REV. 561, 564–65 (2018) (discussing how the creation of the Republican Attorneys General Association (RAGA) and the Democratic Attorneys General Association (DAGA) in the late 1990s resulted in a more partisan dynamic between State AGs and how multistate litigation against the federal government in the past few decades has fallen mostly along partisan lines).

13. See Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2002 n.12 (2001) (“In sixteenth-century England, the responsibility and concomitant powers of representing the sovereign as legal counsel were consolidated into a single office that became the chief representative of the crown in the courts.”).

are democratically elected.¹⁴ The powers of the attorney general are often defined by a state's constitution or statutory guidelines.¹⁵ Typically, these powers are very broad and solely defined in terms of advancing the public interest.¹⁶ Furthermore, state legislatures exert control over the capabilities of these offices by amending statutes and constitutional provisions that govern these powers—expanding and restricting them at will.¹⁷

Cooperative multistate litigation is not an exclusive development of the Trump Administration.¹⁸ In the 1980s, State AGs began engaging in aggressive multistate litigation against large corporate entities, taking advantage of the vast number of tools and the broad mandates granted to them by their respective states.¹⁹ The most prominent example of this activity is the tobacco Master Settlement Agreement (MSA) of the 1990s.²⁰ In 1994, State AG Michael Moore of Mississippi unilaterally sued the four largest tobacco companies in the United States and successfully settled for 3.6 billion dollars.²¹ Three other states then used the suit as a model and

14. Forty-three of fifty State AGs are popularly elected independent executive officers. *Id.* at 2002. In five states (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming), the governor appoints the State AG. *Id.* In Maine, the State AG is selected via secret ballot by the legislature; in Tennessee, the state supreme court selects the State AG. *Id.*

15. See Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 FLA. J.L. & PUB. POL'Y 1, 3 (1993) (stating that the structure of the office and the duties of State AGs vary from state to state based on state constitutions, statutes, and court decisions).

16. See Lynch, *supra* note 13, at 2003 (asserting that the State AG has “wide discretion” in making decisions to forward public interest).

17. See, e.g., Erin Cox, *Maryland Attorney General Frosh Awarded Expanded Power to Sue Trump Administration*, BALT. SUN (Feb. 15, 2017, 9:53 PM), www.baltimoresun.com/news/maryland/politics/bs-md-frosh-trump-powers-20170215-story.html (detailing how the Maryland state legislature granted Maryland AG Brian Frosh independent authority to sue the Trump Administration without having to seek approval from the Republican governor).

18. See generally Lynch, *supra* note 13 (noting that multistate litigation began as early as the 1980s, when AGs started to coordinate their prosecutions and share litigation resources which later became known as multistate litigation).

19. See Dru Stevenson, *Special Solicitude for State Standing: Massachusetts v. EPA*, 112 PENN ST. L. REV. 1, 39 (2007) (providing background surrounding the development and history of multistate litigation).

20. See *The ABCs of The Tobacco Master Settlement Agreement*, NAT'L ASS'N OF ATT'YS GEN., http://www.naag.org/publications/naagazette/volume_1_number_2/the_abcs_of_the_tobacco_master_settlement_agreement.php (explaining the structure of the 1990s tobacco Master Settlement Agreement (MSA) and its current applicability).

21. Gregory W. Traylor, *Big Tobacco, Medicaid-Covered Smokers, and the Substance of the Master Settlement Agreement*, 63 VAND. L. REV. 1081, 1098 (2010).

also settled with the tobacco companies for similarly large sums.²² Eventually, these companies settled with forty-six other states, and they executed the MSA for 206 billion dollars.²³ The MSA was a landmark outcome because large corporate entities, such as tobacco companies, have previously been untouchable despite the clear harm their products inflicted on public health.²⁴ Furthermore, it was an important symbolic victory²⁵ that ushered in the belief that the State AG was “the People’s Lawyer,” an archetype that State AGs emulate today.²⁶

Multistate litigation is an important and effective tactic that affects the implementation of national policy. First, it promotes the sharing of resources and expertise amongst state offices.²⁷ State AGs initially pioneered multistate litigation as a strategy to counter the vast resources available to large multinational corporations that were usually the target of individual state litigation.²⁸ Consequently, it helps remedy the financial disparities between large and small states whose budgets and salaries often vary based on size.²⁹ Second, multistate litigation creates a perception of legitimacy that is important in pursuing successful litigation against the federal government.³⁰

22. *See id.* (discussing the settlements the tobacco industry reached with Florida, Texas, and Minnesota).

23. *Id.* at 1098–99.

24. *See Lynch, supra* note 13, at 2006 (detailing the power that State AGs had when they worked together and drew national attention to their cases).

25. *See id.* (stating that the tobacco industry had never lost a lawsuit before the State AGs sued them).

26. *See, e.g., Maura Healey Attorney General*, MAURA HEALEY, <http://www.maurahealey.com> (last visited Oct. 21, 2018) (declaring “Moving the Ball Forward as the People’s Lawyer” on the front page).

27. *See Lynch, supra* note 13, at 2004–08 (explaining how this strategy increased the efficacy of antitrust and consumer protection litigation, as well as the Master Tobacco Settlement).

28. *See id.* at 2005–06 (statement of former Iowa AG Tom Miller) (“What we’ve found is that by coming together, the dynamics of the cases change. . . . When a corporation discovered it had to face 30 states, instead of one, it suddenly became much more serious about dealing with the issue.”).

29. *See Stevenson, supra* note 19, at 47 (explaining how multistate coalitions are necessary for smaller states); *see also Attorney General Office Comparison*, BALLOTPEDIA, https://ballotpedia.org/Attorney_General_office_comparison (last visited Oct. 2, 2018) (providing data on the disparity between the budgets of the largest offices and smallest offices). For example, large states like California and Texas have State AG budgets consisting of hundreds of millions of dollars, whereas the State AG budgets of smaller states like Nebraska and West Virginia are only few million dollars. *Id.*

30. *See Stevenson, supra* note 19, at 47 (pointing to the “increased credibility that comes

When a large coalition of states band together to sue the federal government, it appears much more powerful and legitimate than if only one state brought the suit.³¹ Finally, it provides a crucial check on a branch of government which has been notoriously unfettered in its ability to influence national policy.³² Ever since the advent of the administrative state, the federal agencies—not Congress—have engaged in the majority of national policy-making.³³ By allowing democratically elected state actors to collaborate and exert influence over national policy through litigation, constituents can now frequently hold undemocratic institutions politically accountable.³⁴

II. STATE AGS AS WATCHDOGS

State AGs are uniquely situated to bring successful legal action against the federal government. The most important and yet most overlooked reason for State AGs' potential for legal success is their exclusive ability to clear the federal standing requirement.³⁵ Following the landmark Supreme Court decision of *Massachusetts v. EPA*,³⁶ this critical component of federal litigation has become less difficult to achieve.³⁷

from greater numbers” of large coalitions of states in a single lawsuit).

31. *See id.* (arguing that the states are more powerful when they work together because they can pool resources and increase their credibility and geographical diversity).

32. *See* Sara Bodnar, *Does the Administrative State Threaten U.S. Democracy?*, REG. REV. (Oct. 19, 2017), <https://www.theregreview.org/2017/10/19/bodnar-administrative-state-threaten-democracy/> (discussing the criticisms of the administrative state, mostly focusing on the lack of democratic accountability of agency regulators).

33. *See id.* (asserting that agencies are performing functions that are executive, legislative, and judicial).

34. *See id.* (quoting Professor John Yoo, who stated that “[i]f agencies know there is a check, they may constrain their behavior”).

35. “Standing” refers to one of six justiciability requirements a plaintiff must meet to bring a lawsuit in an Article III court. *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). There are three elements to standing. *Id.* The plaintiff must have suffered an “injury in fact,” meaning an invasion of a legally protected interest that is both (1) concrete and particularized and (2) actual or imminent (and not purely hypothetical). *Id.* Additionally, the plaintiff’s injury must be “fairly traceable” to the conduct of the defendant. *Id.* Lastly, a favorable ruling for the plaintiff must be likely to remedy the plaintiff’s injury. *Id.*

36. 549 U.S. 497 (2007).

37. *See generally* Stevenson, *supra* note 19 (analyzing the decision in *Massachusetts v. EPA* to grant unique deference to states when considering the standing requirement and the impact it has on the ability of State AGs to sue the federal government, and ultimately concluding that as a result, the fifty State AGs would become a newly dominant force in national policymaking).

A. “Special Solitude” for State AGs

For the past decade, *Massachusetts v. EPA* has been hailed largely as a victory for environmental activists and other conservationist groups.³⁸ In this case, the Supreme Court held that the U.S. Environmental Protection Agency (EPA), under the Clean Air Act, had a statutory duty to promulgate regulations for emissions of carbon dioxide and other greenhouse gases that have been linked to climate change.³⁹ However, prior to reaching this determination, the Supreme Court had to address the threshold issue of whether the parties had standing to bring the suit.⁴⁰ Ultimately, the Court answered that question affirmatively,⁴¹ leading to a successful ruling for the plaintiffs.⁴²

In determining that the plaintiffs had standing, the Court also rendered a very broad administrative law verdict.⁴³ Justice Stevens, writing for the majority, held that states have “special solicitude” when it comes to establishing standing in suits against the federal government.⁴⁴ He reasoned that, in making the decision to join the Union, each individual state gave up certain rights it would have been able to exercise otherwise.⁴⁵ First, states cannot prevent their neighbors from engaging in activities that they consider harmful to their own interests.⁴⁶ Second, states cannot unilaterally make treaties with foreign nations to promote their interests.⁴⁷ Third, states are often unable to create internal regulations to promote their own interests due to the problem of federal preemption.⁴⁸ In exchange for the benefits of being part

38. See, e.g., Ben Levitan, *The Tenth Anniversary of Massachusetts v. EPA*, ENVTL. DEF. FUND BLOG (Apr. 2, 2017), <http://blogs.edf.org/climate411/2017/04/02/the-tenth-anniversary-of-massachusetts-v-epa/> (commemorating on the ten-year anniversary of *Massachusetts v. EPA*).

39. See Stevenson, *supra* note 19, at 2 (explaining environmental significance of *Massachusetts v. EPA*).

40. *Massachusetts v. EPA*, 549 U.S. at 516.

41. *Id.* at 526.

42. *Id.* at 529.

43. See Stevenson, *supra* note 19, at 5 (“The Court adopted what appears to be a new rule, or at least a rule that it had never before made explicit: the states have ‘special solicitude’ to obtain standing to sue federal agencies.”).

44. *Massachusetts v. EPA*, 549 U.S. at 520.

45. *Id.* at 519.

46. See *id.* (“Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions . . .”).

47. *Id.*

48. See *id.* (“[I]n some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.”).

of the Union, states ceded these sovereign powers to the federal government. In return, the federal government became responsible for protecting individual state interests.⁴⁹

The practical effect of the “special solicitude” precedent established in *Massachusetts v. EPA* is that State AGs now have near-automatic standing in lawsuits against the federal government.⁵⁰ The Supreme Court’s decision vested a considerable amount of power in the State AG office.⁵¹ First, State AGs often have complete autonomy in choosing which cases to pursue, as they are not required to receive approval from their governors.⁵² Secondly, when choosing to engage in complex federal litigation, State AGs have to consider the totality of the costs associated with bringing suit.⁵³ In most cases, the standing issue alone can be incredibly time consuming and requires just as much financial expenditure as the merits of the case.⁵⁴ Since State AGs now have “special solicitude” regarding the standing requirement, there is one less cost to consider when deciding whether to pursue litigation against the federal government.⁵⁵

B. Existing Litigation

State AGs are successful in forcing agency action against the current administration. In May 2018, the State AG of New York declared victory in a suit against the EPA that forced the EPA to implement “vital clean air protections” under the Clean Air Act.⁵⁶ Fourteen other states supported

49. See *id.* at 519–20 (“These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered [the Environmental Protection Agency (EPA)] to protect Massachusetts (among others) by prescribing standards applicable to the ‘emission of any air pollutant from any class or classes of new motor vehicle engines, which in [the Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.’”).

50. See Stevenson, *supra* note 19, at 37 (asserting that *Massachusetts v. EPA* practically granted standing for State AGs in lawsuits against the federal government).

51. The dissent laments this point. See *Massachusetts*, 549 U.S. at 536 (Roberts, J., dissenting) (“Relaxing Article III standing requirements because asserted injuries are pressed by a State, however, has no basis in our jurisprudence, and support for any such ‘special solicitude’ is conspicuously absent from the Court’s opinion.”).

52. See Cox, *supra* note 17.

53. See, e.g., Symposium, *The Role of State Attorneys General in National Environmental Policy*, 30 COLUM. J. ENVTL. L. 335, 339–40 (2005) (discussing the various litigation costs that prevent some smaller states from getting involved in multistate litigation).

54. See Stevenson, *supra* note 19, at 38.

55. *Id.*

56. See A.G. Schneiderman Announces Court Ruling Requiring EPA To Implement Vital Clean Air

that suit, and the majority of those states also sued through their respective State AG offices.⁵⁷ In June 2018, New York again won a successful verdict against the EPA for the agency's failure to regulate smog coming from "upwind states."⁵⁸

Current pending multistate litigation provides a strong template for continued success going forward. One of the most effectively-construed lawsuits to date is *New York v. Pruitt*.⁵⁹ On February 6, 2018, New York State AG Eric Schneiderman⁶⁰ filed a lawsuit with a coalition of ten other states and the District of Columbia⁶¹ against the EPA over its suspension of the Clean Water Rule. The Clean Water Rule, promulgated by the EPA un-

Protections, N.Y. ST. ATT'Y GEN. (Mar. 12, 2018), <https://ag.ny.gov/press-release/ag-schneiderman-announces-court-ruling-requiring-epa-implement-vital-clean-air>.

57. See Complaint, *California v. Pruitt*, No. 3:17-cv-06936 (N.D. Cal. Dec. 12, 2017). The sole exception was Minnesota, which sued through its Minnesota Pollution Control Agency.

58. Connecticut and New York conducted this much smaller lawsuit on their own. See Press Release, Barbara D. Underwood, Attorney General Underwood Announces Win for New Yorkers in Smog Lawsuit Against Trump EPA (June 13, 2018), <https://ag.ny.gov/press-release/attorney-general-underwood-announces-win-new-yorkers-smog-lawsuit-against-trump-epa>.

59. 1:18-cv-1030 (S.D.N.Y. Feb. 6, 2018).

60. Deputy State AG Barbara Underwood replaced Eric Schneiderman after he resigned. See Jane Mayer & Ronan Farrow, *Four Women Accuse New York's Attorney General of Physical Abuse*, NEW YORKER (May 7, 2018), <https://www.newyorker.com/news/news-desk/four-women-accuse-new-yorks-attorney-general-of-physical-abuse> (detailing the sexual abuse scandal which led to Schneiderman's resignation). Schneiderman's resignation provides an important rebuttal to the concerns of those who attempt to frame State AGs as invincible and unaccountable partisan actors. See *infra* Section III.C. Schneiderman was the most active of all Democratic State AGs, heading a vast majority of the multistate coalition lawsuits against the Trump Administration as well as many on his own. See Allan Smith, *New York's Combative Attorney General Reached a Major Milestone in His Battle With the Trump Administration—and He Could Be a Last Resort in the Russia Probe*, BUS. INSIDER (Dec. 26, 2017), <https://www.businessinsider.com/new-york-attorney-general-files-100-trump-lawsuits-2017-12> (detailing the legal activism of former New York State AG Eric Schneiderman prior to resignation). However, despite being incredibly popular in Democratic circles for his legal activism against the Trump Administration, he was unable to withstand political pressure from within his own coalition. See Danny Hakim & Vivian Wang, *Eric Schneiderman Resigns as New York Attorney General Amid Assault Claims by 4 Women*, N.Y. TIMES (May 7, 2018), <https://www.nytimes.com/2018/05/07/nyregion/new-york-attorney-general-eric-schneiderman-abuse.html> (stating that Schneiderman resigned within hours of Democratic Governor Andrew Cuomo calling on him to do so as a result of mounting public pressure).

61. See Complaint at 1, *New York v. Pruitt*.

der the Obama Administration in 2015, modified the definition of “waters of the United States” pursuant to the Clean Water Act.⁶² In 2017, the freshly-minted Trump EPA—along with the Army Corps of Engineers—suspended the Clean Water Rule.⁶³ This action was not achieved by following the standard procedure for the repeal of an existing regulation pursuant to the Administrative Procedure Act (APA).⁶⁴ Instead, in a highly irregular move, the Trump EPA added a new “applicability date” that delays the 2015 rule’s applicability for two years and reinstates the definition of “waters of the United States” from the 1980s—referred to in the Complaint as the “Suspension Rule.”⁶⁵ The Complaint alleged that the EPA, through the implementation of the Suspension Rule, engaged in an unlawful suspension of the 2015 Clean Water Rule that harmed the states’ environmental, economic, and proprietary interests.⁶⁶ The original Clean Water Rule became effective on August 28, 2015.⁶⁷ Pursuant to the Clean Water Act,⁶⁸ the 2015 rule defined “waters of the United States” to include both navigable waters and waters that impact the chemical, physical, and biological integrity of navigable waters.⁶⁹

According to the states, the 2015 Clean Water Rule was intended to address ambiguities in pre-existing regulations from the 1980s by establishing a “clearer, more consistent, and easily implementable” definition of protected waters to reduce high volumes of case-specific determinations.⁷⁰ The Complaint alleges that the definition of “Waters of the United States (WOTUS)” is of fundamental importance to achieving the Act’s objective “to restore and maintain the chemical, physical, and biological integrity of

62. See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015).

63. Michael Biesecker, *Trump Administration Delays Expansion of Clean Water Rule*, ASSOCIATED PRESS (Jan. 31, 2018), <https://www.apnews.com/ae3818b2323f421b8cb596614628afa6>.

64. See 5 U.S.C. § 553 (outlining the Administrative Procedure Act’s (APA’s) procedures for rulemaking); *id.* § 551(5) (including “repealing a rule” within the APA’s definition of rulemaking).

65. See Definition of “Waters of the United States”—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018).

66. See Complaint, *supra* note 61, at 21.

67. 80 Fed. Reg. 37,054 (June 29, 2015).

68. 33 U.S.C.A. § 1251 (2012).

69. See 80 Fed. Reg. at 37,055.

70. See Complaint, *supra* note 61, at 3–4 (citing Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,056–57).

the Nation's waters."⁷¹

Bolstered by their pre-existing "special solicitude" for establishing standing,⁷² the State AGs in this case nonetheless do an excellent job of establishing it on the merits.⁷³ They allege that the EPA's proposed Suspension Rule harms multiple state interests.⁷⁴ First, it harms states' environmental interests.⁷⁵ The 2015 Rule clarified Clean Water Act protections within the states' individual jurisdictions and helped to ensure that polluted water from other states did not flow into their waters.⁷⁶ The State AGs argued that because many of the nation's waterways cross multiple state boundaries, it is difficult for downstream states to control pollution sources from upstream states beyond their borders, and are therefore out of the range of their sovereign control.⁷⁷ As such, the downstream states rely on regulation from the federal government to protect their interests because they lack their own regulatory power.⁷⁸ Thus, these goals are only attainable pursuant to the redefined 2015 Rule. Secondly, it harms the states' economic interests.⁷⁹ Under the 1980s Rule that the EPA seeks to implement,⁸⁰ down-

71. 33 U.S.C. § 1251(a).

72. See *supra* Section II.A.

73. See *supra* note 35 for definition and explanation of standing. The extent to which the State AGs have gone to establish standing in this case is important because, even though *Massachusetts v. EPA* implemented a broad precedent in favor of State AGs' standing, it is not guaranteed that a reviewing court will defer to State AGs on the standing question in every single case. See Lawrence G. Wasden & Brian Kane, *Massachusetts v. EPA: A Strategic and Jurisdictional Recipe for State Attorneys General in the Context of Emission Accelerated Global Warming Solutions*, 44 IDAHO L. REV. 703, 723–28 (2008) (summarizing numerous cases where federal courts refused to blindly grant standing to State AGs based on broad interpretations of the "special solicitude" rule established in *Massachusetts v. EPA*). Therefore, while the "special solicitude" established by the Supreme Court certainly makes it easier for State AGs to enter the courthouse, it is important that State AGs not take this process for granted and assume courts will always defer to *Massachusetts v. EPA* when considering the threshold question of standing.

74. See Complaint, *supra* note 61, at 21.

75. *Id.*

76. See *id.* at 4.

77. See *id.* at 10. The similarities between this argument and the argument made by Justice Stevens in *Massachusetts v. EPA* regarding the reliance by states on the federal government to regulate other states that are out of their sovereign interest is likely no coincidence. See *supra* Section II.A.

78. See *supra* note 50 (quoting Justice Stevens in *Massachusetts v. EPA*).

79. See Complaint, *supra* note 61, at 23.

80. Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200, 5201 (Feb. 6, 2018).

stream states must impose more costly regulations to offset the pollution coming from upstream states, thereby raising the costs to the plaintiff states, in addition to businesses within those states.⁸¹ Finally, the Suspension Rule harms states' proprietary interests.⁸² The states "own, operate, finance or manage" property and infrastructure within their borders such as roads, universities, bridges, sewage systems, and more.⁸³ According to the states, the Suspension Rule provides inadequate protection that is likely to cause damage and increase the costs of maintaining such property.⁸⁴

The legal arguments are grounded in administrative law. The states allege that the EPA failed to follow the proper procedures set forth by the APA.⁸⁵ The first prong of the argument focuses on the EPA's non-compliance with necessary procedures regarding notice-and-comment rulemaking.⁸⁶ Under the relevant provisions of the APA,⁸⁷ opportunity for public comments regarding promulgation or modification of existing rules must be "meaningful."⁸⁸ As such, a short period of opportunity for public comment regarding the alteration of an important and complex rule is insufficient.⁸⁹ In this case, the EPA provided only twenty-one days for public comment to a complex environmental regulation,⁹⁰ which a judge will likely find to be too short to be considered "meaningful" as required by the APA.⁹¹ Additionally, an agency can only issue a rule after considering the relevant comments.⁹² However, according to the states, the EPA actively dissuaded the posting of public comments by instructing the public not to comment substantively on any matters regarding WOTUS.⁹³

The second prong of the Complaint alleges that the EPA engaged in ar-

81. Complaint, *supra* note 61, at 23.

82. *Id.*

83. *Id.*

84. *Id.*

85. 5 U.S.C. §§ 551–559, 561–570a, 701–706 (2012).

86. *See* Complaint, *supra* note 61, at 24.

87. 5 U.S.C. § 553(c).

88. *See* Complaint, *supra* note 61, at 5.

89. *See id.* at 8.

90. *See id.* at 20.

91. In another federal case involving actions taken pursuant to the Clean Water Act, a West Virginia District Court found that the Army Corps of Engineers (also a party in this case) did not provide a meaningful opportunity for public comment regarding a proposed action. *See* Ohio Valley Env'tl. Coal. v. U.S. Army Corps of Eng'rs, 674 F. Supp. 2d 783, 801–02 (S.D. W.Va. 2009).

92. *See* 5 U.S.C. § 553(c).

93. Complaint, *supra* note 61, at 5.

bitrary and capricious action in deciding to enact the Suspension Rule.⁹⁴ As the states correctly allege, when an agency proposes to suspend a rule and replace it with a prior regulation, the agency must consider the objectives of the statute under which the rule was promulgated, the law and facts justifying the proposal, and the effectiveness of the prior regulation.⁹⁵ If an agency acts without proper consideration of these factors, it has engaged in arbitrary and capricious behavior⁹⁶ subject to reversal by a reviewing court.⁹⁷ According to the states, the EPA did not consider how the Suspension Rule would meet the Act's objective of "maintaining integrity of the Nation's waters."⁹⁸ Furthermore, the agency must articulate a rational explanation for the Rule.⁹⁹ The EPA claimed that because another suit was pending in the Sixth Circuit involving the same regulation, it should suspend the 2015 Rule before it was successfully appealed to the U.S. Supreme Court in order to prevent confusion.¹⁰⁰ However, the states correctly allege that this is not a rational basis for rescinding the Rule as it has nothing to do with relevant data or information obtained through the notice-and-comment process.¹⁰¹ The states also point out that the Clean Water Rule was enacted after considering a multi-year comment docket and a large volume of scientific data.¹⁰² According to the States, the EPA did not

94. *Id.* The APA establishes that an agency action may be overturned by a reviewing court if the action is found to be "arbitrary and capricious." See 5 U.S.C. § 706(2)(A). The Supreme Court has held that an agency action is arbitrary and capricious when "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

95. See Complaint, *supra* note 61, at 5.

96. See *id.*

97. See 5 U.S.C. § 706(2)(A).

98. See Complaint, *supra* note 61, at 5.

99. *Id.* at 6; see *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)) ("Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'").

100. See Proposed Rule, Definition of "Waters of the United States" – Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,902 (July 27, 2017).

101. Complaint, *supra* note 61, at 2; see 5 U.S.C. § 553(c) (establishing that an agency may only promulgate a rule after "consideration of the relevant matter presented" in public comments).

102. Complaint, *supra* note 61, at 2.

consider this when proposing the Suspension Rule.¹⁰³ The legal theories developed and advanced by the AGs in this case provide an effective approach to handling rogue administrative action and can be translated to challenge the actions of other bad-faith actions of federal agencies.

III. STATE AGS AS A DEMOCRATIC CHECK ON UNMONITORED ADMINISTRATIVE ACTION

As we live in a democratic society, criticism of the accountability of powerful regulators, especially the federal agencies, will always be a valid concern. At the root of this is the long-standing concern regarding special interest “capture” of administrative agencies.¹⁰⁴ Put simply, people are skeptical of administrative actions the more they believe that “the industry tail wags the regulatory dog.”¹⁰⁵ The theory that administrative agencies eventually become subject to the industries and special interests that they were originally designed to regulate is not a novel concept.¹⁰⁶ Indeed, it is

103. *See id.*

104. The phrase “capture” describes the phenomenon where an agency exhibits disproportionately high levels of responsiveness to the objectives of the industry or groups that agency was intended to regulate. *See* ROGER G. NOLL, REFORMING REGULATION 99–100 (1971) (explaining that capture happens most often when an agency assigns undue weight to the interests of the regulated industries as against those of the public). The concept of capture is central to “public choice theory,” a field of thought within administrative theory that views administrative agencies as overly prone to manipulation by the industries they were designed to regulate. *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 5 (1998) (explaining the public choice theory of regulatory process, which maintains that agencies cater to the regulatory needs of well-organized interest groups). “Public choice” theory remains popular today, even among high-ranking government officials who are themselves deeply enmeshed in oversight of the regulatory process. *See, e.g.*, 156 CONG. REC. S5074 (daily ed. June 17, 2010) (statement of Sen. Whitehouse), <http://www.gpo.gov/fdsys/pkg/CREC-2010-06-17/pdf/CREC-2010-06-17-pt1-PgS5071.pdf> (“Inch by inch, the tentacles of industry reach further and further into the regulator, until it silently and invisibly comes under industry control and becomes the industry’s puppet, until it is serving the special interests and not the public interest.”).

105. Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 204 (2003).

106. Throughout U.S. history there has been widespread belief, even among the most influential government officials, that large industries have an outsized influence over the federal government. *See, e.g.*, WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE 201–02 (1st ed. 1913) (“If the government is to tell big business men how to run their business, then don’t you see that big

undeniably true that well-funded special interest groups have far greater access to the tools and levers of regulation than the common citizen.¹⁰⁷ What is new to the Trump Administration is how blatantly obvious and accelerated this process has become. Many of President Trump's appointees hold views that are in direct conflict to the stated purpose of the agencies they lead.¹⁰⁸ This creates the appearance of blatant corruption, which in turn undermines people's faith in the democratic process.¹⁰⁹ For a demo-

business men have to get closer to the government even than they are now? Don't you see that they must capture the government, in order not to be restrained too much by it? Must capture the government? They have already captured it. Are you going to invite those inside to stay inside? They don't have to get there. They are there.”)

107. Empirical studies have confirmed that this disproportionate level of access exists across virtually all stages of the regulatory process. This ranges from the official procedures surrounding the promulgation of rules. See Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128–39 (2006) (finding that during a study of thirty rules and nearly 1,700 comments during a 1994 to 2001 comment period, business interests submitted more than fifty-seven percent of the comments, compared with six percent from public interest groups); see also Wendy E. Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99–158 (2011) (finding that during the EPA's rulemakings on air toxics emission standards for more than one hundred industries, industry provided eighty-one percent of comments, compared with four percent from public interest groups to direct access to regulators before certain rules are even proposed). See Kimberly Krawiec, *Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 79–80 (2013) (explaining that during the promulgation of the Dodd-Frank Wall Street Reform and Consumer Protection Act's "Volcker Rule," regulators met with financial institutions 351 times, trade associations thirty-three times, and law firms representing industry interests thirty-five times amounting to 93.1% of all meetings with regulators. Comparatively, public interest groups had nineteen meetings, and other reform-oriented people had twelve meetings with regulators accounting for 6.9% of meetings).

108. Perhaps the most prominent example is President Trump's original appointment of former EPA Administrator Scott Pruitt. See Coral Davenport et al., *E.P.A. Chief Scott Pruitt Resigns Under a Cloud of Ethics Scandals*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/climate/scott-pruitt-epa-trump.html> (detailing the many ethics scandals and investigations that led to the end of Mr. Pruitt's rocky tenure as EPA Administrator). Mr. Pruitt originally served as the Oklahoma State Attorney General and, during his tenure as AG, he was an active and hostile litigant against the EPA. See Chris Mooney et al., *Trump Names Scott Pruitt, Oklahoma Attorney General Suing EPA on Climate Change, to Head the EPA*, WASH. POST (Dec. 8, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/12/07/trump-names-scott-pruitt-oklahoma-attorney-general-suing-epa-on-climate-change-to-head-the-epa/?noredirect=on&utm_term=.18283e99acd8 (detailing the history behind Scott Pruitt and the EPA prior to his Senate confirmation).

109. See Jamelle Bouie, *The Incredible Corrupting White House*, SLATE (Oct. 4, 2017),

cratic system to work, people need to have faith that the individuals they elect to represent them are acting in their best interest. Through multistate litigation, State AGs are in the best position to provide a democratic check on unchecked and politically isolated regulators who have now become overrun by special interests.¹¹⁰

A. *State AGs as an Alternative to the Elimination of Chevron Deference*

One of the most striking developments of the Trump Administration is the conservative-led assault on *Chevron* deference.¹¹¹ *Chevron* deference is the method of statutory interpretation in administrative law, which the Supreme Court established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹¹² The primary criticism of this doctrine is that it provides too much leeway in terms of decisionmaking for administrative agencies which are already viewed as unaccountable to the democratic process.¹¹³ Since

www.slate.com/articles/news_and_politics/politics/2017/10/the_charter_flights_of_price_mnuchin_pruitt_are_the_tip_of_the_corruption.html (detailing the many allegations of corruption against senior officials in the Trump Administration). As the above commentator elegantly puts it, “Democracy needs trust to survive, and corruption erodes that trust. . . . If . . . one does not believe in collective action for public good, then this is not a problem. For those of us who do, however, it is a crisis.” *Id.*

110. *See id.* (explaining that problem solving in a democracy is based upon collective action, and this becomes more difficult to achieve when people’s faith in democratic institutions is lacking).

111. *See* Jeremy W. Peters, *Trump’s New Judicial Litmus Test: Shrinking ‘the Administrative State’*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/us/politics/trump-judges-courts-administrative-state.html> (listing ways in which President Trump has used his Supreme Court nomination and other federal judicial vacancies to rapidly change the political outlook of the courts against the administrative state).

112. 467 U.S. 837 (1984). *Chevron* deference is “a principle of administrative law requiring courts to defer to interpretations of statutes made by those government agencies charged with enforcing them, unless such interpretations are unreasonable.” David Kemp, *Chevron Deference: Your Guide to Understanding Two of Today’s SCOTUS Decisions*, JUSTIA L. BLOG (May 21, 2012), <https://lawblog.justia.com/2012/05/21/chevron-deference-your-guide-to-understanding-two-of-todays-scotus-decisions/>. Under *Chevron*, even if a court finds a superior alternative to an agency’s interpretation of its statutory authority, it is still bound to the agency’s reasonable but inferior interpretation. *See id.*

113. Both liberals and conservatives alike have expressed similar concerns about *Chevron* deference. *See* Ilya Somin, *Gorsuch Is Right About Chevron Deference*, WASH. POST (Mar. 25, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/25/gorsuch-is-right-about-chevron-deference/?utm_term=.334686a36a21 (defending then-Judge Gorsuch’s opposition to *Chevron* deference as valid from both an originalist and living consti-

taking office, the Trump Administration has signaled its willingness to undermine—and even outright overturn—this doctrine.¹¹⁴ President Trump's recent appointee to the Supreme Court, Neil Gorsuch, has repeatedly expressed his skepticism of *Chevron* deference and potential willingness to overturn it.¹¹⁵ In addition, the Trump Administration has been flooding the federal courts with judges who harbor similar views.¹¹⁶ Finally, there is pending legislation in Congress known as the Separation of Powers Restoration Act.¹¹⁷ If passed, the legislation would amend § 706 of the APA, thereby instructing all federal courts to review *de novo* any agency statutory interpretation, action, and rulemaking.¹¹⁸ This bill effectively eliminates *Chevron* deference by mandating that courts no longer defer to administrative interpretations, but rather review them individually based on the merits.¹¹⁹

While concerns of unfettered agency discretion are certainly valid, overturning *Chevron* would simply shift the pendulum to the opposite extreme.¹²⁰ Instead of agencies interpreting what they can and cannot do according to the policy scope of a statute, the politically isolated courts would have unfettered discretion to determine the validity of an action.¹²¹ Additionally, it is agencies, rather than courts, that are more likely to have the necessary ex-

tutionalist perspective).

114. See Peters, *supra* note 111.

115. See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) (referring to *Chevron* as “a judge-made doctrine for the abdication of the judicial duty,” which adds “prodigious new powers to an already titanic administrative state”).

116. See Peters, *supra* note 111.

117. H.R. 76, 115th Cong. (2017).

118. See *id.*; *H.R.76 – Separation of Powers Restoration Act of 2017*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/76> (last visited Feb. 4, 2019) (providing a brief summary of the function of the bill, as well as co-sponsors, committee statements, and other relevant legislative data).

119. *Id.* During a roundtable on the erosion of *Chevron* deference, Allison Zieve, an active litigator for the advocacy group Public Citizen, questioned the effectiveness of the bill, alleging that courts may continue to engage in agency deference in line with *Chevron* by simply calling it something else, such as arbitrary and capricious review. See American Constitution Society, *Deference in Doubt? The Future of Chevron and the Administrative State*, YOUTUBE (June 11, 2016), <https://www.youtube.com/watch?v=U5mHNiDqKG8>.

120. At least one commentator agrees. See Note, *Justifying the Chevron Doctrine: Insights from the Rule of Lenity*, 123 HARV. L. REV. 2043, 2045 (2010) (arguing that “*Chevron* deference is best understood as maintaining the traditional constitutional balance in which policy discretion is kept out of the hands of the politically unaccountable judiciary”).

121. See *id.*

pertise to decide the best course of action.¹²²

In these two areas, State AGs provide a meaningful balance between completely vesting the interpretation of regulatory statutes in politically isolated courts and equally isolated federal agencies. First, State AG offices, while lacking the technical expertise of government agencies, still have arguably greater access to resources and expertise than federal judges, who often approach the law from a more generalist position.¹²³ Second, allowing democratically elected State AGs to serve as a check on the federal government provides for more democratic accountability than simply shifting deference to unelected federal judges.¹²⁴

B. Congressional Inaction

Recently there has been an increased focus on Congress's failure to perform its constitutionally assigned duties.¹²⁵ This abdication of congressional responsibility in its traditionally designated roles ranging from waging war to substantive policymaking has attracted bipartisan attention.¹²⁶ Given this trend, there are compelling reasons to believe that Congress, despite its

122. The majority in *Chevron* makes this point as a justification for the doctrine. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 865 (1984) (suggesting that Congress may have “consciously desired” agencies to have greater deference during matters of statutory interpretation because it believed that “those with great expertise and charged with responsibility for administering the provision would be in a better position to do so”).

123. *See id.* at 865 (“Judges are not experts in the field . . .”).

124. *See generally infra* Part IV. (recommending that Congress create an independent agency within the DOJ to promulgate and regulate procedural rules for complex multistate litigation).

125. *See* Lauren French, *Congress Setting New Bar For Doing Nothing*, POLITICO (Mar. 21, 2016, 5:04 PM), <https://www.politico.com/story/2016/03/congress-supreme-court-budget-do-nothing-221057> (quoting Representative Gerry Connolly of Virginia in 2016) (“We’re in session, I think, less than 111 days [referring to the year of 2016] and the time we’ve been in session, we haven’t done much.”).

126. Recently, Republican Senator Jeff Flake and Democratic Senator Tim Kaine put forth bipartisan legislation intended to revise the Authorization for Use of Military Force (AUMF) to include ISIS as a means of reclaiming congressional war-making authority. *See* Quinta Jurecic, *Senators Jeff Flake and Tim Kaine Introduce New AUMF*, LAWFARE (May 25, 2017, 1:09 PM), <https://www.lawfareblog.com/senators-jeff-flake-and-tim-kaine-introduce-new-aumf> (containing a press release regarding bipartisan AUMF proposal quoting U.S. Senator Tim Kaine: “It’s our constitutional duty in Congress to authorize military action, yet we’ve stood silent as [presidential] Administrations have stretched the 2001 AUMF far beyond its original purpose.”).

longtime vocal concerns about the alleged usurpation of its policymaking authority,¹²⁷ will not intervene when it comes to this new dynamic between State AGs and the administrative state. First, although Congress has numerous means of exerting pressure on administrative agencies, it has so far been unwilling to do so.¹²⁸ This issue is compounded by political polarization and general legislative gridlock.¹²⁹ Second, large bodies of politically motivated legislators lack the institutional competence and technical expertise to discern what agency actions are genuine abuses of power and which are simply disfavored by their constituents.¹³⁰ Third, even if Congress wanted to regulate these state coalitions, it would not know where to start. As it stands, there are no existing guidelines pertaining to multistate litigation at any level of the federal government.¹³¹ Consequentially, it lacks sufficient information to draw from to make comprehensive reforms regarding multistate litigation.

C. Adaptive Federalism

One of the most potent criticisms regarding the increasingly active role of State AGs in multistate litigation against the federal government is that it

127. See, e.g., David J. Morrow, *Spending It; Transporting Lawsuits Across State Lines*, N.Y. TIMES (Nov. 9, 1997), <https://www.nytimes.com/1997/11/09/business/spending-it-transporting-lawsuits-across-state-lines.html> (quoting Senator John McCain's criticism of State AGs' policymaking through multistate litigation: "Who do these people [State AGs] think they are?").

128. See Brian D. Feinstein, *Avoiding Oversight: Legislator Preferences and Congressional Monitoring of the Administrative State*, 8 J. L. ECON. & POL'Y 23, 41 (2011) (concluding that "members of Congress do not value oversight activity. Instead, oversight is pursued reluctantly. The generally low preference estimates [referring to data tables showing high rates of transfer from subcommittees involving oversight of government agencies] hint at the possibility that members assigned to oversight duties would rather pursue other goals.").

129. See generally Sarah A. Binder, *Polarized We Govern?*, BROOKINGS INSTITUTION (May 27, 2014), <https://www.brookings.edu/research/polarized-we-govern/> (providing a helpful summary of legislative gridlock from early twentieth century to today and analyzing political implications of this trend on modern legislative process).

130. See Steven S. Davis, *The Federal Chevron Doctrine: Once and Future Law in Missouri?*, 55 J. MO. B. 126, 128–29 (1999) (explaining that agencies are the "best institutions equipped" to handle the policy issues that Congress itself cannot sufficiently address).

131. Another reason for the absence of such guidelines could be the fact that the trend of multistate litigation itself is relatively new, especially as it pertains to actions against the federal government. See *supra* Part I (explaining how states joining together to sue the federal government lends their lawsuit legitimacy). As such, Congress has likely not had sufficient time to observe the trend in order to regulate it.

undermines our system of separated powers.¹³² This critique is not new.¹³³ Prominent lawmakers and public figures have long expressed the view that State AGs have gone from representing the interests of their states to engaging in actual policymaking.¹³⁴ Regardless, these critiques are overblown. The rise of State AGs as a foil to unfettered agency activity is simply the newest example of the adaptability of our federalist system. As famously stated by James Madison in the Federalist Papers, “ambition must be made to counteract ambition.”¹³⁵ The increasing prominence of State AGs, both in large partisan coalitions and individually, suits this concept perfectly. As mentioned earlier, the vast majority of State AGs are democratically elected.¹³⁶ Over the past forty years, the office has moved from a relative obscurity to an independent powerhouse in the implementation and adjudication of national policy.¹³⁷ It has become politically expedient for State AGs to frame themselves as rugged, independent fighters for the populations of their respective states.¹³⁸ It is unclear why this has made

132. “Separation of Powers” is a frequently invoked yet notoriously misunderstood concept. Generally, it refers to the division of legislative, executive, and judicial power among the three branches of government. *See Lynch, supra* note 13, at 2025. However, the federal government does not actually consist of purely separated powers, because they are often somewhat mixed, exerting influence on one another through an informal system of checks and balances. *See id.* at 2025–26 (quoting *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902)) (“When we speak . . . of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution.”).

133. *See id.* at 2027 (detailing federalism and separation of powers criticisms against State AGs and multistate litigation).

134. *See, e.g., id.* at 1999–2000 (quoting former Alabama Attorney General William H. Pryor Jr.) (“Recent abuses in government litigation have undermined both federalism and the separation of powers. The purpose of the [Master Tobacco Settlement] . . . was to establish through the action of several states a national policy that is properly reserved first to each state legislature and then to Congress in the exercise of its enumerated powers.”).

135. THE FEDERALIST NO. 51 (James Madison).

136. *See Lynch, supra* note 13, at 2002.

137. *See generally* Part I. (explaining the rise of State AGs’ prominence in modern politics and the origin of their powers).

138. *See, e.g., Maura Healy Attorney General, supra* note 26 (branding herself as “the People’s Lawyer”).

many members of the national political discourse uneasy. Congress, the branch of the government entrusted with the legislative power,¹³⁹ is an unquestionably political body.¹⁴⁰ This fact, while often frustrating, does not seem to keep too many well-informed people awake at night. So why should the trend of democratically elected officials such as State AGs using their authority and mandate to affect national policy generate similar unease? State AGs are simply filling the political void created by Congress's abdication of its traditional responsibilities.¹⁴¹ Until Congress steps back in to fill the gap created by its own inaction, State AGs will continue to take actions they deem favorable to their constituents. This development does not represent the fundamental undermining of our federalist system that many critics claim it does. On the contrary, it provides a powerful example of how robust and flexible the system remains today.

IV. RECOMMENDATION

Current tools of administrative law can be used to both manage and limit the drawbacks of multistate litigation so that it can be reformed in a manner acceptable to all parties involved. Congress should use its enumerated powers¹⁴² to create an independent federal subagency within the DOJ with the authority to regulate and promulgate rules involving the procedures of complex multistate litigation.¹⁴³ As it stands, the federal government is at a significant disadvantage in setting the ground rules for when

139. U.S. CONST. art. I, § 1.

140. See generally Sarah A. Binder & Frances E. Lee, Am. Pol. Sci. Ass'n, *Making Deals in Congress*, in TASK FORCE REPORT: NEGOTIATING AGREEMENTS IN POLITICS 54, 56, 65 (Jane Mansbridge & Cathie Jo Martin, eds. 2013) http://scholar.harvard.edu/files/dtingley/files/negotiating_agreement_in_politics.pdf (arguing that legislative compromise is never solely about policy and that policy and politics are "always intertwined").

141. See *supra* Section III.B. (discussing Congress's failure to fulfill its constitutional duties).

142. Because the Constitution does not explicitly set out a procedure for the creation of administrative agencies, Congress must create them through statutes known as "enabling acts." See Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1468–70 (2000). Enabling acts are essentially the equivalent of a corporate charter, establishing the purpose of a government agency, as well as the mandate and limits of its powers of regulation. See *id.* at 1470.

143. Why the Department of Justice? It is usually the Attorney General who oversees and controls federal litigation. See 28 U.S.C. §§ 516–519 (2006). As such, it makes logical sense for an agency which regulates multistate litigation to be located within the department that the Attorney General presides over.

and how agencies get sued.¹⁴⁴ Creating an impartial office¹⁴⁵ within the DOJ that would oversee and create rules specific to multistate litigation would help resolve this burden. At the very least, such an office would provide federal agencies with a fair say in developing rules which are not needlessly unfair to them, while still managing to be impartial to potential plaintiffs from each state.

Furthermore, this agency can be set up in a way that allows for democratic accountability. The rulemaking process would be subject to the existing requirements for substantive rulemaking set forth in the APA.¹⁴⁶ As such, the public would have meaningful opportunities to voice concerns through the comment process during the promulgation of any rules regulating multistate litigation.¹⁴⁷

In addition to vesting the subagency with substantive rulemaking authority, the agency could also conduct informal adjudication of disputes between plaintiffs and defendants prior to actual court proceedings. The Patent Trial and Appeal Board (PTAB) within the United States Patent and Trademark Office (PTO) provides an existing framework for such an agency. The PTAB is an adjudicatory body within the PTO created to conduct *inter partes* review of a patent's validity.¹⁴⁸ It consists of the Director of the PTO, the Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and administrative patent judges.¹⁴⁹ During the review, both the petitioner and the patent owner are entitled to the following: limited discovery,¹⁵⁰ affidavits, declarations, written memoranda,¹⁵¹ and an oral hearing before the Board.¹⁵² The Board also has the authority to conduct settlements between parties.¹⁵³ If the settlement results in no petitioner

144. See *supra* Section II.A. (describing how states have a “special solicitude” when establishing standing for lawsuits aimed at the federal government).

145. See Steven G. Calabresi, *The Federal Courts Are Overworked and Need to Be Expanded*, NAT'L REV. (Nov. 29, 2017, 3:15 PM), <https://www.nationalreview.com/2017/11/federal-court-expansion-republicans-courts/> (discussing the issue of how administrative judges are often appointed by the very agencies they are trusted with overseeing, thereby leading to a lack of independence necessary for the administrative state).

146. See 5 U.S.C. § 551 (2012).

147. *Id.*

148. See 35 U.S.C. §§ 6, 316(c) (2012) (establishing PTAB); *id.* § 311(a) (authorizing PTAB to conduct *inter partes* review).

149. 35 U.S.C. § 6.

150. *Id.* § 316(a)(5).

151. *Id.* § 316(a)(8).

152. *Id.* § 316(a)(10).

153. *Id.* § 317(a). The owner of the patent can also settle with the petitioner by filing a

remaining in the *inter partes* review, the Board can terminate the proceeding or issue a final written decision.¹⁵⁴ Any party dissatisfied with the Board's decision can seek official judicial review in the U.S. Court of Appeals for the Federal Circuit.¹⁵⁵ As a result of a recent Supreme Court decision affirming the constitutionality of the PTAB, the existing structure of the PTAB could be used for this new subagency within the DOJ to bolster its constitutionality.¹⁵⁶

Such an agency would benefit both the federal government and State AGs in a number of ways. First, the creation of such an agency could drastically reduce the costs surrounding multistate actions on both sides of the dispute. Indeed, the very creation of multistate coalitions in the 1980s grew out of a need to cope with the disparity between the resources of State AG offices and often large, multinational corporate litigants with seemingly endless pockets.¹⁵⁷ This limited resource issue continues to be a problem today, as the financial drain which comes from either bringing or defending against civil actions affects the ability of parties to carry out their more predominant functions.¹⁵⁸ Additionally, this new federal subagency could

written agreement prior to the Board's final decision, which terminates the proceedings with respect to that petitioner. *Id.*

154. *Id.*

155. *Id.* § 319. Any party to the *inter partes* review can be a party to the suit in the Federal Circuit. The Director can intervene to defend the Board's decision, even if no party does. *See id.* § 143. When reviewing the Board's decision, the Federal Circuit assesses "the Board's compliance with governing legal standards de novo and its underlying factual determinations for substantial evidence." *See Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1372 (2018) (quoting *Randall Mfg. v. Rea*, 733 F.3d 1355, 1362 (Fed. Cir. 2013)).

156. In a recent Supreme Court decision, the Court decided 7-2 that the PTAB, despite being an intra-agency adjudicatory body, was not an unconstitutional violation of Article III of the U.S. Constitution or the Seventh Amendment. *Id.* at 1373. Though it did so on the grounds that patent disputes fall within the public rights doctrine—matters involving the grants of public rights such as land or other forms of real property—the case still represents precedent upholding the Article III constitutionality of similarly structured adjudicatory bodies. *Id.*

157. *See Stevenson, supra* note 19, at 47.

158. Since State AG offices do not disclose the costs of individual cases, there is no actual data on this other than what one can reasonably infer from their total state budget. *See generally Attorney General Office Comparison, supra* note 29 (containing a link to a website with the total budget amounts of individual State AG offices). However, the amount of big-dollar fundraising being conducted through partisan State AG organizations like DAGA and RAGA have recently been the subject of media scrutiny. *See, e.g.,* Laura Strickler & Nancy Cordes, *Inside a Lavish Retreat Where Lobbyists Donate for Access to State Attorneys General*, CBS

promulgate rules designed to reduce the costs of litigation. For example, it could issue a rule that mandates the automatic disclosure of certain documents from both sides that would ordinarily be obtained through costly discovery procedures.¹⁵⁹ Second, the creation of a PTAB-like body vested with the authority to conduct internal dispute resolution through informal adjudication would promote judicial economy. The vast majority of multi-state lawsuits never actually go to trial,¹⁶⁰ so why should these actions stymie the federal court dockets that are already overrun by important, costly, and drawn out lawsuits?¹⁶¹ Creating alternative dispute mechanisms outside of the court system promotes judicial efficiency and economy for already overloaded courts and the actors themselves, who can instead more fully devote their time and resources to other functions of their offices. Furthermore, these lawsuits, by their very terms, tend to involve prominent, high-ranking officials from both the federal and state governments. Despite this fact, a special forum for such disputes outside of the normal court process has not been taken seriously. It is now time to do so.

Even for those who do not share the same concerns as most critics of multistate litigation,¹⁶² it is important to remember that multistate litigation conducted through State AG offices is predominantly funded by taxpayer

NEWS (June 19, 2018, 7:47 AM), <https://www.cbsnews.com/news/state-attorney-general-lobbyists-donation-one-on-one-access-raga-daga/> (detailing the “lavish retreats” where lobbyists pay for insider access to State AGs across the political spectrum). While it is not explicitly clear why State AGs feel the need to increase fundraising, possibly for re-election or funding multistate or intrastate litigation, it is possible that State AGs look to sources outside of their own state allocated budgets to fund their activities and legal activism.

159. Discovery makes up a vast majority of the costs in civil cases. See Sonya Sigler, *How Much Does Discovery Cost*, JUSTRESOLVE (June 2, 2014), <https://www.justresolve.com/how-much-does-discovery-cost/> (explaining how discovery can consume sixty to eighty percent of the costs of civil litigation).

160. See Aaron Snow, *Multistate Rulemaking*, COLUM. UNIV., www.law.columbia.edu/sites/default/files/microsites/careerservices/Multistate%20Rulemaking.pdf (last visited Oct. 7, 2018) (“multistate litigation nearly always results in settlements”).

161. See Sudhin Thadawala, *Wheels of Justice Slow at Overloaded Federal Courts*, CHI. TRIB. (Sept. 28, 2015, 12:32 AM), <http://www.chicagotribune.com/news/nationworld/sns-bc-us-federal-case-backlog-20150927-story.html> (discussing the negative effects that overloading the federal courts can have on plaintiffs and defendants in civil and criminal cases); see also Calabresi, *supra* note 145 (advocating for the congressional expansion of the federal court system in order to remedy the problem of overloaded courts).

162. See Lynch, *supra* note 13, at 1999–2000 (quoting former Alabama Attorney General William H. Pryor Jr.’s characterization of multistate litigation as “undermin[ing] both federalism and the separation of powers”).

dollars. While the results of these legal actions often have positive and far-reaching implications for members of the public, the average voter might rightfully be skeptical of the seemingly wasteful activities her tax money is funding. Leaving this problem unaddressed not only forgoes an opportunity to make government more efficient and cost-effective, but arguably exacerbates the view that government is corrupt, wasteful, and pointless.¹⁶³

CONCLUSION

The Office of the State Attorney General has transformed from an antiquated import of the English legal system to one with broad powers, functioning as a dynamic force in national policymaking. In an era where the actions of rogue or unaccountable federal agencies are sheltered, either intentionally or unintentionally, by the failure of Congress to properly exercise government oversight, State AGs offer a democratic alternative to ensure that agencies properly enact and enforce specific policies and conform their behavior to the well-established tenants of executive law. Likewise, well-equipped State AGs with large budgets and access to legal and technical expertise provide a meaningful alternative to the outright elimination of *Chevron* deference currently proposed in right-leaning political circles. Concerns surrounding the constitutional and practical consequences, while valid, are nonetheless overblown and can be addressed through the creation of an independent regulatory body meant to limit the drawbacks and enhance the benefits of multistate litigation. The emergence of State AGs into the administrative and policymaking arena is another example of our dynamic and ever-evolving federal system and should be embraced with open arms.

163. See Bouie, *supra* note 109 (discussing how corruption and the appearance of corruption undermines the public trust needed for effective democratic problem solving).